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PART FIRST.

CRIMINAL CASES.

DIGEST.

ACCOMPLICES.

1. If several persons conspire to do an unlawful act, all are responsible for the acts of each, if done in the prosecution of their common purpose; but, if an offense is committed by any one of them, from causes having no connection with the common object, he alone is responsible for its consequences. *Frank v. The State*, 27 Ala. 37; *Stewart v. The State*, 26 Ala. 44; *Thompson v. The State*, 25 Ala. 41.

2. It is a question of the jury, in such cases, whether the act was done in prosecution of the original unlawful purpose, or was independent of it, and without previous concert. *Frank v. The State*, 27 Ala. 37.

3. If A and B, by pre-concert, make an attack on C, in which D, not being privy to their common design, participates; this will not be murder in D, if death ensues from wounds inflicted by A or B. *Ib.*

4. Where a priority and community of design have been established, the acts, declarations, and conduct of any one of the associates, in furtherance of their common purpose, are admissible evidence against the others. *Johnson v. The State*, 29 Ala. 62; *Martin and Flinn v. The State*, 28 Ala. 71; *Stewart v. The State*, 26 Ala. 44.

5. But the acts and declarations of one man, made apart, can never be legal evidence against another of complicity, unless the community of purpose is shown by other proof than those acts and declarations. *Martin and Flinn v. The State*, 28 Ala. 71; *Stewart v. The State*, 26 Ala. 44.

ADULTERY.

(Statutory Provisions: Code, §3231; Clay's Digest, 431, § 3.)

I. Of the Offense.
II. Of the Indictment.
III. Of the Evidence.

I. Of the Offense.

1. Adultery and fornication are distinct offenses; and, though they may be charged in different counts, yet if the indictment charges adultery in a single count, while the evidence shows that both the parties were unmarried, no conviction can be had. *Smitherman v. The State*, 27 Ala. 23.

II. Of the Indictment.

2. An indictment, which charges that the defendants, a man and a woman, "did live together in fornication," is sufficient. *Lawson and Swinney v. The State*, 20 Ala. 65.

III. Of the Evidence.

3. The fact of illicit connection between a man and a woman is one which, from its very nature, can seldom be directly proved, and must, in the great majority of cases, be inferred from circumstances, the weight and conclusiveness of which vary according to the situation and character of the parties, the habits of society, and other incidental circumstances. *Lawson and Swinney v. The State*, 20 Ala. 65.

4. Evidence of acts anterior to the period covered by the indictment, although inadmissible as independent testimony, and barred as an offense by the statute of limitations, are competent evidence in connection with, and in explanation of, other acts of a similar character within the period covered by the indictment. *Ib.*

5. Acts of indecent familiarity within the period covered by the indictment, cannot be explained by proof of the subsequent illicit intercourse of the parties; but, when they have been explained by previous acts of illicit intercourse, then proof of the subsequent illicit intercourse becomes corroborative, or cumulative evidence, and is admissible. *Ib.*

6. Where the parties are jointly indicted and tried, the confessions of the woman are admissible evidence against herself; but it is the duty of the court, to caution the jury that such confessions can operate only against the party making them, and that the other defendant cannot be convicted, except upon evidence *aliunde* sufficient to establish his guilt. *Ib.*

7. The admission of the woman, that her co-defendant was the father of a bastard child, of which she was delivered more than twelve months after the finding of the indictment, is admissible evidence against her; its relevancy being shown, by connecting it with other acts occurring before and within the period covered by the indictment. *Ib.*

8. The refusal of the man to pay a physician for his professional services rendered during the confinement of the woman, and his declaration that the child was not his, are not competent evidence for him, when unconnected with any conversation or admission offered against him. *Ib.*

9. A conversation carried on in the presence of the woman, and in the room where she was lying, a few minutes after she had been delivered of a child, between her mother and the attending physician, as to the person to whom the latter should look for payment for his professional services, in which conversation she took no part, is not admissible evidence against her, as tending to show her acquiescence in the truth of their statements. *Ib.*

AFFIDAVIT.

1. An affidavit, charging affiant's belief that the accused "was about to persuade, and trying to persuade, two of his (affiant's) hired slaves to leave his premises," though informal, is substantially sufficient to justify a warrant against the accused, under the statute (Clay's Digest, 419, § 15) forbidding any person to "aid any negro or other slave to run away or depart from his master's service. *Crosby v. Hawthorn*, 25 Ala. 221.

2. An affidavit by a married woman, that "she *is afraid* her husband will beat, wound, maim, or do her some bodily hurt," is not sufficient to authorize the husband's arrest; and if the justice's warrant appears on its face to be predicated on such an affidavit, it furnishes no protection to the officer executing it. *Noles v. The State*, 24 Ala. 672.

3. An affidavit, charging that certain goods, of the value of thirty dollars, the property of certain persons named in the affidavit, had been feloniously stolen by some person or persons unknown to affiant, and that, from probable cause, he suspected that said goods were concealed in a trunk belonging to the plaintiff and another, does not amount to a charge of larceny if the plaintiff fails to account satisfactorily for his possession. *Field v. Ireland*, 21 Ala. 240.

4. But it is equivalent to a charge of knowingly concealing stolen goods, although it may not contain the statutory requisites necessary to constitute that offense, and authorizes the justice to issue his warrant for the arrest of the person in whose possession the goods are alleged to be. *Ib.*

5. An affidavit, which charges that the accused "has feloniously taken, stolen, and carried away from the possession of C., where she was placed by affiant, a negro woman named Eliza, valued at $450, and that she is now in the possession of" the accused, is sufficiently descriptive of an offense against the criminal laws of the country to justify the magistrate in causing the accused to be apprehended and brought before him. *Ewing v. Sanford*, 19 Ala. 605.

AFFRAY.

(Statutory Provisions: Code, §§ 3086, 3301; Clay's Digest, 413, § 8.)

I. OF THE OFFENSE.
II. OF THE INDICTMENT.
III. OF THE EVIDENCE.
IV. OF THE PUNISHMENT.

I. OF THE OFFENSE.

1. A field surrounded by a forest, and situated one mile from any highway or other public place, does not lose its private character by the casual presence of three persons, so as to make two of them, who fight together willingly, guilty of an affray. *Taylor v. The State*, 22 Ala. 15.

2. The statute against fighting in a public place, and using fire-arms, was intended to create a new offense, and attach to it a new penalty. *Skains & Lewis v. The State*, 21 Ala. 218.

II. OF THE INDICTMENT.

3. An indictment under the statute against fighting in a public place, must be framed in reference to the statute, and must conform to either its letter or substance. *Skains & Lewis v. The State*, 21 Ala. 218.

III. OF THE EVIDENCE.

4. When two persons are indicted for an affray, proof that, "several months before the occurrence of the affray, they had fought together, on which occasion one had attempted to strike the other, and said he would kill him if he could get at him," is not admissible evidence against the party making the threat, when there is no proof connecting this rencounter with the subsequent affray, or showing that the latter grew out of the former. *Skains & Lewis v. The State*, 21 Ala. 218.

IV. OF THE PUNISHMENT.

5. Under an indictment for an affray as at common law, it is erroneous for the court, by its instructions to the jury, to take away or limit their discretion with regard to the amount of the fine to be assessed in the event of a conviction. *Skains & Lewis v. The State*, 21 Ala. 218.

6. The penalty denounced by the statute against fighting in a public place, cannot be inflicted under a common-law indictment for an affray. *Ib.*

AGENCY.

1. Under an indictment for selling spirituous liquors to a slave, if the evidence shows that the liquor was sold, in defendant's absence, by his clerk, it is error to instruct the jury, "that if the defendant had previously sanctioned the acts of his clerk in selling liquor to slaves under similar orders, and if they believed that the defendant, had he been present, would have done as his clerk did, then they were authorized to find him guilty." *Patterson v. The State*, 21 Ala. 571.

AMENDMENTS.

1. A judgment against the defendant, in a proceeding under the bastardy act, may be amended at a subsequent term, *nunc pro tunc*, so as to require the annual payments to be made on the "first *Monday*" of January, as the statute directs, instead of on the "first *day*" in January. *Williams v. The State*, 29 Ala. 9.

2. Where the trial and conviction occur at the term at which the indictment was found, the court may, at any time during that term, as well after as before conviction, cause the clerk to endorse the indictment "filed," to date the endorsement according to the facts, and sign it; and may also cause an entry to be made on the minutes, that the indictment was returned into court by the grand jury, with the day on which it was returned. Over such matters the court has control during the term, and may alter, amend, or set them aside, as justice may require. *Franklin v. The State*, 28 Ala. 9.

3. But the court has no power, when an indictment is lost, to substitute a copy on proof. *Ganaway v. The State*, 22 Ala. 772.

APPEALS.

See ERROR AND APPEAL.

ARREST.

1. Actual force, or a manual touching of the body, is not necessary to constitute an arrest: if the party is within the power of the officer, and submits, it is sufficient. *Field v. Ireland*, 21 Ala. 240.

2. An affidavit by a married woman, that "she *is afraid* her husband will beat, wound, maim, or do her some bodily hurt," is not sufficient to authorize the husband's arrest; and if the justice's warrant appears on its face to be predicated on such an affidavit, it furnishes no protection to the officer executing it. *Noles v. The State*, 24 Ala. 672.

3. After the defendant has been arrested on a criminal charge, and has given bail for his appearance at court, the magistrate has no authority to cause him to be re-arrested for the same offense, on the supposition that his bail is insufficient. *Ingram v. The State*, 27 Ala. 17.

ARREST OF JUDGMENT.

I. WHAT WILL ARREST JUDGMENT.
II. WHAT WILL NOT ARREST JUDGMENT.

I. WHAT WILL ARREST JUDGMENT.

1. As a general rule, when an indictment is defective on demurrer, advantage may also be taken of the defect on motion in arrest of judgment. *Francois v. The State*, 20 Ala. 83.

2. If an indictment is unobjectionable on its face, no conviction can be had under it on proof of facts which, if stated in it, would enable the defendant to arrest the judgment. *Elliott v. The State*, 26 Ala. 78.

3. Under an indictment for murder, the failure of the verdict to ascertain the degree, though the homicide was committed by poison, is good cause for arrest of judgment. *Johnson v. The State*, 17 Ala. 618.

4. An indictment for counterfeiting, which does not state the time when the counterfeited coin was current in this State, is fatally defective on motion in arrest. *Nicholson v. The State*, 18 Ala. 529.

5. So is an indictment for an assault with intent to murder, if it does not state the facts which constitute the assault. *Beasley v. The State*, 18 Ala. 535; *Trexler v. The State*, 19 Ala. 21.

6. And an indictment for trading with a slave, which charges that the defendant sold "to a certain slave, whose name is to the jurors unknown." *Francois v. The State*, 20 Ala. 83.

7. And an indictment which, upon its face, charges several defendants for several offenses committed by them independently of each other. *Elliott v. The State*, 26 Ala. 78.

8. And an indictment for arson, if it does not charge the ownership of the property burned. *Martin and Flinn v. The State*, 28 Ala. 71.

9. And an indictment for the willful burning of a house insured against fire, with intent to charge or injure the insurer, if it does not allege that the house was "at the time insured against fire." *Martin and Flinn v. The State*, 29 Ala. 30.

II. WHAT WILL NOT ARREST JUDGMENT.

10. Assessing the aggregate (instead of the separate) value of the stolen property, under an indictment for larceny from a store-house, is not good cause for arresting the judgment. *Case v. The State*, 26 Ala. 17.

11. The improper conduct of the jury, after they have retired to make up a verdict, is not available in arrest of judgment. *Brister v. The State*, 26 Ala. 107; *Franklin v. The State*, 29 Ala. 14.

ARSON.

(Statutory Provisions: Code, §§ 3137, 3185–93.)

I. OF THE OFFENSE.
II. OF THE INDICTMENT.
II. OF THE PLEADINGS AND EVIDENCE.

I. OF THE OFFENSE.

1. To justify a conviction for the willful burning of a house insured against fire, with intent to charge or injure the insurer, the jury must be satisfied from the evidence that the defendant had knowledge of the insurance. *Martin and Flinn v. The State*, 28 Ala. 71.

II. OF THE INDICTMENT.

2. Under the Code, as at common law, the ownership of the property must be alleged in the indictment. *Martha v. The State*, 26 Ala. 72; *Martin and Flinn v. The State*, 28 Ala. 71.

3. An indictment for the willful burning of a house insured against fire, with intent to charge or injure the insurer, must allege that the house was "at the time insured against fire." *Martin and Flinn v. The State*, 29 Ala. 30.

III. OF THE PLEADINGS AND EVIDENCE.

4. The ownership of the property burned must be proved as laid. *Martha v. The State*, 26 Ala. 72.

5. If the proof of the ownership varies from the allegation, and a *nolle-pros.* is thereupon entered, this is no bar to a subsequent prosecution under another indictment, in which the ownership is alleged to be in a different person; and if the second indictment contains several counts, in one of which the allegation of ownership is the same as in the first, and the defendant pleads to the whole indictment *autrefois acquit* and discontinuance, the record of the former prosecution does not sustain either plea. *Ib.*

6. After the State has proved the burning of the house as charged, and offered evidence tending to show that the defendant was the person who set fire to it, the subsequent burning of another house belonging to the prosecutor is irrelevant evidence; nor is it made relevant by being offered in connection with proof of defendant's declaration, that he was not yet done with the prosecutor; especially, when the declaration is shown to have been made in a conversation, in which "no reference was made to either of the burnings, but the parties were speaking of a civil case which defendant had before the prosecutor as a justice of the peace, and in which he complained that the prosecutor had treated him rascally." *Brock v. The State*, 26 Ala. 104.

7. The fact that the accused, some five or six months before the burning charged in the indictment, requested another person (witness) to burn the house, is admissible evidence against him. *Martin and Flinn v. The State*, 28 Ala. 71.

8. Evidence showing defendant's connection with attempts to suppress the testimony of a witness for the prosecution, by bribing him to leave the State, is also competent. *Ib.*

ASSAULT AND BATTERY.

(Statutory Provisions: Code, §§ 3107–8, 3300–1; Clay's Digest, 416, § 31; *Ib.* 441, § 23.)

I. OF THE OFFENSE.

1. The unlawful taking and detaining of a person, against his consent, will support an indictment for an assault and battery. *Long v. Rogers*, 17 Ala. 540.

2. Where several persons, without process of law, enter upon a man's premises, for the purpose of searching his negro-houses for stolen property, and one of them commits an assault and battery on the owner, the others are not responsible for it, unless the assault was committed during the prosecution of their original unlawful purpose, or within such a time afterwards as to satisfy the jury that it was connected therewith; but, if the evidence tends to show that their original purpose not only extended to the search, but contemplated the use of force if opposed or interfered with on the premises, a charge which assumes that the common design was limited to the search ought to be refused. *Thompson v. The State*, 25 Ala. 41.

3. To support an indictment under section 3108 of the Code, the accusation must be the moving cause of the assault: if the assault was committed upon the provocation that the person assaulted had whipped the defendant's son, the offense would be a common assault and battery, but not a violation of this statute. *Underwood v. The State*, 25 Ala. 70.

4. An assault and battery committed by one slave on another is an offense. *Bob v. The State*, 29 Ala. 20.

II. OF THE INDICTMENT.

5. An indictment, in the general form prescribed by the Code, charging that the defendant, "before the finding of the indictment, assaulted and beat B. B., against the peace and dignity of the State of Alabama," held sufficient. *Thompson v. The State*, 25 Ala. 41.

III. OF THE PLEADINGS AND EVIDENCE.

6. When a man is indicted for an assault and battery on his wife, he may show, in mitigation, that at the time of the assault he was immediately provoked to its commission by her misconduct. *Robbins v. The State*, 20 Ala. 36.

7. Evidence showing that the person assaulted "was a lazy vagabond, who would not work if he could help it; that money could not be made out of him by legal process; that he had been indebted to the defendant a long time, and would not pay; and that defendant, on the morning of the day on which (in the evening) the assault was committed, had offered him ten dollars per hour if he would work for him in payment of said indebtedness, and he had refused to do it," is not admissible for the defendant, in mitigation or extenuation of the assault. *Ward v. The State*, 28 Ala. 53.

8. A variance between the averment and proof, as to the name of the person assaulted, is immaterial, when the names may be sounded alike without doing violence to the letters found in the variant orthography; as in the names *Chambless* and *Chambles*. *Ib.*

9. When several persons are jointly indicted for an assault and battery, and one of them pleads guilty, the others, who plead not guilty, cannot claim as a matter of right to be tried separately from him. *Thompson v. The State*, 25 Ala. 41.

ASSAULT WITH INTENT TO KILL OR MURDER.

(Statutory Provisions: Code, §§ 3106, 3312; Clay's Digest, 416, § 30; *Ib.* 472, § 2.)

I. OF THE OFFENSE.

1. *When Committed by White Person.*

1. A charge to the jury, that the accused cannot be convicted of an assault with intent to murder, unless he had at the time a "positive intention" to commit murder, is calculated to mislead them, and should therefore be refused. *Moore v. The State*, 18 Ala. 532.

2. At common law, an unintentional homicide would, in many cases, amount to murder; and it is therefore erroneous to instruct the jury, "that the same facts and circumstances which, if death had ensued, would make the offense murder, furnish sufficient evidence of the intention." *Ib.*

3. The court is not bound to instruct the jury, at the defendant's request, "that they cannot find him guilty of an assault with intent to murder, unless they are satisfied from the evidence, beyond a reasonable doubt, that, if death had ensued from the assault, he would have been guilty of murder in the first degree." *Ogletree v. The State*, 28 Ala. 693.

4. It is not sufficient to prove a general felonious intent, or any other than the particular intent alleged in the indictment; and the burden of proving this, as well as all the other facts which constitute the felony, is on the State. *Ib.*

5. A charge which selects a portion only of the facts disclosed by the testimony, and instructs the jury that, if these are proved, "the law presumes that the act was malicious," and that the defendant "intended to kill," is erroneous; because it shifs the burden of proof, and loses sight of the recognized distinction between civil and criminal cases in the measure of proof. *Ib.*

6. The error of such a charge is not cured, by further instructing the jury, in a subsequent part of it, that these presumptions of law only arise in the absence of evidence tending to qualify or explain the selected facts, and may be rebutted, qualified, or explained away by the evidence; "so that, if they find the facts upon which these presumptions of law arise, with other evidence tending to qualify or explain them, it will be their duty to consider all the evidence in connection, and, if they entertain a reasonable doubt upon the whole evidence, they should acquit." *Ib.*

7. A special verdict, finding the accused "guilty of striking with a loaded whip calculated to produce death, without any cause or provocation," does not authorize the rendition of a judgment of conviction for an assault with intent to murder. *Scitz v. The State*, 23 Ala. 42.

8. The question whether an indictment lies against a white man, for an assault on a slave with intent to murder, cannot be raised in the appellate court, by assigning for error the verdict of the jury, when no objection was taken to the indictment in the primary court, and the defendant was convicted of an assault and battery only. *Carpenter v. The State*, 23 Ala. 84.

2. *When Committed by Slave.*

9. *Semble*, that malice is not a necessary ingredient in the offense denounced by the statute against a slave "who shall commit an assault with intent to kill any white person." *Dave v. The State*, 22 Ala. 23.

10. A slave undoubtedly has the natural right of self-defense; but, in order to avail himself of this for the justification of his acts, he must not himself be a wrong-doer. If, while resisting his master's authority, and in personal collision with him, the slave stabs his master, with intention to kill, it is no justification of the act that he was impressed at the time with a reasonable sense of imminent danger to his own life. *Ib.*

II. Bail and Recognizance.

11. When a prisoner is committed for an assault with intent to murder, and it is shown that the person assaulted is in danger of dying before the expiration of a year and a day from the time of the assault, the prisoner is not entitled to bail as a matter of right, because no indictment has been found against him, although two terms of the court at which he might have been indicted have elapsed since his commitment, unless it is also shown that, if death should ensue within the year and day, he would be entitled to bail. *Ex parte Andrews and Wife*, 19 Ala. 582.

12. The judge of the city court of Mobile has power to take a bond, conditioned that the principal obligor "make his personal appearance before the city court, now in session, *instanter*, and from day to day during the term, and from term to term thereafter, to answer the State of Alabama on a charge of an assault to murder. *Arnold v. The State*, 25 Ala. 69.

III. Of the Indictment.

13. Although, under the Code, an indictment which charges an actual poisoning, need not allege that the substance administered was a poison; yet such an allegation is necessary in an indictment for an attempt to poison. *Anthony v. The State*, 29 Ala. 27.

14. A count which charges that the prisoner, a slave, "did administer to, and cause to be administered, and taken by" three white persons, a large quantity of arsenic, &c., is not demurrable for duplicity. *Ben v. The State*, 22 Ala. 9.

15. If the indictment charges that the prisoner "did administer to, and cause to be administered to," &c., a certain deadly poison, "with the intent then and there feloniously to kill and murder" the persons named, it suffi-

ciently charges a violation of the statute, although not using the same words. *Ib.*

16. Under an indictment for an assault with intent to murder a slave, if the prisoner goes to trial on the plea of not guilty, without raising any objection to the indictment, he may be convicted of an assault and battery only; and he cannot, by assigning for error the verdict of the jury, raise the question whether such an indictment lies. *Carpenter v. The State*, 23 Ala. 84.

17. The indictment must state the facts which constitute the assault. *Beasley v. The State*, 18 Ala. 535; *Shaw v. The State*, 18 Ala. 547; *Trexler v. The State*, 18 Ala. 21. (But see the form prescribed by the Code, p. 700, No. 16.)

18. The assault should be alleged as at common law, with the additional averment of the intent. *Beasley v. The State*, 18 Ala. 535.

19. It is not necessary to allege that the assault was felonious. *Ib.*

20. Nor is it necessary to allege that the person assaulted was within the distance to which the gun would carry, or that the gun was a deadly weapon. *Ib.*

21. When two commit a joint assault, with intent to murder,—one with a knife, and the other with a gun,—a count which charges them jointly is not objectionable for duplicity. *Ib.*

IV. OF THE PLEADINGS AND EVIDENCE.

22. Under an indictment containing two counts, "the State moved that the defendant be tried on the first count, and that the second count be postponed until the first is disposed of; to which there was no dissent by the defendant." On the trial upon the first count, the jury found the defendant "guilty as charged in the bill of indictment;" and the solicitor then entered a *nolle-pros.* to the second count. *Held*, that the postponing of the second count was erroneous; that the defendant was not precluded from taking advantage of the error, by the recital in the judgment entry that he did not dissent from such a course of proceeding; that if the defendant had consented to go to trial on one count only, yet the verdict, being general, would be erroneous; and that the subsequent entering of a *nolle-pros.* did not cure the error. *Flanagan v. The State*, 19 Ala. 546.

23. Where three persons are jointly indicted for an assault with intent to murder, but are tried separately, a letter written by one of them to the prosecutor, some time before the commission of the assault, showing malice on the part of the writer towards the prosecutor, is not admissible evidence against another who, though *particeps criminis* in the assault, is not shown to have had any connection whatever with the writing of the letter, nor to have acted in concert with the writer, nor to have participated in his ill-will towards the prosecutor. *Stewart v. The State*, 26 Ala. 44.

24. But *semble*, that if the defendants had entered into a conspiracy to kill the prosecutor, and the letter was subsequently written by one of them to bring on the difficulty, or in furtherance of their common design, it would be admissible evidence against all of them; the act of each, in furtherance of the common design, being deemed in law the act of all. *Ib.*

25. Under an indictment for an assault with intent to murder A, the defendant's threats, made several hours previous to the fight, that he would kill B, are not admissible evidence against him. *Ogletree v. The State*, 28 Ala. 693.

26. The burden of proving the alleged intent, as well as all the other facts which constitute the offense, is on the State; and its actual existence is a question of fact for the jury, in the decision of which they ought to act upon those presumptions which are recognized by the law, so far as they are applicable, and their own judgment and experience, as applied to all the circumstances in proof. *Ib.*

27. A charge to the jury held erroneous, because it shifted the burden of proof, and lost sight of the recognized distinction between civil and criminal cases in the measure of proof. *Ib.*

AUTREFOIS ACQUIT.

See PLEADING, 52, 53.

BAIL.

(Constitutional Provisions: Art. I, §§ 16, 17; Art. V, § 2.)
(Statutory Provisions: Code, §§ 3667-98; Clay's Digest, 444, § 40; *Ib.* 462-9, §§ 1-46.)

I. OF THE RIGHT TO BAIL.

1. *Under Penal Code of* 1841.
2. *Under Code of* 1852.

II. OF THE PROCEEDINGS TO OBTAIN BAIL.

1. *Before Inferior Courts and Magistrates.*

(a) Under Penal Code of 1841.
(b) Under Code of 1852.

2. *Before Supreme Court.*

(a) Under Penal Code of 1841.
(b) Under Code of 1852.

III. OF THE RECOGNIZANCE AND PROCEEDINGS THEREON.

1. *Who may take.*
2. *Amount.*
3. *Description of Offense.*
4. *What will discharge Sureties.*
5. *What will not discharge them.*

I. OF THE RIGHT TO BAIL.

1. *Under Penal Code of* 1841.

1. The 40th section of the 8th chapter of the Penal Code is not repugnant to the constitutional provision, that "all persons shall, before conviction, be bailable by sufficient securities, except in capital cases, where the proof is evident, or the presumption great." *Ex parte Croom & May*, 19 Ala. 561.

2. The word "term," as therein used, means the period of time prescribed by law, within which the court is required to be held, unless the business is sooner disposed of; and not the time during which it may actually be in session. *Ib.*

3. A prisoner, charged with a capital offense, who makes application for bail, on account of an unauthorized premature adjournment of the court, at the first term at which he was properly triable, without any disposition having been made of his case, makes out a *prima-facie* case for relief, by showing that he was arrested, and in the custody of the sheriff, before the adjournment of the court; that the court was adjourned, *sine die*, before the expiration of the period allowed by law for holding it, and while there was business on the docket undisposed of; that no disposition was made of his case; that no cause for the adjournment was assigned in the order, and that none appears in the record. *Ib.*

4. And he may insist on his right to bail, on account of such premature unauthorized adjournment, although he was confined at the time, at a place several miles distant from the court-house, in the custody of the sheriff, who was advised by physicians that, on account of his wounds, it was unsafe to remove him; and although he made no application for a trial, and might have continued his case on account of his situation. *Ib.*

5. A general order, continuing all causes not otherwise disposed of, if made at the suggestion of the parties or their counsel, or with their consent, would operate as a continuance entered in each case by consent, and would be a completion of the business justifying the adjournment of the court. *Ib.*

6. Where the trial of a person, charged with a capital offense, is continued at one term on account of the incompetency of the presiding judge, and at the succeeding term by the State without his fault or assent, he is entitled to bail as a matter of right, although the case had been previously continued at his instance. *Ex parte Stiff*, 18 Ala. 464.

7. A change of venue, on the application of the prisoner, necessarily sets aside a previous order of continuance at the same term by the State, and does not authorize the prisoner, upon the case being continued by the State in the court to which it is transferred, to be admitted to bail as a matter of right. *Ex parte Johnson*, 18 Ala. 414.

8. Where a prisoner is committed for an assault with intent to murder, and it is shown that the person as-

saulted is in danger of dying before the expiration of a year and a day from the time of the assault, the prisoner is not entitled to bail as a matter of right, because no indictment has been found against him, although two terms of the court have elapsed since his commitment, unless it is also shown that, if death should ensue within the year and day, he would be entitled to bail. *Ex parte Andrews and Wife*, 19 Ala. 582.

9. Although *habeas corpus* is a writ of right, yet the courts will not grant it, unless the petitioner shows such a state of facts as entitles him to relief. *Ex parte Campbell*, 20 Ala. 89.

10. When the application is founded on a continuance by the State upon the unsworn statement of the prosecutor, and the statement is reduced to writing and sworn to at the time the application is made, the writ may be refused. *Ib.*

11. Although, since the adoption of the Penal Code, the jury have the power, in all cases of murder in the first degree, of determining whether the punishment shall be death or imprisonment for life in the penitentiary, yet this does not make the offense less capital than before. The inquiry before the magistrate, to whom the application is made, still is, whether the offense charged may be capitally punished; if it may, and the proof is evident, or the presumption great, it is not bailable. *Ex parte McCrary*, 22 Ala. 65.

2. *Under Code of* 1852.

12. A prisoner indicted for murder is entitled to bail, as a matter of right, unless the court is of opinion, on the evidence adduced, that he is guilty of murder in the first degree. *Ex parte Banks*, 28 Ala. 89.

II. OF THE PROCEEDINGS TO OBTAIN BAIL.

1. *Before Inferior Courts and Magistrates.*

(a) Under Penal Code of 1841.

13. On application to the circuit court for bail, if the court proceeds to examine fully the facts and circumstances attending the commission of the alleged offense, it is not error to refuse to permit the prisoner, after having submitted all the evidence, to withdraw his motion; but it is the duty of the court to proceed with the case, and either bail or remand the prisoner, as the facts may require. *Ex parte Campbell*, 20 Ala. 89.

14. Where the record of the court, to which the application is made, shows that the facts of the case were fully inquired into on a previous application, the court, although not bound to do so, may well decline to hear a second application, based on the same facts; and, though the former judgment does not preclude the party from again applying, it is discretionary with the court, whether it will re-try the facts, or repose upon its former judgment. *Ib.* (Changed by statute.—Code, § 3673.)

15. Under the act establishing courts of probate, a judge of probate has power "to grant, hear, and determine writs of *habeas corpus*," in bailable cases. *Hale v. The State*, 24 Ala. 80. (Note, that this power was taken away by the Code, but has been restored by the "act concerning bail in criminal cases," except in cases of murder in the second degree, and manslaughter in the first degree.—Session Acts 1855–6, p. 52.)

16. The judge of the city court of Mobile has power to take a bond, conditioned that the principal obligor "make his personal appearance before the city court, now in session, *instanter*, and from day to day during the term, and from term to term thereafter, to answer the State of Alabama on a charge of an assault to murder." *Arnold v. The State*, 25 Ala. 69.

(b) Under Code of 1852.

17. A sheriff has no power to admit to bail, after indictment found, a person charged with a felony, nor can that power be delegated to him by an order of the circuit court. *Antonez v. The State*, 26 Ala. 81. (Changed by statute. Session Acts 1855–6, pp. 52–3.)

18. Section 3408 of the Code, requiring the magistrate to endorse on the warrant of commitment the amount of bail required, applies only to pre-

liminary proceedings before indictment found. *Ib.*

2. *Before Supreme Court.*

(a) Under Penal Code of 1841.

19. A prisoner charged with a capital offense, after having been refused bail by a circuit judge, may petition the supreme court for a revision of his decision. *Ex parte Croom & May*, 19 Ala. 561.

20. In such case, the proper practice is, for the prisoner to petition the supreme court for the writs of *habeas corpus*, and such other remedial process as may be necessary to render its control effectual; setting forth, under oath, such a state of facts as will show that the circuit judge erred to his prejudice, and that he was entitled by the case then made to the relief sought. *Ib.*

21. If the court deems the showing *prima facie* sufficient to entitle the prisoner to bail, the writs of *habeas corpus* and *certiorari* will be awarded, to bring up the prisoner and the proceedings had before the circuit judge; so that, if the prisoner, upon a full hearing on the return of the writs, should be adjudged entitled to bail, he may be allowed to give it in such sum as may be prescribed. *Ib.*

22. Instead of the writs of *habeas corpus* and *certiorari* issuing from the supreme court, an agreed statement of the facts and proceedings had before the circuit judge may, by consent of counsel, be submitted; and if the court decides that the prisoner is entitled to bail, application may again be made to the circuit judge. *Ib.*

23. The supreme court will not, by *mandamus*, control the discretion of the circuit court in refusing bail on a renewed application, after its previous refusal on the same facts. *Ex parte Campbell*, 20 Ala. 89.

24. When an examination has been had before a magistrate, or a judge of an inferior tribunal, in whom is reposed a sound discretion to grant or refuse bail, the supreme court will always presume, until the contrary is plainly made to appear, that this discretion has been properly exercised. *Ex parte McCrary*, 22 Ala. 65.

25. When the bill of exceptions states that the cause was continued "on the affidavit of the prosecutor, which disclosed the absence of a material witness for the State, who had been regularly subpœnaed," but the affidavit itself is not set out in the record, it will not be presumed that the affidavit did not satisfactorily account for the absence of the witness. If the affidavit was defective, it should have been set out in the record, or its defects made part of the petitioner's case in some other way. *Ib.*

(b) Under Code of 1852.

26. If application for bail is made to a circuit judge, and is by him refused, the evidence may be set out on exceptions, and application made thereon to the supreme court. *Ex parte Banks*, 28 Ala. 89.

III. OF THE RECOGNIZANCE AND PROCEEDINGS THEREON.

1. *Who may take.*

27. A judge of probate has power to take a recognizance from a person charged with a bailable offense, conditioned for his appearance at the next term of the circuit court. *Hale v. The State*, 24 Ala. 80. (Note, that this power was taken away by the Code, but has been restored by the "act concerning bail in criminal cases," except in cases of murder in the second degree, and manslaughter in the first degree.—Session Acts 1855–6, p. 52.)

28. The judge of the city court of Mobile has power to take a recognizance, conditioned that the principal obligor "make his personal appearance before the city court, now in session, *instanter*, and from day to day during the term, and from term to term thereafter, to answer the State of Alabama on a charge of an assault to murder." *Arnold v. The State*, 25 Ala. 69.

29. Under the Code, a sheriff has no power to take a recognizance from a person indicted for murder in the second degree, nor can that power be delegated to him by an order of the circuit court. *Antonez v. The State.*

26 Ala. 81. (Changed by statute.—Session Acts 1855–6, pp. 52–3.)

2. *Amount.*

30. That the defendant is a man of fortune is a fact which may well be considered in fixing the amount of his bail. *Ex parte Banks*, 28 Ala. 89.

3. *Description of Offense.*

31. A recognizance, to appear and answer an indictment to be preferred at a future time against the principal, need not set out the offense charged with the technical accuracy required in an indictment; a substantial description of the offense will be sufficient. *Weaver v. The State*, 18 Ala. 293.

32. A charge of "persuading and inducing a negro woman slave named A., the property of J. K., to leave her master's premises and employ, with a view to take said slave to another State, and convert her to his own use," though not in the technical language of the statute, is a substantial description of an offense against its provisions. *Ib.*

4. *What will discharge Sureties.*

33. To *sci. fa.* on a forfeited recognizance, it is a good plea by the sureties, that their principal, at the time of its execution, "was illegally and by force imprisoned and restrained of his liberty, and that under such illegal and forcible imprisonment and restraint of his liberty, and to procure a release and discharge therefrom, defendants made and subscribed said writing." *The State v. Brantley*, 27 Ala. 44.

5. *What will not discharge them.*

34. The sureties on a forfeited recognizance cannot test the legal sufficiency of the indictment against their principal by a demurrer to the *sci. fa.* *Williams v. The State*, 20 Ala. 63; *Weaver v. The State*, 18 Ala. 293.

35. The re-arrest of the principal, on the supposition by the magistrate that his bail is insufficient, is unauthorized, and does not discharge his sureties. *Ingram v. The State*, 27 Ala. 17.

36. The subsequent arrest of the principal on another charge, or his delivery by the executive authority of another State on the requisition of the governor, does not discharge his sureties: their remedy, *it seems*, is by *habeas corpus*. *Ib.*

BASTARDY.

(Statutory Provisions: Code, §§ 3799–3822; Clay's Digest, pp. 133–5, §§ 1–11.)

I. OF THE PRELIMINARY PROCEEDINGS.

1. *Jurisdiction of Justice.*
2. *Complaint.*
3. *Recognizance.*
4. *Record returned to Court.*

II. OF THE PROCEEDINGS IN COUNTY, PROBATE, OR CIRCUIT COURT.

1. *Jurisdiction of Court.*
2. *Pleading, Practice, and Evidence.*
3. *Judgment.*

III. OF APPEALS.

I. OF THE PRELIMINARY PROCEEDINGS.

1. *Jurisdiction of Justice.*

1. A justice of the peace has no jurisdiction under the bastardy act, unless the mother of the child is a single woman, and is pregnant (or has been delivered) in the county in which the justice acts; but, if the complaint does not state these facts, he may determine their existence from other evidence, and should then state them in his warrant, so that his jurisdiction may appear on the face of his proceedings. *Williams v. The State*, 29 Ala. 9.

2. The recitals in the justice's warrant, of the preliminary facts on which his jurisdiction depends, and which it is his duty to determine, are evidence that he did determine their existence; and his determination of their existence, in the absence of evidence showing it to be erroneous, is conclusive between the parties. *Ib.*

2. *Complaint.*

3. A married woman cannot prefer a complaint, under the statute, against the alleged father of her bastard child. *Judge of Limestone County Court v. Kerr*, 17 Ala. 328.

3. *Recognizance.*

4. The bond taken by the justice from the defendant, conditioned for his appearance at court according to the requisition of the statute, is properly made payable to the governor for the time being and his successors in office. *Chaudron v. Fitzpatrick*, 19 Ala. 649.

5. If the bond does not conform to the statute, in failing to require the defendant to appear "at the next term" after it is taken, it is void, and the proceedings dependent upon it are *coram non judice*. *Seale v. McClanahan*, 21 Ala. 345.

6. If the defendant appears in court, and submits without objection to a trial on the merits, he cannot object, on error, to the regularity of the recognizance taken by the justice. *Wilson v. Judge of Pike County Court*, 18 Ala 757.

4. *Record returned to Court.*

7. The proceedings had before the justice are a part of the record of the cause, and may be looked to in aid of the judgment of the county court. *Wilson v. Judge of Pike County Court*, 18 Ala. 757.

8. Although the Code (§ 3801) only requires the justice to return to the circuit court, by the first day of the term to which the defendant is bound to appear, the bond and complaint; yet the warrant also may be returned, when it recites the existence of the facts on which the jurisdiction of the justice depends, and is expressly referred to in the bond. *Williams v. The State*, 29 Ala. 9.

II. OF THE PROCEEDINGS IN COUNTY, PROBATE, OR CIRCUIT COURT.

1. *Jurisdiction of Court.*

9. If the facts necessary to sustain the jurisdiction of the court appear from the proceedings had before the justice, which are a part of the record, although the judgment may fail to disclose them, it will be sufficient. *Wilson v. Judge of Pike County Court*, 18 Ala. 757.

10. If the proceeding was continued by the defendant at the first term, the county court had jurisdiction to take a recognizance for his personal appearance from term to term, and for his good behavior; and if the recognizance contained any additional stipulation, it was void only as to that condition. *The State, ex rel. Claunch, v. Castleberry*, 23 Ala. 85.

11. If the surety in the recognizance taken by the justice afterwards becomes judge of probate, he is incompetent, by reason of interest, to preside on the trial of the cause; and any proceedings therein, had before him, are *coram non judice* and void. *Ib.*

12. The court of probate has but a limited jurisdiction, to be exercised in a special manner: this jurisdiction attaches, when the defendant is bound to appear before it, on a charge of being the father of a bastard child, at its first session next after the bond is taken; but it has no power to take cognizance, and proceed *ex parte*, with a cause brought before it in a different manner. *Seale v. McClanahan*, 21 Ala. 345.

13. A probate judge has no jurisdiction, except when sitting as a court in term time, to take a confession of judgment from the defendant; but, *it seems*, the court may declare such judgment void, and proceed with the cause from the last previous continuance. *Moore v. McGuire*, 26 Ala. 461.

14. Although the justice is not required (Code, § 3801) to return the warrant to court, yet, when it recites the existence of the jurisdictional facts, and is expressly referred to in the bond, it may be returned; and its recitals will then be sufficient to sustain the jurisdiction of the court. *Williams v. The State*, 29 Ala. 9.

2. *Pleading, Practice, and Evidence.*

15. After a jury has been empaneled to try the question of paternity, the court is not bound, on the motion of

the defendant, and the production of a release from the mother of the child, to dismiss the proceedings, but may refuse to do so; and if the defendant wishes to insist on the release, he should then plead it in bar, and request appropriate instructions to the jury. *Wilson v. Judge of Pike County Court*, 18 Ala. 757.

16. A release, given by the mother whilst under age, is not binding, and, if afterwards repudiated by her, cannot bar her right. *Ib.*

17. When the defendant has entered into a recognizance for his appearance at court, no further notice to him is required, but the court may investigate the charge, and render judgment against him, in his absence: his non-appearance furnishes no reason for suspending or thwarting the action of the court. *Seale v. McClanahan*, 21 Ala. 345.

18. Where the mother and putative father of the child, both being made witnesses by the Code (§ 3807), are examined on the trial, their testimony must be weighed by the jury like that of other witnesses. *Satterwhite v. The State*, 28 Ala. 65.

19. A proceeding in bastardy not being a criminal case, it is not error to refuse to instruct the jury, at the defendant's request, "that they ought to acquit, unless the proof showed, beyond a reasonable doubt, that he was guilty;" but it is erroneous to instruct them, "that if the State produced a preponderance of evidence, they might, upon such preponderance of proof, find the defendant guilty." *Ib.*

3. *Judgment.*

20. A judgment, requiring the defendant to pay into the probate court, annually, for the term of ten years, the sum of fifty dollars, for the support, maintenance, and education of the child, though not in favor of any person by name as plaintiff, is nevertheless sufficient, since the statute points out with certainty who is plaintiff. *Seale v. McClanahan*. 21 Ala. 345.

21. A judgment by confession, taken by a probate judge in vacation, is *coram non judice* and void. *Moore v. McGuire*, 26 Ala. 461.

22. A judgment against the defendant, that he pay "the sum of forty dollars annually, for ten years, to-wit, forty dollars now, and forty dollars every year for ten years afterwards," is erroneous; but, since it shows upon its face that the defendant was adjudged to pay "forty dollars annually, for ten years," the latter portion of the entry must be treated as a clerical misprision, and amended accordingly. *Wilson v. Judge of Pike County Court*, 18 Ala. 757.

23. A judgment in favor of the prosecutrix, "for her costs in this behalf," and requiring the defendant to enter into bond, "conditioned that he pay to the judge of probate fifty dollars, on the first *day* of January in each year, for the term of ten years," &c., is materially different from a judgment requiring him to enter into bond, "conditioned to pay fifty dollars a year, for the period of ten years, on the first *Monday* in January." *Williams v. The State*, 26 Ala. 85.

24. But it may be amended at a subsequent term, *nunc pro tunc*. *Williams v. The State*, 29 Ala. 9.

III. OF APPEALS.

25. From a judgment of the circuit court, in a proceeding under the bastardy act, an appeal may be taken (Code, § 3821) by merely giving security for the costs; and the security may be either a bond, or a simple acknowledgment in writing. *Satterwhite v. The State*, 28 Ala. 65.

26. If the appeal bond describes a judgment materially different from that shown by the record to have been rendered in the cause, and does not show any undertaking for the costs of an appeal from the real judgment, it cannot be regarded as security for the costs, and the appeal will be dismissed; as where the bond describes a judgment, requiring the defendant to enter into bond, conditioned to pay fifty dollars a year, for the period of ten years, "on the *first Monday* in January in each year," while the judgment shown to have been actually rendered required a bond, conditioned to pay, &c., "on the *first day* of January." *Williams v. The State*, 26 Ala. 85.

27. But, when the bond is designed to operate merely as security for the

cost, although a misdescription of the judgment would be fatal, yet a mere omission to recite in it the several days on which the respective sums were required to be paid, would not have that effect, if the judgment were otherwise correctly described, by its aggregate amount, names of parties, term of court when rendered, &c.; such an omission may be supplied by a comparison of the bond with the clerk's certificate, or with other parts of the record. *Satterwhite v. The State*, 28 Ala. 65.

28. The regularity of the recognizance taken by the justice, cannot be questioned in the appellate court, when the defendant appeared in the primary court, and submitted without objection to a trial on the merits. *Wilson v. Judge of Pike County Court*, 18 Ala. 757.

BILL OF EXCEPTIONS.

(Statutory Provisions: Code, §§ 3649–50; Clay's Digest, 471, §10.)

1. Where the record contains no bill of exceptions, but only an agreement, purporting to have been made between the solicitor and the attorney for the defendant, that the bill of exceptions taken in another case should be regarded as having been taken in the case at bar, and the minute entry does not show that the agreement was acknowledged by the parties in the circuit court, or made part of the record by an order of that court, the agreement will be rejected, as forming no part of the record. *Cobb v. The State*, 19 Ala. 18.

2. If one of the original papers in the cause is, by an order of the primary court, attached to the transcript of the record, the appellate court cannot inspect or examine it for any purpose. *Butler v. The State*, 22 Ala. 43.

3. The appellant must make the record affirmatively show error. *Eskridge v. The State*, 25 Ala. 30; *Butler v. The State*, 22 Ala. 43.

4. But, when the bill states enough to put the court clearly in error, the court should, if consistent with the facts, insert what is necessary to set itself right; and if it fails to do so, no presumption can be indulged in favor of its judgment. *Davis v. The State*, 17 Ala. 415.

5. When the bill does not set out all the evidence, it will not be presumed that an affirmative charge was abstract, but, on the contrary, that it was fully warranted by the proof. *McElhaney v. The State*, 24 Ala. 71; *Morris v. The State*, 25 Ala. 57.

6. But, when a party excepts to the refusal of a charge asked, he must set out in his bill sufficient evidence to show that the charge was not abstract. *Morris v. The State*, 25 Ala. 57.

7. Where the record shows that the jury was sworn, it will be presumed that they were sworn before the testimony was heard. *Crist v. The State*, 21 Ala. 137.

8. On application for the writs of *habeas corpus* and *certiorari*, to revise the action of a circuit judge in refusing bail to a prisoner charged with murder, if the bill of exceptions states that the cause was continued "on the affidavit of the prosecutor, which disclosed the absence of a material witness for the State, who had been regularly subpœnaed," but the affidavit itself is not set out in the record, the court will not intend that the affidavit did not satisfactorily account for the absence of the witness. If the affidavit was defective, it should have been set out in the record, or its defects made part of the petitioner's case in some other way. *Ex parte McCrary*, 22 Ala. 65.

9. When an examination has been had before a magistrate, or before a judge of an inferior tribunal, in whom is reposed a sound discretion to grant or refuse bail, as they may think proper under all the circumstances of the case, the appellate court will always presume that this discretion has been correctly exercised, until the contrary is plainly made to appear. *Ib.*

10. In a case in which insanity was relied on as a defense to an indictment for larceny, the bill of exceptions stated, that the State offered to prove, by a witness who had known the prisoner two years before the commission of the alleged offense, "that the prisoner, in his opinion, was a man of sound mind, and not insane, and that he could distinguish right from wrong;

to which the prisoner objected."—*Held*, construing the bill most strongly against the exceptor, that the opinion of the witness referred to the prisoner's mental condition at the time of their previous acquaintance, and not at the time of the trial. *Powell v. The State*, 25 Ala. 21.

11. As to the construction of a bill, which showed two separate objections by the defendants to the admission of their confessions. *Brister v. The State*, 26 Ala. 107.

12. The refusal of the court to require the solicitor, on motion of the defendant, to elect on which count in the indictment he would proceed, will not be revised by the appellate court, when no objection or exception was reserved to it. *Johnson v. The State*, 29 Ala. 62.

13. Injury will be presumed from error, unless the record itself rebuts the presumption, and shows affirmatively that no injury could have resulted therefrom to the party excepting. *Dave v. The State*, 22 Ala. 23; *Holmes v. The State*, 23 Ala. 17.

BILLIARDS.

See GAMING-TABLES.

BURGLARY.

(Statutory Provisions: Code, §§ 3308-10, 3183-4; Clay's Digest, 426, § 64; *Ib.* 472, § 4.)

1. A two-storied house, of which the front room on the first floor was used as a store-house, and the back room (which also contained a few boxes of goods, and communicated with the front by a door in the partition) as a sleeping-room by the owner, while his clerks, who were unmarried men and took their meals at a hotel, slept in the rooms on the second floor,—*held* a dwelling-house, both within the common-law definition, and under the Code. *Ex parte Vincent*, 26 Ala. 145.

2. The term "dwelling-house," as used in section 3308 of the Code, has the same meaning as in the definition of burglary at common law; while section 3309 was intended to soften the rigor of the former statute, by narrowing the meaning of the term, in requiring that a white person should be in the house at the time, and that the building should be joined to, and parcel of the dwelling-house. *Ib.*

3. An indictment for a conspiracy to commit a burglary, with intent to steal the goods of S., is supported by proof that the goods belonged to S. and his dormant partner. *Spalding and Thomas v. The State*, 17 Ala. 440.

CAMP-HUNTING.

(Statutory Provisions: Session Acts 1845-6, p. 134.)

1. In an indictment for camp-hunting, a count which only charges that the defendants "formed themselves into a company, consisting of more than five persons, for the purpose of camp-hunting," is fatally defective. *Underwood v. The State*, 19 Ala. 532.

2. A count which charges that the defendants came into the county of Covington, for the purpose of camp-hunting, and did camp-hunt therein, but does not allege that they hunted together, or in a company of more than five persons, is also defective. *Ib.*

3. The statute does not prohibit citizens of other counties from camp-hunting in Covington, except in companies consisting of more than five persons. *Ib.*

CERTIORARI.

1. If the order for a change of venue directs the clerk to transmit the original papers in the cause to the court to which the trial is removed, that court may order them to be returned to him, and may issue a *certiorari*, requiring him to transmit certified copies thereof. *Harrall v. The State*, 26 Ala. 52.

CHALLENGE OF JURORS.

See JURORS AND JURY, II, 1.

CHANGE OF VENUE.

See VENUE, II.

CHARACTER.

See EVIDENCE, 114–17; WITNESS, III.

CHARGE OF COURT.

(Statutory Provisions: Code, §§ 2274, 2355; Clay's Digest, 340, § 149.)

I. ABSTRACT.

1. An abstract charge, although it may assert a correct legal proposition, should be refused. *Murray v. The State*, 18 Ala. 727; *Felix v. The State*, 18 Ala. 720; *Harrison v. The State*, 24 Ala. 67; *Brister v. The State*, 26 Ala. 107.

2. When a party excepts to the refusal of a charge asked, he must show by his bill of exceptions that it was not abstract. *Morris v. The State*, 25 Ala. 57.

3. But, when an affirmative charge is given, it will be presumed to have been justified by the evidence, unless all the proof is set out in the bill of exceptions. *Moore v. The State*, 18 Ala. 532; *McElhaney v. The State*, 24 Ala. 71; *Morris v. The State*, 25 Ala. 57.

II. EXPLANATORY.

4. Section 2355 of the Code does not deprive the court of the right to give explanatory charges, after having given the charge asked in writing: on the contrary, it is the duty of the court to simplify and explain the charge given, by such additional instructions as will prevent a misunderstanding, or misapplication of it. *Morris v. The State*, 25 Ala. 57.

III. INVADING PROVINCE OF JURY.

5. A charge which assumes to determine a question of intention, invades the province of the jury, and is therefore erroneous. *Oliver v. The State*, 17 Ala. 587.

6. But, if one kills another by the use of a deadly weapon without necessity, the law will presume, in the absence of proof to the contrary, that the act was voluntarily done; therefore, a charge which assumes, in such case, that the act was voluntary, is not an invasion of the province of the jury. *Ib.*

7. Whether an act was done in the prosecution of a common purpose among the defendants, or was committed by one of them from causes which had no connection with their common purpose, is a question for the jury; and a charge which excludes it from their consideration, is erroneous. *Frank v. The State*, 27 Ala. 37.

8. But a charge upon the legal effect of a record is not an invasion of the province of the jury. *Martha v. The State*, 26 Ala. 72.

9. When there is a conflict in the testimony, a charge which assumes the contested fact to be proved, invades the province of the jury, and should therefore be refused. *Skains and Lewis v. The State*, 21 Ala. 218.

10. For the same reason, a charge, under an indictment for retailing, which assumes that the defendant had knowledge of the intemperate habits of the person to whom he sold the liquor, is erroneous. *Elam v. The State*, 25 Ala. 53.

11. Where a witness for the prosecution is impeached, by proof of his contradictory statements on a material point, it is erroneous to instruct the jury, "that they must believe the witness for the State, unless they believe that the contradictory witness is entitled to more weight and credit than said witness for the State." *Corley v. The State*, 28 Ala. 22.

12. Where there is the least conflict, in a material point, between the evidence adduced by the prosecution, and that offered by the defendant, a charge, based upon the former, and indicating that the jury may look to that alone in passing on the guilt or innocence of the prisoner, is erroneous. *Dill v. The State*, 25 Ala. 15.

13. But, if there is no conflict in the testimony, and the conclusion drawn

by the court is the only one warranted by the facts and law, such a charge may be given. *Ib.*

14. When there is any conflict in the evidence, on any material question of fact, it is erroneous to instruct the jury, "that if they believe the evidence, they must find the defendant guilty." *Arnold v. The State*, 29 Ala. 46.

15. But, when all the evidence is adduced by the prosecution, is without conflict, and establishes the guilt of the accused beyond all doubt, such a charge may be given. *Thompson v. The State*, 21 Ala. 48.

16. Even in such case, however, it is erroneous to instruct them, without hypothesis, "that they must find the defendant guilty." *Huffman v. The State*, 29 Ala. 40.

IV. MISLEADING JURY.

17. Instructions to the jury should be direct and certain: a charge which is involved and confused may be refused. *Salomon and Boullemet v. The State*, 28 Ala. 83.

18. A charge which requires explanation or qualification, to prevent it from misleading the jury, may be refused. *Ib.*

19. Where the testimony offered by the prosecution is *prima-facie* evidence of the defendant's guilt, and there is no rebutting evidence, the court may refuse to charge, at the request of the defendant, that the evidence adduced by the prosecution "is not conclusive evidence of his guilt." *Swallow v. The State*, 22 Ala. 20.

20. A charge, which has the effect of withdrawing from the jury any evidence which tends to establish the defense, is erroneous. *Holmes v. The State*, 23 Ala. 17.

21. Although the judge may lay down the law correctly in his general charge to the jury; yet, if in a subsequent specific charge he places the case upon the existence of certain facts, on which alone it may not properly be made to turn, and the effect of this charge, if literally followed by the jury, is to withdraw from them the consideration of other facts which tend to disprove or materially qualify the facts upon which the charge is predicated, injury will be presumed from the error. *Ib.*

22. A charge, which authorizes the jury to find the prisoner guilty without any proof that the offense was committed within the county in which the indictment was found, is erroneous. *Brown v. The State*, 27 Ala. 47; *Salomon v. The State*, 27 Ala. 26; *Huffman v. The State*, 28 Ala. 48; *Spaight v. The State*, 29 Ala. 32.

23. A charge, which instructs the jury that, "if any one or more of their number differed from the majority of the panel as to the guilt or innocence of the prisoner, they might properly waive their convictions and agree with the majority, but were not bound to do so," is calculated to mislead the jury, and is therefore erroneous. *Swallow v. The State*, 20 Ala. 30.

24. It is also erroneous for the court to instruct the jury, that if the proof left the question of the defendant's guilt or innocence in equipoise, they could not, on that account alone, acquit. *Winter and Scisson v. The State*, 20 Ala. 39.

25. Where the evidence before the jury, in a *quasi* criminal proceeding for the violation of a city ordinance, is entirely circumstantial, the court may refuse to charge upon a portion of the testimony, and should refer the whole of it to the jury, whose exclusive province is to weigh the evidence. *Brown v. Mayor of Mobile*, 23 Ala. 722.

26. The charge of the court is properly confined to the matter in issue; the court is not bound to instruct the jury, at the defendant's request, "that they cannot find him guilty of an assault with intent to murder, unless they are satisfied from the evidence, beyond a reasonable doubt, that he would have been guilty of murder in the first degree if death had ensued from the assault." *Ogletree v. The State*, 28 Ala. 693.

27. Under an indictment for an assault with intent to murder, a charge which selects a portion only of the facts disclosed by the testimony, and instructs the jury that, if these facts are proved, "the law presumes that the act was malicious," and that the defendant "intended to kill," is erroneous, because it shifts the burden of proof, and loses sight of the recog-

nized distinction between civil and criminal cases in the measure of proof; nor is the error cured by further instructing the jury, in a subsequent part of the charge, that these presumptions of law only arise in the absence of evidence tending to qualify or explain the selected facts, and may be rebutted, qualified, or explained away by the evidence, "so that, if they find the facts upon which these presumptions of law arise, with other evidence tending to qualify or explain them, it will be their duty to consider all the evidence in connection, and if, upon the whole evidence, they entertain a reasonable doubt, they should acquit the defendant." *Ib.*

28. A charge, asserting that the prisoner cannot be convicted of an assault with intent to murder, unless he had at the time a "positive intention" to commit murder, is calculated to mislead the jury, and should therefore be refused. *Moore v. The State*, 18 Ala. 532.

29. A charge, asserting that, "although, in general, mere words might not be sufficient to reduce the crime of murder to manslaughter, yet the jury were the judges whether the provocation, if more than by mere words, was sufficient," is obnoxious to the same objection. *Felix v. The State*, 18 Ala. 720.

30. The prisoner, being indicted for the mayhem of a slave, the evidence showed that he shot the slave in the leg, rendering its amputation necessary, and that the shot "seemed to go together, making a continuous wound;" and thereupon the court charged the jury, "that, as there was no proof of the distance between the prisoner and the slave when the wound was inflicted, they might look to the character of the wound, for the purpose of determining whether he fired the gun with the view of striking or disabling the leg." *Held*, that the charge was not erroneous. *Eskridge v. The State*, 25 Ala. 30.

31. If the charge given by the court asserts a correct legal proposition in favor of the defendant, he cannot complain that it did not go far enough, and announce to the jury the full extent of his rights: it is his duty, in such case, to call for a fuller charge on the point. *Dave v. The State*, 22 Ala. 23.

V. REFERRING QUESTIONS OF LAW TO JURY.

32. A charge, which instructs the jury that, "if they found there was a conflict between the special charges, given by the court at the defendant's request, and the main charge, then the latter must prevail," is erroneous, because it refers to the jury the decision of a question which belongs exclusively to the court. *Spivey v. The State*, 26 Ala. 90.

33. The jury are not the constituted judges of the law in a criminal case, and consequently have not the legal right to disregard the instructions of the court; a charge which assumes that they have this right ought to be refused. *Batre v. The State*, 18 Ala. 119.

34. A charge which assumes that it is the province of the jury to pass upon the legal sufficiency of the provocation, in a case of homicide, is erroneous. *Felix v. The State*, 18 Ala. 720.

VI. RULES OF CONSTRUCTION.

35. The charges of the court are to be construed in connection with the evidence. *Noles v. The State*, 26 Ala. 31; *Eskridge v. The State*, 25 Ala. 30.

CODE OF ALABAMA.

I. GENERAL RULES OF CONSTRUCTION.
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25. §§ 3608–18 (*Change of Venue.*)
26. §§ 3652–62 (*Suspension of Judgment.*)
27. §§ 3669–79 (*Bail.*)
28. §§ 3801–21 (*Bastardy.*)

I. GENERAL RULES OF CONSTRUCTION.

1. The substantial re-enactment, in the Code, of a previous statute, must be held a legislative adoption of the judicial construction which it had received. *Huffman v. The State*, 29 Ala. 40; *Anthony v. The State*, 29 Ala. 27; *Ex parte Banks*, 28 Ala. 28.

II. CONSTRUCTION OF PARTICULAR SECTIONS.

1. §§ 397–9 (*Licenses.*)

2. The statute requiring licenses to retail spirituous liquors is not merely a revenue law: the payment of the prescribed tax is only one of the prerequisites to obtaining a license; and the other provisions, as to producing certificate, giving bond, and taking oath prescribed, show that the legislature considered it a dangerous privilege, and intended to guard against its abuse. *Long v. The State*, 27 Ala. 32.

3. Although a license may be granted to a partnership, upon each partner complying with the requisitions of the statute, as to certificate, oath, &c.; yet a license to one partner individually confers no authority on his copartner or the firm. *Ib.*

4. A ten-pin alley at a public watering-place, kept by the proprietor for public play, though used solely for amusement by his guests, without charge to them or profit to himself, is within the prohibition of the law. *Spaight v. The State*, 29 Ala. 32.

2. § 712 (*Justice and Constable.*)

5. A justice of the peace has authority, in cases of emergency, to appoint a special constable; and he must himself judge of such emergency. *Noles v. The State*, 24 Ala. 672.

3. §§ 1057–60 (*Retailing.*)

6. Selling vinous or spirituous liquors to a person of known intemperate habits, in quantities greater than a quart, is not a violation of the statute. *Maxwell v. The State*, 27 Ala. 660.

As to licenses, *vide supra*, 2, 3.

7. An indictment in the general form allowed by the Code, charging that the defendant, before the finding of the indictment, "sold spirituous liquors, without a license, and contrary to law," is sufficient; and under it the defendant may be convicted, on proof, of selling to a person of known intemperate habits. *Elam v. The State*, 25 Ala. 53.

8. The defendant cannot require the prosecuting attorney, before any evidence is offered, to state and elect for which one of the different varieties of retailing he intends to proceed; but, when the State has once made its election, by offering evidence of one particular offense, it will be held to that election through all the subsequent proceedings, and will not be allowed, on a second trial, to offer evidence of a different offense. *Elam v. The State*, 26 Ala. 48.

9. Evidence that the intemperate habits of the person to whom the liquor was sold were generally known in the community, is irrelevant and inadmissible, since it would not justify the inference that they were known to the defendant. *Stanley & Elliott v. The State*, 26 Ala. 26.

10. Whether a person is "a man of known intemperate habits," is a ques-

tion of fact to which a witness may depose. *Ib.*

11. Whether the defendant had knowledge of the intemperate habits of the person to whom he sold the liquor, should be left to the decision of the jury, on the evidence; and a charge which assumes that such knowledge was brought home to him, is erroneous. *Elam v. The State*, 25 Ala. 53.

4. § 2355 (*Charge of Court.*)

12. The statute (Code, § 2355) does not deprive the court of the right to give explanatory charges, after having given the charges asked in writing; but, on the contrary, it is the duty of the court to simplify and explain the charge given, by such additional instructions as will prevent a misunderstanding or misapplication of it. *Morris v. The State*, 25 Ala. 57.

5. § 3080 (*Murder.*)

13. The defendant in this case was held entitled to bail as a matter of right, because the court could not, on the evidence set out in the bill of exceptions, say that he was guilty of murder in the first degree, as defined by the Code (§ 3080.) *Ex parte Banks*, 28 Ala. 89.

6. § 3105 (*Mayhem.*)

14. The statutory offense of mayhem may be committed on a slave. *Eskridge v. The State*, 25 Ala. 30.

7. § 3108 (*Lynching.*)

15. To support an indictment under section 3108 of the Code, the accusation must be the moving cause of the assault: if the assault was committed upon the provocation that the person assaulted had whipped the defendant's son, the defendant would be guilty of an assault and battery, but not of the statutory offense. *Underwood v. The State*, 25 Ala. 70.

3. § 3130 (*Inveigling Slaves.*)

16. The statute respecting the inveigling of slaves (Code, § 3130) was intended to afford ampler protection and security to slave property than was afforded by the rules of the common law, and it makes several radical changes in the common law. At common law, a taking was necessary to constitute larceny; but not so as to all the offenses created by this statute. At common law, a bailee, who had acquired possession of goods without any intent at the time to steal them, could not, during the continuance of the bailment, commit larceny as to such goods, unless he broke the bulk or package; but this statute makes no such exception. It includes "any person" who commits any one of the acts denounced by it, with the felonious intent indicated by its terms, and embraces the carrying away, inveigling, &c., of "any slave," whether in the actual possession of the owner, or of a bailee, or in the merely constructive possession of the owner. *Spivey v. The State*, 26 Ala. 90.

17. Conversion and carrying away, as the terms are used in the statute, are neither synonyms, nor convertible terms. A felonious carrying away of a slave necessarily includes a conversion, but a conversion does not necessarily include a carrying away; and a mere conversion, even with a criminal intent, is no felony, unless there is also a carrying away. *Ib.*

18. The defendant's declarations, made while he had possession of the slave, "as to the manner in which he bought him," are not admissible evidence for him; but any evidence tending to prove that he honestly believed that he had the right to carry away and sell the slave, is admissible. *Ib.*

9. §§ 3137, 3185–93 (*Arson.*)

19. An indictment for the willful burning of a house insured against fire, with intent to charge or injure the insurer, (Code, 3137,) must allege that the house was "at the time insured against fire." *Martin & Flinn v. The State*, 29 Ala. 30.

20. And to justify a conviction under such an indictment, the jury must be satisfied from the evidence that the defendant had knowledge of the insurance. *Martin & Flinn v. The State.* 28 Ala. 71.

21. Under the Code, as at common law, the ownership of the property burned must be alleged in the indictment. *Martha v. The State*, 26 Ala. 72; *Martin & Flinn v. The State*, 28 Ala. 71.

10. §§ 3143, 3170, 3175 (*Embezzlement and Larceny.*)

22. A mere servant, having charge of his employer's store-house and goods, without any authority to sell, may be convicted of larceny from a store-house, under section 3170 of the Code; but, if he was the agent of his employer, and had authority as such to furnish goods to customers, he can only be indicted and convicted under section 3143. If, however, he obtained his agency with the felonious intent of stealing the goods, he may be convicted under section 3170. *Case v. The State*, 26 Ala. 17.

23. If the jury assess the aggregate (instead of the separate) value of the stolen articles, (§ 3175,) the irregularity is not available to the defendant, either in arrest of judgment, or on error. *Ib.*

11. § 3231 (*Adultery and Fornication.*)

24. Adultery and fornication, under the statute of this State, are distinct offenses; and therefore, under an indictment for adultery, no conviction can be had, if the evidence shows that both the parties were unmarried. *Smitherman v. The State*, 27 Ala. 23.

12. §§ 3243–4, 3249–53 (*Gaming and Gaming-Tables.*)

25. Under an indictment for playing cards "at a store-house then and there for retailing spirituous liquors," no conviction can be had upon proof that the playing took place "near a house formerly used for retailing, but which was not then so used." *Logan v. The State*, 24 Ala. 182.

26. A lawyer's office, during the session of the circuit court, is not "a public place" within the meaning of the statute, when it is shown that the playing was at night, by permission of the person who occupied the room as a sleeping apartment, when the doors were locked, and the curtains drawn over the windows. *Burdine v. The State*, 25 Ala. 60; *Sanders v. The State*, 25 Ala. 63, note.

27. A physician's office is not "a public place" within the statute, when the playing is at night, with closed doors and curtained windows, although it is also shown that the room adjoined a merchant's counting room, with which it communicated by a door, and that the person who occupied it as a bed-room was in the habit of inviting his friends thither for the purpose of playing cards. *Sherrod v. The State*, 25 Ala. 78.

28. On demurrer to the evidence, under an indictment for gaming, proof that the defendant played a game of "ramps," in a store-house where spirituous liquors were at the time retailed, is sufficient to authorize a conviction. *Bryan v. The State*, 26 Ala. 65.

29. So, also, proof that the defendant and another person "each put up money, and threw dice for it, by placing the dice in a box and throwing three times each, the one throwing the highest number taking the money," will support a conviction, although it is also shown "that the mode of procedure, and of throwing the dice, was the same as in the case of raffling for property." *Jones v. The State*, 26 Ala. 155.

30. If A and B are jointly indicted and tried for gaming, and the evidence shows that A and others played at one time when B was not present, and that B and others played at another time when A was not present, no conviction can be had against them. *Elliott v. The State*, 26 Ala. 78.

31. Under an indictment for betting "at a game of pool at a public place," the defendant may be convicted on proof that he played pool at a table regularly licensed for billiards. *Rodgers v. The State*, 26 Ala. 76.

32. The term "public place," as used in the statute, does not include any of the places thereinbefore specifically enumerated, but embraces all other public places, whether they are public *per se*, or become public merely by force of circumstances; and therefore, if the evidence shows that the defendants played at "a public house," they cannot be convicted of playing at "a public place." *Windham v. The State*, 26 Ala. 69; *McCauley v. The State*, 26

Ala. 135; *Sweeney v. The State*, 28 Ala. 47; *Huffman v. The State*, 28 Ala. 48.

33. When the gaming is at "a public house," or at any one of the other places specifically enumerated in the statute, no matter what secrecy may be used, nor how few the number present, it is a violation of the statute. *Windham v. The State*, 26 Ala. 69.

34. A room in a warehouse for storing cotton on the bank of a navigable river, which is used by the clerk both for the transaction of business and as a bed-room, is "a public house" within the meaning of the statute, but not "a public place." *Ib.*

35. A lawyer's office, though "a public house" within the meaning of the statute, is not "a public place." *McCauley v. The State*, 26 Ala. 135.

36. A room on the second floor of a two-storied house, used and occupied by the defendant as a bed-room, is not brought within the prohibition of the statute, by the mere fact that the lower story is used by another person for the sale of spirituous liquors. *Dale and Underwood v. The State*, 27 Ala. 31.

37. A store-house in the country is "a public house" within the meaning of the statute; and if it consists of only two rooms, one above the other, and both controlled by the owner, who uses the lower room as his store, the upper room is also within the prohibition of the statute, unless it affirmatively appears that it is not used as an appendage to the store, nor in connection with the store for the convenience and accommodation of the owner, his employees or customers, but is occupied for some justifiable private purpose, entirely disconnected from the business of the store and the convenience of the customers. *Brown v. The State*, 27 Ala. 47; *Sweeney v. The State*, 28 Ala. 47.

38. If a country store-house consists of two rooms, both of which are under the control of the same person, the front room being used as a dry-goods store, it is *prima facie* an entirety; and, though this presumption may be overcome by proof that the two rooms are entirely disconnected, and appropriated to distinct and separate uses, yet it is not repelled by proof that the back room was used as a bed-room by one of the proprietors of the store, who was an unmrrried man,—that no goods were kept or sold there, no accounts settled there, and that witness never had seen any of the customers of the store use it for any purpose. *Huffman v. The State*, 29 Ala. 40.

39. A house occupied by the keeper of a public toll-bridge, and consisting of two rooms, which communicate with each other by a door, is *prima facie* an entirety; and if the front room is appropriated to such uses as constitute it "a public house" within the meaning of the statute, the back room is also within the prohibition, though used only as a bed-room by the keeper of the bridge, an unmarried man. *Arnold v. The State*, 29 Ala. 46.

40. If such house is merely the private residence of the keeper of the bridge, it is not within the statute, although occasional settlements for toll are therein made; but, if the front room is appropriated to the transaction of the business of the bridge, such as keeping books, settling accounts, &c., and is occupied by the keeper subject to such appropriation, and persons having business connected with the bridge are invited or licensed to go there by the very nature of the business to which it is appropriated, it then becomes "a public house" within the meaning of the statute. *Ib.*

41. An indictment for gaming, which charged that the defendants "played at a game with cards, or dice, or some device or substitute therefor, at a tavern, inn, store-house for retailing spirituous liquors, or house or place where spirituous liquors were at the time retailed or given away, or at an outhouse where people resorted," held sufficient on demurrer and not violative of the tenth section of the first article of the State constitution. *Burdine v. The State*, 25 Ala. 60; *Sherrod v. The State*, 25 Ala. 78.

42. A license to keep a billiard-table does not authorize its use for the game of pool; and therefore, under an indictment for betting "at a game of pool at a public place enumerated in section 3243 of the Code," proof that the defendant played pool at a table regularly licensed for billiards, will support a conviction. *Rodgers v. The State*, 26 Ala. 76.

43. An indictment for betting "at a

game of pool at a house where spirituous liquors were retailed," or (as alleged in another count) "at a public place enumerated in section 3243 of the Code," conforms substantially to the requisitions of the Code, and is therefore sufficient. *Ib.*

13. § 3254 (*Lotteries.*)

44. Any person who sells a lottery-ticket in this State, for or on behalf of any agent, conductor, manager or proprietor of any lottery which has been set up in this State, or in any other State or country, without the legislative authority of this State, and the prizes in which have not been actually distributed at the time of the sale of the ticket, is "concerned in carrying on such lottery," and is therefore guilty of a violation of the statute. *Salomon v. The State*, 27 Ala. 26.

45. A re-sale of a ticket in a lottery not authorized by the laws of this State, by a person totally disconnected from the lottery, is not a violation of the statute, when his previous purchase extinguished all interest and ownership of every agent, conductor, manager or proprietor in the ticket; otherwise, it is. *Salomon and Boullemet v. The State*, 28 Ala. 83.

46. An indictment, in the form prescribed by the Code, which charges that the defendant "set up, or was concerned in setting up, or carrying on a lottery, without the legislative authority of this State," is sufficiently certain and definite. *Salomon v. The State*, 27 Ala. 26.

14. § 3283 (*Selling Liquor to Slaves.*)

47. An administratrix, who has possession of a slave belonging to her intestate's estate, is his mistress within the purview of the statute. *Boltze v. The State*, 24 Ala. 89.

48. An order in writing, signed by a person who is neither the master nor overseer of the slave, is no protection to the seller. *Ib.*

49. If the overseer of a slave goes to a house where spirituous liquors are retailed, and tells the proprietor that he will send the slave for a specified quantity of a particular liquor, and goes off and sends the slave, with a jug, for the same; and thereupon the proprietor puts the liquor in the jug, and delivers it to the slave,—this is not within the statute, but is lawful without an order in writing. *Powell v. The State*, 27 Ala. 51.

15. §§ 3308–9 (*Burglary.*)

50. The term "dwelling-house," as used in section 3308, has the same meaning as in the definition of burglary at common law; and the following section (3309) was intended to soften the rigor of the old statute, (Clay's Digest, 472, § 4,) by narrowing the meaning of the term, in requiring that some white person should be in the house at the time the offense was committed, and that the building should be joined to and parcel of the dwelling-house. *Ex parte Vincent*, 26 Ala. 145.

51. A two-storied house, of which the front room on the first floor was used as a store-house, and the back room (which also contained a few boxes of goods, and communicated with the front by a door in the partition) as a bed-room by the owner, while his clerks, who were unmarried men, and took their meals at a hotel, slept in the rooms on the second floor, —is a dwelling-house, within the meaning of the statute. *Ib.*

16. §§ 3311, 3125 (*Poisoning and Attempts to Poison.*)

52. In an indictment which charges an actual poisoning, an allegation that the substance administered was a poison, is unnecessary; but an indictment for an attempt to poison must allege that fact. *Anthony v. The State*, 29 Ala. 27.

17. § 3312 (*Homicide of White Person by Slave.*)

53. If a slave, in the unjustifiable attempt to commit an assault and battery on another slave, kill a white person by misadventure, he is guilty of involuntary manslaughter. *Bob v. The State*, 29 Ala. 20.

54. Under an indictment for the murder of a white person, whether framed under the Code or as at common law,

a slave cannot be convicted of involuntary manslaughter. *Ib.*

18. § 3317 (*Petty Offenses by Slaves.*)

55. An assault and battery, committed by one slave on another, is an offense under our statutes. *Bob v. The State*, 29 Ala.

19. §§ 3340–1 (*Peace-Warrants.*)

56. An affidavit by a married woman, that "she is *afraid* her husband will beat, wound, maim, or kill her, or do her some bodily hurt," is not sufficient to authorize the arrest of the husband. *Noles v. The State*, 24 Ala. 672.

20. § 3408 (*Bail by Magistrate.*)

57. The statute which requires the magistrate to endorse on the warrant of commitment the amount of bail required, applies only to preliminary proceedings before indictment found, and not to commitments after indictment. *Antonez v. The State*, 26 Ala. 81.

21. §§ 3501–6 (*Forms of Indictments.*)

58. It was competent for the legislature, by statute, to dispense with the averment, in an indictment for murder, that the offense was committed in the body of the county in which the indictment was found, and to require that fact to be shown by the evidence. *Noles v. The State*, 24 Ala. 672.

59. An indictment for murder, in the general form allowed by the Code, is not violative of any constitutional provision, and is sufficiently certain and definite. *Ib.*

60. An indictment for an assault and battery, in the general form allowed by the Code, alleging the commission of the offense "before the finding of the indictment" without specifying any day, is also sufficient. *Thompson v. The State*, 25 Ala. 41.

61. So is an indictment for retailing. *Elam v. The State*, 25 Ala. 53.

62. And an indictment for gaming. *Burdine v. The State*, 25 Ala. 60; *Sherrod v. The State*, 25 Ala. 78.

63. And an indictment for betting at a gaming table. *Rodgers v. The State*, 26 Ala. 76.

64. And an indictment for setting up a lottery. *Salomon v. The State*, 27 Ala. 26.

22. § 3576 (*Service of Copy of Indictment and Venire.*)

65. Every person indicted for a capital offense, if he is in actual confinement, is entitled to have a copy of the indictment delivered to him at least two entire days before the day appointed for his trial; delivery to his counsel is not sufficient. But if he objects to going to trial, "on the ground that a copy of the indictment has not been served on him *or his counsel*," and it is shown that a copy was delivered to *his counsel*, the objection may be overruled, since the form of it is a waiver of the right to personal service. *Brister v. The State*, 26 Ala. 107.

66. When the venue is changed on the defendant's application, the certified copy of the indictment becomes so far an original, in the court to which the trial is removed, that the delivery of *it* will be a sufficient compliance with the statute. *Ib.*

67. When a prisoner, indicted for a capital offense, is in actual confinement, he is entitled to a list of the jurors summoned for his trial, at least two days before the day appointed for his trial; but when he is not in actual confinement, and has counsel, whose names are so entered on the docket, the right to such list does not arise, in favor of either the prisoner or his counsel, except upon application by the latter. *Bill v. The State*, 29 Ala. 34.

68. If he is not in actual confinement, and has counsel entered on the docket, and proceeds to trial without objecting to the *venire*, he cannot have the entire panel set aside, on account of the misnomer of a juror who was summoned but failed to attend, nor on account of the omission to insert in the panel a juror's christian name in full, when the initial letter of the name is correctly stated. *Ib.*

23. §§ 3581–6 (*Challenge of Jurors.*)

69. Where the accused may be convicted under the indictment of murder in the first degree, he is entitled to the number of peremptory challenges

allowed in prosecutions for that offense; and it is, therefore, no objection to the form of indictment prescribed by the Code, that it does not distinguish between the different degrees of murder. *Noles v. The State*, 24 Ala. 672.

70. Where there is a joint trial, under a joint indictment, each defendant may challenge the whole number of jurors which he would be entitled to challenge if tried separately. *Brister v. The State*, 26 Ala. 107.

71. On the trial of a person under an indictment for an offense which may be punished capitally, or by imprisonment in the penitentiary, it is a good ground of challenge for cause by the State, that the juror has a fixed opinion against capital or penitentiary punishments. *Stalls v. The State*, 28 Ala. 25.

72. But if the juror is accepted by the State, and afterwards by the prisoner, the State's right of challenge for this cause is lost, and cannot be again revived by any act of either the solicitor or the court, although the existence of the ground of challenge was unknown to them when the juror was accepted by the State; and if the court then improperly sets aside the juror, and the prisoner excepts to its decision, the error entitles him to a reversal of the judgment. *Ib.*

24. § 3594 (*Ordering Acquittal of one Defendant.*)

73. When several defendants are jointly indicted and tried, if there is any evidence against one, the court may overrule the motions of his co-defendants "to introduce him as a witness, on the ground that there was no evidence against him to authorize him to be put on his defense," and "to direct and allow the jury to return a verdict of acquittal as to him, on the ground that there was not sufficient evidence of his guilt to require him further to defend." *Brister v. The State*, 26 Ala. 107.

25. §§ 3608–18 (*Change of Venue.*)

74. The granting of a change of venue in a criminal case is discretionary with the court to which the application is made, and its refusal is not revisable by *mandamus* or otherwise. *Ex parte Banks*, 28 Ala. 28.

75. If the order for a change of venue directs the clerk to transmit the "original papers in the cause," it is nevertheless his duty to transmit a transcript; and such order, even if erroneous, is no ground for a reversal of the judgment of conviction. The court to which the trial is removed, in such case, may order the original papers to be returned, and may issue a *certiorari*, requiring the clerk to transmit copies of them. *Harrall v. The State*, 26 Ala. 52.

76. The prosecution is not discontinued by the failure of the clerk to transmit a transcript to the court to which the trial is removed, and the failure to have the cause entered on the docket of that court at the first term next after the order of removal. *Ib.*

77. If the transcript is duly certified by the clerk to contain a copy of the caption of the grand jury, the indictment, with all the endorsements thereon, and all the orders and entries relating to the cause, including the order for the removal of the trial, the defendant may be tried on such transcript. *Brister v. The State*, 26 Ala. 107.

26. §§ 3652-62 (*Suspension of Judgment.*)

78. When questions of law are reserved for the determination of the appellate court, under an indictment for a misdemeanor, and the defendant, after conviction, gives bail to appear at the next term and abide the judgment, the execution of the judgment is only suspended until the next term of the court; unless the defendant, before that time, procures a reversal of the judgment on error, or an order extending the suspension of it; and if the defendant fails to appear at that term, the State is not only entitled to a writ of arrest against him, but may treat the undertaking as forfeited.—But these proceedings must be had in the primary court: the judgment cannot be affirmed on certificate, at the instance of the State, when the defendant has asked no order in the cause, on account of the clerk's failure to transmit a transcript of the proceed-

ings to the appellate court. *The State v. Lowry*, 29 Ala. 44.

27. §§ 3669–3679 (*Bail.*)

79. A person indicted for murder is entitled to bail, as a matter of right, unless the court to which the application is made is of opinion, on the evidence adduced, that he is guilty of murder in the first degree; and if the application is made to a circuit judge, and is by him refused, the evidence may be set out on exceptions, and application made thereon to the supreme court. *Ex parte Banks*, 28 Ala. 89.

80. Section 3679 construed in connection with sections 3652–62. *The State v. Lowry*, 29 Ala. 44. (*Supra*, 78.)

28. §§ 3801–21 (*Bastardy.*)

81. A justice of the peace has no jurisdiction under the bastardy act, unless the mother of the child is a single woman, and is pregnant (or has been delivered) in the county in which the justice acts; but, if the complaint does not state these facts, he may determine their existence from other evidence, and should then state them in his warrant, so that his jurisdiction may appear on the face of his proceedings. *Williams v. The State*, 29 Ala. 9.

82. The recitals in the justice's warrant, of the preliminary facts on which his jurisdiction depends, and which it is his duty to determine, are evidence that he did determine their existence; and his determination of their existence, in the absence of evidence showing it to be erroneous, is conclusive between the parties. *Ib.*

83. Although the statute only requires the justice to return to the circuit court the bond and complaint, yet he may also return the warrant, when it recites the existence of the facts on which his jurisdiction depends, and is expressly referred to in the bond; and its recitals are then sufficient to sustain the jurisdiction of the court. *Ib.*

84. Where the mother and putative father of the child, both being made witnesses by the statute, are examined on the trial, their testimony must be weighed by the jury like that of other witnesses. *Satterwhite v. The State*, 28 Ala. 65.

85. A proceeding under the bastardy act not being a criminal case, it is not error to refuse to instruct the jury, at the defendant's request, "that they ought to acquit, unless the proof showed, beyond a reasonable doubt, that he was guilty;" but it is erroneous to instruct them, "that if the State produced a preponderance of evidence, they might upon such preponderance of proof find the defendant guilty." *Ib.*

86. A judgment in favor of the prosecutrix, "for her costs in this behalf," and requiring the defendant to enter into bond, "conditioned that he pay to the judge of probate fifty dollars, on the first *day* of January in each year, for the term of ten years," &c., is materially different from a judgment requiring him to enter into bond, "conditioned to pay fifty dollars a year, for the period of ten years, on the first *Monday* in January." *Williams v. The State*, 26 Ala. 85.

87. But it may be amended at a subsequent term, *nunc pro tunc*. *Williams v. The State*, 29 Ala. 9.

88. An appeal may be taken from a judgment under the bastardy act, by merely giving security for the costs; and the security may be either a bond, or a simple acknowledgment in writing. *Satterwhite v. The State*, 28 Ala. 65.

89. If the bond, as set out in the record, describes a judgment materially different from that shown by the record to have been rendered in the cause, and does not show any undertaking for the costs of an appeal from the real judgment, it cannot be regarded as security for the costs, and the appeal will be dismissed; as where the bond describes a judgment, requiring the defendant to enter into bond, conditioned to pay fifty dollars a year, for the period of ten years, "on the *first Monday* in January in each year," while the record shows that the judgment actually rendered required a bond, conditioned to pay, &c., "on the *first day* of January." *Williams v. The State*, 26 Ala. 85.

90. But, when the bond is designed to operate merely as security for the costs, although a misdescription of

the judgment would be fatal, yet a mere omission to recite in it the several days on which the judgment required the respective sums to be paid, would not have that effect, if the judgment were otherwise correctly described, by its aggregate amount, names of parties, term of court when rendered, &c.: such an omission may be supplied by a comparison of the bond with the clerk's certificate, or with other parts of the record. *Satterwhite v. The State*, 28 Ala. 65.

CONFLICT OF LAWS.

See POLYGAMY.

CONSPIRACY.

See ACCOMPLICES.

CONSTABLE.

1. A justice of the peace has authority, in cases of emergency, to appoint a special constable (Code, § 712); and he must himself judge of such emergency. *Noles v. The State*, 24 Ala. 672.

2. A justice's warrant, which shows on its face that it was issued without authority, is no protection to the officer who executes it, but he may be treated as a trespasser. *Ib.*

CONSTITUTIONAL LAW.

I. APPEALS.
II. BAIL.
III. INDICTMENTS.
IV. JUDICIARY.
1. *Federal.*
2. *State.*
V. LICENSE LAWS.
VI. SLAVES.
1. *Under Federal Constitution.*
2. *Under State Constitution.*
VII. TRIAL BY JURY.

I. APPEALS.

1. The third section of the act of 1854, (Session Acts 1853–4, p. 247,) which makes defaulting overseers of roads triable before a justice of the peace, is unconstitutional (Art. V, § 10), because it makes no provision for an appeal, while the general law regulating appeals is inapplicable. *Tims v. The State*, 26 Ala. 165.

II. BAIL.

2. The provision of the Penal Code of 1841, (Clay's Digest, 444, § 40,) by which it is enacted, that if the defendant in capital cases is not tried at the first term at which he is properly triable, on account of any causes therein specified, he shall not be entitled to bail as a matter of right, but that he may claim to be discharged on bail if he is not tried at the second term, unless the failure is occasioned by his own failure or misfortune, or on his application, or with his assent, is not repugnant to the constitutional provision, (Art. I, § 17,) which declares that "all persons, before conviction, shall be bailable by sufficient securities, except for capital offenses where the proof is evident and the presumption great." *Ex parte Croom and May*, 19 Ala. 562.

3. Although, since the adoption of the Penal Code, the jury have the power, in all cases of murder in the first degree, of determining whether the punishment shall be death or imprisonment for life in the penitentiary, yet this does not make the offense less "capital" than before. The inquiry before the magistrate, on an application for bail, still is, whether the offense charged may be capitally punished; if it may, and the proof is evident, or the presumption great, it is not bailable. *Ex parte McCrary*, 22 Ala. 65.

III. INDICTMENTS.

4. The act of 1850, (Session Acts 1849–50, p. 51,) which dispensed with the necessity of averring, in an indictment for trading with a slave, the name of the master, owner, or overseer of such slave, or of negativing his as-

sent to such tending, is not unconstitutional. *Hirschfelder v. The State*, 19 Ala. 534.

5. The fifth article of the amendments to the constitution of the United States, which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury," does not restrict the State, in the prosecution of capital or infamous crimes, to common-law indictments. Those amendments were demanded by the States, as safe-guards against encroachments on the part of the Federal Government, and were not designed to restrict their own powers. *Noles v. The State*, 24 Ala. 672.

6. The tenth and twelfth sections of the first article of our State constitution do not restrict the powers of the legislature to enact laws defining offenses and their punishment, and prescribing the forms of indictments suited to them, as well as the mode of trying them. If the form of indictment prescribed by statute contains such an accusation, at the suit of the State, found to be true by the oaths of a grand jury, as furnishes to the accused reasonable information of what he is called on to answer, by setting forth the constituent elements of the offense, it will be sufficient, although it may omit many averments which, at common law, were necessary to the validity of an indictment. *Ib.*

7. It was competent for the legislature, by statute, to dispense with the averment, in an indictment for murder, that the offense was committed within the body of the county in which the indictment was found, and to require that fact to be shown by the evidence. *Ib.*

8. The forms of indictments prescribed by the Code, for murder, for retailing, for gaming, and for assault and battery, are none of them violative of the constitution. *Noles v. The State*, 24 Ala. 672; *Elam v. The State*, 25 Ala. 53; *Burdine v. The State*, 25 Ala. 60; *Sherrod v. The State*, 25 Ala. 78; *Thompson v. The State*, 25 Ala. 41.

9. The legislature has power to make offenses, which have been created by statute since the adoption of the constitution, triable before a justice of the peace without indictment. *Tims v. The State*, 26 Ala. 165.

IV. JUDICIARY.

1. *Federal.*

10. The thirty-third section of the judiciary act of 1789, (U. S. Statutes at large, vol. 1, p. 91,) which empowers justices of the peace, and other officers therein named, to arrest and commit (or bail, as the case may require) persons charged with a violation of the criminal law of the United States, is not unconstitutional. The authority thus conferred on justices of the peace is not "judicial power," within the meaning of the third article of the Federal constitution; nor does the exercise of it make them Federal officers, within the second section of the second article. *Ex parte Gist*, 26 Ala. 156.

2. *State.*

11. A prisoner charged with a capital offense, after having been refused bail by a circuit judge, may petition the supreme court for a revision of his decision; and it is the duty of that court, under its constitutional power of exercising "a general superintendence of inferior jurisdictions," to adopt such a course of proceeding as will make its control complete. *Ex parte Croom & May*, 19 Ala. 561.

12. Proper practice in such case prescribed. *Ib.*

13. An inferior court, within the meaning of the constitution (Art. V. § 1), is a court whose judgments or decrees can be reviewed on appeal or writ of error by a higher tribunal, whether that tribunal be the circuit or the supreme court. *Nugent v. The State*, 18 Ala. 521.

14. The judgments of the city court of Mobile being subject to the revision of the supreme court, in like manner with those of the circuit courts, the act creating it is not unconstitutional. *Ib.*

V. LICENSE LAWS.

15. The legislature is not restricted by the State constitution from impos-

ing such conditions as may be deemed proper and required by the good of the community, upon those who are allowed to retail spirituous liquors, as regards both the persons to whom, and the quantities in which they may sell. *Lodano v. The State*, 25 Ala. 64.

VI. SLAVES.

1. *Under Federal Constitution.*

16. Exclusive power over the importation of slaves, since the first day of January, 1808, is vested in congress by the ninth section of the first article of the Federal constitution. *The State, ex rel. Savary, v. Caroline*, 20 Ala. 19.

17. The State courts never could exercise any jurisdiction in cases of violation of the laws prohibiting the slave trade, except such as were authorized by congress; and all jurisdiction is now taken away from them, by the fourth section of the act of congress approved March 3, 1819. *Ib.*

2. *Under State Constitution.*

18. Although, ordinarily, slaves are not to be considered as embraced in statutes, unless specially named; yet, in view of the constitutional provision (Art. VI, § 3) which declares that "any person who shall maliciously dismember, or deprive a slave of life, shall suffer such punishment as would be inflicted in case the like offense had been committed on a free white person," &c., the statute defining the crime of mayhem (Code, § 3105) extends to the disabling of slaves. *Eskridge v. The State*, 25 Ala. 30.

VII. TRIAL BY JURY.

19. The constitutional guaranty of a trial by jury, in all criminal prosecutions, includes the right to have the deliberations of the jury continued, when once they have begun the trial and heard any evidence, until the occurrence of a sufficient legal reason for their discharge, and the chance of a verdict of acquittal at their hands during all that time. *McCauley v. The State*, 26 Ala. 135.

20. For this reason, the unauthorized discharge of a jury, in any criminal case, either for a misdemeanor or a felony, is equivalent to an acquittal; but, since the court has power to discharge the jury in cases of necessity, a plea of previous withdrawal of the cause from the jury after issue joined, "without the consent of defendant, and against his objection," is demurrable, unless it also negatives the existence of any necessity for such withdrawal. *Ib.*

21. The constitutional guaranty of a trial by jury, "in all prosecutions by indictment or information," does not apply, except in the specified cases, to offenses created by statute since the adoption of the constitution; but such offenses may be made triable before a justice of the peace, without indictment. *Tims v. The State*, 26 Ala. 165.

22. Nor does the provision (Art. I, § 28) which declares that "the trial by jury shall remain inviolate," extend the right of a jury trial to cases which, at the time of the adoption of the constitution, were unknown both to the common and to the statute law. *Ib.*

23. The third section of the act of 1854, (Session Acts 1853–4, p. 247,) which makes defaulting overseers of roads triable before a justice of the peace, is not violative of the constitutional right to a trial by jury. *Ib.*

CONTINUANCE.

1. A general order, continuing all causes not otherwise disposed of, if made at the suggestion of the parties or their counsel, or with their consent, would operate as a continuance entered in each case by consent, and would be a completion of the business of the court justifying its adjournment. *Ex parte Croom & May*, 19 Ala. 562.

2. The action of the primary courts, on applications for continuances, is matter of discretion, and not revisable. *Starr v. The State*, 25 Ala. 49.

3. When application is made for a continuance on account of absent witnesses, the court may, in the exercise of its discretion, require the other party to admit the truth of the facts proposed to be proved by the absent

witnesses, or merely that those witnesses, if present, would swear to those facts; but an admission that the witnesses would swear to those facts, is not an admission of their absolute truth. *Ib.*

CORPORATIONS.

I. BY-LAWS; THEIR VALIDITY AND CONSTRUCTION.
II. PROCEEDINGS FOR VIOLATION OF BY-LAWS.
III. FORFEITURE OF CHARTER.

I. BY-LAWS; THEIR VALIDITY AND CONSTRUCTION.

1. A by-law of a municipal corporation, within the powers granted by its charter, is not rendered void for uncertainty, because the amount of the penalty imposed for its violation is left discretionary, within fixed limits, with the municipal court; *e. g.*, "not exceeding fifty dollars." *Mayor and Aldermen of Huntsville v. Phelps*, 27 Ala. 55. (Overruling *Mayor and Aldermen of Mobile v. Yuille*, 3 Ala. 137.)

2. A municipal by-law, declaring that the city-sexton, whose fees are paid out of the estates of the persons whom he buries, "shall expend, under the supervision of the committee on public grounds, five hundred dollars on the public burial grounds, and bury the paupers free of charge," is unreasonable, unjust, and void; because it is the duty of the corporation to maintain public burial grounds, and to bury paupers, and the expense attendant on the discharge of this duty must be apportioned among all the corporators. *Beroujohn v. Mayor and Aldermen of Mobile*, 27 Ala. 58.

3. Where the charter of an incorporated town gave power to its municipal authorities "to ordain all such ordinances and resolutions, and to make all such regulations, as may by them be deemed necessary for the control of the retailing of spirituous liquors within said town; to grant licenses for [the] retailing of spirituous liquors within said town, upon such sum to be paid therefor by each retailer, not to exceed $2,000 *per annum*, as said intendant and council may order; and in general, to adopt such a system of police and municipal regulation, in regard to the traffic in ardent spirits, as shall be deemed by them most conducive to public order, morality and policy, in reference to the black or colored population,"—*held*, that the term "retailing," construed with reference to the general policy of the law in relation to the sale of ardent spirits, meant selling in small quantities; and that, though the charter authorized the entire prohibition of retailing, yet an ordinance which prohibited, under a penalty, the sale of spirituous liquors in less quantities than twenty gallons, was unauthorized and void. *Harris v. Intendant of Livingston*, 28 Ala. 577.

II. PROCEEDINGS FOR VIOLATION OF BY-LAWS.

4. Proceedings for the recovery of fines or penalties for the violation of city ordinances, are *quasi* criminal in their character, and should be conducted according to the rules applicable to indictments for misdemeanors. *Brown v. Mayor of Mobile*, 23 Ala. 722.

5. In such proceedings, when removed by appeal or *certiorari* to the circuit court, the same nicety and particularity are not required in the statement of the offense or cause of action, as in cases commenced in the circuit court; but if the statement does not show a cause of action, the defendant may demur. *Ganaway and Kimball v. Mayor and Aldermen of Mobile*, 21 Ala. 577.

6. If the statement does not set forth the provision of the ordinance alleged to have been violated, it is fatally defective on demurrer. *Ib.*

7. If the proceeding is for the violation of an ordinance forbidding the trading with slaves, and the statement does not allege the name of the slave, or of his owner or employer, it is fatally defective on demurrer. *Brown v. Mayor of Mobile*, 23 Ala. 722.

III. FORFEITURE OF CHARTER.

8. A *scire facias* is the proper rem-

edy, in a proceeding under the act of 1843, (Clay's Digest, 515, § 39,) against an incorporated turnpike company, for a forfeiture of its charter; and the act of 1846, (Session Acts 1845–6, 44,) which gives an indictment against the company for a failure to keep its road in order, does not deprive the State of the right to proceed for a forfeiture under the former act. *The State v. Moore & Ligon*, 19 Ala. 514.

9. The *scire facias* should allege that the defendants procured the act of incorporation, or that they accepted it, or acted under it. *Ib.*

10. The solicitor of the circuit cannot, of his own volition, sue out a *scire facias* in such case, but can only act under the direction of the legislature, or of the attorney-general. *Ib.*

11. A proceeding by *quo warranto* against an incorporated bridge company, for a forfeiture of its charter, will not be permitted to progress, when no object can be gained by it in reference either to the public or to individuals; as where all the rights of the company have been assigned, and the assignment has been ratified by act of the legislature. *The State v. Centreville Bridge Co.*, 18 Ala. 678.

12. The act of 1848, amendatory of the act to incorporate the Centreville Bridge Company, (Session Acts 1847-8, 62,) confers on Jacob Maberry all the rights and privileges previously granted to said company, freed from all liability to forfeiture for any previous act or omission of the company; and the proviso, saving "any suit or suits now pending in favor of or against said company," applies only to suits by the company against individuals, or by individuals against the company, and not to a pending proceeding for a forfeiture of its charter. *Ib.*

COSTS.

I. IN JUSTICE'S COURT.
II. IN CIRCUIT COURT.
III. IN SUPREME COURT.

I. IN JUSTICE'S COURT.

1. A justice of the peace has no jurisdiction, in the preliminary proceedings had before him on a charge of felony, to render judgment for costs against the defendant. *Sasnett v. Weathers*, 21 Ala. 673.

II. IN CIRCUIT COURT.

2. On appeal from the order of a justice requiring the defendant to find sureties to keep the peace, the circuit court may render judgment for costs against the sureties on the appeal bond. *Tomlin v. The State*, 19 Ala. 9.

3. In a case of assault and battery, fourteen witnesses were summoned by the State to sustain the character of the prosecutor, but no one of them was called on the trial, the prosecutor having died two or three months previous thereto; but it was not shown that his death was known to the solicitor, nor that they were summoned after his death. *Held*, that the defendant, on conviction, should be taxed with the costs of their attendance. *Barrett v. The State*, 24 Ala. 74.

4. A witness for the State cannot bring suit against the defendant, after conviction, on his certificate of attendance. *Nicolas v. Trickey*, 19 Ala. 92.

III. IN SUPREME COURT.

5. From a judgment under the bastardy act, an appeal may be taken by merely giving security for the costs; and the security may be either a bond, or a simple acknowledgment in writing. *Satterwhite v. The State*, 28 Ala. 65.

6. If the appeal bond, as set out in the record, describes a judgment materially different from that shown by the record to have been rendered in the cause, and does not show any undertaking for the costs of an appeal from the real judgment, it cannot be regarded as security for the costs, and the appeal will be dismissed. *Williams v. The State*, 26 Ala. 85.

7. But, when the bond is designed to operate merely as security for the costs, although a misdescription of the judgment would be fatal, yet a mere omission to recite in it the several days on which the judgment required the respective sums to be paid, would not have that effect, if the judgment were otherwise correctly

described, by its aggregate amount, names of parties, term of court when rendered, &c.: such an omission may be supplied by a comparison of the bond with the clerk's certificate, or with other parts of the record. *Satterwhite v. The State*, 28 Ala. 65.

COUNTERFEITING.

(Statutory Provisions: Code, §§ 3160–61; Clay's Digest, 423–4, §§ 45–49.)

1. The time when the coin counterfeited was current in this State by law, custom or usage, is a material ingredient in the offense denounced by the statute, and should be distinctly stated in the indictment. *Nicholson v. The State*, 18 Ala. 529.

COURT, CIRCUIT.

1. The proviso to the 8th section of the act of 1819, (Clay's Digest, 295, § 35,) relative to the alternation of the circuit judges, is directory merely, and does not deprive them of the power to hold successive courts in any of the counties of their respective circuits. *Spalding and Thomas v. The State*, 17 Ala. 440. (Changed by statute.—Session Acts 1855–6, p. 29.)

2. The competency of the presiding judge to hold the court, cannot be questioned by plea in a criminal prosecution. *Ib.*

3. Under the revenue act of 1848, the circuit court alone had jurisdiction of offenses committed in violation of the 98th section. *Rossett v. The State*, 17 Ala. 496.

4. The court has no power, when an indictment is lost, to substitute a copy on proof. *Ganaway v. The State*, 22 Ala. 772.

5. As to the power of the court to make amendments, see AMENDMENTS.

COURT, CITY (MOBILE.)

I. CONSTITUTIONALITY.
II. JURISDICTION.

I. CONSTITUTIONALITY.

1. An inferior court, within the meaning of the constitution (Art. V, § 1), is a court whose judgments or decrees are revisable on error or appeal in a higher tribunal, whether that tribunal be the circuit or the supreme court; since, therefore, the judgments of the city court of Mobile are subject to the revision of the supreme court, in like manner as are the judgments of the circuit courts, the act creating it is not unconstitutional. *Nugent v. The State*, 18 Ala. 521.

II. JURISDICTION.

2. The criminal court of Mobile had no jurisdiction of offenses created by the revenue act of 1848. *Rossett v. The State*, 17 Ala. 496. (The name of the 'criminal court of Mobile' was changed to that of the 'city court of Mobile' by act of February 12, 1850 (Session Acts, p. 88); and by another act of the same session, (*Ib.* 24,) jurisdiction was conferred on it over "all matters of an indictable nature, and of all penalties arising from a violation of any of the provisions" of the revenue law.)

3. The city court has power to originate criminal proceedings at a special term. *Nugent v. The State*, 19 Ala. 540.

4. The judge of said court has power to take a bond, conditioned that the principal obligor "make his personal appearance before the city court, now in session, *instanter*, and from day to day during the term, and from term to term thereafter, to answer the State of Alabama on a charge of an assault to murder." *Arnold v. The State*, 25 Ala. 69.

COURT, COUNTY.

1. The act of 1836 (Clay's Digest, 509, § 11) authorized the judge of the county court, and made it his duty, to fill any vacancy that might occur, from whatever cause, after a regular appointment had been made, in the office of overseer of roads. *Thompson v. The State*, 21 Ala. 48. (Note, that this jurisdiction is now transferred to the probate court.)

2. In a proceeding under the bastardy act, the county court had jurisdiction, if the cause was continued by the defendant at the first term, to compel him to enter into a recognizance for his personal appearance from term to term, and for his good behavior. *The State, ex rel. Claunch, v. Castleberry*, 23 Ala. 85.

COURT, PROBATE.

1. The jurisdiction conferred on the county court by act of 1836, (Clay's Digest, 309, § 11,) and now transferred to the probate court, authorizes the judge, and makes it his duty, to fill any vacancy that may occur, from whatever cause, in the office of overseer of roads, after a regular appointment has been made. *Thompson v. The State*, 21 Ala. 48.

2. It is no objection to the regularity of the appointment, that it is tested by the judge of probate as clerk. *Ib.*

3. In a proceeding under the bastardy act, if the surety on the defendant's recognizance for his appearance at court afterwards becomes judge of probate, he is incompetent by reason of interest to preside on the trial of the cause; and any proceedings therein, had before him, are *coram non judice* and void. *The State, ex rel. Claunch, v. Castleberry*, 23 Ala. 85.

4. Under the act establishing courts of probate, a judge of probate had power (now taken away by the Code) "to grant, hear, and determine writs of *habeas corpus*," in bailable cases. *Hale v. The State*, 24 Ala. 80. (Note, that this power has been restored by the "act concerning bail in criminal cases," approved February 15, 1856, except in cases of murder in the second degree, and manslaughter in the first degree.)

COURT, SUPREME.

See BAIL.
BILL OF EXCEPTIONS.
ERROR AND APPEAL.
MANDAMUS.

COURT AND JURY.

I. PROVINCE AND DUTY OF COURT.

1. *Competency of Evidence.*

1. The general rules stated, which should govern the court in deciding upon the competency of confessions, and the jury in determining their credibility and effect; also, the distinction between their respective spheres. *Brister v. The State*, 26 Ala. 107.

2. *Construction of Writings.*

2. When a record is offered to sustain the plea of *autrefois acquit* or discontinuance, it is the duty of the court to declare its legal effect; and if it does not sustain either plea, the court may so instruct the jury. *Martha v. The State*, 26 Ala. 72.

3. Under an indictment for forgery, where there is a patent ambiguity on the face of the instrument charged to have been forged, arising from the use of words awkwardly, unskillfully, or designedly inserted, it is the duty of the court to examine it, and to instruct the jury how it should be read. *Butler v. The State*, 22 Ala. 43.

4. Where a writing contains both legal and illegal evidence, the court cannot be required to expunge that which is illegal: if the court points out to the jury the illegal evidence, and designates it in such a way that they can identify it, it is all that can be required. *Johnson v. The State*, 17 Ala. 618.

3. *Matters Judicially known.*

5. It is the duty of the courts to know judicially the general course of the transactions of human life, and whatever ought to be generally known within the limits of their jurisdiction; *e. g.*, the peculiar nature of lotteries, and the mode in which they are generally carried on. *Salomon and Boullemet v. The State*, 28 Ala. 83.

6. They are also bound to know judicially who are the sheriffs of the several counties in the State. *Ingram v. The State*, 27 Ala. 17.

7. Also, the names of all the counties in the State. *Reeves v. The State*, 20 Ala. 33.

8. And the meaning of the terms used in an indictment. *Sterne v. The State*, 20 Ala. 43; *Ward v. The State*, 22 Ala. 16.

9. The supreme court will take judicial notice of the regular terms of the probate courts. *Moore v. McGuire*, 26 Ala. 461.

10. But not of a private act incorporating a turnpike company. *Moore v. The State*, 26 Ala. 88.

4. *Records and Judgments.*

11. Where the trial and conviction occur at the term at which the indictment is found, the court may, at any time during that term, as well after as before conviction, cause the clerk to endorse the indictment 'filed,' to date the endorsement according to the fact, and to sign it; and may also cause an entry to be made on the minutes, that the indictment was returned into court by the grand jury, with the day on which it was so returned. Over such matters the court has control during the term, and may alter, amend, or set them aside, as justice may require. *Franklin v. The State*, 28 Ala. 9.

12. A judgment against the defendant, in a proceeding under the bastardy act, may be amended at a subsequent term, *nunc pro tunc*, so as to require the annual payments to be made on the "first *Monday*" in January, as the statute directs, instead of on the "first *day*" in January. *Williams v. The State*, 29 Ala. 9.

13. When an indictment is lost or destroyed, it cannot be substituted on satisfactory proof to the court of a copy. *Ganaway v. The State*, 22 Ala. 772.

II. PROVINCE AND DUTY OF JURY.

1. *As to Questions of Fact.*

14. Under an indictment for an assault with intent to murder, the actual existence of the alleged intent is a question of fact for the jury, in the decision of which they ought to act upon those presumptions which are recognized by the law, so far as they are applicable, and their own judgment and experience, as applied to all the circumstances in evidence. *Ogletree v. The State*, 28 Ala. 693.

15. In cases of conspiracy, it is a question for the jury, whether the act was done in prosecution of the original unlawful purpose, or was independent of it, and without previous concert; and a charge which excludes this question from their consideration, is erroneous. *Frank v. The State*, 27 Ala. 37.

16. The general rules stated, which should govern the jury in determining the credibility and effect of confessions, after the court has admitted them; also, the distinction between the respective spheres of the court and jury. *Brister v. The State*, 26 Ala. 107.

17. Under an indictment for retailing, the question, whether the defendant had knowledge of the intemperate habits of the person to whom he sold the liquor, should be left to the decision of the jury upon the evidence; and a charge which assumes that such knowledge is brought home to him, is erroneous. *Elam v. The State*, 25 Ala. 53.

18. Where the question before the jury was the identity of the prisoner as the murderer, the State offered in evidence the register of the hotel in Mobile at which the murder was committed, and the registers of two other hotels, one in New Orleans, and the other in Montgomery, in each of which a different name was entered, and which were admitted without objection from the prisoner; accompanied by parol proof that the three names were written by the prisoner, and that

he was known by them respectively in the three cities named. *Held*, that the jury, in determining whether the three names were written by the same person, might compare the handwriting. *Crist v. The State*, 21 Ala. 137.

19. The intent with which a child is forcibly taken from its parent, is a fact to be inferred from the evidence, and falls within the exclusive province of the jury. *Oliver v. The State*, 17 Ala. 587.

2. *As to Questions of Law.*

20. The jury are not the constituted judges of the law in a criminal case, and consequently have not the legal right to disregard the instructions of the court. *Batre v. The State*, 18 Ala. 119; *Felix v. The State*, 18 Ala. 720.

21. A charge to the jury, "that if they found there was a conflict between the special charges given by the court at the defendant's request and the main charge, then the latter must prevail," is erroneous, because it refers to the jury the decision of a question of law. *Spivey v. The State*, 26 Ala. 90.

See, also, CHARGE OF COURT.

3. *Misconduct.*

22. The misconduct of the jury, after they have retired to make up their verdict, is a matter to be considered by the court on a motion for a new trial, but is not a proper ground for an arrest of the judgment. *Brister v. The State*, 26 Ala. 107; *Franklin v. The State*, 29 Ala. 14.

DEMURRER.

See EVIDENCE, III.
PLEADING, II.

DISCONTINUANCE.

1. When an indictment is withdrawn from the docket, "on motion of the solicitor, the leave of the court being first had, with permission to reinstate it if necessary," and no other step is taken in the cause for more than two years, the cause is discontinued. *Drinkard v. The State*, 20 Ala. 9.

2. After a change of venue has been ordered, the failure of the clerk to transmit a transcript to the clerk of the court to which the trial is removed, and the failure to enter the cause on the docket of that court at the term next after the order of removal, do not amount to a discontinuance of the prosecution. *Harrall v. The State*, 26 Ala. 52.

3. Under an indictment for arson, if the proof of ownership varies from the allegation, and a *nolle-pros.* is thereupon entered, this is no bar to a subsequent prosecution under another indictment, in which the ownership is alleged to be in a different person; and if the second indictment contains several counts, in one of which the allegation of ownership is the same as in the first, and the defendant pleads discontinuance to the whole indictment, the record of the former prosecution does not sustain the plea. *Martha v. The State*, 26 Ala. 72.

EMBEZZLEMENT.

(Statutory Provisions: Code, § 3143–4.)

1. An agent, having charge of his employer's store-house and goods, with authority as such to furnish goods to customers, can only be indicted and convicted under section 3143 of the Code; but if he obtained his agency with the felonious intent of stealing goods, or was a mere servant, having charge of the store-house and goods, without any authority to sell, he may be convicted under section 3170. *Case v. The State*, 26 Ala. 17.

ERROR AND APPEAL.

I. WHEN ERROR OR APPEAL LIES.
II. OF THE BOND, OR SECURITY FOR COSTS.
III. AS TO AFFIRMANCE OF JUDGMENT ON CERTIFICATE.
IV. WHAT IS, OR NOT, REVISABLE.
V. WHAT WILL, OR NOT, REVERSE JUDGMENT.

1. *What will Reverse.*
2. *What will not Reverse.*

VI. NOVEL AND DIFFICULT QUESTIONS.
VII. BILL OF EXCEPTIONS.—*See that Title.*

I. WHEN ERROR OR APPEAL LIES.

1. A writ of error does not lie, to revise the action of the circuit court, on appeal from the order of a justice of the peace, or other officer, requiring a party to find sureties to keep the peace. *Tomlin v. The State*, 19 Ala. 9.

2. As to appeals and writs of error under the Code, see §§ 3649–3666.

I. OF THE BOND, OR SECURITY FOR COSTS.

3. From a judgment under the bastardy act, an appeal may be taken, by merely giving security for costs (Code, § 3821); and the security may be either a bond, or a simple acknowledgment in writing. *Satterwhite v. The State*, 28 Ala. 65.

4. If the bond, as set out in the record, describes a judgment materially different from that shown by the record to have been rendered in the cause, and does not show any undertaking for the costs of an appeal from the real judgment, it cannot be regarded as security for the costs, and the appeal will be dismissed; as where the bond describes a judgment, requiring the defendant to enter into bond, conditioned to pay fifty dollars a year, for the period of ten years, "on the *first Monday* in January in each year," while the record shows that the judgment actually rendered required a bond, conditioned to pay, &c., "on the *first day* of January." *Williams v. The State*, 26 Ala. 85.

5. But, when the bond is designed to operate merely as security for the costs, although a misdescription of the judgment would be fatal, yet a mere omission to recite in it the several days on which the judgment required the respective sums to be paid, would not have that effect, if the judgment were otherwise correctly described, by its aggregate amount, names of parties, term of court when rendered, &c.: such an omission may be supplied by a comparison of the bond with the clerk's certificate, or with other parts of the record. *Satterwhite v. The State*, 28 Ala. 65.

III. AS TO AFFIRMANCE OF JUDGMENT ON CERTIFICATE.

6. When questions of law are reserved for the determination of the appellate court, under an indictment for a misdemeanor, and the defendant, after conviction, gives bail to appear at the next term and abide the judgment, the execution of the judgment is only suspended until the next term of the court; unless the defendant, before that time, procures a reversal of the judgment on error, or an order extending the suspension of it; and if the defendant fails to appear at that term, the State is not only entitled to a writ of arrest against him, but may treat the undertaking as forfeited.—But these proceedings must be had in the primary court: the judgment cannot be affirmed on certificate, at the instance of the State, when the defendant has asked no order in the cause, on account of the clerk's failure to transmit a transcript of the proceedings to the appellate court. *The State v. Lowry*, 29 Ala. 44.

IV. WHAT IS, OR NOT, REVISABLE.

7. The refusal of the court to require the solicitor, on motion of the defendant, to elect on which count in the indictment he would proceed, will not be revised by the appellate court, when no objection or exception was reserved to it. *Johnson v. The State*, 29 Ala. 62.

8. The action of the court in refusing a new trial, on account of the misconduct of the jury, is not revisable on error. *Franklin v. The State*, 29 Ala. 14; *Brister v. The State*, 26 Ala. 107.

9. The action of the primary courts on applications for continuances, is matter of discretion, and therefore not revisable on error. *Starr v. The State*, 25 Ala. 49.

10. On the trial of a prisoner indicted for murder, one of his witnesses,

who was a county surveyor, illustrated his evidence with a diagram, which he had himself made, and which was not objected to by the State, showing the relative situations of several places near the scene of the murder; and was cross-examined on it. *Held*, that it was discretionary with the court to allow the jury to take it with them on their retirement, and that its exclusion from them was not revisable on error. *Campbell v. The State*, 23 Ala. 44.

11. The action of the circuit court in permitting additional evidence to go to the jury, after the argument has been closed, and the jury instructed, to prove the venue as laid, is purely discretionary, and not revisable on error. *Dave v. The State*, 22 Ala. 23.

12. When one of the original papers belonging to the files of the primary court is, by an order of that court, attached to the transcript of the record sent to the supreme court, it cannot be inspected or examined, on error, for any purpose whatever. *Butler v. The State*, 22 Ala. 43.

13. When the escape of the plaintiff in error from jail, under conviction for a felony, and pending a writ of error to reverse the judgment, is brought to the knowledge of the appellate court by affidavits, it is nevertheless its duty to proceed with the cause, and, without reference to the facts outside the record, to determine whether the conviction was according to the forms of law. *Parsons v. The State*, 22 Ala. 50.

14. What is revisable when questions are referred as novel and difficult, see *inf a*, 35.

V. WHAT WILL, OR NOT, REVERSE JUDGMENT.

1. *What will Reverse.*

15. If the court improperly sets aside a juror, for a ground of challenge which the State has lost by previously accepting him, and the defendant excepts to its decision, the error entitles him to a reversal of the judgment of conviction. *Stalls v. The State*, 28 Ala. 25.

16. A charge dispensing with proof of the venue, is an error for which the judgment of conviction will be reversed, and the cause remanded. *Brown v. The State*, 27 Ala. 47; *Sweeney v. The State*, 28 Ala. 47; *Huffman v. The State*, 28 Ala. 48; *Spaight v. The State*, 29 Ala. 32; *Salomon v. The State*, 27 Ala. 26.

17. An indictment for resisting process, in which the time of the commission of the offense is laid after the return day of the process, is fatally defective on error. *McGehee v. The State*, 26 Ala. 154.

18. The discharge by the court of two persons summoned as jurors in a capital case, after the *venire* had been served on the prisoner, and without the knowledge or consent of either the prisoner or his counsel, is an error for which the judgment of conviction will be reversed, although the bill of exceptions recites that they were discharged "on the ground of the sickness of their families," when the record shows that the prisoner objected to this action of the court on the trial, and excepted to the overruling of his objection. *Parsons v. The State*, 22 Ala. 50.

19. The admission of irrelevant evidence is an error for which the judgment of conviction will be reversed, unless the record affirmatively shows that the defendant could not have been injured by it. *Thompson v. The State*, 20 Ala. 54. (But see, *infra*, 31.)

20. Injury will be presumed from error, unless the record itself rebuts the presumption, and affirmatively shows that no injury could have resulted from it. *Dave v. The State*, 22 Ala. 23; *Davis v. The State*, 17 Ala. 415.

2. *What will not Reverse.*

21. Error, without injury, will not reverse a judgment; as where demurrers are overruled to several pleas, one of which is good, and the verdict entitles the defendant to judgment on that one. *The State v. Brantley*, 27 Ala. 44.

22. Under an indictment for larceny from a store-house, (Code, §§ 3170. 3175,) if the jury assess the aggregate (instead of the separate) value of the stolen articles, the irregularity is not available to the defendant, either on motion in arrest, or on error. *Case v. The State*, 26 Ala. 17.

23. An order for a change of venue,

which directs the clerk to transmit "the original papers in the cause," even if erroneous, is no ground for a reversal of the judgment of conviction. *Harrall v. The State*, 26 Ala. 52.

24. If the verdict of the jury is received, and read aloud in open court, in the absence of the prisoners, and the jury are then told by the court that they are discharged, it is within the power of the court to call them back before they have left the bar; and if they are immediately recalled, upon the discovery being made that the prisoners are not in court, and the papers in the cause are handed back to them, the prisoners are not deprived of their right to poll the jury, nor can they complain on error of this action of the court. *Brister v. The State*, 26 Ala. 107.

25. When the record shows that the prisoner was regularly arraigned, pleaded not guilty, and proceeded to trial without objection, he cannot raise the objection on error, that the record fails to show that the *venire* was returned into court, or that he was served with a copy of it and the indictment. *Ben v. The State*, 22 Ala. 9.

26. Although a prisoner indicted for a capital offense, if he is in actual confinement, is entitled to have a copy of the indictment delivered to him personally, at least two entire days before the day appointed for his trial (Code, § 3576); yet, if he objects to going to trial, "on the ground that a copy of the indictment has not been served on him *or his counsel*," and it is shown that a copy was delivered *to his counsel*, there is no error in overruling the objection. *Brister v. The State*, 26 Ala. 107.

27. When the bill of exceptions does not set out all the evidence, it will not be presumed that an affirmative charge was abstract; but, on the contrary, that it was fully warranted by the proof. *McElhaney v. The State*, 24 Ala. 71; *Morris v. The State*, 25 Ala. 57; *Moore v. The State*, 18 Ala. 532.

28. But when a party excepts to the refusal of a charge asked, he must show by his bill of exceptions that it was not abstract. *Morris v. The State*, 25 Ala. 57.

29. When the charge of the court asserts a correct legal proposition in favor of the defendant, he cannot complain, on error, that it did not go far enough, and announce to the jury the full extent of his rights; it was his duty to have called for a fuller charge on the point. *Dave v. The State*, 22 Ala. 23.

30. The statute which requires that not more than twenty, nor less than ten days, shall elapse between the time of sentence and execution, is directory merely; if more than twenty days are allowed, the judgment of conviction is not thereby vitiated, nor is the irregularity available on error. *Seaborn and Jim v. The State*, 20 Ala. 15.

31. The admission of evidence *prima-facie* irrelevant, against the objection of the defendant, will not reverse the judgment, when the record affirmatively shows that its relevancy was made to appear from its connection with evidence subsequently adduced. *Lawson and Swinney v. The State*, 20 Ala. 65; *Campbell v. The State*, 23 Ala. 44.

32. An objection to the formation of the grand jury cannot be raised for the first time in the appellate court. *Morgan v. The State*, 19 Ala. 556; *Shaw v. The State*, 18 Ala. 547.

33. Where an indictment contains good and bad counts, and there is a general verdict, the finding will be referred to the good counts, and the judgment will be sustained. *Shaw v. The State*, 18 Ala. 547.

34. If the court, at the instance of the defendant, improperly sets aside a competent juror, it is an error of which he cannot be heard to complain. *McAllister v. The State*, 17 Ala. 434.

VI. NOVEL AND DIFFICULT QUESTIONS.

35. Where points are referred to the supreme court as novel and difficult, (Clay's Digest, 469, § 1,) and there is no writ of error in the case, that court can only consider the questions referred to it, and cannot look at a bill of exceptions in the record. *The State v. Williams*, 19 Ala. 15; *Nicholson v. The State*, 18 Ala. 529.

VII. BILL OF EXCEPTIONS.—*See that Title.*

EVIDENCE.

I. ADMISSIONS AND CONFESSIONS.

1. *Express.*

1. The general rules stated, which should govern the court in deciding upon the competency of confessions, and the jury in determining their credibility and effect. *Brister v. The State*, 26 Ala. 107.

2. A witness who is introduced to prove the defendants' confessions, and who states, on re-examination, "that he had testified to the substance of all that each of the defendants stated, but that they may have stated something which he did not recollect," is competent to testify to the confessions, if in themselves admissible. *Ib.*

3. If part of a conversation is adduced in evidence by the State, as proving the defendant's declarations or confessions of guilt, he has the right to call for all that was said in that conversation, relative to the subject-matter in issue. *Chambers v. The State*, 26 Ala. 59. (See, also, *infra*, 16.)

4. Confessions of guilt, voluntarily made by the defendant after he was arrested, and whilst his hands and feet were tied, are admissible evidence against him. *Franklin v. The State*, 28 Ala. 9.

5. The fact that the defendant was intoxicated,—"that he was excited and scattering in his conversation, and that no one who heard him could repeat all that he said," does not render his confessions inadmissible. *Eskridge v. The State*, 25 Ala. 30.

6. Nor can the confession be rejected, merely because the question to which it was a reply, assumed his guilt; as where the officer, while conveying the prisoner to jail after his commitment, asked him, "whether, if it was to do over again, he would do it," and the prisoner replied, "*yes sirree Bob*,"—*held*, that the question and answer were admissible. *Carroll v. The State*, 23 Ala. 28.

7. Where a man and woman are jointly indicted and tried for living together in fornication, the confessions of the woman are competent evidence against herself; but it is the duty of the court to instruct the jury, that such confessions can only operate against her, and that her co-defendant cannot be

convicted, except upon evidence *aliunde* sufficient to establish his guilt. *Lawson and Swinney v. The State*, 20 Ala. 65.

8. The woman's admission, that her co-defendant was the father of a bastard child, of which she was delivered more than twelve months after the finding of the indictment, is also admissible against her; its relevancy being shown by connecting it with other acts occurring before and within the period covered by the indictment. *Ib.*

2. *Implied.*

9. A declaration made by a slave in the presence and hearing of a white man, naturally calling for a response from him, and of a character proper for a slave to make, is admissible evidence against such white person, if uncontradicted by him, as showing his acquiescence in the truth of the statement. *Spencer v. The State*, 20 Ala. 24.

10. A statement made by a third person, or a conversation carried on in the presence and hearing of a party, to which he made no reply, cannot be received in evidence against him, as an implied admission of its truth, unless it was of such a character as would naturally call for a response from him, and he was in such a situation that he would probably have replied to it, if it was untrue. *Lawson and Swinney v. The State*, 20 Ala. 65.

11. A conversation carried on in the presence of a woman, who had just been delivered of a child, between her mother and the attending physician, as to the person to whom the latter should look for payment of his professional services, in which conversation she took no part, is not admissible evidence against her, as tending to show her acquiescence in the truth of their statements. *Ib.*

12. As to presumptions from a man's conduct, which operate in the nature of admissions, see *Campbell v. The State*, 23 Ala. 44; *Johnson v. The State*, 17 Ala. 618; *Martin and Flinn v. The State*, 28 Ala. 71.

3. *Of Slaves.*

13. A slave's voluntary confessions of guilt are admissible evidence against him: that he is a slave, ignorant, and, to some extent, unacquainted with the consequences which may attend the making of such confessions, does not affect their competency, but should be considered by the jury, in connection with the confessions, in ascertaining the weight to be given to them. *Seaborn and Jim v. The State*, 20 Ala. 15.

14. But a slave's confessions to his master, when elicited or influenced by the fear of punishment or the hope of some benefit, are not admissible evidence against him; and his subsequent repetition of them before the examining magistrate, if made in the presence of his master, is equally inadmissible, unless it is clearly shown that he was then free from the least apprehension of punishment from his master as a consequence of his recantation.—Therefore, in this case, the slave's confessions to his master were excluded, because the latter had said to him, "Boy, these denials only make the matter worse;" and the repetition of them before the examining magistrate, in the presence of the master, was also ruled inadmissible, the justice having failed to caution him as to their effect. *Wyatt v. The State*, 25 Ala. 9.

15. The confessions of slaves, under an indictment for murder, were also held inadmissible in this case; but the question turned on the construction of the objection made in the primary court. *Brister v. The State*, 26 Ala. 107.

16. On the trial of several slaves for the murder of another slave, a witness for the State (one B.) testified, that he came up with the defendants immediately after the fight, going towards the house of one W.; that one of them was bleeding profusely from a wound on the back of his head; that on his inquiring how it happened, Frank, one of the defendants, gave him a false account of the fight, and said that Fayette, who had gone off wounded, and who afterwards died from the effects of the wounds, was not much hurt, and had gone home; "that Frank evidently tried to conceal the fact that any serious hurt had been done to any one in the fight;" that he continued the conversation, until he got to W.'s house, and then went in and brought W. out into the yard where

the slaves were. W. was afterwards introduced as a witness by the prisoners, and testified, that he came out immediately upon B.'s going into the house, and that B. came back into the yard with him; "and the prisoners then offered to prove by him, that when he came out, Frank, in reply to questions propounded by him, made a full and fair statement of all that occurred in the fight—the wounds which he had inflicted on the deceased, the manner in which the fight had been brought about, and the way in which he had been wounded." *Held*, that these declarations, being a continuation of the conversation commenced with B., although he did not hear them, and tending to rebut the truth of his statement as to Frank's intentional concealment of the facts, were admissible evidence for the prisoners. *Frank v. The State*, 27 Ala. 37.

17. Where a slave's confessions are offered in evidence against him, and it is shown that they were made to a person in whose charge, after having been arrested and tried, he was left by his master, the fact that the master "had always been in the habit of tying his slaves, when they were charged with anything, and whipping them until they confessed the truth, and that he had frequently treated the prisoner in the same way," is proper evidence for the consideration of the court, in determining the competency of the confessions. *Spencer v. The State*, 17 Ala. 192.

II. BURDEN—WEIGHT—SUFFICIENCY.

18. Under an indictment for an assault with intent to murder, the burden of proving the alleged intent, as well as the other facts which constitute the felony, is on the State; and a charge which selects a portion only of the facts disclosed by the testimony, and instructs the jury that, if these facts are proved, "the law presumes that the act was malicious," and that the defendant "intended to kill," is erroneous, because it shifts the burden of proof, and loses sight of the recognized distinction between civil and criminal cases in the measure of proof. Nor is the error cured, by further instructing them, in a subsequent portion of the charge, that these presumptions of law only arise in the absence of evidence tending to qualify or explain the selected facts, and may be rebutted, qualified, or explained away by the evidence; "so that, if they find the facts upon which these presumptions of law arise, with other evidence tending to qualify or explain them, it will be their duty to consider all the evidence in connection, and if, upon the whole evidence, they entertain a reasonable doubt, they should acquit the defendant." *Ogletree v. The State*, 28 Ala. 693.

19. In a civil action, if the plaintiff establishes a *prima-facie* case, the burden of proof is thereby shifted, and he is entitled to recover, unless his *prima-facie* case is destroyed by proof from the defendant; but in a criminal case, the State being required to prove, beyond all reasonable doubt, the facts which constitute the offense, the establishment of a *prima-facie* case only does not take away the presumption of the defendant's innocence, nor shift the burden of proof. *Ib.*

20. Under an indictment for being concerned in carrying on a lottery, evidence being adduced by the State showing that the defendant had sold tickets in a foreign lottery under such circumstances as tend to prove that he was concerned in carrying on the lottery, if the defendant wishes to protect himself on the ground that he had previously purchased such tickets, and that he had no connection with the lottery, the burden of proof rests on him. *Salomon and Boullemet v. The State*, 28 Ala. 83.

21. The testimony of a witness for the prosecution, who is shown to be unworthy of credit, is not sufficient to justify a conviction, without corroborating evidence; and such corroborating evidence, to avail anything, must be of a fact tending to show the guilt of one or both of the defendants. *Martin & Flinn v. The State*, 28 Ala. 71.

22. Where a witness for the State is impeached by proof of his contradictory statements on a material point, it is error to instruct the jury, "that they must believe the witness for the State, unless they believe that the contradicting witness is entitled to more weight and credit than said witness

for the State." Such a charge invades the province of the jury, who are the sole judges of the credibility and degree of credit to be accorded to each witness; and is also objectionable for the further reason, that the contradicting evidence, though less credible than the testimony of the witness for the State, may yet be sufficient to raise a reasonable doubt in the minds of the jury, and thus secure the defendant's acquittal. *Corley v. The State*, 28 Ala. 22.

23. Proceedings under the bastardy act not being a criminal case, it is not error to refuse to instruct the jury, at the defendant's request, "that they ought to acquit, unless the proof showed, beyond a reasonable doubt, that he was guilty;" but it is erroneous to instruct them, "that if the State produced a preponderance of evidence, they might, upon such preponderance of proof, find the defendant guilty." *Satterwhite v. The State*, 28 Ala. 65.

24. To warrant a conviction on circumstantial evidence, where the circumstances are inconclusive in their character, *i. e.* such that, admitting all they tend to prove, the guilt of the accused is still left wholly uncertain, or dependent upon some definite probability, the circumstances must be so multiplied, as to increase the probability to an indefinite extent beyond the reach of mere calculation; but this principle does not apply to circumstances of a conclusive character. The true test is, not whether the circumstances proved produce as full conviction as the positive testimony of a single credible witness, but whether they produce moral conviction to the exclusion of every reasonable doubt. *Mickle v. The State*, 27 Ala. 20.

25. It is error to instruct the jury, in a criminal case, that if the proof left the question of the defendant's guilt or innocence in equipoise, they could not, on that account alone, acquit. *Winter and Scisson v. The State*, 20 Ala. 39.

26. When the testimony offered by the State is *prima-facie* evidence of the defendant's guilt, and there is no rebutting evidence, the court may refuse to instruct the jury, at the defendant's request, that the testimony adduced by the State is not conclusive evidence of his guilt. *Swallow v. The State*, 22 Ala. 20.

27. No conviction can be had, under an indictment unobjectionable on its face, on proof of facts which, if stated in it, would make it fatally defective, and enable the defendants, after conviction, to arrest or reverse the judgment. *Elliott v. The State*, 26 Ala. 78.

III. DEMURRER.

28. The object of a demurrer to evidence is, not to substitute the judge for the jury as a trier of the facts, but to ascertain the law upon an admitted state of facts; and its effect, when issue is joined, is to admit every fact which the testimony tends to establish. *Bryan v. The State*, 26 Ala. 65.

29. In criminal cases, nether party can be permitted, except by mutual consent, to withdraw the trial from the jury by a demurrer to the evidence. *Brister v. The State*, 26 Ala. 107.

IV. HANDWRITING, COMPARISON OF.

30. Where the question before the jury was the identity of the prisoner as the murderer, the State offered in evidence the register of the hotel in Mobile at which the murder was committed, with the registers of two other hotels, one in New Orleans, and the other in Montgomery, in each of which registers a different name was entered, and which were admitted without objection from the prisoner; accompanied by parol proof that the three names were written by the prisoner, and that he was known by them respectively in the three cities named. *Held*, that the jury, in determining whether the three names were written by the same person, might compare the handwriting. *Crist v. The State*, 21 Ala. 137.

V. HEARSAY.

1. *Dying Declarations.*

31. Where it is shown that the deceased, from the time the wound was received, fifty-two days before his death, uniformly expressed the belief that the wound was mortal; that his medical attendant had so informed him;

and that he was paralyzed from the point at which the ball entered, just below the shoulder, to his feet,—a sufficient predicate is laid to authorize the admission of a statement, made by him three days before his death, as a dying declaration. *Oliver v. The State*, 17 Ala. 587.

32. Where it was shown that the deceased was poisoned on Sunday, and from that time until Tuesday evening, when she died, suffered severely from a burning in the stomach and bowels; that on Sunday night, on Monday, and on Tuesday just before she made the statement which was offered as a dying declaration, she used such expressions as, "I cannot stay here,"—"I must go,"—"good people, I am gone;" that her medical attendant considered her *in extremis* from Tuesday morning until she died; that on Tuesday morning, between nine and twelve o'clock, she asked him, if he could help her; and that he replied, he thought he could,—*held*, that the inquiry and reply, taken in connection with such strong evidence of a sense of impending death, proved nothing more than the hope of present ease or relief, and were not sufficient to exclude the declaration. *Johnson v. The State*, 17 Ala. 618.

33. Such circumstances, connected with the homicide, as the deceased, if living, would be allowed to testify to, may be the subject-matter of dying declarations. *Oliver v. The State*, 17 Ala. 587.

34. But the statement by him of a distinct fact, in no way connected with the circumstances of the death, or the immediate cause of it, is not admissible. *Johnson v. The State*, 17 Ala. 618.

2. *Evidence of Deceased Witness.*

35. The magistrate before whom a person charged with a criminal offense is brought for examination being required by the statute to reduce the testimony to writing, the legal presumption is, that he has done his duty; and parol proof of what a deceased witness swore on such examination is therefore inadmissible, until this presumption is rebutted, or the absence of the written evidence otherwise accounted for. *Davis v. The State*, 17 Ala. 415.

36. But if it is shown that the examination was not reduced to writing, such parol proof is admissible. *Davis v. The State*, 17 Ala. 354.

27. It is not necessary to prove the language used by the witness: its substance is all that is required. *Ib.*

38. Proof of what a deceased witness testified on the preliminary examination before the magistrate, is not admissible, where the point in issue is not the same; as where the examination before the magistrate was on a charge of stealing a buggy, while the indictment was for the larceny of a mule. *Ib.*

3. *General Reputation.*

39. Under an indictment for selling spirituous liquors to a free person of color, the *status* of the person to whom the liquor was sold may be proved by general reputation. *Tucker v. The State*, 24 Ala. 77.

40. But the ownership of a slave, when alleged in an indictment, cannot be proved by general reputation. *Corley v. The State*, 28 Ala. 22.

41. Under an indictment for retailing, the fact that the intemperate habits of the person to whom the liquor was sold were generally known in the community, does not justify the inference that they were known to the defendant; and evidence of that fact is therefore irrelevant. *Stanley and Elliott v. The State*, 26 Ala. 26.

4. *Res Gestæ.*

42. Representations made by a sick person to his medical attendant, as to the nature, symptoms, and effect of the malady under which he is laboring, are admissible as original evidence. *Johnson v. The State*, 17 Ala. 618.

43. An act performed by a quick, impulsive, blood-thirsty, abandoned man may afford much stronger evidence that the life of the person assailed was in imminent danger, than if performed by a man known to possess an entirely different character and disposition, and might very reasonably justify a resort to more prompt measures of self-preservation. The

act, in such case, and the *status* of the actor, must be taken together, in order to arrive at a just conclusion respecting its nature; and thus the character of the deceased may become a legitimate subject of inquiry, as explaining and connecting itself with the transaction. But, however desperate the character of the deceased may have been, and however many threats he may have made, he forfeits no right to his life, until, by an actual attempt to execute his threats, or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief in the mind of the slayer, that it is necessary to take life, in order to save his own, or to prevent some felony upon his person. *Pritchett v. The State*, 22 Ala. 39.

44. When a homicide is committed under such circumstances as tend to show that the slayer acted in self-defense, the previous threats of the deceased, and his conduct upon the fatal occasion, construed with reference to his known character and peculiarities, having relation to such conduct, and tending to explain it, enter into, and form parts of the transaction, and may properly be received in evidence. *Ib.*

45. The character of the deceased as a violent, turbulent, blood-thirsty man, when it qualifies, explains, and gives point and meaning to his conduct, and tends to produce in the mind of the slayer a reasonable belief of imminent danger, is competent evidence for the defendant; and there are cases, also, in which it may be looked to, in determining the amount of provocation, and thus fixing the degree of the homicide; but the facts of this case do not justify its admission on either ground. *Franklin v. The State*, 29 Ala. 14.

46. Threats of personal violence, made by the deceased against the prisoner, and not communicated to the latter, are admissible evidence for him when they constitute part of the *res gestæ*. *Carroll v. The State*, 28 Ala. 28.

47. The declarations of the prisoner, made after the commission of the act with which he stands charged, when they form part of the *res gestæ*, are admissible evidence for him. *Oliver v. The State*, 17 Ala. 587.

48. Under an indictment for trading with a slave, it was shown that the defendant had bought some bricks from the slave, which the slave had stolen from his master; and the master testified, on behalf of the State, that the bricks were his, and that he had examined them on the defendant's premises. *Held*, that the defendant's declarations, made while the witness was examining the bricks, "that the bricks were his, and that he got them from another person's brick-yard," were not admissible evidence for him. *Starr v. The State*, 25 Ala. 49.

49. Under an indictment for stealing a slave, the prisoner's declarations, made while in possession of the slave, "as to the manner in which he bought him," are not admissible evidence for him. *Spivey v. The State*, 26 Ala. 90.

VI. MATTERS JUDICIALLY KNOWN.

50. The courts are bound to know judicially the general course of the transactions of human life, and whatever ought to be generally known within the limits of their jurisdiction; *e. g.*, the peculiar nature of lotteries, and the mode in which they are generally carried on. *Salomon and Boullemet v. The State*, 28 Ala. 83.

51. They are also bound to know judicially who are the sheriffs of the several counties in the State. *Ingram v. The State*, 27 Ala. 17.

52. Also, the names of all the counties in the State. *Reeves v. The State*, 20 Ala. 33.

53. And the meaning of the terms used in an indictment. *Sterne v. The State*, 20 Ala. 43; *Ward v. The State*, 22 Ala. 16.

54. The supreme court will take judicial notice of the regular terms of the probate courts. *Moore v. McGuire*, 26 Ala. 461.

55. But not of a private act incorporating a turnpike company. *Moore v. The State*, 26 Ala. 88.

VII. OBJECTIONS; WHEN AND HOW MADE.

56. A general objection to a transcript as a whole, when a portion of it

is competent evidence, may be overruled. *Harrall v. The State*, 26 Ala. 52.

57. When evidence is *prima-facie* inadmissible, a general objection to it is sufficient, without specifying the ground of objection. *Davis v. The State*, 17 Ala. 415.

58. Where a written instrument contains both legal and illegal evidence, the court cannot be required to expunge that which is illegal: if the court points out the illegal evidence to the jury, and designates it in such a way that the jury can identify it, it is all that can be required. *Johnson v. The State*, 17 Ala. 618.

59. The failure to object to an answer, which states a legal conclusion, is a waiver of the objection. *Sterne v. The State*, 20 Ala. 43.

VIII. OPINION, LAW, AND FACT; QUESTIONS OF.

60. No precise rule can be laid down, as to the length or character of acquaintance which would render the opinion of a witness, who is not a physician, admissible evidence on a question of insanity. In cases of general insanity, a total incapacity to distinguish right from wrong on any question, the same degree of observation is not required to discover the existence of the disease, as in cases of monomania, or partial derangement; and therefore the same degree of intimacy is not necessary to render the opinion of the witness admissible.—But in every case, the circumstances must be such as to have afforded the witness the opportunity of forming an accurate judgment as to the existence or non-existence of the disease, considered with reference to the character or degree in which it is alleged to exist. *Powell v. The State*, 25 Ala. 21.

61. The opinions of medical men, founded on facts detailed by other witnesses, or on their personal observation of the accused, are admissible to prove insanity; but such opinions are to be weighed by the jury as other testimony, and are not conclusive. *McAllister v. The State*, 17 Ala. 434.

62. A witness may be asked, and may state, his "opinion as to the time of day" when an event occurred; and he may also state his opinion as to the length of time which elapsed between the happening of two events. *Campbell v. The State*, 23 Ala. 44.

63. The individual opinion of a witness, founded on rumor, respecting the guilt of another witness of the crime of murder, is not admissible for the purpose of impeaching the latter. *Ib.*

64. It is not competent for a witness to give his opinion as to the appearance of the prisoner at a particular time, but he should state the evidences of his mental condition: not that "he looked serious," but that 'he was habitually lively, yet on that occasion was silent,' or the like. *Johnson v. The State*, 17 Ala. 618.

65. That a person is "a man of known intemperate habits," is a question of fact to which a witness may depose. *Stanley & Elliott v. The State*, 26 Ala. 26.

66. That the shoes taken from the feet of the horse ridden by the prisoner on the day of the murder, "seemed to fit in every particular" the tracks found near the body of the deceased, is not the statement of an inference or conclusion, but is competent evidence. *Campbell v. The State*, 23 Ala. 44.

67. A witness, who testified that the prisoner, in reply to the question, "whether, if it was to do over again, he would do it," answered, "*Yes sir-ree Bob*," also stated that, in making this reply, "his manner was short,"—*held*, that the expression was not objectionable. *Carroll v. The State*, 23 Ala. 28.

68. A witness may, with the consent of the party against whom he is introduced, state a legal conclusion; and the failure to object to the answer is an implied consent. *Sterne v. The State*, 20 Ala. 43.

IX. PAROL AND WRITTEN.

69. Under an indictment for forgery, parol proof, as to the manner in which the prisoner read the note to the witness, to whom he offered it, is admissible to show *quo animo* it was made and uttered. *Butler v. The State*, 22 Ala. 43.

70. A record cannot be gainsayed by parol proof. *Martha v. The State*, 26 Ala. 72.

X. PARTIES AND ACCOMPLICES.

1. *When Party may Testify for Himself.*

71. Under an indictment for refusing to testify before the grand jury in reference to gaming, the defendant cannot be allowed to give evidence in his own favor: the practice of permitting defaulting witnesses, on application to the court, to excuse themselves by their own testimony, furnishes no authority for such procedure. *Batre v. The State*, 18 Ala. 119.

72. In proceedings under the bastardy act, both parties are made competent witnesses by the statute; and if they are examined on the trial, their testimony must be weighed by the jury like that of other witnesses. *Satterwhite v. The State*, 28 Ala. 65.

2. *Admissibility of Party's Declarations.*

73. The declarations of the accused, made after the commission of the act with which he stands charged, are not admissible evidence for him as original, independent testimony, when they form no part of the *res gestæ*. *Oliver v. The State*, 17 Ala. 587.

74. Under an indictment for trading with a slave, it was shown that the defendant had bought some bricks from the slave, which the latter had stolen from his master; and the master testified, on behalf of the State, that the bricks were his, and that he had examined them on the defendant's premises. *Held*, that the defendant's declarations, while the witness was examining the bricks, "that the bricks were his, and that he got them from another person's brick-yard," were not admissible evidence for him. *Starr v. The State*, 25 Ala. 49.

75. Under an indictment for stealing or inveigling a slave, the defendant's declarations, while in possession of the slave, "as to the manner in which he bought him," are not admissible evidence for him. *Spivey v. The State*, 26 Ala. 90.

76. Under an indictment against a man and a woman for living together in fornication, the refusal of the man to pay the physician for his professional services during the confinement of the woman, and his declaration that the child of which she was delivered was not his, are not admissible evidence for him, when unconnected with any conversation or admission offered against him. *Lawson and Swinney v. The State*, 20 Ala. 65.

77. The declarations of the prisoner cannot be given in evidence in his favor, even for the avowed purpose of bringing out the reply of the witness to whom they were made, unless they constitute part of a conversation elicited by the State. *Campbell v. The State*, 23 Ala. 44.

78. And his conduct and appearance, when informed that he was suspected of the murder, are inadmissible on the same principle, even though the State may have previously proved his appearance on the day after the murder. *Ib.*

79. But, when part of a conversation is adduced in evidence by the State, as proving the defendant's declarations or confessions of guilt, he has the right to call for all that was said in that conversation, relative to the subject-matter in issue. *Chambers v. The State*, 26 Ala. 59.

80. On the trial of several slaves for the murder of another slave, a witness for the State (one B.) testified, that he came up with the defendants immediately after the fight, going towards the house of one W.; that one of them was bleeding profusely from a wound on the back of his head; that on his inquiring how it happened, Frank, one of the defendants, gave him a false account of the fight, and said that Fayette, who had gone off wounded, and who afterwards died from the effects of the wounds, was not much hurt, and had gone home; "that Frank evidently tried to conceal the fact that any serious hurt had been done to any one in the fight;" that he continued the conversation, until he got to W.'s house, and then went in and brought W. out into the yard where the slaves were. W. was afterwards introduced as a witness by the prisoners, and testified, that he came out immediately upon B.'s going into the house, and that B. came back into the yard with him; "and the prisoners then offered to prove by him, that when he came out, Frank, in reply to questions propounded by him, made a

full and fair statement of all that occurred in the fight—the wounds which he had inflicted on the deceased, the manner in which the fight had been brought about, and the way in which he had been wounded." *Held*, that these declarations, being a continuation of the conversation commenced with B., although he did not hear them, and tending to rebut the truth of his statement as to Frank's intentional concealment of the facts, were admissible evidence for the prisoners. *Frank v. The State*, 27 Ala. 37.

3. *Admissibility of Acts and Declarations of Third Persons.*

81. If several persons conspire to do an unlawful act, all are responsible for the acts of each, if done in the prosecution of their common purpose; but if an offense is committed by any one of them, from causes having no connection with the common object, he alone is responsible for its consequences. *Thompson v. The State*, 25 Ala. 41; *Stewart v. The State*, 26 Ala. 44; *Frank v. The State*, 27 Ala. 37.

82. Where a privity and community of design have been established, the acts, declarations, and conduct of any one of the associates, in furtherance of their common purpose, are admissible evidence against the others. *Johnson v. The State*, 29 Ala. 62; *Martin and Flinn v. The State*, 28 Ala. 71; *Stewart v. The State*, 26 Ala. 44.

83. But the acts and declarations of one man, made apart, can never be legal evidence against another, unless the community of purpose is shown by other proof than those acts and declarations. *Martin and Flinn v. The State*, 28 Ala. 71; *Stewart v. The State*, 26 Ala. 44.

XI. PRESUMPTIONS.

84. There is a wide difference between presumptions of law and presumptions of fact: the law draws no presumption, except from facts which, unexplained, are conclusive of guilt; but presumptions of fact are to be drawn by the jury, and every fact which tends to prove the guilt, or to prove a fact which is evidence of it, is proper for their consideration. *Balaam v. The State*, 17 Ala. 451.

85. Where one kills another, without necessity, with a deadly weapon, the law, in the absence of proof that it was accidental, will imply that the act was voluntary. *Oliver v. The State*, 17 Ala. 587.

86. As to the presumption of malice from the use of a deadly weapon, the want of provocation, &c., see *Oliver v. The State*, 17 Ala. 587; *Felix v. The State*, 18 Ala. 720; *Carroll v. The State*, 23 Ala. 28; *Dill v. The State*, 25 Ala. 15; *Morris v. The State*, 25 Ala 57.

87. Every man is presumed innocent, until the contrary is plainly proved. *Patterson v. The State*, 21 Ala. 571; *Ogletree v. The State*, 28 Ala. 693

88. No presumption can be indulged, on error, against the regularity of the judgment and proceedings in the primary court; and therefore the party who alleges error, must make the record affirmatively show it. *Eskridge v. The State*, 25 Ala. 30; *Ex parte McCrary*, 22 Ala. 65; *Crist v. The State*, 21 Ala. 137; *Ward v. The State*, 28 Ala. 53.

89. For the same reason, when an affirmative charge is given, it will be presumed to have been justified by the evidence, unless all the proof is set out in the bill of exceptions. *Morris v. The State*, 25 Ala. 57; *McElhaney v. The State*, 24 Ala. 71; *Moore v. The State*, 18 Ala. 532.

90. And when a charge is refused, the party excepting to the refusal must set out in his bill of exceptions enough of the evidence to show that the charge was not abstract. *Morris v. The State*, 25 Ala. 57.

91. The party excepting must state enough to exclude every reasonable inference in favor of the decision of the court; but when he states enough to put the court clearly in error, the court should, if the facts will justify it, state what is necessary to set itself right. *Davis v. The State*, 17 Ala. 415.

92. Injury will be presumed from error, unless the record itself rebuts the presumption, and affirmatively shows that no injury could have resulted. *Dave v. The State*, 22 Ala. 23; *Thompson v. The State*, 20 Ala. 54.

XII. PRIMARY AND SECONDARY.

93. Parol proof of the testimony of a deceased witness, on the preliminary examination of the accused before a justice of the peace, is inadmissible, until it is shown that the justice did not reduce the testimony to writing, or the absence of the written evidence is otherwise accounted for. *Davis v. The State*, 17 Ala. 415.

94. But if it is shown that the examination was not reduced to writing, such proof may be received. *Davis v. The State*, 17 Ala. 354.

95. Under an indictment for stealing or inveigling a slave, it being shown that the prisoner had possession of the slave under a bailment from the former owner, since deceased, the declarations of the bailor, tending to show a sale to the prisoner, are competent evidence for him, although referring to a paper which is not produced, and whose absence is not accounted for. *Spivey v. The State*, 26 Ala. 90.

XIII. RECORDS AND JUDGMENTS.

96. A record cannot be gainsayed by parol evidence. *Martha v. The State*, 26 Ala. 72.

97. The recitals in a justice's warrant of the preliminary facts on which his jurisdiction depends, and which it is his duty to determine, are evidence that he did determine their existence; and his determination of their existence, in the absence of evidence showing it to be erroneous, is conclusive between the parties. *Williams v. The State*, 29 Ala. 9.

XIV. RELEVANCY AND ADMISSIBILITY.

1. *Generally.*

98. It is the duty of the court to confine the evidence to the points in issue, that the attention of the jury may not be distracted from them, nor the public time needlessly wasted; but in cases depending upon circumstantial evidence, it often becomes a most embarrassing question, to determine what circumstance is too remote to admit of any reasonable direction to the jury, in arriving at a conclusion upon the main point of inquiry. If no presumption, to be drawn from the circumstance offered in evidence, ought properly to have any weight upon the minds of the jury, the court should exclude it; but circumstances which, considered separately, are of very little importance, and shed but a dim ray of light upon the transaction sought to be elucidated, may, when grouped together and considered in the aggregate, constitute a chain of evidence which draws the mind to a very satisfactory conclusion. *Campbell v. The State*, 23 Ala. 44.

99. In criminal cases, evidence of the prisoner's previous good character is admissible for him, not only where a doubt exists on the other proof, but even to generate a doubt as to his guilt. *Felix v. The State*, 18 Ala. 720.

100. When evidence which is *prima facie* irrelevant is offered, its relevancy should be shown by its connection with facts already in evidence, or its proposal with facts subsequently to be proved; and if it is not thus offered, it is the better course for the court to reject it, although not bound to do so. But if it is admitted in the first instance, and the record shows that its relevancy was made to appear from its connection with facts subsequently introduced, its admission is, at most, error without injury. *Lawson and Swinney v. The State*, 20 Ala. 65; *Campbell v. The State*, 23 Ala. 44.

101. The admission of irrelevant evidence is an error, for which the judgment of conviction will be reversed, unless the record affirmatively shows that the defendant could not have been injured by it. *Thompson v. The State*, 20 Ala. 54.

102. When evidence is objected to as irrelevant, the appellate court will only examine the question of its relevancy. *Noles v. The State*, 26 Ala. 31.

As to relevancy of evidence concerning acts not covered by the indictment, see *infra*, 104, 105, 149, 150.

2. *Particular Cases and Issues.*

(a) Adultery and Fornication.

103. The fact of illicit sexual intercourse can seldom be directly proved, and must generally be inferred from

circumstances, the weight and conclusiveness of which vary according to the situation and character of the parties, the habits of society, and other incidental circumstances. *Lawson and Swinney v. The State*, 20 Ala. 65.

104. Evidence of acts anterior to the period covered by the indictment, although inadmissible as independent testimony, and barred as an offense by the statute of limitations, is relevant, in connection with, and in explanation of, other acts of a similar character within the period covered by the indictment. *Ib.*

105. Acts of indecent familiarity, within the period covered by the indictment, cannot be explained by proof of the subsequent illicit intercourse of the parties; but, when they have been explained by proof of previous acts of illicit intercourse, then proof of the subsequent illicit intercourse becomes cumulative, or corroborative evidence. *Ib.*

(b) Affray.

106. When two persons are indicted for an affray, proof that, "several months before the occurrence of the affray, they had fought together, on which occasion one had attempted to strike the other, and said he would kill him if he could get at him," is not admissible evidence against the party making the threat, when there is no proof connecting this rencounter with the subsequent affray, or showing that the latter grew out of the former. *Skains & Lewis v. The State*, 21 Ala. 218.

(c) Arson.

107. The fact that the prisoner, some five or six months before the burning charged in the indictment, requested another person to burn the house, is admissible evidence against him. *Martin & Flinn v. The State*, 28 Ala. 71.

108. Evidence showing the prisoner's connection with attempts to suppress the testimony of a witness for the prosecution, by inducing him by threats and bribes to leave the State, is also admissible against him. *Ib.*

109. After the State has proved the burning of the house as laid, and offerred evidence tending to show that the prisoner was the person who set fire to it, the subsequent burning of another house, belonging to the prosecutor, is irrelevant evidence; nor is it made relevant, by being offered in connection with proof of the prisoner's declaration, 'that he was not yet done with the prosecutor;' especially, when the declaration is shown to have been made in a conversation, "in which no reference was made to either of the burnings, but the parties were speaking of a civil case, which the prisoner had before the prosecutor as a justice of the peace, and in which he complained the prosecutor had treated him rascally." *Brock v. The State*, 26 Ala. 104.

(d) Assault and Battery.

110. When a man is indicted for an assault and battery on his wife, he may show, in mitigation, that he was immediately provoked to its commission by her misconduct at the time. *Robbins v. The State*, 20 Ala. 36.

111. Proof that the person assaulted "was a lazy vagabond, who would not work if he could help it; that money could not be made out of him by legal process; that he had been indebted to the defendant a long time, and would not pay; and that the defendant, on the morning of the day on which (in the evening) the assault was committed, had offered him ten dollars per hour if he would work for him in payment of said indebtedness, and he refused to do it,"—is not admissible for the defendant, in mitigation or extenuation of the assault. *Ward v. The State*, 28 Ala. 53.

(e) Assault with Intent, &c.

112. It is not sufficient to prove a general felonious intent, or any other than the particular intent alleged in the indictment; and the burden of proving this, as well as all the other facts which constitute the felony, is on the State. *Ogletree v. The State*, 28 Ala. 693.

113. The defendant's threats, made several hours before the fight with the person alleged to have been assaulted, that he would kill another person, are not admissible evidence against him. *Ib.*

(f) Character.

114. In criminal cases, evidence of the prisoner's previous good character is admissible for him, not only where a doubt exists on the other proof, but even to generate a doubt as to his guilt. *Felix v. The State*, 18 Ala. 720.

115. In cases of homicide, the character of the deceased, as a violent, turbulent, blood-thirsty man, when it qualifies, explains, and gives point and meaning to his conduct, and tends to produce in the mind of the slayer a reasonable belief of imminent danger, is admissible evidence for the prisoner. *Pritchett v. The State*, 22 Ala. 39; *Franklin v. The State*, 29 Ala. 14.

116. There are cases, also, in which it may be looked to, in determining the amount of provocation, and thus fixing the degree of the homicide. *Franklin v. The State*, 29 Ala. 14.

117. The violent character of the deceased cannot be established by proof of isolated facts. *Ib.*

118. To authorize a witness to testify to the character of a person in respect to his habits, he should first state that he is acquainted with that person's general character in the particular to which he deposes; but if his testimony shows that fact, whether brought out on preliminary examination or examination in chief, it will be sufficient. *Elam v. The State*, 25 Ala. 53.

119. To render a witness competent to testify to the general character of the accused, it is not necessary that he should know what a majority of his neighbors said or thought of him, nor that he should have heard some one say what a majority of them thought or said of him: the only test of his competency is, whether he knows the general character of the accused among his neighbors, or acquaintances. *Dave v. The State*, 22 Ala. 23.

120. In impeaching a witness, the inquiry is not limited to his general character for truth, but the impeaching witness may be asked his general character. *Ward v. The State*, 28 Ala. 53.

121. A witness who states that he is acquainted with the general character of the impeached witness, although he may never have heard it canvassed, is competent to testify in reference to it. *Ib.*

122. The record of a conviction for libel in another State is not admissible to discredit a witness. *Campbell v. The State*, 23 Ala. 44.

123. That a witness is subject to fits of mental derangement, is no objection to his credibility, if sane when offered; and evidence of that fact is, therefore, inadmissible to affect his credit. *Ib.*

124. Evidence showing that several indictments for libel are pending against a witness, is not admissible for the purpose of impeaching him. *Ib.*

125. The general character of a witness, at his place of residence, cannot be proved by evidence of what rumor said of it before he came to that place. *Ib.*

(g) Fraudulent Pretenses.

126. Where a witness is examined in behalf of the State, on the trial of three persons under an indictment for grand larceny, to show a common design and confederacy among them, he may also testify to the same facts, on a subsequent trial of two of them, under an indictment for obtaining money by false pretenses, from the same person, at a different time and place. *The State v. Davis & Ferguson*, 19 Ala. 13.

127. It being shown that the prosecutor's money was borrowed by an accomplice of the prisoner, to stake on a pretended bet with him; that the prisoner, claiming to have won the bet, seized the money, and went away with it; and that his accomplice then gave the prosecutor a fictitious bank check for a large amount, which was refused payment on presentation, *held*, that the evidence in relation to the check was admissible, as tending to prove the fraudulent intent of the prisoner and his accomplice. *Johnson v. The State*, 29 Ala. 62.

(h) Homicide.

128. Evidence showing the proximity of the prisoner to the place where the crime was committed, tends to prove that he could have committed it, and is therefore relevant and proper. *Johnson v. The State*, 17 Ala. 618.

129. The situation and locality of

the prisoner on the morning of the murder, as affording him an opportunity of knowing when the deceased left the school at the time when she was last seen in life, and whether his being in that place at that time was or was not an unusual occurrence with him, are circumstances which, though weak in themselves, are not so foreign from the main inquiry, as to justify their exclusion from the jury as irrelevant. *Campbell v. The State*, 23 Ala. 44.

130. Any evidence, giving a history of the prisoner's acts on the day of the murder, is relevant, and admissible against him. *Ib.*

131. It was shown that the prisoner, on the second morning after the murder, was seen coming from the direction of a house where two women, who were mother and daughter, resided,—the daughter being an unmarried woman, and having two children; that he had frequently been seen at their house previously, at one time shaving and changing his clothes; that witness went to the house, on the evening of the same day, and found the daughter alone, washing a man's shirt, which had stains on the bosom and cuff of the right sleeve; that "said splotches looked more like the stains from chesnut timber than anything else witness could compare them to;" that no man lived in the house, and witness knew no man in that neighborhood who wore so fine a shirt. The witness was asked by the prosecuting attorney, whether any person inquired of him if he knew what would take stains out of shirts; to which he replied, that the question was asked him by the young woman, and gave his answer to it. The prisoner objected to the question and answer, and moved the court to exclude from the jury all that the witness had said about the shirt and the stains on it; but the court refused to do so, and the prisoner excepted. The young woman was afterwards introduced as a witness for the defense, and testified, on cross-examination, that the prisoner slept at their house on the second night after the murder, that he left a shirt with her to be washed, and that she washed it. *Held*, that the evidence to which the prisoner objected, was properly admitted. *Ib.*

132. Any indications of conscious guilt, arising from the conduct, demeanor, or expressions of the prisoner, such as silence, or unusual seriousness, are also relevant; but such a fact, of itself, should weigh but little, and ought to be considered by the jury with great caution. *Johnson v. State*, 17 Ala. 618.

133. Where the circumstances point to the accused as the perpetrator of the murder, facts tending to show a motive, though remote, are competent and relevant evidence; but the jury cannot be too cautious with respect to the importance to be attached to such evidence. *Balaam v. The State*, 17 Ala. 451.

134. The prisoner being indicted for the murder of his wife, proof that he applied, during the year preceding the homicide, to the mother of a single woman for permission to visit her daughter, and was refused because he was a married man, is relevant and admissible to show a motive for the commission of the crime; and the fact that he compelled his wife, for some time prior to his death, to sleep in the kitchen, which stood apart from the dwelling-house where he and his children lived, and was very open, is admissible evidence to show both malice and a motive. *Johnson v. The State*, 17 Ala. 618.

135. Any fact, which tends to prove the real motive of the prisoner in killing the deceased, or the purpose of the deceased in going to the prisoner's house at the time of the homicide, or that the prisoner knew at the time that the deceased and his companions did not intend to commit any felony, nor to do him any great bodily harm, is relevant evidence. *Noles v. The State*, 26 Ala. 31.

136. If a slave kill a white person, by a misdirected blow aimed at another slave, the intent with which he made the assault is a material inquiry in fixing the character of the homicide; and in determining this question, evidence of a previous quarrel and separation between the slaves, who had lived together as man and wife, is admissible against the prisoner.

137. Evidence of the prisoner's previous good character is proper for the consideration of the jury, not only

where a doubt exists on the other proof, but even to generate a doubt as to his guilt. *Felix v. The State*, 18 Ala. 720.

138. The character of the deceased as a violent, turbulent, blood-thirsty man, when it qualifies, explains and gives point and meaning to his conduct, and tends to produce in the mind of the slayer a reasonable belief of imminent danger, is competent evidence for the prisoner. *Pritchett v. The State*, 22 Ala. 39; *Franklin v. The State*, 29 Ala. 14.

139. There are cases, also, in which it may be looked to, in determining the amount of provocation, and thus fixing the degree of the homicide.—*Franklin v. The State*, 29 Ala. 14.

140. Threats of personal violence, made by the deceased against the prisoner, were rejected in this case, because it was not shown that they had been communicated to the prisoner before the killing; but the court further said, "We will not undertake to say that no case could occur, in which such threats, although unknown to the prisoner, might be admissible." *Powell v. The State*, 19 Ala. 577.

141. As a general rule, such threats of personal violence, when not communicated to the prisoner, can only be received in evidence, when they constitute part of the *res gestæ*. *Carroll v. The State*, 23 Ala. 28.

(i) Insanity.

142. Where insanity is relied on as a defense in a criminal case, evidence of the state of the prisoner's mind at the time of the trial is admissible for him, as tending to show his true mental condition when the act was committed. *McAllister v. The State*, 17 Ala. 434.

143. To render the defense of insanity available, the evidence must satisfy the jury, that the prisoner, at the time the act was committed, was not conscious that he was committing an offence against the law of God or man. *Ib.* See, also, *supra*, 60, 61.

(j) Inveigling Slaves.

144. Any evidence, tending to prove that the accused honestly believed that he had the right to carry away and sell the slave, is admissible for him. *Spivey v. The State*, 26 Ala. 90.

145. Therefore, when the defendant had possession of the slave under a bailment from the former owner, since deceased, the declaration of his bailor, tending to show a sale to him, are admissible, although referring to a paper which is not produced, and whose absence is not accounted for. *Ib.*

146. But the defendant's own declarations, while in possession of the slave, "as to the manner in which he bought him," are not admissible for him. *Ib.*

147. Under an indictment for inveigling, &c., proof that the slave was stolen by the prisoner in another State, and brought by him into this, is competent. *Murray v. The State*, 18 Ala. 727.

(k) Lotteries.

148. Evidence showing that a bookseller in this State, through a series of months, kept on hand in his store tickets in a lottery not authorized by the legislative authority of this State, and at various times sold them; that he continued to keep such tickets on hand, after having been indicted and convicted under the statute, and instructed his clerk to inform persons applying for tickets that he could not sell them, and refused as a general thing to sell them, but yet did sell to some persons,—tends to prove that he was concerned in carrying on the lottery. *Salomon & Boutlemet v. The State*, 28 Ala. 83.

(l) Negro-Traders.

149. Under an indictment against a negro-trader for exhibiting slaves for sale without a license, after evidence has been offered of a particular act of sale within the period covered by the indictment, evidence of a previous act, more than twelve months before the finding of the indictment, is admissible for the State, as tending to show that the defendant was engaged in the business of negro-trading. *Chambers v. The State*, 26 Ala. 59.

(m) Obstructing Road.

150. It being shown that the defend-

ant had extended his fences across the road, previous to the act for which he was indicted, while an order of the commissioners' court establishing it was in full force, which order was afterwards quashed by an appellate court, the record of the proceedings had by the commissioners' court on that order is irrevelant and inadmissible to show the defendant's motive in obstructing the road after it had been again established. *Thompson v. The State*, 20 Ala. 54.

(n) Rape.

151. Under an indictment for an attempt to commit a rape on a child under ten years of age, it having been shown by the prosecution that the private parts of the child were bruised and inflamed, and infected with a venereal disease, proof of sexual intercourse between her and other persons than the prisoner, before and near the time of the commission of the alleged offense, is admissible for the prisoner, as tending to weaken the force of these circumstances as corroborating evidence. *Nugent v. The State*, 18 Ala. 521.

152. That the prisoner, at the time of the commission of the alleged offense, was in a greatly debilitated condition from a previous debauch, is a circumstance which, however light, is proper for the consideration of the jury, in ascertaining whether he was physically capable of committing the offense. *Ib.*

(o) Retailing.

153. Proof that the intemperate habits of the person to whom the liquor was sold were generally known in the community, is irrelevant and inadmissible, since that fact, if proved, would not justify the inference that his intemperate habits were known to the defendant. *Stanley & Elliott v. The State*, 26 Ala. 26.

XIV. VARIANCE.

154. In an indictment for murder, the designation of the person slain as a "*free negro*," though an unnecessary allegation, is matter of description, and must be proved as laid; and proof that he was a *mulatto* will not sustain the allegation. *Felix v. The State*, 18 Ala. 720.

155. In an indictment for the mayhem of a slave, the allegation of ownership, being a material part of the description of the slave, must be proved as laid; if the slave is alleged to have belonged to the prisoner's wife, while the evidence shows that the prisoner himself was the owner, the variance is fatal. *Eskridge v. The State*, 25 Ala. 30.

156. If an indictment for larceny describes the goods stolen as the property of the husband, while the proof shows that they were the separate property of the wife, but were stolen from the possession of the husband, there is no variance. *Davis v. The State*, 17 Ala. 415.

157. An indictment for a conspiracy to commit a burglary, with intent to steal the goods of S., is supported by proof that the goods belonged to S. and his dormant partner. *Spradling & Thomas v. The State*, 17 Ala. 440.

158. In an indictment for an assault and battery, a variance between the averment and proof, as to the name of the person assaulted, is immaterial, when the names may be sounded alike without doing any violence to the letters found in the variant orthography; as in the names *Chambless* and *Chambles*. *Ward v. The State*, 28 Ala. 53.

159. The variance between the names *Isaac L. Edmindson* and *Isaac Edmundson* is not sufficient to support a plea in abatement. *Edmundson v. The State*, 17 Ala. 179.

160. If an indictment for murder charges that A gave the mortal blow, and that B and C were present, aiding and abetting; while the evidence shows that B struck the blow, and that A and C were present aiding and abetting, this is not a material variance, for the blow is adjudged in law to be the stroke of every one of them. *Brister v. The State*, 26 Ala. 107.

161. Under an indictment for an assault on A, with intent to murder him, the prisoner's threats, made several hours "previous to the fight," that he would kill B, are not admissible evidence. *Ogletree v. The State*, 28 Ala. 693.

162. Under an indictment for playing cards "at a public place," proof that the defendant played in "a public highway," does not support the charge, nor authorize a conviction. *Bush v. The State*, 18 Ala. 415.

163. If the indictment charges that the playing was "at a store-house then and there for retailing spirituous liquors," no conviction can be had on proof that the playing was "near a house formerly used for retailing, but which was not then so used." *Logan v. The State*, 24 Ala. 182.

164. If the evidence shows that the defendants played cards at "a public house," they cannot be convicted of playing at a "public place." *Windham v. The State*, 26 Ala. 69.

165. Under an indictment for forgery, it is not necessary that there should be a literal correspondence between the instrument described in the indictment, and that offered in evidence: if the correspondence is such as will prevent the prisoner, should he be acquitted, from being a second time put in jeopardy for the same cause, or, should he be convicted, from being a second time punished, it is sufficient. *Butler v. The State*, 22 Ala. 43.

166. Under an indictment for retailing, in the general form allowed by the Code, (§ 1059,) although the prosecuting attorney cannot be required to elect and state, before any evidence is offered, for which one of the different varieties of retailing he intends to proceed; yet, when the State has once made its election, by offering evidence of one particular offense, it will be held to that election through all the future proceedings, and will not be allowed, on a second trial under the same indictment, to offer evidence of a different offense. *Elam v. The State*, 26 Ala. 48.

167. An indictment for selling *whiskey* to a slave cannot be supported by proof of the sale of any other kind of liquor, although the liquor specified is laid under a *videlicet*. *Lindsay v. The State*, 19 Ala. 560.

168. When the time of the commission of the offense is alleged under a *videlicet*, the prosecutor is not held to proof of it as laid; but may prove its commission at any time before the finding of the indictment, within the period prescribed as a bar. *McDade v. The State*, 20 Ala. 81.

EXCEPTIONS.

See BILL OF EXCEPTIONS.

EXECUTORS; ADMINISTRATORS.

1. An administratrix, who has possession of a slave belonging to her intestate's estate, is his mistress, within the purview of the statute (Code, § 3283) forbidding the sale of spirituous liquors to a slave, without an order in writing signed by his "master or overseer." *Boltze v. The State*, 24 Ala. 89.

FALSE PRETENSES.

(Statutory Provisions: Code, §§ 3141-2; Clay's Digest, 421, §§ 29, 30.

1. Where a witness is examined in behalf of the State, on the trial of three persons under an indictment for grand larceny, to show a common design and confederacy among them, he may also testify to the same facts, on a subsequent trial of two of them, under an indictment for obtaining money by false pretenses, from the same person, at a different time and place. *The State v. Davis & Ferguson*, 19 Ala. 13.

2. It being shown that the prosecutor's money was borrowed by an accomplice of the prisoner, to stake on a pretended bet with him; that the prisoner, claiming to have won the bet, seized the money, and went away with it; and that his accomplice then gave the prosecutor a fictitious bank check for a large amount, which was refused payment on presentation,—*held*, that the evidence in relation to the check was admissible, as tending to prove the fraudulent intent of the prisoner and his accomplice. *Johnson v. The State*, 29 Ala, 62.

FINES.

1. Where a person is convicted of

a misdemeanor, and sentenced to pay a certain fine, and to be imprisoned until it is discharged, a remission by the governor of the imprisonment alone is not a release or satisfaction of the fine. *The State v. Richardson*, 18 Ala. 109.

FORGERY.

(Statutory Provisions: Code, §§ 3151–3169; Clay's Digest, 422–25, §§ 37–54.)

1. A writing in these words, "By the 25th day of December next, I promise date to pay to Wm. H. Butler, or bearer, the sum of one hundred and interest from and two dollars, for value rec'd of him, this February 23d, 1850," (signed with a forged name,) is a promissory note within the meaning of the statute, and will sustain an indictment for forgery. *Butler v. The State*, 22 Ala. 43.

2. The statute (Clay's Digest, 442, § 26) dispenses with the necessity of alleging in the indictment that the act was "feloniously" done. *Ib.*

3. A demurrer to the indictment, on account of a variance between the instrument described therein and that offered in evidence, cannot be considered by the court, unless oyer is craved. *Ib.*

4. It is not necessary that there should be a literal correspondence between the instrument described in the indictment and that offered in evidence on the trial: if the correspondence is such as will prevent the prisoner, should he be acquitted, from being a second time put in jeopardy for the same cause, or, should he be convicted, from being a second time punished, it is sufficient. *Ib.*

5. Where there is a patent ambiguity on the face of the instrument alleged to have been forged, arising from the use of words which are awkwardly, unskillfully, or designedly inserted in it, it is the duty of the court to examine it, and to instruct the jury how it should be read. *Ib.*

6. Parol proof as to the manner in which the prisoner read the note to the witness, to whom he offered it, is admissible, to show the intent with which it was made and uttered. *Ib.*

7. In an indictment for uttering and publishing a counterfeit coin, the time when the coin was current by law, usage, or custom in this State, must be distinctly stated. *Nicholson v. The State*, 18 Ala. 529.

FORNICATION.

See ADULTERY.

GAMING.

(Statutory Provisions: Code, §§ 3243–4, 3251; Clay's Digest, pp. 432–4, §§ 8, 9, 11.)

I. OF THE OFFENSE.

1. *Under Penal Code of* 1841.
2. *Under Code of* 1852.

II. OF THE INDICTMENT.

1. *Under Penal Code of* 1841.
2. *Under Code of* 1852.

I. OF THE OFFENSE.

1. *Under Penal Code of* 1841.

1. The offense of gaming is complete by playing once. *Swallow v. The State*, 20 Ala. 30.

2. Where several persons are jointly indicted for betting at a faro-bank, and the evidence shows that only one of them was engaged in the betting, he may be convicted, and the others acquitted. *Ward v. The State*, 22 Ala. 16.

3. A shoemaker's shop, in which the occupant, who was an unmarried man, cooked his meals, and slept on the floor, is within the prohibition of the statute, when the evidence shows that the playing was at night, during the session of the circuit court; that the door was shut, and latched inside, though any one acquainted with the room could open it from the outside; that the persons present were ten or twelve in number; that five or six other persons came to the door during the playing, but were refused admittance, although most persons, on being

recognized, were admitted; and that many persons passed in and out during the playing. *Campbell v. The State*, 17 Ala. 369.

4. A room in the second story of a two-storied house, which is accessible only by means of a flight of steps leading up to it on the outside, and which is used by one of the proprietors of the house as a bed-room, while the lower room is used by them for retailing spirituous liquors, is within the prohibition of the statute. *Johnson v. The State*, 19 Ala. 527.

5. An infirmary is "a public place" within the meaning of the statute. *Flake v. The State*, 19 Ala. 551.

6. A back room, occupied by the register in chancery as a bed-room, and communicating by a door with the front room, which was his office, is not "a public place" within the meaning of the statute, when it is shown that the house was surrounded in the rear by a high fence; that the playing was at night, when the doors were locked, and the windows closed; that the persons present, about eight in number, came by invitation from the occupant of the room, and entered through a back door, and not through the front room. *Roquemore v. The State*, 19 Ala. 528.

7. An unoccupied store-house, situated in a town, and fronting on the street, if habitually resorted to for the purpose of playing cards, comes within the provision of the statute against playing cards at any "outhouse where people resort." *Swallow v. The State*, 20 Ala. 30.

8. Under an indictment for playing cards "at a public place," the proof was, that there was a large assemblage of persons, on a public day, at a certain store-house in the country; that the defendants, five in number, "went into a piece of woods where the undergrowth was very thick, and into a deep hollow in said woods," and there engaged in a game of cards; that, whilst so engaged, three other persons came to the same place, and took part in the game, one of whom testified that, when he went into the woods, he did not know where the defendants were, but hunted them up; that he had never known cards to be played at that place before, but had known persons, during the previous year, to play "in the piece of woods, some fifty or one hundred yards from said hollow."—*Held*, that the playing was not at "a public place." *Bythwood v. The State*, 20 Ala. 47.

9. The assemblage of eight or ten persons, by invitation, at a private house or room to which the public have not the right to go, for the purpose of playing cards, or participating in social amusements, does not constitute such house or room "a public place" within the meaning of the statute. *Coleman v. The State*, 20 Ala. 51.

10. But, if the occupants of a room are in the constant habit of inviting persons thither for the purpose of playing cards, and others are allowed to come uninvited without any restraint, it is testimony tending to prove the room "a public place," and the jury may so find it. *Ib.*

11. A neighborhood road is "a public place" within the meaning of the statute, when it is shown that the playing was near an assemblage of persons, some of whom were looking at the game, and others passing about at the time. *Mills v. The State*, 20 Ala. 86.

12. The term "highway," as used in the statute, means a public road,—one dedicated to, and kept up by the public, as contra-distinguished from a private way, or a neighborhood road. *Ib.*

13. Under an indictment for playing cards "at a public place," proof of playing in "a public highway" will not authorize a conviction. *Bush v. The State*, 18 Ala. 415.

14. Under an indictment charging the defendant, in different counts, with playing cards "at a highway," "at a house where spirituous liquors were retailed," "at a public place," and "at a public house," no conviction can be had, when the evidence shows that the playing was in a hollow more than a hundred yards from a house where spirituous liquors were retailed, and where the persons present at the playing had been drinking; that two persons first went to the hollow, and, while they were playing, the defendant and three other persons came; that they could not be seen from the grocery, nor from the public road, nor

could they see either the road or the grocery from the hollow; that witness never had, either before or since, seen any playing at that place; and that there were no marks, or signs, of persons having played cards there previously. *Smith v. The State*, 23 Ala. 39.

2. *Under Code of* 1852.

15. Under an indictment for playing cards "at a store-house then and there for retailing spirituous liquors," no conviction can be had upon proof that the playing took place "near a house formerly used for retailing, but which was not then so used." *Logan v. The State*, 24 Ala. 182.

16. A lawyer's office, during the session of the circuit court, is not "a public place" within the meaning of the statute, when it is shown that the playing was at night, by permission of the person who occupied the room as a sleeping apartment, when the doors were locked, and the curtains drawn over the windows. *Burdine v. The State*, 25 Ala. 60; *Sanders v. The State*, 25 Ala. 63, note.

17. A physician's office is not "a public place" within the statute, when the playing is at night, with closed doors and curtained windows, although it is also shown that the room adjoined a merchant's counting-room, with which it communicated by a door, and that the person who occupied it as a bed-room was in the habit of inviting his friends thither for the purpose of playing cards. *Sherrod v. The State*, 25 Ala. 78.

18. On demurrer to the evidence, under an indictment for gaming, proof that the defendant played a game of "ramps," in a store-house where spirituous liquors were at the time retailed, is sufficient to authorize a conviction. *Bryan v. The State*, 26 Ala. 65.

19. So, also, proof that the defendant and another person "each put up money, and threw dice for it, by placing the dice in a box and throwing three times each, the one throwing the highest number taking the money," will support a conviction, although it is also shown "that the mode of procedure, and of throwing the dice, was the same as in the case of raffling for property." *Jones v. The State*, 26 Ala. 155.

20. If A and B are jointly indicted and tried for gaming, and the evidence shows that A and others played at one time when B was not present, and that B and others played at another time when A was not present, no conviction can be had against them. *Elliott v. The State*, 26 Ala. 78.

21. Under an indictment for betting "at a game of pool at a public place," the defendant may be convicted on proof that he played pool at a table regularly licensed for billiards. *Rodgers v. The State*, 26 Ala. 76.

22. The term "public place," as used in the statute, does not include any of the places thereinbefore specifically enumerated, but embraces all other public places, whether they are public *per se*, or become public merely by force of circumstances; and therefore, if the evidence shows that the defendants played at "a public house," they cannot be convicted of playing at "a public place." *Windham v. The State*, 26 Ala. 69; *McCauley v. The State*, 26 Ala. 135; *Sweeney v. The State*, 28 Ala. 47; *Huffman v. The State*, 28 Ala. 48.

23. When the gaming is at "a public house," or at any one of the other places specifically enumerated in the statute, no matter what secrecy may be used, nor how few the number present, it is a violation of the statute. *Windham v. The State*, 26 Ala. 69.

24. A room in a warehouse for storing cotton on the bank of a navigable river, which is used by the clerk both for the transaction of business and as a bed-room, is "a public house" within the meaning of the statute, but not "a public place." *Ib.*

25. A lawyer's office, though "a public house" within the meaning of the statute, is not "a public place." *McCauley v. The State*, 26 Ala. 135.

26. A room on the second floor of a two-storied house, used and occupied by the defendant as a bed-room, is not brought within the prohibition of the statute, by the mere fact that the lower story is used by another person for the sale of spirituous liquors. *Dale and Underwood v. The State*, 27 Ala. 31.

27. A store-house in the country is 'a public house" within the meaning of the statute; and if it consists of

only two rooms, one above the other, and both controlled by the owner, who uses the lower room as his store, the upper room is also within the prohibition of the statute, unless it affirmatively appears that it is not used as an appendage to the store, nor in connection with the store for the convenience and accommodation of the owner, his employees or customers, but is occupied for some justifiable private purpose, entirely disconnected from the business of the store and the convenience of the customers. *Brown v. The State*, 27 Ala. 47; *Sweeney v. The State*, 28 Ala. 47.

28. If a country store-house consists of two rooms, both of which are under the control of the same person, the front room being used as a dry-goods store, it is *prima facie* an entirety; and, though this presumption may be overcome by proof that the two rooms are entirely disconnected, and appropriated to distinct and separate uses, yet it is not repelled by proof that the back room was used as a bed-room by one of the proprietors of the store, who was an unmarried man,—that no goods were kept or sold there, no accounts settled there, and that witness never had seen any of the customers of the store use it for any purpose. *Huffman v. The State*, 29 Ala. 40.

29. A house occupied by the keeper of a public toll-bridge, and consisting of two rooms, which communicate with each other by a door, is *prima facie* an entirety; and if the front room is appropriated to such uses as constitute it "a public house" within the meaning of the statute, the back room is also within the prohibition, though used only as a bed-room by the keeper of the bridge, an unmarried man. *Arnold v. The State*, 29 Ala. 46.

30. If such house is merely the private residence of the keeper of the bridge, it is not within the statute, although occasional settlements for toll are therein made; but, if the front room is appropriated to the transaction of the business of the bridge, such as keeping books, settling accounts, &c., and is occupied by the keeper subject to such appropriation, and persons having business connected with the bridge are invited or licensed to go there by the very nature of the business to which it is appropriated, it then becomes "a public house" within the meaning of the statute. *Ib.*

II. OF THE INDICTMENT.

1. *Under Penal Code of* 1841.

31. An indictment for gaming, at any one of the places specifically named in the statute, must be equally specific in charging the offense. *Bush v. The State*, 18 Ala. 415.

32. An indictment for playing cards "at a public place" is sufficiently definite. *Roquemore v. The State*, 19 Ala. 528; *Flake v. The State*, 19 Ala. 551.

33. Two or more persons may be jointly indicted for betting, or being concerned in betting, at a faro-bank. *Ward v. The State*, 22 Ala. 16; *Swallow v. The State*, 22 Ala. 20.

34. Betting, and being concerned in betting at a faro-bank, are different grades of the same offense, and may properly be charged in the same count. *Ib.*

35. A count charging the defendant with betting at a certain game of cards, "called faro," is sufficiently certain. *Ib.*

2. *Under Code of* 1852.

36. An indictment for gaming, which charged that the defendants "played at a game with cards, or dice, or some device or substitute therefor, at a tavern, inn, store-house for retailing spirituous liquors, or house or place where spirituous liquors were at the time retailed or given away, or at an outhouse where people resorted," held sufficient on demurrer and not violative of the tenth section of the first article of the State constitution. *Burdine v. The State*, 25 Ala. 60; *Sherrod v. The State*, 25 Ala. 78.

37. An indictment for betting "at a game of pool at a public place enumerated in section 3243 of the Code," or (as alleged in another count) "at a house where spirituous liquors were retailed," conforms substantially to the requisitions of the Code, and is therefore sufficient. *Rodgers v. The State*, 26 Ala. 76.

GAMING-TABLES.

(Statutory Provisions: Code, §§ 3249–53; Clay's Digest, pp. 433–4, §§ 12, 14, 15, 16, 19.)

I. OF THE OFFENSE.
II. OF THE INDICTMENT.

I. OF THE OFFENSE.

1. To constitute a violation of the statute against keeping a billiard-table, in connection with a house where spirituous liquors are retailed, as an appendage thereto, it is not necessary that the billiard-table should be kept in the same room, or under the same roof, where the spirituous liquors are retailed; if the one is contiguous to the other, and forms part and parcel of the same establishment, it is within the statute. *Smith v. The State*, 22 Ala. 54.

2. A license to keep a billiard-table does not authorize its use for the game of pool; and therefore, under an indictment for betting "at a game of pool at a public place enumerated in section 3243 of the Code," proof that the defendant played pool at a table regularly licensed for billiards, will support a conviction. *Rodgers v. The State*, 26 Ala. 76.

II. OF THE INDICTMENT.

3. An indictment for permitting a gaming-table to be exhibited and carried on in a house occupied by the defendant, if it describes the offense in the language of the statute, is sufficient. *Clark v. The State*, 19 Ala. 552.

4. Such an indictment need not allege the name of the person by whom the table was exhibited, or that his name is unknown; nor is it necessary to aver that the defendant does not come within the proviso of the statute. *Ib.*

5. An indictment for keeping a billiard-table, in connection with a house where spirituous liquors are retailed, and as an appendage thereto, is sufficient when it pursues the words of the statute literally. *Smith v. The State*, 22 Ala. 54.

6. Two or more persons may be jointly indicted for betting, or being concerned in betting, at a faro-bank. *Ward v. The State*, 22 Ala. 16; *Swallow v. The State*, 22 Ala. 20.

7. Betting, and being concerned in betting, at a faro bank, being different grades of the same offense, may properly be charged in the same count. *Ib.*

8. A count which charges that the defendant bet "at a certain game of cards, "called faro," is sufficiently certain. *Ib.*

9. An indictment for betting "at a game of pool at a house where spirituous liquors were retailed," or (as alleged in another count) "at a public place enumerated in section 3243 of the Code," conforms substantially to the requisitions of the Code, and is therefore sufficient. *Rodgers v. The State*, 26 Ala. 76.

HABEAS CORPUS.

See BAIL.

HANDWRITING.

See EVIDENCE, IV.

HOMICIDE.

(Statutory Provisions: Code, §§ 2080–88, 3295–6, 3312–14; App. to Code, 698–700; Clay's Digest, 412–14, §§ 1–10; *Ib.* 472, §§ 2, 7.)

I. OF THE OFFENSE.

1. *Murder.*
2. *Manslaughter.*
3. *In Self-Defense, or to Prevent Trespass.*
4. *By or upon Slave.*
5. *How Affected by Erroneous Treatment of Wound.*

II. OF THE INDICTMENT.

1. *Form and Sufficiency.*
2. *Service of Copy on Defendant.*—*See* INDICTMENT, VI.

III. OF THE EVIDENCE.

1. *Admissions and Confessions.*

I. OF THE OFFENSE.

1. *Murder.*

1. Upon the evidence set out in the bill of exceptions in this case, the defendant was held entitled to bail, as a matter of right, because the court could not say, upon that evidence, that he was guilty of murder in the first degree, as defined by section 3080 of the Code. *Ex parte Banks*, 28 Ala. 89.

2. If A and B, by pre-concert, make an attack on C, in which D, not being privy to their common design, participates; this will not be murder in D, if death ensues from wounds inflicted by either A or B. *Frank v. The State*, 27 Ala. 37.

3. If one see another about to perpetrate a felony, he may use such force to prevent it as may be necessary; and if, while so engaged, he is intentionally killed, it is murder in the slayer. *Dill v. The State*, 25 Ala. 15.

4. If one man deliberately kill another, to prevent a mere trespass upon property, whether such trespass could or could not be otherwise prevented, it is murder. *Harrison v. The State*, 24 Ala. 67.

5. A mere civil trespass upon a man's house, unaccompanied by such force as would make it a breach of the peace, is not a sufficient provocation to reduce the killing of the trespasser to manslaughter, if committed under circumstances from which the law would imply malice; as with a deadly weapon. *Carroll v. The State*, 23 Ala. 28.

6. If a slave resists the authority of his master by physical force, in a personal conflict, and in that resistance kills his master, he cannot reduce the crime from murder to manslaughter, by showing that in the commencement of the resistance he had no intention to take life. *Dave v. The State*, 22 Ala. 23.

7. Mere words are not, in any case, sufficient provocation to reduce the crime of murder to manslaughter; nor is any provocation sufficient, where express malice is shown. *Felix v. The State*, 18 Ala. 720.

2. *Manslaughter.*

8. If an act amounting to manslaughter is voluntarily committed, the statute fixes the grade of the offense, without regard to the circumstances of provocation, and pronounces it manslaughter in the first degree. *Oliver v. The State*, 17 Ala. 587.

9. Where one kills another, without necessity, with a deadly weapon, the law, in the absence of proof that it was accidental, will imply that the act was voluntary. *Ib.*

3. *In Self-Defense, or to Prevent Trespass.*

10. To excuse a homicide, on the ground of self-defense, there must exist an actual necessity, on the part of the slayer, to kill in order to prevent the commission of a felony, or great bodily harm; or a reasonable belief in his mind that such necessity exists. *Noles v. The State*, 26 Ala. 31.

11. If one has reasonable apprehension of great personal violence, involving imminent peril to life or limb, he has the right to protect himself, even at the expense of his assailant's life, if such protection cannot be otherwise secured. *Holmes v. The State*, 23 Ala. 17.

12. The necessity that will justify the taking of life need not be actual, but the circumstances must be such as to impress the mind of the slayer with a reasonable belief that such necessity is impending. *Oliver v. The State*, 17 Ala. 587; *Carroll v. The State*, 23 Ala. 28.

13. It is not sufficient, to justify the killing, that the deceased had the means at hand to effect a deadly purpose, but he must have indicated, by some act or demonstration, at the time of the killing, a present intention to carry out such purpose, thereby in-

ducing a reasonable belief in the mind of the slayer that it was necessary to take life in order to save his own; and if the evidence shows no such act or demonstration, no question on the law of self-defense arises. *Harrison v. The State*, 24 Ala. 67. See, also, *Dill v. The State*, 25 Ala. 15.

14. An act performed by a quick, impulsive, blood-thirsty, abandoned man may afford much stronger evidence that the life of the assailed was in imminent peril, than if performed by one known to possess an entirely different character and disposition, and might very reasonably justify a resort to more prompt measures of self-preservation; but however bad and desperate the character of the deceased may have been, and however many threats he may have made, he forfeits no right to his life, until, by an actual attempt to execute his threats, or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief in the mind of the slayer, that it is necessary to deprive him of life in order to save his own, or to prevent some felony upon his person. In such cases, the act and the *status* of the actor must be taken together, in order to arrive at a just conclusion respecting its nature. *Pritchett v. The State*, 22 Ala. 39.

15. Whether the circumstances are such as to create a reasonable belief in the mind of the slayer that a necessity for taking life exists, is a question for the jury, in the solution of which they may consider the condition of both the parties. *Oliver v. The State*, 17 Ala. 587.

16. The law will justify the taking of life, when necessary to prevent the commission of a felony, but not to prevent the commission of a mere trespass on the person or property of the slayer. *Ib.*

17. If one man kill another, to prevent a mere trespass upon property, whether such trespass could or could not be otherwise prevented, it is murder. *Harrison v. The State*, 24 Ala. 67.

18. While every citizen has the right to resist any attempt to put an illegal restraint upon his liberty, his resistance must not be in enormous disproportion to the injury threatened: he has no right to kill, to prevent a mere trespass, which is unaccompanied by any imminent danger of great bodily harm or felony, or which does not produce in his mind a reasonable belief of such danger. *Noles v. The State*, 26 Ala. 31.

19. A mere civil trespass upon a man's house, not accompanied by such force as would make it a breach of the peace, is not a sufficient provocation to reduce the killing of the trespasser to manslaughter, if committed under circumstances from which the law would imply malice; as, with a deadly weapon. If the trespass is forcible, the owner may resist the entry; but he has no right to kill the assailant, unless it is rendered necessary to prevent a felonious destruction of his property, or to defend himself against loss of life or great bodily harm. If he kills the assailant, when there is not a reasonable ground for apprehending imminent danger to his person or property, it is manslaughter; and if done with malice, express or implied, it is murder. But if the assault is made under circumstances which would create, in the mind of a reasonable man, a just apprehension of imminent danger to his person or property, the owner may lawfully act upon appearances, and kill the assailant, since the law does not require that the danger should be real. *Carroll v. The State*, 23 Ala. 28.

20. An entry into a man's house, after a warning not to enter, does not amount to a forcible trespass. *Ib.*

21. A constable who attempts to execute a warrant, which shows on its face that it was issued without authority, may be treated as a trespasser. *Noles v. The State*, 24 Ala. 672.

4. *By or upon Slave.*

22. A slave may be convicted of murder for the homicide of another slave. *Seaborn and Jim v. The State*, 20 Ala. 15.

23. If a slave throws off the authority of his master, puts himself in a hostile attitude, resists his dominion and control by physical force, evincing by his acts, while in a personal conflict with the master, a design to make that resistance effectual by escaping from

his dominion and authority, the master has the right to employ such means, and so much force to any extent, as may be necessary to subdue him; but if the slave is not resisting by physical force or hostile acts, and is simply in a state of disobedience, without personal violence towards his master, then the master can only administer such punishment as is appropriate to the case, without endangering life or limb. *Dave v. The State*, 22 Ala. 23; *Eskridge v. The State*, 25 Ala. 30.

24. When a slave resists the authority of his master by physical force, and in a personal conflict kills him, he cannot reduce the crime from murder to manslaughter, by showing that he had no design in the commencement of the resistance to take life. *Dave v. The State*, 22 Ala. 23.

25. The slave undoubtedly has the natural right of self-defense; but, in order to avail himself of this for the justification of his acts, he must not himself be a wrong-doer. *Ib.*

26. If a slave, in the unjustifiable attempt to commit an assault and battery on another slave, kill a white person by misadventure, he is guilty of involuntary manslaughter under section 3312 of the Code. *Bob v. The State*, 29 Ala. 20.

5. *How Affected by Erroneous Treatment of Wound.*

27. Where death is caused by a wound, the person who inflicted it is responsible for its consequences, although the deceased might have recovered by the exercise of more care and prudence. *McAllister v. The State*, 17 Ala. 434.

28. If the wound inflicted was not dangerous in itself, and the death of the person wounded was evidently caused by the grossly erroneous surgical treatment of it, the person who inflicted it will not be accountable; but if the wound was mortal, or dangerous, he cannot shelter himself under the plea of erroneous treatment. *Parsons v. The State*, 21 Ala. 300.

29. Where the evidence was conflicting, whether the deceased came to his death from the effects of the wound inflicted by the prisoner, or from the improper treatment of the surgeon in sewing it up; and the prisoner's counsel requested the court to charge the jury, that if the wound was not mortal, and it clearly appeared that the deceased came to his death from the erroneous treatment, and not from the wound, they must acquit the prisoner; which charge the court gave, but with this qualification, "that if the ill-treatment relied on was the sewing up of the wound, the defendant would not be excused if otherwise guilty,"—*held*, that the qualification was erroneous. *Ib.*

II. OF THE INDICTMENT.

1. *Form and Sufficiency.*

30. The form of an indictment for murder prescribed by the Code, (p. 698,) is not violative of any provision of the State or Federal constitution; nor is it objectionable because it does not distinguish between the different degrees of murder, and does not aver that the offense was committed within the body of the county. *Noles v. The State*, 24 Ala. 672.

31. Under an indictment for the murder of a white person, whether framed under the Code or as at common law, a slave cannot be convicted of involuntary manslaughter. *Bob v. The State*, 29 Ala. 20.

32. If the indictment charges that A gave the mortal blow, and that B and C were present aiding and abetting, while the evidence shows that B struck the blow, and that A and C were present aiding and abetting; this is not a material variance, for the blow is adjudged, in law, to be the stroke of every one of them. *Brister v. The State*, 26 Ala. 107.

33. The designation of the deceased as a "*free negro*," though an unnecessary allegation, is matter of description, and must be proved as laid: proof that he was a *mulatto* will not sustain the allegation. *Felix v. The State*, 18 Ala. 720.

34. In an indictment against a slave, for murder, the name of his owner must be alleged; and an allegation that he is the property of "the late W. C.," is not sufficient. *Pleasant v. The State*, 17 Ala. 190.

2. *Service of Copy on Defendant.* See INDICTMENT, VI.

III. OF THE EVIDENCE.

1. *Admissions and Confessions.*

35. Confessions of guilt, voluntarily made by the defendant after he was arrested, and whilst his hands and feet were tied, are competent evidence against him. *Franklin v. The State*, 28 Ala. 9.

36. The general rules stated, which should govern the court in deciding upon the competency of confessions, and the jury in determining their credibility and effect; distinction also stated between the respective spheres of the court and jury. Under these rules, the confessions in this case were held to have been improperly admitted; but the question turned upon the construction of the objections shown by the bill of exceptions. *Brister v. The State*, 26 Ala. 107.

37. On the trial of several slaves for the murder of another slave, a witness for the State (one B.) testified, that he came up with the defendants immediately after the fight, going towards the house of one W.; that one of them was bleeding profusely from a wound on the back of his head; that on his inquiring how it happened, Frank (one of the defendants) gave him a false account of the fight, and said that the deceased (who had gone off wounded, and afterwards died from the effects of the wound) was not much hurt, and had gone home, "and witness said, that he evidently tried to conceal the fact that any serious hurt had been done to any one in the fight;" that he continued the conversation until he got to W.'s house, and then went in, and brought W. out into the yard where the slaves were. W. was afterwards introduced as a witness by the prisoners, and testified, that he came out immediately upon B.'s going into the house, and that B. came back into the yard with him; "and the prisoners then offered to prove by him, that when he came out, Frank, in reply to questions propounded by him, made a full and fair statement of all that had occurred in the fight,—the wounds which he had inflicted on the deceased, the manner in which the fight had been brought about, and the way in which he had been wounded." *Held*, that these declarations were competent evidence for the prisoners; being a continuation of the conversation commenced with B., although he did not hear them; and tending to rebut the truth of his statement as to Frank's intentional concealment of the facts. *Frank v. The State*, 27 Ala. 37.

38. The prisoner's confession cannot be rejected as evidence, merely because the question, to which it was a reply, assumed his guilt. *Carroll v. The State*, 23 Ala. 28.

39. Where the officer, who was conveying him to jail after his commitment, asked him," whether, if it was to do over again, he would do it;" to which the prisoner replied," *"yes Sir-ree Bob;" held*, that the question and answer were admissible evidence; and that, in making this reply, the prisoner's "manner was short" was also competent evidence. *Ib.*

40. The prisoner's confession, that he had assisted to get another man out of jail, whose father would aid him in escaping, and the fact that the father had twice come to the jail where the prisoner was confined, are admissible evidence against him. *Campbell v. The State*, 23 Ala. 44.

41. The declarations of the prisoner cannot be given in evidence in his favor, even for the avowed purpose of bringing out the reply of the witness to whom they were made, unless they constitute a part of a conversation elicited by the State; and a letter written for the prisoner by the witness, while they were in jail together, is inadmissible on the same ground. *Ib.*

42. The declarations of the prisoner, made after the commission of the act, are not competent evidence for him as original and independent testimony, when they form no part of the *res gestæ*. *Oliver v. The State*, 17 Ala. 587.

43. A slave's voluntary confessions of guilt are admissible evidence against him: that he is a slave, ignorant, and, to some extent, unacquainted with the consequences which may attend them, are facts which should be considered by the jury, in connection with the confessions, in ascertaining the weight

to be given to them, but which do not affect their competency. *Seaborn and Jim v. The State*, 20 Ala. 15.

44. Where a slave's confessions are offered in evidence against him, and it is shown that they were made to a person in whose charge, after having been arrested and tied, he was left by his master, the fact that the master "had always been in the habit of tying his slaves, when they were charged with any matter, and whipping them until they confessed the truth, and that he had frequently treated the prisoner in the same way," is proper evidence for the consideration of the court, in determining the competency of the confessions. *Spencer v. The State*, 17 Ala. 192.

2. *Character of Accused.*

45. Evidence of the prisoner's previous good character is proper for the consideration of the jury, not only where a doubt exists upon the other proof, but even to generate a doubt as to his guilt. *Felix v. The State*, 18 Ala. 720.

3. *Character, Conduct, and Threats of Deceased.*

46. An act performed by a quick, impulsive, blood-thirsty, abandoned man may afford much stronger evidence that the life of the assailed was in imminent peril, than if performed by one known to possess an entirely different character and disposition, and might very reasonably justify a resort to more prompt measures of self-preservation; but however bad and desperate the character of the deceased may have been, and however many threats he may have made, he forfeits no right to his life, until, by an actual attempt to execute his threats, or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief in the mind of the slayer, that it is necessary to deprive him of life in order to save his own, or to prevent some felony upon his person. In such cases, the act and the *status* of the actor must be taken together, in order to arrive at a just conclusion respecting its nature. *Pritchett v. The State*, 22 Ala. 39.

47. When a homicide is committed under such circumstances as tend to show that the slayer acted in self-defense, the previous threats of the deceased, and his conduct upon the fatal occasion, construed with reference to his known character and peculiarities, having relation to such conduct, and tending to explain it, enter into, and form parts of the transaction, and may properly be received in evidence. *Ib.*

48. The character of the deceased as a violent, turbulent, blood-thirsty man, when it qualifies, explains, and gives point and meaning to his conduct, and tends to produce in the mind of the slayer a reasonable belief of imminent danger, is competent evidence for the defendant; and there are cases, also, in which it may be looked to, in determining the amount of provocation, and thus fixing the degree of the homicide; but the facts of this case do not justify its admission on either ground. *Franklin v. The State*, 29 Ala. 14.

49. The violent character of the deceased cannot be established by proof of isolated facts. *Ib.*

50. Threats made by the deceased against the defendant, were rejected in this case, because it was not shown that they were communicated to the defendant before the killing; but the court further said, "We will not undertake to say that no case could occur, in which such threats, although unknown to the prisoner, might be admissible." *Powell v. The State*, 19 Ala. 577.

51. As a general rule, threats of personal violence made by the deceased against the prisoner, and not communicated to him, can only be received in evidence, when they constitute part of the *res gestæ*. *Carroll v. The State*, 23 Ala. 28.

4. *Dying Declarations of Deceased.*

52. Where it is shown that the deceased, from the time the wound was received, fifty-two days before his death, uniformly expressed the belief that the wound was mortal; that his medical attendant had so informed him; and that he was paralyzed from the point at which the ball entered,

just below the shoulder, to his feet,—a sufficient predicate is laid to authorize the admission of a statement, made by him three days before his death, as a dying declaration. *Oliver v. The State*, 17 Ala. 587.

53. Where it was shown that the deceased was poisoned on Sunday, and from that time until Tuesday evening, when she died, suffered severely from a burning pain in the stomach and bowels; that on Sunday night, on Monday, and on Tuesday just before she made the statement which was offered as a dying declaration, she used such expressions as, "I cannot stay here,"—"I must go,"—"good people, I am gone;" that her medical attendant considered her *in extremis*, from Tuesday morning until she died; that on Tuesday morning, between nine and twelve o'clock, she asked her medical attendant if he could help her; and that he replied, he thought he could,—*held*, that the inquiry and reply, taken in connection with such strong evidence of a sense of impending death, prove nothing more than the hope of present ease or relief, and are not sufficient to exclude the declaration. *Johnson v. The State*, 17 Ala. 618.

54. Such circumstances, connected with the homicide, as the deceased, if living, would be allowed to testify to, may be the subject-matter of dying declarations. *Oliver v. The State*, 17 Ala. 587.

55. But the statement by the deceased of a distinct fact, in no way connected with the circumstances of the death, or the immediate cause of it, is not admissible. *Johnson v. The State*, 17 Ala. 618.

5. *Identity of Accused and Slayer.*

56. The situation and locality of the prisoner on the morning of the murder, as affording him an opportunity of knowing when the deceased left the school at the time when she was last seen in life, and whether his being in that place at that time was or was not an unusual occurrence with him, are circumstances which, though weak in themselves, are not so foreign from the main inquiry, as to justify their exclusion from the jury as irrelevant. *Campbell v. The State*, 23 Ala. 44.

57. Any evidence, giving a history of the prisoner's acts on the day of the murder, is relevant, and admissible against him. *Ib.*

58. It was shown that the prisoner, on the second morning after the murder, was seen coming from the direction of a house where two women, who were mother and daughter, resided,—the daughter being an unmarried woman, and having two children; that he had frequently been seen at their house previously, at one time shaving and changing his clothes; that witness went to the house, on the evening of the same day, and found the daughter alone, washing a man's shirt, which had stains on the bosom and cuff of the right sleeve; that "said splotches looked more like the stains from chesnut timber than anything else witness could compare them to;" that no man lived in the house, and witness knew no man in that neighborhood who wore so fine a shirt. The witness was asked by the prosecuting attorney, whether any person inquired of him if he knew what would take stains out of shirts; to which he replied, that the question was asked him by the young woman, and gave his answer to it. The prisoner objected to the question and answer, and moved the court to exclude from the jury all that the witness had said about the shirt and the stains on it; but the court refused to do so, and the prisoner excepted. The young woman was afterwards introduced as a witness for the defense, and testified, on cross-examination, that the prisoner slept at their house on the second night after the murder, that he left a shirt with her to be washed, and that she washed it. *Held*, that the evidence to which the prisoner objected, was properly admitted. *Ib.*

59. After the prosecution has proved the appearance of the prisoner on the evening of the day of the murder, and on the following day, he cannot be allowed to prove that, on the third day thereafter, when informed of the murder, he appeared surprised; nor can he be allowed to prove that, when informed that he was suspected of the murder, he seemed astonished. *Ib.*

60. Evidence showing the proximity of the prisoner to the place where the crime was committed, tends to prove that he could have committed it, and is therefore relevant and proper. *Johnson v. The State*, 17 Ala. 618.

61. Any indications of conscious guilt, arising from the conduct, demeanor, or expressions of the prisoner, such as silence, or unusual seriousness, at or about the time of the commission of the offense, are also relevant; but such a fact, of itself, should weigh but little, and ought to be considered with great caution by the jury. *Ib.*

62. Where the circumstances point to the accused as the perpetrator of the murder, facts tending to show a motive, though remote, are competent evidence against him; but the jury cannot be too cautious with respect to the importance which they attach to such evidence. *Balaam v. The State*, 17 Ala. 451.

63. Where the question before the jury was the identity of the prisoner as the murderer, the State offered in evidence the register of the hotel in Mobile at which the murder was committed, with the registers of two other hotels, one in New Orleans, and the other in Montgomery, in each of which registers a different name was entered, and which were admitted without objection from the prisoner; accompanied by parol proof that the three names were written by the prisoner, and that he was known by them respectively in the three cities named. *Held*, that the jury, in determining whether the three names were written by the same person, might compare the handwriting. *Crist v. The State*, 21 Ala. 137.

6. *Malice, Motive, or Intention.*

64. Where the killing is without necessity, and committed with a deadly weapon, the law will imply that the act was voluntary, in the absence of proof that it was accidental. *Oliver v. The State*, 17 Ala. 587.

65. Where the circumstances point to the accused as the perpetrator of the murder, facts tending to show a motive, though remote, are competent evidence against him; but the jury cannot be too cautious with respect to the importance which they attach to such evidence. *Balaam v. The State*, 17 Ala. 451.

66. Where the prisoner is indicted for the murder of his wife, proof that he applied, during the year preceding the homicide, to the mother of a single woman for permission to visit her daughter, and was refused because he was a married man, is relevant and admissible to show a motive for the commission of the crime; and the fact that he compelled his wife, for some time prior to her death, to sleep in the kitchen, which stood apart from the dwelling-house where he and his children lived, and was very open, is admissible evidence to show both malice and a motive. *Johnson v. The State*, 17 Ala. 618.

67. As to the presumption of malice from the use of a deadly weapon, the want of provocation, &c., see *Oliver v. The State*, 17 Ala. 587; *Felix v. The State*, 18 Ala. 720; *Carroll v. The State*, 23 Ala. 28; *Dill v. The State*, 25 Ala. 15; *Morris v. The State*, 25 Ala. 57.

68. Any fact, which tends to prove the real motive of the prisoner in killing the deceased, or the purpose of the deceased in going to the prisoner's house, or that the prisoner knew, at the time of the killing, that the deceased and his companions did not intend to commit any felony, nor to do him any great bodily harm, is relevant evidence. *Noles v. The State*, 26 Ala. 31.

69. If a slave kill a white person, by a misdirected blow aimed at another slave, the intent with which he made the assault is a material inquiry in fixing the character of the homicide; and in determining this question, evidence of a previous quarrel and separation between the slaves who had lived together as man and wife, is admissible against the prisoner. *Bob v. The State*, 29 Ala. 20.

7. *Variance.*

70. If the indictment charges that A gave the mortal blow, and that B and C were present aiding and abetting, while the evidence shows that B struck the blow, and that A and C were present aiding and abetting,—this is not a material variance; for the blow is adjudged, in law, to be the stroke of

every one of them. *Brister v. The State*, 26 Ala. 107.

71. The designation of the person slain as a "*free negro*," though an unnecessary allegation in the indictment, is a matter of description, and must be proved as laid; and proof that he was a *mulatto* will not sustain the allegation. *Felix v. The State*, 18 Ala. 720.

IV. OF THE VERDICT AND JUDGMENT.

72. No judgment can be rendered on a verdict of guilty, which does not ascertain the degree of the murder, although it was committed by poison. *Johnson v. The State*, 17 Ala. 618.

73. But a verdict of "guilty of murder in the first degree," with the words, "and we sentence him to be hung," is sufficient to authorize a judgment of conviction and sentence of death. *Noles v. The State*, 24 Ala. 672.

74. A verdict finding the defendant "guilty of murder in the first degree, and penitentiary for life," is sufficient to support a judgment of conviction, and sentence of confinement in the penitentiary for life. *Noles v. The State*, 26 Ala. 31; *Harrall v. The State*, 26 Ala. 52.

75. The statute (Clay's Digest, 474, § 16) which requires that not more than twenty, nor less than ten days, shall elapse between the sentence and execution of a slave, is directory merely; and the allowance of more than twenty days does not vitiate the judgment of conviction. *Seaborn and Jim v. The State*, 20 Ala. 15.

76. There is not any fixed form of words, in which the minute entries of the court are required to be made: they should show substantially that all was done at the trial that the law requires to be done, and this should be set down in fit and expressive words; but the form adopted in England, and followed in some of the United States, is not indispensably necessary to their legal sufficiency. *Crist v. The State*, 21 Ala. 137.

77. Whether the objection can avail, that the past, instead of the present tense, is employed in recording the action of the court and jury, *quære*. *Ib.*

78. The date of the sentence, and day of execution, may be expressed in figures, instead of letters. *Noles v. The State*, 24 Ala. 672.

HOTEL-KEEPERS.

1. An indictment for keeping a hotel without a license should allege that the defendant "was engaged in the business of keeping," &c.: an allegation that he "did keep" is not sufficient. *Pettibone v. The State*, 19 Ala. 586.

INDICTMENT.

(Statutory Provisions: Code, §§ 3149, 3179, 3200, 3221, 3244, 3252, 3272, 3275, 3298, 3320, 3324, 3497–3534; Appendix to Code, pp. 698–708; Clay's Digest, 433, §§ 11, 15; *Ib.* 439, § 12; *Ib.* 442, § 26; *Ib.* 444, § 35; *Ib.* 460–1, §§ 1–11.)

I. OF THE FINDING.

1. *By Whom.*
2. *Where.*

II. FORM AND REQUISITES.

1. *Constitutional Provisions.*
2. *Caption.*
3. *Statement of Venue.*
4. *Statement of Time.*
5. *Description of Defendant.*
6. *Description of Third Persons.*
7. *Description of Property, &c.*
8. *Description of Offense.*

(a) Adultery and Fornication.
(b) Affray.
(c) Arson.
(d) Assault and Battery.
(e) Assault with Intent, &c.
(f) Counterfeiting.
(g) Forgery.
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(i) Gaming-Tables.
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(m) Homicide.
(n) Inveigling Slaves.
(o) Larceny.
(p) Lotteries.
(q) Perjury.
(r) Poisoning.
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(t) Refusing to Testify before Grand Jury.
(u) Retailing Spirituous Liquor.
(v) Roads; Obstructing, and Failing to Repair.
(w) Ten-Pin Alleys.
(x) Miscellaneous Points.

I. OF THE FINDING.

1. *By Whom.*

1. An indictment which alleges that "the grand jurors for the State of Alabama upon their oaths present," &c., when the name of the proper county is stated in the caption, is sufficiently certain, although it does not aver that such grand jurors were selected, empaneled, sworn, and charged to inquire for the body of the county. *Morgan v. The State*, 19 Ala. 556.

2. So, an indictment which purports to be found by "the grand jurors for the said State, sworn and charged to inquire for the said county," when the names of the State and proper county are stated in the margin, is sufficient. *Lawson & Swinney v. The State*, 20 Ala. 65.

3. When the record shows that the indictment was found and returned into court by a grand jury, and was treated by the prisoner in the primary court as a valid indictment, the failure of the record to show that the grand jury was regularly selected and summoned, will not reverse the judgment. *Shaw v. The State*, 18 Ala. 547.

2. *Where.*

4. Where a person entices or inveigles a slave from the service of his master in another county, with the intent to convert such slave to his own use, and thereby induces him to come into the county of such person's residence, the offense is complete in the latter county, and he may be there indicted. *Crow v. The State*, 18 Ala. 541.

II. FORM AND REQUISITES.

1. *Constitutional Provisions:*

5. The fifth article of the amendments to the constitution of the United States, which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury," does not restrict the States, in the prosecution of capital or infamous crimes, to common-law indictments. Those amendments were demanded by the States, as safe-guards against encroachments on the part of the Federal government, and were not designed to restrict their own powers. *Noles v. The State*, 24 Ala. 672.

6. The tenth and twelfth sections of the first article of our State constitution do not restrict the powers of the legislature to enact laws defining offenses and their punishment, and prescribing the forms of indictments suited to them, as well as the mode of trying them. If the form of indictment prescribed by the statute contains such an accusation, at the suit of the State, found to be true by the oaths of a grand jury, as furnishes to the accused reasonable information of what he is called on to answer, by setting forth the constituent elements of the offense, it will be sufficient, although it may omit many averments which, at common law, were necessary to the validity of an indictment. *Ib.*

7. The form of an indictment for murder prescribed by the Code, is not violative of the constitution. *Ib.*

8. The form prescribed for an indictment for retailing is also sufficient. *Elam v. The State*, 25 Ala. 53.

9. So is the form prescribed for an indictment for gaming. *Burdine v.*

The State, 25 Ala. 60; *Sherrod v. The State*, 25 Ala. 78.

10. And the form prescribed for an assault and battery. *Thompson v. The State*, 25 Ala. 41.

11. And the form prescribed for setting up, or being concerned in setting up, or carrying on, a lottery. *Salomon v. The State*, 27 Ala. 26.

12. The legislature has power to make offenses, which have been created by statute since the adoption of the constitution, triable before a justice of the peace without indictment. *Tims v. The State*, 26 Ala. 165.

13. The act of February 7, 1850, (Session Acts, p. 51,) which dispenses with the necessity of averring, in an indictment for trading with a slave, the name of his master, owner, or overseer, or of negativing his assent to such trading, is not unconstitutional. *Hirschfelder v. The State*, 19 Ala. 534.

2. *Caption.*

14. The caption of an indictment is that entry of record which shows when and where the court was held, who presided as judge, and who were summoned and sworn as grand jurors; and this caption is part of every indictment, and need not be repeated in any part of it. *Reeves v. The State*, 20 Ala. 33.

15. The caption of an indictment may be looked to, in aid of the indictment, as a part of the record. *Noles v. The State*, 24 Ala. 672; *Lawson and Swinney v. The State*, 20 Ala. 65; *Morgan v. The State*, 19 Ala. 556.

3. *Venue.*

16. It was competent for the legislature, by statute, to dispense with the averment, in an indictment for murder, that the offense was committed within the body of the county in which the indictment was found, and to require that fact to be shown by the evidence. *Noles v. The State*, 24 Ala. 672.

17. Where an indictment was entitled in the margin, "The State of Alabama, *Butler* county," and recited that "the grand jurors of the county of *Buter* upon their oaths present," &c.; while the name of the county was not again repeated, and the offense was charged to have been committed "in the county aforesaid,"—*held*, that the indictment was not defective, since the courts are bound judicially to know the names of all the counties in the State. *Reeves v. The State*, 20 Ala. 33.

18. Under an indictment for inveigling a slave, (Clay's Digest, 419–20, §§18, 25,) the defendant may be convicted on proof that the slave was stolen by him in another State and brought into this. *Murray v. The State*, 18 Ala. 727.

19. But not under a common-law indictment for larceny. *Ham v. The State*, 17 Ala. 188.

4. *Time.*

20. An indictment is fatally defective, on demurrer, if it does not state the time when the offense was committed. *Roberts v. The State*, 19 Ala. 526.

21. But, under the Code, it is sufficient to charge that the offense was committed before the finding of the indictment, without naming a day certain. *Thompson v. The State*, 25 Ala. 41.

22. An indictment for counterfeiting coin is fatally defective, on motion in arrest of judgment, if it does not state the time when the counterfeited coin was current by law, custom, or usage in this State. *Nicholson v. The State*, 18 Ala. 529.

23. When the time of the commission of the offense is alleged under a *videlicet*, the prosecutor is not held to proof of it as laid, but may prove its commission at any time before the finding of the indictment, within the period prescribed as a bar. *McDade v. The State*, 20 Ala. 81.

24. An indictment for resisting process, in which the time of the commission of the offense is laid after the return day of the process, is fatally defective on error. *McGehee v. The State*, 26 Ala. 154.

5. *Description of Defendant.*

25. The variance between the names *Edmundson* and *Edmindson* is too imperceptible to support a plea in abatement. *Edmundson v. The State*, 17 Ala. 179.

26. The law knows but one christian name; the insertion or omission of the initial letter of a middle name is immaterial, and may be disregarded. *Ib.*

27. The addition of the county of the defendant's residence is mere matter of form, and the failure to aver it does not affect the validity of an indictment. *Morgan v. The State*, 19 Ala. 556.

28. An indictment against a slave, for murder, must allege the name of his owner: an averment that he is the property of the "late W. C." is not sufficient. *Pleasant v. The State*, 17 Ala. 190. (*Vide infra*, 31–34.)

6. *Description of Third Persons.*

29. An indictment, alleging that the defendant, "in and upon one H. S. (she, the said H. S., then and there being a female child under the age of ten years) feloniously did make an assault, and her, the said H. S., then and there feloniously did abuse, *in the attempt carnally know*," is fatally defective, on motion in arrest of judgment, because it does not specify with sufficient certainty and precision the person upon whom the attempt was committed. *Nugent v. The State*, 19 Ala. 540.

30. An indictment under the statute against permitting the exhibition of gaming-tables, need not allege the name of the person by whom the table was exhibited, or that his name was unknown. *Clark v. The State*, 19 Ala. 552.

31. Under the act of 1850, (Session Acts 1849–50, p. 51,) it is unnecessary to aver in an indictment for trading with a slave, or to prove, who was the master, owner, or overseer of such slave, or to negative his assent to such trading. *Hirschfelder v. The State*, 19 Ala. 534.

32. An indictment, which charges that the defendant sold "to a certain slave, whose name is to the jury unknown," is demurrable for uncertainty in the description, both under the general statute, and under the act of 1850. *Francois v. The State*, 20 Ala. 83.

33. So, in a *quasi* criminal proceeding for the violation of a municipal ordinance forbidding the trading with slaves, if the statement does not allege the name of the slave, or of his owner or employer, it is fatally defective on demurrer. *Brown v. Mayor of Mobile*, 23 Ala. 722.

34. An indictment, under the Code, for trading with "a slave, the property of B. S. B., whose name is to the jury unknown," is fatally defective on error. *Starr v. The State*, 25 Ala. 38.

35. In an indictment for murder, the designation of the person slain as "a free negro," though unnecessary, is matter of description, and must be proved as alleged: proof that he was a mulatto does not sustain the allegation. *Felix v. The State*, 18 Ala. 720.

36. Under an indictment for the mayhem of a slave, the allegation of ownership is a material part of the description, and must be proved as laid: if the averment is that he belonged to the defendant's wife, while the evidence shows that the defendant himself is the owner, the variance is fatal. *Eskridge v. The State*, 25 Ala. 30.

37. Under an indictment for an assault and battery, a variance between the allegation and proof as to the name of the person assaulted, where the names may be sounded alike without doing any violence to the letters found in the variant orthography, is immaterial; as in the names *Chambless* and *Chambles*. *Ward v. The State*, 28 Ala. 53.

7. *Description of Property, &c.*

38. In an indictment for larceny, if the goods were stolen from the possession of the husband, though they were the separate property of the wife, it is sufficient to describe them as the goods of the husband. *Davis v. The State*, 17 Ala. 415.

39. An indictment for a conspiracy to commit a burglary, with intent to steal the goods of S., is supported by proof that the goods belonged to S. and his dormant partner. *Spradling & Thomas v. The State*, 17 Ala. 440.

40. An indictment for larceny of "bank-notes," *eo nomine*, which states their number, denomination, and value, is sufficient. *Williams v. The State*, 19 Ala. 15.

41. In an indictment for selling liquor to a slave, the kind of liquor

specified, though laid under a *videlicet*, must be proved as alleged. *Lindsay v. The State*, 19 Ala. 560.

42. Under an indictment for forgery, it is not necessary that there should be a literal correspondence between the instrument described in the indictment and that offered in evidence at the trial: if the correspondence is such as will prevent the prisoner, should he be acquitted, from being a second time put in jeopardy for the same cause, or from being a second time punished, should he be convicted, it is sufficient. *Butler v. The State*, 22 Ala. 43.

43. An indictment for arson, under the Code, as at common law, must allege the ownership of the property charged to have been burned. *Martha v. The State*, 26 Ala. 72; *Martin and Flinn v. The State*, 28 Ala. 71.

44. In an indictment which alleges an actual poisoning, an allegation that the substance administered was a poison, is unnecessary; but an indictment for an attempt to poison must allege that fact. *Anthony v. The State*, 29 Ala. 46.

45. In an indictment for an assault with intent to murder, it is not necessary to allege that the gun and knife, charged to have been used, were deadly weapons. *Shaw v. The State*, 18 Ala. 547.

8. *Description of Offense.*

(a) Adultery and Fornication.

46. An indictment, which charges that the defendants, a man and a woman, "did live together in fornication," is sufficient. *Lawson and Swinney v. The State*, 20 Ala. 65.

47. Adultery and fornication, under the statutes of this State, (Code, § 3231; Clay's Digest, p. 431, § 3,) are distinct offenses; no conviction can be had under an indictment for adultery, if the evidence shows that both the parties were unmarried. *Smitherman v. The State*, 27 Ala. 23.

(b) Affray.

48. The statute prohibiting fighting in public places, (Clay's Digest, p. 413, § 8,) creates a new offense, and attaches to it a new penalty; and this penalty cannot be inflicted, when the indictment is framed as for an affray at common law. *Skains & Lewis v. The State*, 21 Ala. 218.

(c) Arson.

49. In an indictment for arson, under the Code, as at common law, the ownership of the house or property burned must be alleged and proved. *Martha v. The State*, 26 Ala. 72; *Martin and Flinn v. The State*, 28 Ala. 71.

50. An indictment for the willful burning of a house insured against fire, with intent to charge or injure the insurer, (Code, § 3137,) must allege that the house was "at the time insured against fire." *Martin & Flinn v. The State*, 29 Ala. 30.

(d) Assault and Battery.

51. An indictment, under the Code, which charged that the defendants, "before the finding of this indictment, assaulted and beat B. B., against the peace and dignity of the State of Alabama," held sufficient. *Thompson v. The State*, 25 Ala. 41.

(e) Assault with Intent, &c.

52. An indictment for an assault with intent to murder must state the facts which constitute the assault. *Beasley v. The State*, 18 Ala. 535; *Shaw v. The State*, 18 Ala. 547; *Trexler v. The State*, 19 Ala. 21. (But see the form prescribed by the Code, p. 700, No. 16.)

53. The assault should be alleged as at common law, with the additional averment of the intent; and the statute (Clay's Digest, 442, § 26) dispenses with the allegation that the act was feloniously done. *Beasley v. The State*, 18 Ala. 535.

54. It is not necessary to allege that the person assaulted was within the distance to which the gun would carry; nor that the weapon charged to have been used was a deadly weapon. *Shaw v. The State*, 18 Ala. 547,

(f) Counterfeiting.

55. An indictment for counterfeiting,

if it does not state the time when the coin counterfeited was current by law, custom or usage in this State, is fatally defective on motion in arrest of judgment. *Nicholson v. The State*, 18 Ala. 529.

(g) Forgery.

56. An indictment for forgery need not allege that the act was feloniously done. *Butler v. The State*, 22 Ala. 43.

57. Nor is it necessary that there should be a literal correspondence between the instrument set out in the indictment and that offered in evidence. *Ib.*

58. A demurrer to the indictment, on account of a variance in describing the instrument forged, cannot be considered unless oyer is craved. *Ib.*

(h) Gaming.

59. An indictment for gaming, at any one of the places specifically named in the statute, must be equally specific in charging the offense. *Bush v. The State*, 18 Ala. 415.

60. An indictment for playing cards "at a public place" is sufficiently definite. *Roquemore v. The State*, 19 Ala. 528; *Flake v. The State*, 19 Ala. 551.

61. A count charging the defendant with betting at a certain game of cards "called faro," is sufficiently certain. *Ward v. The State*, 22 Ala. 16; *Swallow v. The State*, 22 Ala. 20.

62. An indictment for gaming, in the general form prescribed by the Code, is sufficient. *Burdine v. The State*, 25 Ala. 60; *Sherrod v. The State*, 22 Ala. 78.

(i) Gaming-Tables.

63. An indictment for permitting the exhibition of a gaming-table, if it describes the offense in the language of the statute, is sufficient. *Clark v. The State*, 19 Ala. 552.

64. It is not necessary to allege the name of the person by whom the table was exhibited, or that his name is unknown; nor to aver that the defendant does not come within the proviso of the statute. *Ib.*

65. An indictment for keeping a billiard-table in connection with a house where spirituous liquors are retailed, and as an appendage thereto, if it pursues the words of the statute literally, is sufficient. *Smith v. The State*, 22 Ala. 54.

66. An indictment for betting "at a game of pool at a house where spirituous liquors were retailed," or (as alleged in another count) "at a public place enumerated in section 3243 of the Code," is sufficient under the Code. *Rodgers v. The State*, 26 Ala. 76.

(k) Hawking and Peddling.

67. An indictment under the revenue act of 1848, (Session Acts 1847–8, p. 32, § 98,) which prescribes a specific and different penalty for each of the different classes of peddlers who may violate its provisions, must designate the class to which the defendant belongs. *Hirschfelder v. The State*, 18 Ala. 112.

68. But it is not necessary to allege the facts which constitute hawking and peddling, since the gist of the offense is the being "engaged in the business." *Sterne v. The State*, 20 Ala. 43.

(l) Hotel-Keepers.

69. An indictment under the revenue act of 1850, for keeping a hotel without a license, should allege that the defendant "was engaged in the business of keeping," &c.: an allegation that he "did keep" is not sufficient *Pettibone v. The State*, 19 Ala. 586.

(m) Homicide.

70. The form of an indictment for murder prescribed by the Code, though it omits many averments which were necessary to the validity of such an indictment at common law, is sufficiently definite and certain, and is not violative of any constitutional provision. *Noles v. The State*, 24 Ala. 672.

(n) Inveigling Slaves.

71. When a slave is stolen in another State, and brought into this, the indictment should be framed under the 18th section of the 4th chapter of the Penal Code. *Ham v. The State*, 17 Ala. 188; *Murray v. The State*, 18 Ala. 727.

(o) Larceny.

72. An agent, who has charge of his employer's store-house and goods, with authority to furnish goods to customers, and who embezzles, or fraudulently converts such goods to his own use, can only be indicted and convicted under section 3143 of the Code; but, if he obtained his agency with the felonious intent of stealing the goods, or was a mere servant, having no authority to sell, he may be indicted and convicted under section 3170. *Case v. The State*, 26 Ala. 17.

73. An indictment for larceny of "bank-notes," *eo nomine*, which states their number, denomination, and value, is sufficient. *Williams v. The State*, 19 Ala. 15.

(p) Lotteries.

74. An indictment in the form prescribed by the Code, (No. 73, p. 707,) is sufficiently certain and definite. *Salomon v. The State*, 27 Ala. 26.

(q) Perjury.

75. An indictment for perjury is not vitiated because some of the assignments are bad. *De Bernie v. The State*, 19 Ala. 23.

76. In an indictment which charges the defendant with having taken a false oath to procure his discharge from custody under a *ca. sa.*, an assignment which alleges that, at the time he took the oath, he had moneys whereby to satisfy the debt for which he was arrested, is sufficient. *Ib.*

(r) Poisoning.

77. When the indictment alleges that the defendant "did administer to, and cause to be administered to and taken by," &c., a certain deadly poison, "with the intent then and there feloniously to kill and murder" the persons named, it sufficiently charges a violation of the statute, although not using the same words. *Ben v. The State*, 22 Ala. 9.

78. In an indictment which charges an actual poisoning, an allegation that the substance administered was a poison is unnecessary; but an indictment for an attempt to poison must contain that allegation. *Anthony v. The State*, 29 Ala. 27.

(s) Rape.

79. An indictment which alleges that the defendant, "in and upon one H. S. (she, the said H. S., then and there being a female child under the age of ten years,) feloniously did make an assault, and her, the said H. S., then and there feloniously did abuse, *in the attempt carnally know*," is fatally defective, in not specifying with sufficient certainty and precision the person upon whom the attempt was made. *Nugent v. The State*, 19 Ala. 540.

(t) Refusing to Testify before Grand Jury.

80. An indictment for refusing to testify before the grand jury in reference to gaming, if it charges the offense in the language of the statute, is sufficient. *Batre v. The State*, 18 Ala. 119.

(u) Retailing Spirituous Liquors.

81. An indictment in the general form prescribed by the Code, charging that the defendant "sold spirituous liquors, without a license, and contrary to law," is sufficient. *Elam v. The State*, 25 Ala. 53.

82. But this general form is not sufficient, when the State proceeds for a violation of the special act of December 10, 1851, "to regulate the sale of spirituous liquors in the town of Elyton," which is not repealed by the Code. *Camp v. The State*, 27 Ala. 53.

(v) Roads; Obstructing, and Failing to Repair.

83. It is not necessary that the width or grade of the road charged to have been obstructed should be stated. *Thompson v. The State*, 20 Ala. 54.

84. An indictment for failing and neglecting to keep in repair a certain turnpike road, which defendant and another were authorized by private statute to construct, is fatally defective on demurrer, if it alleges that the defendant alone accepted the charter, erected toll-gates and took toll by its

authority, but does not aver that the charter authorized him to accept alone, or that it required him to keep the road in repair. *Moore v. The State*, 26 Ala. 88.

(w) Ten-Pin Alleys.

85. An indictment under the revenue act of 1848, for keeping a ten-pin alley without a license, should allege that the defendant "was engaged in the business of keeping," &c.: an averment that he did keep is not sufficient, *Eubanks v. The State*, 17 Ala. 181.

(x) Miscellaneous Points.

86. The useless repetition of words in an indictment does not vitiate it: the superadded words may be rejected as surplusage. *Lodano v. The State*, 25 Ala. 64.

87. In indictments for offenses which were misdemeanors at common law, but which are made felonies by our Penal Code, the statute (Clay's Digest, 442, § 26) dispenses with the necessity of alleging that the act was feloniously done. *Beasley v. The State*, 18 Ala. 535; *Butler v. The State*, 22 Ala. 43.

88. Where the offense charged is complicated, consisting of a repetition of acts, or where it includes a continuation of acts, it is not necessary to set them out in the indictment. *Sterne v. The State*, 20 Ala. 43; *Lawson and Swinney v. The State*, 20 Ala. 65.

89. In a *quasi* criminal proceeding for the violation of a municipal ordinance, removed by appeal into the circuit court, if the statement does not set forth the provision of the ordinance alleged to have been violated, it is fatally defective on demurrer. *Ganaway & Kimball v. Mayor of Mobile*, 21 Ala. 577.

90. Where a statute creates a new offense, unknown to the common law, and describes its constituents, it is sufficient to charge the offense in the language of the statute. *Lodano v. The State*, 25 Ala. 64; *Smith v. The State*, 22 Ala. 54; *Clark v. The State*, 19 Ala. 552; *Beasley v. The State*, 18 Ala. 535; *Batre v. The State*, 18 Ala. 119; *Eubanks v. The State*, 17 Ala. 181.

91. But, if the statute merely designates the offense, and does not in express terms prescribe its constituents, it is not sufficient to pursue literally the words of the statute. *Ben v. The State*, 22 Ala. 9; *Clark v. The State*, 19 Ala. 552; *Trexler v. The State*, 19 Ala. 21; *Beasley v. The State*, 18 Ala. 535; *Batre v. The State*, 18 Ala. 119; *Anthony v. The State*, 29 Ala. 27.

92. Where a statute creates an offense, and describes its ingredients, an indictment under it must conform to the description thus given. *Skains & Lewis v. The State*, 21 Ala. 218; *Pettibone v. The State*, 19 Ala. 586; *Eubanks v. The State*, 17 Ala. 181.

93. But it is not necessary to pursue the literal words of the statute, if others of equivalent import are used. *Ben v. The State*, 22 Ala. 9; *Ward v. The State*, 22 Ala. 16.

94. Where a specific term in a statute is followed by one of more comprehensive meaning, an indictment for the offense designated by the more specific term must be equally specific in charging it. *Bush v. The State*, 18 Ala. 415.

95. Where a statute prescribes a specific and different penalty for each of the several classes of persons who may violate its provisions, an indictment under it must designate the class to which the defendant belongs. *Hirschfelder v. The State*, 18 Ala. 112.

96. If the statute contains an exception, or proviso, but not in the same clause that creates the offense, it is not necessary to allege in the indictment that the defendant does not come within its benefit. *Clark v. The State*, 19 Ala. 552.

9. *Signature of Solicitor.*

97. It is not necessary that an indictment should be signed by the solicitor. *Harrall v. The State*, 26 Ala. 52; *Ward v. The State*, 22 Ala. 16.

III. JOINDER OF OFFENSES.

1. *In the same Count.*

(a) What Offenses may, or not, be joined; and herein of Duplicity.

98. Betting, and being concerned in betting at a faro-bank, are different grades of the same offense, punished

with the same penalty, and may be charged in the same count. *Ward v. The State*, 22 Ala. 16; *Swallow v. The State*, 22 Ala. 20.

99. In an indictment against a slave, for attempting to poison white persons, a count which charges that the defendant "did administer to, and cause to be administered to and taken by" three certain free white persons, a large quantity of arsenic, &c., is not demurrable for duplicity. *Ben v. The State*, 22 Ala. 9.

100. When two commit a joint assault, with intent to murder,—one with a knife, and the other with a gun,—a count which charges them jointly is not objectionable for duplicity. *Shaw v. The State*, 18 Ala. 547.

101. An indictment for gaming, in the general form prescribed by the Code, which charges, in the alternative, all the separate offenses enumerated in the statute, is authorized by law (Code, § 3506), and is not unconstitutional. *Burdine v. The State*, 25 Ala. 60; *Sherrod v. The State*, 25 Ala. 78.

102. An indictment for retailing, in the general form prescribed by the Code, does not include more than one offense; and though the prosecuting attorney cannot be required, before offering any evidence, to elect and state for which one of the different varieties of retailing he intends to proceed, yet, when that election has been once made by adducing evidence of one particular offense, he will be held to it though all the subsequent proceedings. *Elam v. The State*, 26 Ala. 48.

(b) Conviction on Part of Count.

103. When different grades of the same offense are charged in the same count, the defendant may be convicted on proof of either. *McElhaney v. The State*, 24 Ala. 71; *Ben v. The State*, 22 Ala. 9.

(c) Conviction of Inferior Offense.

104. When a white man is indicted for an assault with intent to murder a slave, and goes to trial on the plea of not guilty, without either demurring to the indictment, or moving to quash it, he may be convicted of assault and battery only; and he cannot, by assigning for error the verdict of the jury, raise the question whether such an indictment lies. *Carpenter v. The State*, 23 Ala. 84.

105. Under an indictment for the murder of a white person, whether framed under the Code or as at common law, a slave cannot be convicted of involuntary manslaughter. *Bob v. The State*, 29 Ala. 20.

2. *In different Counts.*

(a) What Offenses may be thus joined.

106. Offenses of the same general nature, belonging to the same family of crimes, and punishable in the same manner, though with different degrees of severity, may be joined, in different counts, in the same indictment; such as larceny from the person, and obtaining money under false pretenses. *Johnson v. The State*, 29 Ala. 62.

(b) Conviction on single Count.

107. When an indictment contains several counts, a verdict of guilty as charged in the second count", is equivalent to an acquittal on the other counts. *Martin & Flinn v. The State*, 28 Ala. 72.

108. When there is a general finding on an indictment which contains good and bad counts, the finding will be referred to the good counts, and the judgment thereupon sustained. *Shaw v. The State*, 18 Ala. 547.

IV. JOINDER OF DEFENDANTS.

109. An indictment which, upon its face, charges several defendants for several offenses committed by them independently of each other, is fatally defective; and if the indictment is unobjectionable on its face, no conviction can be had under it on proof of facts which, if stated in it, would make it fatally defective. *Elliott v. The State*, 26 Ala. 78.

110. If A and B are jointly indicted and tried for gaming, and the evidence shows that A and others played at one time when B was not present, and that B and others played at another time when A was not present, no conviction can be had. *Ib.*

111. Two or more persons may be jointly indicted for betting, or being concerned in betting, at a faro-bank; and if the evidence shows that only one of them was engaged in the betting, he may be convicted, and the others acquitted. *Ward v. The State*, 22 Ala. 16; *Swallow v. The State*, 22 Ala. 20.

V. OBJECTIONS; WHEN AND HOW MADE.

112. The question whether an indictment lies against a white man for an assault on a slave with intent to murder, cannot be raised on error, when the defendant went to trial on the plea of not guilty, without either demurring to the indictment or moving to quash it, and was convicted of assault and battery only. *Carpenter v. The State*, 23 Ala. 84.

113. A demurrer to an indictment for forgery, on account of a variance in the description of the forged instrument, cannot be considered by the court, unless oyer is craved. *Butler v. The State*, 22 Ala. 43.

114. As a general rule, when an indictment is defective on demurrer, advantage may also be taken of the defect on motion in arrest of judgment. *Francois v. The State*, 20 Ala. 83.

115. An objection to the grand jury can only be taken by plea in abatement. *Morgan v. The State*, 19 Ala. 556; *Nugent v. The State*, 19 Ala. 540; *Shaw v. The State*, 18 Ala. 547.

116. In a *quasi* criminal proceeding for the violation of a municipal ordinance, removed by appeal into the circuit court, if the statement does not show a cause of action, the defendant may demur. *Ganaway & Kimball v. Mayor, &c., of Mobile*, 21 Ala. 577.

VI. SERVICE OF COPY.

117. Every person indicted for a capital offense, if he is in actual confinement, is entitled (Code, § 3576) to have a copy of the indictment delivered to him at least two entire days before the day appointed for his trial: delivery to his counsel is not sufficient. *Brister v. The State*, 26 Ala. 107.

118. But, if the prisoner objects to going to trial, "on the ground that a copy of the indictment has not been served on him or his counsel two entire days before the trial," and it is shown that a copy was delivered to his counsel two entire days before the trial, the objection may be overruled, since the form in which it is made is a waiver of the right to personal service if a copy has been delivered to counsel. *Ib.*

119. When the venue is changed on the prisoner's application, the certified copy of the indictment becomes so far an original, in the court to which the trial is removed, that a copy of *it*, when delivered to the prisoner, will be a sufficient compliance with the statute. *Ib.*

120. When the record shows that the prisoner was regularly arraigned, pleaded not guilty, and proceeded to trial without objection, the point cannot be raised in the appellate court, that the record fails to show that he was served with a copy of the indictment two entire days before the trial. *Ben v. The State*, 22 Ala. 9.

VII. SUBSTITUTION OF COPY ON LOSS OF ORIGINAL.

121. When an indictment is lost or destroyed, it cannot be substituted on satisfactory proof of a copy. *Ganaway v. The State*, 22 Ala. 772.

INSANITY.

I. AS AFFECTING THE COMPETENCY OR CREDIBILITY OF WITNESS.
II. AS DEFENSE TO INDICTMENT.
III. HOW PROVED.

I. AS AFFECTING THE COMPETENCY OR CREDIBILITY OF WITNESS.

1. That a person is subject to fits of mental derangement, is no objection to either his competency or credibility as a witness, if it appears that he is sane at the time he is offered. *Campbell v. The State*, 23 Ala. 44.

2. When the competency of a witness is attacked on the ground of insanity, and the court decides in favor of his sanity, the evidence adduced to

the court cannot be submitted to the jury, to affect his credibility. *Ib.*

3. When evidence is adduced to the court, on a preliminary examination touching the incompetency of a witness by reason of insanity, the appellate court will presume that the judge was not influenced by any evidence which he ought not to have considered. *Ib.*

II. AS DEFENSE TO INDICTMENT.

4. To render insanity available as a defense, the evidence must satisfy the jury, that the accused, at the time the act was done, was not conscious that he was committing an offense against the law of God or man. *McAllister v. The State*, 17 Ala. 434.

III. HOW PROVED.

5. Where insanity is relied on as a defense, evidence of the state of the prisoner's mind at the time of the trial is admissible for him, as tending to show his true mental condition when the act was committed. *McAllister v. The State*, 17 Ala. 434.

6. The opinions of medical men, founded on their own personal observation of the accused, or on facts detailed by other witnesses, are admissible to prove insanity; but such opinions are to be weighed by the jury as other testimony, and are not conclusive. *Ib.*

7. No precise rule can be laid down, as to the length or character of acquaintance which would render the opinion of a person who is not a physician admissible evidence on the question of insanity. In cases of general insanity, a total incapacity to distinguish right from wrong on any question, the same degree of observation is not required to discover the existence of the disease, as in cases of monomania, or partial derangement, and therefore the same degree of intimacy is not necessary to render the opinion of the witness admissible; but in every case, the circumstances must be such as to have afforded the witness an opportunity of forming an accurate judgment as to the existence or non-existence of the disease, considered with reference to the character or degree in which it is alleged to exist. *Powell v. The State*, 25 Ala. 21.

INVEIGLING SLAVES.

See LARCENY.

JUDGMENTS.

I. AMENDMENT.

1. In a proceeding under the bastardy act, a judgment requiring the defendant to pay "the sum of forty dollars annually for ten years, to-wit, forty dollars now, and forty dollars every year for ten years afterwards," though erroneous, will be amended, on error, at the costs of the appellant. *Wilson v. Judge of Pike County Court*, 18 Ala. 757.

2. A judgment under the bastardy act may be amended at a subsequent term, *nunc pro tunc*, so as to require the annual payments to be made on the "first *Monday* of January," as the statute directs, instead of on the "first *day* in January." *Williams v. The State*, 29 Ala. 9.

II. CONCLUSIVENESS.

3. A judgment refusing to discharge the petitioner, on an application for bail, does not conclude him from again applying; but it is within the sound discretion of the court, after having fully examined the facts and circumstances on the previous application, either to repose on its former judgment, or to re-try the facts. *Ex parte Campbell*, 20 Ala. 89.

III. FORM AND VALIDITY.

5. The statute (Clay's Digest, 474, §16) which requires that not more than twenty, nor less than ten days, shall elapse between the sentence and execution of a slave, is directory merely; and the allowance of more than twenty days does not vitiate the judgment of conviction. *Seaborn and Jim v. The State*, 20 Ala. 15.

6. The date of the sentence, and day of execution, may be expressed in figures, instead of letters. *Noles v. The State*, 24 Ala. 672.

7. There is not any fixed form of words, in which the minute entries of courts are required to be made: they should show substantially that every thing was done at the trial which the law requires to be done, and this should be set down in fit and expressive words; but the form adopted in England, and followed in some States of the Union, is not indispensably necessary to their legal sufficiency. *Crist v. The State*, 21 Ala. 137.

8. Whether the objection can avail, that the past, instead of the present tense, is employed in recording the action of the court and jury, *quære*. *Ib.*

9. A judgment against the defendant in a proceeding under the bastardy act, requiring him to pay into the probate court, annually, for the term of ten years, the sum of fifty dollars, for the support, maintenance, and education of the child, though not in favor of any person by name as plaintiff, is nevertheless sufficient, since the statute points out with certainty who is plaintiff. *Seale v. McClanahan*, 21 Ala. 345.

10. A judgment by confession, taken by a probate judge in vacation, from the defendant in a proceeding under the bastardy act, is *coram non judice* and void. *Moore v. McGuire*, 26 Ala. 461.

11. A probate judge is incompetent from interest to preside on the trial of a bastardy case, when he is bound as surety for the defendant on the recognizance taken by the justice; and any proceedings therein, had before him, are *coram non judice* and void. *The State, ex rel. Claunch, v. Castlebery*, 23 Ala. 85.

12. A judgment, requiring the defendant to pay "the sum of forty dollars annually for ten years, to-wit, forty dollars now, and forty dollars every year for ten years afterwards," is erroneous; but, since it shows upon its face that the defendant was adjudged to pay "forty dollars annually for ten years," the latter portion of the entry must be treated as a clerical misprision, and amended accordingly. *Wilson v. Judge of Pike County Court*, 18 Ala. 757.

13. A judgment in favor of prosecutrix, "for her costs in this behalf expended," and requiring the defendant to enter into bond, "conditioned that he pay to the judge of probate fifty dollars, on the first *day* of January in each year, for the term of ten years," &c., is materially different from a judgment requiring him to enter into bond, "conditioned to pay fifty dollars, for the period of ten years, on the first *Monday* in January." *Williams v. The State*, 26 Ala. 85.

JURISDICTION.

I. GENERALLY.

1. Where a new offense is created by statute, or a different penalty affixed to an offense previously known, and the jurisdiction is limited to a particular court, no other court can take cognizance of it. *Rossett v. The State*, 17 Ala. 496.

2. The jurisdiction of the superior courts cannot be taken away by mere implication. *The State v. Moore and Ligon*, 19 Ala. 514.

3. When a court has no jurisdiction over the subject-matter of a suit, the consent of the parties, whether express or implied, cannot confer it. *The State, ex rel. Savary, v. Caroline*, 20 Ala. 19.

4. The State courts could never exercise any jurisdiction in cases of violation of the laws prohibiting the slave-trade, except such as was authorized by congress; and all jurisdiction is now taken away by the fourth section of the act of March 3d, 1819. *Ib.*

5. The competency of the presiding judge to hold the court, cannot be questioned by plea in a criminal case. *Spradling and Thomas v. The State*, 17 Ala. 440.

II. OF JUSTICE OF THE PEACE.

6. A justice of the peace has no jurisdiction to render judgment for costs against the defendant, in the preliminary proceedings had before him on a charge of felony. *Sasnett v. Weathers*, 21 Ala. 673.

7. A justice has authority, in cases of emergency, to appoint a special constable (Code, § 712); and he must himself judge of the emergency. *Noles v. The State*, 24 Ala. 672

8. The third section of the act of 1854, (Session Acts 1853–4, p. 247,) which makes defaulting overseers of roads triable before a justice of the peace, is not violative of the right to a trial by jury, as secured by the tenth and twenty-eighth sections of the first article of the constitution; but it is nevertheless unconstitutional, in that it makes no provision for an appeal, while the general law governing appeals is inapplicable. *Tims v. The State*, 26 Ala. 165.

9. The thirty-third section of the judiciary act of 1789, (U. S. Statutes at Large, vol. 1, p. 91,) which empowers justices of the peace to arrest and commit, or bail, as the case may require, persons charged with a violation of the criminal law of the United States, is not unconstitutional. *Ex parte Gist*, 26 Ala. 156.

10. A justice has no jurisdiction of a complaint under the bastardy act, unless the mother of the child is a single woman, and is pregnant, or has been delivered, in the county in which the justice acts; but, if the complaint does not state these facts, he may determine their existence from other evidence, and should then state them in his warrant, so that his jurisdiction may appear on the face of his proceedings. *Williams v. The State*, 29 Ala. 9.

11. The recitals in the justice's warrant, of the preliminary facts on which his jurisdiction depends, and which it is his duty to determine, are evidence that he did determine their existence; and his determination of their existence, in the absence of evidence showing it to be erroneous, is conclusive between the parties. *Ib.*

III. OF COUNTY AND PROBATE COURTS.

12. The jurisdiction conferred by the act of 1836 (Clay's Digest, 509, § 11) on the county court, and now transferred to the probate court, authorizes the judge, and makes it his duty, to fill any vacancy that may occur, from whatever cause, in the office of overseer of roads, after a regular appointment has been made. *Thompson v. The State*, 21 Ala. 48.

13. In a proceeding under the bastardy act, the county court had jurisdiction, if the cause was continued by the defendant at the first term, to compel him to enter into a recognizance for his good behavior; and if the recognizance contained any superadded condition, it was void only as to the excess. *The State, ex rel. Claunch, v. Castleberry*, 23 Ala. 85.

14. Where the defendant's surety, on the bond taken by the justice, afterwards becomes judge of probate, he is incompetent from interest to preside on the trial of the case; and any proceedings therein, had before him, are *coram non judice* and void. *Ib.*

15. Under the act establishing courts of probate, a judge of probate had power (now taken by the Code) "to grant, hear, and determine writs of *habeas corpus*" in bailable cases. *Hale v. The State*, 24 Ala. 80. (Note, that this power has been restored by the "act concerning bail in criminal cases," approved February 15, 1856; except in cases of murder in the second degree, and manslaughter in the first degree.)

IV. OF CITY COURT OF MOBILE.

16. The criminal court of Mobile had no jurisdiction of offenses created by the revenue act of 1848. *Rossett v. The State*, 17 Ala. 496. (Note, that the name of this court was changed, by act of February, 1850, to that of "the city court of Mobile;" and that jurisdiction was conferred on it, by the revenue act, approved February 11, 1850, "over all matters of an indictable nature, and of all penalties arising from a violation of any of the provisions" of the revenue law.)

17. The city court has power to originate criminal proceedings at a special term. *Nugent v. The State*, 19 Ala. 540.

18. The judge of said court has

power to take a bond, conditioned that the principal obligor "make his personal appearance before the city court, now in session, *instanter*, and from day to day during the term, and from term to term thereafter, to answer the State of Alabama on a charge of an assault to murder." *Arnold v. The State*, 25 Ala. 69.

V. OF CIRCUIT COURT.

19. Under the revenue act of 1848, the circuit court alone had jurisdiction of offenses committed in violation of the 98th section. *Rossett v. The State*, 17 Ala. 496. (*Vide supra*, 16.)

20. The proviso to the 8th section of the act of 1819, (Clay's Digest, 295, § 35,) relative to the alternation of the circuit judges, is directory merely, and does not deprive them of the power to hold successive courts in any county of their respective circuits. *Spradling & Thomas v. The State*, 17 Ala. 440. (Changed by statute.—Session Acts 1856–6, p. 29.)

JURORS AND JURY.

(Statutory Provisions: Code, §§3436–96, 3576–3604.)

I. GRAND JURY.
II. PETIT JURY.

1. *Challenge.*

(a) Peremptory.
(b) Propter Defectum.
(c) To Array.

2. *Discharge.*
3. *Misconduct.*
4. *Oath.*
5. *Polling.*
6. *Service of List on Prisoner.*

III. PROVINCE OF JURY.
IV. RIGHT OF TRIAL BY JURY.
See, also, VENIRE.

I. GRAND JURY.

1. An objection to the grand jury can only be taken by plea in abatement. *Nugent v. The State*, 19 Ala. 540; *Morgan v. The State*, 19 Ala. 556.

2. Where the record shows that the indictment was found and returned into court by a grand jury, and was treated by the prisoner as a valid indictment, the judgment of conviction will not be reversed because the record fails to show that the grand jury was regularly selected and summoned. *Shaw v. The State*, 18 Ala. 547.

II. PETIT JURY.

1. *Challenge.*

(a) Peremptory.

3. Under an indictment for murder, in the general form prescribed by the Code, (No. 2, p. 698,) the prisoner is entitled to the number of peremptory challenges allowed in prosecutions for murder in the first degree. *Noles v. The State*, 24 Ala. 672.

4. Where several persons are jointly indicted and tried, each is entitled to the same number of challenges to which he would be entitled if tried separately. *Brister v. The State*, 26 Ala. 107.

(b) Propter Defectum.

5. A juror, whose sole property in slaves consists of a distributive share of an undivided estate composed of slaves, is not a slaveholder within the meaning of the statute, and is incompetent to sit as such on the trial of a slave for a capital offense. *Spence v. The State*, 17 Ala. 192.

6. On the trial of a person for an offense which may be punished capitally or by confinement in the penitentiary, it is a good cause of challenge by the State, that a juror has a fixed opinion against capital or penitentiary punishment. *Stalls v. The State*, 28 Ala. 25.

7. But if the juror is accepted by the State and by the prisoner, the right of challenge for this cause is lost, and cannot be again revived, by any act of either the court or the solicitor, against the objection of the prisoner, although the existence of the cause of challenge was unknown to the solicitor and court when he was

accepted; and if the court afterwards sets aside the juror for that cause, and the prisoner excepts to its decision, the error entitles him to a reversal of the judgment of conviction. *Ib.*

8. If the court, at the instance of the prisoner, improperly sets aside a competent juror, it is an error of which he cannot be heard to complain. *McAllister v. The State*, 17 Ala. 434.

(c) To Array.

9. Although the sickness of a juror's family, if of such a character as to demand his personal attention, is a sufficient excuse to authorize his discharge by the presiding judge; yet, where the record shows that, after the list of jurors summoned had been served upon the prisoner, and before the day appointed for his trial, two of their number were discharged by the judge, without the knowledge or consent of the prisoner or his counsel, and that the prisoner objected at the trial to this action of the court, the judgment will be reversed on error, although the bill of exceptions recites that they were discharged "on the ground of the sickness of their families." *Parsons v. The State*, 22 Ala. 50.

10. In such case, the prisoner may move for a *venire de novo;* but when the record shows that he objected at the trial to the action of the court, and that his objection was overruled, this is equivalent to deciding that there was no ground for a *venire de novo*, and the objection is available on error. *Ib.*

11. If a defendant in a capital case, not being in actual confinement, and having counsel entered on the docket, proceed to trial without objecting to the panel of jurors summoned, he cannot have the entire panel set aside, on account of the misnomer of one of the jurors, who was summoned but failed to attend; nor on account of the omission to insert a juror's christian name in full, when the initial letter is correctly stated. *Bill v. The State*, 29 Ala. 34.

2. *Discharge.*

12. When the judgment entry recites, that the jury, after deliberating a reasonable time, were unable to agree upon a verdict; that the court had disposed of the business before it; and that it was absolutely necessary that the term of the court should then be closed,—the jury may properly be discharged, and a mistrial entered.—*Powell v. The State*, 19 Ala. 577.

13. The unauthorized discharge of a jury in any criminal case, whether for a felony or a misdemeanor, is equivalent to an acquittal; but, since the court has power to discharge the jury in cases of necessity, as well as when the prisoner consents to it, a plea setting up the previous withdrawal of the cause from the jury after issue joined, "without the consent of the defendant, and against his objection," is defective on demurrer, because it does not negative the existence of any necessity for such withdrawal. *McCauley v. The State*, 26 Ala. 135.

3. *Misconduct.*

14. The misconduct of the jury, after they have retired to make up their verdict, is a matter to be considered by the court on a motion for a new trial, but is not a proper ground for an arrest of judgment. *Brister v. The State*, 26 Ala. 107; *Franklin v. The State*, 29 Ala. 14.

4. *Oath.*

15. Where the jury are sworn "well and truly to try the issue joined between the State of Alabama and the said defendant," while the record shows that the defendant had been arraigned on an indictment for murder, and had pleaded not guilty, the oath is a substantial compliance with the requirements of the statute, (Clay's Digest, 458, § 46.) *Crist v. The State*, 21 Ala. 137.

16. Where the minute entry contained the following recitals: "Thereupon came a jury," &c., "who were selected and empaneled well and truly to try the issue joined between the State of Alabama and the said defendant, and the trial of said cause commenced;" that the court adjourned in the evening, the trial not being finished, and re-assembled on the following morning; and that thereupon "came the defendant and his counsel, as also the counsel for the State, together with

the jury that had been empaneled and *sworn as aforesaid*, and the trial of said cause was resumed; and after the evidence of all the witnesses had been given in, and the argument of counsel had been heard, the jury received the charge of the court, and retired in charge of the sheriff to make up their verdict; and now return into court, and *on their oaths do say*," &c. *Held*, that the record sufficiently showed that the jury were sworn, and that it would be presumed on error that they were sworn before the testimony was heard. *Ib.*

5. *Polling.*

17. If the verdict of the jury is received, and read aloud in open court, in the absence of the prisoners, and the jury are then told by the court that they are discharged, it is within the power of the court to call them back before they have left the bar; and if they are immediately recalled, upon the discovery being made that the prisoners are not in court, and the papers in the cause are handed back to them, the prisoners are not deprived of their right to poll the jury, nor can they complain on error of this action of the court. *Brister v. The State*, 26 Ala. 107.

6. *Service of List on Prisoner.*

18. When a prisoner, indicted for a capital offense, is in actual confinement, he is entitled to a list of the jurors summoned for his trial, at least two days before the day appointed for his trial; but when he is not in actual confinement, and has counsel entered on the docket, the right to such list does not arise, in favor of either the prisoner or his counsel, except upon application by the latter. *Bill v. The State*, 29 Ala. 34.

19. *It seems*, that the list must be delivered to the prisoner himself, and not to his counsel; but if he objects to going to trial, on the ground that the list "had not been served on him or his counsel," and it is shown that the list was delivered to his counsel, there is no error in overruling the objection. *Brister v. The State*, 26 Ala. 107.

20. When the record shows that the prisoner was regularly arraigned, pleaded not guilty, and proceeded to trial without any objection, the objection cannot be raised on error, that the record fails to show that he was served with a list of the jury, two entire days before the trial, or that the *venire* was returned into court. *Ben v. The State*, 22 Ala. 9.

III. PROVINCE OF JURY.

21. The jury are not the constituted judges of the law in a criminal case, and consequently have not the legal right to disregard the instructions of the court. *Batre v. The State*, 18 Ala. 119; *Felix v. The State*, 18 Ala. 720.

22. A charge to the jury, "that if they found there was a conflict between the special charges, given by the court at the defendant's request, and the main charge, then the latter must prevail," is erroneous, because it refers to the jury the decision of a question of law. *Spivey v. The State*, 26 Ala. 90.

23. Under an indictment for murder, the question before the jury being the identity of the prisoner as the murderer, the State offered in evidence the register of the hotel in Mobile at which the murder was committed, and the registers of two other hotels, one in New Orleans, and the other in Montgomery, in each of which a different name was entered, and which were admitted without objection from the prisoner; accompanied by parol proof that the three names were written by the prisoner, and that he was known by them respectively in the three cities named. *Held*, that the jury, in determining whether the three names were written by the same person, might compare the handwriting. *Crist v. The State*, 21 Ala. 137.

24. Under an indictment for an assault with intent to murder, the actual existence of the alleged intent is a question of fact for the jury, in the decision of which they ought to act upon those presumptions which are recognized by the law, so far as they are applicable, and their own judgment and experience, as applied to all the circumstances in evidence. *Ogletree v. The State*, 28 Ala. 693.

25. In cases of conspiracy, it is a

question for the jury, whether the act was done in prosecution of the original unlawful purpose, or was independent of it, and without previous concert; and a charge which excludes this question from their consideration, is erroneous. *Frank v. The State*, 27 Ala. 37.

26. The distinction between the respective spheres of the court and jury, as to the competency and credibility of confessions, stated. *Brister v. The State*, 26 Ala. 107.

27. Under an indictment for retailing, the question, whether the defendant had knowledge of the intemperate habits of the person to whom he sold the liquor, should be left to the decision of the judge upon the evidence; and a charge which assumes that such knowledge is brought home to him, is erroneous. *Elam v. The State*, 25 Ala. 53.

28. The inference of one fact from another falls within the exclusive province of the jury. *Oliver v. The State*, 17 Ala. 587.

IV. RIGHT OF TRIAL BY JURY.

29. The constitutional guaranty of a trial by jury, in all criminal prosecutions, includes the right to have the deliberations of the jury continued, when once they have begun the trial and heard a portion of the evidence, until the occurrence of a sufficient legal reason for their discharge, and the chance of a verdict of acquittal at their hands during all that time. *McCauley v. The State*, 26 Ala. 135.

30. For this reason, the unauthorized discharge of the jury, in any criminal case, either for a felony or a misdemeanor, is equivalent to an acquittal; but, since the court has power to discharge the jury in cases of necessity, a plea of previous withdrawal of the cause from the jury after issue joined, "without the consent of defendant, and against his objection," is demurrable, unless it also negatives the existence of any necessity for such withdrawal. *Ib.*

31. The constitutional guaranty of a trial by jury, "in all prosecutions by indictment or information," does not apply, except in the specified cases, to offenses created by statute since the adoption of the constitution; but such offenses may be made triable before a justice of the peace, without indictment. *Tims v. The State*, 26 Ala. 165.

32. Nor does the provision contained in the 28th section of the 1st article, which declares that "the trial by jury shall remain inviolate," extend the right of a jury trial to cases which, at the time of the adoption of the constitution, were unknown both to the common and to the statute law. *Ib.*

33. The 3d section of the act of 1854, (Session Acts 1853–4, p. 247,) which makes defaulting overseers of roads triable before a justice of the peace, is not violative of the constitutional right to a trial by jury. *Ib.*

JUSTICE OF THE PEACE.

(Statutory Provisions: Code, §§3339–57, 3377–3417.)

I. JURISDICTION AND PROCEEDINGS.

1. *Appointment of Constable.*
2. *Arrest and Commitment for Indictable Offenses.*
3. *Bastardy.*
4. *Overseers of Roads.*
5. *Sureties of the Peace.*

II. APPEALS; PROCEEDINGS THEREON.

I. JURISDICTION AND PROCEEDINGS.

1. *Appointment of Constable.*

1. A justice has authority, in cases of emergency, to appoint a special constable (Code, § 712); and he must himself judge of the emergency. *Noles v. The State*, 24 Ala. 672.

2. *Arrest and Commitment for Indictable Offenses.*

2. Under the 33d section of the judiciary act of 1789, (U. S. Statutes at Large, vol. 1, p. 91,) a justice of the peace has authority to arrest and commit, or bail, as the case may require, persons charged with a violation of the criminal law of the United States. The authority thus conferred is not "judicial power," within the

meaning of the 3d article of the Federal constitution; nor does the exercise of it make him a Federal officer, within the meaning of the 2d clause of the 2d section of the 2d article. *Ex parte Gist*, 26 Ala. 156.

3. After a party has been arrested on a criminal charge, and has given bail for his appearance at court, the magistrate has no authority to cause him to be re-arrested for the same offense; on the supposition that his bail is insufficient. *Ingram v. The State*, 27 Ala. 17.

4. Technical accuracy is not required in the proceedings had before a justice preliminary to the issue of a warrant for a public offense: it is sufficient, if, giving to the language employed its usual and ordinary signification, it shows that an offense against the criminal law has been committed. *Crosby v. Hawthorn*, 25 Ala. 221.

5. A recognizance, to appear and answer an indictment to be preferred against the principal, need not set out the offense charged with the technical accuracy required in an indictment, but a substantial description will be sufficient. *The State v. Weaver*, 18 Ala. 293.

6. A charge of persuading and inducing a negro woman slave named Ann, the property of J. K., to leave her master's premises and employ, with a view to take said slave to another State and convert her to his own use," though not in the technical language of the statute, is a substantial description of an offense within its provisions. *Ib.*

7. An affidavit, charging the affiant's belief that the accused "was about to persuade, and trying to persuade, two of his (affiant's) hired slaves to leave his premises," though informal, is substantially sufficient to justify a warrant against the accused, under the statute forbidding any person "to aid any negro or other slave to run away or depart from his master's service." *Crosby v. Hawthorn*, 25 Ala. 221.

8. An affidavit, charging that certain goods, of the value of thirty dollars, the property of certain persons named, had been feloniously stolen by some person or persons unknown to affiant, and that from probable cause he suspected that said goods were concealed in a trunk belonging to the defendants, does not amount to a charge of larceny, but is equivalent to a charge of knowingly concealing stolen goods, although it may not contain the statutory requisites of that offense, and authorizes the justice to issue his warrant for the arrest of the parties. *Field v. Ireland*, 21 Ala. 240.

9. An affidavit, which charges that the accused "has feloniously taken, stolen, and carried away from the possession of C., where she was placed by affiant, a negro woman named Eliza, valued at $450, and that she is now in his possession," is sufficiently descriptive of an offense against the criminal laws of the country to justify the magistrate in causing the accused to be apprehended and brought before him. *Ewing v. Sanford*, 19 Ala. 605.

10. A justice has no jurisdiction to render judgment for costs against the defendant in the preliminary proceedings had before him on a charge of felony. *Sasnett v. Weathers*, 21 Ala. 673.

3. *Bastardy.*

11. A married woman cannot prefer a complaint under the statute. *Judge of Limestone County Court v. Kerr*, 27 Ala. 328.

12. A justice has no jurisdiction of a complaint under the bastardy act, unless the mother of the child is a single woman, and is pregnant, or has been delivered, in the county in which the justice acts; but, if the complaint does not state these facts, he may determine their existence from other evidence, and should then state them in his warrant, so that his jurisdiction may appear on the face of his proceedings. *Williams v. The State*, 29 Ala. 9.

13. The recitals in the justice's warrant, of the preliminary facts on which his jurisdiction depends, and which it is his duty to determine, are evidence that he did determine their existence: and his determination of their existence, in the absence of evidence showing it to be erroneous, is conclusive between the parties. *Ib.*

14. Although the statute (Code, § 3801) only requires the justice to return to the circuit court, by the first day of the term to which the defendant

is bound to appear, the bond and complaint; yet he may also return the warrant, when it recites the existence of the facts on which his jurisdiction depends, and is expressly referred to in the bond. *Ib.*

15. The bond taken from the defendant, conditioned for his appearance at court, is properly made payable to the governor for the time being, and his successors in office. *Chaudron v. Fitzpatrick*, 19 Ala. 649.

16. If the bond does not conform to the statute, in failing to require the defendant to appear "at the next term" after it is taken, it is void, and the proceedings dependent upon it are *coram non judice*. *Seale v. McClanahan*, 21 Ala. 345.

17. But if the defendant appears in court, and submits without objection to a trial on the merits, he cannot afterwards object to the regularity of the recognizance. *Wilson v. Judge of Pike County Covrt*, 18 Ala. 757.

3. *Overseers of Roads.*

18. The 3d section of the act of 1854, (Session Acts 1853–4, p. 247,) which makes defaulting overseers of roads triable before a justice of the peace, is not violative of the right to a trial by jury, as secured by the 10th and 28th sections of the 1st article of the constitution; but it is unconstitutional, because it makes no provision for an appeal, while the general law regulating appeals is inapplicable. *Tims v. The State*, 26 Ala. 165.

5. *Sureties of the Peace.*

19. An affidavit, made by a married woman, "that she is afraid her husband will beat, wound, maim, or do her some bodily hurt," is not sufficient to authorize the arrest of the husband (Code, §§ 3340–41); and if the warrant of the justice appears on its face to be predicated on such an affidavit, it is void, and furnishes no protection to the officer executing it. *Noles v. The State*, 24 Ala. 672.

II. APPEALS; PROCEEDINGS THEREON.

20. On appeal from the judgment of a justice, requiring the party to find sureties to keep the peace, the circuit court is required to proceed with the trial *de novo*, and may therefore refuse to look to the legal sufficiency of the warrant under which the party was arrested. *Tomlin v. The State*, 19 Ala. 9.

21. In such case, the court may render judgment for the costs against the sureties on the appeal bond. *Ib.*

22. A writ of error does not lie, to revise the action of the circuit court, in cases of appeal from the order of a justice, requiring sureties of the peace. *Ib.*

23. As to proceedings on appeal in bastardy cases, see title BASTARDY.

LARCENY.

(Statutory Provisions: Code, §§ 3127–30, 3141–50, 3170–81; Clay's Digest, 419–20, §§ 18, 25; *Ib.* 425, §§ 55–62.)

I. OF THE OFFENSE.

1. *As at Common Law.*
2. *Bringing Stolen Property into this State.*
3. *Embezzlement and Larceny from Storehouse.*
4. *Stealing or Inveigling Slaves.*

II. OF THE INDICTMENT.
III. OF THE PLEADINGS AND EVIDENCE.
IV. OF THE VERDICT AND JUDGMENT.

I. OF THE OFFENSE.

1. *As at Common Law.*

1. A taking was necessary to constitute larceny at common law. *Spivey v. The State*, 26 Ala. 90.

2. A bailee could not be guilty of larceny by a fraudulent conversion of the deposit. *Wright v. Lindsay*, 20 Ala. 428.

3. Unless he broke the bulk or package, or acquired possession of the goods with intent to steal them. *Spivey v. The State*, 26 Ala. 90.

4. A joint owner, or tenant in common, could not be guilty of larceny, by taking the property, and disposing of the whole of it to his own use; unless he took it out of the hands of a bailee, and the effect of his taking

would be to charge the bailee. *Kirksey v. Fike*, 29 Ala. 206.

5. An affidavit, charging that certain goods, of the value of thirty dollars, the property of certain persons named, had been feloniously stolen by some person or persons unknown to affiant, and that from probable cause he suspected that said goods were concealed in a trunk belonging to two persons named, does not amount to a charge of larceny against the owners of the trunk if they fail to account satisfactorily for their possession. *Field v. Ireland*, 21 Ala. 240.

2. *Bringing Stolen Property into this State.*

6. The offense denounced by the 25th section of the 4th chapter of the Penal Code of 1841, (Clay's Digest, 419, § 25,) is not the stealing of property in another State, but the bringing of the stolen property into this State; consequently, where the taking was under such circumstances as would constitute a larceny if done here, and the property is afterwards brought into this State, the offense is complete, without regard to the law of the State in which the property was taken. *Murray v. The State*, 18 Ala. 727.

7. The terms "steal" and "larceny," as used in the 25th section of said chapter, are technical, and do not include an offense which, if committed here, would not amount to larceny. *Spencer v. The State*, 20 Ala. 24.

3. *Embezzlement and Larceny from Storehouse.*

8. A mere servant, having charge of his employer's storehouse and goods, without any authority to sell, may be convicted of larceny from a storehouse, under section 3170 of the Code; but, if he was the agent of his employer, and as such had authority to furnish goods to customers, he can only be indicted and convicted under section 3143. If, however, he obtained his agency with the felonious intent of stealing the goods, he may be convicted under section 3170. *Case v. The State*, 26 Ala. 17.

4. *Stealing or Inveigling Slaves.*

9. A runaway slave may be the subject of larceny. *Murray v. The State*, 18 Ala. 727.

10. Where a person entices or inveigles a slave from the service of his master in another county, with intent to convert such slave to his own use, and thereby induces the slave to come into the county of his own residence, the offense is complete in the latter county, and he may be there indicted. *Crow v. The State*, 18 Ala. 541.

11. The 18th section of the 4th chapter of the Penal Code of 1841 (Clay's Digest, 419, § 18) has not an extra-territorial operation. *Spencer v. The State*, 20 Ala. 24.

12. A charge of "persuading and inducing a negro woman slave named Ann, the property of J. K., to leave her master's premises and employ, with a view to take said slave to another State and convert her to his own use," though not in the technical language of the statute, is a substantial description of an offense within its provisions. *The State v. Weaver*, 18 Ala. 293.

13. An affidavit, which charges that the accused "has feloniously taken, stolen, and carried away from the possession of C., where she was placed by affiant, a negro woman named Eliza, valued at $450, and that she is now in the possession of" the accused, is sufficiently descriptive of an offense against the criminal laws of the State, to justify the magistrate in causing the accused to be apprehended and brought before him. *Ewing v. Sanford*, 19 Ala. 605.

14. The statute respecting the stealing and inveigling of slaves (Code, § 3130) was intended to afford ampler protection and security to slave property than was afforded by the rules of the common law; and it makes several radical changes in the common law. A taking, which was necessary to constitute larceny at common law, is not an essential ingredient of all the offenses created by the statute; nor is a bailee, who, at common law, could not commit larceny as to the goods in his possession, unless he broke the bulk or package, or acquired his possession with intent to steal the goods, excepted

from its provisions. It includes "any person" who commits any one of the acts denounced by it, with the felonious intent indicated by its terms, and embraces the carrying away, inveigling, &c., of "any slave," whether in the actual possession of the owner, or of a bailee, or in the merely constructive possession of the owner. *Spivey v. The State*, 26 Ala. 90.

15. Conversion and carrying away, as the terms are used in the statute, are neither synonyms, nor convertible terms: a felonious carrying away of a slave necessarily includes a conversion, but a conversion does not necessarily include a carrying away; and a mere conversion, even with a criminal intent, is no felony, unless there is also a carrying away. *Ib.*

16. Where one man has carried away the slave of another, the question whether he is guilty of the statutory offense depends on the intent with which the act was done; and whenever there is not clear and satisfactory proof of the felonious intent, concurring with the act of carrying away, there is no ground for a conviction. *Ib.*

II. OF THE INDICTMENT.

17. An indictment for larceny of "bank-notes," *eo nomine*, which states their number, denomination, and value, is sufficient. *The State v. Williams*, 19 Ala. 15.

18. Where a slave is stolen in another State, and brought into this, the indictment should charge the offense in the same form as if it had been committed here: an indictment for larceny, framed as at common law, is not sufficient. *Ham v. The State*, 17 Ala. 188.

19. If goods, the separate property of the wife, are stolen from the possession of the husband, it is sufficient to describe them in the indictment as the goods of the husband. *Davis v. The State*, 17 Ala. 415.

20. Obtaining money by false pretenses, and larceny from the person, being offenses of the same general nature, and belonging to the same family of crimes, though punished with different degrees of severity, (Code, §§ 3142, 3172,) may properly be joined, in different counts, in the same indictment. *Johnson v. The State*, 29 Ala. 62.

III. OF THE PLEADINGS AND EVIDENCE.

21. Under an indictment for the stealing and inveigling of a slave, framed in conformity with the provisions of the 18th section of the 4th chapter of the Penal Code of 1841, proof that the slave was stolen by the accused in another State, and brought by him into this, is competent, and warrants a conviction. *Murray v. The State*, 18 Ala. 727.

22. The defendant's declarations, while in possession of the slave, "as to the manner in which he bought him," are not admissible evidence for him under an indictment for stealing the slave. *Spivey v. The State*, 26 Ala. 90.

23. But any evidence, tending to prove that he honestly believed that he had the right to carry away and sell the slave, is admissible for him; and therefore, where he had possession of the slave under a bailment from a former owner, since deceased, the declarations of the bailor, tending to show a sale to defendant, are competent evidence, although referring to a paper which is not produced, and whose absence is not accounted for. *Ib.*

IV. OF THE VERDICT AND JUDGMENT.

24. Under an indictment for larceny from a storehouse, (Code, §§ 3170, 3175,) if the jury assess the aggregate, instead of the separate value of the stolen articles, the irregularity is not available to the defendant, either in arrest of judgment or on error. *Case v. The State*, 26 Ala. 17.

LOTTERIES.

(Statutory Provisions: Code, § 3254; Appendix, p. 707, No. 73.)

I. OF THE OFFENSE.
II. OF THE INDICTMENT.
III. OF THE PLEADINGS AND EVIDENCE.

I. OF THE OFFENSE.

1. Any person who sells a lottery-ticket in this State, for or on behalf of any agent, conductor, manager or proprietor of any lottery which has been set up in this State, or in any other State or country, without the legislative authority of this State, and the prizes in which have not been actually distributed at the time of the sale of the ticket, is "concerned in carrying on such lottery," and is therefore guilty of a violation of the statute. *Salomon v. The State*, 27 Ala. 26.

2. A re-sale of a ticket in a lottery not authorized by the laws of this State, by a person totally disconnected from the lottery, is not a violation of the statute, when his previous purchase extinguished all interest and ownership of every agent, conductor, manager or proprietor in the ticket; otherwise, it is. *Salomon and Boullemet v. The State*, 28 Ala. 83.

II. OF THE INDICTMENT.

3. An indictment, in the form prescribed by the Code, which charges that the defendant "set up, or was concerned in setting up, or carrying on a lottery, without the legislative authority of this State," is sufficiently certain and definite. *Salomon v. The State*, 27 Ala. 26.

III. OF THE PLEADINGS AND EVIDENCE.

4. Where evidence is adduced by the prosecution, showing that the defendant had sold tickets in a foreign lottery under such circumstances as tend to prove that he was concerned in carrying on the lottery, if the defendant wishes to protect himself on the ground that he had previously purchased such tickets, and that he had no connection with the lottery, the *onus probandi* rests on him. *Salomon and Boullemet v. The State*, 28 Ala. 83.

5. It is the duty of the courts judicially to know the peculiar nature of lotteries, and the mode in which they are generally carried on. *Ib.*

6. Evidence showing that a bookseller in this State, through a series of months, kept on hand in his store tickets in a lottery not authorized by the legislative authority of this State, and at various times sold them; that he continued to keep such tickets on hand, after having been indicted and convicted for selling them, and instructed his clerk to inform persons who might apply for such tickets that he could not sell them, and refused as a general thing to sell them, but yet did sell to some persons,—tends to prove that he was concerned in carrying on such lottery. *Ib.*

7. A charge to the jury, that the case for the prosecution is made out by proof that the defendant "is the agent" of the persons carrying on any lottery not authorized by the legislative authority of this State, is erroneous, because it relieves the State from proving that the defendant, within one year before the finding of the indictment, and within the county in which it was preferred, had done an act which amounted to a violation of the statute. *Salomon v. The State*, 27 Ala. 26.

LUNACY.

See INSANITY.

LYNCHING.

See ASSAULT AND BATTERY, 3.

MANDAMUS.

1. This writ does not lie to control the discretion of the circuit court on an application for bail, where the facts of the case were fully examined by that court on a former application. *Ex parte Campbell*, 20 Ala. 89.

2. Nor on the refusal of a change of venue in a criminal case, the granting of which is discretionary with the primary court. *Ex parte Banks*, 28 Ala. 28.

3. When a judge of probate improperly refuses to transfer to the circuit court a cause in which he is personally interested, *mandamus* lies to compel its transfer. *The State, ex rel. Claunch, v. Castleberry*, 23 Ala. 85.

MANSLAUGHTER.

See HOMICIDE.

MARRIAGE.

See POLYGAMY.

MAYHEM.

(Statutory Provisions: Code, § 3105; Appendix, p. 700, No. 15.)

1. The statutory offense of mayhem may be committed on a slave. *Eskridge v. The State*, 25 Ala. 30.

2. Although the master may use such means, and so much force, to any extent, as will be effectual to subdue his slave, yet he may not deprive the slave of life or limb, unless impelled to such an act by necessity. *Ib.*

3. Where the indictment alleges that the slave who was maimed belonged to the defendant's wife, while the evidence shows that the defendant himself was the owner, the variance is fatal: the allegation of ownership, being a material part of the description of the slave, must be proved as laid. *Ib.*

4. Where the evidence showed that the defendant shot the slave in the leg, rendering its amputation necessary, and "that the shot seemed to go together, making a continuous wound;" the court charged the jury, "that, as there was no proof of the distance between the prisoner and the slave when the wound was inflicted, they might look to the character of the wound, for the purpose of determining whether he fired the gun with the view of striking and disabling the leg." *Held*, that the charge was not erroneous. *Ib.*

MULATTOES.

1. A mulatto is the offspring of a negress by a white man, or of a white woman by a negro; and there is nothing in the language of our statutes, or in the popular use of the term, to show that it is used in the legislation of this State otherwise than in its common acceptation. *Thurman v. The State*, 18 Ala. 276.

2. The offspring of a white mother by a mulatto father is not a mulatto, within the meaning of the statute prescribing the punishment of rape, &c., when committed by a "slave, free negro, or mulatto." *Ib.*

3. In an indictment for murder, the person slain being designated as a "free negro," proof that he was a mulatto does not sustain the allegation. *Felix v. The State*, 18 Ala. 720.

MURDER.

See HOMICIDE.

NEGROES.

See MULATTOES; SLAVES.

NEGRO-TRADERS.

1. Under an indictment against a negro-trader for exhibiting slaves for sale without a license, if the accused was engaged in the business of negro-trading, proof of one act, in pursuance of such business, within the county in which the indictment was found, is sufficient to support a conviction. *Chambers v. The State*, 26 Ala. 59.

2. After evidence has been offered of one particular act of sale within the time covered by the indictment, evidence of a previous act, more than twelve months before the finding of the indictment, is admissible for the State, as tending to show that the defendant was engaged in the business of negro-trading. *Ib.*

NEW TRIAL.

1. Misconduct of the jury, after they have retired to made up their verdict, is a good ground for a motion for a new trial; but the action of the court in refusing a new trial on that ground is not revisable on error. *Brister v. The State*, 26 Ala. 107; *Franklin v. The State*, 29 Ala. 14.

OBTAINING MONEY BY FALSE PRETENSES.

See FALSE PRETENSES.

OBSTRUCTING PUBLIC ROADS.

(Statutory Provisions : Code, § 1176; Clay's Digest, 508, § 7.)

1. In an indictment for obstructing a public road, it is not necessary that the width or grade of the road should be alleged. *Thompson v. The State*, 20 Ala. 54.

2. A count, which alleges that the defendant, "a certain impediment, to-wit, a large quantity of logs, sticks, brushwood and dirt, did erect and cause to be erected," &c., is good. *Ib.*

3. Where it is shown that the defendant had extended his fences across the road while a former order of court establishing it was in full force, (which order was afterwards quashed by the circuit court,) the record of the proceedings had under that order is irrelevant and inadmissible to show the defendant's motive in obstructing the road after it had been again established; and the admission of the record for that purpose is an error for which the judgment of conviction will be reversed. *Ib.*

4. When a person is indicted for obstructing a public road opened by an overseer *de facto*, he cannot defend his own misdemeanor under the overseer's supposed want of authority, although the obstruction consisted in putting up his own fences, which the overseer had pulled down. *Thompson v. The State*, 21 Ala. 48.

OVERSEERS OF ROADS.

1. The act of 1836 (Clay's Digest, 509, § 11) authorized the judge of the county court, and made it is his duty, to fill any vacancy that might occur in the office of overseer of roads, from whatever cause, after a regular appointment had been made; and this jurisdiction is now transferred to the probate court. *Thompson v. The State*, 21 Ala. 48.

2. It is no objection to the regularity of the appointment that it is tested by the probate judge as clerk. *Ib.*

3. The true distinction between those irregular appointments which are void, and those which are only voidable, seems to be this; where the authority, under which the officer assumes to act, shows on its face that it emanated from a power which had no right to confer it, it is void; but where it is regular on its face, and emanates from a source which has the legal or constitutional right to bestow it, and it requires a resort to facts not disclosed in the commission, or order of appointment, to show that the power of appointment was illegally or irregularly exercised, the appointment is voidable only. *Ib.*

4. Where an overseer has been regularly appointed by the commissioners' court, and another is afterwards appointed by the judge of probate as in case of a vacancy, the latter appointment being regular on its face, the person thereby appointed is *de facto* the overseer of the road, and his acts in opening it are valid as to the public and third persons, although the former is the overseer *de jure*. *Ib.*

5. The act of 1854, (Session Acts 1853–4, p. 247,) which makes defaulting overseers triable before a justice of the peace, is not violative of the constitutional right to a trial by jury; but it is unconstitutional, in that it makes no provision for an appeal, while the general law regulating appeals does not apply. *Tims v. The State*, 26 Ala. 165.

OWNERSHIP.

AVERMENT OF;
See Indictment, 28, 31–39, 43.

PROOF OF;
See Evidence, 39–40, 155–7.

PARDON.

1. Where a party is convicted of a misdemeanor, and sentenced to pay a certain fine, and to be imprisoned until it is discharged, a pardon by the gov-

ernor from the imprisonment is no release or satisfaction of the fine. *The State v. Richardson*, 18 Ala. 109.

PARTNERSHIP.

1. Although a retailing license may be granted to a partnership, upon each partner complying with the requisitions of the statute, as to certificate, oath, &c.; yet a license to one partner individually confers no authority upon his co-partners or the firm. *Long v. The State*, 27 Ala. 32.

PEACE-WARRANTS.

See SURETIES OF THE PEACE.

PEDDLERS.

(Statutory Provisions: Code, §§ 397–9; Session Acts cited *infra*.)

1. The 1st and 2d sections of the act of 1837, (Clay's Digest, 562, § 27,) relative to the licensing of peddlers and the penalty for peddling without a license, is repealed by the revenue act of 1848.—(Session Acts 1847–8, p. 32, § 98.) *Hirschfelder v. The State*, 18 Ala. 112.

2. The penalties prescribed by the act of 1848 are not repealed by the act of 1850.—Session Acts 1849–50, p. 3.) *Sterne v. The State*, 20 Ala. 43.

3. The act of 1848 having prescribed a specific and different penalty for each of the several classes of peddlers who may violate its provisions, an indictment under it must designate the class to which the accused belongs. *Hirschfelder v. The State*, 18 Ala. 112.

4. The gist of the offense is the being engaged in the business of hawking and peddling; therefore, an indictment which charges that the defendant "was engaged in the business of hawking and peddling," but does not allege the facts which constitute the hawking and peddling, is sufficient. *Sterne v. The State*, 20 Ala. 43.

PERJURY.

(Statutory Provisions: Code, §§ 3197–3200, 3372; Clay's Digest, 427, §§ 1–3; *Ib.* 444, §§ 35, 38.)

1. The penalty of perjury, as prescribed by the act of 1839. is changed by the act of 1841. *DeBernie v. The State*, 19 Ala. 23.

2. In an indictment charging the prisoner with having taken a false oath to procure his discharge from custody under a *ca. sa.*, an assignment which alleges that, at the time he took the oath, he had moneys whereby to satisfy the debt for which he was arrested, is sufficient. *Ib.*

3. The indictment is not vitiated because some of the assignments are bad: proof of any one good assignment will support a conviction. *Ib.*

PLEADING.

I. CERTAINTY.

1. *In Description of Offense.*
2. *In other Particulars.*

II. DEMURRER.
III. DUPLICITY.
IV. JOINDER AND MISJOINDER.

1. *Of Offenses.*
2. *Of Persons.*

V. OYER.
VI. PLEAS.

1. *To Jurisdiction.*
2. *In Abatement.*
3. *In Bar.*

VII. SURPLUSAGE.
VIII. TECHNICAL TERMS.
IX. TIME AND PLACE, STATEMENT OF.
X. VARIANCE.
XI. VIDELICET.

I. CERTAINTY.

1. *In Description of Offense.*

1. The forms of indictment prescribed by the Code have been held sufficient, in the following cases: For

murder, *Noles v. The State*, 24 Ala. 672. For retailing, *Elam v. The State*, 25 Ala. 53. For assault and battery, *Thompson v. The State*, 25 Ala. 41. For gaming, *Burdine v. The State*, 25 Ala. 60; *Sherrod v. The State*, 25 Ala. 78. For carrying on lottery, *Salomon v. The State*, 27 Ala. 26.

2. Where the offense charged is complicated, consisting of a repetition of acts, or where it includes a repetition of acts, it is not necessary to set them out in the indictment. *Sterne v. The State*, 20 Ala. 43; *Lawson and Swinney v. The State*, 20 Ala. 65.

3. When a statute creates a new offense, unknown to the common law, and describes its constituents, the offense may be charged in the words of the statute. *Lodano v. The State*, 25 Ala. 64; *Smith v. The State*, 22 Ala. 54; *Clark v. The State*, 19 Ala. 552; *Beasley v. The State*, 18 Ala. 535; *Batre v. The State*, 18 Ala. 119; *Eubanks v. The State*, 17 Ala. 181.

4. But, if the statute merely designates the offense, and does not in express terms prescribe its constituents, it is not sufficient to pursue literally the words of the statute. *Anthony v. The State*. 29 Ala. 27; *Ben v. The State*, 22 Ala. 9; *Clark v. The State*, 19 Ala. 552; *Trexler v. The State*, 19 Ala. 21; *Beasley v. The State*, 18 Ala. 535; *Batre v. The State*, 18 Ala. 119.

5. Where a statute creates an offense, and describes its ingredients, an indictment under it must conform to the description thus given. *Skains and Lewis v. The State*, 21 Ala. 218; *Pettibone v. The State*, 19 Ala. 586; *Eubanks v. The State*, 17 Ala. 181.

6. But it is not necessary to pursue the literal words of the statute, if others of equivalent import are used. *Ben v. The State*, 22 Ala. 9; *Ward v. The State*, 22 Ala. 16.

7. When a specific term in a statute is followed by one of more comprehensive meaning, an indictment for the offense designated by the more specific term must be equally specific in charging it. *Bush v. The State*, 18 Ala. 415.

8. Where a statute prescribes a specific and different penalty for each of the several classes of persons who may violate its provisions, an indictment under it must designate the class to which the defendant belongs. *Hirschfelder v. The State*, 18 Ala. 112.

9. If the statute contains an exception, or provisio, but not in the same clause that creates the offense, it is not necessary that the indictment should negative the proviso. *Clark v. The State*, 19 Ala. 552.

10. An indictment for an assault with intent to murder must state the facts which constitute the assault. *Beasley v. The State*, 18 Ala. 535; *Shaw v. The State*, 18 Ala. 547; *Trexler v. The State*, 19 Ala. 21. (But see the form prescribed by the Code, p. 700, No. 16.)

11. It is not necessary, in such an indictment, to allege that the person assaulted was within the distance to which the gun would carry; nor that the weapon charged to have been used was a deadly weapon. *Shaw v. The State*, 18 Ala. 547.

12. An indictment, which charges that the defendants, a man and a woman, "did live together in fornication," is sufficient. *Lawson and Swinney v. The State*, 20 Ala. 65.

13. An indictment for the willful burning of a house insured against fire, with intent to charge or injure the insurer, must allege that the house was "at the time insured against fire." *Martin and Flinn v. The State*, 29 Ala. 30.

14. An indictment for playing cards "at a public place" is sufficiently definite. *Roquemore v. The State*, 19 Ala. 528; *Flake v. The State*, 19 Ala. 551.

15. An indictment for betting at a game of cards, "called faro," is sufficient. *Ward v. The State*, 22 Ala. 16; *Swallow v. The State*, 22 Ala. 20.

16. An indictment for betting "at a game of pool at a house where spirituous liquors were retailed," or (as alleged in another count) "at a public place enumerated in section 3243 of the Code," is sufficient under the Code. *Rodgers v. The State*, 26 Ala. 76.

17. An indictment under the revenue act of 1848, for keeping a ten-pin alley without a license, should allege that the defendant "was engaged in the business ot keeping," &c.: an averment that he "did keep" is not sufficient. *Eubanks v. The State*, 17 Ala. 181.

18. An indictment under the revenue

act of 1850, for keeping a hotel without a license, should allege that the defendant "was engaged in the business of keeping," &c.: an allegation that he "did keep" is not sufficient. *Pettibone v. The State*, 19 Ala. 586.

19. An indictment for larceny of "bank-notes," *eo nomine*, which states their number, denomination, and value, is sufficient. *Williams v. The State*, 19 Ala. 15.

20. An indictment for perjury, charging the defendant with having taken a false oath to procure his discharge from custody under a bail-writ, and alleging that, at the time he took the oath, he had moneys whereby to satisfy the debt for which he was arrested, is sufficient. *DeBernie v. The State*, 19 Ala. 23.

21. In an indictment, under the Code, which charges an actual poisoning, it is not necessary to allege that the substance administered was a poison; but an indictment for an attempt to poison must contain that allegation. *Anthony v. The State*, 29 Ala. 27.

22. An indictment, which alleges that the prisoner, "in and upon one H. S., (she, the said H. S., then and there being a female child under the age of ten years,) feloniously did make an assault, and her, the said H. S., then and there feloniously did abuse, *in the attempt carnally know*," is fatally defective, in not specifying with sufficient certainty and precision the person upon whom the attempt was made. *Nugent v. The State*, 19 Ala. 540.

23. In an indictment for obstructing a public road, a count, alleging that the defendant, "a certain impediment, to-wit, a large quantity of logs, sticks, brushwood, and dirt, did erect, and cause to be erected," &c., is good. *Thompson v. The State*, 20 Ala. 54.

24. In proceedings for the recovery of fines and penalties for the violation of municipal ordinances, which are *quasi* criminal in their character, the same nicety and particularity are not required in the statement of the offense, or cause of action, as in cases commenced in the circuit court; but the statement must show a substantial cause of action, and set forth the provisions of the ordinance alleged to have been violated. *Ganaway & Kimball v. Mayor and Aldermen of Mobile*, 21 Ala. 577.

2. *In other Particulars.*

25. The law knows but one christian name; therefore, the insertion or omission of the initial letter of a middle name is immaterial. *Edmundson v. The State*, 17 Ala. 179.

26. The addition of the county of the defendant's residence is mere matter of form; its omission, therefore, does not affect the validity of an indictment. *Morgan v. The State*, 19 Ala. 556.

27. An indictment against a slave, for murder, must allege the name of his owner: an averment that he is the property of "the late W. C.," is not sufficient. *Pleasant v. The State*, 17 Ala. 190.

28. In an indictment for trading with a slave, under the act of 1850, (Session Acts 1849–50, p. 51,) it is not necessary to aver or prove the name of the master, owner, or overseer of the slave, or to negative their assent to such trading. *Hirschfelder v. The State*, 19 Ala. 534.

29. An indictment, which charges that the defendant sold, &c., "to a certain slave, whose name is to the jury unknown," is demurrable for uncertainty in the description, both under the general statute, and under the act of 1850. *Francois v. The State*, 20 Ala. 83.

30. So, in a *quasi* criminal proceeding for the violation of a municipal ordinance against trading with slaves, if the statement does not aver the name of the slave, or of his owner or employer, it is fatally defective on demurrer. *Brown v. Mayor of Mobile*, 23 Ala. 722.

31. An indictment, under the Code, for trading with "a slave, the property of B. S. B., whose name is to the jury unknown," is fatally defective. *Starr v. The State*, 25 Ala. 38.

32. Descriptive averments, even when they might have been omitted without affecting the validity of the indictment, are material, and must be proved as laid. *Eskridge v. The State*, 25 Ala. 30; *Felix v. The State*, 18 Ala. 720; *Lindsay v. The State*, 19 Ala. 560.

33. An indictment for arson, under

the Code, as at common law, must aver the ownership of the house burned. *Martha v. The State*, 26 Ala. 72; *Martin and Flinn v. The State*, 28 Ala. 71.

34. In an indictment for larceny, if the goods were stolen from the possession of the husband, though they were the separate property of the wife, they may be described as the goods of the husband. *Davis v. The State*, 17 Ala. 415.

II. DEMURRERS.

35. A demurrer to an indictment for forgery, on account of a variance in the description of the forged instrument, cannot be considered by the court, unless oyer is craved. *Butler v. The State*, 22 Ala. 43.

36. As a general rule, when an indictment is defective on demurrer, advantage may also be taken of the defect in arrest of judgment. *Francois v. The State*, 20 Ala. 83.

37. In a *quasi* criminal proceeding for the violation of a municipal ordinance, removed by appeal into the circuit court, if the statement does not show a cause of action, the defendant may demur. *Ganaway & Kimball v. Mayor and Aldermen of Mobile*, 21 Ala. 577.

As to demurrers to evidence, see EVIDENCE, III.

III. DUPLICITY.

38. In an indictment against a slave, for attempting to poison white persons, a count which charges that the prisoner "did administer to, and cause to be administered to and taken by" three certain free white persons, a large quantity of arsenic, &c., is not demurrable for duplicity. *Ben v. The State*, 22 Ala. 9.

39. When two commit a joint assault with intent to murder,—one with a knife, and the other with a gun,—a count which charges them jointly is not objectionable for duplicity. *Shaw v. The State*, 18 Ala. 547.

40. Betting, and being concerned in betting, at a faro-bank, are different grades of the same offense, punished with the same penalty, and may be charged in one count. *Ward v. The State*, 22 Ala. 16; *Swallow v. The State*, 22 Ala. 20.

IV. JOINDER AND MISJOINDER.

1. *Of Offenses.*

41. An indictment for gaming, in the general form prescribed by the Code, which charges, in the alternative, all the separate offenses enumerated in the statute, is authorized by law, (Code, § 3506,) and is not unconstitutional. *Burdine v. The State*, 25 Ala. 60; *Sherrod v. The State*, 25 Ala. 78.

42. An indictment for retailing, in the general form allowed by the Code, does not include more than one offense. *Elam v. The State*, 26 Ala. 48.

43. Offenses of the same general nature, belonging to the same family of crimes, and punishable in the same manner, though with different degrees of severity, may be joined, in different counts, in the same indictment; *e. g.*, larceny from the person, and obtaining money under false pretenses. *Johnson v. The State*, 29 Ala. 62.

2. *Of Persons.*

44. Two or more persons may be jointly indicted for betting, or being concerned in betting, at a faro-bank; and if the evidence shows that only one of them was engaged in the betting, he may be convicted alone. *Ward v. The State*, 22 Ala. 16; *Swallow v. The State*, 22 Ala. 20.

45. An indictment which, upon its face, charges several persons for several offenses committed by them independently of each other, is fatally defective; and if the indictment is unobjectionable on its face, no conviction can be had under it on proof of facts which, if stated in it, would make it fatally defective. *Elliott v. The State*, 26 Ala. 78.

46. Therefore, if A and B are jointly indicted and tried for gaming, no conviction can be had, on proof that A and others played at one time when B was not present, and that B and others played at another time when A was not present. *Ib.*

V. OYER.

47. A demurrer to an indictment for forgery, on account of a variance between the instrument described in

the indictment and that offered in evidence, cannot be considered by the court, unless oyer is craved. *Butler v. The State*, 22 Ala. 43.

VI. PLEAS.

1. *To Jurisdiction.*

48. The competency of the presiding judge to hold the court cannot be questioned by plea. *Spradling and Thomas v. The State*, 17 Ala. 440.

2. *In Abatement.*

49. The variance between the names *Edmindson* and *Edmundson* is too imperceptible to support a plea in abatement. *Edmundson v. The State*, 17 Ala. 179.

50. The law knows but one christian name; the insertion or omission of the initial letter of a middle name is therefore immaterial. *Ib.*

51. An objection to the grand jury by which the indictment was found, can only be taken by plea in abatement. *Nugent v. The State*, 19 Ala. 540; *Morgan v. The State*, 19 Ala. 556.

3. *In Bar.*

52. A special plea of *autrefois acquit*, averring a previous withdrawal of the cause from the jury after issue joined, "without the consent of the defendant, and against his objection," is demurrable, unless it also negatives the existence of any necessity for such withdrawal. *McCauley v. The State*, 26 Ala. 165.

53. Under an indictment for arson, if the proof of the ownership of the property varies from the allegation, and a *nolle-pros.* is thereupon entered, this is no bar to a subsequent prosecution under a second indictment, in which the ownership is laid in a different person; and if the second indictment contains several counts, in one of which the allegation of ownership is the same as in the first indictment, and the prisoner pleads to the whole indictment *autrefois acquit* and discontinuance, the record of the former prosecution does not sustain either plea. *Martha v. The State*, 26 Ala. 72.

54. A release, given by the mother of a bastard whilst under age, and afterwards repudiated, is no bar to a subsequent statutory proceeding instituted by her against the putative father of the child. *Wilson v. Judge of Pike County Court*, 18 Ala. 757.

VII. SURPLUSAGE.

55. The useless repetition of words in an indictment does not vitiate it: the superadded words may be rejected as surplusage. *Lodano v. The State*, 25 Ala. 64.

VIII. TECHNICAL TERMS.

56. In indictments for offenses which were misdemeanors at common law, but which are made felonies by our Penal Code, the statute (Clay's Digest, 442, § 26) dispenses with the necessity of averring that the act was feloniously done. *Butler v. The State*, 22 Ala. 43; *Beasley v. The State*, 18 Ala. 535.

IX. TIME AND PLACE, STATEMENT OF.

57. An indictment is fatally defective, on demurrer, if it does not state the time when the offense was committed. *Roberts v. The State*, 19 Ala. 526.

58. But under the Code, it is sufficient to charge that the offense was committed before the finding of the indictment, without naming a day certain. *Thompson v. The State*, 25 Ala. 41.

59. When the time of the commission of the offense is laid under a *videlicet*, the prosecutor is not held to proof of it as laid, but may prove its commission at any time before the finding of the indictment, within the period prescribed as a bar. *McDade v. The State*, 20 Ala. 81.

60. An indictment for resisting process, in which the time of the commission of the offense is laid after the return day of the process, is fatally defective on error. *McGehee v. The State*, 26 Ala. 154.

61. An indictment for counterfeiting, which does not state the time when the coin counterfeited was current in this State, is fatally defective. *Nicholson v. The State*, 18 Ala. 529.

62. It was competent for the legis-

lature, by statute, to dispense with the averment, in an indictment for murder, that the offense was committed within the body of the county in which the indictment was found, and to require that fact to be shown by the evidence. *Noles v. The State*, 24 Ala. 672.

63. Where an indictment was entitled in the margin, "The State of Alabama, *Butler* county," and recited that "the grand jurors of the county of *Buter* upon their oaths present," &c.; while the name of the county was not again repeated, and the offense was charged to have been committed in the county aforesaid,"—*held*, that the venue was sufficiently laid. *Reeves v. The State*, 20 Ala. 33.

X. VARIANCE.

64. The variance between the names *Isaac L. Edmindson* and *Isaac Edmundson*, is not sufficient to support a plea in abatement. *Edmundson v. The State*, 17 Ala. 179.

65. Under an indictment for an assault and battery, a variance between the averment and proof, as to the name of the person assaulted, is immaterial, when the names may be sounded alike without doing any violence to the letters found in the variant orthography; as in the names *Chambles* and *Chambless*. *Ward v. The State*, 28 Ala. 53.

66. In an indictment for murder, the designation of the person slain as "*a free negro*," though an unnecessary allegation, is matter of description, and must be proved as laid; and proof that he was a *mulatto* will not sustain the allegation. *Felix v. The State*, 18 Ala. 720.

67. In an indictment for the mayhem of a slave, the allegation of ownership, being a material part of the description of the slave, must be proved as laid: if the indictment alleges that the slave belonged to the prisoner's wife, while the evidence shows that the prisoner himself was the owner, the variance is fatal. *Eskridge v. The State*, 25 Ala. 30.

68. If an indictment for larceny describes the stolen goods as the property of the husband, while the proof shows that they were the separate property of the wife, but were stolen from the possession of the husband, there is no variance. *Davis v. The State*, 17 Ala. 415.

69. An indictment for conspiracy to commit a burglary, with intent to steal the goods of S., is supported by proof that the goods belonged to S. and his dormant partner. *Spradling & Thomas v. The State*, 17 Ala, 440.

70. If an indictment for murder charges that A gave the mortal blow, and that B and C were present, aiding and abetting; while the evidence shows that B struck the blow, and that A and C were present, aiding and abetting,—this is not a material variance, for the blow is adjudged in law to be the stroke of every one of them. *Brister v. The State*, 26 Ala. 107.

71. Under an indictment for an assault on A, with intent to murder him, the prisoner's threats, made several hours "previous to the fight," that he would kill B, are not competent evidence. *Ogletree v. The State*, 28 Ala. 693.

72. Under an indictment for forgery, it is not necessary that there should be a literal correspondence between the instrument described in the indictment, and that offered in evidence: if the correspondence is such as will prevent the prisoner, should he be acquitted, from being a second time put in jeopardy for the same offense, or, should he be convicted, from being a second time punished, it is sufficient. *Butler v. The State*, 22 Ala. 43.

73. Under an indictment for retailing, in the general form allowed by the Code (§ 1059), although the defendant cannot require the prosecuting attorney to elect and state, before any evidence is offered, for which one of the different varieties of retailing he intends to proceed; yet, when the State has once made its election, by offering evidence of one particular offense, it will be held to that election through all the future proceedings, and will not be allowed, on a second trial under the same indictment, to offer evidence of a different offense. *Elam v. The State*, 26 Ala. 48.

74. The defendants cannot be convicted of playing cards "at a public place," when the evidence shows that the playing was "at a public house." *Windham v. The State*, 26 Ala. 69.

75. Under an indictment for playing cards "at a house then and there for retailing spirituous liquors," no conviction can be had, on proof that the playing was "near a house formerly used for retailing, but which was not then so used." *Logan v. The State*, 24 Ala. 182.

76. If the indictment charges that the playing was "at a public place," proof of a playing in "a public highway" does not support the charge, nor authorize a conviction. *Bush v. The State*, 18 Ala. 415.

VII. VIDELICET.

77. When the time of the commission of the offense is alleged under a *videlicet*, the prosecutor is not held to proof of it as laid; but may prove its commission at any time before the finding of the indictment, within the period prescribed as a bar. *McDade v. The State*, 20 Ala. 81.

78. But an indictment for selling whiskey to a slave, although laid under a *videlicet*, cannot be supported by proof of the sale of any other kind of liquor. *Lindsay v. The State*, 19 Ala. 560.

POISONING.

(Statutory Provisions: Code, §§ 3080, 3106, 3311-12; Clay's Digest, 412, §1; *Ib.* 416, § 30; *Ib.* 472, §§ 2, 4.)

1. Under the Code, an indictment which charges an actual poisoning, need not allege that the substance administered was a poison; but such an allegation is necessary in an indictment for an attempt to poison. *Anthony v. The State*, 29 Ala. 27.

2. In an indictment against a slave for an attempt to poison white persons, a count which charges that the prisoner "did administer to, and cause to be administered to, and taken by" three certain white persons, a large quantity of arsenic, &c., is not demurrable for duplicity. *Ben v. The State*, 22 Ala. 9.

3. If the indictment alleges that the prisoner "did administer to, and cause to be administered to, and taken by," &c., a certain deadly poison, "with the intent then and there feloniously to kill and murder" the persons named, it sufficiently charges a violation of the statute, although not using the same words. *Ib.*

4. Under an indictment for murder committed by poison, if the verdict does not ascertain the degree of the murder, no judgment of conviction can be pronounced upon it. *Johnson v. The State*, 17 Ala. 618.

POLYGAMY.

(Statutory Provisions: Code, §§ 3232-3; Clay's Digest, 432, §§ 4-5.)

1. A decree of divorce obtained in Arkansas, by a person domiciled in Alabama, would be void, and would constitute no defense to a prosecution here for polygamy, if the decree was procured by fraud; or, if the defendant did not go to Arkansas *animo manendi;* or, if he went thither merely for the purpose of obtaining a divorce, and with the intention of remaining no longer than was necessary to accomplish that purpose. *Thompson v. State*, 28 Ala. 12.

2. Under the statutes of Arkansas, as shown in evidence in this case, the fact that the cause of divorce commenced and was completed elsewhere, would not render void a decree there obtained, by a husband who had resided there an entire year. *Ib.*

3. The English doctrine, that the dissolubility of the marriage contract depends upon the law of the country in which it was solemnized, is founded on the doctrine of perpetual allegiance, is therefore inconsistent with our institutions, and is here repudiated. *Ib.*

4. The husband has a right to emigrate and acquire a new domicile, and thereby acquires, as a consequence, the right of having his matrimonial *status* controlled by the laws and judicial tribunals of the country of his new domicile, although his wife may remain in the State which he left. *Ib.*

5. The general principle, that foreign judgments and decrees may be avoided when the court had no jurisdiction of the defendant's person and there was no appearance, does not apply to decrees of divorce, rendered on publication against non resident defendants; but the validity of such judg-

ments and decrees depends on the statutes of the State in which they were rendered, and necessarily results from the existence of the jurisdiction. *Ib.*

PRACTICE.

(All the decisions which might have been grouped under this general head, may be found under other more definite titles, to which they have been thought more appropriately to belong.)

PRESUMPTIONS.

See EVIDENCE, XI.

QUO WARRANTO.

1. When no object can be gained, in reference either to the public or to individuals, by a proceeding *in quo warranto*, the cause will not be permitted to progress, *The State v. Centreville Bridge Co.*, 18 Ala. 678.

RAPE.

(Statutory Provisions: Code, §§ 3090, 3307; Clay's Digest, 414, §§ 14, 16; *Ib.* 473, § 3.)

I. OF THE OFFENSE.
II. OF THE INDICTMENT.
III. OF THE EVIDENCE.

I. OF THE OFFENSE.

1. The offspring of a white mother and a mulatto father is not a mulatto, within the meaning of the statute prescribing the punishment for rape, when committed by a "slave, free negro, or mulatto." *Thurman v. The State*, 18 Ala. 276.

II. OF THE INDICTMENT.

2. An indictment, alleging "that J. N., late of said county, in and upon one H. S. (she, the said H. S., then and there being a female child under the age of ten years) feloniously did make an assault, and her, the said H. S., then and there feloniously did abuse *in the attempt carnally know*," is fatally defective, in not specifying with sufficient certainty and precision the person upon whom the attempt was made. *Nugent v. The State*, 19 Ala. 540.

III. OF THE EVIDENCE.

3. Under an indictment for an attempt to commit a rape on a child under ten years of age, it having been shown by the prosecution that the private parts of the child were bruised and inflamed, and infected with a venereal disease, proof of sexual intercourse between her and other persons than the prisoner, before and near the time of the commission of the alleged offense, is admissible for the prisoner, as tending to weaken the force of these circumstances as corroborating evidence. *Nugent v. The State*, 18 Ala. 521.

4. That the prisoner, at the time of the commission of the alleged offense, was in a greatly debilitated condition from a previous debauch, is a circumstance which, however light, is proper for the consideration of the jury, in ascertaining whether he was physically capable of committing the crime. *Ib.*

RECEIVING STOLEN GOODS.

(Statutory Provisions: Code, §§ 3177–8; Clay's Digest, 425–6, §§ 60, 61, 63.)

1. An affidavit, charging that certain goods, of the value of thirty dollars, the property of certain persons named, had been feloniously stolen by some person or persons unknown to the affiant, and that from probable cause he suspected that said goods were concealed in a trunk belonging to the accused and another person, is equivalent to a charge of knowingly concealing stolen goods, and authorizes the justice to issue his warrant for the arrest of the parties. *Field v. Ireland*, 21 Ala. 240.

REFUSING TO TESTIFY BEFORE GRAND JURY.

(Statutory Provisions : Code, §§ 3247-8 ; Clay's Digest, 432, § 10.)

1. An indictment, alleging the issue of a summons by the solicitor, requiring the defendant to appear before the grand jury and give evidence of any gaming, its service by the sheriff, the appearance of the defendant in obedience to its mandate, and his refusal to testify when there, is good. *Batre v. The State*, 18 Ala. 119.

2. Issue being joined on the plea of not guilty, the defendant cannot be allowed to give evidence in his own favor : the practice of permitting defaulting witnesses, on application to the court, to excuse themselves by their own testimony, furnishes no authority for such procedure. *Ib.*

RESISTING PROCESS.

(Statutory Provisions: Code, § 3218; Clay's Digest, 430, § 20.)

1. Under an indictment for resisting process, if the time of the commission of the offense is shown by the indictment itself to have been after the return day of the process, it is fatally defective on error. *McGehee v. The State*, 26 Ala. 154.

RETAILING.

(Statutory Provisions : Code, §§ 1055-61, 3280-84 ; Clay's Digest, 554-7, §§ 1 to 28.)

I. OF THE OFFENSE ; AND HEREIN OF THE LICENSE.
II. OF THE INDICTMENT.
III. OF THE PLEADINGS AND EVIDENCE.

I. OF THE OFFENSE ; AND HEREIN OF THE LICENSE.

1. The legislature is not restricted by the constitution from imposing upon those who are allowed to retail spirituous liquors such conditions, both as regards the persons to whom, and the quantities in which they may sell, as may be deemed proper and requisite for the good of the community. *Lodano v. The State*, 25 Ala. 64.

2. The several statutory provisions, authorizing licenses to retail, are not merely revenue laws : the payment of the prescribed tax is only one of the pre-requisites to obtaining a license ; and the other provisions, as to producing certificate, giving bond, and taking the oath prescribed, show that the legislature considered it a dangerous privilege, against the abuse of which these provisions were intended to guard. *Long v. The State*, 27 Ala. 32.

2. A license may be granted to a partnership, upon each partner complying with the requisitions of the statute, as to certificate, oath, &c. ; but a license to one partner individually confers no authority on his co-partner or the firm. *Ib.*

4. Where the charter of an incorporated town gave power to its municipal authorities "to ordain all such ordinances and resolutions, and to make all such regulations, as may by them be deemed necessary for the control of the retailing of spirituous liquors within said town ; to grant licenses for retailing of spirituous liquors within said town, upon such sum to be paid therefor by each retailer, not to exceed $2,000 *per annum*, as said intendant and council may order ; to restrain and prohibit them, when deemed a nuisance ; and, in general, to adopt such a system of police and municipal regulation, in regard to the traffic in ardent spirits, as shall be deemed by them most conducive to public order, morality, and policy, in reference to the black or colored population,"—*held*, that the term "retailing," construed with reference to the general policy of the law in relation to the sale of ardent spirits, meant selling in small quantities ; and that, though the charter authorized the entire prohibition of retailing, yet an ordinance which prohibited, under a penalty, the sale of spirituous liquors in *less quantities than twenty gallons*, without a license, was unauthorized and void. *Harris v. Intendant of Livingston*, 28 Ala. 577.

5. The act of December 16th, 1851, "to regulate the sale of spirituous li-

quors in the town of Elyton," being a local act inconsistent with the provisions of the Code, is expressly continued in force by section 10 of the Code; and since the two statutes cannot operate together within the same territorial limits, the town of Elyton, with the circumjacent territory within two miles thereof, is not governed by the provisions of the Code concerning retailing. *Camp v. The State*, 27 Ala. 53.

6. Selling liquor to a person of known intemperate habits, in quantities greater than a quart, is not a violation of the statute. *Maxwell v. The State*, 27 Ala. 660.

7. If the overseer of a slave goes to a house where spirituous liquors are retailed, and tells the proprietor that he will send his slave for a specified quantity of a particular liquor, and then goes off and sends the slave with a jug for it; and thereupon the proprietor puts the liquor in the jug, and delivers it to the slave,—this is not a sale, gift, or delivery to the slave, within the meaning of section 3283 of the Code, but is lawful without an order in writing. *Powell v. The State*, 27 Ala. 51.

8. A free person of color, whose mother was an inhabitant of Mobile when that territory was ceded by Spain to the United States, is within the act of 1852 (Session Acts 1851–2, p. 80) prohibiting the sale of spirituous liquors to free persons of color. *Lodano v. The State*, 25 Ala. 64.

9. An administratrix, who has possession of a slave belonging to her intestate's estate, is his mistress, within the purview of the statute which requires a written order signed by "the master or overseer." *Boltze v. The State*, 24 Ala. 89.

10. A written order, signed by a person who is neither the master nor overseer of the slave to whom the liquor is sold, is no protection to the seller. *Ib.*

II. Of the Indictment.

11. An indictment under the Code, charging that the defendant, before the finding of the indictment, "sold spirituous liquor, without a license, and contrary to law," is sufficient. *Elam v. The State*, 25 Ala. 53.

12. But, when the State proceeds for a violation of the special act regulating the sale of spirituous liquors in the town of Elyton, this general form is not sufficient. *Camp v. The State*, 27 Ala. 53.

13. An indictment under the act of 1850, charging that the defendant sold spirituous liquors to a slave, "without the consent of the master, overseer, or agent of such slave," is fatally defective. *Agee v. The State*, 25 Ala. 67.

14. But an indictment under said act, alleging that the defendant sold "to one Henry, a slave, the property of one M. H., a certain commodity, to-wit, one gallon of whiskey, without the consent of the master, owner, or overseer of said slave, either verbally or in writing, expressing the article permitted to be sold, being first had and obtained," is good. *Lindsay v. The State*, 19 Ala. 560.

15. An indictment under the act of 1852, charging that the defendant, before the finding of the indictment, "did retail or sell spirituous liquors to one John Jones, then and there a free person of color," is good. *Lodano v. The State*, 25 Ala. 64.

16. An indictment, which charges that the defendant sold, &c., "to a certain slave, whose name is to the jurors unknown," is fatally defective for uncertainty. *Francois v. The State*, 20 Ala. 83.

III. Of the Pleadings and Evidence.

17. Under an indictment in the general form prescribed by the Code, the defendant may be convicted, on proof, of selling to a person of known intemperate habits. *Elam v. The State*, 25 Ala. 53.

18. Whether the defendant had knowledge of the intemperate habits of the person to whom the liquor was sold, should be left to the decision of the jury upon the evidence: a charge which assumes that such knowledge is brought home to him, is erroneous. *Ib.*

19. Whether the person to whom the liquor was sold was "a man of known intemperate habits," is a question of fact to which a witness may depose. *Stanley & Elliott v. The State*, 26 Ala. 26.

20. The fact that his intemperate habits were generally known in the community, does not justify the inference that they were known to the defendant; evidence of that fact is, therefore, irrelevant and inadmissible. *Ib.*

21. The defendant cannot require the prosecuting attorney to elect and state, before any evidence is offered, for which one of the different varieties of retailing he intends to proceed; but after the State has once made its election, by offering evidence of one particular offense, it will be held to that election through all the future proceedings, and will not be allowed, on a subsequent trial, to offer evidence of a different offense. *Elam v. The State*, 26 Ala. 48.

22. Under an indictment for selling to a free person of color, the State may prove the *status* of the person to whom the liquor was sold by hearsay and general reputation. *Tucker v. The State*, 24 Ala. 77.

23. Where it is shown that the liquor was sold in the defendant's absence, by his clerk, it is error to instruct the jury, "that if the defendant had previously sanctioned the acts of his clerk in selling liquor to slaves under similar orders, and if they believed that the defendant, if he had been present, would have done as his clerk did, then they were authorized to find him guilty." *Patterson v. The State*, 21 Ala. 571.

24. An indictment for selling *whiskey* to a slave, although laid under a *videlicet*, cannot be supported by proof of the sale of any other kind of liquor. *Lindsay v. The State*, 19 Ala. 560.

ROADS.

1. A crop, which was sown or planted in an enclosure after the commissioners' court had passed an order establishing a road through the enclosure, is not a growing crop within the protection of the statute, (Clay's Digest, 507, § 4.) although it may be growing at the time the road is ordered to be cut out. *Thompson v. The State*, 20 Ala. 54.

See, also, OBSTRUCTING PUBLIC ROADS; OVERSEERS OF ROADS.

SCIRE FACIAS.

I. AGAINST BAIL.
II. AGAINST CORPORATIONS.

I. AGAINST BAIL.

1. The sureties on a forfeited recognizance cannot, by a demurrer to the *scire facias*, test the legal sufficiency of the indictment against their principal. *The State v. Weaver*, 18 Ala. 293; *Williams v. The State*, 20 Ala. 63.

See, also, BAIL.

II. AGAINST CORPORATIONS.

2. *Scire facias* is the proper remedy, in proceeding under the act of 1843, (Clay's Digest, 515, § 39,) against an incorporated turnpike company for a forfeiture of its charter. *The State v. Moore & Ligon*, 19 Ala. 514.

3. The *sci. fa.* should allege that the defendants procured their act of incorporation, or that they accepted it, or acted under it. *Ib.*

4. The *sci. fa.* in such case cannot be sued out by the solicitor of the circuit, of his own volition; but he can only act under the direction of the legislature, or of the attorney-general.

SHERIFFS.

1. A sheriff has no power, under the Code, to admit to bail a person charged with a felony, after indictment found; nor can that power be delegated to him by an order of the circuit court. *Antonez v. The State*, 26 Ala. 81.—(Changed by statute. Session Acts 1855–6. pp. 52–3.)

2. The courts are bound to know judicially who are the sheriffs of the several counties in the State. *Ingram v. The State*, 27 Ala. 17.

SLAVES.

(The principal statutory provisions on this subject are cited within.)

(Constitutional Provisions: Const. Ala., Art. VI, title Slaves.)

I. OF THE RELATION OF MASTER AND SLAVE; THEIR RIGHTS; DUTIES.

(Statutory Provisions: Code, §§ 2042–63; Clay's Digest, pp. 539–48.)

1. If a slave throws off the authority of his master, puts himself in a hostile attitude towards him, and resists his dominion and control by physical force, evincing by his acts, while in a personal conflict with the master, a design to make that resistance effectual in escaping from his dominion and authority, the master has the right to employ such means, and so much force to any extent, as will be effectual to subdue him. But, if the slave is not resisting by physical force, or by hostile acts, and is simply in a state of disobedience, without personal violence to the master, then the latter can only administer such punishment as is appropriate to the case, without endangering life or limb. *Dave v. The State*, 22 Ala. 23.

2. Although the master may use such means, and so much force to any extent, as will be effectual to subdue his slave; yet he may not deprive the slave of life or limb, unless impelled to such an act by necessity. *Eskridge v. The State*, 25 Ala. 30.

3. The slave undoubtedly has the natural right of self-preservation, or self-defense; but, in order to avail himself of this for the justification of his acts, he must not himself be a wrong-doer. If, in the perpetration of a wrong, he does an act which he might justify if he were in the right, the law will no more protect him, on the ground of natural right, than it will any other wrong-doer. *Dave v. The State*, 22 Ala. 23.

II. OF THE IMPORTATION OF SLAVES.

4. The constitution of the United States (Art. I, § 9) vests in congress, from and after the first day of January, 1808, exclusive power over the importation of slaves. *The State, ex rel. Savary, v. Caroline*, 20 Ala. 19.

5. The State courts could never exercise any jurisdiction in cases of violation of the laws prohibiting the slave-trade, except such as was authorized by the congress of the United States; and all jurisdiction is now taken away from them by the 4th section of the act approved March 3, 1819, entitled "An act in addition to the acts prohibiting the slave-trade." *Ib.*

III. OF OFFENSES AGAINST SLAVES.

(Statutory Provisions: Code, §§ 3295–3300; Clay's Digest, 545, § 41; *Ib.* 431, § 1.)

1. *Assault and Battery.*

6. An assault and battery, committed by one slave on another, is an offense under the statutes of this State. *Bob v. The State*, 29 Ala. 20.

See *infra*, 7.

2. *Assault with Intent to Kill.*

7. When a white man is indicted for an assault on a slave, with intent to murder him, and, without demurring or moving to quash the indictment, goes to trial on the plea of not guilty, he may be convicted of an assault and battery; and he cannot, by assigning for error the verdict of the jury, raise the question whether such an indictment lies. *Carpenter v. The State*, 23 Ala. 84.

3. *Homicide.*

8. A slave may be convicted of murder for the homicide of another slave. *Seaborn and Jim v. The State*, 20 Ala. 15.

4. *Mayhem.*

9. The statutory offense of mayhem (Code, § 3105) may be committed on a slave. *Eskridge v. The State*, 25 Ala. 30.

IV. OF OFFENSES BY SLAVES.

(Statutory Provisions: Code, §§ 3305–35; Clay's Digest, 472, §§ 1 to 8.)

1. *Assault and Battery.*

10. An assault and battery, committed by one slave on another, is an offense under the statutes of this State. *Bob v. The State*, 29 Ala. 20.

2. *Assault with Intent to Kill.*

11. If a slave, while resisting the authority of his master in a personal collision, stabs him with intent to kill, it is no justification of the act, that he was impressed at the time with a reasonable sense of imminent danger to his own life. *Dave v. The State*, 22 Ala. 23.

12. *Semble*, that malice is not a necessary ingredient of the offense denounced by the statute (Clay's Digest, 472, § 2) against a slave "who shall commit an assault with intent to kill." *Ib.*

3. *Homicide.*

13. A slave may be convicted of murder for the homicide of another slave. *Seaborn and Jim v. The State*, 20 Ala. 15.

14. When a slave, in a personal conflict with his master, resists his authority by physical force, and in that resistance kills his master, he cannot reduce the crime from murder to manslaughter, by showing that, in the commencement of the resistance, he had no design to take life. *Dave v. The State*, 22 Ala. 23.

15. If a slave, in the unjustifiable attempt to commit an assault and battery on another slave, kill a white person by misadventure, he is guilty of involuntary manslaughter under the Code (§ 3312). *Bob v. The State*, 29 Ala. 20.

16. But under an indictment for the murder of a white person, whether framed under the Code, or as at common law, a slave cannot be convicted of involuntary manslaughter. *Ib.*

Larceny.

17. A person who believes that his property has been stolen by a slave, has no right, without process of law, to search the slave's dwelling on the premises of his master. *Thompson v. The State*, 25 Ala. 41.

5. *Poisoning.*

18. In an indictment against a slave for administering poison to white persons, a count, which charges that the defendant "did administer to, and cause to be administered to and taken by," &c., three white persons, "a large quantity of arsenic," is not demurrable for duplicity. *Ben v. The State*, 22 Ala. 9.

19. When the indictment alleges that the slave "did administer to, and cause to be administered to and taken by," &c., a certain deadly poison, "with the intent then and there feloniously," &c., "to kill and murder" the persons named, it sufficiently charges a violation of the statute (Clay's Digest, 472, § 4.) *Ib.*

20. In an indictment which charges an actual poisoning, an allegation that the substance administered was a poison is unnecessary; *secus*, if the indictment alleges only an attempt to poison. *Anthony v. The State*, 29 Ala. 27.

V. OF OFFENSES RELATIVE TO SLAVES.

(Statutory Provisions: Code, §§ 3126–30, 3282–88; Clay's Digest, 419, §§ 14–18: *Ib.* 437, §§ 7, 8.)

1. *Aiding to Escape.*

21. To warrant a conviction on an indictment for aiding slaves to escape from the service of their master, the prosecution must prove that the accused aided the slaves to escape, and that they were the slaves of the person whose property they are averred to be in the indictment. *Winter and Scisson v. The State*, 20 Ala. 39.

22. An affidavit, charging the affiant's belief that the accused "was about to persuade, and trying to persuade, two of his hired slaves to leave his premises," though informal, is substantially sufficient to justify a warrant against the accused under the statute. *Crosby v. Hawthorn*, 25 Ala. 221.

2. *Harboring and Concealing.*

23. The terms "harbor" and "conceal," as used in the statute, are descriptive of two offenses: a person may be convicted of "harboring," on proof that he, knowing the slave to be a runaway, fed her, or furnished her with shelter and the like, to enable her to remain away from her master, or to deprive him of her service; although he may not have "concealed" her. *McElhaney v. The State*, 24 Ala. 71.

24. If the indictment charges the accused with "harboring *and* concealing," he may be convicted on proof of either harboring *or* concealing. *Ib.*

3. *Inveigling, Stealing, &c.*

25. A runaway slave may be the subject of larceny. *Murray v. The State*, 18 Ala. 727.

26. Where a person entices or inveigles a slave from the service of his master in another county, with intent to convert such slave to his own use, and thereby induces the slave to come into the county of his own residence, the offense is complete in the latter county, and he may be there indicted. *Crow v. The State*, 18 Ala. 541.

27. The statute (Clay's Digest, 419, § 18) has not an extra-territorial operation. *Spencer v. The State*, 20 Ala. 24.

28. A charge of "persuading and inducing a negro woman slave named Ann, the property of J. K., to leave her master's premises and employ, with a view to take said slave to another State and convert her to his own use," though not in the technical language of the statute, is a substantial description of an offense within its provisions. *The State v. Weaver*, 18 Ala. 293.

29. An affidavit, which charges that the accused "has feloniously taken, stolen, and carried away from the possession of C., where she was placed by affiant, a negro woman named Eliza, valued at $450, and that she is now in the possession of" the accused, is sufficiently descriptive of an offense against the criminal laws of the State, to justify the magistrate in causing the accused to be apprehended and brought before him. *Ewing v. Sanford*, 19 Ala. 605.

30. The statute respecting the stealing and inveigling of slaves (Code, § 3130) was intended to afford ampler protection and security to slave property than was afforded by the rules of the common law; and it makes several radical changes in the common law. A taking, which was necessary to constitute larceny at common law, is not an essential ingredient of all the offenses created by the statute; nor is a bailee, who, at common law, could not commit larceny as to the goods in his possession, unless he broke the bulk or package, or acquired his possession with intent to steal the goods, excepted from its provisions. It includes "any person" who commits any one of the acts denounced by it, with the felonious intent indicated by its terms, and embraces the inveigling, carrying away, &c., of "any slave," whether in the actual possession of the owner, or of his bailee, or in his merely constructive possession. *Spivey v. The State*, 26 Ala. 90.

31. Conversion and carrying away, as the terms are used in the statute, are neither synonyms, nor convertible terms: a felonious carrying away of a slave necessarily includes a conversion, but a conversion does not necessarily

include a carrying away; and a mere conversion, even with a criminal intent, is no felony, unless there is also a carrying away. *Ib.*

32. Where one man has carried away the slave of another, the question whether he is guilty of the statutory offense depends on the intent with which the act was done; and whenever there is not clear and satisfactory proof of the felonious intent, concurring with the act of carrying away, there is no ground for a conviction. *Ib.*

33. Where a slave is stolen in another State, and brought here, the indictment should charge the offense in the same form as if it had been committed here: an indictment for larceny, framed as at common law, is not sufficient. *Ham v. The State*, 17 Ala. 188.

34. Under an indictment charging the offense as if committed here, proof that the slave was stolen by the accused in another State, and brought by him into this, is competent, and warrants a conviction. *Murray v. The State*, 18 Ala. 727.

35. The defendant's declarations, while in possession of the slave, "as to the manner in which he bought him," are not admissible evidence for him; but any evidence, tending to prove that he honestly believed that he had the right to carry away and sell the slave, is competent and admissible. *Spivey v. The State*, 26 Ala. 90.

3. *Selling Spirituous Liquors.*

36. If the overseer of a slave goes to a house where spirituous liquors are retailed, and tells the proprietor that he will send his slave for a specified quantity of a particular liquor, and then goes off and sends the slave with a jug for the same; and thereupon the proprietor puts the liquor in the jug, and delivers it to the slave—this is not a sale, gift, or delivery to the slave, within the meaning of the statute (Code, § 3283), but is lawful without an order in writing. *Powell v. The State*, 27 Ala. 51.

37. An administratrix, who has possession of a slave belonging to her intestate's estate, is his mistress, within the purview of this statute. *Boltze v. The State*, 24 Ala. 89.

38. A written order, signed by a person who is neither the master nor overseer of the slave, is no protection to the seller. *Ib.*

39. An indictment under the act of 1850, (Session Acts 1849–50, p. 51.) charging that the accused sold spirituous liquor, "without the consent of the master, overseer, or agent of such slave," is fatally defective. *Agee v. The State*, 25 Ala. 67.

40. But an indictment under said act, alleging that the accused sold "to one Henry, a slave, the property of one M. H., a certain commodity, to-wit, one gallon of whiskey, without the consent of the master, owner, or overseer of said slave, either verbally or in writing, expressing the article permitted to be sold, being first had and obtained," is good. *Lindsay v. The State*, 19 Ala. 560.

41. An indictment which charges that the accused sold, &c., "to a certain slave, whose name is to the jurors unknown," is fatally defective for uncertainty. *Francois v. The State*, 20 Ala. 83.

42. Where it is shown that the liquor was sold during the defendant's absence, by his clerk, it is error to instruct the jury, "that if the defendant had previously sanctioned the acts of his clerk in selling liquor to slaves under similar orders, and if they believed that the defendant, if he had been present, would have done as his clerk did, then they were authorized to find him guilty." *Patterson v. The State*, 21 Ala. 571.

43. An indictment for selling *whiskey* to a slave, although laid under a *videlicet*, cannot be supported by proof of the sale of any other kind of liquor. *Lindsay v. The State*, 19 Ala. 560.

5. *Trading with.*

44. Verbal permission to sell "dry goods" is too general and indefinite, under the act of 1841. (Clay's Digest, 437, § 8.) *Hurt v. The State*, 19 Ala. 19.

45. The master's permission to sell goods to his slave, if it does not express the article to be sold, furnishes no protection to the accused, under the act of 1850. (Session Acts 1849–50, p. 51). *Hirschfelder v. The State*, 19 Ala. 534.

46. The act of 1850 renders it unnecessary to aver in the indictment, or to prove, who was the master, owner, or overseer of the slave, or to negative his assent to such trading; and this act is not unconstitutional. *Ib.*

47. An indictment, under the Code, for trading with "a slave, the property of B. S. B., whose name is to the jury unknown," is fatally defective. *Starr v. The State*, 25 Ala. 38.

48. In a *quasi* criminal proceeding for the violation of a municipal ordinance, if the statement does not aver the name of the slave, or of his owner or employer, it is fatally defective on demurrer. *Brown v. The Mayor of Mobile*, 23 Ala. 722.

49. It being shown that the defendant had bought some bricks from the slave, which the latter had stolen from his master, the master testified, on behalf of the State, that the bricks were his, and that he had examined them on the defendant's premises.—*Held*, that the defendant's declarations, while the witness was examining the bricks, "that the bricks were his, and that he got them from the brick-yard of S. & E.," were not admissible evidence for him. *Starr v. The State*, 25 Ala. 49.

VI. Of the Rules of Evidence Concerning Slaves.

(Statutory Provisions: Code, §§ 2276, 3318; Clay's Digest, 539, § 4; *Ib.* 600, § 8; *Ib.* 473, § 9.)

50. On the trial of a slave for a capital offense, his master is a competent witness for him. *Spence v. The State*, 17 Ala. 192.

51. A slave's voluntary confessions of guilt are admissible evidence against him: that he is a slave, ignorant, and, to some extent, unacquainted with the consequences which may atttend them, should be considered by the jury, in connection with the confessions themselves, in ascertaining the weight to be given to them, but does not affect their admissibility as evidence. *Seaborn and Jim v. The State*, 20 Ala. 15.

52. A slave's confessions of guilt to his master, when elicited or influenced by the fear of punishment or the hope of benefit, are not admissible evidence against him; and his subsequent repetition of them before the examining magistrate, if made in the presence of his master, is equally inadmissible, unless it is clearly shown that he was free from all apprehension of punishment by his master as a consequence of his recantation. *Wyatt v. The State*, 25 Ala. 9.

53. In this case, the slave's confessions to his master were excluded, because his master had said to him, "Boy, these denials only make the matter worse;" and the repetition of them before the examining magistrate, in the presence of the master, was also ruled out, the justice having failed to caution him as to their effect. *Ib.*

54. Where a slave's confessions are offered in evidence against him, and it is shown that they were made to a person in whose charge, after having been arrested and tried, he was left by his master, the fact that the master "had always been in the habit of tying his slaves, when they were charged with anything, and whipping them until they confessed the truth, and that he had frequently treated the prisoner in the same way," is proper evidence for the consideration of the court, in determining the competency of the confessions. *Spence v. The State*, 17 Ala. 192.

See, also, EVIDENCE, 15, 16.

VII. Of the Trial of Slaves.

(Statutory Provisions: Code, § 3319–35; Clay's Digest, 472–6, §§ 1–28.)

55. A person, whose sole property in slaves consists of a distributive share of an undivided estate composed of slaves, is not a slaveholder within the meaning of the statute, and is incompetent to sit as such on the trial of a slave for a capital offense. *Spence v. The State*, 17 Ala. 192.

56. The statute which requires that not more than twenty, nor less than ten days, shall elapse between the sentence and execution of a slave, is merely directory; and if more than twenty days are allowed, the judgment of conviction is not thereby vitiated. *Seaborn and Jim v. The State*, 20 Ala. 15.

STATUTES, CONSTRUCTION OF.

1. Although penal statutes are to be strictly construed, and cannot be extended by construction, yet they are not to be construed so strictly as to defeat the obvious intention of the legislature. *Crosby v. Hawthorn*, 25 Ala. 221; *Noles v. The State*, 24 Ala. 672.

2. It is the duty of the courts, while disclaiming the right to extend a criminal statute by construction to cases out of its letter, to apply it to every case clearly within the mischief intended to be remedied, when its words are broad enough to embrace such case. *Huffman v. The State*, 29 Ala. 40.

3. A literal interpretation, when it would defeat the purposes of a statute, will not be adopted, if any other reasonable construction can be given to it. *Thompson v. The State*, 20 Ala. 54.

4. The legislature is presumed to have used words in their proper signification, unless the contrary in some way appears. *Thurman v. The State*, 18 Ala. 276.

5. When words are used in a statute, which have obtained a fixed and definite meaning at common law when used in reference to the same subject, the presumption is, that they were intended to be used in their common-law sense. *Ex parte Vincent*, 26 Ala. 145.

6. The substantial re-enactment in the Code, of a previous statute, must be held a legislative adoption of the judicial construction which it had received. *Huffman v. The State*, 29 Ala. 40; *Anthony v. The State*, 29 Ala. 27; *Ex parte Banks*, 28 Ala. 28.

7. The word "may," when used in a statute, will be held mandatory and imperative, for the purpose of sustaining and enforcing rights, but not for the purpose of creating a right, or determining its character.—*Per* WALKER, J., while RICE, C. J., held, that a permissive word should be construed peremptory, when used to clothe a public officer with power to do an act which, for the sake of public justice, ought to be done, or which concerns the public interests, or the rights of third persons. *Ex parte Banks*, 28 Ala. 28.

8. The granting of an application for a change of venue, under the Code (§§ 3608–9), is discretionary with the court to which the application is made; and the exercise of that discretion will not be controlled by *mandamus* or otherwise. *Ib.*

9. The proviso to the act of 1819, (Clay's Digest, 295, § 35,) relative to the alternation of the circuit judges, is merely directory, and does not deprive them of the power to hold successive terms of the courts of their respective circuits. *Spradling and Thomas v. The State*, 17 Ala. 440.—(Changed by statute. Session Acts 1855–6, p. 29.)

10. The statute (Clay's Digest, 474, § 16) which requires that not more than twenty, nor less than ten days, shall elapse between the time of sentence and execution of a slave, is merely directory; and if more than twenty days are allowed, the judgment of conviction is not thereby vitiated. *Seaborn and Jim v. The State*, 20 Ala. 15.

11. When a generic term is used in a statute, without any words of restriction, it includes every species which belongs to that genus; *e. g.*, a free person of color, whose mother was an inhabitant of Mobile at the time the territory was ceded by Spain to the United States, is included in the act of 1852 (Session Acts 1851–2, p. 80) prohibiting the sale of spirituous liquors to "free persons of color." *Lodano v. The State*, 26 Ala. 64.

12. Ordinarily, slaves are not to be considered as embraced in statutes, unless specially named; but in view of the constitutional provision (Art. VI, § 3) respecting the malicious maiming or killing of a slave, the statutory offense of mayhem (Code, § 3105) may be committed on a slave. *Eskridge v. The State*, 25 Ala. 30.

13. A repealing clause in an unconstitutional statute, declaring that "all laws, contravening the provisions of this act, be, and the same are hereby, repealed," does not affect the previous laws. *Tims v. The State*, 26 Ala. 165.

SUPREME COURT.

See BAIL;
BILL OF EXCEPTIONS;
ERROR AND APPEAL;
MANDAMUS.

SURETIES OF THE PEACE.

(Statutory Provisions: Code, §§ 3339–59; Clay's Digest, 445–50, §§ 1–35.)

1. An affidavit, made by a married woman, that she "is afraid her husband will beat, wound, maim, or do her some bodily hurt," is not sufficient to authorize the arrest of the husband; and if the warrant of the justice appears on its face to be predicated on such an affidavit, it is void, and furnishes no protection to the officer executing it. *Noles v. The State*, 24 Ala. 672.

2. On appeal from the judgment of a justice, requiring the party to find sureties to keep the peace, the circuit court is required to proceed with the trial *de novo;* and it may, therefore, refuse to look to the legal sufficiency of the warrant, under which the party was arrested. *Tomlin v. The State*, 19 Ala. 9.

3. In such case, the court may render judgment for the costs against the sureties on the appeal bond. *Ib.*

4. A writ of error does not lie, to revise the action of the circuit court, in cases of appeal from the order of a justice, requiring sureties of the peace. *Ib.*

TEN-PIN ALLEYS.

(Statutory Provisions: Code, § 397; Session Acts 1851–2, p. 4.)

1. A ten-pin alley at a public watering-place, kept by the proprietor of the place for public play, though used solely for the amusement of his guests, without charge to them or profit to himself, is within the prohibition of the revenue law. *Spaight v. The State*, 29 Ala. 32.

2. An indictment, under the revenue act of 1838, for keeping a tin-pin alley without a license, should aver that the defendant "was engaged in the business, or employment, of keeping" such an establishment: an averment that he "did keep" one is not sufficient. *Eubanks v. The State*, 17 Ala. 181.

THEATRES.

(Statutory Provisions: Code, §§ 391–7.)

1. A license to keep a theatre will not protect one who, by contract with the person licensed, exhibits therein feats of legerdemain, or slight of hand. *Jacko v. The State*, 22 Ala. 73.

TRIAL.

(Constitutional Provisions: Art. I. §§ 10, 28.)

(Statutory Provisions: Code, §§ 3574–3607; Clay's Digest, 460–2, §§ 1–11.)

I. RIGHT OF TRIAL BY JURY.

1. The constitutional guaranty of a trial by jury, in all criminal prosecutions, includes the right to have the deliberations of the jury continued, when once they have begun the trial and heard a portion of the evidence, until the occurence of a sufficient legal reason for their discharge, and the chance of a verdict of acquittal at their hands during all that time. *McCauley v. The State*, 26 *Ala.* 135.

2. For this reason, the unauthorized discharge of the jury, in any criminal case, is equivalent to an acquittal; but, since the court has power to discharge the jury in cases of necessity, a plea averring the previous withdrawal of the cause from the jury after issue joined, "without the consent of defendant, and against his objection," is defective on demurrer, unless it also negatives the existence of any necessity for such withdrawal. *Ib.*

3. The constitutional guaranty of a trial by jury, "in all prosecutions by indictment or information," does not apply, except in the specified cases, to offenses created by statute since the adoption of the constitution; such offenses may, therefore, be made triable before a justice of the peace, without indictment. *Tims v. The State*, 26 *Ala.* 165.

4. Nor does the provision which declares that "the trial by jury shall remain inviolate," extend the right of a jury trial to cases which, at the time the constitution was adopted, were unknown both to the common and to the statute law. *Ib.*

5. The third section of the act of 1854, (Session Acts 1853–4, page 247,) which makes defaulting overseers of roads triable before a justice of the peace, is not violative of the constitutional right to a trial by jury. *Ib.*

II. ARRAIGNMENT AND PRELIMINARY PROCEEDINGS.

6. Every person indicted for a capital offense, if he is in actual confinement, is entitled to have a copy of the indictment delivered to him, in person, at least two entire days before the day appointed for his trial: delivery to his counsel is not sufficient. But, if he objects to going to trial, "on the ground that a copy of the indictment has not been served on him *or his counsel*," and it is shown that a copy was delivered to his counsel two entire days before the trial, there is no error in overruling the objection. *Brister v. The State*, 26 Ala. 107.

7. When the venue is changed on the defendant's application, the certified copy of the indictment becomes so far an original, in the court to which the trial is removed, that the delivery of a copy of *it* to the prisoner will be a sufficient compliance with the statute, and will have the same effect that a copy of the actual original could have. *Ib.*

8. When a prisoner, indicted for a capital offense, is in actual confinement, he is entitled to a list of the jurors summoned for his trial, at least two days before the day appointed for his trial; but when he is not in actual confinement, and has counsel entered on the docket, the right to such list does not arise, in favor of either the prisoner or his counsel, except upon application by the latter. *Bill v. The State*, 29 Ala. 34.

9. When the record shows that the prisoner was regularly arraigned, pleaded not guilty, and proceeded to trial without any objection, the objection cannot be raised on error, that the record fails to show that he was served with a list of the jury two entire days before the trial, or that the *venire* was returned into court. *Ben v. The State*, 22 Ala. 9.

III. SEVERANCE OF TRIAL.

10. Where several persons are jointly indicted for an assault and battery, and one of them pleads guilty, the others cannot claim, as a matter of right, to be tried separately from him. *Thompson v. The State*, 25 Ala. 41.

IV. ORGANIZATION OF JURY.

11. If the accused, in a capital case, having counsel entered on the docket, and not being in actual confinement, proceed to trial without objecting to the panel of jurors summoned, he cannot have the entire panel set aside, on account of the misnomer of a juror who was summoned but failed to attend; nor on account of the omission to insert in the panel a juror's christian name in full, when the initial letter of his name is correctly stated. *Bill v. The State*, 29 Ala. 34.

12. Although the sickness of a juror's family, if of such a character as to demand his personal attention, is a sufficient excuse to authorize his discharge by the presiding judge; yet, where the record shows that, after the list of jurors summoned had been served upon the prisoner, and before the day appointed for his trial two of their number were discharged by the judge, without the knowledge or consent of the prisoner or his counsel, and that the prisoner objected at the trial to this action of the court, the judgment will be reversed on error, although the bill of exceptions says they were discharged "on the ground of the sickness of their families." *Parsons v. The State*, 22 Ala. 50.

13. In such case, the prisoner may move for a *venire de novo;* but when the record shows that he objected at the trial to the action of the court, and that his objection was overruled, this equivalent to deciding that there was no ground for a *venire de novo*, and the objection is available on error. *Ib.*

14. If the court, at the instance of the prisoners, improperly sets aside a competent juror, it is an error of which he cannot be heard to complain. *McAllister v. The State*, 17 Ala. 434.

15. A juror, whose sole property in slaves consists of a distributive share of an undivided estate composed of slaves, is not a slaveholder within the meaning of the statute, and is incompetent to sit as such on the trial of a slave for a capital offense. *Spence v. The State*, 17 Ala. 192.

16. On the trial of a person for an offense which may be punished capitally or by confinement in the penitentiary, it is a good cause of challenge by the State, that a juror has a fixed opinion against capital or penitentiary punishment. *Stalls v. The State*, 28 Ala. 25.

17. But if the juror is accepted by the State, and then by the prisoner, the right of challenge for this cause is lost, and cannot be again revived, by any act of either the court or the solicitor, against the objection of the prisoner, although the existence of the cause of challenge was unknown to the solicitor and court when the juror was accepted; and if the court afterwards sets aside the juror for that cause, and the prisoner excepts to its decision, the error entitles him to a reversal of the judgment of conviction. *Ib.*

18. Where several persons are jointly indicted and tried, each is entitled to the same number of challenges to which he would be entitled if tried separately. *Brister v. The State*, 26 Ala. 107.

19. Under an indictment for murder, in the general form prescribed by the Code, the prisoner is entitled to the same number of challenges allowed in prosecutions for murder in the first degree. *Noles v. The State*, 24 Ala. 672.

20. Where the jury are sworn "well and truly to try the issue joined between the State of Alabama and the said defendant," while the record shows that the defendant had been arraigned on an indictment for murder, and had pleaded not guilty, the oath is a substantial compliance with the requirements of the statute. *Crist v. The State*, 21 Ala. 137.

21. Where the minute entry contained the following recitals, to-wit: "Thereupon came a jury," &c., who were selected and empaneled well and truly to try the issue joined between the State of Alabama and the said defendant," and the trial of said cause commenced;" that the court adjourned in the evening, the trial not being finished, and re-assembled on the following morning; and that thereupon "came the defendant and his counsel, as also the counsel for the State, together with the jury that had been empaneled and *sworn as aforesaid*, and the trial of said cause was resumed; and after the evidence of all the witnesses had been given in, and the argument of counsel had been heard, the jury received the charge of the court, and retired in charge of the sheriff to make up their verdict; and now return into court, and *on their oaths* do say," &c. *Held*, that the record sufficiently showed that the jury were sworn, and that it would be presumed on error that they were sworn before the testimony was heard. *Ib.*

V. NOLLE PROSEQUI.

22. Under an indictment for retailing, in the general form allowed by the Code, the defendant cannot require the prosecuting attorney to elect and state, before any evidence is offered, for which one of the different varieties of retailing he intends to proceed; but after the State has once made its election, by offering evidence of one particular offense, it will be held to that election through all the future proceedings, and will not be allowed, on a second trial under the same indictment, to offer evidence of a different offense. *Elam v. The State*, 26 Ala. 48.

23. The refusal of the court to require the solicitor, on motion of the defendant, to elect on which count in the indictment he would proceed, will not be revised on error, when no ob-

jection or exception was reserved to it. *Johnson v. The State*, 29 Ala. 62.

24. On the trial of a prisoner under an indictment for an assault with intent to murder, containing two counts, the judgment entry recited that "the State moved that the defendant be tried on the first count in the indictment, and that the second count be postponed until the first is disposed of, to which there was no dissent by the defendant"; that the trial on the first count then proceeded, and the jury returned a verdict of "guilty as charged in the bill of indictment;" and that the solicitor afterwards entered a *nolle-prosequi* as to the second count. *Held*, that the postponing of the second count was an error for which the judgment of conviction must be reversed, and that the prisoner was not precluded from taking advantage of the error by the recital in the record that he did not dissent from such a course of proceeding. *Flanagan v. The State*, 19 Ala. 546.

VI. Discharging one Defendant and Examining him as Witness.

25. Where several defendants are jointly indicted and tried, the court may, if there is any evidence against one, overrule the motions of his co-defendants "to introduce him as a witness, on the ground that there was no evidence against him to authorize him to be put on his defense," and "to direct and allow the jury to return a verdict of acquittal as to him, on the ground that there was no sufficient evidence of his guilt to require him farther to defend." *Brister v. The State*, 26 Ala. 107.

VII. Mis-trial.

26. When the judgment entry recites that the jury, after deliberating a reasonable time, were unable to agree upon a verdict; that the court had disposed of all the business before it; and that it was absolutely necessary that the term of the court should then be closed,—the jury may properly be discharged, and a mis-trial entered. *Powell v. The State*, 19 Ala. 577.

27. The unauthorized discharge of the jury, in any criminal case, after they have begun the trial and heard a portion of the evidence, is equivalent to an acquittal. *McCauley v. The State*, 26 Ala. 135.

VIII. Polling Jury.

28. If the verdict of the jury is received, and read aloud in open court, in the absence of the prisoners, and the jury are then told by the court that they are discharged, it is within the power of the court to call them back before they have left the bar; and if they are immediately recalled, upon the discovery being made that they are not in court, and the papers in the cause are handed back to them, the prisoners are not deprived of their right to poll the jury, nor can they complain on error of this action of the court. *Brister v. The State*, 26 Ala. 107.

IX. Verdict.

29. A verdict, finding the prisoner guilty of murder in the first degree, and sentencing him to be hung, is sufficient to authorize a judgment of conviction and sentence of death. *Noles v. The State*, 24 Ala. 672.

30. A verdict, finding the defendant "guilty of murder in the first degree, and penitentiary for life," is sufficient to support a judgment of conviction and sentence of confinement in the penitentiary for life. *Noles v. The State*, 26 Ala. 31; *Harrall v. The State*, 26 Ala. 52.

31. But no judgment can be rendered on a verdict of guilty, which does not ascertain the degree of the murder, although it was committed by poison. *Johnson v. The State*, 17 Ala. 618.

32. Under an indictment for an assault with intent to murder, a special verdict, finding the prisoner "guilty of striking with a loaded whip calculated to produce death, without any cause or provocation," does not authorize the rendition of a judgment of "guilty in manner and form as charged in the indictment." *Scitz v. The State*, 23 Ala. 42.

33. Under an indictment for an assault with intent to murder, containing two counts, if the prisoner is tried upon one count only, a general verdict

of "guilty as charged in the bill of indictment" does not authorize the rendition of a judgment of conviction. *Flanagan v. The State*, 19 Ala. 546.

34. A general verdict of guilty, under an indictment containing both good and bad counts, will be referred to the good counts, and the judgment of conviction thereupon sustained. *Shaw v. The State*, 18 Ala. 547.

X. MOTIONS IN ARREST OF JUDGMENT.

35. As a general rule, when an indictment is defective on demurrer, advantage may also be taken of the defect on motion in arrest of judgment. *Francois v. The State*, 20 Ala. 83.

36. Under an indictment for murder, the failure of the verdict to ascertain the degree, though the homicide was committed by poison, is good cause for arrest of judgment. *Johnson v. The State*, 17 Ala. 618.

37. An indictment for counterfeiting, which does not state the time when the counterfeited coin was current in this State, is fatally defective on motion in arrest. *Nicholson v. The State*, 18 Ala. 529.

38. So is an indictment for an assault with intent to murder, if it does not state the facts which constitute the assault. *Beasley v. The State*, 18 Ala. 535; *Trexler v. The State*, 19 Ala. 21.

39. And an indictment for trading with a slave, which charges that the defendant sold "to a certain slave, whose name is to the jurors unknown." *Francois v. The State*, 20 Ala. 83.

40. And an indictment which, upon its face, charges several defendants for several offenses committed by them independently of each other. *Elliott v. The State*, 26 Ala. 78.

41. And an indictment for arson, if it does not charge the ownership of the property burned. *Martin and Flinn v. The State*, 28 Ala. 71.

42. And an indictment for the willful burning of a house insured against fire, with intent to charge or injure the insurer, if it does not allege that the house was "at the time insured against fire." *Martin and Flinn v. The State*, 29 Ala. 30.

43. But the improper conduct of the jury, after they have retired to make up a verdict, is not available on motion in arrest. *Brister v. The State*, 26 Ala. 107; *Franklin v. The State*, 29 Ala. 14.

44. And if the jury assess the aggregate (instead of separate) value of the stolen articles, under an indictment for larceny from a storehouse, the irregularity is not good cause for arresting the judgment. *Case v. The State*, 26 Ala. 17.

XI. JUDGMENT AND CONVICTION.

45. The statute which requires that not more than twenty, nor less than ten days, shall elapse between the sentense and execution of a slave, is directory merely; and the allowance of more than twenty days does not vitiate the judgment of conviction. *Seaborn and Jim v. The State*, 20 Ala. 15.

46. The date of the sentence, and day of execution, may be expressed in figures, instead of letters. *Noles v. The State*, 24 Ala. 672.

47. There is not any fixed form of words, in which the minute entries of the court are required to be made: they should show substantially that all was done at the trial that the law requires to be done, and this should be set down in fit and expressive words; but the form adopted in England, and followed in some of the United States, is not indispensably necessary to their legal sufficiency. *Crist v. The State*, 21 Ala. 137.

48. Whether the objection can avail, that the past, instead of the present tense, is employed in recording the action of the court and jury, *quære*. *Ib.*

49. No conviction can be had, under an indictment which is unobjectionable on its face, on proof of facts which, if stated in it, would enable the defendant to arrest the judgment. *Elliott v. The State*, 26 Ala. 78.

XII. NEW TRIALS.

50. Misconduct on the part of the jury, after they have retired to make up their verdict, is good ground for a motion for a new trial; but the action of the court in refusing a new trial on that ground is not revisable on error. *Brister v. The State*, 26 Ala. 107; *Franklin v. The State*, 29 Ala. 14.

VARIANCE.

See EVIDENCE, XIV;
PLEADING, VI.

VENIRE.

1. A *venire facias* is not void for the want of the seal of office of the court from which it issues. *Powell v. The State*, 25 Ala. 21.

See, also, JURORS AND JURY, 10 11, 18, 19, 20.

VENUE.

(Statutory Provisions: Code, §§ 3608–18; Clay's Digest, 343, § 166; Ib. 480, § 26.)

I. ALLEGATION.

1. It was competent for the legislature, by statute, to dispense with the averment, in an indictment for murder, that the offense was committed within the body of the county, and to require that fact to be proved. *Noles v. The State*, 24 Ala. 672.

2. Where an indictment was entitled in the margin, "State of Alabama, *Butler* county," and recited in its body that "the grand jurors of the county of *Buter* upon their oaths present," &c.; while the name of the county was not again repeated, nor was any other county named, and the offense was charged to have been committed "in the county aforesaid",—*held*, that the statement of the venue was sufficient. *Reeves v. The State*, 20 Ala. 33.

3. When the name of the proper county is stated in the margin of the indictment, and the indictment itself purports to be found by the grand jurors for the State, "sworn and charged to inquire for the said county," the indictment is sufficient. *Morgan v. The State*, 19 Ala. 556; *Lawson and Swinney, v. The State*, 20 Ala. 65.

II. CHANGE.

4. The granting of an application for a change of venue, in a criminal case, is discretionary with the court to which the application is made; and its refusal is not revisable by *mandamus* or otherwise. *Ex parte Banks*, 28 Ala. 28.

5. If the order for a change of venue directs the clerk to transmit "the original papers in the cause," it is nevertheless his duty to transmit a transcript; and such order, even if erroneous, is no ground for reversing the judgment and sentence of conviction. *Harrall v. The State*, 26 Ala. 52.

6. In such case, the court to which the trial is removed may issue a *certiorari* to the clerk of the court in which the indictment was found, requiring him to transmit certified copies of any and all papers and entries in the cause, and may order the original papers to be returned to him. *Ib.*

7. The prosecution is not discontinued by the failure of the clerk, after a change of venue has been ordered, to transmit a transcript to the clerk of the court to which the trial is removed, and the failure to have the cause entered on the docket of that court at the term next after the order of removal. *Ib.*

8. If the transcript is duly certified by the clerk to contain a copy of the caption of the grand jury, the indictment, with all the endorsements thereon, and all the entries and orders made in the cause, including the order for the removal of the trial, the defendants may be tried on such transcript. *Brister v. The State*, 26 Ala. 107.

9. The certified copy of the indictment becomes so far an original, in the court to which the trial is removed, that the delivery to the prisoner of a copy of it will be a sufficient compliance with the statute (Code, § 3576), and will have the same effect that a copy of the actual original could have. *Ib.*

10. A change of venue on the prisoner's application, after the cause has been continued by the State at the same term, necessarily sets aside the continuance, and does not authorize the prisoner, upon the case being again continued by the State in the court to which it is transferred, to claim as a

matter of right that he be admitted to bail on the ground that the case has been twice continued by the State. *Ex parte Johnson*, 18 Ala. 414.

II. PROOF.

11. A charge which, in effect, authorizes the jury to find the defendant guilty without any proof that the offense was committed within the county in which the indictment was found, is erroneous. *Brown v. The State*, 27 Ala. 47; *Salomon v. The State*, 27 Ala. 27; *Huffman v. The State*, 28 Ala. 48; *Spaight v. The State*, 29 Ala. 32.

12. Under an indictment for inveigling a slave, charging the offense to have been committed in the county in which the indictment was found, a conviction may be had on proof that the accused stole the slave in another State and brought him into this. *Murray v. The State*, 18 Ala. 727.

VERDICT.

1. A verdict, finding the prisoner "guilty of murder in the first degree, and penitentiary for life," is sufficient to support a judgment of conviction and sentence of confinement for life in the penitentiary. *Noles v. The State*, 26 Ala. 31; *Harrall v. The State*, 26 Ala. 52.

2. A verdict of "guilty of murder in the first degree," with the words added, "and we sentence him to be hung," is sufficient to authorize a judgment of conviction and sentence of death. *Noles v. The State*, 24 Ala. 672.

3. But no judgment can be rendered on a verdict of guilty, which does not ascertain the degree of the homicide, although it was committed by poison. *Johnson v. The State*, 17 Ala. 618.

4. Under an indictment for an assault with intent to murder, a special verdict, finding the prisoner "guilty of striking with a loaded whip calculated to produce death, without any cause or provocation," does not authorize the rendition of a judgment of "guilty in manner and form as charged in the indictment." *Seitz v. The State*, 23 Ala. 42.

5. If the indictment contains two counts, and the prisoner is tried upon one count only, a general verdict of "guilty as charged in the bill of indictment" does not authorize the rendition of a judgment of conviction. *Flanagan v. The State*, 19 Ala. 546.

6. A general verdict of guilty, under an indictment containing both good and bad counts, will be referred to the good counts, and the judgment of conviction thereupon sustained. *Shaw v. The State*, 18 Ala. 547.

VIDELICET.

1. When the time of the commission of the offense is alleged under a *videlicet*, the prosecutor is not held to proof of it as laid; but he may prove that the offense was committed at any time before the finding of the indictment, within the period prescribed as a bar. *McDade v. The State*, 20 Ala. 81.

2. But an indictment for selling *whiskey* to a slave, though the liquor is laid under a *videlicet*, cannot be supported by proof of the sale of any other kind of liquor. *Lindsay v. The State*, 19 Ala. 560.

WARRANT.

1. A warrant, issued by a justice of the peace, and showing on its face that he had no authority to issue it, is no protection to the officer who executes it. *Noles v. The State*, 24 Ala. 672.

2. An affidavit, by a married woman, that "she is *afraid* her husband will beat, wound, maim, or kill her, or do her some bodily hurt," does not authorize the issue of a warrant for the husband's arrest; and if the warrant appears on its face to be predicated on such an affidavit, it is void, and furnishes no protection to the officer who executes it. *Ib.*

3. An affidavit, charging the affiant's belief that the accused "was about to persuade, and trying to persuade, two of his (affiant's) hired slaves to leave his premises," though informal, is substantially sufficient to authorize the issue of a warrant against the accused,

under the statute (Clay's Digest, 419, § 15) forbidding any person to "aid any negro or other slave to run away or depart from his master's service." *Crosby v. Hawthorn*, 25 Ala. 221.

4. An affidavit, charging that certain goods, of the value of thirty dollars, the property of certain persons named, had been feloniously stolen by some person or persons unknown to affiant, and that from probable cause he suspected that said goods were concealed in a trunk belonging to two persons named, is equivalent to a charge of knowingly concealing stolen goods, and authorizes the issue of a warrant for the arrest of the persons in whose possession the goods are alleged to be. *Field v. Ireland*, 21 Ala. 240.

5. An affidavit, which charges that the accused "has feloniously taken, stolen, and carried away from the possession of C., where she was placed by affiant, a negro woman named Eliza, valued at $450, and that she is now in his possession," is sufficiently descriptive of an offense against the criminal laws of the country to authorize the issue of a warrant for the arrest of the accused. *Ewing v. Sanford*, 19 Ala. 605.

WITNESS.

(Statutory Provisions: Code, §§ 3560–73; Clay's Dig., 432, § 10; *Ib* 449–50, §§ 27–32; *Ib.* 599-602.)

I. ATTENDANCE AND FEES.
II. COMPETENCY.
III. CREDIBILITY AND HOW IMPEACHED.
IV. EXAMINATION.

I. ATTENDANCE AND FEES.

1. In a case of assault and battery, fourteen witnesses were summoned by the State to sustain the character of the prosecutor, but, the prosecutor having died two or three months previous to the trial, none of them were called; it not being shown that they were summoned after the death of the prosecutor, nor that his death was known to the solicitor, *held*, that the defendant, on conviction, was properly taxed with the costs of their attendance. *Barrett v. The State*, 24 Ala. 74.

2. A witness for the State in a criminal case cannot, after the conviction of the defendant, bring suit against him on his certificate of attendance. *Nicolas v. Trickey*, 19 Ala. 92.

II. COMPETENCY.

3. On the trial of a slave for a capital offense, his master is a competent witness for him. *Spence v. The State*, 17 Ala. 192.

4. A conviction for libel, in another State, does not disqualify a witness here. *Campbell v. The State*, 23 Ala. 44.

5. That a witness is subject to fits of mental derangement, is no objection to his competency, if it appears that he is sane when offered. *Ib.*

6. A witness for the State, who is introduced to prove the defendant's confessions, and who states, on re-examination, "that he had testified to the substance of all that each of said defendants stated on that occasion, but that may have stated something which he did not recollect," is competent to testify to the confessions, if in themselves admissible. *Brister v. The State*, 26 Ala. 107.

7. To authorize a witness to testify to the character of a person in respect to his habits, he should first state that he is acquainted with that person's general character in the particular to which he deposes; but if his testimony shows that fact, whether brought out on preliminary examination or examination in chief, it will be sufficient. *Elam v. The State*, 25 Ala. 53.

8. To render a witness competent to testify to the general character of the accused, it is not necessary that he should know what a majority of his neighbors said or thought of him, nor that he should have heard some one say what a majority of them thought or said of him: the only test of his competency is, whether he knows the general character of the accused among his neighbors, or those acquainted with him. *Dave v. The State*, 22 Ala. 23. (*Vide infra*, 11.)

9. On a trial upon an indictment for refusing to testify before the grand jury in reference to gaming, the prisoner cannot be allowed to give evidence in his own favor. *Batre v. The State*, 18 Ala. 119.

III. CREDIBILITY, AND HOW IMPEACHED.

10. In impeaching a witness, the inquiry is not limited to his general character for truth, but the impeaching witness may be asked his general character. *Ward v. The State*, 28 Ala. 53.

11. A witness who states that he is acquainted with the general character of the impeached witness, although he may never have heard it canvassed, is competent to testify in reference to it. *Ib.* (*Vide supra*, 7, 8.)

12. Where female relatives of the prisoner, whose evidence is material to his defense, are examined on his behalf at the trial, they cannot be impeached by proving that they were present at the examination before the committing magistrate, and were not then examined as witnesses, although the same evidence was then adduced against him as upon the trial. *Brock v. The State*, 26 Ala. 104.

13. The record of a conviction for libel in another State is not admissible to discredit a witness. *Campbell v. v. The State*, 23 Ala. 44.

14. That a witness is subject to fits of mental derangement, is no objection to his credibility, if sane when offered; and evidence of that fact is, therefore, inadmissible to affect his credit. *Ib.*

15. When the competency of a witness is attacked on the ground of insanity, and the court decides that he is competent, the same evidence cannot be submitted to the jury to affect his credit. *Ib.*

16. Evidence showing that several indictments for libel are pending against a witness, is not admissible for the purpose of impeaching him. *Ib.*

17. The general character of a witness, at his place of residence, cannot be proved by evidence of what rumor said of it before he came to that place. *Ib.*

18. The individual opinion of a witness, founded on rumor respecting the guilt of another witness of the crime of murder, is not admissible for the purpose of impeaching the latter. *Ib.*

19. An impeaching witness, who testifies, on cross-examination, that public rumor attributed to the impeached witness "a bad moral character as to drinking, fighting, murder, shooting at men, and certain publications, reputed false, in his newspaper," cannot be asked, on re-examination, "what other moral delinquencies public rumor attributed to him;" nor, "what rumor said in regard to those publications;" nor, "whether he did not know, of his own knowledge, that they were false." *Ib.*

20. A letter written for the prisoner by the witness, while they were in jail together, is not admissible evidence for the purpose of impeaching the witness. *Ib.*

21. A witness cannot be impeached by proof of previous contradictory statements, whether oral or written, without first giving him an opportunity to explain them. *Powell v. The State*, 19 Ala. 577.

22. The credit of a witness cannot be impeached by showing particular acts of immorality, disconnected from the question of veracity. *Nugent v. The State*, 18 Ala. 521.

IV. EXAMINATION.

23. A party may ask his own witness whether he has not previously made statements inconsistent with what he has just stated on the trial. *Campbell v. The State*, 23 Ala. 44.

24. Where the county surveyor, a witness for the prisoner, illustrated his evidence with a diagram, which he had himself made, showing the relative position and distances from each other of several places near the scene of the murder; which diagram was introduced without objection from the State, and the witness cross-examined on it—*held*, that it was discretionary with the court to allow the jury to take it with them on their retirement, and that its exclusion from them was not revisable. *Ib.*

25. A witness may be questioned, on cross-examination, as to his habits of drinking. *Ib.*

26. An unmarried woman may be asked, on cross-examination, whether or not she has any children; but she may refuse to answer the question. *Ib.*

27. The prisoner's witnesses may be questioned, on cross-examination, as to their relations with them—whether they were on terms of friendly

intimacy, their means of knowing the facts to which they testify, and any bias or prejudice which might influence them. *Ib.*

27. When a witness has been cross-examined, with a view of impeaching him, respecting his former statements, he may be asked, on re-examination, his motive in making those statements. *Ib.*

28. A witness for the State, who testifies, on cross-examination, that he has taken an active part in the prosecution, and that he cherishes unfriendly feelings towards the prisoner, may be asked, on re-examination, "whether his feelings towards the prisoner are such as to desire to see an innocent man convicted." *Ib.*

PART SECOND.

PROBATE CASES.

DIGEST.

AD QUOD DAMNUM.

I. When the Writ lies.
II. Of the Proceedings under it.

I. When the Writ lies.

1. Under the act establishing courts of probate, (Session Acts 1849–50, p. ,) a judge of probate has authority to grant writs of *ad quod damnum*, in those cases in which, before the abolition of the county courts, a judge of the county court had such authority. *Stein v. Burden*, 19 Ala. 715.

2. Under the act of 1841, (Session Acts, pp. 5–6,) giving the lessee of the "city water-works" of Mobile a writ of *ad quod damnum*, to ascertain the damage caused to riparian proprietors by his diversion of the water from Three-mile creek, the writ might be sued out as well after as before the erection of the water-works, and against any one or more of the riparian proprietors. *Burden v. Stein*, 25 Ala. 455.

3. The writ is given by the general law, (Code, § 2094,) on applications for the erection of water-works and mill-dams.

II. Of the Proceedings under it.

4. If the writ, when sued out under the act of 1841, commands the sheriff to make his return thereon, with the proceedings had under it, "within ten days from the date of the writ," although it specifies no day for the summoning of the jury, it is a sufficient compliance with the statutory requisition, that the jury shall be summoned to view the premises "at a time not exceeding ten days from the issuing of the writ." *Burden v. Stein*, 25 Ala. 455.

2. If the defendant was present, and objected to the action of the jury, "because he was not duly notified of the time when the jury was to assemble," his objection cannot avail, on error, unless he affirmatively shows that the notice given him was too short for him to prepare for the protection of his interest: since the statute does not specify the length of notice, it will be construed to mean a reasonable time. *Ib.*

6. If the writ commands the jury to ascertain the amount of damage which the defendant "sustains or may sustain," and the verdict is that he "sustains no damage," this is a substantial compliance with the statute; since the statute was designed, not merely to give a remedy for the present injury sustained by the proprietor, but to settle and fix compensation adequate to the injury occasioned by the continuous diversion of the water. *Ib.*

7. The effect of a decision under this act, when the verdict of the jury is that the defendant sustains no damage, is to vest in the lessee "the absolute right to the land, water privilege, or right, condemned by the jury;" therefore, it is not erroneous to render judgment that the lessee "is entitled to the use of the waters of said creek, for and during their continuance, without any compensation therefor to the defendant." *Ib.*

8. The defendant in the writ, when the verdict is against him, can only be taxed with the costs of the appeal to

the probate court, and the attendance of witnesses; but if that court renders judgment against him for the costs of the whole proceeding, the proper amendment will be made, on error, at his costs. *Ib.*

9. The writ being issued in this case under the general statute, (Code, §§ 2088–98,) the inquest of the jury was quashed, because, 1st, the return did not show that the jury were sworn by the sheriff "to discharge their duties fairly and to the best of their ability;" 2dly, it did not show that they were charged by the sheriff as the statute directs; and, 3dly, it did not respond to the matters which the statute requires them to investigate. *Owen v. Jordan*, 27 Ala. 608.

ADVANCEMENT.

(Statutory Provisions: Code, §§ 1582–7; Clay's Digest, 197, §§ 25–6.)

I. WHAT IS, OR NOT, AN ADVANCEMENT.
II. ADEMPTION OF LEGACIES BY SUBSEQUENT ADVANCEMENTS.
III. PRACTICE ON TRIAL OF ISSUE RESPECTING ADVANCEMENTS.

I. WHAT IS, OR NOT, AN ADVANCEMENT.

1. An advancement is a provision, made by a parent to his child, of money or property, the entire interest in which passes out of the former in his lifetime, though it is not necessary, in all cases, that it should take effect in possession before his death. *Grey's Heirs v. Grey's Adm'rs*, 22 Ala. 233.

2. A promissory note, executed by a child to his father, is, of itself, no evidence of an advancement, and it is error to allow it to go to the jury "as evidence of an advancement; but parol evidence is admissible to show a subsequent agreement, between the payee and the maker, by which the former parted with all interest in the money secured by the note, as an advancement to the maker. *Ib.*

3. If a child receives either money or property from a parent, it will be, *prima facie*, an advancement, unless the presumption is repelled by the nature of the property, or by some other circumstance showing that it could not have been so intended. *Smith v. Smith's Heirs*, 21 Ala. 761.

4. The advancement of the husband, living the wife, is an advancement of the wife, and is chargeable, after her death, against those who occupy the same relation to the estate of the parent by whom it was made that she, if living, would have occupied; and on final settlement of his estate, such advancement must be brought into hotchpot by the representatives of the wife, before they can participate in the distribution. *Wilson's Heirs v. Wilson's Adm'r*, 18 Ala. 176.

5. Where a decree, rendered on the final settlement of an estate, contained a recital in these words: "It appearing that A. H. and S. H., his wife, have received advancements made to the said A. H. in his lifetime," &c., *held*, that, if necessary to sustain the decree on error, it would be presumed that the advancements were made to A. H. in the lifetime of his wife, or, if made after her death, that he had authority to receive them; and that the respective heirs had received the property in equal portions. *Ib.*

II. ADEMPTION OF LEGACIES BY SUBSEQUENT ADVANCEMENTS.

6. The rule is now well settled, that parol evidence is admissible to show that a subsequent advancement was not intended by the testator as a satisfaction, either in whole or in part, of a previous provision by will; and whenever such evidence is admitted for that purpose, it may be rebutted by similar evidence. *May's Heirs v. May's Adm'r*, 28 Ala. 141.

7. Testator, after providing for the payment of his debts, directed that "the entire residue" of his estate, consisting of lands, slaves, and other property, should be equally divided among his wife and children, and declared it his "settled purpose" to make them all equally interested in his estate. The share of his only married daughter he directed should be divided between her and her husband; one half being secured to her as her separate estate, and the other half

vesting absolutely in her husband. Afterwards he made advancements, consisting of lands, slaves, and other property, approximating the share which each would take under the will, to this daughter, to another daughter then married, and to his eldest son, who were the children of his first wife; and there was parol evidence, by two witnesses, of his subsequent declarations, that this was independent of the provisions made for them by the will; that most of his property had come by their mother, and that he felt it his duty to give more to them than to his other children. *Held*, that the advancements were a satisfaction, *pro tanto*, of the provisions by will. *Ib.*

8. The probate court has jurisdiction, as incident to the settlement and distribution of estates, over the ademption of legacies. *Ib.*

III. PRACTICE ON TRIAL OF ISSUE RESPECTING ADVANCEMENTS.

9. Since infants are incapable of electing whether they will account for advancements, or be excluded from the distribution on final settlement of the estate, their exclusion, without the previous appointment of a guardian *ad litem*, is erroneous. *Wilson's Heirs v. Wilson's Adm'r*, 18 Ala, 176. (Overruling, to that extent, *Parks v. Stonum*, 8 Ala. 752.)

10. A distributee of the estate, who has released and abandoned all interest therein, which release has been entered of record, is a competent witness for the administrator, to prove an advancement to another distributee. *Grey's Heirs v. Grey's Adm'rs*, 22 Ala. 233.

11. In forming an issue, to ascertain whether an advancement has been made to a child, although the better practice would be, to conduct the proceedings in the name of the administrator as plaintiff, and the party who contests the fact of advancement as defendant; yet, if the record shows that the question at issue was fairly presented, and correctly decided, without objection in the primary court, the defendant cannot complain on error that the other distributees were the plaintiffs, instead of the administrator. *Smith v. Smith's Adm'rs*, 21 Ala. 761.

AMENDMENTS.

I. OF PLEADINGS.

1. When a petition for dower is defective for want of proper parties and necessary allegations, it may be amended; and in such case, the apellate court will not dismiss the petition, but will remand the cause, that the proper amendments may be made. *Martin's Heirs v. Martin*, 22 Ala. 86.

I. OF DECREES AND RECORDS.

2. A final decree cannot be so amended, at a subsequent term, as to relieve one party from the costs, and tax them against the other. *Harris v. Billingsley*, 18 Ala. 438.

3. A record or decree can only be amended by some matter of record. *Metcalf v. Metcalf*, 19 Ala. 319; *Kidd v. Montague*, 19 Ala. 619; *Saltmarsh v. Bird*, 19 Ala. 665.

4. Or by some entry made by or under the authority of the court, which entry must be shown by the record, or by some book belonging to the office of the court, and required by law to be there kept. *Hudson v. Hudson*, 20 Ala. 364.

5. A memorandum, in the handwriting of the judge of probate, on the docket of his court, in these words: "J. M., heir of A. M., v. Adm'rs. Ordered to appoint auditors" (naming them); "ordered that they report *instanter;* auditors report in administrators' hands, $469 82," is not sufficient to authorize the rendition of a decree at a subsequent term, *nunc pro tunc*, in favor of J. M., and against the administrators, for the sum thus ascertained. *Metcalf v. Metcalf*, 19 Ala. 319.

6. A final decree, in favor of husband and wife, for the wife's distributive share of an estate, cannot be so amended at a subsequent term, *nunc pro tunc*, as to be rendered in favor of husband and wife for the separate use of the wife, when the record does not show that the wife's interest in the estate

accrued after the passage of the "woman's law" of 1848. *Kidd v. Montague*, 19 Ala. 619.

7. A memorandum, in the handwriting of the judge of probate, endorsed on a claim filed against an insolvent estate, showing the reason why the claim was rejected, does not authorize an amendment of the decree *nunc pro tunc*. *Saltmarsh v. Bird*, 19 Ala. 665.

8. A paper, purporting to be a final decree, ascertaining the amount in the hands of the administrator and the share of each distributee, signed by the judge of the orphans' court, and filed among the papers of the cause, is not sufficient to authorize the rendition of a decree at a subsequent term, *nunc pro tunc*, when it does not appear that it was ever recorded or entered on the minutes of the court, or that any note or memorandum of a final decree was ever made in any book of the office. *Hudson v. Hudson*, 20 Ala. 364; see, also, *Hall v. Hudson*, 20 Ala. 284.

9. An entry, made by a judge of probate on his trial docket, in these words: "Estate of S. P., deceased.—Final settlement; settlement made," in connection with memoranda endorsed on the executor's account current by one of the attorneys in the cause, showing the terms of the settlement, and the parol testimony of the judge that he had pronounced an oral decree in conformity with the memoranda,—does not authorize the rendition of a final decree at a subsequent term, *nunc pro tunc*. *Perkins v. Perkins*, 27 Ala. 479.

10. But the general rule, that a record can only be amended by some matter of record, does not apply to cases in which the entry is impeached for fraud; and though these cases generally arise collaterally, yet an entry, relating to a grant of letters of administration, may be amended on a direct application, of which the opposite party must have notice, setting forth the fraud specifically, and making the necessary proof. *Dunham v. Roberts*, 28 Ala. 286.

11. If the motion simply states, as the ground for the amendment asked, that the record states a fact which was not proved,—that as it stands it operates a fraud on the rights of the plaintiff in the motion, and that it is void, in law, on account of fraud in a legal sense,—the allegation is not sufficiently specific to authorize the introduction of parol evidence to prove that the recital is not true. *Ib.*

III. ON ERROR.

12. A writ of error, if defective, may be amended by the record; but it cannot be so altered as to strike out the name of a party plaintiff and make him a defendant, unless the record shows that he was improperly made a plaintiff, when he should have been a defendant. *Knox's Distributees v. Steele*, 18 Ala. 815.

13. An error in the imposition of costs will be amended, on error, at the costs of the appellant. *Burden v. Stein*, 25 Ala. 455.

14. A mistake in the given name of a party against whom a decree has been rendered, when the true name appears in the record, is a clerical misprision, which will be corrected at the cost of the appellant. *McBrom's Adm'rs v. McBroom's Creditors*, 19 Ala. 173.

APPEALS.

See ERROR AND APPEALS.

BASTARDY.

See same title in PART I, *ante*, p. 14.

BILL OF EXCEPTIONS.

(Statutory Provisions: Code, §§ 2353–58; Clay's Digest, 307, § 5.)

I. WHEN NECESSARY OR PROPER.
II. EXECUTION AND CONTENTS.
III. CONSTRUCTION.

I. WHEN NECESSARY OR PROPER.

1. A decision of the probate court, upon a question of fact, cannot be revised on error, unless duly excepted to. *Gordon v. McLeod*, 20 Ala. 242; *Smith's Distributees v. King*, 22 Ala. 558.

2. This rule equally applies to a

decision upon the admissibility of evidence. *Croft v. Ferrell*, 21 Ala. 351.

3. The affidavits which the administrator is required to make, in regard to the use of the money of the estate, and the names of the heirs and legatees, will be presumed to have been made, in the absence of an exception for the want of them. *Clack's Heirs v. Clack's Adm'rs*, 20 Ala. 461.

4. But, where the decree itself, rendered on the final settlement of an estate, shows that the widow of the decedent was excluded from participation in the distribution, the error may be revised, at the instance of the administrator, although no exception was reserved to the action of the court below. *Crothers v. Heirs of Ross*, 17 Ala. 816.

5. Under the Code (§ 1891), a decision of the probate court, upon a question of fact, cannot be revised on error, unless excepted to, or reserved in some other manner, in the court below. *Williams and Wife v. Gunter*, 28 Ala. 681; *Reese v. Gresham*, 29 Ala. 91.

II. EXECUTION AND CONTENTS.

6. A bill of exceptions, without the seal of the presiding judge, does not conform to the requirements of the statute, and cannot be regarded as a part of the record. *Floyd v. Fountain*, 17 Ala. 700. (Note, that the Code, § 2354, does not require the bill to be under seal.)

7. When the court refuses to give a charge as asked, the party who wishes to revise the refusal must set out in his bill of exceptions so much of the evidence as will show that the charge was not abstract. *Leverett's Heirs v. Carlisle*, 19 Ala. 80.

8. To authorize the reversal of a judgment on error, on account of the rejection of evidence, it must be shown that the fact intended to be established by such evidence was material to the decision of the case; and the party excepting must state in his bill of exceptions sufficient to show the relevancy, or materiality, of the alleged erroneous decision, at the time it was made. *Jones v. Dyer and Wife*, 20 Ala. 373.

9. To enable the appellate court to determine whether the allowance of a particular item in an administrator's account is erroneous, the bill of exceptions must set out all the evidence in relation to it that was before the primary court. *Bendall's Distributees v. Bendall's Adm'r*, 24 Ala. 295.

10. Under the Code (§ 1891), the evidence on which the primary court acted, in deciding a question of fact, must all be set out in the record, either on the minutes, or in the bill of exceptions, before the decision can be revised on error. *Reese v. Gresham*, 29 Ala. 91.

III. CONSTRUCTION.

11. Where the bill of exceptions, after reciting the ruling of the court on another point, with the defendant's exception thereto, and stating that the defendant then offered certain evidence, concluded thus: "The court refused to receive the testimony as offered by the defendant. The defendant prays the court to seal this his bill of exceptions to the ruling of the court, which the court now signs,"—*held*, that the exception did not refer to the ruling of the court in excluding the evidence. *Croft v. Ferrell*, 21 Ala. 351.

CHARGE OF COURT.

(Statutory Provisions: Code, §§ 2274, 2355; Clay's Digest, 340 § 149.)

1. A charge which admits of two constructions, one of which asserts an incorrect legal proposition, may be refused, since it is not the duty of the court to modify or give precision to a charge requested. *Ross v. Ross*, 20 Ala. 105.

2. A charge, which assumes that an immaterial question of fact is an issue to be tried and determined by the jury, is well calculated to mislead them, by withdrawing their minds from the true issues in the cause, and may for that reason be refused. *Dunlap v. Robinson*, 28 Ala. 100.

3. A charge held to have been properly refused, because, if the fact assumed in it was true, the charge was abstract, and, if untrue, it did not conform to the evidence. *Ib.*

4. Where the evidence is such as to

render a general rule of law inapplicable to the case, the court may properly refuse to give it in charge to the jury. *Ross v. Pearson*, 21 Ala. 473.

5. Where a charge given by the court, if not critically correct, is fully as favorable to the appellant as if the court had charged the law correctly, the error furnishes no ground of reversal. *Ib.*

6. An erroneous charge to the jury, on the trial of an issue of fact, where the awarding of such issue is discretionary with the court, is no ground for a reversal of the decree, when the verdict is in conformity with the evidence, and the final decree, based upon the verdict, is the same as it should have been without it. *Milam v. Ragland*, 19 Ala. 85.

7. The party who wishes to revise the refusal of a charge asked, must set out in the bill of exceptions so much of the evidence as will show that the charge was not abstract. *Leverett's Heirs v. Carlisle*, 19 Ala. 80.

CODE OF ALABAMA.

I. GENERAL RULES OF CONSTRUCTION.
II. PARTICULAR SECTIONS CONSTRUED.

1. §§ 1572–6 (*Descent and Distribution.*)
2. § 1611 (*Execution of Wills.*)
3. §§ 1634–43 (*Contesting Probate of Wills.*)
4. §§ 1658–74 (*Letters Testamentary and Administration.*)
5. § 1696 (*Removal of Administrator.*)
6. § 1813 (*His Liability for Interest.*)
7. § 1823 (*Effect of Annual Settlements.*)
8. § 1825 (*Administrator's Services and Compensation.*)
9. § 1847 (*Affidavit to Claim against Insolvent Estate.*)
10. §§ 1888–98, 3019–41 (*Appeals.*)
11. § 1922 (*Summary Judgments against Sureties of Executor or Administrator.*)
12. § 1981–97 (*Separate Estates of Married Women.*)
13. §§ 2031–2 (*Guardian and Ward.*)
14. §§ 2089–98 (*Water-Works and Mill-Dams.*)
15. §§ 2318–28 (*Depositions.*)

I. GENERAL RULES OF CONSTRUCTION.

1. The re-enactment in the Code, of a previous statute, must be taken as a legislative adoption of the judicial construction which it had received. *Stallworth v. Stallworth*, 29 Ala. 76.

II. PARTICULAR SECTIONS CONSTRUED.

1. §§ 1572–6 (*Descent and Distribution.*)

2. When an intestate leaves no children or their descendants, the children of a deceased brother or sister of the half blood occupy "the same degree" of relationship as the surviving brothers and sisters, and take, by right of representation, the share which their ancestor, if living, would have taken. *Stallworth v. Stallworth*, 29 Ala. 76.

2. § 1611 (*Execution of Wills.*)

3. Section 1611 of the Code, requiring two witnesses to a will, applies to a will of realty executed before the adoption of the Code, if the testator died since its adoption; but a will of personalty only would be governed by the old law. *Hoffman v. Hoffman*, 26 Ala. 535.

4. It is not necessary that the witnesses should sign the will in the presence of each other. *Ib.*

5. This statute, so far as it relates to the signing of the will, being a substantial transcript of the statute 29th Car. II, ch. 3, the construction which the British statute had previously received must be regarded as the construction which the legislature intended should be put upon our statute, and that construction is hereby adopted. Therefore, where the will was written in the presence of the testator, and at his dictation, and was subscribed by the attesting witnesses as the statute directs, after having been read and approved by him; and the testator, on being asked if he was able to sign it, replied that he was not, and that it was a good will,—*held*, on demurrer to the evidence, that the testator's name, written in the beginning of the will, was a sufficient compliance with the requisitions of the statute. *Armstrong's Executor v. Armstrong's Heirs*, 29 Ala. 538.

3. §§ 1634–43 (*Contesting Probate of Wills.*)

6. The probating of a will, under any circumstances, is a proceeding *in rem;* yet, under our statutes and practice, it partakes somewhat of the nature of a proceeding *in personam*, and is assimilated, in many respects, to an ordinary suit at law. *Deslonde and James v. Darrington's Heirs*, 29 Ala. 92.

7. Where objections are filed to the probate, it is not necessary to join issue thereon; nor can a joinder in issue, by one of the proponents, work a change of parties to the record, or release a co-proponent from his duties and liabilities as such. *Ib.*

8. An application for probate may properly be made in writing, though our statutes do not require that it should be so made; but where the will is propounded orally by two joint executors, and a day set for the hearing, a subsequent written application by one of the proponents alone cannot annul or vary the previous proceedings. *Ib.*

9. Where two joint executors propound a will for probate, and an issue is made up to test its validity, it is too late for either of them, at the trial, to renounce his executorship, in order that he may become a competent witness to sustain the will; nor can he demand to be discharged, as a matter of right, on offering to deposit in court a sum of money sufficient to cover the costs, in order that he may be examined as a witness to sustain the will. *Ib.*

4. §§ 1658–74 (*Letters Testamentary and of Administration.*)

10. A widow is entitled to administer on her husband's estate, unless disqualified by some one of the causes specified in section 1658; but the fact that she had separated and was living apart from him at the time of his death, and entertained feelings of hostility towards him, does not disqualify her. *Williams v. McConico*, 27 Ala. 572.

11. Her right to administer can only be relinquished in some one of the modes specified in the statute: a recital in an order of court, granting letters of administration to another person, that it was "made known to the court, by A. B., special attorney of said widow, that she relinquishes her right of administration to the applicant," does not debar her from applying for letters within the period allowed by the statute: nor is she precluded from asserting her right, by a previous grant of administration, on an *ex parte* application, to another person. *Dunham v. Roberts*, 27 Ala. 701.

5. § 1696 (*Removal of Administrator.*)

12. Section 1696, specifying the causes for which an administrator may be removed, does not apply to a case in which the widow of the decedent, within the period allowed for the assertion of her right to administer, asks the revocation of former letters to another, and the grant of letters to herself. *Dunham v. Roberts*, 27 Ala. 701.

6. § 1813 (*Administrator's Liability for Interest.*)

13. An affidavit by an administrator, seeking to discharge himself from the payment of interest, "that he always had on hand, or within his immediate control, a sum sufficient to pay the amount due by him as administrator," is not sufficient to discharge him from the payment of interest, unless he also denies that he used the funds of the estate. *Farmer's Distributees v. Farmer's Adm'r*, 26 Ala. 671.

7. § 1823 (*Effect of Annual Settlements.*)

14. The allowance of a credit, on an annual settlement of an administrator's accounts, is *prima-facie* evidence in his favor on the final settlement; and if no other evidence is adduced by either party, in reference to the item, than the annual settlement, it is error to disallow the credit. *Newberry's Adm'r v. Newberry's Distributees*, 28 Ala. 691.

8. § 1825 (*Services and Compensation of Administrator.*)

15. An administrator cannot be allowed, as compensation for his ordinary services, more than two-and-a-half per cent. on his receipts, and the same

per cent. on his disbursements; and additional compensation can only be allowed for actual expenses and extraordinary services. *Newberry's Adm'r v. Newberry's Distributees*, 28 Ala. 691.

16. When an estate is kept together under an order of court, and the money belonging to it loaned out, the services rendered by the administrator, in the discharge of the duties thus imposed, are special and extraordinary; and the court may allow for them a joint compensation, to be determined upon the evidence adduced. *Reese v. Gresham*, 29 Ala. 92.

9. § 1847 (*Affidavit to Claim against Insolvent Estate.*)

17. When a claim against an insolvent estate is verified by the affidavit (not of the creditor himself, but) of a third person, who swears that the claim, "to the best of his knowledge, information and belief, is yet due and unpaid," but does not state that he has any knowledge of the facts, the claim should be rejected, on account of the insufficiency of the affidavit. *Pickle's Adm'r v. Ezzell*, 27 Ala. 623.

10. §§ 1888–98, 3016–41 (*Appeals.*)

18. An appeal does not lie from an order for the sale of a decedent's real estate. *Devany's Heirs v. Devany's Adm'rs*, 25 Ala. 722.

19. An appeal lies from a decree, sustaining a demurrer to a petition, under the act of 1854, to compel a settlement from a personal representative of his intestate's administration on an estate, and dismissing the petition with costs. *Howard's Distributees v. Howard's Adm'r*, 26 Ala. 682.

20. An appeal lies from a final decree, confirming the commissioners' report of the division of slaves among legatees, although the proceedings were instituted by the personal representative, and not by a legatee or distributee. *May's Heirs v. May's Adm'r*, 28 Ala. 141.

21. On motion to dismiss an appeal from a final decree on the settlement of a guardian's accounts, because it was not taken within six months after the rendition of the decree, the court said, that the question was one of difficulty and importance, and declined to consider it, because its decision could not affect the result of the case. *Williams and Wife v. Gunter*, 27 Ala. 681.

22. The proviso to section 3040, as to existing judgments and decrees, does not exempt from the statute of limitations therein prescribed all judgments and decrees then existing, but only such judgments and decrees as would otherwise come within its provisions; that is, those from which appeals would be barred in two years. *Banks v. McDougald's Adm'r*, 29 Ala. 75.

23. The limitation of an appeal from a decree declaring an estate insolvent, which was one year under the act of 1843, is thirty days under the Code; and this limitation applies though the decree was rendered before the adoption of the Code. *Ib.*

24. Affidavits cannot be received in the appellate court, to contradict the certificate of the judge of probate, as to the time when the appeal was taken; but when he only certifies that an appeal was taken on a specified day, and that "A. E. is the security of said appellant for the costs of said appeal," affidavits may be received to show that the security was not given at the time the appeal was taken; and when such affidavits are filed, a special *certiorari* will be awarded, on motion, requiring the probate judge to certify the time when the security was executed and lodged in his office. *Carey v. McDougald's Adm'r*, 25 Ala. 109.

25. The appellant producing satisfactory evidence to raise the presumption that his bond was accepted by the judge at the time the appeal was taken, although the written endorsement on the bond referred its approval to a subsequent day, a special *certiorari* was awarded, on motion, requiring the judge to certify the time when he accepted the bond, without reference to his written endorsement. *Williams v. McConico*, 25 Ala. 538.

26. When security for costs merely is given, it is only necessary that the surety should acknowledge himself liable for the costs of the appeal, as under the old practice; but if a bond is given to supersede the judgment, it is the duty of the judge to send up a copy of it, with the record. When

the certificate merely states, that the appellant "has given bond, with A. B. security for said appeal," and a copy of the bond is not sent up, the appeal will be dismissed on motion. *Spencer v. Thompson and Wife*, 24 Ala. 512.

27. A simple acknowledgment in writing is sufficient security for the costs of an appeal under section 1888; and if an appeal bond is taken, which describes the decree with sufficient certainty, and which is shown by the judge's certificate to have been approved by him at the time the appeal was taken, this is a substantial compliance with the statute. *Williams v. McConico*, 27 Ala. 572.

28. An appeal bond does not require the written approval of the judge endorsed on it: if the judge signifies his assent by receiving it, this is a sufficient approval in fact. *Williams v. McConico*, 25 Ala. 538.

29. Security for the costs of the appeal cannot be taken in the appellate court: if the security is not given in the primary court, the appeal will be dismissed. *Carey v. McDougald's Adm'r*, 25 Ala. 109.

30. A valid appeal cannot be taken, without giving bond, or security for costs, within the period prescribed by the statute of limitations governing appeals: when application for an appeal is made within the prescribed period, but no bond or security for costs is given until after its expiration, the appeal will be dismissed on motion. *Mays v. King*, 28 Ala. 690.

31. The practice in appeal cases, where one defendant wishes to revise on error a judgment rendered against himself jointly with others, should conform to the former practice under writs of error: the appeal must be sued out in the name of all the defendants, after which, as to those who refuse to join, there may be a summons and severance; and after such severance, the party refusing to join will not be liable for the cost of the appeal, nor for the statutory damages on affirmance. *Moore v. McGuire*, 26 Ala. 461.

32. But if the appeal bond, upon a fair construction of its language, shows that the whole case is brought up, it is not necessary that it should, in so many words, recite that the appeal, though sued out by one of the defendants, is in the name of all. Therefore, where a joint judgment was rendered against D. and J., the two proponents of a will, from which D. alone sued out an appeal, and the condition of the appeal bond was as follows: "Whereas the above-bound D. hath applied for and obtained an appeal, in a certain suit heretofore pending and determined, wherein the said C. and E." [obligees] "are defendants, and said D. and J. are plaintiffs, in the matter of the contest of the will of J. D., deceased," &c.; "now, if the said D. shall prosecute said appeal to effect, and pay and satisfy the judgment which shall be rendered," &c.—*held*, that the bond was sufficient. *Deslonde and James v. Carter*, 28 Ala. 541.

33. On the reversal of a decree disallowing the probate of a will, although the appellate court might render the decree which the probate court ought to have rendered, (the cause having been heard before the judge without the intervention of a jury,) the safer practice is to remand the cause. *Wells v. Bransford*, 28 Ala. 200.

11. § 1922 (*Summary Judgment against Sureties of Executor or Administrator.*)

34. When an execution against an executor or administrator has been returned "no property found," an execution may issue against him and his sureties; but the court is not authorized to render a judgment against the sureties on such return; and if one of the sureties dies before the return of "no property" against the principal, the summary remedy entirely fails as to him, and cannot be revised by *scire facias*. *Kirby's Adm'r v. Anders*, 26 Ala. 466.

12. §§ 1981–97 (*Separate Estates of Married Women.*)

35. The provisions of the Code, regulating the distribution of the separate estate of a married woman dying intestate, do not apply to separate estates created by deed before the 1st March, 1848, although the marriage took place after that day; and the husband, in such case, takes nothing under the statute. *Willis v. Cadenhead*, 28 Ala. 472.

36. On the death of the wife, intestate, her husband is entitled, under the act of 1850, to one half the separate estate secured to her under that act or the act of 1848; but he takes nothing under this statute, in property which vested in the wife by bequest before the passage of the act of 1848, although the period of its distribution did not arrive until 1854. *Hardy v. Boaz*, 29 Ala 168.

13. §§ 2031–2 (*Guardian and Ward.*)

37. Where letters of guardianship have been granted in this State, the guardian and ward both residing here at the time, the property can not be removed to another State, on the application of another guardian appointed there, who alleges in his petition that the ward has been removed to that State. *Cook v. Wimberly*, 24 Ala. 486.

14. §§ 2089–98 (*Water-Works and Mill-Dams.*)

38. Where a writ of *ad quod damnum* was issued on an application for the elevation of a mill-dam, the inquest of the jury was quashed, because, 1st, the return did not show that the jury were sworn by the sheriff "to discharge their duties fairly and to the best of their ability;" 2dly, it did not show that they were charged by the sheriff as the statute directs; and, 3dly, it did not respond to the matters which the statute requires them to investigate. *Owen v. Jordan*, 27 Ala. 608.

15. §§ 2318–28 (*Depositions.*)

39. When the claim or defense, or a material part thereof, depends exclusively on the evidence of a single witness, his deposition may be taken, and may be read on the trial, although he resides within one hundred miles of the court. *May's Heirs v. May's Adm'r*, 28 Ala. 141.

40. An objection to an entire deposition, on account of defects in the commissioner's certificate, must be made before the trial commences, and comes too late afterwards, though made as soon as the deposition is opened by the court. *Ib.*

COSTS.

I. IN PROBATE OR ORPHANS' COURT.

1. *Security.*
2. *Taxation.*

II. IN SUPREME COURT.

1. *Security.*
2. *Taxation.*

I. IN PROBATE OR ORPHANS' COURT.

1. *Security.*

1. A non-resident, who voluntarily appears and contests the validity of a will, may be required to give security for the costs, if unsuccessful. *Rainer v. McElroy*, 20 Ala. 347.

2. *Taxation.*

2. A final judgment cannot be so altered, at a subsequent term, as to relieve one party from the costs, and charge them against the other. *Harris v. Billingsley*, 18 Ala. 438.

3. When a guardian is charged with a particular sum which has been litigated, he is also properly chargeable with the costs attending the litigation of it. *Hughes v. Mitchell*, 19 Ala. 268.

4. When a decree against an executor is revived by *scire facias*, costs may be awarded against him. *Hanson v. Jacks and Wife*, 22 Ala. 549.

5. The defendant in a writ of *ad quod damnum*, sued out by the lessee of the water-works of Mobile under the act of 1841, can only be taxed, under the statute, with the costs of the appeal to the probate court, and of the attendance of witnesses. *Burden v. Stein*, 25 Ala. 455.

6. A probate judge is not entitled to any fee for "certificates of filing bond for costs;" nor for "filing depositions, and certificates of filing the same." *Rainer v. McElroy*, 20 Ala. 347.

7. A sheriff is not entitled to any fee for "entering and returning notices;" nor for "entering subpœnas." *Ib.*

II. IN SUPREME COURT.

1. *Security.*

8. Security for the costs of an appeal cannot be taken in the appellate court: if the security is not given in the primary court, the appeal will be dismissed. *Carey v. McDougald's Adm'r*, 25 Ala. 109.

9. It is only necessary that the surety should acknowledge himself liable for the costs of the appeal, as under the old practice; but if a *supersedeas* bond is given, it is the duty of the judge to send up a copy of it with the record: where the certificate merely states, that the appellant "has given bond, with A. B. security for said appeal," and a copy of the bond is not sent up, the appeal will be dismissed on motion. *Spencer v. Thompson and Wife*, 24 Ala. 512.

10. The bond or security must be given within the period prescribed by the statute of limitations governing appeals; otherwise, though the application for an appeal was made within the prescribed period, the appeal will be dismissed on motion. *Mays v. King*, 28 Ala. 690.

11. A simple acknowledgment in writing is sufficient security for the costs of an appeal under section 1888; and if an appeal bond is taken, which describes the decree with sufficient certainty, and which is shown by the judge's certificate to have been approved by him at the time the appeal was taken, this is a substantial compliance with the statute. *Williams v. McConico*, 27 Ala. 572.

12. An appeal bond does not require the written approval of the judge endorsed on it: if the judge signifies his assent by receiving it, this is a sufficient approval in fact. *Williams v. McConico*, 25 Ala. 538.

2. *Taxation.*

13. Where the certificate appended to the transcript, *prima facie*, gives the appellate court jurisdiction of the case, costs are allowable, although the case is finally stricken from the docket for want of jurisdiction. *Carey v. McDougald's Adm'r*, 27 Ala. 616.

14. An error in the taxation of costs will be amended in the appellate court, at the appellant's costs. *Burden v. Stein*, 25 Ala. 455.

COURT AND JURY.

1. The statute which authorizes the summoning of a jury, to try any question of fact touching the validity of a will, (Clay's Digest, 304, § 35,) vests in the court trying the issue a more enlarged discretion than is ordinarily exercised by courts in trying civil causes. *Ex parte Henry*, 24 Ala. 638.

COURT, ORPHANS' OR PROBATE.

I. JURISDICTION.—*See that title.*
II. PRACTICE.—*See that title.*

COURT, SUPREME.

See BILL OF EXCEPTIONS;
ERROR AND APPEAL;
MANDAMUS;
PROHIBITION.

DECREES.

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I. AMENDMENT.—*See that title.*

II. CONCLUSIVENESS AND EFFECT.

1. *Probate of Will.*

1. The probating of a will is, under any circumstances, a proceeding *in rem;* yet, under the statutes and practice of this State, it partakes somewhat of the nature of a proceeding *in personam*, and is assimilated in many respects to an ordinary suit at law. *Deslonde and James v. Darrington's Heirs*, 29 Ala. 92.

2. The probate of a will, unless contested in the mode and within the period prescribed by the statute, (Clay's Digest, 598, § 15,) is conclusive; consequently, an application to establish a testamentary paper of later date, which is inconsistent with the provisions of the will already probated, cannot be allowed after the expiration of five years, when the applicant does not bring himself within any of the exceptions to the statute. *Hardy v. Hardy's Heirs*, 26 Ala. 524.

3. But, when a will is admitted to probate, without notice to those who are entitled to it, the probate will be set aside on their application. *Roy v. Segrist*, 19 Ala. 810; *Stapleton v. Stapleton*, 21 Ala. 587.

4. Although the will of a married woman may be admitted to probate in the orphans' court, such probate is not conclusive of her right to devise the real estate; and the heir, when sued in ejectment by the devisee, may call in question the legal effect of the will as a muniment of title, and show that it was ineffectual to pass the real estate. *Baker v. Chastang's Heirs*, 18 Ala. 417.

5. Where a nuncupative will, which was admitted to probate without due notice to those entitled to it, is afterwards declared null and void, by a decree of the same court, on their application, and an administrator appointed; and this decree is subsequently affirmed on error, on the appeal of the person to whom the property was bequeathed by the will, he is barred from prosecutiug another petition in the same court for the re-probate of the will. *Bradley v. Andress*, 27 Ala. 596.

2. *Grant of Administration.*

6. Where the jurisdiction of the court has attached, the grant of administration is not void, and cannot be collaterally impeached in chancery, on the ground that it was improperly granted. *Savage v. Benham*, 17 Ala. 119.

7. A grant of letters of administration on the estate of a living man, who is supposed to be dead, is absolutely void; and if the administrator sells the property, under an order of court regularly made, he is a trespasser. But the purchaser of a slave at the sale cannot, while holding possession under the contract, or if the slave has died while thus in his possession, resist the payment of the note given for the purchase-money, when sued by the administrator, or by the supposed decedent, to whom, on his re-appearance, the administrator endorsed the note. *Duncan & Hooper v. Stewart*, 25 Ala. 408.

8. The action of the courts of probate, in granting letters testamentary or of administration, though conclusive in those cases in which they have the power to act, may, like the sentences of all other courts, be assailed for want of jurisdiction. *Miller v. Jones' Adm'r*, 26 Ala. 247.

9. If property belonging to the estate of an intestate, who neither resided nor had property in this State at the time of his death, is afterwards brought into any county of this State, the probate court of that county may grant administration on it. *Ib.*

10. The fact that there is property belonging to the estate in the county, and not the allegation of the petition, gives the court jurisdiction; consequently, the applicant is not held down to the ground stated in the petition. *Ib.*

11. After the grant of letters of administration, to a person entitled to, and capable of discharging the trust, the court has no power to make any new appointment to the office, until it

is vacated, either temporarily or permanently, by the death, resignation, removal, &c., of the first administrator: such new appointment before the office is vacated, is totally void, and confers no authority on the person appointed to have the first administrator cited to make final settlement. *Matthews v. Douthitt and Wife*, 27 Ala. 273.

12. A grant of letters of administration to another person, on an *ex-parte* application, does not preclude the widow from asserting her right, by petition to the court, within the period prescribed by the statute, (Code, § 1669) asking the revocation of the former letters, and the grant of letters to herself; nor is she estopped by a recital in the previous order, that it was "made known to the court by A. B., special attorney of said widow, that she relinquishes her right of administration to the applicant." *Dunham v. Roberts*, 27 Ala. 701.

3. *Discharging Sureties.*

13. Under the statute (Clay's Digest, 221–2, §§ 5–7) authorizing the discharge of the sureties of a guardian, the taking of a new bond is a jurisdictional fact, necessary to appear in order to give validity to the discharge; but the existence of this fact is to be determined by the judge to whom the application is made, and his decision of it is final and conclusive. Therefore, where the sureties of a guardian of several minors applied for a discharge, and a decree was thereupon rendered by the court, reciting that the guardian had given a new bond, and ordering that the sureties on the old bond be discharged from all further liability,—*held*, in a proceeding against the sureties on the old bond, that the recital was conclusive of the fact that a new bond had been given, although the new bond entirely omitted the name of the minor for whose use the suit was brought, and did not therefore protect his estate. *Hamner v. Mason*, 24 Ala. 480.

4. *Insolvent Estates.*

14. A decree against an administrator, rendered prior to the passage of the act of 1843, is equally conclusive upon him and his sureties, both as to the claims allowed against the estate, and the assets in his hands; and the sureties cannot, in the absence of fraud, litigate any question, except such as arise upon the execution or legal sufficiency of the bond. *Watts v. Gayle & Bower*, 20 Ala. 817.

15. A decree of insolvency by a State court does not preclude a creditor, even in the Federal chancery courts, from denying the truth of the decree, and showing that, when its assets are fairly stated, the estate is in fact solvent. *Byrne v. McDow*, 23 Ala. 404.

16. By the law of this State, prior to the passage of the act 1843, a decree of insolvency might be obtained, when the personalty alone was insufficient to pay all the debts; but such a decree would not be conclusive evidence, in the Federal chancery courts, of the fact of insolvency. *Ib.*

17. The action of the court, in ascertaining the amount of the decedent's indebtedness, binds the realty equally with the personalty, and is at least *prima-facie* evidence against all parties interested in the estate, and against a fraudulent grantee of the decedent. *Heydenfeldt v. Towns*, 27 Ala. 423.

18. Where the record contains no report or decree of insolvency, a mere recital, in the order of publication against creditors, that the estate had theretofore been reported and decreed insolvent, does not give the court jurisdiction to proceed to a settlement of the estate as insolvent. *McBroom's Adm'rs v. McBroom's Creditors*, 19 Ala. 173.

19. A "statement of the condition of the estate," filed by two joint executors prior to the act of 1843, showing an excess of debts over personal assets, which was received by the court, and ordered to be recorded, held sufficient to give jurisdiction of the estate as insolvent; the order reciting that the estate appeared to be insolvent, and the real estate having been afterwards sold as in case of an insolvent estate. *Shackelford v. King*, 24 Ala. 158.

20. Although the settlement of an insolvent estate is liable to be reversed on error, when the record does not show a report of insolvency by the personal representative; yet, in a col-

lateral proceeding, the recitals of the record, showing that such a report was made, are sufficient. *Heydenfeldt v. Towns*, 27 Ala. 423.

5. *Sales of Personalty.*

21. Although the orphans' court, under the general powers conferred on it by the act of 1806, (Clay's Digest, 300, § 21,) may have been a court of general jurisdiction; yet, as to its power to order a sale of the personalty, which was derived exclusively from the act of 1809, (*Ib.* 223, § 13,) it is a court of special, or limited jurisdiction; and its records, therefore, must affirmatively show the facts necessary to sustain its jurisdiction. *Wyatt's Adm'r v. Rambo*, 29 Ala. 510.

22. If a court of limited jurisdiction is charged with the ascertainment of a jurisdictional fact, and its proceedings show that this fact was ascertained, it cannot be collaterally impeached; but the ascertainment of such jurisdictional fact cannot be inferred from the mere exercise of jurisdiction. *Ib.*—(Overruling *Wyatt's Adm'r v. Steele*, 26 Ala. 639.)

23. Under an order to sell all "the *perishable* property" belonging to an estate, the administrator sold all the *personal* property, including slaves, and made due return of his proceedings to the court, which was received, and ordered to be recorded. *Held*, in an action by the succeeding administrator for the recovery of one of the slaves, that the term "perishable property," as applied to decedents' estates, not having a statutory definition, the order of sale should receive the same construction given to it by the court and parties, and that the sale passed the legal title to the slaves. *Steele v. Wyatt's Adm'r*, 23 Ala. 764; *S. C.*, 26 Ala. 639.

24. When the order does not, on its face, appear to have been granted on the application of the administrator, that fact will be presumed after the lapse of twenty years. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

25. On petition for the distribution of slaves, if the number of distributees exceeds the number of slaves to be divided, the court may order a sale in the first instance, without the appointment and report of commissioners.—*Hamlet v. Johnson*, 26 Ala. 557.

6. *Sales of Realty.*

26. Proceedings in the orphans' court, for the sale of a decedent's real estate, are in the nature of a proceeding *in rem;* and therefore, where the jurisdiction is shown to have attached, the action of the court is conclusive until vacated, and cannot, though abounding with errors and irregularities, be collaterally impeached. *Doe d. Saltonstall and Wife v. Riley and Dawson*, 28 Ala. 164; *Field's Heirs v. Goldsby*, 28 Ala. 218; *King v. Kent's Heirs*, 29 Ala. 542; *Matheson's Heirs v. Hearin*, 29 Ala. 210; *Cox v. Davis*, 17 Ala. 714.

27. Under the act of 1818, (Clay's Digest, 195, § 18,) the jurisdiction of the court attached, on its reception of a petition by the administrator, stating that a sale of the real estate would be less injurious than a sale of the slaves, and that a sale of a portion of the estate was necessary to discharge debts. *Matheson's Heirs v. Hearin*, 29 Ala. 210.

28. The petition may also be filed by the widow. *King v. Kent's Heirs*, 29 Ala. 542.

29. As to the sufficiency of the allegations of the petition, when the proceedings are collaterally assailed. *Ib.*

30. The authority to order a sale, under the act of 1818, is not restricted to the estates of intestates, but extends to the estate of any decedent. *Ib.*

31. The order of sale is not void, when collaterally attacked, because made in vacation; nor because it fails to prescribe the character and place of the sale, and the notice to be given. *Matheson's Heirs v. Hearin*, 29 Ala. 210.

32. Under the authority conferred by this statute, the court may order a sale of the decedent's inchoate equity in lands. *Vaughan and Hatcher v. Heirs of Holmes and West*, 22 Ala. 593.

33. Under the act of 1822, (Clay's Digest, 224, § 16,) the jurisdiction of the court attached, on its reception of a petition by the administrator, alleging a deficiency of personal assets for the payment of debts, or that the real estate could not "be equally, fairly, and beneficially divided," without a sale; and asking an order of sale. *Doe d. Saltonstall and Wife v. Riley and Dawson*, 28 Ala. 164; *Field's Heirs v. Goldsby*, 28 Ala. 218; *Cox v. Davis*, 17 Ala. 714.

34. The failure to state in the petition which of the heirs are of full age, does not invalidate the proceedings. *Field's Heirs v. Goldsby*, 28 Ala. 218.

35. The failure to issue a citation to the resident heirs, or to make publication against the non-residents; the failure of the guardian of the infant defendants to deny the allegations of the petition; and the want of proof by deposition of the alleged ground of sale,—are mere irregularities, which, although they might be sufficient to reverse the proceedings on error, have no weight in a collateral attack. *Ib.*

36. The failure of the record to show that the guardian *ad litem* of the infant heirs accepted the appointment, and the absence of proof by the record that the commissioners gave proper notice of the time and place of sale, are also mere irregularities. *Doe d. Saltonsall and Wife v. Riley and Dawson*, 28 Ala. 164.

37. Indefiniteness and discrepancies in the description of the land, in the petition, order of sale, report of sale, and commissioners' deed, will not invalidate the sale, when enough appears to show that the land sold and conveyed by the commissioners was comprehended in the petition and order of sale. *Ib.*

38. It is not necessary that the record should affirmatively show that the petition was filed more than forty days before the final hearing. *Cox v. Davis*, 17 Ala. 714.

7. *Annual Settlements.*

39. Under the Code, (§ 1823,) the allowance of a credit, on an annual settlement of an administrator's accounts, is presumptive evidence in his favor on final settlement; consequently, if no other evidence than the annual settlement is adduced by either party in reference to the item, it is error to disallow the credit. *Newberry's Adm'r v. Newberry's Distributees*, 28 Ala. 691.

40. Under the act of 1850, (Session Acts 1849–50, p. 32, § 28,) partial settlements are to be considered, on final settlement, "only *prima-facie* correct;" and this statute so far modifies their character, that they are not revisable on error. *Thompson and Wife v. Hunt*, 22 Ala. 517.

41. But the statute does not apply to partial settlements which were made prior to its passage. *Duke's Adm'r v. Duke's Distributees*, 26 Ala. 673.

42. A partial settlement under the act of 1843, all the proper parties being regularly before the court, is, as to the validity of certain claims, concerning which an issue was made up and tried, as conclusive as if rendered on final hearing, and may be pleaded in bar on the final settlement. *Ib.*

43. But, prior to the passage of the act of 1843, if the record did not show notice to the distributees, and the appointment of a guardian *ad litem* for the infants, the settlement was not *prima-facie* evidence against them. *McCreliss' Distributees v. Hinkle*, 17 Ala. 459.

44. Where the trustee of an infant is also its duly appointed guardian, and as such annually accounts with the orphans' court, for a period of fifteen years, for the proceeds of the trust estate, and is allowed credits exceeding in amount the annual income of the estate other than that embraced by the trust, he is estopped, on final settlement, unless some error or mistake is shown, from denying his right to the proceeds as such guardian. *Wilson v. Knight*, 18 Ala. 129.

8. *Final Settlements.*

45. A decree against an administrator, in favor of the distributees, for their respective distributive shares, is conclusive on him and his sureties, and cannot be impeached on the ground that the parties, in whose favor it is rendered are not distributees. *Lamkin v. Heyer*, 19 Ala. 228.

46. Such a decree is conclusive evidence of a sufficiency of assets in the hands of the administrator, in a subsequent action against his sureties on their bond. *Kyle v. Mays, use of Pond*, 22 Ala. 692; *Holley v. Acre*, 23 Ala. 603.

47. But a decree, rendered on the settlement of an executor's accounts by his administrator, is not binding and conclusive on the sureties of the executor. *Gray v. Jenkins*, 24 Ala. 516.

48. Where executors are cited to make final settlement and distribution of the estate, a decree, ascertaining the

amount in their hands and the share therein of each distributee, and awarding to each the sum so ascertained, but not discharging the executors, is a final decree, and, so long as it remains in force, conclusive of the rights of the parties. *Sankey's Distributees v. Sankey's Executors*, 18 Ala. 713.

49. A decree, rendered on the application of an executor for a settlement of the estate, ascertaining the amount in his hands, and ordering him to pay over a portion of that amount to those entitled, and to retain the balance until the further order of the court, is not a final decree; but it may well be regarded as an interlocutory decree, and, being *prima-facie* correct, unless impeached for errors or mistakes, may be made the basis of a final decree. *Rhodes v. Turner and Wife*, 21 Ala. 210.

50. A decree, rendered against a guardian, on the final settlement of his accounts, ascertaining the balance due from him to his ward, is evidence of a debt for that amount from him to his ward, although the settlement, considered as a judgment, would be void because not rendered in favor of any one. *Hughes v. Mitchell*, 19 Ala. 268.

51. So, a decree in favor of "the legal representative" of a distributee, though void for uncertainty, is evidence of a debt due from the administrator, and authorizes a recovery by the person entitled to receive it, after he is judicially ascertained; but the failure to pay it does not amount to a *devastavit*, until after the judicial ascertainment of the person entitled to receive it. *Kyle v. Mays, use of Hatchett*, 22 Ala. 673.

52. A decree, rendered prior to the passage of the act of 1846, in favor of an administrator *de bonis non*, against the preceding administrator for moneys received and unaccounted for, is not merely voidable, but void. *Hanna v. Price*, 23 Ala. 826.

53. A final decree, rendered within eighteen months after the grant of administration, discharging the administrator from further liability, is absolutely void, when no report of the solvency or insolvency of the estate has been made; and, admitting it to be valid so far as it allows and confirms the administrator's accounts, (as to which, *quære?*) it cannot be conclusive beyond the very items mentioned in it, nor protect the administrator from liability as to other matters. *Matthews v. Douthitt and Wife*, 27 Ala. 273.

54. The final settlement of his administration, by an administrator *de bonis non*, without a discharge from the trust, does not divest him of the power to call upon a former administrator, for a settlement of his accounts. *Simmons v. Price*, 18 Ala. 405.

9. *Reversal of Decrees.*

55. A decree which has been reversed, is a mere nulity: the judgment of reversal restores the parties to the condition in which they stood before the decree was rendered. *Simmons v. Price*, 18 Ala. 405; *S. C.*, 21 Ala. 337; *Jones v. Dyer and Wife*, 20 Ala. 373.

56. Therefore, when a decree, rendered on the final settlement of an administrator's accounts, is generally reversed and remanded, the administrator may introduce additional evidence, on another settlement, to discharge himself of an item with which he was charged on the former settlement, and with which the appellate court held him to have been properly charged on the evidence then adduced. *Jones v. Dyer and Wife*, 20 Ala. 373.

57. But it is competent for the appellate court to declare the proceedings regular to a certain point, and to reverse from the point at which the first irregularity or error intervened. *Ib.*

58. A decree, on the settlement of an insolvent estate, having been reversed on appeal, and the cause remanded, the certificate of reversal recited the decree of the primary court, "requiring the executors to settle up before the court would hear the contest among the several creditors upon the objections filed, which, being brought before the supreme court by appeal, was reversed, annulled," &c.; while the opinion delivered showed that the decree was reversed because "it was not proper to do either just then." *Held*, that the object of the certificate was simply to inform the primary court what action the supreme court had taken on its decree, while the opinion showed the reasons of that action, and the course indicated for

the future progress of the cause; and that the certificate did not require the court, before proceeding to a settlement with the executors, to hear and determine the contests among creditors. *Weaver's Executors v. Weaver's Creditors*, 23 Ala. 789.

10. *Decisions of Supreme Court.*

59. A decision of the supreme court is the law of the case in which it is rendered, and its correctness cannot be questioned, either in the primary court, or on a second appeal. *Weaver's Executors v. Weaver's Creditors*, 23 Ala. 789; *Bryan and Wife v. Weems*, 25 Ala. 195.

II. FORM AND REQUISITES.

1. *Certainty.*

60. A decree which does not designate the person in whose favor it is rendered, is void for uncertainty. *Turner v. Dupree's Adm'r*, 19 Ala. 198; *Hughes v. Mitchell*, 19 Ala. 268; *Kyle v. Mays, use of Hatchett*, 22 Ala. 673; *Gilbreath v. Manning*, 24 Ala. 418.

61. But, although such a decree is void, the settlement may be regarded as evidence of a debt due from the administrator or guardian. *Hughes v. Mitchell*, 19 Ala. 268; *Kyle v. Mays, use of Hatchett*, 22 Ala. 673.

62. A judgment under the bastardy act, though not in favor of any person by name as plaintiff, is nevertheless sufficient, since the statute points out with certainty who is the plaintiff. *Seale v. McClanahan*, 21 Ala. 345.

2. *Finality.*

63. A final decree of settlement should be definitive as to all the liabilities of the executor to the estate, and should award distribution of the entire fund in his hands. *Rhodes v. Turner and Wife*, 21 Ala. 210.

64. A decree ascertaining the amount in the hands of an executor, and ordering him to pay over a portion of it to the distributees, and to retain the balance until the further order of the court, is not a final decree, but may well be regarded as an interlocutory decree, and may be made the basis of a final decree. *Ib.*

65. A decree is not final, unless it makes distribution of all the assets in the hands of the executor or administrator, among all the parties who appear by the record to be interested in the estate; and unless all the parties in interest are before the court, either in person, or by notice. *Hollis v. Caughman and Wife*, 22 Ala. 478.

66. But when the decree purports to be final, and execution is awarded upon it, it may be revised on error, although not in fact final. *Ib.*

67. A decree, purporting to have been rendered on the final settlement of an estate, and reciting that the administrator "moved the court to be discharged, on the grounds of payment and delivery of the property in his hands to the heirs; which motion being argued by counsel, and due deliberation had thereon by the court, it is considered by the court that the testimony is not sufficient to discharge the administrator," is not such a final decree as will support a writ of error. *Hamilton v. Gwynn and Wife*, 24 Ala 515.

68. A decree, sustaining a demurrer to a petition under the act of 1854, to compel a settlement from a personal representative of his intestate's administration on an estate, because of its failure to allege that assets of the first estate came to the defendant's hands, and dismissing the petition with costs, is revisable by appeal. *Howard's Distributees v. Howard's Adm'r*, 26 Ala. 682.

69. An order for the sale of a decedent's real estate is not revisable by appeal. *Devany's Heirs v. Devany's Adm'r*, 25 Ala. 722.

70. An appeal lies from a final decree, confirming the report of commissioners appointed to make a division of slaves, although the proceedings were instituted by the personal representative, and not by a legatee or distributee. *May's Heirs v. May's Adm'r*, 28 Ala. 141.

71. Under the act of 1843, a writ of error lay from a decree rendered on the annual settlement of an administrator's accounts; but the act of 1850 destroys the final character of such decrees, and renders them interlocutory only. *Thompson and Wife v. Hunt*, 22 Ala. 517.

72. The refusal of the court to grant administration to the sheriff, on the application of a creditor, is neither an interlocutory nor a final decree, within the meaning of the act of 1850, and will not support an appeal. *Brennan's Adm'r v. Harris*, 20 Ala. 185.

73. The refusal of the court to proceed to a settlement of the accounts of an administrator of an insolvent estate, on the citation of a creditor, and the dismissal of the citation, will not support a writ of error. *Shadden v. Sterling's Adm'rs*, 23 Ala. 518.

74. A decree of insolvency cannot be reviewed on error, until a final decree of settlement has been rendered, unless an issue has been made up and tried under the act of 1843. *Black's Creditors v. Black's Adm'rs*, 20 Ala. 401.

75. The rejection of a claim against an insolvent estate, under the act of 1843, is such a final judgment as will support a writ of error, although no issue was made up under the act. *Bartol v. Calvert*, 21 Ala. 42; *McNeil v. Macon's Adm'r*, 20 Ala. 772.

76. But the refusal to permit a creditor to renew the litigation, after a final decree rejecting his claim, is not. *Saltmarsh v. Bird*, 19 Ala. 665.

77. A decree, allowing the substitution of a lost paper or record, will support a writ of error. *Bishop's Heirs v. Hampton*, 19 Ala. 792.

78. The action of the probate court, on a writ of *habeas corpus*, cannot be revised by writ of error. *Wilkinson v. Murphy*, 20 Ala. 104.

3. *Parties.*

79. All the parties in interest, on the final settlement of an estate, must be before the court, either in person, or by notice. *Hollis v. Caughman and Wife*, 22 Ala. 478; *Smith and Wife v. Hooper*, 20 Ala. 245.

80. When any of the distributees have died, it is error to proceed to a final settlement, without bringing in their legal representatives. *Hall's Distributees v. Andrews*, 17 Ala. 40; *McConico v. Cannon*, 25 Ala. 462.

81. When the record shows that there are minor heirs, it should also show that they were represented on the settlement, either by a guardian, or by a guardian *ad litem*. *Clack's Heirs v. Clack's Adm'rs*, 20 Ala. 461.

82. Infants may be represented, on the final settlement of an estate, by their general guardian, unless he is incompetent or unfit. *Smith v. Smith's Adm'rs*, 21 Ala. 761.

83. But if their general guardian, after being notified of the settlement, fails to attend, it is the duty of the court to appoint a guardian *ad litem*. *King v. Collins*, 21 Ala. 363.

84. The exclusion of infants from the distribution of an estate, without the appointment of a guardian *ad litem*, on the ground that they had received advancements, is erroneous. *Wilson's Heirs v. Wilson's Adm'r*, 18 Ala. 176.

85. Where property is bequeathed to one, in trust for others, the trustee is regarded at law as the legatee, and the *cestuis que trust* are not necessary parties to a settlement of the administration. *Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27.

86. The widow, or (if dead) her personal representative, is a necessary party to a final settlement of the estate. *Crothers v. Heirs of Ross*, 17 Ala. 816.

87. The widow and next of kin are entitled to notice of an application for the probate of a will. *Roy v. Segrist*, 19 Ala. 810; *Stapleton v. Stapleton*, 21 Ala. 587.

88. Where the wife is a distributee, the decree for her distributive share should be in the name of husband and wife, for the use of the wife. *Roberson's Heirs v. Roberson's Executors*, 21 Ala. 273.

89. The wife is a necessary party to a final settlement of her guardianship of a minor, and a decree against her husband only is erroneous. *McGinty v. Mabry*, 23 Ala. 672.

90. The husband is a necessary party to a settlement of an estate, of which his wife is a distributee, since the passage of the acts of 1848 and 1850, "securing to married women their separate estates." *Smith and Wife v. Hooper*, 20 Ala. 245.

As to the practice of making parties to final decrees, in order that they may sue out an appeal or writ of error, see ERROR AND APPEAL, 17.

4. *Record.*

91. A paper, purporting to be a decree on the final settlement of an

estate, signed by the judge of the orphans' court, and filed among the papers of the cause, with the endorsement thereon, "Decree in Est. of J. H., deceased, filed 2d Monday April, 1847," also signed by the judge, is not the decree of the court until entered of record. *Hall v. Hudson*, 20 Ala. 284; see, also, *Hudson v. Hudson*, 20 Ala. 364.

IV. PRESUMPTIONS IN FAVOR OF REGULARITY.—See Error and Appeal, 55–65.

V. REVIVAL AND SATISFACTION.

92. A *scire facias* does not lie to revive a decree, upon which, on account of its uncertainty, no execution could have issued. *Turner v. Dupree*, 19 Ala. 198.

93. A *scire facias*, to revive a decree on which no execution issued within a year and day, may be regarded as a suit on the decree, so far as the plaintiff's right to discontinue as to parties not served is concerned. *Hanson v. Jacks and Wife*, 22 Ala. 549.

94. On *scire facias* to revive a joint decree against two executors, if one of them is a non-resident, his name may be omitted from the writ; or, if he is included in the writ, and not served with process, the plaintiff may enter a discontinuance as to him, and proceed to judgment against the other. *Ib.*

95. At common law, the lapse of seventeen years would not be sufficient to raise the presumption of payment by an executor of the amount ascertained to be due to the legatees upon a settlement of his testator's estate, and our statutes fix no period as a limitation to proceedings to compel a final settlement; but if the parties allow twenty years to elapse, without taking any steps to compel a settlement, the presumption of payment arises in favor of the executor; and this period would date from the time when he might have been called to a settlement. *Rhodes v. Turner and Wife*, 21 Ala. 210.

VI. SUMMARY JUDGMENTS AGAINST SURETIES.

96. To support a *fi. fa.* under the statute (Clay's Digest, 305, § 45) against the sureties of an executor, it is indispensable that a *fi. fa.* should have been issued against the executor, and returned "no property found;" otherwise, the execution against the sureties is void, and may be quashed on motion. *Poacher v. Weisinger*, 20 Ala. 102.

97. The record must show the decree against the administrator, the bond by which the sureties have become liable, the issue of an execution on the decree against the administrator, and its return "no property found." *Hanna v. Price*, 23 Ala. 826.

98. Under the Code (§ 1922), when an execution against an executor or administrator has been returned "no property found," an execution may issue against him and his sureties; but the court is not authorized to render a decree against the sureties on such return; and if one of the sureties dies before the return of "no property" against the principal, the statutory remedy as to him entirely fails. *Kirby's Adm'r v. Anders*, 26 Ala. 466.

DEEDS.

See same title in PART IV.

DEPOSITIONS.

See same title in PART IV.

DESCENT AND DISTRIBUTION.

See ESTATES OF DECEDENTS, II.

DEVISE.

See LEGACY AND DEVISE.

DISCONTINUANCE.

See PLEADING AND PRACTICE.

DOWER.

(Statutory Provisions: Code, §§ 670, 1354–72; Clay's Digest, 157, § 36; *Ib.* 155, §§ 27–8; *Ib.* 168, § 2; *Ib.* 172–4, §§ 1–12.)

I. OF THE RIGHT OF DOWER.

1. *Nature of Estate, and when it Attaches.*
2. *How Barred or Relinquished.*

II. PROCEEDINGS TO RECOVER DOWER.

1. *Jurisdiction of Probate Court.*
2. *Pleadings and Evidence.*

III. OF THE WIDOW'S RIGHTS BEFORE DOWER ASSIGNED.

IV. OF THE ASSIGNMENT OF DOWER IN EQUITY.—*See title Dower, in* PART III.

I. OF THE RIGHT OF DOWER.

1. *Nature of Estate, and when it Attaches.*

1. To entitle the widow to dower, in lands of which her husband was seized during the coverture, he must have been beneficially seized, though but for a moment, to his own use, and not as a mere conduit for passing the title. *Edmondson v. Welsh and Wife*, 27 Ala. 578.

2. Where a mortgagor conveys by absolute deed, and the lands are afterwards sold under the mortgage, the widow of the first purchaser is not entitled to dower in them, because the estate of her husband was divested by the sale under the mortgage. *Cheek v. Waldrum and Wife*, 25 Ala. 152.

3. A widow is not entitled, as against the mortgagee, to dower in lands which, on the same day they were conveyed to her husband, were mortgaged by him to his vendor, to secure the payment of the purchase-money. *Eslava v. Lepretre*, 21 Ala. 504.

4. An outstanding right of dower, whether perfect or inchoate, is an incumbrance upon the title which renders it defective. *Thrasher and Mitchell v. Pinckard's Heirs*, 23 Ala. 616; *McLemore v. Mabson*, 20 Ala. 137.

2. *How Barred or Relinquished.*

5. The wife cannot, by any agreement with her husband during coverture, bar her right of dower; nor will she be estopped, in a court of law, from asserting her claim, by any recognition on her part, after a voluntary separation from her husband, of his right to marry another woman, or of the validity of his supposed subsequent marriage. *Martin's Heirs v. Martin*, 22 Ala. 86.

6. When a woman marries a man who has another wife living, such marriage imposes no obstacle to her subsequent marriage with another man; and the fact that, at the time of her supposed first marriage, she knew that her husband's former wife was living, would not affect her right to have dower in her husband's estate allotted to her at law. *Ib.*

7. A sale of real estate, by commissioners, under an order of the probate court, does not affect the widow's right of dower; and although the order was made on her application, as administratrix, her failure to announce that the land was sold subject to her dower, does not estop her from asserting her claim. *Owen v. Slatter*, 26 Ala. 547.

8. When the husband's will makes no provision for the widow, she may claim dower without an express dissent from it. *Turner v. Cole*, 24 Ala. 364; *Martin's Heirs v. Martin*, 22 Ala. 86.

9. The wife's right to dower, in lands aliened by her husband during coverture, can only be relinquished by herself in person. *Martin's Heirs v. Martin*, 22 Ala. 86.

10. The act of 1839, authorizing relinquishments of dower by deed of husband and wife attested by two witnesses, embraces non-resident as well as resident femes covert. *Carter v. Corley*, 23 Ala. 612.

11. An ante-nuptial contract, barring dower, specifically enforced against the widow at the suit of the heirs of her deceased husband. *Webb v. Webb's Heirs*, 29 Ala. 588.

II. OF THE PROCEEDINGS TO RECOVER DOWER.

1. *Jurisdiction of Probate Court.*

12. The statutory jurisdiction of the

probate court, in the allotment of dower, is in derogation of the common law; consequently, the proceedings must conform to the statute in every particular. *Martin's Heirs v. Martin*, 22 Ala. 86.

13. In the exercise of this statutory jurisdiction, the court has no equity jurisdiction, but proceeds according to the rules of law; so that, if the demandant has a legal right to dower, it is the duty of the court to allot it, irrespective of considerations which are of purely equitable cognizance. *Ib.*

14. The court has no jurisdiction to go into an inquiry, whether the lands, in which dower is sought, were purchased by the husband with money obtained by him from another woman, with whom, after a voluntary separation between him and the demandant, he had contracted a supposed marriage, and with whom, as his lawful wife, he lived until his death. *Ib.*

15. The probate court can only allot dower in the mode prescribed by the statute, and in those lands of which the husband died seized. *Thrasher & Mitchell v. Pinckard's Heirs*, 23 Ala. 616.

16. In reference to the question, whether the probate court could assign dower out of the surplus proceeds of the sale of lands, which were sold for the payment of the debts of the estate, the court say, it is "a jurisdiction which we should be strongly inclined to deny, but we leave it an open question, since its decision is not involved in the case before us." *Williamson and Wife v. Mason*, 23 Ala. 488.

2. *Pleadings and Evidence.*

17. The petition must allege the marriage, the seizin of the husband during coverture, and his death; an allegation that the demandant is the *widow* of the decedent, is not a sufficient averment of their marriage. *Martin's Heirs v. Martin*, 22 Ala. 86.

18. It must also contain a description of the lands in which dower is sought, and aver that they lie in the county in which the petition is filed; an allegation that the decedent died in the county, "seized and possessed of the following lands," is not a sufficient averment that the lands are situated in the county. *Ib.*

19. It must also show whether the decedent died testate or intestate, who are his heirs, who his personal representatives, if any, and who the tenants of the freehold; an allegation that certain named persons are "*his only legitimate children*," is not a sufficient averment that they are his only *heirs-at-law*. *Ib.*

20. If the petition is defective, for the want of proper parties and necessary allegations, it may be amended; and in such case, the appellate court will not dismiss the petition, but will remand the cause, that the proper amendments may be made. *Ib.*

21. The record must show that the proper parties were before the court. *Ib.*

22. Proof of the marriage, by an eye-witness, is not required; nor is it indispensable that the license, with the minister's return thereon endorsed, should be produced: it is only necessary that the proof should be sufficient to satisfy the jury that the marriage did actually take place. *Ib.*

23. The bond, given by the intended husband, preliminary to obtaining a license, is relevant and legal evidence of the marriage; but where the marriage was celebrated in another State, to make a certified copy of the bond admissible evidence here, it should be shown that it was there required by law to be recorded, and the copy should be authenticated according to the act of Congress of 1804. *Ib.*

24. Parol evidence is admissible, to show that a deed, absolute on its face, was received in trust for a particular purpose, and that the vendee was a mere conduit for passing the title. *Edmondson v. Welsh and Wife*, 27 Ala. 578.

25. Where the demandant's husband was the mere conduit for passing the title from his vendors, as trustees, back to them individually, a purchaser from them is not estopped from showing that he had no beneficial seizin: his seizin is not thereby denied, but only explained. *Ib.*

26. Where the demandant's husband, on receiving a deed, with covenants of warranty, from the assignees of a mortgage, reconveyed to them on the same day, by quit-claim deed, the testimony of the subscribing witness to

the deeds, to the effect that the husband purchased for the assignees, that no money passed between them, and that the transfer of deeds was only intended to make good titles to the land, was held sufficient to show that the husband had no beneficial seizin. *Ib.*

III. OF THE WIDOW'S RIGHTS BEFORE DOWER ASSIGNED.

27. Until her dower is assigned, the widow is entitled, free of rent, to the dwelling-house in which her husband resided at the time of his death. *Pharis v. Leachman*, 20 Ala. 663.

28. But she has not such a legal title therein as can be sold under execution at law. *Doe d. Cook & Hardy v. Webb*, 18 Ala. 810.

29. If the administrator rents the plantation on which the decedent resided at the time of his death, when the widow's dower has not been assigned, the heirs-at law cannot maintain an action against him for the rents. *McLaughlin v. Godwin*, 23 Ala. 846.

30. If the widow, before her dower is assigned, conveys by deed her interest in the lands of her deceased husband, the heir may recover in ejectment against her alienee. *Wallace v. Hall's Heirs*, 19 Ala. 367.

31. If the widow of the mortgagor, while in possession of the mortgaged premises, before dower is assigned to her, conveys by deed to the mortgagee, her deed, if effective for any purpose as against the heir, certainly does not pass more than the right to retain one third of the rents and profits of the premises. *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

ELECTION.

1. When an administrator continues, without authority, to employ the slaves of the estate in the business in which they were engaged at the time of the intestate's death, the distributees may elect to take either the hire of the slaves or the profits realized: if they elect to take the hire, it is an abandonment of the profits; if the profits, they must take them *cum onere*, and allow all reasonable expenses incurred in making them. *McCreeliss' Distributees v. Hinkle*, 17 Ala. 459.

2. If an administrator invests the assets of the estate in property, he is chargeable, on final settlement, with the sum invested and interest thereon, and, if the property has been used for the benefit of the estate, he should be allowed therefor a reasonable compensation; but such a settlement could not deprive an infant distributee of his right of election, nor preclude him from resorting to equity to compel a conveyance. *Gerald and Wife v. Bunkley*, 17 Ala. 170.

3. Whether the administrator, in such case, can resort to equity to compel a conveyance, is a question well worthy of consideration. *Ib.*

4. Infants are incapable of electing, whether they will account for advancements, or be excluded from the distribution on final settlement. *Wilson's Heirs v. Wilson's Adm'r*, 18 Ala. 176.

EMBLEMENTS.

1. Under the "married-women's law" of 1850, the husband is entitled, like any other tenant for life, to *emblements* in his wife's separate estate; that is, the crop growing or matured, whether gathered or not, at the termination of the life estate. *Weems v. Bryan and Wife*, 21 Ala. 303.

2. When the right attaches, and what it includes. *Price v. Pickett*, 21 Ala. 741.

ERROR AND APPEAL.

(Statutory Provisions: Code, §§ 1888–98, 3016–41; Clay's Digest, 306–12; *Ib.* 285, § 4; *Ib.* 297, § 4.)

I. WHEN ERROR OR APPEAL LIES.

1. *Before the Code.*
2. *Under the Code.*

II. PARTIES.

III. BOND, AND SECURITY FOR COSTS.

IV. LIMITATION.

V. PRACTICE.

1. *Amendment of Writ.*

I. WHEN ERROR OR APPEAL LIES.

1. *Before the Code.*

1. An order, allowing the substitution of a lost paper or record, is such a final decree as will support a writ of error. *Bishop's Heirs v. Hampton*, 19 Ala. 792.

2. The rejection of a claim against an insolvent estate, under the act of 1843, will support a writ of error, although no issue was made up under that act. *McNeil v. Macon's Adm'r*, 20 Ala. 772; *Bartol v. Calvert*, 21 Ala. 42.

3. But the refusal of the court, after the final rejection of a claim, to permit the creditor to renew the litigation, will not. *Saltmarsh v. Bird*, 19 Ala. 665.

4. Unless an issue is made up and tried under the act of 1843, a writ of error does not lie from a decree of insolvency, until a final decree of settlement has been rendered. *Black's Creditors v. Black's Adm'rs*, 20 Ala. 401.

5. The refusal of the court to grant letters of administration to the sheriff, on the application of a creditor, is not such an order or decree, within the meaning of the act establishing courts of probate, as will support an appeal. *Brennan's Adm'r v. Harris*, 20 Ala. 185.

6. The action of the probate court, on a writ of *habeas corpus*, cannot be revised by writ of error. *Wilkinson v. Murphy*, 20 Ala. 104.

7. When a decree purports to be final, and execution is awarded upon it, it may be revised on error, although not in fact final. *Hollis v. Caughman and Wife*, 22 Ala. 478.

8. Under the act of 1843, a writ of error lay from an annual settlement of an administrator's accounts; but the act of 1850 destroys the final character of such decrees, and renders them interlocutory only. *Thompson and Wife v. Hunt*, 22 Ala. 517.

9. A writ of error does not lie from the refusal of the court to proceed with the settlement of the accounts of an administrator of an insolvent estate, to which he had been cited by a creditor, and the dismissal of the petition. *Shadden v. Sterling's Adm'rs*, 23 Ala. 518.

10. A writ of error does not lie from a decree, purporting to have been rendered on the final settlement of an estate, and reciting that the administrator "moved the court to be discharged, on the grounds of payment and delivery of the property in his hands to the heirs; which motion being argued by counsel, and due deliberation had thereon by the court, it is considered by the court, that the testimony is not sufficient to discharge the administrator." *Hamilton v. Gwynn and Wife*, 24 Ala. 515.

2. *Under the Code.*

11. An appeal does not lie from an order for the sale of a decedent's real estate. *Devany's Heirs v. Devany's Adm'rs*, 25 Ala. 722.

12. An appeal lies from a final decree, confirming the commissioners' report of the division of slaves among legatees, although the proceedings were instituted by the personal representatives, and not by a legatee or distributee. *May's Heirs v. May's Adm'r*, 28 Ala. 141.

13. An appeal lies from a decree, sustaining a demurrer to a petition, under the act of 1854, to compel the settlement by an administrator of his intestate's administration on an estate, and dismissing the petition with costs, on account of its failure to allege that assets of the first estate came to the defendant's hands. *Howard's Distributees v. Howard's Adm'r*, 26 Ala. 682.

II. PARTIES.

14. A writ of error can only be sued out by one who is either a party or privy to the record, and who has been injured by the decree, and who will be benefited by its reversal. *Dupree v. Perry*, 18 Ala. 34.

15. In a statutory proceeding against the administrator of a deceased vendor, to obtain title to land, the administrator, who is the only indispensable

party defendant to the petition, may alone sue out a writ of error, to reverse a decree rendered against him. *Prince v. Bates*, 19 Ala. 105.

16. In a proceeding for the substitution of a lost record, between a subpurchaser at a sale of land under order of the orphans' court, as plaintiff, and the decedent's heirs-at-law as defendants, the parties to the motion in the court below are the proper parties to the writ of error. *Bishop's Heirs v. Hampton*, 19 Ala. 792.

17. A party interested, if he was not before the court when the decree was rendered, may propound his interest by petition, and be made a party to the decree, so that he may sue out a writ of error. *Roy v. Segrist*, 19 Ala. 810; *Stapleton v. Stapleton*, 21 Ala. 587; *Collier's Adm'r v. Slaughter's Adm'r*, 22 Ala. 671; *Binford v. Binford*, 22 Ala. 682; *McConico v. Cannon*, 25 Ala. 462.

18. In appeals under the Code, where one defendant wishes to revise a decree rendered against himself jointly with others, the practice should conform to the former practice under writs of error: the appeal must be sued out in the name of all the defendants, after which there may be a summons and severance as to those who refuse to join. *Moore v. McGuire*, 26 Ala. 461.

19. An appeal from a joint decree against several defendants, though sued out by one only, must be in the names of all. *Deslonde and James v. Carter*, 28 Ala. 541.

III. BOND, AND SECURITY FOR COSTS.

20. When security for costs merely is given, it is only necessary that the surety should acknowledge himself liable for the costs of the appeal, as under the old practice; but if a *supersedeas* bond is given, it is the duty of the judge to send up a copy of it, with the record: where the certificate merely states, that the appellant "has given bond, with A. B. security for said appeal," and a copy of the bond is not sent up, the appeal will be dismissed on motion. *Spencer v. Thompson and Wife*, 24 Ala. 512.

21. A simple acknowledgment in writing is sufficient security for the costs of an appeal under section 1888; and if an appeal bond is taken, which describes the decree with sufficient certainty, and which is shown by the judge's certificate to have been approved by him at the time the appeal was taken, this is a substantial compliance with the statute. *Williams v. McConico*, 27 Ala. 572.

22. Security for the costs cannot be taken in the appellate court: if the security is not given in the primary court, the appeal will be dismissed. *Carey v. McDougald's Adm'r*, 25 Ala. 109.

23. The bond or security for costs must be given within the period prescribed by the statute of limitations governing appeals: when application for an appeal is made within the prescribed period, but no bond or security is given until after its expiration, the appeal will be dismissed on motion. *Mays v. King*, 28 Ala. 690.

24. An appeal bond does not require the written approval of the judge endorsed on it: if the judge signifies his assent by receiving it, this is a sufficient approval in fact. *Williams v. McConico*, 25 Ala. 538.

25. Affidavits cannot be received in the appellate court, to contradict the certificate of the judge of probate, as to the time when the appeal was taken; but when he only certifies that an appeal was taken on a specified day, and that "A. E. is the security of said appellant for the costs of said appeal," affidavits may be received to show that the security was not given at the time the appeal was taken; and when such affidavits are filed, a special *certiorari* will be awarded, on motion, requiring the probate judge to certify the time when the security was executed and lodged in his office. *Carey v. McDougald's Adm'r*, 25 Ala. 109.

26. The appellant producing satisfactory evidence to raise the presumption that his bond was accepted by the judge at the time the appeal was taken, although the written endorsement on the bond referred its approval to a subsequent day, a special *certiorari* was awarded, on motion, requiring the judge to certify, without reference to his written endorsement, the time when he accepted the bond. *Williams v. McConico*, 25 Ala. 538.

27. If the appeal bond, upon a fair

construction of its language, shows that the whole case is brought up, it is not necessary that it should, in so many words, recite that the appeal, though sued out by one of the defendants, is in the name of all. *Deslonde and James v. Carter*, 28 Ala. 541.

IV. Limitation.

28. A writ of error from a decree of insolvency, when an issue is made up and tried under the act of 1843, must be sued out within a year from the trial of such issue. *Black's Creditors v. Black's Adm'rs*, 20 Ala. 401.

29. Under the Code, the limitation of an appeal from such a decree is thirty days; and this limitation applies, though the decree was rendered before the adoption of the Code. *Banks v. McDougald's Adm'r*, 29 Ala. 75.

30. The limitation of writs of error, from final decrees of the probate court, is three years. *Binford v. Binford*, 22 Ala. 682. (But note, that the Code abolishes writs of error, and substitutes appeals in their stead; and that the limitation of appeals, except in cases otherwise specially provided, is two years.)

31. Where a person interested is made a party to a decree previously rendered, for the purpose of contesting its validity by writ of error, the entry making him a party relates back to the rendition of the decree; and he must sue out his writ of error within three years from the rendition of that decree. *Ib.*

32. On motion to dismiss the appeal in this case, which was taken from a decree rendered on the final settlement of a guardian's accounts, because it was not taken within six months after the rendition of the decree, the court said, that the question was one of difficulty and importance, and declined to consider it, because its decision could not affect the result of the case. *Williams and Wife v. Gunter*, 28 Ala. 681.

33. The proviso to section 3040, as to existing judgments and decrees, does not except from the general statute of limitations all judgments and decrees then existing, but only such judgments and decrees as would otherwise come within the provisions of that section; that is, those from which appeals would be barred in two years. *Banks v. McDougald's Adm'r*, 29 Ala. 75.

V. Practice.

1. *Amendment of Writ.*

34. Writs of error, if defective, may be amended by the record, but the name of a party plaintiff cannot be stricken out and made a defendant, unless the record shows that he ought to have been made a defendant instead of a plaintiff. *Knox's Distributees v. Steele*, 18 Ala. 815.

2. *Assignment of Errors.*

35. There is no rule of practice which allows one plaintiff to assign errors against a co-plaintiff. *Knox's Distributees v. Steele*, 18 Ala. 815.

36. All that a plaintiff can do, when his co-plaintiff refuses to join, is to sever and assign errors alone. *Ib.*

37. Under the Code, as under the former practice, there may be a summons and severance as to those who refuse to join; and after such severance, the party refusing to join will not be liable for the costs of the appeal, nor for the statutory damages on affirmance. *Moore v. McGuire*, 26 Ala. 461.

38. Where a plaintiff has sued out execution, and coerced payment in whole or in part, he will not be heard to assign errors in the decree, unless the money so collected has been first refunded. *Knox's Distributees v. Steele*, 18 Ala. 815.

39. But where the money was paid without compulsion, and the defendant in error can in no aspect of the case be injured, the writ will not be dismissed, but the plaintiff will be allowed to assign errors without refunding the money. *McCreliss' Distributees v. Hinkle*, 17 Ala. 459.

3. *Record.*

40. Each case must be tried upon its own record, which cannot be aided by reference to the record in another case, though involving the construction of the same will. *Collier's Adm'r v. Slaughter's Adm'r*, 21 Ala. 671.

4. *What is, or not, revisable.*

41. Matters which were not excepted to, nor reserved in any other manner in the court below, cannot be assigned as error. *Gordon v. McLeod*, 20 Ala. 242.

42. A decision upon a question of fact, unless duly excepted to, cannot be revised on error. *Smith's Distributees v. King*, 22 Ala. 558.

43. This rule equally applies to a decision upon the admissibility of evidence. *Croft v. Ferrell*, 21 Ala. 351.

44. Under the Code (§ 1891), a decision upon a question of fact must be excepted to, or reserved in some other manner in the court below. *Williams and Wife v. Gunter*, 28 Ala. 681; *Reese v. Gresham*, 29 Ala. 91.

45. Where the decree itself, rendered on the final settlement of an estate, shows that the widow was excluded from participation in the distribution, the error may be revised, at the instance of the administrator, although no exception was reserved to it, and although the decree recites that those to whom distribution is made "are the sole distributees of said estate." *Crothers v. Heirs of Ross*, 17 Ala. 816.

46. After the evidence on both sides has closed, on the trial of an issue before a jury, it is discretionary with the court to receive additional evidence; and this discretion is not revisable on error. *Gilbert v. Gilbert*, 22 Ala. 529.

47. A point which was not in any shape presented in the court below, cannot be noticed in the appellate court. *McGinty v. Mabry*, 23 Ala. 672.

48. The action of the court, under the act of 1850, upon questions of fact growing out of administrations, is a matter of law, and is revisable on error in the same manner as are the decisions of the court on questions of fact, which are referred to the court rather than to the jury. *Bogle v. Bogle's Adm'r*, 23 Ala. 544.

49. The admission of incompetent evidence, when duly excepted to, is revisable on error, although the issue was tried before the judge without the intervention of a jury. *Mims v. Sturdevant and Wife*, 23 Ala. 664.

50. Where *ex-parte* proceedings are instituted against a sheriff, after his removal from the State, to compel the settlement of his administration *virtute officii*, the objection may be raised by him for the first time on error, that the preliminary proceedings, in which he is described as "administrator *de bonis non*," are not sufficient to support a final decree, by default, against him as "late sheriff of said county, and, by virtue of his office as sheriff, administrator *de bonis non*," &c. *Spence v. Savery*, 25 Ala. 723.

51. Where one of the heirs appears, and contests the validity of a will, he cannot be heard to assign as error that there were other resident heirs, who were duly notified and failed to appear. *Walker v. Jones*, 23 Ala. 448.

52. Where a special term is appointed by consent for the trial of an issue respecting the validity of a will, the contestant is estopped from raising the objection, on error, that the court could not hear and render judgment in the cause at any other than a regular term. *Ib.*

53. Where the parties in interest appear, and consent to a postponement of the settlement, they cannot afterwards be heard to complain of any irregularity in the manner of bringing them in. *Barnett's Executor v. Tarrence*, 23 Ala. 463; see, also, *Croft v. Ferrell*, 21 Ala. 351.

54. On the trial of an issue, to ascertain whether an advancement has been made to a child, if the record shows that the question at issue was fairly presented, and correctly decided, without objection in the court below, the defendant cannot complain, on error, that the other distributees, instead of the administrator, were the plaintiffs in the issue. *Smith v. Smith's Distributees*, 21 Ala. 761.

5. *Presumptions in favor of Judgment.*

55. Every reasonable intendment will be made in favor of the decree, when the record shows that the jurisdiction of the court had attached. *Wilson's Heirs v. Wilson's Adm'r*, 18 Ala. 176.

56. Therefore, where a decree, rendered on the final settlement of an estate, contained a recital in these words: "It appearing that the heirs of A. H. and S. H., his wife, have received advancements made to the said

A. H. in his lifetime," &c.—*held*, that the presumption would be indulged, if necessary to sustain the decree, either that the advancements were made to A. H. in the lifetime of his wife, or, if made after her death, that he had authority to receive them, and that the property so advanced had been actually received by the respective heirs of S. H. in equal portions. *Ib.*

57. Where a claim against an insolvent estate is filed on the same day on which the decree of insolvency is rendered, it will be presumed, in the absence of other proof, to have been filed after the rendition of the decree. *Gaffney v. Williamson's Adm'r*, 21 Ala. 112.

58. The affidavits which the administrator is required to make, in regard to the use of the money of the estate and the names of the heirs and legatees, will be presumed to have been made, in the absence of an exception for the want of them. *Clack's Heirs v. Clack's Adm'rs*, 20 Ala. 461.

59. Where an order of sale does not on its face appear to have been granted on the application of the administrator, that fact will be presumed after the lapse of twenty years. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

60. Where the record shows an irregular final settlement, the court will presume in favor of its correctness, after the lapse of twenty years, that the necessary notices were given, and that the parties in interest were present. *Barnett's Executor v. Tarrence*, 23 Ala. 463.

61. After a lapse of eighteen years, the court will not force conclusions, nor draw any inferences not clearly warranted by the evidence, in favor of a distributee who has had ample time and opportunity to assert his rights, and has made no effort to do so until after the administrator's death. *Bogle v. Bogle's Adm'r*, 23 Ala. 544.

62. Where a decree, which is free from error on its face, does not appear, and is not shown by bill of exceptions, to be based on an account which is copied in the transcript, the appellate court will not indulge the presumption that it was founded on that account, and on that presumption reverse it. *Williams and Wife v. Gunter*, 28 Ala. 681.

63. Where the record shows that the decedent left a widow, and the final decree excludes her from all participation in the distribution of the estate, without any reason therefor being assigned, it will not be intended, because the decree so recites, that those to whom distribution is made "are the sole distributees of said estate," but the recital will be regarded as the assertion of an erroneous legal proposition. *Crothers v. Heirs of Ross*, 17 Ala. 816.

64. An administrator, who reports the estate insolvent, thereby becomes the actor, and is chargeable with notice of all the subsequent proceedings in the cause. *Ib.*

65. Where the decision of a pending cause is suspended, by consent, until the decision of the supreme court in another cause between the same parties can be had, and the decree afterwards rendered recites that the opinion had been received, it will be intended that the decree was rendered in open court, in the presence of the parties or their counsel. *Burden v. Stein*, 25 Ala. 455.

VI. JUDGMENT IN ERROR.

66. An error in the imposition of costs will be corrected, on error, at the appellant's costs. *Burden v. Stein*, 25 Ala. 455.

67. A mistake in the christian name of a party, when the true name appears in the record, will be corrected at the appellant's costs. *McBroom's Adm'rs v. McBroom's Creditors*, 19 Ala. 173.

68. When a petition for dower is defective, for the want of proper parties and necessary allegations, the cause will be remanded, that the proper amendments may be made. *Martin's Heirs v. Martin*, 22 Ala. 86.

69. On the reversal of a decree rejecting the probate of a will, the cause having been heard before the judge without the intervention of a jury, although the appellate court might (Code, § 3034) render the decree which the probate court ought to have rendered, the safer practice is to remand the cause. *Wells v. Bransford*, 28 Ala. 200.

70. In revising the action of the

probate court, under the act of 1850, upon questions of fact growing out of administrations, the appellate court will look to the whole evidence, if it is to be found in the record, and will not remand the cause for another trial, if, rejecting testimony which may have been illegally admitted, enough remains to sustain the decree. *Bogle v. Bogle's Adm'r*, 23 Ala. 544.

71. It is competent for the appellate court to declare the proceeding regular to a certain point, and to reverse from the point at which the first irregularity or error intervened; but when the decree is generally reversed and remanded, the decree is vacated *in toto*, and the parties then stand in precisely the same situation as if it had never been rendered. *Jones v. Dyer & Wife*, 20 Ala. 273.

72. To authorize a reversal, on account of a supposed erroneous decision of the primary court in the rejection of evidence, it must be shown that the fact intended to be established by such evidence was material to the decision of the case then under consideration. *Ib.*

73. A decree will not be reversed on account of an error which is not prejudicial to the appellant. *Smith v. Martin's Executors*, 18 Ala. 819.

74. But injury will be presumed from error, unless the record itself rebuts the presumption, and affirmatively shows that no injury could have resulted. *Mims v. Sturdevant & Wife*, 23 Ala. 664.

75. The sustaining of a demurrer to a special plea, on the trial of an issue to test the validity of a will, when the contestant had the benefit of the same facts under his other pleas, is not an available error, being at most error without injury. *Dunlap v. Robinson*, 28 Ala. 100.

76. Where the record shows a clear and unequivocal charge, excluding from the consideration of the jury illegal evidence which had been previously admitted, the admission of the evidence is at most error without injury. *Florey's Executors v. Florey*, 24 Ala. 241.

77. The admission of rebutting evidence before that has been offered which it is intended to rebut, though irregular, is at most error without injury, when the opposite party admits that he will offer such evidence, and the record shows that it was subsequently introduced. *Ross v. Pearson*, 21 Ala. 473.

78. The appellate court will not reverse, on account of the misdirections of the judge to the jury, on the trial of an issue of fact, where the awarding of such issue is discretionary with the court, when the verdict is in conformity with the evidence, and the final decree, based upon the verdict, is the same as it should have been without it. *Milam v. Ragland*, 19 Ala. 85.

79. The want of "due notice," on the trial of a writ of *ad quod damnum*, is not available on error, when the appellant was present, unless he affirmatively shows that the notice given him was too short to enable him to prepare for the protection of his interests. *Burden v. Stein*, 25 Ala. 455.

ESCHEATS.

(Statutory Provisions: Code, §§ 2064–74; Clay's Digest, 189–91, §§ 1–13.)

1. Lands, patented by the United States to an alien, on his death leaving no inheritable blood, escheat to the State, and do not revert to the United States. *Etheridge v. Doe d. Malempre*, 18 Ala. 565.

2. However true may be the doctrine, that a legislative grant of land by the United States, to an alien and his heirs, necessarily confers the power to enjoy and transmit it, it does not hold good as to patents, issued by the ministerial officers of the government, upon ordinary purchases by an alien of the public domain. *Ib.*

3. The act of 1844, (Session Acts 1843–4, p. 56,) for the relief of Francis Malempre, is an unconditional legislative grant to him of all the lands of which Christopher Vanner died seized and possessed; but said Christopher, at the death of his brother John, being incapable, by reason of alienage, of inheriting the lands of the latter, and consequently having never acquired the legal seizin thereof, such lands did not pass by the act. *Ib.*

4. The property of a free negro,

who dies intestate, leaving no persons who can claim as heirs-at-law, escheats to the State; and if the State afterwards relinquishes, by statute, all its rights to the intestate's children, born of two female slaves with whom he cohabited, neither set of children is in a condition to insist on the necessity of an inquisition to vest title in the State. *Malinda and Sarah v. Gardner*, 24 Ala. 719.

5. Slaves, which have escheated to the State, may be emancipated by statute; and the validity of the act can only be questioned by one who shows a right of property in himself. *Ib.*

ESTATES OF DECEDENTS.

(Statutory Provisions: Code, §§ 1572–88, 1657–1827, 1867–1941; Clay's Digest, 191–9, §§ 1–37.)

I. ADMINISTRATION.
II. DESCENT AND DISTRIBUTION.

1. *Governed by what law.*
2. *Who may inherit.*
3. *How Property descends.*

III. KEEPING ESTATE TOGETHER UNDER WILL OR STATUTE.
IV. MARSHALING ASSETS.—*See same title in* PART III.
V. PAYMENT OF DEBTS.—*See* EXECUTORS AND ADMINISTRATORS, V, 2.
VI. SALES OF PERSONALTY.
VII. SALES OF REALTY.
VIII. SETTLEMENT.—*See* EXECUTORS AND ADMINISTRATORS, XI.

I. ADMINISTRATION.

1. It is the duty of the probate court, on the application of a creditor or other interested person, to commit an estate to administration; and if the court improperly refuses, the party's remedy is by *mandamus*. *Brennan's Adm'r v. Harris*, 20 Ala. 185.

2. The action of the probate court, in granting letters testamentary or of administration, though conclusive in those cases in which it has the power to act, may, like the sentences of all other courts, be assailed for want of jurisdiction. *Miller v. Jones' Adm'r*, 26 Ala. 247.

3. If property belonging to the estate is brought into any county of this State after the intestate's death, although he was not a resident of this State, and had no property here at the time of his death, the probate court of that county has jurisdiction to grant administration on it. *Ib.*

4. The fact that there is property in the county belonging to the estate, and not the allegation of the petition, gives the court jurisdiction. *Ib.*

5. But the court has no jurisdiction of property which was at the testator's domicile in another State at the time of his death, and which was afterwards removed here by the executor. *Varner v. Bevil*, 17 Ala. 286.

6. Where a foreign executrix, to whom a life estate in slaves is bequeathed in another State, there qualifies, and takes possession of them, her subsequent removal to this State, with the slaves, does not invest the orphans' court with jurisdiction to grant administration on the estate. *Ramey v. Green*, 18 Ala. 771.

7. As to the validity of the grant of administration on the estate of a living man, who is supposed to be dead. *Duncan & Hooper v. Stewart*, 25 Ala. 408.

8. As a general rule, the distributees, or next of kin, can maintain no suit, either at law or in equity, for the mere purpose of distribution, until administration has been granted on the decedent's estate. *Gardner v. Gantt*, 19 Ala. 666; *Frowner v. Johnson*, 20 Ala. 477; *Hall's Distributees v. Andrews*, 17 Ala. 40; *McConico v. Cannon*, 25 Ala. 462; *Lockhart and Wife v. Cameron*, 29 Ala. 355; *Plunkett v. Kelly*, 22 Ala. 655.

9. But there are cases, in which administration may be dispensed with. *Prater v. Stinson and Wife*, 26 Ala. 456; *Marshall v. Crow's Adm'r*, 29 Ala. 278; *Vanzant v. Morris*, 25 Ala. 285; *Carter and Wife v. Balfour's Adm'r*, 19 Ala. 814.

For other decisions, which might be referred to this title, as to the rights, powers, duties, &c., of executors and administrators, see EXECUTORS AND ADMINISTRATORS.

II. DESCENT AND DISTRIBUTION.

1. *Governed by what law.*

10. Each State has the right to enact laws regulating the descent of, and succession to, property within its limits, and to determine who shall take in default of heirs. *Etheridge v. Doe v. Malempre*, 18 Ala. 565.

11. The testamentary disposition of real property is governed by the law of the place where it is situated, and that of personalty by the law of the testator's domicile. *Varner v. Bevil*, 17 Ala. 286.

2. *Who may inherit.*

12. At common law, the right to inherit was dependent upon the duties which devolved on the natural-born subject, in return for the protection supposed to be afforded him by the sovereign, and sprang directly from the obligation of fealty, which, under the feudal system, was required of the vassal; and, although the reasons on which the rule was founded have in a great measure ceased, yet the rule still exists, and under its operation all persons entitled to take by inheritance at common law, unless inhibited by our statutes either expressly or by necessary implication, possess the same right here. *Tannis v. Doe d. St. Cyre*, 21 Ala. 449.

13. Previous to the act of 1832, a free negro might inherit lands in this State; whether he can inherit, where the descent was cast upon him after the passage of that law, he not being a resident of this State on the first day of February, 1832, *quære? Ib.*

14. A slave, who was emancipated prior to the passage of the act of 1834, (Clay's Digest, 545, §§ 37–8,) may hold lands in this State. *Ib.*

15. A free negro, who was an inhabitant of Florida at the date of the treaty by which Spain ceded that territory to the United States, lost the character of an alien by the operation of that treaty, and, if not incapacitated by the laws of the State in which the lands were situated, would be entitled to take by descent. *Ib.*

16. An alien, unless permitted by statute, cannot inherit lands situated within this State. *Etheridge v. Doe d. Malempre*, 18 Ala. 565.

17. The act of 1844 for the relief of Francis Malempre, (Sess. Acts 1843–4, p. 56,) is an unconditional legislative grant to him of all the lands of which Christopher Vanner died seized and possessed; but said Christopher being incapable, by reason of alienage, at the death of his brother John, of inheriting the lands of the latter, and consequently having never acquired the legal seizin thereof, such lands did not pass by said act. *Ib.*

18. Since slaves cannot contract marriage, the children of a free negro, by a slave woman, cannot inherit property from their father. *Malinda and Sarah v. Gardner*, 24 Ala. 719.

3. *How Property descends.*

19. When an intestate leaves no children or their descendants, the children of a deceased brother or sister of the half blood occupy "the same degree" of relationship as the surviving brothers and sisters, and take, by right of representation, the share which their ancestor, if living, would have taken. *Stallworth v. Stallworth*, 29 Ala. 76.

20. On the death of the wife, intestate, having a separate estate secured by law, the husband is entitled (Code, § 1990) to one half of the personalty absolutely, whether in possession or not. *Marshall v. Crow's Adm'r*, 29 Ala. 278.

21. The provisions of the Code, regulating the distribution of the separate estate of a married woman, dying intestate, do not apply to separate estates created by deed before the 1st March, 1848, although the marriage took place after that day; and the husband, in such case, takes nothing under the statute. *Willis v. Cadenhead*, 28 Ala. 472.

22. Under the provisions of the "married-woman's law" of 1850, the husband is entitled, on the death of the wife, intestate, to one half of the separate estate secured to her under that act or the act of 1848; but he takes nothing, under this statute, in property which vested in the wife, by bequest, before the passage of the act of 1848, although the period of its dis-

tribution did not arrive until 1854. *Hardy v. Boaz*, 29 Ala. 168.

23. If the wife dies intestate as to a portion of her estate only, her husband is entitled, under the acts of 1848 and 1850, to one half of the personalty undisposed of. *Bryan and Wife v. Weems*, 25 Ala. 195.

24. Under an ante-nuptial agreement, stipulating that the wife, "during her natural life, shall have the sole management and control" of the slaves owned by her before marriage, "with the exclusive right to dispose of the same at her death," thereby vesting the entire estate in the wife for her separate use,—on her death without disposing of the slaves, prior to the passage of the act of 1848, the slaves went to her administratrix and next of kin, and not to her surviving husband. *Randall v. Shrader*, 20 Ala. 328.

25. Under the act of 1846, the property possessed by the wife at the time of the marriage vested in the husband, subject to the payment of her debts contracted *dum sola;* and on his death passed to his personal representative, subject, after payment of the liabilities which had attached to it, to distribution under the general law. *Maynard v. Williams*, 17 Ala. 676.

26. The title of the heirs-at-law or next-of-kin can only be defeated by a testamentary disposition of the property: if any portion of it remains undisposed of by will, they are entitled to it, notwithstanding it may appear that the testator did not intend that they should succeed to it. *Denson and Wife v. Autrey's Executor*, 21 Ala. 205.

27. The right of an Indian reservee, which has not been sold or abandoned, descends to his heirs-at-law. *Rowland and Heifner v. Ladiga's Heirs*, 21 Ala. 9.

28. Land-warrants, granted under acts of congress, unless specifically devised, pass to the heirs-at-law. *Atwood's Heirs v. Beck*, 21 Ala. 590.

29. Real estate, acquired by the testator after the execution of his will, descends to the heirs-at-law. *Ib.*

30. When land is sold, under an order of court, for the payment of the debts of the estate, and a surplus remains after paying all the debts, it goes to the heirs, as the land itself would have gone. *Williamson and Wife v. Mason*, 23 Ala. 488.

31. Whether the real estate of a partnership, in the absence of an agreement or other act giving it the impress of personalty, descends to the heirs-at-law, or to the personal representative, on the death of one of the partners, *quære?* *Lang's Heirs v. Waring*, 17 Ala. 145.

32. In such case, the legal title to the share of the deceased partner descends to his heirs-at-law, and a court of law cannot regard or protect the mere equities of others. *Andrew's Heirs v. Brown's Adm'r*, 21 Ala. 437.

33. In a court of equity, however, the real estate of the firm, purchased with partnership funds, and for partnership purposes, is considered personal property; to this extent, at least, that the surviving partner has a claim upon it for that purpose, which is superior to the title of the widow and heirs of the deceased partner. *Ib*; *Lang's Heirs v. Waring*, 25 Ala. 625; see, also, *Owens v. Collins & Langworthy*, 23 Ala. 837.

34. But the legal title is still left undisturbed, except so far as may be necessary to protect the equitable rights of the respective partners. *Lang's Heirs v. Waring*, 25 Ala. 625.

35. The statutes, authorizing the personal representative to sell or rent the decedent's lands, do not, *per se*, intercept the passing of the estate to the heirs or devisees, who may consequently assert their title, with all its incidents, until the statutory power is exercised. *Chighizola v. LeBaron*, 21 Ala. 406.

36. The heir may maintain an action for rents accruing after the death of his ancestor, whose estate has been declared insolvent, if neither the administrator nor creditors interpose any obstacle. *Branch Bank at Mobile v. Fry*, 23 Ala. 770.

37. But if an administrator rents out the plantation on which his intestate resided at the time of his death, before the widow's dower has been assigned to her, the heirs cannot maintain an action against him for the rents. *McLaughlin v. Godwin*, 23 Ala. 846.

38. When a bond for title shows that the title is (not in the obligor, but) in a third person, and the obligor never procures a conveyance of it either to himself or the obligee, the heir of the

obligee does not take the land by descent, nor can he sue for a breach of the condition, whether that breach happened before or after the death of his ancestor. *Allen v. Greene*, 19 Ala. 34.

39. The title to personal property descends to the personal representative, and the parties beneficially interested take as distributees under the statute. *Randall v. Lang*, 23 Ala. 751; *Lockhart and Wife v. Cameron*, 29 Ala. 355.

40. The executor or administrator, as respects the personalty, is the only representative that the law will regard, and his rights to it are exclusive. *Beattie v. Abercrombie*, 18 Ala. 9.

41. The distributees can maintain no suit, either at law or in equity, for the mere purpose of distribution, until letters of administration have been granted on the estate of the decedent. *Hall's Distributees v. Andrews*, 17 Ala. 40; *Gardner v. Gantt*, 19 Ala. 666; *Plunkett v. Kelly*, 22 Ala. 655; *Frowner v. Johnson*, 20 Ala. 477; *McConico v. Cannon*, 25 Ala. 462.

42. But there are cases in which administration may be dispensed with. *Carter and Wife v. Balfour's Adm'r*, 19 Ala. 814; *Vanzant v. Morris*, 25 Ala. 285; *Prater v. Stinson and Wife*, 26 Ala. 456; *Marshall v. Crow's Adm'r*, 29 Ala. 278.

43. The title to personalty, at common law, was cast upon the decedent's personal representative, and not upon his next of kin; and the statutes of Virginia, as shown in the record in this case, have not changed this principle of the common law. *Reese v. Harris*, 27 Ala. 301.

44. By the laws of Louisiana, on the death of a person possessed of, or entitled to property, real or personal, the right to the property descends to his heirs; but the heir is not obliged to accept the succession, and the right does not vest (that is, become fixed and without suspense) in him, until he does some act accepting the succession. *Miller v. Jones' Adm'r*, 29 Ala. 174.

45. Where one of several residuary legatees, who take in common, dies before the testator, his legacy does not survive to his co-legatees, but goes to the testator's next-of-kin under the statute of distribution. *Bendall's Distributees v. Bendall's Adm'r*, 24 Ala. 295; *Hamlet v. Johnson*, 26 Ala. 557.

46. A bequest in trust for certain slaves, whom the testator attempts by will to emancipate, being void, the property bequeathed falls into the general residuum for distribution. *Pool v. Harrison*, 18 Ala. 515.

47. Slaves, to whom the testator attempted to bequeath their freedom, go to the residuary legatee under the will, and not to the next-of-kin under the statute as property undisposed of by the will. *Roberson's Heirs v. Roberson's Executors*, 21 Ala. 273.

48. But where one of the residuary legatees is a slave woman, she herself, with her portion of the legacy, is to be regarded as property not disposed of by the will, and therefore distributable under the statute. *Abercrombie's Executor v. Abercrombie's Heirs*, 27 Ala. 489.

49. Where property is bequeathed to an executor, in trust for a specific object, which fails or is declared invalid, a resulting trust arises in favor of the next-of-kin. *Ib.*

50. Under a gift *mortis causa*, the donee claims directly from the donor; and, though the property may be liable, after the donor's death, to the payment of his debts, it is not liable to the claims of his distributees. *Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27.

51. When no provision is made for the wife by her husband's will, she may claim the provision which the law makes for her, without dissenting from the will. *Turner v. Cole*, 24 Ala. 364.

52. Adultery on the part of the wife is no bar to her claim for a distributive share in her husband's estate under the act of 1812. *Ib.*

As to the right of dower, and the widow's rights before her dower is assigned, see title DOWER.

III. KEEPING ESTATE TOGETHER UNDER WILL OR STATUTE.

53. The statute which authorizes the slaves of which a decedent was possessed at the time of his death, and which were employed in making a crop, to be continued on the plantation in his occupation until the close of the year, embraces all the plantations be-

longing to and cultivated by him at that time. *Pinckard's Distributees v. Pinckard's Adm'rs*, 24 Ala. 250.

54. Under this statute, the administrator is authorized to furnish the widow and children of the decedent with all things necessary to their comfortable support, according to their respective condition and wants; but he must keep an account against each, to be charged upon his respective distributive share; and such expenses only as are indispensable to the cultivation of the plantation, are a charge upon the estate, to be deducted from the proceeds of the crops. *Ib.*

55. The domestic servants, employed about the household at the time of the decedent's death, may be allowed to remain with the family, until the end of the year, for their use, free of charge: the town residence of the family, and the plantation a few miles distant, constitute but one establishment. *Ib.*

56. Where an estate is directed by the will to be kept together until the testator's youngest child becomes of age, (1845,) and the administrator with the will annexed rents out the real estate, or cultivates it for his own benefit, he is chargeable with the rents on final settlement, although the administration commenced prior to the passage of the act of 1839, and although final settlement was not made at the time appointed by the will. *Smith's Distributees v. King*, 22 Ala. 558.

57. Where an administrator is authorized by an order of court to keep the estate together for the term of ten years, he is entitled to an allowance for reasonable expenses incurred in the erection of suitable and necessary buildings. *Gerald and Wife v. Bunkley*, 17 Ala. 170.

58. If the administrator continues, without authority, to employ the slaves of the estate in the business in which they were engaged at the time of the intestate's death, the distributees may elect to take their hire or the profits realized: if they elect the hire, it is an abandonment of the profits; and if the profits, they must allow for all reasonable expenses incurred in making them. *McCreliss' Distributees v. Hinkle*, 17 Ala. 459.

As to the compensation to which the personal representative is entitled, where the estate is kept together under the statute or will, see EXECUTORS AND ADMINISTRATORS.

IV. MARSHALING ASSETS.—*See same title in* PART III.

V. PAYMENT OF DEBTS.—*See* EXECUTORS AND ADMINISTRATORS, V, 2.

VI. SALES OF PERSONALTY.

59. The orphans' court, as to its power to order a sale of personal property belonging to an estate, which is derived exclusively from the act of 1809, (Clay's Digest, 223, § 13,) is a court of special or limited jurisdiction; consequently, its records, when collaterally assailed, must affirmatively show the facts necessary to sustain its jurisdiction. *Wyatt's Adm'r v. Rambo*, 29 Ala. 510.

60. The order of sale must appear to have been granted on the petition of the administrator, and must allege or show that a sale was necessary. *Ib.* (Overruling *Wyatt's Adm'r v. Steele*, 26 Ala. 639, in which it was held, that the granting of the order of sale implied the previous judicial ascertainment of the fact that a sale was necessary.)

61. But, when the order does not appear on its face to have been granted on the application of the administrator, that fact will be presumed after the lapse of twenty years. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

62. Under an order to sell all "the *perishable* property" of the estate, the administrator sold all the *personal* property, including slaves, and made due return of his proceedings, which was received by the court, and ordered to be recorded. *Held*, in an action by the succeeding administrator for the recovery of one of the slaves, that the term "perishable property," as applied to decedent's estates, not having a statutory definition, the order of sale should receive the same construction given to it by the court and parties, and that the sale passed the legal title to the slaves. *Steele v. Wyatt's Adm'r*, 23 Ala. 764; *S. C.*, 26 Ala. 639.

63. The validity of a sale, under such an order, if conducted publicly and according to law, is not affected

by the administrator's opinion, or belief, that the order did not authorize him to sell the slaves. *Ib.*

64. The failure of the purchaser to give "bond with approved security," does not render the sale void; the statutory requisition being directory only, and not mandatory. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

65. An unauthorized sale by an administrator, is void, and does not confer on the purchaser a title which is available against a succeeding administrator. *Wyatt's Adm'r v. Rambo*, 29 Ala. 510; *Swink's Adm'r v. Snodgrass*, 17 Ala. 653; see, also, *Hopper v. Steele*, 18 Ala. 828.

66. On petition for the distribution of slaves, if the number of distributees exceeds the number of slaves to be divided, the court may order a sale in the first instance, without the appointment and report of commissioners. *Hamlet v. Johnson*, 26 Ala. 557.

VII. SALES OF REALTY.

67. Proceedings in the orphans' court, for the sale of realty, are in the nature of a proceeding *in rem;* consequently, where the jurisdiction of the court is shown to have attached, the action of the court is conclusive until vacated, and cannot, though abounding with errors and irregularities, be collaterally impeached. *Cox v. Davis*, 17 Ala. 714; *Doe d. Saltonstall and Wife v. Riley and Dawson*, 28 Ala. 164; *Field's Heirs v. Goldsby*, 28 Ala. 218; *Matheson's Heirs v. Hearin*, 29 Ala. 210; *King v. Kent's Heirs*, 29 Ala. 542.

68. Under the act of 1818, the jurisdiction of the court attached, on its reception of a petition by the administrator, stating that a sale of the real estate would be less injurious than a sale of slaves, and that a sale of a portion of the estate was necessary to discharge debts. *Matheson's Heirs v. Hearin*, 29 Ala. 210.

69. The petition may also be filed by the widow. *King v. Kent's Heirs*, 29 Ala. 542.

70. The authority to order a sale, under this statute, is not restricted to the estates of intestates, but extends to the estate of any decedent. *Ib.*

71. A description of the lands, in the petition, by the numbers of the section, township and range, "in the district of lands sold at Cahaba," sufficiently shows their location within the State of Alabama; since the court will take judicial notice of the fact, that Cahaba, and the lands within the district subject to sale at that place, are within this State. *Ib.*

72. Where the petition was in these words: "Your petitioner is satisfied that said estate would be less injured by a sale of real estate described in the petition, than by a sale of the slaves belonging to the estate. If the slaves be sold to pay said debts, it will leave to the heirs a large amount of lands, without any one to cultivate it; but if said lands be sold, it will leave to the heirs 170 acres of land, on which your petitioner resides, with a sufficient number of slaves to cultivate it; which is a matter of great importance to said minors, as well as your petitioner,"—*held*, that the averment, although it might not have been sufficient on demurrer, was sufficient, when collaterally assailed, to sustain the jurisdiction of the court. (RICE, C. J., *dissenting.*) *Ib.*

73. "Your petitioner further represents, that said estate is indebted to about the amount of $4,000, and that it would probably take the whole amount of the slaves of said estate to pay the debts of the same," held a sufficient averment that a sale was necessary for the payment of debts. *Ib.*

74. The order of sale is not void, when collaterally attacked, because made in vacation; nor because it fails to prescribe the character and place of sale, and the notice to be given. *Matheson's Heirs v. Hearin*, 29 Ala. 210.

75. The sale itself is not void, when collaterally attacked, because it was not made on the premises; nor because the administrator failed to give the statutory notice. *Ib.*

76. Under the authority conferred by this statute, the court may order a sale of the decedent's inchoate equity in lands. *Vaughan and Hatcher v. Heirs of Holmes and West*, 22 Ala. 593.

77. Under the act of 1822, the jurisdiction of the court attached, on its reception of a petition by the administrator, alleging a deficiency of personal assets for the payment of debts, or that the real estate could not be

"equally, fairly, and beneficially divided," without a sale; and asking an order of sale. *Doe d. Saltonstall and Wife v. Riley and Dawson*, 28 Ala. 164; *Field's Heirs v. Goldsby*, 28 Ala. 218; *Cox v. Davis*, 17 Ala. 714.

78. The failure to state in the petition which of the heirs are of full age, does not invalidate the proceedings. *Field's Heirs v. Goldsby*, 28 Ala. 218.

79. The failure to issue citation to the resident heirs, or to make publication against the non-residents; the failure of the guardian of the infant defendants to deny the allegations of the petition; and the want of proof by deposition of the alleged ground of sale,—are mere irregularities, which, although they might be sufficient to reverse the proceedings on error, have no weight in a collateral attack. *Ib.*

80. The failure of the record to show that the guardian *ad litem* of the infant heirs accepted the appointment, and the absence of proof by the record that the proper notice of the time and place of sale was given, are also mere irregularities. *Doe d. Saltonstall and Wife v. Riley and Dawson*, 28 Ala. 164.

81. Indefiniteness and discrepancies in the description of the land, in the petition, order of sale, report of sale, and commissioners' deed, will not invalidate the sale, when enough appears to show that the land sold and conveyed by the commissioners was comprehended in the petition and order of sale. *Ib.*

82. Where the jurisdiction of the court otherwise appears, the decree may be looked to, for the purpose of ascertaining whether the action of the court was predicated upon two petitions separately shown in the record, or whether, as might have been done, one was regarded as amendatory of the other, and the two considered as but one application. *Ib.*

83. It is not necessary, in a collateral proceeding, that the petition should be shown by the record to have been filed more than forty days before the final hearing. *Cox v. Davis*, 17 Ala. 714.

84. Where land is sold under the act of 1822, the commissioners have no power to execute a conveyance to the purchaser, until the rendition of a final decree, confirming their report, and directing them to convey; their deed, without such final decree, does not divest the title of the heirs. *Wallace v. Hall's Heirs*, 19 Ala. 367.

VIII. SETTLEMENT.—*See* EXECUTORS AND ADMINISTRATORS, XI.

ESTOPPEL.

1. There can be no estoppel, where there is no privity; therefore, a settlement between a surviving partner and the administrator of a deceased partner, in which the former accounts for a certain sum as being due from a debtor to the firm, does not estop him, in a suit against the debtor, from recovering a larger amount. *Ross v. Pearson*, 21 Ala. 473.

2. The recognition by the wife, after a voluntary separation from her husband, of his right to marry another woman, or of the validity of his supposed subsequent marriage, does not estop her, in a court of law, from asserting her claim to dower after his death. *Martin's Heirs v. Martin*, 22 Ala. 86.

3. If an administrator returns slaves in his inventory, as belonging to the estate, and hires them out, taking notes payable to himself as administrator, he is not thereby estopped from so amending his inventory, if they do not belong to the estate, as to leave them out. *McWilliams v. Ramsay*, 23 Ala. 813.

4. When a special term is appointed, by consent, for the trial of an issue respecting the validity of a will, the contestant is estopped from raising the objection, on error, that the cause could not be heard and determined at any other than a regular term. *Walker v. Jones*, 23 Ala. 448.

5. All orders and entries, made in the regular progress of a cause during term time, are considered as emanating from the court, import absolute verity, and estop the parties from disputing their correctness. *Deslonde and James v. Darrington's Heirs*, 29 Ala. 92.

As to the conclusiveness and effect of decrees, see DECREES, II.

EVIDENCE.

See same title in PART IV.

EXCEPTIONS.

See BILL OF EXCEPTIONS.

EXECUTIONS.

(Statutory Provisions: Code, §§ 1921–3; Clay's Dig. 304–5 §§ 42–45.)

1. To support a *fi. fa.* against the sureties of an executor or administrator, it is indispensable that a *fi. fa.* should have been issued against their principal, and returned "no property found;" otherwise the execution against the sureties is void, and may be quashed on motion. *Poacher v. Weisinger*, 20 Ala. 102.

2. The record must show the decree against the principal, the bond by which the sureties have become liable, the issue of a *fi. fa.* on the decree against the principal, and its return "no property found." *Hanna v. Price*, 23 Ala. 826.

3. A memorandum on the margin of the execution docket, in the handwriting of the clerk, is not evidence of the issue and return of an execution, unless proof is first made of its existence at one time and subsequent loss. *Ib.*

4. If the decree against the principal embraces some items which accrued after the discharge of the sureties, a *fi. fa.* cannot be issued on it against them. *Hamner v. Mason*, 24 Ala. 480.

5. Under the Code, when a *fi. fa.* against an executor or administrator has been returned "no property found," a *fi. fa.* may issue against him and his sureties, but the court is not authorized to render a decree against the sureties on such return; and if one of the sureties dies before the return against the principal, the statutory remedy, as to him, entirely fails. *Kirby's Adm'r v. Anders*, 26 Ala. 466.

EXECUTORS & ADMINISTRATORS.

(Statutory Provisions: Code, §§ 1657–1827, 1876–82, 1917–41; Clay's Digest, 220–30, §§ 1–48.)

I. APPOINTMENT AND QUALIFICATION.

1. It is the duty of the court to commit an estate to administration, on the application of a creditor or other interested person; but the refusal of the court is not revisable by writ of error, and the party's only remedy is by *mandamus*. *Brennan's Adm'r v. Harris*, 20 Ala. 185.

2. The orphans' court has no jurisdiction of personal property, which was at the testator's domicile in another State at the time of his death, and which was afterwards removed by his executor to this State. *Varner v. Bevil*, 17 Ala. 286.

3. Nor has it jurisdiction of slaves which were brought into this State by a foreign executor, to whom a life estate in them was bequeathed in another State, and who there qualified and took possession of them. *Ramey v. Green*, 18 Ala. 771.

4. If property belonging to the estate of an intestate, who neither resided, nor had property here at the time of his death, is afterwards brought into any county of this State, the orphans' court of that county may grant administration on it. *Miller v. Jones' Adm'r*, 26 Ala. 247.

5. The fact that there is property in the county belonging to the estate, and not the allegation of that fact in the petition, gives the court jurisdiction. *Ib.*

6. An allegation, that "there is property in the county belonging to the heirs of said estate, which is likely to be wasted, or so disposed of as to be lost to the said heirs, unless some one should be appointed to administer on said estate," is equivalent, it seems, to an assertion of title in the estate; but whether it is or not is immaterial, since the applicant is not held down to the ground stated in the petition. *Ib.*

7. The grant of letters testamentary or of administration, though conclusive where the court had power to act, may be assailed collaterally for want of jurisdiction. *Ib.*

8. Where the jurisdiction of the court has attached, the grant of administration cannot be collaterally impeached in chancery, on the ground that it was improperly granted. *Savage v. Benham*, 17 Ala. 119.

9. A grant of administration on the estate of a living man, who is supposed to be dead, is absolutely void. *Duncan & Hooper v. Stewart*, 25 Ala. 408.

10. After the grant of letters to a person entitled to, and capable of discharging the trust, the court has no power to make any new appointment to the office, until it is vacated, either permanently or temporarily, by the death, resignation, removal, &c., of the first administrator: such new appointment before the office is vacated, is totally void, and confers no authority on the appointee to have the first administrator cited to a final settlement. *Matthews v. Douthitt and Wife*, 27 Ala. 273.

11. A widow is entitled to administer on her husband's estate, unless she is disqualified by some one of the causes specified in the statute: the fact that she had separated and was living apart from him at the time of his death, and entertained feelings of hostility towards him, does not disqualify her. *Williams v. McConico*, 27 Ala. 572.

12. Her right to administer, when, being competent, she makes application within forty days after her husband's death, can only be relinquished in some one of the modes specified in the statute: a recital, in an order of court granting administration to another person, that it was "made known to the court by A. B., special attorney of said widow, that she relinquishes her right of administration to the applicant," does not debar her from applying for letters within the period allowed by the statute; nor is she precluded from asserting her right, by a previous grant, on an *ex-parte* application, to another person. *Dunham v. Roberts*, 27 Ala. 701.

13. The husband is not entitled to administer on his wife's estate, to the exclusion of her children, or one appointed at their request. *Randall v. Shrader*, 17 Ala. 333.

14. The legal appointment and qualification of an executrix may be presumed, after the lapse of twenty years, without the production of the record, from the existence and production of the will and its probate; an inventory and appraisement of the estate, purporting on its face to be made under the authority of the court; and proof that the executrix acted as such, from the testator's death until her own, paid the debts of the estate, kept the property together as directed by the will, and exercised ownership and control over it,—that the heirs and legatees acquiesced in her acts respecting the property for more than twenty years, and that the records of the orphans' court of the county, in which the will was probated, were loosely kept for a series of years about that time. *Gantt's Adm'r v. Phillips*, 23 Ala. 275.

15. In such case, the inventory and appointment, and the acts and declarations of the executrix, legatees and distributees, are admissible evidence, as laying the predicate for the court to leave to the jury the question of the legal appointment and qualification of the executrix. *Ib.*

II. ASSENT TO LEGACY.—*See* LEGACY AND DEVISE, II.

III. AUTHORITY AND RIGHTS.

16. A power of sale given by will to the executor, for the payment of debts, is not affected by the widow's dissent from the will. *Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27.

17. Where a testator devises and bequeaths to his children a certain portion of his real, with all his personal estate, "to be distributed when required, at mature age or majority, in equal parts," the authority to make distribution confers upon the executor a naked power merely, uncoupled with any interest, and, in the absence of a devise to him or words of implication, gives him no right to the possession or control of the lands. *Chighizola v. LeBaron*, 21 Ala. 406.

18. The common-law distinction stated, between a devise of lands to executors to sell, and a devise that the executors shall sell the lands. *Patton v. Crow*, 26 Ala. 426.

19. Where the testator does not devise his real estate *to* his executors, nor *to* any other person, and does not dispose of the rents and profits accruing after his death, the executors, if they have not exercised the power of sale conferred on them by the will, and if the estate is solvent, may maintain trespass for the lands. *Ib.*

20. An administrator may maintain ejectment, if the estate is solvent. *Golding v. Golding's Adm'r*, 24 Ala. 122.

21. *Secus*, where the estate has been reported insolvent. *Long v. McDougald's Adm'r*, 23 Ala. 413.

22. The statutory power to rent out the real estate, is a bare authority, and must be strictly pursued. *Martin v. Williams*, 18 Ala. 190; *Chighizola v. LeBaron*, 21 Ala. 406.

23. An administrator has no authority to receive the rents of lands lying without the limits of the State. *Smith's Executors v. Wiley*, 22 Ala. 396.

24. As to the personal estate, the executor or administrator is the only representative that the law will regard, and his rights to it are exclusive. *Beattie v. Abercrombie*, 18 Ala. 9.

25. Under our statutes, an executor is not entitled to exercise any power as such, until he has been duly qualified; consequently, his assent to a legacy, before letters testamentary have been granted to him, does not pass the legal title, nor bind the estate of his testator. *Gardner v. Gantt*, 19 Ala. 666.

26. An executor or administrator may retain, out of the assets which come into his hands, the amount which he has paid on a note, against which the decedent was bound to protect him. *Milam v. Ragland*, 19 Ala. 85.

27. In England, if a debtor makes his creditor, or the executor of his creditor, his executor, and the latter accepts the trust, and receives sufficient assets of the debtor's estate, the debt is extinguished; but this doctrine, which results from the power there possessed by the executor over the personal estate of his testator, does not here obtain to the same extent, because the executor has no right to take the assets, other than money, and retain them in satisfaction of his debt; consequently, the debt cannot be considered extinguished, unless it is also shown that moneys came to the executor's hands, which were sufficient for the payment of the demand, and which he might lawfully retain in satisfaction of it. *Kimball v. Moody*, 27 Ala. 130.

28. It being shown that the debtor, at the time of his death, was seized and possessed of a large estate, consisting of both real and personal property, which went into the hands of his executor, who administered on the estate for nearly twelve years, and left at his death a large portion of the assets unadministered, which afterwards came into the hands of his successor,—*held*, that the retainer, and consequent extinguishment of the debt, would be presumed in equity. *Ib.*

29. An executor or administrator may compromise, or settle without suit, the choses in action belonging to the estate. *Woolfork's Adm'r v. Sullivan*, 23 Ala. 548.

30. But he has no right to make a loan, or gratuitous bailment of a slave, for a number of years: both he and his bailee, in such case, are guilty of a converson. *Lawson's Adm'r v. Lay's Executor*, 24 Ala. 184.

31. Where the legal title to slaves

bequeathed is vested in the executors, as trustees, their title will not be continued beyond the time contemplated by the will for its determination. *Powell v. Glenn*, 21 Ala. 458; see, also, *Comby v. McMichael*, 19 Ala. 747.

32. A sole executor may, by his admissions, remove the bar of the statute of limitations, and revive a cause of action against the estate; and his admissions will bind the estate after his death. *Townes and Nooe v. Ferguson*, 20 Ala. 147.

33. But where several co-executors qualify and give bond, a promise by the sole acting executor, who has the possession and control of the entire estate, will not remove the bar of the statute. *Pitts v. Wooten's Executors*, 24 Ala. 474.

34. An administrator's admission, whether express or implied, of the genuineness of his intestate's signature to a note, is not admissible evidence against his successor, in a suit on the note. *Rogers v. Grannis & Co.*, 20 Ala. 247.

35. His admissions of the presentation of a claim, though made after the lapse of eighteen months from the grant of letters, is sufficient, in a suit against him, to take the case out of the statute of non-claim; and if the suit is in chancery, for the purpose of subjecting to the payment of debts property which is standing in the name of a trustee for the benefit of the intestate's wife and children, and which is alleged to have been purchased by the intestate with his individual means, such admission is also evidence against the *cestuis que trust*. *Pharis v. Leachman*, 20 Ala. 662.

36. An executor cannot, by any assumpsit of his, render the estate liable for a debt which it does not really owe. *Colvin v. Owens*, 22 Ala. 782.

37. A conversion of a slave by an administrator will not authorize a recovery against him in his representative character, since the estate is not responsible for his acts. *Shorter v. Urquhart*, 28 Ala. 360.

38. A bill of exchange, drawn by G. S., with the addition of the words "executor of S. S.," is the personal contract of the drawer, and does not bind the estate; consequently, an accommodation endorser, on paying it, has no claim against the estate. *Kirkman, Abernathy & Hanna v. Benham*, 28 Ala. 501.

39. If an executor, in taking a confession of judgment from a debtor to whom he has loaned the money of the estate, includes a debt due to himself individually, or to another person, this unauthorized blending of the debts creates no right against the estate; and if a succeeding representative of the estate collects a portion of the judgment, not exceeding the amount of the debt due to the estate, the other creditor, whose debt was included in the judgment, is not entitled to share in it. *Ib.*

40. An administrator, in selling the slaves belonging to his intestate's estate, may warrant their soundness, and thus bind himself personally. *Stoudenmeier v. Williamson*, 29 Ala. 558.

41. An action does not lie against an administrator *de bonis non*, in his representative character, to recover money received by him from the administrator in chief, arising from the sale of property belonging to the estate which was exempt from sale. *Godbold v. Roberts*, 20 Ala. 354.

42. Nor to recover money paid, through mistake, by the administrator in chief to his successor in the administration. *Weeks v. Love*, 19 Ala. 25.

43. When judgment is rendered against two joint executors, on a bond executed by their testator as surety for another, and one of them pays off this judgment, an action against the principal, for the recovery of the money so paid, can only be maintained in the joint names of the two executors in their representative capacity. *Martin v. Nall*, 22 Ala. 610.

44. The marriage of an administratrix does not divest her of the title to the assets of the estate, but they remain, notwithstanding the coverture, subject to be seized and sold under execution against her in her representative character. *Bobe v. Frowner and Wife*, 18 Ala. 89.

45. An administrator *de bonis non* is entitled to all the goods and personal estate of the deceased, which remain in specie and unadministered by his predecessor. *Swink's Adm'r v. Snodgrass*, 17 Ala. 653; *Abney v. Pickett*, 21 Ala. 739.

46. He may, therefore, recover at law assets which were fraudulently and without consideration disposed of by his predecessor, if they can be identified. *Swink's Adm'r v. Snodgrass*, 17 Ala. 653.

47. But the parties in interest may treat such fraudulent sale as an administration; and if they elect to do so, the administrator *de bonis non* cannot recover the property. *Elliott v. Br. Bank at Mobile*, 20 Ala. 345.

48. An administratrix may maintain detinue, in her individual name, to recover slaves belonging to the estate, of which she has been wrongfully dispossessed. *Walker v. Lauderdale*, 17 Ala. 359.

49. If an executor or administrator lends, without authority, the money or choses in action of the estate, he may sue on the contract in his own name, notwithstanding his resignation or removal from the administration, unless he has been in some way discharged from the liability thus incurred. *Tomkies v. Reynolds*, 17 Ala. 109.

50. In trover for a slave, an administrator may declare on his own prior possession in his representative character, although he has never had possession. *Wyatt's Adm'r v. Rambo*, 29 Ala. 542.

51. The final settlement of his administration, without a discharge from the trust, does not divest an administrator *de bonis non* of the power to cite a former administrator to a settlement. *Simmons v. Price*, 18 Ala. 405.

52. Where joint debtors of the estate reside in different jurisdictions, an administrator in either may effectually settle and release the demand as against all of them. *Beattie v. Abercrombie*, 18 Ala. 9.

IV. COMPENSATION.

53. Reasonable compensation will not be refused to executors and administrators, except in cases of willful default, or gross negligence, by which loss to the estate has been caused. *Gould v. Hayes*, 19 Ala. 438.

54. The mere failure to make annual returns, when he has not been guilty of any gross neglect of duty, will not deprive an executor of compensation. *Ib.*

55. Where an estate is kept together under the directions of the testator's will, the executor has a right to insist on annual compensation, under the act of 1841, instead of commissions on the receipts and disbursements; but for services performed prior to the passage of that act, the compensation must be determined by the then existing law. *Ib.*

56. In ascertaining the annual compensation under the act of 1841, regard must be had "to the amount of labor performed, the responsibility involved and the value of the estate." *Ib.*

57. The value of the estate being about $25,000, and the administrator having managed the plantation for nearly a year, and made a crop, five per cent. on the amount of the estate was held a reasonable compensation. *Pinckard's Distributees v. Pinckard's Adm'rs*, 24 Ala. 250.

58. Five per cent. on the amount of his receipts allowed as compensation, the value of the estate being about $8,000, and no willful default or gross negligence being proved. *Bendall's Distributees v. Bendall's Adm'r*, 24 Ala. 295.

59. As a general rule, in making allowances to executors, either under the act of 1841, or without reference to that act, the court should look to the loss of time, trouble, risk and responsibility, which are demanded by the nature of the trust, and actually incurred, and allow such a remuneration as a prudent and just man would, under such circumstances, consider a fair compensation; not, however, being governed by the business charges usually made for like services. *Gould v. Hays*, 25 Ala. 426.

60. Under the Code, an administrator cannot be allowed, as compensation for ordinary services, more than two and a half per cent. on his receipts, and the same per cent. on his disbursements; and additional compensation can only be allowed for actual expenses and extraordinary services. *Newberry's Adm'r v. Newberry's Distributees*, 28 Ala. 691.

61. When an estate is kept together under an order of court, and the money belonging to it loaned out, the services rendered by the administrator, in the discharge of the duties thus imposed

on him, are special and extraordinary; and the court may allow for them a just compensation, to be determined upon the evidence adduced. *Reese v. Gresham*, 29 Ala. 91.

62. An order of the probate court, made on the application of two co-executors, for the allowance to each of a specified sum, as annual compensation, will not support an action at law by one of them, or his assignee, against the other. *Carver v. Hallett*, 26 Ala. 722.

V. Duties and Liabilities.

1. *Assets.*

63. To entitle an administrator to the rents of the real estate as assets, it is necessary that the land should have been rented at public outcry. *Martin v. Williams*, 18 Ala. 190.

64. Real estate, acquired by purchase from the heirs-at-law, cannot be regarded, in a court of law, as assets in the hands of the administrator. *Coster v. Brack*, 19 Ala. 210.

65. The rent of lands lying without the limits of the State, if received by the administrator, is not assets in his hands. *Smith's Executors v. Wiley*, 22 Ala. 396.

66. The subject of a gift *mortis causa*, although it may be liable, after the donor's death, to the payment of his debts, is not liable to the claims of his distributees. *Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27.

67. If an administrator places claims of the estate in the hands of an attorney for collection, and after his removal receives the money from the attorney, he is chargeable with the amount on final settlement. *Sloan v. McKinney*, 19 Ala. 115.

68. An executor is bound to include in his inventory a debt due from himself to his testator. *Weems v. Bryan and Wife*, 25 Ala. 302.

69. Where the sheriff sold goods under a void execution, and paid over the proceeds to the plaintiff in execution, and afterwards became administrator *de bonis non*, by virtue of his office, of the defendant's estate, which was declared insolvent, he was held chargeable, on final settlement with the creditors, with the amount for which the goods sold. *Whitlock's Adm'r v. Whitlock's Creditors*, 25 Ala. 543.

70. Where the widow purchases property at an administrator's sale, giving her notes for the purchase money, and afterwards marries again, and her husband takes out letters of administration *de bonis non*, he becomes chargeable with his wife's debt to the estate. *Bogle v. Bogle's Adm'r*, 23 Ala. 544.

71. The grantor's *quasi* reversionary interest in slaves, which were conveyed by deed to his wife for life, with contingent remainder to the heirs of her body who might be living at her death, passes to his administrator, on his death leaving his wife surviving, and is assets in his hands. *McWilliams v. Ramsay*, 23 Ala. 813.

72. Where an estate is kept together under the directions of the testator's will, and the administrator with the will annexed rents out the land, or cultivates it for his own benefit, the rents are assets in his hands, although the administration commenced prior to the passage of the act of 1839, and although he failed to make final settlement at the time appointed by the will. *Smith's Distributees v. King*, 22 Ala. 558.

73. On final settlement by the husband, as executor, of his trusteeship of his wife's separate estate under the acts of 1848 and 1850, he is chargeable with all moneys or other property received by him as *corpus*, or capital of her estate, and not as income. *Weems v. Bryan and Wife*, 21 Ala. 302.

74. But he is entitled, in his own right, to money accruing during coverture from the hire and rent of the wife's slaves and land, and to the crop growing or matured, whether gathered or not, at the death of the wife. *Ib.*

75. Also, to the hire of the wife's slaves for the portion of the term which was unexpired at the time of the marriage, although included in the notes taken for the entire term. *S. C.*, 25 Ala. 195.

76. An administrator may discharge himself, by showing that he delivered to his successor the assets which remained in his hands unadministered; and the admissions of the latter are competent evidence to prove that fact *Bogle v. Bogle's Adm'r*, 23 Ala. 544.

2. *Debts and Charges.*

77. Where the administrator paid a note, executed by the intestate, one K. and himself, as joint makers, he was allowed a credit for the entire amount, on proof of the intestate's repeated declarations, "that there were matters between him and K,. in relation to the note, of which R." (the administrator) "knew nothing, and which made it his duty to protect R."; although there was also evidence of his own declarations, that he signed the note as cosurety with his intestate, and considered himself equally bound for its payment. *Milam v. Ragland*, 25 Ala. 243.

78. On final settlement by the husband, as executor, of his trusteeship of his wife's separate estate, he is entitled to a credit for all proper payments and disbursements made by him as her trustee. *Weems v. Bryan and Wife*, 21 Ala. 302.

79. Debts contracted by the wife *dum sola*, which constituted a charge on her separate estate, and which were paid by the husband during coverture, should be allowed him. *S. C.*, 25 Ala. 195.

80. A receipt, signed by the duly authorized agent of the creditor, acknowledging payment by the administrator of an account due by the intestate, accompanied with proof of the signature, and of the removal of both creditor and agent from the State, is *prima-facie* evidence of the payment. *McCreliss' Distributees v. Hinkle*, 17 Ala. 459.

81. But the mere production of a receipt, purporting to be signed by the creditor, without proof of the signature or the validity of the debt, is not sufficient to authorize the allowance of the credit. *Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27.

82. Proof which would be sufficient, in a suit against the administrator, to charge him with the payment of a debt due by the decedent, is sufficient to support his claim to a credit for such payment. *Ib.*

83. An administrator is entitled to a credit for reasonable expenses incurred by him in the criminal prosecution of a stranger, who, after personating a deceased relative of the intestate, so far as to create an honest impression of their identity in the minds of many who had intimately known the deceased, was about to leave the country, and prosecute by attorney his right to the property which had passed into the hands of the administrator's intestate. *Gerald and Wife v. Bunkley*, 17 Ala. 170.

84. The allowance of a credit for the cost of a tombstone erected over the deceased, must depend, in each case, upon the desire of the deceased, as expressed by him orally or in his will, and the value of the estate. The estate in this case, amounting to $8,000, being bequeathed to collateral relations, and the deceased having left neither widow nor children, $210 was allowed for the cost of a marble tombstone, for which the deceased had expressed a wish. *Bendall's Distributees v. Bendall's Adm'r*, 24 Ala. 295.

85. Where the administrator placed certain notes for collection in the hands of his law partner, who collected some of them by due course of law, filled up (but did not issue) writs in other cases, and received the money from the debtors without suit in all the other cases, he was allowed a credit for two and a half per cent. on the entire amounted collected, as commissions paid to the attorney. *Ib.*

86. He is also entitled to a credit for reasonable counsel fees, paid by him in defending against a previous application for final settlement, to which he had been cited by the distributees before the expiration of eighteen months from the grant of letters. *Williamson and Wife v. Mason*, 23 Ala. 488.

87. Also, for reasonable counsel fees paid by him in prosecuting or defending the interests of the estate. *Pinckard's Distributees v. Pinckard's Adm'rs*, 24 Ala. 250.

88. But not for counsel fees and costs paid by him in a chancery suit, which he had instituted against the legatees to enjoin proceedings in the probate court to compel a partial settlement; his bill having been dismissed for want of equity. *Bendall's Distributees v. Bendall's Adm'r*, 24 Ala. 295.

89. He is entitled, also, to a credit for reasonable counsel fees for services rendered on his final settlement, although exceptions were sustained to

several items in his accounts and vouchers. *Pinckard's Distributees v. Pinckard's Adm'rs*, 24 Ala. 250.

90. The value of the estate being $25,000, and many of the administrator's accounts and vouchers being contested by the distributees, and some rejected, $150 was held a reasonable allowance for attorney's fees on final settlement. *Bendall's Distributees v. Bendall's Adm'r*, 24 Ala. 295.

91. But counsel fees paid for prosecuting the widow's right to dower, and her account for medical services rendered after her husband's death, are personal charges against her, and not against the estate. *Pinckard's Distributees v. Pinckard's Adm'rs*, 24 Ala. 250.

92. So, counsel fees paid for guardian *ad litem* of minor heirs, are a personal charge against them, and not against the estate. *Ib.*

93. The cost of repairing household furniture belonging to the estate, when the value of the furniture is thereby increased to that extent, is a proper charge against the estate. *Ib.*

94. Two days' services of an auctioneer, in selling the property of the estate, are a proper charge against it. *Ib.*

95. Where the decedent died in February, after he had commenced planting, and the administrator kept up the plantation until the end of the year, he was allowed a credit for his expenses in going to Montgomery to sell the cotton crop. *Ib.*

96. But tavern bills, incurred by the administratrix in town, are not a proper charge against the estate, where her remaining in town was connected with her own pleasure, or to avoid the loneliness of a country life. *Gerald and Wife v. Bunkley*, 17 Ala. 170.

97. Where the estate is kept together, under an order of court, for the term of ten years, and the plantation cultivated, the administrator is entitled to a credit for reasonable expenses incurred in the erection of suitable and necessary buildings. *Ib.*

98. Where the estate is kept together, under the statute, until the close of the year after the testator's death, the administrator is authorized to furnish the widow and children with all things necessary to their comfortable support, according to their respective condition and wants; but he must keep a separate account against each, and such expenses only are a charge upon the estate as are indispensable to the cultivation of the plantation. *Pinckard's Distributees v. Pinckard's Adm'rs*, 24 Ala. 250.

99. Where a testator, devising a very large estate, both real and personal, to his widow and children, directed that each of the children should receive out of it a good education,—that the estate should be divided when the eldest son attained his majority, or when the eldest daughter attained the age of eighteen and married, unless the widow should marry or desire an earlier division; that the family residence should be kept up until the division was made, for the use of the widow and children, and "the family expenses, economically made," to be paid by the executors out of the "joint funds" of the estate; and that his executors should pay fifty dollars annually to the church of which he was a member, so long as the estate remained undivided and "a joint stock" for the use of the family,—*held*, that the executors were not required to keep separate accounts against the widow and children for their respective expenses, but that the entire expenses of the domestic establishment were a charge upon the joint fund; that, in ascertaining what expenses fell within the provisions of the will, as being "economically made," the state of the property and condition of the family should be considered; and that the reasonable expenses of the widow, in going with her youngest daughter and a servant to Virginia, to visit her eldest daughter then at school, were a proper charge against the estate. *Moore's Executors v. Moore's Distributees*, 18 Ala. 242.

100. Where an executrix, who was also the testator's widow, paid lawful jail fees, to regain the possession of certain slaves belonging to the estate, who had been taken up and committed to jail as runaways, she was allowed a credit for the amount, on proof that no other person than herself and children was interested in the estate,—that the estate was kept together under the directions of the will, and the plantation cultivated; that the overseer employed by her was cruel and

severe towards the slaves; that several of them had previously run away on account of his cruelty, and had been committed to jail, "for which and other jail fees allowance had been made;" and that said overseer made good crops, but was finally discharged by the executrix, in the fall of the same year, on account of his severity to the slaves. *Walker v. Walker's Distributees*, 26 Ala. 262.

101. Also, to a credit for the value to the estate, from the time of the testator's death, of the services of certain slaves specifically bequeathed to herself, where the facts raised the presumption that she assented to the legacy. *Ib.*

102. An administrator is not entitled to a credit for money collected from one of his sureties, under execution issued on a former decree, which was reversed on error after the money had been distributed among the legatees; the surety having brought suit for the recovery of the money, against the administrator *de bonis non* who was the plaintiff in the decree. *Price v. Simmons*, 21 Ala. 337.

For kindred decisions, see GUARDIAN AND WARD.

As to the presentation of claims, see NON-CLAIM.

3. *Devastavit.*

103. If an executor or administrator makes an authorized loan of the money or property of the estate, he is guilty of a conversion. *Tomkies v. Reynolds*, 17 Ala. 109; *Gerald and Wife v. Bunkley*, 17 Ala. 170; *Lawson's Adm'r v. Lay's Executor*, 24 Ala. 184.

104. If the sum so loaned should eventually be lost, he is chargeable with principal and interest. *Gerald and Wife v. Bunkley*, 17 Ala. 170.

105. He may, in such case, notwithstanding his removal or resignation, sue on the contract in his own name, unless it is shown that he has been discharged from the liability thus incurred. *Tomkies v. Reynolds*, 17 Ala. 109.

106. But he cannot avoid a fraudulent sale or gratuitous bailment of a slave belonging to the estate. *Swink's Adm'r v. Snodgrass*, 17 Ala. 653; *Lawson's Adm'r v. Lay's Executor*, 24 Ala. 184.

107. Where an administrator has invested the assets of the estate in property, he is chargeable, on final settlement, with the principal sum and interest thereon; but if the property has been used for the benefit of the estate, he should be allowed therefor a reasonable compensation. *Gerald and Wife v. Bunkley*, 17 Ala. 170.

108. Where he has continued, without authority, to employ the slaves of the estate in the business in which they were engaged at the time of the intestate's death, he is chargeable, at the election of the distributees, with either the profits realized, or the hire of the slaves; but if they elect the hire, it is an abandonment of the profits; and if the profits, they must allow for all reasonable expenses incurred in making them. *McCreliss' Distributees v. Hinkle*, 17 Ala. 459.

109. If he receives depreciated bank-notes in payment for property sold by him, and passes it off at par in discharge of the debts of the estate, he is not chargeable with difference of exchange. *Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27.

110. Where the testator a short time before his death, in the presence of his executor or administrator, hands money to a third person to be taken care of, and at his death there is no money on hand, it is the duty of the executor or administrator to show what has become of it; and in the absence of an explanation on his part, he will be charged with the amount. *Milam v. Ragland*, 19 Ala. 85.

111. But where the money is shown to have been paid over by the bailee to the succeeding administrator *de bonis non*, the administrator in chief is not chargeable with it. *S. C.*, 25 Ala. 243.

112. The husband of an administratrix is liable for her *devastavit*, whether committed before or during coverture, if his liability is fixed before her death. *Bobe v. Frowner and Wife*, 18 Ala. 89.

113. An administrator is not chargeable with a bequest made to the intestate in his lifetime, unless knowledge of it is brought home to him. *Malinda and Sarah v. Gardner*, 24 Ala. 719.

114. He is not bound to plead the statute of limitations, when he has

personal assets sufficient to pay the debts; *secus*, where a resort to the realty is necessary. *Pollard v. Scears' Adm'r*, 28 Ala. 484.

115. If he refuses to plead the statute, the distributees cannot be made parties to the cause, on motion, for the purpose of putting in that plea. *Ex parte Perryman and Wife*, 25 Ala. 79.

116. A decree against an administrator, in favor of a distributee, is conclusive evidence of assets in his hands to that amount; and the failure to pay it amounts, in law, to a *devastavit*. *Kyle v. Mays, use of Pond*, 22 Ala. 692; *Holly v. Acre*, 23 Ala. 603.

117. But where the decree is in favor of "the legal representative" of a distributee, although the settlement may be regarded as evidence of a debt due by the administrator, the failure to pay it does not amount to a *devastavit*, until the person who is to receive it is judicially ascertained. *Kyle v. Mays, use of Hatchett*, 22 Ala. 672.

118. A decree against the administrator of a deceased executor, on final settlement of his intestate's administration under the act of 1845, will not support an action at law against the sureties of the executor. *Gray v. Jenkins*, 24 Ala. 516.

4. *Interest.*

119. An administrator is properly chargeable with interest on the money in his hands, unless he makes affidavit that he has not used it. *Hollis v. Caughman and Wife*, 22 Ala. 478.

120. But if he makes affidavit that he has not used the money for his own private purposes, and his statement is not controverted, he is not chargeable with interest. *McCreliss' Distributees v. Hinkle*, 17 Ala. 459.

121. The affidavit should be made when the account is stated on the day of settlement; and if the distributees are taken by surprise, the court may continue the case, to give them an opportunity to examine into the facts, and, if they see fit, to contest the affidavit. *Bendall's Distributees v. Bendall's Adm'r*, 24 Ala. 295.

122. It is not necessary, ordinarily, that the record should show that the affidavit was made: it will be presumed to have been made, in the absence of an exception for the want of it. *Clack's Heirs v. Clack's Adm'rs*, 20 Ala. 461.

123. An affidavit, stating that he always had on hand, or within his immediate control, a sum sufficient to pay the amount due by him as administrator, is not sufficient to discharge him from the payment of interest, unless he also denies that he used the trust funds. *Farmer's Distributees v. Farmer's Adm'r*, 26 Ala. 671.

124. A decree against an administrator, on final settlement of his accounts, bears interest from the time of its rendition. *Kyle v. Mays, use of Pond*, 22 Ala. 692.

For kindred decisions, see GUARDIAN AND WARD.

5. *Joint and several Liability.*

125. Executors and administrators, who enter into a joint bond for the performance of their duties, are liable for the acts and defaults of each other, unless the bond itself shows that they did not intend to become so bound. *Williams and Wife v. Harrison*, 19 Ala. 277.

126. The orphans' court has jurisdiction, in such case, to make them account for each other's defaults, and may, *it seems*, render a joint decree against them. *Ib.*

6. *Costs.*

127. When a decree against an executor is revived by *scire facias*, costs may be awarded against him. *Hanson v. Jacks and Wife*, 22 Ala. 549.

128. As to costs in chancery, see *Atwood's Heirs v. Beck*, 21 Ala. 590; *Colvin v. Owens*, 22 Ala. 782.

VI. EXECUTORS DE SON TORT.

129. A voluntary sale by an executor *de son tort*, without any legal compulsion, confers on his purchaser no better title than he himself had; and when sued in trover by the rightful administrator, the purchaser cannot show in mitigation of damages that, since his purchase, the executor *de son tort* has paid debts which the administrator was bound to pay in due course of administration. *Carpenter v. Going*, 20 Ala. 587.

130. Whether such executor himself, when sued in trover by the rightful administrator, can show such payments in mitigation of damages, *quære? Ib.*

131. A *bona-fide* purchaser for valuable consideration, at a public sale by an executor *de son tort*, acquires at least a possession and right of possession, which he can maintain against all the world except the legal representative of the deceased, and as against him an actual possession of which he can only be deprived by suit. *Woolfork's Adm'r v. Sullivan*, 23 Ala. 558.

132. One claiming under a fraudulent conveyance from the decedent in his lifetime, may, after the death of his grantor, be charged as executor *de son tort*, although there is a lawful representative, because the latter being bound by the fraud of his testator or intestate, cannot be charged at all in his representative character; but this doctrine has no application to cases of collusion between the lawful representative and a third person, where there is nothing to prevent the former from being held liable, and therefore the latter cannot be charged as executor *de son tort*. *Simonton v. McLane's Adm'r*, 25 Ala. 353.

132. A creditor may come into a court of equity against the executor *de son tort* of his debtor, to obtain satisfaction of his debt out of property which the debtor fraudulently conveyed, and which is in the possession of a person who cannot administer it as the rightful representative, being bound by the fraud of the intestate; and in such case, it is not necessary that the creditor should have exhausted his legal remedies, or should stand as a creditor with a lien. *Watts v. Gayle & Bower*, 20 Ala. 817.

VII. FOREIGN AND SPECIAL ADMINISTRATIONS.

133. A foreign executor may sue in the courts of this State; and if he makes profert of his letters, the effect is the same as if they were set out in the declaration, although he does not aver in what State they were granted. *Carr's Executor v. Wyley*, 23 Ala. 821.

134. An attachment lies, in favor of a resident creditor, against the foreign executor or administrator of his deceased non-resident debtor. (GOLDTHWAITE, J., *dissenting*.) *Branch Bank at Mobile v. McDonald*, 22 Ala. 474.

135. But, to authorize an attachment in such case, it must appear that the debtor was a non-resident at the time of his death; and when an attachment is sued out against him while living, the suit cannot be revived against his foreign personal representative. *Ib.*

136. The act of 1802, authorizing the revival of a suit against personal representatives, does not apply to foreign representatives. *Ib.*

137. An administrator *de bonis non* is entitled to all the goods and personal estate of the decedent, which remain in specie, and which were not administered by his predecessor; and he may recover; at law, assets which were fraudulently disposed of by his predecessor, if they can be identified. *Swink's Adm'r v. Snodgrass*, 17 Ala. 653.

138. So he may recover, in an action at law, a slave belonging to the estate, which had been gratuitously loaned by his predecessor. *Lawson's Adm'r v. Lay's Executor*, 24 Ala. 184.

139. But he cannot recover a note which his predecessor had surrendered to one claiming to be the owner of it, and for which he had fully accounted. *Abney v. Pickett*, 21 Ala. 739.

140. Nor can he recover property fraudulently disposed of by his predecessor, if the parties in interest elect to treat such fraudulent sale as an administration. *Elliott v. Branch Bank at Mobile*, 20 Ala. 345.

VIII. PURCHASES AT THEIR OWN SALES.

141. A purchase by an administrator at his own sale, to be valid, must be fair and *bona fide:* if it appears that he purchased the property at less than its value, never accounted for the proceeds, and is insolvent, chancery will set aside the sale, not only as against him, but as against purchasers under him with notice. *McCartney v. Calhoun*, 17 Ala. 301.

142. If he obtains an order of sale after the administration of the estate has been removed into the chancery court, and himself becomes the purchaser at his sale, the chancery court

will provide that the property shall be forthcoming to abide the final decree in the cause. *Pearson v. Darrington*, 21 Ala. 169.

143. Where an executor, by an arrangement with the creditors of the estate, obtained indulgence on the debts, and was thus enabled to purchase some of the property at a sale under an order of the chancery court, which was had by consent, he was held to have purchased for the benefit of the estate, and not for himself individually; there being, also, some evidence of his declarations, at the time of the sale, that he was purchasing for the estate. *Montgomery v. Givhan*, 24 Ala. 568.

144. An administrator is bound not to do anything which has a tendency to interfere with his duty in discharging the trust, since his office is not conferred upon him for the purpose of enabling him successfully to engage in intrigues for his private benefit. If he purchases property with the money of the estate, and afterwards re-sells it at a profit, the benefit of the purchase enures to the estate. *Mosely v. Lane*, 27 Ala. 62.

IX. Proceedings to obtain Title.

145. The probate court has no jurisdiction, to compel an administrator to convey his intestate's interest in lands, which were sold by a firm of which the intestate was a partner, unless the intestate had entered into "bond or obligation to make title thereto." *Wilkerson v. Vinson*, 20 Ala. 131.

146. If the obligee in the bond has sold a part of the land to another person, the court is not thereby deprived of jurisdiction. *Prince v. Bates*, 19 Ala. 105.

147. Where the obligee transferred to the intestate the notes of the person to whom he sold a portion of the land, and took up his own notes, it is erroneous to render a decree for title until the transferred notes have been fully paid, although the intestate failed to fix the liability of the endorser by suit against the maker. *Ib.*

148. The fact that the intestate assumed to sell the land, and executed his bond for title, raises the presumption of ownership in him; and the *onus* of showing an outstanding title is cast on his administrator. *Ib.*

149. The administrator is the only indispensable party defendant; and he may sue out a writ of error alone to reverse a decree against him. *Ib.*

X. Proceedings to obtain Partial Distribution.

150. Where the estate has not been reported solvent, the administrator cannot be compelled to make distribution until after the lapse of eighteen months from the grant of administration. *Williamson and Wife v. Mason*, 18 Ala. 87.

151. The purchaser at execution sale of a devisee's undivided interest in lands, which are afterwards sold for distribution, cannot institute proceedings in the probate court for a distribution of the proceeds of sale. (Dargan, C. J., and Chilton, J., *dissenting*.) *Smith and Loveless v. Hall*, 20 Ala. 777.

152. Where the widow fails to present her claim for her distributive share of her husband's estate to his administrator until after the estate has been finally settled by due course of law, her remedy against him and his sureties is gone, and she must follow the assets in the hands of the heir or distributee. *Turner v. Cole*, 24 Ala. 364.

153. Adultery on the part of the wife, is no bar to her claim for a distributive share of her husband's estate. *Ib.*

154. When no provision is made for the wife by her husband's will, she may claim her distributive share without dissenting. *Ib*; *Martin's Heirs v. Martin*, 22 Ala. 86.

155. The statute, authorizing any person entitled to an estate by will to institute proceedings against the personal representative, does not apply to devises of which the executor has no control, and in relation to which he has exercised none of his statutory powers; and in such case he cannot be held responsible, in his representative character, for the rents or possession of the land. *Chighizola v. Le Baron*, 21 Ala. 406.

156. A distributee cannot be required, either by the commissioners or by the court, to pay a sum of money to another; but if the parties adopt

the division made by the commissioners, and act upon it, or make distribution among themselves on the same terms, they will be bound by it. *Allen and Wife v. Raney and Wife*, 19 Ala. 68.

157. If the number of distributees exceeds the number of slaves to be divided, the court may order a sale in the first instance, without the appointment and report of commissioners. *Hamlet v. Johnson*, 26 Ala. 557.

157. If the executor, in accounting on settlement with one distributee, has accounted for less than he might have been charged with, this does not give another distributee any right to a greater interest in the residue. *Montgomery v. Givhan*, 24 Ala. 568.

XI. SETTLEMENT OF ACCOUNTS.

1. *Annual, or Partial.*

158. Prior to the act of 1843, a partial settlement was regarded on final settlement as *prima-facie* correct, and, unless impeached for errors or mistakes, might be made the basis of a final settlement. *Rhodes v. Turner and Wife*, 21 Ala. 210.

159. But, if it did not show notice to the distributees, and the appointment of a guardian *ad litem* for the infants, it was not *prima-facie* evidence against them. *McCreliss' Distributees v. Hinkle*, 17 Ala. 459.

160. Under the act of 1843, all the proper parties being regularly before the court, a partial settlement is as conclusive, concerning the validity of claims then contested, as if rendered on final hearing, and may be pleaded in bar on final settlement. *Duke's Adm'r v. Duke's Distributees*, 26 Ala. 673.

161. The act of 1850, which declares that partial settlements shall be considered "only *prima-facie* correct," does not retroact upon settlements made before its passage. *Ib.*

162. The character of such settlements is so far modified by this statute, that they are not revisable on error. *Thompson and Wife v. Hunt*, 22 Ala. 517.

163. Under the Code, the allowance of a credit on an annual settlement is presumptive evidence of its correctness; and if, on final settlement, no other evidence than the annual settlement is adduced by either party in reference to the item, it is error to disallow the credit. *Newberry's Adm'r v. Newberry's Distributees*, 28 Ala. 691.

2. *Final.*

164. The final settlement of his administration, without a discharge from the trust, does not divest an administrator *de bonis non* of the power to cite his predecessor to a final settlement. *Simmons v. Price*, 18 Ala. 405.

165. An administrator *de bonis non*, whose appointment is void because made before the office was vacated by the death, resignation or removal of his predecessor, has no authority to cite the former representative to a final settlement. *Matthews v. Douthitt and Wife*, 27 Ala. 273.

166. Whether an executor or administrator in chief, after settling with his successor in the administration, may apply to the probate court for a discharge from liability to the estate, *quære?* But, conceding that he may, he should give notice of his application, produce his receipt showing the settlement, and move for a discharge: the court cannot, *ex mero motu*, order his discharge, upon the representation of his successor, on final settlement, that such settlement had been had. *King v. Collins*, 21 Ala. 363.

167. Prior to the act of 1846, the distributees of an estate might maintain a suit against the personal representative, after his removal from office, to make him account. *Gould v. Hayes*, 19 Ala. 438.

168. A decree rendered prior to the passage of this act, against an administrator in chief in favor of his successor, for moneys received in the course of administration and unaccounted for, was not merely voidable, but void for want of jurisdiction. *Hanna v. Price*, 23 Ala. 826.

169. Under the act of 1854, (Session Acts 1853–4, p. 24,) the personal representative of a deceased administrator may be cited by the distributees, to make a settlement of his intestate's administration, "as fully and completely" as could have been made by the deceased administrator himself, if alive; but such personal representative is personally liable, on such settlement, only to the amount of the assets of his

intestate's estate which have come to his hands. *Howard's Distributees v. Howard's Adm'r*, 26 Ala. 682.

170. Although there is no statutory limitation to proceedings in the orphans' court, against an executor or administrator, to compel a final settlement; yet, if the parties in interest allow twenty years to elapse, from the time when they might call him to a settlement, without taking any steps to compel a settlement, the presumption of payment arises in his favor. *Rhodes v. Turner and Wife*, 21 Ala. 210.

171. Where a distributee attempts, after the lapse of twenty years, to charge an executor with the value of slaves not included in his inventory, and shows no excuse for his delay, his claim cannot be allowed in the probate court. *Barnett's Executor v. Tarrence*, 23 Ala. 463.

172. After the lapse of eighteen years, the court will not force conclusions, nor draw any inferences not clearly warranted by the evidence, in favor of a distributee who, although he had ample time and opportunity to assert his rights, made no effort to do so until after the administrator's death. *Bogle v. Bogle's Adm'r*, 23 Ala. 544.

173. A final decree, rendered within eighteen months after the appointment of the administrator, "that he go hence discharged from further liability as such," when he has neither resigned, nor reported the estate solvent or insolvent, is utterly void: it neither affects his rights or liabilities as administrator, nor authorizes the appointment of an administrator *de bonis non;* and, even if admitted to be valid so far as it confirms and allows the administrator's accounts, it cannot be conclusive beyond the very items mentioned, nor protect the administrator from liability as to all other matters. *Matthews v. Douthitt and Wife*, 27 Ala. 273.

174. Notice of an intended annual, or partial settlement, will not authorize the rendition of a final decree. *King v. Collins*, 21 Ala. 363.

175. Where the parties interested appear, and consent to a postponement of the settlement, they cannot afterwards be heard to complain of any irregularity in the manner of bringing them in. *Barnett's Executor v. Tarrence*, 23 Ala. 463.

176. After the lapse of twenty years, the court will presume, in favor of the correctness of an irregular final settlement, that the necessary notices were given. *Ib.*

177. All the parties in interest must be before the court, either in person, or by notice. *Smith & Wife v. Hooper*, 20 Ala. 245; *Hollis v. Caughman and Wife*, 22 Ala. 478.

178. When any of the distributees have died, it is error to proceed to a final settlement, without bringing in their legal representative. *Hall's Distributees v. Andrews*, 17 Ala. 40; *McConico v. Cannon*, 25 Ala. 462.

179. Where the record shows that there are minor heirs, it should also show that they were represented on the settlement, either by a guardian, or by a guardian *ad litem*. *Clack's Heirs v. Clack's Adm'rs*, 20 Ala. 461; also, *Collier's Adm'r v. Slaughter's Adm'r*, 22 Ala. 671.

180. The exclusion of infants from the distribution, without the appointment of a guardian *ad litem*, on the ground that they had received advancements, is erroneous. *Wilson's Heirs v. Wilson's Adm'r*, 18 Ala. 176.

181. Infants may be represented by their general guardian, unless he is incompetent or unfit. *Smith v. Smith's Adm'rs*, 21 Ala. 761.

182. But, if their general guardian, after being notified of the settlement, fails to attend, it is the duty of the court to appoint a guardian *ad litem*. *King v. Collins*, 21 Ala. 363.

183. Where property is bequeathed to one, in trust for others, the *cestuis que trust* are not necessary parties to a settlement of the administration. *Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27.

184. The widow, or (if dead) her personal representative, is a necessary party to the settlement of her husband's estate. *Crothers v. Heirs of Ross*, 17 Ala. 816.

185. The husband is a necessary party to the settlement of an estate of which his wife is a distributee, since the passage of the "woman's laws" of 1848 and 1850 *Smith and Wife v. Hooper*, 20 Ala. 245.

186. After the lapse of twenty years, the court will presume, in favor of the correctness of an irregular final settle-

ment, that all the parties in interest were present. *Barnett's Executor v. Tarrence*, 23 Ala. 463.

187. Where an executor alleges, in his answer to the citation, "that suits are pending against him as executor," but does not give any statement or description of them, nor refer to any record or schedule of them, the answer is demurrable for insufficiency; but the better practice would be to except to the answer. *Chighizola v. LeBaron*, 21 Ala. 406.

188. An administrator cannot protect himself by plea, setting up an agreement between himself, the executors and legatees, entered into before letters of administration were granted to him, by which the entire estate was transferred to him for a term of years, to be by him managed and retained until all the debts were paid; and averring that he took possession of the estate and held it under the agreement, and not by the order of the court. *George v. Goldsby*, 23 Ala. 326.

189. Where letters of administration are granted to the sheriff, *virtute officii*, and, after his removal from the State without settling his administration, *ex-parte* proceedings are instituted against him, all the preliminary proceedings must show that he was proceeded against in that capacity; especially, when it appears that, after the expiration of his term of office as sheriff, he took out letters of administration individually, and gave a new bond; and this objection may be raised for the first time on error. *Spence v. Savery*, 25 Ala. 723.

190. Where *ex-parte* proceedings are instituted against an executor or administrator, who has removed beyond the jurisdiction of the court without settling his accounts, although it is necessary that the record should show the facts which authorize the court to state the account, yet it is immaterial whether these facts are proved before or after publication: from the time the application is made, until the final action of the court in stating the account, the proceedings are to be regarded as *in fieri*. *Croft v. Ferrell*, 21 Ala. 351.

191. Where the account is stated by the court, and reported for allowance at the next term, at which term, on account of the incompetency of the judge, the proceedings are regularly continued to the next term, the subsequent appearance of the defendant, and his failure to object to the irregular continuance, are a waiver of the irregularity, even if it amounted to a discontinuance, and place him rightly in court. *Ib.*

192. A recital in the final decree, that the term to which the defendant was cited was a regular term, and that it was "shown to the satisfaction of the court, by competent and sufficient testimony, that the publication required by law has been regularly and duly given," when the record contains an order of publication, shows a substantial compliance with the requirements of the statute. *Wright v. Clough*, 17 Ala. 490.

193. It is error, in proceedings instituted under the act of 1843, to render a final decree against the defendant, on his default, at the term to which he is cited to appear, and at which the account against him is stated. *Ib.*

194. The auditing and stating of the account, is a necessary preliminary to a final settlement; and in all cases, both before and since the passage of the act of 1843, the account as stated, whether by the court or by the executor or administrator, should lie over, and be presented for allowance at a subsequent term, of which at least forty days notice should be given. *Rhodes v. Turner and Wife*, 21 Ala. 210. (But see *Bendall's Distributees v. Bendall's Adm'r*, 24 Ala. 295.)

195. The stating of the account is the act of the court; consequently, to enable the appellate court to determine whether there was error in the allowance of any particular item, the bill of exceptions must set out all the evidence in relation to it that was before the primary court. *Bendall's Distributees v. Bendall's Adm'r*, 24 Ala. 295.

196. It is not necessary, ordinarily, that the record should show that the administrator made the affidavits required by law, in regard to the use of the money of the estate, and the names of the heirs and legatees. *Clack's Heirs v. Clack's Adm'rs*, 20 Ala. 461.

GUARDIAN AND WARD.

(Statutory Provisions: Code, §§ 2012–41; Clay's Digest, 267–72, §§ 1–26.)

I. APPOINTMENT OF GUARDIANS.

1. Where the orphans' court, in the rightful exercise of its jurisdiction, has appointed a guardian of the person and property of a minor, no other person can be recognized as the lawful guardian, while such appointment remains unrevoked. *Dupree v. Perry*, 18 Ala. 34.

2. The orphans' court has no jurisdiction to appoint a guardian for a person, on the ground that he is a lunatic or *non compos mentis*, without the issue of a writ *de lunatico inquirendo*, and the finding of a jury thereon: the appointment of a guardian, without these preliminary proceedings, is void, and may be collaterally impeached in any court. *Eslava v. Lepretre*, 21 Ala. 504.

3. The appointment is void, also, if made without notice to the party against whom the proceedings are instituted. *Ib.*

4. Where the record of the final settlement of an estate shows that there are minor heirs, it should also show that they were represented on the settlement, either by a guardian, or by a guardian *ad litem*. *Clack's Heirs v. Clack's Adm'rs*, 20 Ala. 461; *Wilson's Heirs v. Wilson's Adm'r*, 18 Ala. 176.

5. Infants may be represented, on the final settlement of an estate, by their general gusrdian, unless he is incompetent or unfit. *Smith v. Smith's Adm'rs*, 21 Ala. 761.

6. But if their general guardian, after being notified of the settlement, fails to attend, it is the duty of the court to appoint a guardian *ad litem*. *King v. Collins*, 21 Ala. 363.

6. In a suit against a lunatic, the appointment by the court of a guardian *ad litem* for him is not erroneous, when the record shows that he appeared and pleaded "by his guardian *ad litem* and by attorney;" especially, when the record shows that such guardian was appointed at the instance of the attorney. *Walker v. Clay & Clay*, 21 Ala. 797.

II. AUTHORITY OF GUARDIANS.

8. A guardian may make a submission to arbitration for his ward, and is bound by the award as in other ordinary cases where one man binds himself for the acts of another *Strong v. Beroujon*, 18 Ala. 168.

9. He cannot maintain case or trover, in his own name, against the hirer of a slave belonging to his ward, to recover damages for the loss of the slave, although the contract of hiring was made with him. *Hooks v. Smith*, 18 Ala. 338.

10. Where personal property, belonging to several wards, is held by their common guardian under appointment of the chancery court, the interest of each ward is not a chose in action, but is property in possession; and on the marriage of one of the females, her interest vests, *eo instanti*, in her husband. *Chambers v. Perry*, 17 Ala. 726.

11. A guardian has no authority, under his appointment by a probate court in this State, to receive the rent of lands lying without the State; and his receipt of the rents being in his own wrong, the law implies an undertaking on his part to pay it to the persons who, *ex æquo et bono*, are entitled to it. *Smith's Executors v. Wiley*, 22 Ala. 396.

12. The probate court can only authorize a public sale by a guardian in the manner prescribed by the statute: a private sale under an order of court, though sanctioned by the court, passes no title as against the ward. *Hudson v. Helmes' Executors*, 23 Ala. 585.

13. A guardian has no power over his ward's real estate, except so far as the rents and profits are concerned; consequently, a receipt given by the ward, acknowledging that his guardian had surrendered his whole estate, can-

not be held to include the purchase-money of lands sold by the guardian. *Beene's Heirs v. Randall's Heirs*, 23 Ala. 514.

14. But, if not restrained by statute, he has power to sell his ward's personal estate without an order of court, and such sale will convey a good title to a *bona-fide* purchaser; therefore, if a guardian, appointed in Tennessee, here sells his ward's slave to a *bona-fide* purchaser, the ward cannot recover the slave without proving the statute law of Tennessee. *Woodward v. Donnally*, 27 Ala. 198.

III. Liability of Guardians.

15. Guardians, who enter into joint bond, are liable for the acts and defaults of each other, unless the bond itself shows that they did not intend to become so bound. *Williams and Wife v. Harrison*, 19 Ala. 277.

16. Where two guardians have given a joint bond, and one of them dies insolvent, the survivor may be directly charged, not only with his own defaults, but also with those of the deceased. *Ib.*

17. But one is not liable, under a joint bond, for a default committed by the other, while sole guardian, before the execution of their joint bond. *Ib.*

18. When money is shown to have come to the hands of a guardian at a particular time, and there is no evidence whatever that any disposition has been made of it, it is the province of the jury to decide whether it continued in his possession until another subsequent period; but, where there is also evidence tending to show that he had used it prior to the latter time, neither the court nor the jury can, for the purpose of charging a surety with it, presume that it still continued in his possession. *Ib.*

19. When a guardian is charged with a particular sum which has been litigated, he is also properly chargeable with the costs attending the litigation of it. *Hughes v. Mitchell*, 19 Ala. 268.

20. If he has notice of a debt due to his ward, and makes no attempt to collect it, and it is lost through his negligence, he is chargeable with the amount. *Ib.*

21. But where he has acted as guardian only for seven months, he will not be charged with a debt due from a preceding guardian, on account of negligence in failing to collect it, when it is shown that the sureties of the former guardian are entirely solvent. *Williams and Wife v. Harrison*, 19 Ala. 277.

22. If he invests his ward's funds in a mercantile partnership, whose operations are based partly on cash and partly on credit, he is only chargeable with that portion of the profits, if it can be ascertained, which accrued on the cash investment. *Kyle v. Barnett*, 17 Ala. 306.

23. If he employs his son to take charge of the business in which he has invested his ward's funds, under a *bona-fide* agreement to allow for his services one half of the net profits after paying interest on the investment, and the compensation does not appear unreasonable, he will not be held liable for that portion of the profits which may have been received by his son. *Ib.*

24. He is chargeable with interest, on the profits derived from the funds so invested, from the time they were received; and on the funds invested, after the dissolution of the partnership, from the time he received, or might with due diligence have received them. *Ib.*

25. If he has made profits by the employment of the ward's funds, the ward may elect, either to take the profits, or to charge him with interest, but cannot claim both. *Ib.*

26. If he sells his ward's property at private sale, he is chargeable with its value at the time of the sale, or at the time of settlement, or at any intermediate time, with interest on that value from the time of sale. *Hudson v. Helmes' Executors*, 23 Ala. 585.

27. If he hires out his ward's slaves, and afterwards deprives the hirer of their services during the term, by harboring them when run away, he is guilty of a breach of contract; but to make him responsible for the act of his ward in harboring the slaves, he must be in some way connected with it, and it must be shown to have been done by his directions, or with his assent: it is not sufficient to show that

he had previously allowed his ward to make contracts in relation to his own property, and had refused to entertain a proposition to rescind the contract until he had consulted the ward. *Camp v. Dill*, 27 Ala. 553.

IV. Removal of Ward or Property to another State.

28. Where an orphans' court here, in the rightful exercise of its jurisdiction, has appointed a guardian of the person and property of a minor, the removal of the guardian or ward to another State does not confer authority upon its courts to appoint another guardian who can supersede the former. *Dupree v. Perry*, 18 Ala. 34.

29. In determining whether the guardianship of a minor shall be transferred to another State, the orphans' court must necessarily exercise a sound discretion; and if the transfer is refused, the letters of guardianship granted by the foreign court should be treated as a nullity. *Ib.*

30. The design of the settlement required by the statute, as preliminary to an order for the transfer of a guardianship to another State, is to furnish the foreign court with record evidence of the condition of the ward's estate; and if the settlement does not show this, it is not sufficient to authorize the transfer. *Ib.*

31. To authorize the transfer of a guardianship under the act of 1837, both the guardian and ward must reside in the State to which it is proposed to be removed. *Ib.*

32. Under the Code, where the guardian and ward both reside here, and letters of guardianship are granted here, the property cannot be removed to another State on the application of a guardian appointed there, who alleges in his petition that the ward has been removed to that State. *Cook v. Wimberly*, 24 Ala. 486.

V. Renewal of Guardians' Bonds.

33. Under the act of 1821, authorizing the discharge of a guardian's sureties, the taking of a new bond is a jurisdictional fact, necessary to appear in order to give validity to the discharge; but the existence of this fact is to be determined by the judge to whom the application is made, and his decision is final and conclusive. *Hamner v. Mason*, 24 Ala. 480.

34. Where the sureties of a guardian of several minors applied for a discharge from further liability on their bond, and a decree was thereupon rendered by the court, reciting that the guardian had given a new bond, and ordering that the old sureties be therefore discharged,—*held*, in an action against the sureties on the old bond, that the recital was conclusive of the fact that a new bond had been given, although the new bond omitted the name of the minor for whose use the suit was brought, and consequently did not protect his estate. *Ib.*

35. Whether the personal representative of a deceased surety, wishing to put an end to the decedent's liability on the bond, can compel the guardian to give new security, *quære? Moore v. Wallis*, 18 Ala. 458.

VI. Settlement of Accounts.

36. A petition, filed by a ward against his guardian's administrator, asking a settlement of his guardianship accounts, and showing on its face that the guardian's estate has been previously settled as an insolvent estate, is demurrable. *Patterson v. Leachman*, 19 Ala. 745.

37. The wife is a necessary party to a proceeding to compel a final settlement of her guardianship of a minor child: a decree against her husband only is erroneous. *McGinty v. Mabry*, 23 Ala. 672.

38. The appearance of the guardian, without objection, dispenses with the necessity of notice to him. *Wilson v. Knight*, 18 Ala. 129.

39. Where *ex-parte* proceedings are instituted against a guardian, after his removal from the State, to compel a settlement of his guardianship, and the record contains an order of publication, a recital in the final decree, that the term to which the guardian was cited was a regular term, and that it was "shown to the satisfaction of the court, by competent and sufficient testimony, that the publication required by law has been regularly and duly given," shows a substantial compliance with

the requirements of the statute. *Wright v. Clough*, 17 Ala. 490.

40. It is error to render a final decree against the guardian, upon his default, at the term to which he is cited to appear, and at which the account against him is stated. *Ib.*

41. Although it is necessary, in such case, that the record should show the facts which invest the court with authority to state the account, yet it is immaterial whether the facts are proved before or after publication: from the time of the application, until the stating of the account, the proceedings are to be regarded as *in fieri*, and the authority upon which the final action of the court is based may be proved at any time before such action is had. *Croft v. Ferrell*, 21 Ala. 351.

42. Where the account is stated, and reported for allowance at the next term of the court, at which term, on account of there being no judge qualified, the proceedings are irregularly continued to the next term, the subsequent appearance of the guardian, and his failure to object to the irregular continuance, are a waiver of the irregularity, and place him rightly in court, even if such irregularity amounted to a discontinuance of the proceedings. *Ib.*

43. It cannot be assumed, as a legal conclusion, that no trust can be created by deed, the annual proceeds of which might go into the hands of a guardian as such, and be administered in the orphans' court. *Wilson v. Knight*, 18 Ala. 129.

44. Where a guardian, who is also trustee of his ward, has annually accounted with the orphans' court, for a series of years, for the proceeds of the trust estate, and has been allowed credits exceeding in amount the income of the estate other than that embraced in the trust, his acts will be regarded as a recognition of his right to such proceeds as guardian, and, unless some error or mistake is shown, will estop him from denying it. *Ib.*

45. The orphans' court may compel guardians, who have given a joint bond, to account for each other's defaults, and may, *it seems*, render a joint decree against them; and if one of them has died insolvent, the survivor may be directly charged, not only with his own defaults, but also with the defaults of the deceased. *Williams and Wife v. Harrison*, 19 Ala. 277.

46. A final settlement with the orphans' court, ascertaining a balance due from the guardian to his ward, although it would be void, considered as a judgment, because not rendered in favor of any one by name, is evidence of a debt, due from the guardian to his ward, for the amount of the ascertained balance. *Hughes v. Mitchell*, 19 Ala. 268.

47. A guardian is not entitled, on final settlement, to a credit for the proceeds of the sale of property under execution on a former decree, which was afterwards reversed on error, and the sale set aside: the presumption arises, in such case, when the contrary is not shown, that he has regained the possession of the property, or at least that its value has not been lost to him. *Ib.*

48. On the settlement of a guardian's accounts in equity, he should be allowed a credit for reasonable expenses in boarding, clothing and educating his female ward, if necessary under the circumstances, although such expenses may exceed the interest or annual profits of her estate in his hands; and if she, while residing with him, performed valuable services for him, she is entitled to set off their value against his demand for board. *Montgomery v. Givhan*, 24 Ala. 568.

49. If the ward, in such case, after her marriage, continued with her husband to board with her guardian, it will be presumed, in the absence of any contract between the parties, that it was understood between them that the price of their board should be charged to the wife's property in the hands of her guardian; and the guardian will be allowed a credit for the amount, although the husband is insolvent. *Ib.*

50. He is entitled, also, to a credit for the value of slaves delivered to the ward and her husband when they commenced housekeeping, if the bill does not offer to return them, and the husband assents to her right to have them settled upon her for her separate support and maintenance. *Ib.*

51. The ward's right to a settlement of her property upon herself, is un-

affected, as between herself and her guardian, by any transactions between the latter and her husband, which had no reference to her estate in the guardian's hands, and which were not designed to be credited to that fund; but if the property in the guardian's hands is more than sufficient for the reasonable support and maintenance of her and her children, and her husband is indebted to the guardian on the settlement of their accounts, the guardian will be allowed, after making a reasonable settlement on her, to retain the amount due from the husband. *Ib.*

VII. SURETIES.—*See that title.*

INSOLVENT ESTATES.

(Statutory Provisions: Code, §§ 1828–66; Clay's Digest, 191–5, §§ 1–16.)

I. OF THE REPORT AND DECLARATION OF INSOLVENCY.
II. OF THE SUBSEQUENT PROCEEDINGS.

1. *Governed by what Law.*
2. *Appointment of Commissioners.*
3. *Settlement with Administrator.*
4. *Filing Claims.*
5. *Verification of Claims.*
6. *Contesting Validity of Claims; and herein of their Allowance or Rejection.*
7. *Marshaling Assets.*
8. *Distribution of Surplus.*

I. OF THE REPORT AND DECLARATION OF INSOLVENCY.

1. A report of insolvency, in the name of two joint executors, although signed and verified by one only, is sufficient, when the record shows that it was adopted by the other, and that it was considered sufficient by the court in ordering a sale of the real estate. *Steele v. Weaver's Executors*, 20 Ala. 540.

2. A "statement of the condition of the estate," filed by two joint executors, showing an excess of debts over personal assets, being received by the court, and ordered to be recorded, was sufficient, prior to the passage of the act of 1843, to give the court jurisdiction of the estate as insolvent; the order reciting that the estate appeared to be insolvent, and the real estate having been sold as in cases of insolvency. *Shackelford v. King*, 24 Ala. 158.

3. Where the record contains no report or decree of insolvency, a mere recital, in the order of publication against creditors, that the estate had theretofore been reported and declared insolvent, does not give the court jurisdiction to proceed to the settlement of the estate as insolvent. *McBroom's Adm'rs v. McBroom's Creditors*, 19 Ala. 173.

4. But, in a collateral proceeding, the recitals of the record, showing that a report of insolvency was made, are sufficient to sustain the jurisdiction. *Heydenfeldt v. Towns*, 27 Ala. 423.

5. By the law of this State in 1840, a decree of insolvency might be obtained, when the personalty alone was insufficient to pay all the debts, though the real estate might be more than sufficient for that purpose; but such a decree would not, in the Federal chancery courts, be conclusive evidence of the fact of insolvency. *Byrne v. McDow*, 23 Ala. 404.

6. In an action at law in the Federal courts, against an administrator, a plea setting up a decree of insolvency rendered by a State court, is no bar to the rendition of judgment; but, when the estate is actually insolvent, the judgment at law will be enjoined in equity, and the creditor compelled to come in and take his place with the other creditors. *Ib.*

7. But a decree of insolvency, rendered by a State court, does not preclude a creditor, even in the Federal chancery courts, from denying the truth of the decree, and showing that the estate, when its assets are fairly stated, is in fact solvent. *Ib.*

8. A writ of error does not lie from a decree of insolvency, until the rendition of the final decree of settlement, unless an issue is made up and tried under the act of 1843; and if such issue is made up and tried, a writ of error can only be sued out within a year from the trial. *Black's Creditors v. Black's Adm'rs*, 20 Ala. 401.

9. Under the Code, the limitation of an appeal from a decree of insolvency, is thirty days; and this limitation applies, though the decree was rendered before the adoption of the Code. *Banks v. McDougald's Adm'r*, 29 Ala. 75.

10. The heir-at-law may, notwithstanding a decree of insolvency, recover by suit rents accruing after his ancestor's death, if neither the administrator nor creditors object. *Branch Bank at Mobile v. Fry*, 23 Ala. 770.

11. The administrator cannot, after a declaration of insolvency, maintain ejectment for the lands. *Long v. McDougald's Adm'r*, 23 Ala. 413.

II. OF THE SUBSEQUENT PROCEEDINGS.

1. *Governed by what Law.*

12. Where an estate was reported insolvent prior to the passage of the act of 1843, the subsequent proceedings must be regulated by that act. *Steele v. Weaver's Executors*, 20 Ala. 540; *Weaver's Executors v. Weaver's Creditors*, 23 Ala. 789; *S. C.*, 20 Ala. 557.

13. The retroactive effect thus given to the act of 1843 does not conflict with any constitutional provisions, nor does it deprive the executor of any vested right, personal to himself, which he could have insisted on under the previous law: it only works a revocation of his letters testamentary, and changes the mode of proceeding to a final settlement of the estate. *Weaver's Executors v. Weaver's Creditors*, 23 Ala. 789.

2. *Appointment of Commissioners.*

14. The act of 1833 (Aikin's Digest, 253, § 41), requiring the appointment of commissioners to make settlement with executors, &c., when the judge of the county court is interested in the estate, does not apply to the auditing of claims against an insolvent estate; consequently, if the commissioners are appointed by the judge of the county court, who is a creditor of the estate, their proceedings in auditing claims are voidable only, and not absolutely void. *Heydenfeldt v. Towns*, 27 Ala. 423.

15. Where the settlement is transferred from the probate to the circuit court, since the passage of the act of 1850, on account of the incompetency of the probate judge, the circuit court should not appoint commissioners to settle the estate, but should proceed with the case as the probate court would have done. *Shackelford v. King*, 24 Ala. 158.

3. *Settlement with Administrator.*

16. An estate having been reported insolvent, and the creditors notified to file their claims against it, under the law existing prior to the act of 1843, and no other proceedings being had until after the passage of that act, it is error for the court to proceed at once to a settlement with the executors, against their objections: the next step should be, the appointment of a day for the executors to settle, and notifying the creditors to attend; and on that day the court should proceed to settle with the executors, and the creditors to choose an administrator *de bonis non*. *Weaver's Executors v. Weaver's Creditors*, 20 Ala. 557.

17. The settlement with the executor, and the appointment of an administrator *de bonis non*, may, with the assent of the court, precede each other according to the convenience of the parties; but no final decree can be rendered against the executor, until his successor is qualified. *S. C.*, 23 Ala. 789.

18. If the court improperly refuses to proceed with the settlement of the executor's accounts, and dismisses the citation against him, a writ of error does not lie from his decree, but the proper remedy is by *mandamus*. *Shadden v. Sterling's Adm'rs*, 23 Ala. 518.

19. An issue having been formed between the executor and creditors, the court afterwards allowed various irregular pleadings to intervene, and the executor then sued out a writ of error upon the decree rendered against him,—*held*, that the case should be considered as if the parties had been held to the issue first formed, and that the subsequent pleadings and rulings of the court should be disregarded. *Shackelford v. King*, 24 Ala. 158.

20. Where an executor becomes surety on a note given for property purchased at a sale made by himself and his co-executor, and is afterwards

cited by his co-executor, on behalf of the creditors of the estate, to make final settlement and account for the note, he cannot protect himself by pleading the statute of limitations of six years. *Ib.*

21. After the administrator has reported the estate insolvent, personal notice to him of the subsequent proceedings is unnecessary, since he is considered the actor, and is held to notice of all the subsequent proceedings. *Watts v. Gayle & Bower*, 20 Ala. 817; *Crothers v. Heirs of Ross*, 17 Ala. 816; also, *Shackelford v. King*, 24 Ala. 158.

22. But this rule does not apply to *ex-parte* proceedings against an administrator, after his removal from the State, to compel a settlement of his administration where the estate, though reported by him insolvent, is not settled as such, and the decree against him is in favor of his successor. *Spence v. Savery*, 25 Ala. 723.

23. Nor can the executor raise any objection to the sufficiency of the citation to the creditors. *Shackelford v. King*, 24 Ala. 158.

24. On the trial of an issue between the executor and creditors, a note may be given in evidence without proof of its execution, unless its execution is denied by a proper plea. *Ib.*

25. The only vouchers that can be allowed the administrator, for money paid out after the declaration of insolvency, are for the "last sickness and necessary funeral expenses;" and if the court states an account, on due notice to the creditors, giving the administrator credit for "receipts, vouchers and allowances," exceeding the amount of assets received by him, the settlement is unauthorized by law, and a creditor may again cite the administrator to a settlement. *Shadden v. Sterling's Adm'rs*, 23 Ala. 518.

26. The administrator is chargeable, on final settlement with the creditors, with the proceeds of the sale of goods belonging to the estate, on which he, as sheriff, before his appointment as administrator, levied a void execution, and paid over the proceeds of sale to the plaintiff in execution. *Whitlock's Adm'r v. Whitlock's Creditors*, 25 Ala. 543.

4. *Filing Claims.*

27. Where the report of insolvency was made prior to the passage of the act of 1843, but no progress was made in the settlement until afterwards, the creditors would only be bound to file their claims within the time prescribed by the court under the previous law. *Steele v. Weaver's Executors*, 20 Ala. 540.

28. A claim is not required to be in any particular form: it is sufficient, if it shows the liability of the estate to the party asserting it. *Hogan's Executor v. Calvert*, 21 Ala. 194.

29. A party having merely an equitable title to a demand against an insolvent estate, may file it as a claim against the estate. *Ib.*

30. Where one partner covenants, for a valuable consideration paid by his co-partner, to pay the debts of the firm without unnecessary delay, a failure to perform his covenant gives a right of action to his co-partner; and the latter may, in such case, before he has paid any part of the partnership debts, file his claim against the estate of his deceased partner. *Ib.*; *Peacey's Creditors v. Peacey's Adm'r*, 27 Ala. 683.

31. When a claim is filed on the same day on which the decree of insolvency is rendered, the appellate court will presume, in the absence of other proof, that it was filed after the rendition of the decree. *Gaffney v. Williamson's Adm'r*, 21 Ala. 112.

32. The term "month," as used in the act of 1843, means a calendar, and not a lunar month. *Bartol v. Calvert*, 21 Ala. 42.

33. An endorser, on paying the note, may present his claim against the insolvent estate of a prior endorser at any time within six months after the payment, although the holder failed to present the note as a claim against the estate within six months after the declaration of insolvency. *Henry v. Black's Adm'rs*, 24 Ala. 417.

34. If a claim is filed in due time, and is afterwards taken from the office for a special purpose with the permission of the judge, it does not lose its place because, not having been returned through inadvertence, it cannot be found in the office on the last day allowed for filing objections. *Ross v. Ross*, 20 Ala. 105; *S. C.*, 21 Ala. 322.

5. *Verification of Claims.*

35. When a claim is filed in time, but not verified by affidavit, the affidavit may be supplied at any time before, or even on the day of final hearing. *Gaffney v. Williamson's Adm'r*, 21 Ala. 112.

36. Where the claim is verified by the affidavit (not of the creditor, but) of a third person, who swears that, "to the best of his knowledge, information and belief, it is yet due and unpaid," but does not state any other facts, the affidavit is not sufficient. *Pickle's Adm'r v. Ezzell*, 27 Ala. 623.

6. *Contesting Validity of Claims; and herein of their Allowance or Rejection.*

37. Prior to the passage of the act of 1843, the law made no provision for contests among the creditors; consequently, in cases governed by the old law, the common-law rule would prevail, that written objections to claims should be filed within a reasonable time after the appointment of the administrator *de bonis non*. *Steele v. Weaver's Executors*, 20 Ala. 540.

38. Under the act of 1843, if a claim is filed within the proper time, objections to its verification, correctness or validity, must be filed within three months after the expiration of the time allowed for filing claims; that is, within nine months after the decree of insolvency. *Bartol v. Calvert*, 21 Ala. 42; *Gaffney v. Williamson's Adm'r*, 21 Ala. 112; *Hogan's Executor v. Calvert*, 21 Ala. 194.

39. The objection, that a claim was not filed within the proper time, may be made at any time before the hearing, or even at the hearing. *Ib.*

40. Objections to the time of filing a claim, are properly triable by the court. *Bartol v. Calvert*, 21 Ala. 42.

41. In contests among creditors, it is a proper practice for the creditor, whose claim is contested, to declare upon it, as in a suit at common law, against the administrator *de bonis non*, in behalf of the objecting creditor, as defendant; and where the administrator's individual claim is contested, and he declares, as creditor, against himself as administrator, the declaration is not demurrable. *Ross v. Ross*, 20 Ala. 105.

42. Where the contested claim is an account of goods, wares and merchandise furnished to the intestate, and money paid for him, by the firm of which the creditor is surviving partner; and the administrator, for the purpose of reducing the amount, proves that the firm collected money for the intestate, upon the understanding that, when collected, it should be placed to his credit, the creditor may rebut this proof, by introducing evidence of another item of indebtedness from said intestate to said firm, to which the money collected might, under the general authority given by the intestate, have been applied. *Ross v. Pearson*, 21 Ala. 473.

43. Although it is irregular, in such case, to admit the rebutting proof before the administrator has introduced the evidence which it is intended to rebut; yet its admission is not error, when the administrator admits that he will offer such evidence, and the record shows that it was subsequently introduced. *Ib.*

44. If the validity of a claim, which is filed in time, and properly verified, is not contested by either the administrator or any creditor in the manner prescribed by the act of 1843, the judge has no power to call for other proof: it only remains for him to allow the claim, and charge the estate with its *pro rata* payment. *McNeil v. Macon's Adm'r*, 20 Ala. 772.

45. Where the record shows that a claim was properly filed and verified, and that additional evidence of its validity was afterwards adduced before the judge, who, after rejecting some of it, held the residue insufficient to establish the claim, and consequently rejected it; and it is not shown, either affirmatively or by necessary implication, that either the administrator or any creditor objected to the claim, the whole proceeding is without authority of law, and the decree rejecting the claim will be reversed. (CHILTON, J., *dissenting*.) *Ib.*

46. A claim allowed, for money paid by mistake, under these facts: the creditor, as administrator of the estate of the decedent's father, paid to the trustee of the decedent (she being

then an unmarried woman) the distributive share of one of her brothers, which was supposed by all the parties to have been assigned to her husband for her separate use, and was afterwards compelled to pay it again to her husband's administrator, upon proof that the assignment was to the husband in his own right. *Bird v. Bohannon's Adm'r*, 25 Ala. 279.

47. Where the decedent, on the dissolution of his partnership with another, covenanted to pay the outstanding debts within a reasonable time, and died without complying with his covenant, the surviving partner has a claim against his estate for the amount of the outstanding debts. *Hogan's Executor v. Calvert*, 21 Ala. 194; *Peacey's Creditors v. Peacey's Adm'r*, 27 Ala. 683.

48. The rejection of a claim, under the act of 1843, is such a final decree as will support a writ of error, although no issue was made up under that act. *McNeil v. Macon's Adm'r*, 20 Ala. 772; *Bartol v. Calvert*, 21 Ala. 42.

49. When a claim has been once rejected, it cannot be re-investigated by the succeeding judge, against the objection of any of the creditors; nor will the refusal of the court, in such case, to permit a re-investigation of the claim, support a writ of error. *Saltmarsh v. Bird*, 19 Ala. 665.

50. A decree against the administrator, rendered prior to the passage of the act of 1843, is equally conclusive against him and his sureties, both as to the claims allowed against the estate, and the assets in the administrator's hands; and the sureties cannot, in the absence of fraud, litigate any question, except such as may arise upon the execution or legal sufficiency of the bond. *Watts v. Gayle & Bower*, 20 Ala. 817.

51. The action of the court, in ascertaining the amount of the decedent's indebtedness, binds the real estate equally with the personal, and, if not conclusive, is at ~~least~~ *prima-facie* evidence against all parties interested in the estate, and against a fraudulent grantee of the decedent. *Heydenfeldt v. Towns*, 27 Ala. 423.

7. *Marshaling Assets.*

52. In distributing the separate estate of a deceased partner, which has been declared insolvent, the partnership creditors will be postponed to the individual creditors, when there is a joint fund in the hands of the surviving partner, to which they may resort. *Emanuel v. Bird*, 19 Ala. 596; *Smith & Co. v. Mallory's Executor*, 24 Ala. 628; *Bridge & Co. v. McCullough's Adm'rs*, 27 Ala. 661; *Van Wagner & Yeoman v. Chapman's Adm'r*, 29 Ala. 172.

53. Although it is shown that the surviving partner himself is insolvent. *Emanuel v. Bird*, 19 Ala. 596; *Van Wagner & Yeoman v. Chapman's Adm'r*, 29 Ala. 172; *Smith & Co. v. Mallory's Executor*, 24 Ala. 628.

54. But when the surviving partner is insolvent, and there is no joint fund to which the partnership creditors may resort, they are entitled to share in the estate of the deceased partner *pari passu* with the individual creditors. *Emanuel v. Bird*, 19 Ala. 596.

55. After a claim has been allowed without objection, and the time within which objections are required to be made has expired, the administrator may still move to postpone its payment until after the separate debts shall have been satisfied, on the ground that it is a partnership debt which is not entitled to share equally with separate debts. *Bridge & Co. v. McCullough's Adm'rs*, 27 Ala. 661.

8. *Distribution of Surplus.*

56. When a surplus is left in the hands of the administrator, on account of the rejection of a claim because it was not properly filed or verified, such surplus should be appropriated to the creditor, in preference to the distributees, unless his claim is barred on some other ground. *Bartol v. Calvert*, 21 Ala. 42.

57. If the settlement is pending in the chancery court, and a surplus is found in the hands of the administrator after paying all claims against the estate, a distributee of the estate may propound his interest to the court by petition, praying to be made a party to the cause, and to have a decree against the administrator for his dis-

tributive share of such surplus. *Purdom & McBroom v. McBroom*, 19 Ala. 110.

58. But it is erroneous, in such case, to render a final decee against the administrator, without giving him notice of the filing of the petition, and thus allowing him an opportunity to contest the petitioner's claim. *Ib.*

JURISDICTION.

I. ADEMPTION OF LEGACIES.
II. AD QUOD DAMNUM.
III. BASTARDY.—*See that title*, PART I.
IV. CERTIORARI.
V. DOWER.
VI. ESTATES OF DECEDENTS.

1. *Grant of Administration.*
2. *Proceedings to obtain Title.*
3. *Sales of Personalty.*
4. *Sales of Realty.*
5. *Settlement and Distribution.*

VII. GUARDIANS.
VIII. INSOLVENT ESTATES.
IX. JUDICIAL ASCERTAINMENT OF JURISDICTIONAL FACT.
X. LUNATICS, AND PERSONS NON COMPOTES MENTIS.
XI. SUBSTITUTION OF LOST RECORDS.
XII. TRUSTS.

I. ADEMPTION OF LEGACIES.

1. Although there may be cases, involving equitable circumstances, which the probate court, from its peculiar organization and mode of procedure, would be incompetent fully to adjust; yet it has jurisdiction, as incident to the settlement and distribution of estates, over the ademption of legacies. *May's Heirs v. May's Adm'r*, 28 Ala. 141.

II. AD QUOD DAMNUM.

2. A probate judge has authority, under the act establishing courts of probate, to grant writs of *ad quod damnum*, in those cases in which, before the abolition of the county court, a judge of the county court had such authority. *Stein v. Burden*, 19 Ala. 715.

2. This jurisdiction being special and summary, the record must affirmatively show a compliance with all the requisites of the statute. *Owen v. Jordan*, 27 Ala. 608.

III. BASTARDY.—*See that title in* PART I.

IV. CERTIORARI.

3. A judge of probate has power, under the act of 1850, "to grant" a *certiorari;* and when the writ is issued and signed by him, it is operative as his fiat, even if he has no authority to issue it. *Hatter v. Eastland*, 22 Ala. 688.

V. DOWER.

4. The statutory jurisdiction of the probate court, in the allotment of dower, is in derogation of the common law; consequently, the proceedings must conform to the statute in every particular. *Martin's Heirs v. Martin*, 22 Ala. 86.

6. In the exercise of this statutory jurisdiction, the court has no equity jurisdiction, but proceeds according to the rules of law; so that, if the demandant has a legal right of dower, it is the duty of the court to allot it, irrespective of considerations of purely equitable cognizance. *Ib.*

7. The court has no jurisdiction to go into an inquiry, whether the lands, in which dower is sought, were purchased by the husband with money obtained by him from another woman, with whom, after a voluntary separation between him and the demandant, he had contracted a supposed marriage, and with whom, as his lawful wife, he lived until his death. *Ib.*

8. The probate court can only allot dower in the mode prescribed by the statute, and in those lands of which the husband died seized. *Thrasher & Mitchell v. Pinckard's Heirs*, 23 Ala. 616.

9. In reference to the question, whether the probate court could assign dower out of the surplus proceeds of the sale of lands, which were sold for the payment of the debts of the estate, the court said, it is "a jurisdiction which we should be strongly inclined to deny, but we leave it an open question. since its decision is not involved in the case before us." *Williamson and Wife v. Mason*, 23 Ala. 488.

VI. ESTATES OF DECEDENTS.

1. *Grant of Administration.*

10. The orphans' court here has no jurisdiction of personal property, which was at the testator's domicile in another State at the time of his death, and which was afterwards brought here by his executor. *Varner v. Bevil*, 17 Ala. 286.

11. Nor has it jurisdiction of slaves which were brought into this State by a foreign executor, to whom a life estate in them was bequeathed in another State, and who there qualified and took possession of them. *Ramey v. Green*, 18 Ala. 771.

12. If property belonging to the estate of an intestate, who neither resided, nor had property here at the time of his death, is afterwards brought into any county of this State, the orphans' court of that county may grant administration on it. *Miller v. Jones' Adm'r*, 26 Ala. 247.

13. The fact that there is property in the county belonging to the estate, and not the allegation of that fact in the petition, gives the court jurisdiction. *Ib.*

14. The grant of letters testamentary or of administration, though conclusive where the court had power to act, may be assailed collaterally for want of jurisdiction. *Ib.*

15. Where the jurisdiction of the court has attached, the grant of administration cannot be collaterally impeached in chancery, on the ground that it was improperly granted. *Savage v. Benham*, 17 Ala. 119.

16. A grant of administration on the estate of a living man, who is supposed to be dead, is absolutely void. *Duncan & Hooper v. Stewart*, 25 Ala. 408.

17. After the grant of letters to a person entitled to, and capable of discharging the trust, the court has no power to make any new appointment to the office, until it is vacated, either temporarily or permanently, by the death, resignation, removal, &c., of the first administrator: such new appointment is totally void, and confers no authority on the person appointed to have the first administrator cited to a settlement. *Matthews v. Douthitt and Wife*, 27 Ala. 273.

2. *Proceedings to obtain Title.*

18. If the vendee, holding the decedent's title-bond, has sold a part of the land to a third person, the orphans' court is not thereby deprived of jurisdiction. *Prince v. Bates*, 19 Ala. 105.

19. The probate court has no jurisdiction to compel an administrator to convey his intestate's interest in certain lands, which were sold by a firm of which the intestate was a partner, unless the intestate had entered into "bond or obligation to make title thereto." *Wilkerson v. Vinson*, 20 Ala. 131.

3. *Sales of Personalty.*

20. Although the orphans' court, under the general powers conferred on it by the act of 1806, (Clay's Digest, 300, § 21,) may have been a court of general jurisdiction; yet, as to its power to order a sale of the personalty, which was derived exclusively from the act of 1809, (*Ib.* 223, § 13,) it is a court of special, or limited jurisdiction; consequently, its records must affirmatively show all the facts necessary to sustain its jurisdiction. *Wyatt's Adm'r v. Rambo*, 29 Ala. 510.

21. The order of sale must appear to have been granted on the petition of the administrator, and must either allege or show that a sale was necessary. *Ib.* (Overruling *Wyatt's Adm'r v. Steele*, 26 Ala. 639, in which it was held, that the granting of the order of sale implied the previous judicial ascertainment of the fact that a sale was necessary.)

22. But, when the order does not appear on its face to have been granted on the application of the administrator, that fact will be presumed after the lapse of twenty years. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

23. On petition for the distribution of slaves, if the number of distributees exceeds the number of slaves to be divided, the court may order a sale in the first instance, without the appointment and report of commissioners. *Hamlet v. Johnson*, 26 Ala. 557.

4. *Sales of Realty.*

24. Proceedings in the orphans' court, for the sale of realty, are in the

nature of a proceeding *in rem*; consequently, where the jurisdiction of the court is shown to have attached, the action of the court is conclusive until vacated, and cannot, though abounding with errors and irregularities, be collaterally impeached. *Cox v. Davis*, 17 Ala. 714; *Doe d. Saltonstall and Wife v. Riley and Dawson*, 28 Ala. 164; *Field's Heirs v. Goldsby*, 28 Ala. 218; *Matheson's Heirs v. Hearin*, 29 Ala. 210; *King v. Kent's Heirs*, 29 Ala. 542.

25. Under the act of 1818, the jurisdiction of the court attached, on its reception of a petition by the administrator or widow, stating that a sale of a portion of the estate was necessary to discharge debts, and that a sale of the real estate would be less injurious than a sale of slaves. *Matheson's Heirs v. Hearin*, 29 Ala. 210; *King v. Kent's Heirs*, 29 Ala. 542.

26. The authority to order a sale, under this statute, is not restricted to the estates of intestates, but extends to the estate of any decedent. *Ib.*

27. The court may, under the authority conferred by this statute, order a sale of the decedent's inchoate equity in lands. *Vaughan and Hatcher v. Heirs of Holmes and West*, 22 Ala. 593.

28. As to the sufficiency of the petition, in its description of the lands, and its averment of the jurisdictional facts, when the proceedings are collaterally assailed, see *King v. Kent's Heirs*, 29 Ala. 542.

29. The order of sale is not void, when collaterally attacked, because made in vacation; nor because it fails to prescribe the character and place of sale, and the notice to be given. *Matheson's Heirs v. Hearin*, 29 Ala. 210.

30. Under the act of 1822, the jurisdiction of the court attached, on its reception of a petition by the administrator, alleging a deficiency of personal assets for the payment of debts, or that the real estate could not be "equally, fairly and beneficially divided," without a sale; and asking an order of sale. *Doe d. Saltonstall and Wife v. Riley and Dawson*, 28 Ala. 164; *Field's Heirs v. Goldsby*, 28 Ala. 218; *Cox v. Davis*, 17 Ala. 714.

31. The failure to state in the petition which of the heirs are of full age, does not invalidate the proceedings. *Field's Heirs v. Goldsby*, 28 Ala. 218.

32. The failure to issue citation to the resident heirs, or to make publication against the non-residents; the failure of the guardian of the infant defendants to deny the allegations of the petition; and the want of proof by deposition of the alleged ground of sale,—are mere irregularities, which do not affect the validity of the sale, when collaterally attacked. *Ib.*

33. The failure of the record to show that the guardian *ad litem* of the infant heirs accepted the appointment, and the absence of proof by the record that the proper notice of the time and place of sale was given, are also mere irregularities. *Doe d. Saltonstall and Wife v. Riley and Dawson*, 28 Ala. 164.

34. It is not necessary, in a collateral proceeding, that the petition should be shown by the record to have been filed more than forty days before the final hearing. *Cox v. Davis*, 17 Ala. 714.

5. *Settlement and Distribution.*

35. A testator appointed his widow guardian of his minor children and executrix of his will, and directed that the share of each child should be paid on its arriving at majority. A division of the estate was afterwards had between the widow and children, by commissioners duly appointed, but no settlement was made with the court. After the death of the widow, her administrators were cited by one of the testator's legatees to settle her executorship, and also by one of her distributees to settle their administration on her estate. After due notice, all the parties interested appeared, and "it was agreed that both estates should be blended and considered as one, as the parties in interest to both were precisely the same;" and a settlement was made, and decree rendered, accordingly. *Held*, on error assigned by the administrators, that the decree was erroneous, because the court had no power thus to consolidate the two estates. *Richardson's Adm'rs v. Richardson*, 24 Ala. 395.

36. Where commissioners are appointed to make distribution, neither they nor the court can require one distributee to pay a sum of money to another: such a decree, whether made

by the commissioners only, or confirmed by the court, will not sustain an action of debt for the recovery of the money; but if the parties adopted the division, and acted on it, or made distribution among themselves on the same terms, they would be bound by it. *Allen and Wife v. Raney and Wife*, 19 Ala. 68.

37. A decree against an administrator, in favor of his successor in the administration, for moneys received in the course of administration and unaccounted for, rendered prior to the passage of the act of 1846, was void for want of jurisdiction. *Hanna v. Price*, 23 Ala. 826.

38. Under the act of 1854, (which is substantially the same as the act of 1846,) the personal representative of a deceased administrator may be cited by the distributees, to make settlement of his intestate's administration, "as fully and completely" as could have been made by the deceased administrator himself, if alive. *Howard's Distributees v. Howard's Adm'r*, 26 Ala. 682.

VII. GUARDIANS.

39. The orphans' court cannot confer upon a guardian authority to receive the rent of lands lying without the limits of the State. *Smith's Executors v. Wiley*, 22 Ala. 396.

40. Nor can it authorize a sale by the guardian in any other manner than that specified by the statute: a private sale under an order of court, though sanctioned by the court, passes no title as against the ward. *Hudson v. Helmes' Executors*, 23 Ala. 585.

41. Where an orphans' court here, in the rightful exercise of its jurisdiction, has appointed a guardian of the person and property of a minor, the removal of the guardian or ward to another State does not confer authority upon its courts to appoint another guardian who can supersede the former. *Dupree v. Perry*, 18 Ala. 34.

42. To authorize the transfer of a guardianship to another State, under the act of 1837, both the guardian and ward must reside in that State. *Ib.*

43. Under the Code, where letters of guardianship have been granted here, while both the guardian and ward reside here, the removal of the ward to another State does not authorize a transfer of the property. *Cook v. Wimberly*, 24 Ala. 486.

44. Under the act of 1821, authorizing the discharge of a guardian's sureties, the taking of a new bond is a jurisdictional fact, necessary to appear in order to give validity to the discharge; but the existence of this fact is to be determined by the judge to whom the application is made, and his decision is final and conclusive. *Hamner v. Mason*, 24 Ala. 480.

45. The orphans' court may compel guardians, when they have given a joint bond, to account for each other's defaults, and may, *it seems*, render a joint decree against them; and if one of them has died insolvent, the survivor may be directly charged, not only with his own defaults, but also with the defaults of the deceased. *Williams and Wife v. Harrison*, 19 Ala. 277.

46. Where *ex-parte* proceedings are instituted against a guardian, who has removed beyond the jurisdiction of the court without settling his accounts, although it is necessary that the record should show the facts which authorize the court to state the account, yet it is immaterial whether these facts are proved before or after publication: from the time the application is made, until the final action of the court in stating the account, the proceedings are to be regarded as *in fieri*, and the authority upon which the final action of the court is based may be proved at any time before such action is had. *Croft v. Ferrell*, 21 Ala. 351.

VIII. INSOLVENT ESTATES.

47. A report of insolvency, in the name of two joint executors, although signed and verified by one only, is sufficient, when the record shows that it was adopted by the other, and that it was considered sufficient by the court in ordering a sale of the real estate. *Steele v. Weaver's Executors*, 20 Ala. 540.

48. A "statement of the condition of the estate," filed by two joint executors, showing an excess of debts over personal assets, being received by the court, and ordered to be recorded, was sufficient, prior to the passage of

the act of 1843, to give the court jurisdiction of the estate as insolvent; the order reciting that the estate appeared to be insolvent, and the real estate having been sold as in cases of insolvency. *Shackelford v. King*, 24 Ala. 158.

49. Where the record contains no report or decree of insolvency, a mere recital, in the order of publication against creditors, that the estate had theretofore been reported and declared insolvent, does not give the court jurisdiction to proceed to the settlement of the estate as insolvent. *McBroom's Adm'rs v. McBroom's Creditors*, 19 Ala. 173.

50. But, in a collateral proceeding, the recitals of the record, showing that a report of insolvency was made, are sufficient to sustain the jurisdiction. *Heydenfeldt v. Towns*, 27 Ala. 423.

IX. JUDICIAL ASCERTAINMENT OF JURISDICTIONAL FACT.

51. Where a court of limited jurisdiction is charged by statute with the ascertainment of a jurisdictional fact, and its proceedings show that this fact was judicially ascertained, it cannot be collaterally impeached. *Hamner v. Mason*, 24 Ala. 480; *Wyatt's Adm'r v. Rambo*, 29 Ala. 510.

52. But the judicial ascertainment of such jurisdictional fact cannot be inferred from the mere exercise of jurisdiction. *Wyatt's Adm'r v. Rambo*, 29 Ala. 510. (Overruling *Wyatt's Adm'r v. Steele*, 26 Ala. 639.)

X. LUNATICS, AND PERSONS NON COMPOTES MENTIS.

53. The orphans' court has no jurisdiction to appoint a guardian for a person, on the ground that he is a lunatic or *non compos mentis*, without the issue of a writ *de lunatico inquirendo*, and the finding of a jury thereon: the appointment of a guardian, without these preliminary proceedings, is void, and may be collaterally impeached in any court. *Eslava v. Lepretre*, 21 Ala. 504.

54. The appointment is void, also, if made without notice to the party against whom the proceedings are instituted. *Ib.*

XI. SUBSTITUTION OF LOST RECORDS.

55. If an entire record, or a part thereof, is lost or destroyed, the court has power to substitute in its stead another, upon proof of the contents of that which is lost; but the substitute must be consistent with the part remaining on file. *Bishop's Heirs v. Hampton*, 19 Ala. 792.

56. Where the lost paper is the petition upon which a sale of lands was decreed by the court, and the record shows that the sale was ordered on the ground that "the estate was solvent and it would be of infinite benefit to the heirs to sell the land," a petition cannot be substituted, alleging the additional ground that the land could not be equally, fairly and beneficially divided. *Ib.*

XII. TRUSTS.

57. The orphans' court has no jurisdiction over a bequest, coupled with a power to the executors to give the property to such of the testator's children as they "shall think fit and proper." *Billingsley v. Harris*, 17 Ala. 214.

58. Nor has it power to follow the assets of an estate, which the administrator has invested in property, and to establish a trust in favor of an infant distributee. *Gerald and Wife v. Bunkley*, 17 Ala. 170.

59. But it cannot be assumed, as a legal conclusion, that no trust can be created by deed, the annual proceeds of which might go into the hands of a guardian, and be administered by him as such in the orphans' court. *Wilson v. Knight*, 18 Ala. 129.

60. The probate court may compel the husband, as executor of his wife, to settle his trusteeship of her separate estate under the acts of 1848 and 1850. *Weems v. Bryan and Wife*, 21 Ala. 302.

LACHES.

See LIMITATIONS, STATUTE OF.

LAPSE OF TIME.

See LIMITATIONS, STATUTE OF.

LEGACY AND DEVISE.

I. ADEMPTION OF LEGACIES.
II. ASSENT OF EXECUTOR.
III. CONSTRUCTION AND VALIDITY.

1. *Bequests to Charity.*
2. *Bequests to Illegitimate Children.*
3. *Bequests to or for Slaves.*
4. *Contingent and Vested Interests.*
5. *Conditions.*
6. *Executory Devises, and Void Limitations.*
7. *What Estate passes, and what Persons take.*

IV. INTEREST ON LEGACIES.
V. LAPSED LEGACIES.
VI. LIABILITY FOR DEBTS.
VII. PROCEEDINGS TO RECOVER.

I. ADEMPTION OF LEGACIES.

1. It is now well settled, that parol evidence is admissible to show that a subsequent advancement was not intended by the testator as a satisfaction, either in whole or in part, of a previous provision by will; and whenever such evidence is received for that purpose, it may be rebutted by similar evidence. *May's Heirs v. May's Adm'r*, 28 Ala. 141.

2. Testator, after providing for the payment of his debts, directed that "the entire residue" of his estate, consisting of lands, slaves, and other property, should be equally divided among his wife and children, and declared it his "settled purpose" to make them all equally interested in his estate. The share of his only married daughter he directed should be divided between her and her husband; one half being secured to her as her separate estate, and the other half vesting absolutely in her husband. Afterwards he made advancements, consisting of lands, slaves, and other property, approximating the share which each would take under the will, to this daughter, to another daughter then married, and to his eldest son, who were the children of his first wife; and there was parol evidence, by two witnesses, of his subsequent declarations, that this was independent of the provisions made for them by the will, —that most of his property had come by their mother, and that he felt it his duty to give more to them than to his other children. *Held*, that the advancements were a satisfaction, *pro tanto*, of the provisions by will. *Ib.*

3. The probate court has jurisdiction, as incident to the settlement and distribution of estates, over the ademption of legacies. *Ib.*

II. ASSENT OF EXECUTOR.

4. An executor's assent to a legacy, before letters testamentary have been issued to him, does not pass the legal title, nor bind the estate which he represents. *Gardner v. Gantt*, 19 Ala. 666.

5. Where personal property is bequeathed to one for life, with vested remainder to another, the assent of the executor to the legacy of the particular estate, is an assent to the remainder. *Hunter v. Green*, 22 Ala. 329; *Gantt's Adm'r v. Phillips*, 23 Ala. 275; *Nixon v. Robbins*, 24 Ala. 663; *Gibson v. Land*, 27 Ala. 117.

6. The executor, in such case, can make but one delivery: a delivery to the first taker enures to the benefit of the remainder-man, and a delivery to the latter, with the assent of the former, is equally good; and in either case, the title of the executor is gone forever. *Hunter v. Green*, 22 Ala. 329.

7. But, if the remainder is contingent, and the will does not dispose of the interest in the property during the interval between the termination of the life estate and the happening of the contingency on which the remainder is to vest, this interest must be administered accordingly by the executor, and his assent to the legacy for life will have no effect whatever on the remainder. *Nixon v. Robbins*, 24 Ala. 663.

8. An executor's assent to a legacy may be inferred from any act or expression on his part, clearly recognizing the legatee's present right to receive it. *George v. Goldsby*, 23 Ala. 326.

9. But where the executors and legatees enter into a written agreement with another person, by which they transfer to him the entire estate for a number of years; and he afterwards takes out letters of administration in

pursuance of the agreement,—this does not amount to an assent to the legacies on the part of the executors. *Ib.*

10. Where a life estate in slaves is bequeathed to an executrix, who takes out letters testamentary, and takes possession of the estate, returning an inventory thereof, her legacy thereby vests in her, unless she expressly dissents from the will; and the remainder limited upon her life estate becomes vested by the same act, and cannot on her death revert to the estate. *Gantt's Adm'r v. Phillips*, 23 Ala. 275.

11. Her assent to such legacy to herself will also be presumed, where it appears that she did not dissent from the will, although it would have been greatly to her pecuniary advantage to do so; that she promptly qualified as executrix, and kept the estate together under the will for three years, for the purpose of raising and educating the children; that in the meantime, by her industry, economy, and prudent management of the estate, she totally exonerated it from all indebtedness; and that she ceased to be executrix after all the debts were paid, and claimed a credit, on final settlement of her administration, for services rendered by the slaves to the estate after the testator's death. *Walker v. Walker's Distributees*, 26 Ala. 262.

12. Her assent, in such case, though not given until all the debts of the estate were paid, or even until the day before she ceased to be executrix, relates back to the testator's death. *Ib.*

III. CONSTRUCTION AND VALIDITY.

1. *Bequests to Charity.*

13. A bequest to the "Baptist Societies for Foreign and Domestic Missions, and the American and Foreign Bible Society," is valid, and sufficiently specific; and if societies can be found which were organized and known by those names at the time of the testator's death, whether incorporated or not, they will be considered the societies referred to in the will, and capable of taking the bequest. *Carter and Wife v. Balfour's Adm'r*, 19 Ala. 814.

14. But if such societies did not exist at the time of the testator's death, or cannot now be found, the bequests must be considered and disposed of as lapsed legacies. *Ib.*

15. *Semble*, that the statute 43d Eliz., respecting bequests to charitable institutions, is in force in this State. *Ib.*

2. *Bequests to Illegitimate Children.*

16. There is no rule of law, and no reason founded either in morals or in public policy, which prohibits an unmarried man from making a provision by will for his illegitimate children. *Dunlap v. Robinson*, 28 Ala. 100.

3. *Bequests to or for Slaves.*

17. A pecuniary legacy to a slave, to vest immediately on the testator's death, is void, because he is incapable of taking as legatee; but if the legacy is not to be paid until the time fixed for his emancipation, and there is no express gift before the time of payment, it is valid. *Abercrombie's Executor v. Abercrombie's Heirs*, 27 Ala. 489.

18. A bequest of property, in trust for certain slaves, whom the testator attempts by his will to emancipate, is void. *Pool v. Harrison*, 18 Ala. 514.

19. A bequest of freedom to a slave is void, in consequence of his incapacity to take under the will. *Roberson's Heirs v. Roberson's Executors*, 21 Ala. 273.

20. Where a bequest to certain slaves was as follows: "To each and all of the before-mentioned children I give and bequeath the sum of $8,000 each, to be appropriated and invested in such manner as hereafter described, for the special benefit of the said children,—the same being invested in the hands of my executors; and the bondage and slavery to which said children, by the laws of the State, are subjected, I hereby invest in the hands of my executors, for the purpose of my said executors removing said children, viz.," (naming them,) "to a free State,—the others being already in a free State, from which they are not to be removed into any slave State; it being my desire to give to each and all of the children before-named their freedom, as also the sum of $8,000, to be invested as hereinafter-named, viz., one half in lands in Indiana, Illinois or Michigan, and the other half to be loaned out on good individual security,

additionally secured by mortgage on real estate; the title to said lands, and the bonds for said moneys, to be delivered to the said legatees when they shall have been removed to a non-slaveholding State,"—*held*, that the legacies and trusts were valid as to all the negroes, and that chancery would not interfere, at the suit of the residuary legatee, to prevent the trustee from carrying out the lawful desire of the testator. *Atwood's Heirs v. Beck*, 21 Ala. 590.

21. A bequest of slaves to an executor, with directions "to have their freedom secured to them when they shall have arrived at age by the laws of this State, if it can be done, so that they may remain here, and, if he cannot do so, to send them to some free State or country, wherever in his discretion will be best for them," is a valid trust, which the executor, under our existing laws, has full authority to execute; and if the laws in force at the time fixed for their emancipation should not allow them to remain here free, and the executor should then refuse to remove them, after having submitted his administration to a court of equity, although the slaves themselves might not be able to enforce the execution of the trust by suit, the court itself would have ample powers to enforce it. *Abercrombie's Executor v. Abercrombie's Heirs*, 27 Ala. 489.

22 If a testator gives specific directions by will to his executor, concerning the treatment and government of his young slaves, until they arrive at the age fixed for their emancipation, which contemplate that they shall remain here and yet occupy a condition of qualified freedom, the trust is invalid, since our law recognizes no other *status* than that of absolute freedom or absolute slavery; but where he directs his executor "to receive them into his possession, to take care of, protect, govern and control them, until they arrive at age according to the laws of this State, treating them with humanity according to the position they occupy in society, and see that they are not imposed upon by others," the directions create no additional obligation on the executor to that which would exist independently of them, and are not illegal. *Ib.*

4. *Contingent and Vested Interests.*

23. Testator directed his executors to keep together his entire estate, to cultivate the plantation with the slaves, and to apply the proceeds of the crops to the support of his family and the education of his children; and gave them power to sell property, and to manage the estate as they thought would be most conducive to the interests of the estate. In addition to a specific bequest of three slaves to one daughter, the will contained the following clauses: "It is my further will and desire, that in the event of the marriage of my wife, or either of my daughters, or of the child with which my wife is now pregnant, or of either of my children arriving at the age of twenty-one years, then my said executors shall have a division of all my property, both real and personal, and of whatever kind it may consist, and assign and give to my said wife, or my said children, when they shall marry or arrive at age as aforesaid, a child's part of said estate, which I give to them and their heirs forever." "In explanation of the foregoing bequest as to my plantation, it is my will and desire, that in the event of my wife's marriage, or of the marriage of any one of my children, or of any of them arriving at age as aforesaid, that my property be then equally divided among them, giving each one, as before stated, a child's part of the same, and that the plantation be still managed and kept up by said executors, for the benefit of my other children." The testator's family consisted of his wife and two daughters, one of whom was born of a former marriage. *Held*, that the legacies were contingent, and that, consequently, those legatees only were entitled to share in the estate who were living at the happening of the contingency on which the division was to take place. *Travis v. Morrison and Wife*, 28 Ala. 494.

24. Where a bequest was in these words: "I lend unto my beloved wife, during her natural life or widowhood, all my land, also one negro girl called Sarah." * * * "Item, my will and desire is, at the death or marriage of my wife, that my son may have my land, to him, his heirs and assigns for-

ever. Item, I likewise desire, if my wife marries, that my eldest daughter may have the negro girl,"—*held*, that the *quasi* remainder of the daughter was not contingent, but vested—that she took equally on the death or second marriage of her mother. *Gibson v. Land*, 27 Ala. 117.

25. Where conditional words are used in a will, which, if unexplained, would prevent the vesting of a legacy, such words will not be allowed to defeat the intention of the testator, apparent from other portions of the will, that the legacy should vest immediately; and where an absolute property is bequeathed to one at a certain period *in futuro*, and the whole of the intermediate interest is given to another, the legatee of the absolute property takes a vested interest. *Nixon v. Robbins*, 24 Ala. 663.

26. Where a testator bequeathed certain slaves to his daughter, "during her natural life, with this proviso: that if her son Thomas, now an infant, should live to be twenty-one years of age," then he gave three of said slaves to his said grandson, "to him and to his heirs forever,"—*it was held*, that the legacy to Thomas was contingent, and did not vest until he arrived at the age of twenty-one years. *Ib.*

27. The first clause of a will, after an absolute bequest of certain specific property to the testator's wife, was as follows: "That she may have a comfortable support and maintenance, I give her the tract of land on which I now live, together with all my property of whatsoever kind that I may die possessed of, for her use, during her natural life." A subsequent clause was in these words: "I give and bequeath to my neice, Ann Finley, my negro boy Franklin, to her and her heirs forever, and also my negro girl Peggy, until she arrive at the age of twenty-five, at which age she is to be emancipated,"—*held*, that Ann Finley took a vested remainder in the slaves, limited upon the life estate of the testator's widow. *Hunter v. Green*, 22 Ala. 329.

28. Where the testator's will, after directing that his estate should be kept together until his daughter married or attained the age of twenty-one, and that in the meantime she and his three step-children (Ellen, John and Lawrence) should be supported and educated out of the proceeds, contained a clause in these words: "When my daughter becomes of age, or is married, she is to have my farm and one half of my personal estate, money on hand, and claims of every kind, due or to become due, for money or personal estate. The other half of my personal estate, as just above stated, I wish and direct to be equally divided amongst my three step-children above-named, as they respectively become of age, or Ellen may marry with the approbation of her guardian. But, in the event that any or all of my step-children shall die, before they arrive of age or Ellen may marry as aforesaid, then the amount herein devised to them or either of them, as may happen, is to be divided as follows," &c.,—*held*, that the legacies to the step-children did not vest in them absolutely on the testator's death, but were contingent until the legatees respectively arrived at majority, or until Ellen married with the approbation of her guardian. *Collier v. Slaughter's Adm'r*, 20 Ala. 263.

29. Where a testator, after making provision for his wife, declared it his will and intention "to give and bequeath the residue of my estate, both real and personal, in the manner and form following, to-wit: to my dear children and to my grand-children as follows," &c.; and then directed his executors to keep his estate together until the death of his wife, and to give his younger children, when they respectively reached the age of twenty-one or married, as much property as he had advanced to his elder children; also, after deducting what might be necessary for the support of his wife and the support and education of his younger children, to make annual division of the proceeds of the crops among the children who were married or of full age, to be accounted for by them on the final division; to "reimburse" the younger children, who had not received the benefit of these dividends, on such final division, "their proportion with interest;" and, upon the death of his wife, to divide all the property equally among his children and grand-children as previously provided,—*held*, that the legacies vested

at the testator's death, although their full enjoyment was postponed until the death of the widow. *Savage v. Benham*, 17 Ala. 119.

5. *Conditions.*

30. A condition, annexed to the vesting of a legacy, requiring the guardian's approbation of the legatee's marriage, is not *in terrorem* only, when it is confined to marriage during minority, and there is a limitation over. *Collier v. Slaughter's Adm'r*, 20 Ala. 263.

31. Where the vesting of a legacy is made to depend upon the legatee's attaining the age of twenty-one years, or marrying before that time with the approbation of her guardian; and the legatee marries under twenty-one with the consent of her grand-father, with whom she is livlng at the time, this is not a compliance with the condition, although at the time she has no legally constituted guardian, and her father and mother are both dead. *Ib.*

32. When the enjoyment of a legacy is made to depend upon a condition subsequent, and the performance of that condition depends alone upon the legatee, who has the power to do what is required, and yet fails to perform it, such failure will work a forfeiture of the legacy; but where, upon the marriage of the testator's widow, her husband takes control of the family, locks the house against his wife's sister, and refuses her admission, she cannot be held to have voluntarily abandoned the testator's family, nor to have forfeited a legacy which was made to depend upon her remaining single and a member of his family. *Huckabee v. Swoope*, 20 Ala. 491.

33. Where the payment of a legacy is made to depend on the estate being worth a specified amount after the debts are paid, the point of time at which the value of the estate is to be ascertained, is not that of the testator's death, nor that of the probate of his will, but that at which the assets are applied in due course of administration to their proper objects in conformity with the directions of the will. *Kirkman v. Mason*, 17 Ala. 134.

34. In ascertaining the value of the estate in such case, the distributive share of the widow, she having dissented from the will, is not to be taken into the estimate. *Ib.*

6. *Executory Devises; Void Limitations.*

35. Where a testator bequeaths personal property to his daughter and the heirs of her body, and, if she die "without leaving lawful issue from her body," then over, the meaning of the words "issue from her body" is limited by the word "leaving" to issue living at her death, and the limitation over is good as an executory devise; and, since estates tail have been abolished in this State, the same rule of construction should be applied to devises.—(*Per* DARGAN, C. J.) *Flinn v. Davis*, 18 Ala. 132.

36. A bequest of slaves to one for life, and to her "lawfully begotten heirs, to be equally divided among them at her death," uncontrolled by any other clause in the will, vests the absolute property in the first taker. *Ewing v. Standefer*, 18 Ala. 400.

37. Where a testator bequeathed certain slaves to each of his daughters, "and to the heirs of her body begotten," and, by another clause, declared his intention to be as follows: "That the negroes willed and devised to my two daughters as above are for their support and maintenance, and to the support and maintenance of the heirs of their bodies begotten, or to be begotten, and to descend directly after their death to the heirs of their bodies begotten. If either of my daughters above-named should die without an heir of their body begotten, then and in that case, the property so willed to them, or to the one that may so die without an heir, shall pass off, and become the property of my surviving daughter and my two sons, or their heirs; each one to have a share alike in the property so willed to the one so dying without heirs,"—*held*, that the words "heirs of the body" were synonymous with children, and that the limitation over was good. *Williams v. Graves*, 17 Ala. 62; *Powell v. Glenn*, 21 Ala. 458.

38. If personal property be given by words which, if the subject of the gift were land, would create an estate tail at common law, the remainder over is void, and the absolute property

vests in the first taker. *Ewing v. Standefer*, 18 Ala. 400; *Powell v. Glenn*, 21 Ala. 458; *Isbell v. Maclin*, 24 Ala. 315.

39. Although the words "heirs of the body" ordinarily create an estate tail, yet they may be restricted and explained by other expressions; and if the testator's intention appears from such expressions to have been that the estate of the first taker should cease with his life, and that the property should then vest in his children, or, in default of children at the time of his death, then over to another, the remainder is good, and the words will be construed words of purchase, and not of limitation. *Powell v. Glenn*, 21 Ala. 458.

40. Where a will contained this clause: "I give and bequeath to my half-sister Adeline," who was then unmarried, "all my property of whatever kind or description, provided she shall survive me, under the following conditions: should she marry, and have lawful issue, then said property is to go to her and her heirs; but, in case my said half-sister should die without any lawful issue, then and in that case, it is my will that all my property should go from my said half-sister to —— H., son of J. H., now living in Greenville county, Virginia, to whom I give and bequeath all my property in case of the death of my said half-sister without lawful issue, as above mentioned," —*held*, that the limitation to ——H. was not too remote, but that he took a vested interest in the property, subject to be defeated by the performance of the conditions annexed to the bequest to said Adeline; and that said Adeline, on her marriage and birth of lawful issue, became entitled to the absolute property. *Isbell v. Maclin*, 24 Ala. 315.

41. A testator gave by will the whole of his property, both real and personal, to his wife during her natural life, "with the following exceptions: I give and bequeath the special legacies to my three daughters hereinafter named—I give my daughter Frances one negro girl, named Maria; to my daughter Lina, one negro girl, named Aggy; and to my daughter Mary Ann, one negro boy, named Alick; which latter named negro, Alick, I give to my daughter Mary Ann, and to the heirs of her body, and in the event that Mary Ann should die without any such heirs, it is my will that said boy return to my estate, to be disposed of as the rest of my property. It is further my will that, at the death of my wife, the whole of my estate, both real and personal, be equally divided among all my living children, or to the living heirs of their body,—the three above-named daughters to receive an equal proportion in common with the rest of my children, notwithstanding the above-named special legacies; provided, however, that the portion falling to my daughter Mary Ann be subject to the same requirements that are made in reference to the boy Alick, given to her above." At the time of the execution of this will, and also at the testator's death, Mary Ann was unmarried, but afterwards married, and gave birth to one child, who died before her; and upon her death without issue surviving her, the surviving children and grand-children of the testator brought detinue against her husband for the boy Alick. *Held*, that the words of the will must be construed in their legal sense, as meaning an indefinite failure of issue; and that, consequently, the limitation over was void for remoteness, and Mary Ann took the absolute property. *Landman v. Snodgrass*, 26 Ala. 593.

42. Where an absolute right to dispose of the property is given to the first taker, a limitation over of so much as he may leave undisposed of at his death is void for repugnancy. *Flinn v. Davis*, 18 Ala. 132.

7. *What Estate passes, and what Persons take.*

43. The general rule is, that where a devise is to A and his children, and A has children living at the date of the will and at the testator's death, he and his children living at the testator's death take jointly under the will, unless there is something in the will indicating an intention that the interest of the children should be postponed until after the death of their parent; and the rule is the same, *it seems*, if there are no children at the date of the will, but some are afterwards born and in life at the testator's death. *Nimmo v. Stewart*, 21 Ala. 682.

44. Where a bequest was in these words: "I commit to my three sons, as trustees for my daughter Rhoda and her children during her (the said Rhoda's) natural life, the following negroes," &c.; "and my will and desire is, that the profits arising from the aforesaid property, either by hiring or otherwise, shall be applied to the benefit of the said Rhoda and her children; and after the decease of my said daughter Rhoda, my desire is, that what I have left her upon trust shall be equally divided between the heirs of her body, share and share alike, to them and their heirs forever,"—*held*, that the children of Rhoda took an immediate and joint interest with their mother on the testator's death. *Ib.*

45. A bequest to A "and his children," when A has no children either at the date of the will or at the testator's death, vests the absolute property in A; but, where there is a specific bequest of slaves, with the addition of these words, to each one of the testator's children, some of whom are unmarried at the date of the will and at the testator's death, while others are married and have children living, and the vesting in possession is postponed until the death or marriage of the widow, the children living when the property falls into possession take jointly with their parent. *Vanzant v. Morris*, 25 Ala. 285.

46. A bequest to a trustee, in trust that he shall employ it in such manner as may be most beneficial for a *feme covert*, and annually pay over to her the net profits thereof, "for the sole and separate use and maintenance of her and her children during her natural life, free from the control of her husband," and that at her death the property shall be equally divided among such of her children as may then be living, vests the entire life estate in the *feme covert*, with the remainder to such of her children as should survive her. *McCroan v. Pope*, 17 Ala. 612.

47. Where a testator bequeathed a slave to one of his daughters, by her maiden name, "*entirely* for her and her children," and gave others specific legacies of slaves with incumbrances on them,—*held*, that the word "entirely" did not exclude the marital rights of the husband, but had reference only to the quantity of the estate which the legatee took as compared with the others; that if she was unmarried when the will took effect, she took a life estate only, with remainder to her children; but if she was then married and had children, she took an absolute estate jointly with them. *Furlow's Adm'r v. Merrell*, 23 Ala. 705.

48. A bequest of slaves to the testator's daughter, then a married woman, "exclusively to her and the heirs of her body forever," excludes the marital rights of her husband. *Gould v. Hill*, 18 Ala. 84.

49. Where a will contained the following clause: "I give and bequeath to my daughter M., to be held in trust by my executors, for her use during her natural life, and then for the heirs of her body forever, the following negroes, together with their increase," &c.; "it is my will and desire, that the labor and increase of the said negroes shall in no manner whatever be liable for the debts of her present or any future husband;" and provided, also, that if M. should die "without leaving issue," then the executors should sell the negroes, and divide the proceeds among the surviving heirs-at-law,—*held*, that the will created a separate estate in the wife, as against the personal representative of the husband. *Williams v. Maull*, 20 Ala. 721.

50. Where a will, in addition to a specific bequest of sixteen slaves to the testator's widow, and absolute specific bequests to his four daughters of two, four and eleven slaves, contained the following residuary clause: "It is my will and desire, that my beloved wife have the residue and remainder of my estate, both real and personal, during the term of her natural life, and that no sale or alteration of my plantation, stock, household furniture, or any other thing shall accrue, until her death; then, it is my will and desire, that my negroes be divided between my five daughters, share and share alike, for their use during the term of their natural lives, and not subject to the debts of their husbands or any future husbands, and at their deaths to their heirs forever; and it is further my will and desire, that the residue and remainder of my estate,

both real and personal, be divided between my four daughters, viz.,"—*held*, that the residuary clause did not embrace the slaves specifically bequeathed to the daughters, so as to give them a separate estate therein. *Frierson v. Frierson*, 21 Ala. 549.

51. A bequest to a trustee, of a certain portion of the testator's estate, "for the use and benefit of his son Thomas," contained these provisions: The property was to be held, used, and managed by the trustee, who was also empowered, with the assent of the said Thomas, to sell the slaves, and to reinvest the proceeds in other property to be held on the same trusts. The trustee was expressly forbidden to pay any of the debts of the said Thomas, and was directed "to pay over to the said Thomas, from time to time, such part of the income of the trust estate (or the whole thereof, if required) as may be necessary for the comfortable and reasonable support of the said Thomas, and of his wife and children, should he have any,—the same to be used by the said Thomas." On the death of Thomas, the property was to be disposed of in such manner as he might by his last will and testament direct; if he died intestate, leaving a wife or child, the property was to be delivered over to them; and if he left neither wife nor child, it was to return to the testator's estate, and be distributed as though no such bequest had ever been made. Thomas was unmarried at the time of the testator's death, but subsequently married, and his wife was living when this bill was filed against him by a creditor. *Held*, that the bequest was intended as a prospective provision for the wife and children of Thomas, as well as for himself; that his wife took a joint interest with him in such portion of the income of the trust estate as might be necessary for their comfortable and reasonable support; and that no portion of the income could be subjected in equity by his creditors. *Hill and Wife v. McRae*, 27 Ala. 175.

52. As to the construction of a bequest to W. R., "to have and to hold the same in trust for the benefit of E. T. R., but the same shall not be subject to the payment of any debt that he may owe, nor shall the rents and profits of the land or the hire of the slaves be applied for the same object; but the same shall be held for the use and benefit of the said E. T. R. and his family during the term of his natural life, and from and after his death to the use of such persons as the same may be devised and bequeathed by the said E. T. R. in his will; and in the event no will shall be made, then to the heirs-at-law of the said E. T. R,"—see *Rugely & Harrison v. Robinson*, 19 Ala. 404, adhering to the previous decision in 10 Ala. 702.

53. Where a testator bequeathed a negro girl and her increase to his grand-children, and provided that the negroes should remain undivided until the youngest child arrived at the age of twenty-one years, and should then be divided among those who were living,—*held*, that the negroes were exempt from execution against any of the legatees, until the youngest child had attained his majority, and a division had been made pursuant to the will; and that the marital rights of the husband of one of the legatees did not attach until that time, although he had possession of some of the negroes as bailee. *Johnson v. Culbreath*, 19 Ala. 348.

54. Where a testator devises and bequeaths to his children a certain portion of his real, with all of his personal estate, "to be distributed when required, at mature age or majority, in equal parts," and present words of bequest are used, the word "distributed" simply postpones the division of the estate to the time fixed by the will, and, with reference to the personal property, is synonymous with "divided;" and until the real estate is divided at the time appointed for a division, the devisees take as tenants in common. *Chighizola v. LeBaron*, 21 Ala. 406.

55. Where a limitation over is of all the estate, both real and personal, which the first taker "may die possessed of, or entitled to, under and by virtue of my will," the remainder is limited to what the first taker may leave undisposed of at his death; and his absolute right to dispose of the property is necessarily implied.—(DARGAN, C. J., *dissenting*.) *Flinn v. Davis*, 18 Ala. 132.

56. An express bequest of an estate for life negatives the intention to give the absolute property, and converts a superadded right of disposition into a mere power. *Denson v. Mitchell and Wife*, 26 Ala. 360.

57. The common-law distinction stated, between a devise of lands to executors to sell, and a devise that the executors shall sell the lands. *Patton v. Crow*, 26 Ala. 426.

58. Authority to make distribution confers upon an executor a naked power merely, uncoupled with any interest, and, in the absence of a devise to him, or of words of implication, gives no right to the possession or control of the lands. *Chighizola v. Le Baron*, 21 Ala. 406.

59. Where property is bequeathed to an executor, in trust for a specific object which fails or is declared invalid, he takes no personal interest in it, but a resulting trust then arises in favor of the next of kin. *Abercrombie's Executor v. Abercrombie's Heirs*, 27 Ala. 489.

60. By the fourth clause of his will, testator directed his wife to keep together under her care and protection all his children, and, "for the better enabling her to do so," gave her during widowhood, or until his youngest child attained majority, "the control and use of any five negroes not otherwise disposed of, to be by her selected;" by the fifth clause, he bequeathed four slaves to his wife during her natural life or widowhood, and on her death or marriage to his children, George, William, Marcus, Augustus, and Eliza; and the ninth clause was in these words: "I will and bequeath to my said wife and my children, George, William, Marcus, Augustus, and Eliza, and to their heirs forever, all the rest and residue of my personal estate, to be equally divided among them, share and share alike, in the manner hereinafter mentioned and described; and that each of my said children shall, upon arriving at full age in law, be entitled to demand from my executors their just distributive share of said estate in this clause mentioned, to be ascertained and determined upon a fair valuation of all my property herein referred to, at the time of his or her majority, by any three disinterested slaveholders of the county, always counting my said wife as a child,—it being my intention to make her and all my children equally interested in the disposition of my estate, including the five negroes hereinbefore mentioned in the third (?) clause, as reserved for the use of my wife and family,"—*held*, that the slaves mentioned in the fifth clause were not included in the residuary clause, but, on the marriage of the widow, passed to the children to whom they were specifically bequeathed. *Miller and Wife v. Flournoy's Heirs*, 26 Ala. 724.

61. Where a testator bequeathed to his daughter a negro woman named Jinney, "and all her increase which she now has or may hereafter have;" and, by a subsequent clause, gave to his son a negro boy named Moses, who was a child of Jinney's,—*held*, that the latter bequest must be construed as an exception to the former, and that the boy Moses passed to the testator's son. *Pace and Wife v. Bonner*, 27 Ala. 307.

62. After giving specific legacies to his wife, children, and grand-children, whose mother, one of his daughters, was still living, the testator bequeathed the residue of his property as follows: "The remainder of my property," &c., "I give to be equally divided among my legatees, agreeably to the laws of the State in which I reside,"—*held*, that the term "legatees" was restricted to those who would have taken the estate in case of intestacy; that is, the wife and children of the testator. *Smith v. Martin's Executors*, 18 Ala. 819.

63. Where the legal title to slaves is bequeathed to the executors as trustees, their title will not be continued beyond the time contemplated by the will for its determination. *Powell v. Glenn*, 21 Ala. 458.

64. Slaves, to whom the testator attempted to bequeath their freedom, go to the residuary legatee, and not to the next of kin as property undisposed of. *Roberson's Heirs v. Roberson's Executors*, 21 Ala. 273.

65. But, where one of the slaves is also one of the residuary legatees, she herself, with her portion of the residuary legacy, must be regarded as property undisposed of by the will, and therefore distributable among the

next of kin. *Abercrombie's Executors v. Abercrombie's Heirs*, 27 Ala. 489.

66. Where the residuary legatees take in common, and one dies before the testator, his portion does not survive to his co-legatees, but goes to the next of kin under the statute of distribution. *Bendall's Distributees v. Bendall's Adm'r*, 24 Ala. 295.

67. Under a clause in these words: "After my debts are paid, the remainder of my property, of whatever kind or nature, I give and bequeath to my beloved wife," the word "remainder" must be construed to mean the residue of the testator's estate after deducting previous bequests and paying debts. *Carter and Wife v. Balfour's Adm'r*, 19 Ala. 814.

68. A child, born of a female slave after the execution of the testator's will, but before his death, does not pass to the legatee to whom its mother is bequeathed, but goes to the executor as property unbequeathed. *Hardy v. Toney*, 20 Ala. 237.

69. A will contained these clauses: "I also wish that my sister-in-law, S., be considered as one of my heirs, so far as a support, but not as a legal heir to a part of my estate; provided, she lives single, and in my family. It is also my wish, that my executor shall collect all moneys due me, by note or account, and apply said moneys to the purchase of negroes or stock, for the benefit of my plantation and family. It is also my wish, that my family be well supported, in sickness and health, out of the proceeds of my plantation and other effects." The testator further directed, that his plantation should be kept up, at the discretion of his executor; that his estate should not be divided, until his eldest child attained his majority or married; and that, if his widow again married, her distributive share of the estate should be allotted to her. The widow having married a second time, her share of the estate was allotted to her; and S. afterwards sued for her legacy. *Held*, that the testator's family was not dissolved by the marriage of his widow, but continued to exist until the time appointed for a final division of the estate; and that S. was entitled to a support out of the estate until that time, unless she voluntarily forfeited it. (CHILTON, J., *dissenting*, held that she was entitled to a support for life, unless forfeited.) *Huckabee v. Swoope*, 20 Ala. 491.

70. A testator bequeathed his slaves to his widow and five living children, and died intestate as to the residue of his estate, both real and personal. The seventh clause of his will provided, that if a certain child of a deceased son should arrive at the age of twenty-one years, then the testator's widow and children should make, with what his guardian had paid him, an equivalent to their own shares at the time of division; and the eighth clause directed, that all the heirs who had received advancements should render in the amount, in valuation, at the time of the division, to be considered so much of their shares of the estate. *Held*, that the testator's grand-son, whose father had received an advancement, was entitled to a distributive share of the real and personal estate unbequeathed, on his accounting for the advancement to his father; and that the legatees to whom the slaves were bequeathed, were bound to contribute from their legacies, on his arrival at the age of twenty-one years, so much as would make his entire estate equal to their respective portions. *Wheat v. Wheat's Executors*, 24 Ala. 429.

71. Where a testator, devising a very large estate, both real and personal, to his widow and children, directed that each of the children should receive out of it a good education,—that the estate should be divided when the eldest son attained his majority, or when the eldest daughter attained the age of eighteen and married, unless the widow should marry or desire an earlier division; that the family residence should be kept up until the division was made, for the use of the widow and children, and "the family expenses, economically made," to be paid by the executors out of the "joint funds" of the estate; and that his executors should pay fifty dollars annually to the church of which he was a member, so long as the estate remained undivided and "a joint stock" for the use of the family,—*held*, that the executors were not required to keep separate accounts against the widow and children for their respective expenses,

but that the entire expenses of the domestic establishment were a charge upon the joint fund; that, in ascertaining what expenses fell within the provisions of the will, as being "economically made," the state of the property and condition of the family should be considered; and that the reasonable expenses of the widow, in going with her youngest daughter and a servant to Virginia, to visit her eldest daughter then at school, were a proper charge against the estate. *Moore's Executors v. Moore's Distributees*, 18 Ala. 242.

IV. INTEREST ON LEGACIES.

72. A legacy to a grand-child, payable at a future day, does not bear interest until after it is payable; whether the legatee is entitled, when the time of payment arrives, to the interest that has accrued, *quære? Walker v. Walker*, 17 Ala. 396.

V. LAPSED LEGACIES.

73. Where a legacy is given to one for life, with remainder to another, the remainder does not lapse on the death of the first taker before the testator. *Billingsley v. Harris*, 17 Ala. 214.

74. A void bequest, in trust for slaves whom the testator attempts by will to emancipate, falls into the general residuum of the estate for distribution. *Pool v. Harrison*, 18 Ala. 514; *Abercrombie's Executor v. Abercrombie's Heirs*, 27 Ala. 489.

75. Slaves, to whom the testator attempted to bequeath their freedom, go to the residuary legatee, and not to the next of kin as property undisposed of. *Roberson's Heirs v. Roberson's Executors*, 21 Ala. 273.

76. But, where one of the slaves is also one of the residuary legatees, she herself, with her portion of the residuary legacy, must be regarded as property not disposed of, and therefore distributable among the next of kin. *Abercrombie's Executor v. Abercrombie's Heirs*, 27 Ala. 489.

77. Where one of several residuary legatees, who take in common, dies before the testator, his portion does not survive to his co-legatees, but descends to the next of kin under the statute. *Bendall's Distributees v. Bendall's Adm'r*, 24 Ala. 295; *Hamlet v. Johnson*, 26 Ala. 557.

VI. LIABILITY FOR DEBTS.—*See same title in* PART III.

VII. PROCEEDINGS TO RECOVER.

78. A legatee cannot institute proceedings against the executor, for the recovery of his legacy, before the expiration of eighteen months from the granting of letters testamentary. *Horton v. Averett*, 20 Ala. 719.

79. A decree against an executor, in favor of a legatee, cannot properly be rendered before a final settlement of the estate is had. *Ib.*

80. The statute (Clay's Digest, 196, §§ 23–4) does not apply to devises of which the executor has no control, and in relation to which he has exercised none of his statutory powers. *Chighizola v. LeBaron*, 21 Ala. 406.

As to proceedings in equity, for the recovery of legacies, see same title in PART III.

LIMITATIONS, STATUTE OF.

1. At common law, the lapse of seventeen years would not be sufficient to raise the presumption of payment by an executor of the amount ascertained to be due to the legatees upon a settlement by his testator's estate; and the statutes of this State fix no period as a limitation to proceedings in the orphans' court to compel a final settlement by an executor or administrator. *Rhodes v. Turner and Wife*, 21 Ala. 210.

2. But if the parties allow twenty years to elapse without taking any steps to compel a settlement by the personal representative, the presumption of payment arises in his favor, as in case of a final judgment at common law; and this period would date from the time when he might have been called to a settlement. *Ib.*

3. Where the slaves returned in the inventory are divided among the distributees, under an order of the orphans' court; and, after the lapse of twenty years, one of the distributees attempts to charge the executor with

the value of other slaves not included in the inventory, and shows no excuse for his delay, his claim can not be asserted or allowed in the orphans' court. *Barnett's Executor v. Tarrence*, 23 Ala. 463.

4. After the lapse of eighteen years, the court will not force conclusions, nor draw any inferences not clearly warranted by the evidence, as in favor of a distributee who, having ample time and opportunity to assert his rights, made no effort to do so until after the administrator's death. *Bogle v. Bogle's Adm'r*, 23 Ala. 544.

5. When an executor becomes surety on a note given for property at a sale made by himself and his co-executor, and, on the estate becoming insolvent, is cited by his co-executor, on behalf of the creditors of the estate, to make final settlement and account for the note, he cannot protect himself by pleading the statute of limitations of six years. *Shackelford v. King*, 24 Ala. 158.

As to the limitation of appeals and writs of error, see ERROR AND APPEAL, IV.

LUNATICS.

(Statutory Provisions: Code, §§ 670, 2750–63; Clay's Digest, 302, §§ 29–32, and Note.)

1. The orphans' court has no jurisdiction to appoint a guardian for a person, on the ground that he is a lunatic or *non compos mentis*, without the issue of a writ *de lunatico inquirendo*, and the finding of a jury thereon: the appointment of a guardian, without these preliminary proceedings, is void, and may be collaterally impeached in any court. *Eslava v. Lepretre*, 21 Ala. 504.

2. The appointment is void, also, if made without notice to the party against whom the proceedings are instituted. *Ib.*

MANDAMUS.

1. If the probate court improperly refuses to grant letters of administration to the sheriff, on the application of a person representing himself to be a creditor, *mandamus* is the proper remedy. *Brennan's Adm'r v. Harris*, 20 Ala. 185.

2. The writ lies, also, to compel the transfer to the circuit court of a cause in which the probate judge is personally interested, and which he refuses to transfer. *The State, ex rel. Claunch, v. Castleberry*, 23 Ala. 85.

3. It lies, also, to compel the probate judge, on his refusal, to proceed with the settlement of the accounts of the administrator of an insolvent estate, to which he had been cited by a creditor. *Shadden v. Sterling's Adm'rs*, 23 Ala. 518.

4. On the trial of an issue respecting the validity of a will, which was contested on the grounds of fraud, undue influence, mental incapacity on the part of the testator, and insufficiency of attestation, the jury having returned a verdict finding it invalid generally, the court inquired, on motion of the contestant, on what ground their verdict was predicated; to which the foreman replied, "principally on the ground that it was not signed by the witnesses in the presence of the testator;" and the court then ordered them to retire and find another verdict,—*held*, that the contestant could not have a *mandamus* for judgment on this verdict. *Ex parte Henry*, 24 Ala. 638.

5. Nor can the contestant have a *mandamus* for judgment on a verdict which was rejected by the court on his own motion. *Ib.*

NON-CLAIM.

(Statutory Provisions: Code, §§ 1883–87: Clay's Digest, 195, § 17; *Ib.* 223, § 12; Session Acts 1849–50, p. 68.)

1. Service on an executor or administrator of a *scire facias*, which is afterwards abandoned, to revive a suit instituted against the decedent in his lifetime, is not a sufficient presentation of the demand to prevent the operation of the statute. *Pipkin v. Hewlett*, 17 Ala. 291.

2. At a meeting between an administrator and several of the distributees, two of whom claimed to hold debts against the deceased, the account in

reference to the transaction out of which the claims arose, was stated in writing, with the assistance of the administrator, who then asked one of the parties, "if that item was all he claimed;" to which the latter replied, "that was all they claimed,"—*held*, that this was a sufficient presentation of the claim. *Pollard v. Scears' Adm'r*, 28 Ala. 484.

3. In chancery, where the benefit of the statute is claimed by plea, but the presentation is not clearly denied in the answer, proof of presentation by one witness is sufficient. *Pharis v. Leachman*, 20 Ala. 663.

4. In a suit against an administrator, his admissions of the presentation of the demand, though made after the lapse of eighteen months from the grant of administration, are sufficient to take the case out of the statute; and if the suit is in chancery, for the purpose of subjecting to the payment of debts property standing in the name of a trustee for the benefit of the intestate's wife and children, which is alleged to have been purchased by the intestate with his individual means, such admissions are also evidence against the *cestuis que trust*. *Ib.*

5. A payment, made by the administrator after the lapse of eighteen months from the grant of letters, is a fact tending to prove its due presentation. *Ib.*

6. So, a report of insolvency, made after the lapse of eighteen months, in which a claim is returned as a subsisting debt against the estate, is evidence of its due presentation. *Ib.*

7. A waiver of previous irregularities, in making an administrator a party to a suit commenced against his intestate, is not a waiver of the right to insist on the defense of the statute. *Pipkin v. Hewlett*, 17 Ala. 291.

8. The fact that an infant has a guardian, does not deprive him of the benefit of the express proviso in favor of persons under age. *Moore v. Wallis*, 18 Ala. 458.

9. If a creditor fails to present his claim to the personal representative of the principal debtor, this does not discharge the sureties, nor affect his right to proceed against them. *Minter and Gayle v. Branch Bank at Mobile*, 23 Ala. 762.

10. The statute does not apply to equities of redemption. *Lock's Executor v. Palmer*, 26 Ala. 312.

11. The statute continues to run, notwithstanding the death of the administrator; and the interval between that event and the appointment of his successor, is not to be deducted in the computation of time. *Pipkin v. Hewlett*, 17 Ala. 291.

12. Under the act of 1850, the statute commenced to run, not from the grant of letters, but from the publication of notice by the executor or administrator. *McHenry v. Wells*, 28 Ala. 451.

13. The statutory bar cannot be made out, under the Code, by uniting the time which elapsed before the Code went into effect, with the time which elapsed after that event. *Ib.*

14. Under the statute which imposes the costs on a successful plaintiff, in an action brought against an executor or administrator, for a failure to prove a presentation of his demand, if the defendant intends to raise the question of presentation, he must present it on the record by plea or suggestion, so that the plaintiff may have an opportunity of proving the presentation, and the issue must be tried by the jury; but, if no such plea or suggestion is made, and the plaintiff has a general verdict on the issue joined, he is entitled to full costs. *Wallace v. Nelson*, 28 Ala. 282.

PRACTICE.

I. APPEARANCE.
II. DISCONTINUANCE.
III. GENERAL RULES.
IV. PARTIES.
V. TRIAL OF ISSUES.

(*Decisions on questions of practice may also be found under other particular titles;* as, ADVANCEMENT, DOWER, INSOLVENT ESTATES, WILLS, &c.)

I. APPEARANCE.

1. The appearance of an executor, administrator, or guardian, on the final settlement of his accounts, without objection, dispenses with the necessity of notice. *Wilson v. Knight*, 18 Ala. 129.

2. Even where the proceedings against him have been discontinued by an irregular continuance, his subsequent appearance, without objection, places him rightly in court. *Croft v. Ferrell*, 21 Ala. 351.

3. On the final settlement of an estate, if the parties in interest appear, and consent to a postponement of the settlement, they cannot afterwards be heard to complain of an irregularity in the manner of bringing them in. *Barnett's Executor v. Tarrence*, 23 Ala. 463.

4. An administrator, who reports the estate insolvent, thereby becomes chargeable with notice of all the subsequent proceedings in the cause, and cannot, on error, insist on objections to the settlement which, in the absence of exceptions, were waived by his presence. *Crothers v. Heirs of Ross*, 17 Ala. 816; also, *Watts v. Gayle & Bower*, 20 Ala. 817.

5. A recital in the record, as to the appearance of minors by their guardian, is conclusive; and such appearance dispenses with the necessity of notice. *Smith v. Smith's Adm'rs*, 21 Ala. 761.

II. DISCONTINUANCE.

6. On *sci. fa.* to revive a decree against two executors, if one of them is a non-resident, his name may be omitted from the writ; or, if he is included in the writ, but not served with process, the plaintiff may enter a discontinuance as to him, and proceed to judgment against the other. *Hanson v. Jacks and Wife*, 22 Ala. 549.

7. Where *ex-parte* proceedings are instituted against an executor, administrator, or guardian, who has removed beyond the jurisdiction of the court without settling his accounts; and, after the account is stated and reported for allowance, the proceedings are irregularly continued, the subsequent appearance of the defendant, and his failure to object to the irregular continuance, are a waiver of the irregularity, even if it amounted to a discontinuance, and place him rightly in court. *Croft v. Ferrell*, 21 Ala. 351.

III. GENERAL RULES.

8. The rules of practice which obtain in chancery, when they can be applied, should be adopted by the probate court, in those cases where no rule of practice can be drawn from the statutes, or from the ecclesiastical courts of England. *King v. Collins*, 21 Ala. 363.

IV. PARTIES.

1. *To Decrees.—See that title.*
2. *To Appeals.—See Error and Appeal.*

V. TRIAL OF ISSUES.

9. In forming an issue to ascertain whether an advancement has been made to a child, although the better practice would be, to conduct the proceedings in the name of the administrator as plaintiff, and the party who contests the fact of advancement as defendant; yet, if the record shows that the question at issue was fairly presented, and correctly decided, without objection in the primary court, the defendant cannot complain on error, that the other distributees were the plaintiffs, instead of the administrator. *Smith v. Smith's Adm'rs*, 21 Ala. 761.

10. An issue having been formed between the personal representative and creditors of an insolvent estate, the court allowed various irregular pleadings to intervene, and the executor then sued out a writ of error upon the decree rendered against him,—*held*, that the case should be considered as if the parties had been held to the issue first formed, and that the subsequent pleadings and rulings of the court should be disregarded. *Shackelford v. King*, 24 Ala. 158.

11. On the trial of such an issue, a note may be given in evidence without proof of its execution, unless its execution is denied by a proper plea. *Ib.*

12. In contests among the creditors of an insolvent estate, it is a proper practice for the creditor, whose claim is contested, to declare upon it, as in a suit at common law, against the administrator *de bonis non*, in behalf of the objecting creditor, as defendant; and where the administrator's individual claim is contested, and he declares, as creditor, against himself as administrator, the declaration is not demurrable. *Ross v. Ross*, 20 Ala. 105.

13. Where the probate of a will is contested, it is not necessary to join issue on the objections filed; nor can a joinder in issue, by one of the proponents, work a change of parties to the record, or release a co-proponent from his duties and liabilities as such. *Deslonde and James v. Darrington's Heirs*, 29 Ala. 92.

14. The issues in such case are not educed by the pleadings, but are made up under the direction of the judge, in whom is vested a more enlarged discretion than in ordinary civil causes. *Ex parte Henry* 24 Ala. 638.

15. The sustaining of a demurrer to one of the contestant's objections, when he had the full benefit of the same facts under the issues presented by his other specifications, is not an available error. *Dunlap v. Robinson*, 28 Ala. 100.

PROHIBITION.

1. The supreme court will not, in the first instance, award a prohibition to the probate court: application must first be made to the circuit court, which is invested by statute with power and authority to exercise a general superintendence over the probate court. *Ex parte Russell*, 29 Ala. 717.

SURETIES.

(Statutory Provisions: Code, §§ 1683–6, 1696–1717; Clay's Digest, 198, § 33; *Ib.* 221, § 3; *Ib.* 304–5, §§ 42–3.)

I. LIABILITY.

1. *Action on Bond.*
2. *Summary Execution.*

II. REQUIRING NEW BOND.

I. LIABILITY.

1. *Action on Bond.*

1. An action on their bond does not lie against the sureties of an executor, on a decree rendered against his administrator on final settlement of his executorship under the act of 1845. *Gray v. Jenkins*, 24 Ala. 516.

2. A decree of the orphans' court against an administrator, in favor of a distributee, is evidence of assets to that amount in the hands of the administrator, and sufficient to sustain an action on the bond. *Kyle v. Mays, use of Pond*, 22 Ala. 692; *Holley v. Acre*, 23 Ala. 603; also, *Lamkin v. Heyer*, 19 Ala. 228.

3. But where the decree, being in favor of the "legal representative" of a distributee, is void for uncertainty, although the settlement may be regarded as evidence of a debt against the administrator, the failure to pay the decree does not amount to a *devastavit*, so as to authorize an action on the bond, until after the person who is to receive it is judicially ascertained. *Kyle v. Mays, use of Hatchett*, 22 Ala. 673.

4. A count in debt on the penalty alone, not noticing the condition, is sufficient. *Holley v. Acre*, 23 Ala. 603.

5. No demand is necessary, in order to sustain an action on the bond; consequently, the admission of evidence to prove a demand is not an available error. *Kyle v. Mays, use of Pond*, 22 Ala. 692.

6. The action may be brought, at the suit of the party injured by the breach, either in his own name, or in the name of the obligee for his use. *Amason v. Nash*, 24 Ala. 279.

7. To debt on bond against an administrator and his sureties, "jointly and severally, defendants plead fully administered;" to which the plaintiff "demurred in short by consent,"—*held*, that the plea was equivalent to a joint and several plea of *plene administravit*, and was good as to the sureties. *Ib.*

8. It is error to render judgment final, against both the principal and sureties, without the intervention of a jury. *Ib.*

9. Where the action is brought to charge the sureties with a judgment rendered against the administrator, to be levied *de bonis intestatis*, it is not necessary to allege in the declaration that the judgment was rendered on a debt which was a proper charge against the estate, or against the administrator as such. *Reid v. Nash*, 23 Ala. 733.

10. A plea, averring that the judgment against the administrator was not a proper charge against the intestate, nor against his administrator as such, is but the statement of a conclusion, and therefore demurrable. *Ib.*

11. A plea, averring that the intestate's estate has been duly declared insolvent, and is in progress of settlement as such, is fatally defective on demurrer. *Ib.*

12. So, also, is a plea containing the additional averment, that plaintiff failed to present his judgment as a claim against the estate within six months after the declaration of insolvency. *Ib.*

13. A plea of *plene administravit* is demurrable, if it does not allege that the assets were fully administered before suit brought. *Ib.*

14. The death of a surety does not discharge his liability on the bond. *Moore v. Wallis*, 18 Ala. 458.

2. *Summary Execution.*

15. When an execution is issued against the sureties of an executor or administrator, they cannot impeach the decree against their principal, on the ground that the parties in whose favor it is rendered are not distributees. *Lamkin v. Heyer*, 19 Ala. 228.

16. To support a *fi. fa.* against the sureties of an executor or administrator, it is indispensable that a *fi. fa.* should have been issued against their principal, and returned "no property found;" otherwise, the execution against the sureties is void, and may be quashed on motion. *Poacher v. Weisinger*, 20 Ala. 102.

17. The record must show the decree against the principal, the bond by which the sureties have become liable, the issue of a *fi. fa.* against the principal, and its return "no property found." *Hanna v. Price*, 23 Ala. 826.

18. A memorandum on the margin of the execution docket, in the handwriting of the clerk, is not evidence of the issue and return of an execution, unless proof is first made of its existence at one time and subsequent loss. *Ib.*

19. If the decree against the principal embraces some items which accrued after the discharge of the sureties, a *fi. fa.* cannot be issued on it against them. *Hamner v. Mason*, 24 Ala. 480.

20. Under the Code, when a *fi. fa.* against the principal has been returned "no property found," a *fi. fa.* may issue against him and his sureties, but the court is not authorized to render a decree against the sureties on such return; and if one of the sureties dies before the return against the principal, the statutory remedy, as to him, entirely fails. *Kirby's Adm'r v. Anders*, 26 Ala. 466.

II. REQUIRING NEW BOND.

21. Whether the personal representative of a deceased surety, wishing to put an end to his decedent's liability on the bond, can compel the principal to give new security, *quære?* *Moore v. Wallis*, 18 Ala. 458.

22. The taking of a new bond is a jurisdictional fact, necessary to appear in order to give validity to the discharge of the old sureties; but the existence of this fact is to be determined by the judge to whom the application is made, and his decision is final and conclusive. *Hamner v. Mason*, 24 Ala. 480.

23. Where the sureties of a guardian of several minors applied for a discharge from further liability on their bond, and a decree was thereupon rendered by the court, reciting that the guardian had given a new bond, and ordering that the old sureties be therefore discharged,—*held*, in an action against the sureties on the old bond, that the recital was conclusive of the fact that a new bond had been given, although the new bond omitted the name of the minor for whose use the suit was brought, and consequently did not protect his estate. *Ib.*

WILLS.

(Statutory Provisions: Code, §§ 1589–1656; Clay's Digest, 596–9, §§ 1–16.)

I. EXECUTION.

1. *Governed by what Law.*
2. *Capacity of Testator.*
3. *Signature of Testator.*
4. *Attestation.*

I. EXECUTION.

1. *Governed by what Law.*

1. The testamentary disposition of real property being governed by the law of the place where it is situated, and that of personal property by the law of the testator's domicile, the validity of a will, as respects the capacity of the testator and the formalities necessary to give it effect, must be tested by the laws of these respective jurisdictions. *Varner v. Bevil*, 17 Ala. 286.

2. The legislature has power to prescribe rules for the execution of wills, whether made before or after the passage of the statute, if rights have not become vested by the testator's death. *Hoffman v. Hoffman*, 26 Ala. 535.

3. The provisions of the Code, requiring two witnesses to a will, apply to wills of realty executed before its adoption, if the testator died since its adoption; but a will of personalty only would be governed by the old law. *Ib.*

2. *Capacity of Testator.*

4. A person possessed of sufficient capacity to attend to his ordinary business, is capable of making a valid will; the capacity requisite to make a will or contract being precisely the same. *Coleman v. Robertson's Executors*, 17 Ala. 84.

5. A married woman may, with the assent of her husband, make a valid will of her choses in action, in his favor. (PARSONS, J., *dissenting.*) *Burton v. Holly*, 18 Ala. 408.

6. Married women are not embraced in the act of 1806, and could not, by virtue of that statute, devise their real estate. *Baker v. Chastang's Heirs*, 18 Ala. 417; *Gannard v. Eslava*, 20 Ala. 732.

7. Where there is an agreement between husband and wife, before marriage, that she shall have either the whole or a particular portion of her personal property to her separate use, she may dispose of it by will, without his consent. *Wells v. Bransford*, 28 Ala. 200.

3. *Signature of Testator.*

8. A paper in the handwriting of the deceased, purporting to be his last will and testament, with his name written in the beginning, but without date, signature or attestation, cannot be admitted to probate as a valid will of personalty, upon proof that it was found among the decedent's papers after his death, and in connection with it a memorandum, also in his handwriting, containing a schedule of his debts, and suggestions for the management of his estate; that the deceased was a lawyer,—a cautious and prudent man, not disposed to communicate to people generally his views and plans for the management of his affairs, and not apt to change any views or opinions which he had deliberately reduced to writing; that he had approved of a similar will, made by his brother-in-law about two years previously; that the paper was written in May, and a few weeks afterwards the decedent was taken sick, and confined about two weeks; that he partially recovered, and was able to attend to business for two or three weeks, when he relapsed, and, after a confinement of sixteen days, died in a congestive chill, on the first of August; that the result of his case was, in the opinion of his attending physician, unexpected to him up to the time of the chill, and after that he was unable to attend to business. *Boling's Heirs v. Boling's Executor*, 22 Ala. 826.

9. Section 1611 of the Code being, so far as it relates to the signing of the will, a substantial transcript of the statute 29th Car. II, ch. 3, the construction previously given to the latter must be regarded as the construction which the legislature intended to be put on our statute, and that construction is hereby adopted. *Armstrong's Executor v. Armstrong's Heirs*, 29 Ala. 538.

10. It being shown that a will was written in the presence of the testator, and at his dictation, and was subscribed by the attesting witnesses as the statute directs, after having been read and approved by him; and that the testator, on being asked if he was able to sign it, replied that he was not, and that it was a good will,—*held*, on demurrer to the evidence, that the testator's name, written in the beginning of the will, was a sufficient compliance with the requisitions of the statute. *Ib.*

4. *Attestation.*

11. It is not necessary that the subscribing witnesses should be informed of the contents of the will. *Leverett's Heirs v. Carlisle*, 19 Ala. 80.

12. The act of 1806, requiring the attesting witnesses to subscribe their names in the presence of the testator, applies only to devises; therefore, a will, containing an attestion clause, but not attested, though void as to the realty, may be good as to the personalty, if it was really intended by the testator to operate as his will irrespective of the attestation. *Ex parte Henry*, 24 Ala. 638.

13. Where a will, disposing of both real and personal property, contains an attestation clause, but is not attested, the presumption is, that it is incomplete, and not the will of the testator; but this presumption is slight, and may be rebutted by slight circumstances,—as that the testator was prevented from finishing it by the act of God, or that he intended it to operate in its present form. *Ib.* (See, also, as to incomplete instruments, *Boling's Heirs v. Boling's Executor*, 22 Ala. 826.)

14. It is not necessary, under the Code, that the witnesses should sign the will in the presence of each other. *Hoffman v. Hoffman*, 26 Ala. 535.

5. *Form, and other Requisites.*

15. The same instrument cannot operate both as a deed and as a will. *Thompson v. Johnson*, 19 Ala. 59.

16. An instrument, founded on valuable consideration, in form a deed executed by both parties, capable of full effect as a deed, and manifestly intended to convey a beneficial interest to the grantee, to take effect and be enjoyed in the grantor's lifetime,—held a deed, and not a will. *Ib.*

17. An instrument, in form a deed, containing a clause of warranty, attested by two witnesses, and conveying real and personal property by the words, "at my death I do hereby give and grant unto my son,"—held a deed, and not a will; the evidence showing that it was delivered to the grantee, who was a cripple, on the day of its date, and that it was intended as a present provision for him, to induce him to continue to live with the grantor, who was his mother. *Golding v. Golding's Adm'r*, 24 Ala. 122.

18. A writing under seal, in form a deed, conveying to the grantor's daughter and her children, by present words of gift, in consideration of natural love and affection, several slaves and other property, and containing this clause, "The condition of the above-named gift is to take place at my death—until then the property is to remain as my own,"—held a deed, and not a will. *Elmore v. Mustin*, 28 Ala. 309.

19. An instrument purporting to be a deed, acknowledged as such before a justice of the peace on the day of its date, and conveying by present words of gift, in consideration of natural love and affection, to each of the grantor's children, several slaves, together with all the money, notes, and household and kitchen furniture on hand at the time of his death, but reserving to him the right of ownership over the slaves until his death, at which time, it is declared, "this deed shall take effect,"—held a will, and not a deed. *Walker v. Jones*, 23 Ala. 448.

6. *Nuncupative Wills.*

20. It being shown that the decedent, some time before his death, went to the house of one B. to have his will written, but did not find the latter at home; that he met witness on his return, and, after stating the object of his visit, said, "that he was satisfied he would not live long, and never expected to see B. again; that he wanted, witness to bear witness that he wished B. to pay Mrs. H. $500 for the services, she had rendered him,"—*held*

in an action by Mrs. H. and her husband to recover for these services, that this admission was not in the nature of a testamentary bequest, but was a positive acknowledgment of the rendition of the services. *Jordan's Adm'r v. Hubbard and Wife*, 26 Ala. 433.

21. A nuncupative will, disposing of personal property greater in value than the statute allows, cannot be established in equity, on the ground of the decedent's ignorance or mistake as to the change in the law made by the Code. *Erwin v. Hamner*, 27 Ala. 296.

II. PROBATE.

22. Both the widow and the next of kin are entitled to notice of an application for the probate of a will; the disjunctive conjunction "*or*," as used in the statute, being a misprint for "*and*." *Roy v. Segrist*, 19 Ala. 810; *Stapleton v. Stapleton*, 21 Ala. 587.

23. If the will is admitted to probate without notice to a party interested, the probate will be set aside on his application; or he may be made a party by petition, and sue out a writ of error. *Ib.*

24. A will, executed in a foreign domicile, but disposing of real and personal property in this State, may be admitted to probate here, although it has not been probated in the place of the testator's domicile. *Varner v. Bevil*, 17 Ala. 286.

25. The probating of a will is, under any circumstances, a proceeding *in rem;* yet, under our practice and statutes, it partakes somewhat of the nature of a proceeding *in personam*, and is assimilated, in many respects, to an ordinary suit at law. *Deslonde and James v. Darrington's Heirs*, 29 Ala. 92.

26. An application for probate may properly be made in writing, though our statutes do not require that it should be so made; but, where a will is propounded orally, by two joint executors, and a day set for the hearing, a subsequent written application, by one of the proponents alone, cannot annul or vary the previous proceedings. *Ib.*

27. A suit cannot be maintained for a legacy, until the will has been admitted to probate here, although it may have been admitted to probate in a foreign domicile. *Moore v. Lewis*, 21 Ala. 580.

28. The probate of the will of a married woman is not conclusive of her right to devise her real estate; but the heir, when sued in ejectment for the land, may call in question the legal effect of the will as a muniment of title, and show that it was ineffectual to pass the real estate. *Baker v. Chastang's Heirs*, 18 Ala 417; *Gannard v. Eslava*, 20 Ala. 732.

29. The probate of a will, unless contested in the mode and within the period prescribed by the statute, is conclusive; consequently, an application to establish a testamentary paper of later date, which is inconsistent with the provisions of the will already probated, cannot be allowed after the expiration of five years, when the applicant does not bring himself within any of the exceptions to the statute. *Hardy v. Hardy's Heirs*, 26 Ala. 524.

30. Where a nuncupative will, which was admitted to probate without due notice to those entitled, is afterwards declared null and void, on their petition, by a decree of the same court, and an administrator of the estate appointed; and this decree is afterwards affirmed on error, on appeal sued out by the person to whom the property was bequeathed by the will, he is barred from prosecuting another petition, in the same court, for the re-probate of the will. *Bradley v. Andress*, 27 Ala. 596.

31. A bill in chancery, to set aside and annul the probate of a will, is in the nature of a proceeding *in rem*, to which any person in interest may make himself a party; and a decree, annulling the probate, is final and conclusive, as to the validity of the will, in all courts and upon all persons, until set aside or reversed in some direct proceeding. *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

III. VALIDITY, AND HOW CONTESTED.

32. If the testator is of sound mind, and his will is not procured by fraud or undue influence, he may make such disposition of his property as may be dictated by partiality, pride, or caprice. *Coleman v. Robertson's Executors*, 17 Ala. 84.

33. An insane delusion, existing in the testator's mind at the time of the execution of the will, as to the principal legatee being his son, renders the will void, if it is the offspring of that delusion. *Florey's Executors v. Florey*, 24 Ala. 241.

34. Where the principal legatee, who was born in lawful wedlock two or three months after his mother's marriage with the testator, bears the peculiar, distinctive marks of the negro, while his mother and the testator were white persons of fair complexion, the testator's belief, that the legatee was his son, is admissible evidence, for the purpose of showing mental delusion on that particular subject. *Ib.*

35. A witness, whose acquaintance with the testator was such as to enable him to form a correct opinion of the mental condition of the latter, may not only depose to facts conducing to establish unsoundness of mind, but may also, in connection with these facts, give his own opinion upon the question of sanity or insanity. *Ib.*

36. Fraud or undue influence, in procuring one legacy, does not invalidate other legacies, which are the result of the testator's own free will; but, if the fraud or undue influence affects the whole will, though exercised by one legatee only, the whole will is void. *Ib.*

37. The burden of proof is on the executor, to show the testator's capacity, and the due execution of the will; and when these facts are established, it then devolves on the contestants to show fraud or undue influence. *Dunlap v. Robinson*, 28 Ala. 100.

38. To constitute undue influence, some act or acts must have been done, to cause the testator to dispose of his property contrary to his desire. *Leverett's Heirs v. Carlisle*, 19 Ala. 80.

39. It is not enough, to constitute undue influence, that the testator's own misconduct may have brought about a condition of things, which, operating as a moral inducement on his mind, may cause him to make a disposition of his property, which, under other circumstances, he might not have made: it must in some degree destroy his free agency, and constrain him to do that which is against his will, but which he is unable to refuse, or too weak to resist. *Dunlap v. Robinson*, 28 Ala. 100.

40. Nor is it enough that he is dissuaded by argument or solicitation from disposing of his property as he had previously intended: it must amount to moral coercion, and constrain him to do that which is against his will, but which, from fear, the desire of peace, or some other feeling, he is unable to resist. *Gilbert v. Gilbert*, 22 Ala. 529.

41. In determining the question of undue influence, the fact that the will makes an unnatural disposition of the property, the physical and mental condition of the testator at the time the influence is exerted, the relative position of the testator and the person exercising the influence, and the motives of the latter, as deducible from self-interest, or from affection or ill-will towards others, may all be proper circumstances for consideration. *Ib.*

42. The testator's acts and declarations before the publication of his nuncupative will, and his expressions at the time of its execution, tending to show a paternal feeling and affection towards a child for whom the will makes no provision, are admissible evidence for the contestant. *Ib.*

43. So, also, acts of officious intermeddling, harrassing and annoying to a dying man, or evincing a purpose to hurry him on to the act without giving him time to deliberate, are admissible evidence against the will. *Ib.*

44. But the fact that two of the testator's relatives, who resided in the same neighborhood with him, had never heard of the will until a short time before it was offered for probate, is not admissible, as tending to show either that undue influence was exerted, or that no such will was in fact made. *Ib.*

45. The declarations of the testator, made two or three weeks before the execution of the will, are admissible to prove fraud or undue influence. *Roberts v. Trawick*, 17 Ala. 55.

46. His declarations, made and repeated at the distance of ten and five years before its execution, and tending to show a fixed and settled purpose to make a similar will, are admissible as rebutting evidence. *Ib.*

47. But declarations, made by the

testator some six or seven years before the execution of the will, to the effect that the executor and his wife "were constantly ding-donging at him to make a will, but that he would not do it, and never meant to do it,—that the law of Alabama would make a good enough will for him," are not admissible evidence against the will. *Bunyard and Wife v. McElroy*, 21 Ala. 312.

48. Where the executor and proponent is the principal legatee, his declaration or admissions cannot be received to invalidate the will, even when offered in connection with proof that it would be for the interest of all the other legatees to set it aside. *Ib.*

49. Where the proponent is the husband of one of the legatees, his declarations are equally inadmissible. *Walker v. Jones*, 23 Ala. 448.

50. The proponent, having proved a conversation between the testator and a witness, had two days before the execution of the will, in which the testator, replying to a suggestion made by the witness, declared "that his sons-in law should never have any of his property, and as to his daughters, as they had made their beds so they must lie," then offered to prove declarations of the testator's wife, who was his principal legatee, made in the same conversation, to the effect that she wished her husband to make a will different from the one propounded, and which should make provision for his daughters. *Held*, that these declarations were not admissible to sustain the will. *Roberts v. Trawick*, 22 Ala. 490.

51. Where the will gives the widow a greater portion of the estate than she would take under the statute of distribution, her heirs, she being dead, are competent witnesses to defeat, but not to sustain the will. *Roberts v. Trawick*, 17 Ala. 55.

52. The proponent is an incompetent witness to sustain the will, nor can he render himself competent by renouncing as executor. *Gilbert v. Gilbert*, 22 Ala. 529.

53. Where the will is propounded for probate by two joint executors, and an issue is made up to test its validity, it is too late at the trial for either of them to renounce his executorship, in order that he may become a competent witness to sustain the will; nor can he demand to be discharged, as a matter of right, on offering to deposit in court a sum of money sufficient to cover the costs. *Deslonde and James v. Darrington's Heirs*, 29 Ala. 92.

54. The contestants, for the purpose of showing an adulterous intercourse between the testator and the mother of the children who were his legatees, having adduced evidence of his intimacy with her and her family, his visits to her house during her husband's absence, his gifts to them, &c.,—*held*, that this proof might be rebutted, by evidence showing that their intercourse was characterized by a religious sentiment; such as the fact that they frequently attended class-meetings together. *Dunlap v. Robinson*, 28 Ala. 100.

55. Although the proponent, if he fails to have all the parties in interest duly notified, proceeds at his peril, and is liable to have as many trials as there are heirs-at-law; yet, where one of the heirs appears, and contests the validity of the will, he cannot complain, on error, of the want of due notice to the other resident heirs. *Walker v. Jones*, 23 Ala. 448.

56. The sustaining of a demurrer to one of the contestant's objections, when he had the full benefit of the same facts under the issues presented by his other specifications, is not an available error. *Dunlap v. Robinson*, 28 Ala. 100.

57. It is not necessary to join issue on the objections filed; nor can a joinder in issue, by one of the proponents, work a change of parties to the record or release a co-proponent from his duties and liabilities as such. *Deslonde and James v. Darrington's Heirs*, 29 Ala. 92.

58. Where the probate of a will is contested, the issues are not educed by the pleadings, but are made up under the direction of the judge, in whom is vested a more enlarged discretion than in ordinary civil causes. *Ex parte Henry*, 24 Ala. 638.

59. On the trial of an issue respecting the validity of a will, which was contested on the grounds of fraud, undue influence, mental incapacity on the part of the testator, and insufficiency

of attestation, the jury having returned a verdict finding it invalid generally, the court inquired, on motion of the contestant, on what ground their verdict was predicated; to which the foreman replied, "principally on the ground that it was not signed by the witnesses in the presence of the testator;" and the court then ordered them to retire and find another verdict,—*held*, that the contestant could not have a *mandamus* for judgment on this verdict. *Ib.*

60. Nor can the contestant have a *mandamus* for judgment on a verdict which was rejected by the court on his own motion. *Ib.*

61. Where the jury return a general verdict against the validity of the will, but state to the court that their verdict is not predicated on any one of the grounds of contest, and that they cannot agree upon any one of them, their verdict may be rejected. *Ib.*

62. A charge to the jury, that an unequal distribution of property among the testator's next of kin is no reason for considering the will an irrational act, is the assertion of a correct legal proposition, and cannot be regarded as precluding the jury, in making up their verdict, from considering the character of the will in connection with the other evidence. *Coleman v. Robertson's Executors*, 17 Ala. 84.

63. A charge, to the effect that, if the jury believed that, "from the weakness of the mind of the deceased, undue influence had been practiced on him, then the will was not valid," cannot be considered as asserting the proposition, that undue influence, unconnected with weakness of mind, is no objection to the validity of the will. *Ib.*

IV. CONSTRUCTION.

64. In construing a will, it is permissible to look at the condition of the testator's family. *Moore's Executors v. Moore's Distributees*, 18 Ala. 242; *Travis v. Morrison and Wife*, 28 Ala. 449.

65. There is no legal principle more firmly established by the uniform and constant decisions of judicial tribunals, than the rule which declares that an omission in a written will cannot be supplied by parol. *Abercrombie's Executor v. Abercrombie's Heirs*, 27 Ala. 489.

66. The words of a devising clause cannot, ordinarily, be carried beyond their just legal import and legitimate meaning by any supposed general intent to be gathered from the preamble, or introductory part of the will; and it is only in case of doubt, where the words of a bequest may, without doing violence to the apparent intent and the rules of law, be construed more ways than one, that resort is had to the introductory part of the will, to aid in solving such doubt. *Denson v. Mitchell and Wife*, 26 Ala. 360.

67. The rule which sacrifices the former of two contradictory clauses to the latter, is never applied except on the failure of every attempt to reconcile them. *Walker v. Walker*, 17 Ala. 396; *Pace and Wife v. Bonner*, 27 Ala. 307.

68. Clauses and sentences may be transposed, if a consistent disposition can be thereby deduced from the entire will. *Ib.*

69. Although the last clause in a will must prevail over a preceding clause which cannot be reconciled with it, and the particular must yield to the general intent, when the two are equally apparent, and so repugnant that both cannot stand; yet the cardinal rule of construction is to give effect, if possible, to every part of the will. *Miller and Wife v. Flournoy's Heirs*, 26 Ala. 724. See, also, *Gibson v. Land*, 27 Ala. 117.

70. Where a testator bequeathed to his daughter a negro woman named Jinney, "and all her increase which she now has or may hereafter have," and, by a subsequent clause, gave to his son a negro boy named Moses, who was a child of Jinney's,—*held*, that the latter bequest must be construed as an exception to the former. *Pace and Wife v. Bonner*, 27 Ala. 307.

71. A clause in these words, "After my debts are paid, the remainder of my property, of whatever kind or nature, I give and bequeath to my beloved wife," does not conflict with or destroy a preceding bequest to charitable societies. *Carter and Wife v. Balfour's Adm'r*, 19 Ala. 810.

72. Where an absolute right of dis-

position is given to the first taker, a limitation over of what he may leave undisposed of at his death, is void for repugnancy. *Flinn v. Davis*, 18 Ala. 132.

73. The law inclines to regard legacies as vested rather than contingent, because such a construction favors the interests of the legatee; but this rule only applies where the intention is obscure and doubtful. *Savage v. Benham*, 17 Ala. 119; *Travis v. Morrison and Wife*, 28 Ala. 494.

74. Under our statutes, a testator can only defeat his heirs-at-law or next of kin, by making a disposition of his property; and if any portion of it remains undisposed of by will, they are entitled to it, although it may appear that he did not intend they should have it. *Denson and Wife v. Autrey's Executor*, 21 Ala. 205.

As to the construction of particular clauses and phrases, see LEGACY AND DEVISE, III.

V. WHAT PASSES UNDER A WILL.

75. Only such real estate as is owned by the testator at the time of the execution of his will passes under it. *Atwood's Heirs v. Beck*, 21 Ala. 590.

76. A child, born of a female slave after the execution of the testator's will, but before his death, does not pass to the legatee to whom its mother is bequeathed, but goes to the executor as property undisposed of. *Hardy v. Toney*, 20 Ala. 237.

VI. WIDOW'S DISSENT.

77. Where no provision is made for the wife by her husband's will, she may claim the provision which the law makes for her, without dissenting from the will. *Martin's Heirs v. Martin*, 22 Ala. 86; *Turner v. Cole*, 24 Ala. 364.

78. The widow's dissent does not affect a power of sale, given by the will to the executors, for the purpose of paying the debts of the estate. *Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27.

79, Where the payment of a legacy is made to depend on the condition, that the estate in the hands of the executor is worth a specified amount after the payment of debts, the distributive share allotted to the widow, in consequence of her dissent from the will, is not to be estimated in ascertaining the value of the estate. *Kirkman v. Mason*, 17 Ala. 134.

PART THIRD.

CHANCERY CASES.

DIGEST.

ACCIDENT.

1. Equity will not relieve against a judgment at law, because a witness for the defendant did not testify on the trial to material facts within his knowledge, as to which he was not examined, where it appears that the defendant, by the exercise of proper diligence, might have ascertained what the witness knew in reference to the matters in controversy. *Powell v. Stewart*, 17 Ala. 719.

2. The death of the original counsel employed to defend a suit at law, and the want of familiarity on the part of the succeeding counsel with the grounds of defense, do not furnish a sufficient reason for equitable interference with the judgment. *Ib.*

3. Where a judgment by default is rendered against a party, he cannot obtain relief against it in equity, on the ground that the attorney whom he had retained, instead of appearing for him, appeared for the opposite party, when the proof shows that he had not mentioned the particular case to the attorney, but had only requested him to attend to any and all business for him. *Watts v. Gayle & Bower*, 20 Ala. 817.

4. In assumpsit on a promissory note, a judgment by default having been rendered, the clerk of the court made a mistake in the computation of interest, and entered up judgment for less than the real amount due; the defendant having sued out a writ of error to the next term of the supreme court, and neglecting to file the transcript, the judgment was affirmed on certificate,—*held*, that the plaintiff was entitled to go into equity to have the mistake corrected. *Norris, Stodder & Co. v. Cottrell*, 20 Ala. 304.

For analogous decisions, see INJUNCTION, and MISTAKE.

ACCOUNT.

I. WHEN BILL FOR ACCOUNT LIES.

1. A perpetual injunction and account decreed, at the suit of the proprietor of an established bridge, against the owner of a neighboring private bridge, who permitted persons subject to the payment of toll at complainant's bridge to pass over his bridge. *Harrell & Croft v. Ellsworth*, 17 Ala. 576.

2. On clear and satisfactory proof of a mistake in a deed, chancery will reform it, and decree an account against a party who, with notice of the mistake, purchased the property conveyed, and holds it in opposition to the rightful owner. *Whitehead v. Brown*, 18 Ala. 682.

3. A court of equity will take jurisdiction, at the instance of specific legatees, to compel the executor to discover and account for unadministered assets, and appropriate them to the

payment of the testator's debts, to prevent the sale for that purpose of the property specifically bequeathed; and the pendency of a settlement in the orphans' court cannot divest this jurisdiction. *Pearson v. Darrington*, 18 Ala. 348.

4. Prior to the passage of the act of 1846, the distributees of an estate might maintain a suit against an executor, after his removal from office, to make him account for the assets which had come to his hands; and where such suit was properly commenced, the subsequent passage of the act of 1846 could not operate to defeat it. *Gould v. Hayes*, 19 Ala. 438.

5. A bill filed by a vendor, alleging that the purchase-money was to be paid out of the proceeds of certain mills situated on the lands, and that the purchaser had received enough to pay the amount, and asking an account of the proceeds received, is without equity, because the remedy at law is adequate and complete. *May v. Lewis*, 22 Ala. 646.

6. A bill for an account does not lie against an attorney at law, charging him with negligence and a failure to pay, when there is no complexity or difficulty in the account. *Crothers v. Lee*, 29 Ala. 337.

II. OPENING, SURCHARGING AND FALSIFYING ACCOUNTS.

7. Equity will open a stated account between principal and agent, where it is shown that the former was of weak and confiding mind, and that undue advantage was taken of him. *Rembert & Hale v. Brown*, 17 Ala. 667.

8. To induce a court of equity to open a partnership account, which was settled on full deliberation, clear and convincing proof of error must be shown; and further, that this error was unknown, at the time of the settlement, to the party complaining. *Desha & Sheppard v. Smith*, 20 Ala. 747.

9. Mutual accounts between the parties, when not complicated, do not furnish a sufficient ground for overhauling a judgment at law; especially, when they were submitted to and decided by the law court. *Powell v. Stewart*, 17 Ala. 719; *Foster v. State Bank*, 17 Ala. 672.

10. A decree of the orphans' court, rendered on the final settlement of an administrator's accounts, previous to the passage of the act of 1850 conferring jurisdiction on chancery to overhaul such decrees, will not be opened in equity, when impeached for fraud, on proof of an error or mistake in the allowance of a credit for money paid to a guardian after the revocation of his letters of guardianship; it being shown that the complainant, then an infant, was represented on the settlement by a guardian *ad litem*,—that the payment was made in good faith, for the ward's accommodation, and in accordance with her wishes at the time, and it not appearing that the facts were concealed from the court. *Cowan and Wife v. Jones*, 27 Ala. 317.

11. Where an account is opened on the ground of fraud, the whole of it may be unraveled; but where permission is given merely to surcharge and falsify, the account stands as *prima facie* correct, and the *onus* of proving mistakes is on the party alleging them. *Ib.*

II. PLEADINGS, PRACTICE, AND EVIDENCE.

12. A defendant may protect himself from a discovery and account, by a partial answer, averring that the complainants are slaves. *Bentley v. Cleaveland*, 22 Ala. 814.

13. The statute of limitations of six years will bar a suit for an account of rents and profits received by one tenant in common under an implied trust for his co-tenant. *Tarleton v. Goldthwaite's Heirs*, 23 Ala. 346.

14. Where the complainant, in such case, proves the contracts of rent made by the defendant, fixing the amounts, &c., this is *prima facie* sufficient to charge the defendant with the entire amount, and throws on him the *onus* of showing what he did not receive. *Ib.*

15. Where the bill alleges an indebtedness on the part of defendant's intestate, for rents received and not accounted for, and charges that the defendant has in his possession the documents showing such indebtedness, and calls for their production; and the documents, when produced, tend to show that no indebtedness whatever exists, the complainant may neverthe-

less establish his case by other evidence. *Ib.*

16. When an account is called for by the bill, and given in the answer, it must be regarded as responsive matter, and as *prima facie* correct. *May v. Barnard*, 20 Ala. 200.

17. The burden of proof is on him who complains of error in a stated account. *Desha & Sheppard v. Smith*, 20 Ala. 747.

18. Where a trustee, under a voluntary deed in favor of the grantor's children, renders an account to the grantor himself, which is casually examined by one of the beneficiaries, who is at the time ignorant of his interest in the trust, this does not render it binding on him as a stated account. *Andrews v. Hobson's Adm'r*, 23 Ala. 219.

19. Where a decree is impeached on the ground of fraud, and the answer denies all fraud, but admits an error or mistake in the statement of the account, the complainant cannot have a decree unless he amends his bill. *Cowan and Wife v. Jones*, 27 Ala. 317.

20. The dismissal of such bill, though without reservation, would not prejudice the right to file another for the purpose of surcharging and falsifying the account; but, even if the practice were otherwise, the complainant's laches, in failing to amend, would be good ground for refusing to modify the decree on error. *Ib.*

21. Where a testator directed, that his estate should be kept together until his eldest son attained majority, and that the profits derived therefrom, after defraying the expenses of his plantation, together with all money accruing to his estate from other sources, should be invested in bank-stock as a permanent fund, of which the dividends should be equally divided among his children; and the distributees filed a bill for an account against the executor, after his removal, charging him with waste, negligence, &c,—*held*, that the complainants occupied the position of residuary legatees, and must bring before the court all persons interested in the fund which they sought to appropriate; that the administrator *de bonis non* was a necessary party defendant, and that the bill ought to show that he set up no conflicting claim to the fund; and that the creditors, if any, should be brought in before the master in taking the account, as in case of a creditors' bill. *Gould v. Hayes*, 19 Ala. 438.

22. A trustee, under a deed of assignment for the benefit of creditors, who, after accepting the trust, voluntarily permits his co-trustee to take the entire possession, management and control of the trust property, is equally with him liable to account; and on a bill being filed against both for an account and settlement, he is an incompetent witness for his co-defendant, to prove the insolvency of the debtors. *Royall's Adm'r v. McKenzie*, 25 Ala. 363.

IV. STATEMENT OF ACCOUNT.

23. Where mortgaged property is seized under execution against the mortgagor before the law-day, and is afterwards sold by agreement between the mortgagor and mortgagee, the plaintiffs in execution would be entitled to the hire of the property from the time of the sale until the law-day, and to have an account taken of the value of the property on the law-day; and in stating the account, they cannot take advantage of usury in the mortgage debt, nor can the mortgagees be allowed reasonable solicitors' fees incurred by them in the prosecution of the suit. *Harbinson v. Harrell*, 19 Ala. 753.

24. Where a mortgage is given to indemnify a surety, and he repudiates his trust, thereby compelling his co-surety to file a bill against him, he is not entitled, on the taking of the account, to commissions for selling the property; nor is he entitled, as against his co-surety, to a credit for moneys paid by him on other debts of the mortgagor. *Steele v. Mealing*, 24 Ala. 285.

25. Where a tenant in common receives rents under an implied trust for his co-tenant, and a bill for account is filed against him, he is chargeable with interest on the amount found in his hands, from the time of its receipt. *Tarleton v. Goldthwaite's Heirs*, 23 Ala. 346.

26. On the settlement of an assignment, consisting principally of notes

and accounts under twenty dollars, against debtors who were residents of the district in which the trustee lived, the trustee should, in the absence of all special cause, be allowed twelve months from his acceptance of the trust for the collection of the debts, and should be charged with interest on the available assets from that time. *Royall's Adm'r v. McKenzie*, 25 Ala. 363.

27. The trustee's own note, when included in the assignment, should be charged as cash in his hands from its maturity. *Ib.*

28. It being agreed between the assignor and the trustee, that, on the latter confessing judgments in favor of certain preferred creditors, the balance should stand open for future adjustment, the trustee should nevertheless be charged with interest on that balance from that time. *Ib.*

29. The trustee is also chargeable with a debt lost by his own negligence, although he may have acted without any improper motive. *Ib.*

30. Also, with the amount of a debt, although the evidence is conflicting as to the solvency of the debtor, on proof that he had a settlement with the debtor, and paid him in cash the balance found in his favor. *Ib.*

31. If the trustee, without the sanction of the beneficiaries, receives lands in settlement and satisfaction of the trust debts, he is responsible for whatever loss may ensue, and, at the election of the beneficiaries, the lands will be treated as his own individual property. *Ib.*

32. The trustee is not estopped from showing that the actual amount of any debt is less than that specified in the assignment; and he would only be accountable for the actual amount of it. *Ib.*

33. If the trustee buys up the secured debts at less than their nominal value, he is only entitled to a credit for the amount actually paid by him. *Ib.*

34. Where the order of reference directs the master to take an account of the expenses of executing the trust, and to ascertain what would be a reasonable compensation to the trustee, should the court decree compensation; and the master reports, as a reasonable compensation, a certain per cent. on the amount of available assets, which are also ascertained and reported under another part of the reference, the report conforms to the reference. *Ib.*

35. In stating the accounts of a mercantile partnership, under an order of reference, the master should first ascertain whether the business resulted in profit or loss, and to what extent; and should also dispose of the uncollected debts. *Zimmerman v. Huber*, 29 Ala. 379.

36. In stating an account before the master, the answer of one defendant cannot be used as evidence against the others; but if the other answers and proof in the case show a greater balance against them, than the account as stated on the basis furnished by the answer, it is error without injury. *Halstead v. Shepard*, 23 Ala. 558.

AGENCY.

1. Equity will open a stated account between principal and agent, where it is shown that the former was of weak and confiding mind, and that undue advantage was taken of him. *Rembert & Hale v. Brown*, 17 Ala. 667.

2. If an agent, acting for himself and his principal, purchases land on their joint account, but exceeds his authority in the price agreed to be paid, the principal, in the absence of collusion between the vendor and agent, or of notice to the vendor that the agent was exceeding his powers, must either ratify or repudiate the contract *in toto*: he cannot hold the land, and at the same time avoid the payment of a part of the price; but, if he repudiates the contract, the agent would be bound by it, and the vendor's lien might then be enforced against him. *Crawford v. Barkley*, 18 Ala. 270.

3. An agent to sell cannot, without his principal's consent, become himself the purchaser: if he is surety on his principal's notes for the purchase-money, he has the right to secure himself, and a deed taken to himself from his principal's vendor would give him a lien to the extent of the money which he had paid; but, if had other moneys

of his principal in his hands at the time of his purchase, his lien would be diminished to that extent. *Walker v. Palmer*, 24 Ala. 358.

4. Although an agent to make a tender cannot delegate his authority to another, yet he may make the tender by letter sent by the hands of another. *Couthway v. Berghaus*, 25 Ala. 393.

5. When an agent lends out his principal's money at a usurious rate of interest, the fact of agency does not affect the illegality of the contract, nor avoid the effect of the statute against usury. *Pearson v. Bailey*, 23 Ala. 537.

6. If notice, actual or implied, is brought home to an agent or attorney, it is immaterial whether the principal had personal knowledge of the fact, since the principal is presumed, both at law and in equity, to know whatever his agent knows. *Wiley, Banks & Co. v. Knight*, 27 Ala. 336.

7. A deed executed by an agent with authority to sell, although ineffectual as a conveyance because the agent's authority was not under seal, will be upheld in equity as evidence of a contract to sell. *Morrow v. Higgins*, 29 Ala. 448.

AMENDMENT.

I. OF BILLS.
II. OF ANSWERS.
III. OF DECREES.
IV. OF WRITS OF ERROR.

I. OF BILLS.

1. Matter arising subsequent to the filing of the original bill, cannot be made the subject of an amendment, but must be brought to the knowledge of the court by supplemental bill. *Barringer v. Burke*, 21 Ala. 765; *Collins v. Lavenberg & Co.*, 19 Ala. 682.

2. An amended bill, which is repugnant to the original bill, cannot be allowed. *Rumbly v. Stainton and Wife*, 24 Ala. 712.

3. An amendment can only be allowed, where the bill is defective in proper parties, or in the prayer for relief, or in the omission or mistake of some fact connected with the substance of the case. *Larkins v. Biddle*, 21 Ala. 252.

4. If the amendment is inconsistent with the original bill, and makes a new case, a demurrer will lie to it. *Ib.*

5. Where the original bill, which sought the reformation of a deed of gift, alleged that the donor's intention was, "to settle said slaves to the sole and separate use of complainant, free from the debts of her husband;" while the amended bill alleged, that his intention was, "to secure said slaves to the sole and separate use of the complainant during her life, and at her death to her children,"—*held*, that the amendment made a different case from the original bill. *Ib.*

6. Where a bill was filed by judgment creditors, seeking to condemn their debtor's beneficial interest in certain property, which was standing in the name of a trustee for the benefit of him and his family; and, on the defendants setting up the debtor's discharge in bankruptcy, and insisting that he had no such interest in the trust property as could be subjected to the payment of his debts, the bill was amended, by bringing in as defendants the assignee in bankruptcy and the debtor's wife and children,—*held*, that the amendment did not make a new case, but was allowable. *Rugely & Harrison v. Robinson*, 19 Ala. 404.

7. When an amendment is properly allowed, the appellate court will not inquire into the correctness of its allowance by the chancellor without terms. *McLane & Plowman v. Riddle & Burt*, 19 Ala. 180.

8. A cause will not be remanded, that the bill may be amended, when the amendment would make a new case. *Crabb's Adm'r v. Thomas*, 25 Ala. 212; *Williams v. Barnes*, 28 Ala. 613.

9. Where a bill seeks to impeach a decree on the ground of fraud, and the answer denies all fraud, but admits an error or mistake in the statement of the account, the complainant cannot have a decree unless he amends his bill. *Cowan and Wife v. Jones*, 27 Ala. 317.

10. If the plaintiff, in such case, fails to amend his bill, his laches would be a good ground for refusing to modify

the decree on error, so as to dismiss the bill without prejudice. *Ib.*

11. Where the bill alleges, that a release, executed by the distributees of an estate to one of its debtors, is inoperative by reason of fraud or mistake; and the answer sets up a release from the administrator,—this latter, if proved, is a complete bar, unless the bill is so amended as to impeach its validity. *Beattie v. Abercrombie*, 18 Ala. 9.

12. When leave to amend the bill is asked for the first time at the hearing, it is discretionary with the chancellor to grant or refuse it. *Michan and Wife v. Wyatt*, 21 Ala. 813.

II. OF ANSWERS.

13. In a case of interpleader, after the discharge of the complainant, the testimony having been published by consent without prejudice, it is discretionary with the court to permit an amendment of one of the answers. *Lanier v. Driver*, 24 Ala. 149.

III. OF DECREES.

14. The written opinion of the presiding judge, when the circuit courts exercised chancery jurisdiction, and the judges were required to file their opinions in writing, was sufficient to authorize the rendition of a decree *nunc pro tunc* at any subsequent stage of the proceedings. *The State, ex rel. Waring v. Mayor of Mobile*, 24 Ala. 701.

15. On a bill to enforce the execution of a decree, if the record shows sufficient to authorize an amendment of the decree *nunc pro tunc*, by reciting that the defendant appeared though not served with process, the court will consider the amendment as made, and will sustain the former decree. *Ib.*

16. A mistake in the christian name of a party against whom a decree is rendered, when the true name appears in the record, is a mere clerical misprision, which will be amended at the cost of the plaintiff in error. *McBroom's Adm'r v. McBroom's Creditors*, 19 Ala. 173.

IV. OF WRITS OF ERROR.

17. When a writ of error is sued out in the name of one of the defendants, "*et al.*," although the abbreviation cannot, strictly considered, be construed to mean the other defendants; yet, under the statute of amendments, the writ will be considered so amended as to conform to the actual facts. *Colvin v. Owens*, 22 Ala. 782.

ANSWER.

I. TIME OF FILING.
II. SIGNATURE OF COUNSEL.
III. SUFFICIENCY.
IV. WHAT RELIEF MAY BE PRAYED.
V. ADMISSIBILITY AND EFFECT AS EVIDENCE.

1. *For or against Respondent.*
2. *For or against Co-Defendant.*

I. TIME OF FILING.

1. After the rendition of a regular decree *pro confesso* against a defendant, he has no right, except by consent, or by leave of the court, to file an answer after the master has reported under an order of reference. *Hunter v. Robbins*, 21 Ala. 585.

II. SIGNATURE OF COUNSEL.

2. An answer cannot be struck from the files for want of the signature of counsel, since a party has the constitutional right to conduct his own defense. *May & Tindall v. Williams*, 17 Ala. 23.

III. SUFFICIENCY.

3. An answer cannot be struck from the files, when it contains a response to any one of the material allegations of the bill: if the complainant deems it insufficient, he should except to it. *May & Tindall v. Williams*, 17 Ala. 23.

4. Nor is it a good cause to strike an answer from the files, that it omits the name of one of the defendants in the title of the cause. *McLure v. Colclough*, 17 Ala. 89.

5. Nor that it is interlined in a material part, when it does not appear that the interlineation was made after

the answer was sworn to, or that any other irregularity intervened. *Ib.*

6. Where a commission issues to take the answer of a non-resident defendant, after a decree *pro confesso* has been entered against him, and after the bill has been amended; and the answer is general, not specifying whether it is to the original, or to the amended bill, or to both, it will be intended that the answer is to the bill in the condition in which it was when the commission issued. *Hanson & Moore v. Patterson*, 17 Ala. 738.

7. A defendant may protect himself from a discovery and account, by a partial answer averring that the complainants are slaves. *Bentley v. Cleaveland*, 22 Ala. 814.

8. The court may reserve to the complainants the right to except to such answer for want of the discovery, if it should be found that they are entitled to it; but has no power to order the answer to stand as a plea, and to be tried as such. *Ib.*

9. If, however, the answer is ordered to stand as a plea, and an issue is made up on it as such, under which the complainants proceed to take proof to establish their case, the irregularity is only error without injury. *Ib.*

10. If the allegations of the answer are sufficient as to the slavery of those complainants who are the only real parties in interest, exceptions will not lie to it for the insufficiency of its allegations as the slavery of the other complainants. *Ib.*

11. It is not enough that a defendant answers the charges of the bill literally: he must go further, and confess or traverse the substance of each. *Savage v. Benham*, 17 Ala. 119.

12. He cannot shelter himself behind equivocal, evasive, or doubtful terms; nor behind a literal denial, which amounts to no more than a negative pregnant. Particular charges must be answered particularly and precisely: a general answer, even when it includes an answer to all the particular charges, is insufficient. *Grady v. Robinson*, 28 Ala. 289.

13. A general denial of a material allegation, although it might be held insufficient on exceptions, cannot be regarded, on account of its insufficiency, as an admission of the truth of the allegation. *Savage v. Benham*, 17 Ala. 119.

14. Where the bill states material facts, which are *prima facie* within the knowledge, information or belief of the defendant, his failure to deny them, or to express his belief of their falsity, or to state that he cannot form any belief respecting their truth, is a virtual admission that they are true. *Grady v. Robinson*, 28 Ala. 289.

15. To authorize the dissolution of an injunction, the answer must clearly and explicitly deny the allegations of the bill: if it is evasive or uncertain, or if the case made by it does not clearly show that the complainant is not entitled to relief, the injunction should be retained until the final hearing. *Rembert & Hale v. Brown*, 17 Ala. 667.

16. Where an injunction of a judgment at law has been properly granted in the first instance, and the answer admits that the complainant is entitled to some relief, though not to the extent claimed by the bill, the injunction may be either dissolved in part, or continued on such terms as will insure ultimate justice; but to authorize such dissolution, or a requirement that the complainant pay into court a portion of the judgment, as a condition to the continuance of the injunction, the answer should show explicitly the amount which is justly due on the judgment: otherwise, if there is no danger of the debt being lost, the injunction should be retained until the final hearing. *Maulden, Montague & Co. v. Armistead*, 18 Ala. 500.

17. Where the bill seeks to enjoin the collection of a judgment or execution at law, and the answer so far denies its allegations, as to leave it without equity as respects the other facts not denied, the injunction may be dissolved on the answer. *Moore v. Barclay*, 23 Ala. 739; *Rogers v. Bradford*, 29 Ala. 274.

18. The answer of a corporation, under its corporate seal only, denying the allegations of the bill, is not sufficient to authorize the dissolution of an injunction. *Griffin v. State Bank*, 17 Ala. 358. (Overruling *Hogan v. Branch Bank at Decatur*, 10 Ala. 485.)

19. Where the defendant sets up the defense of a *bona-fide* purchase,

without notice, he must deny notice, whether it be charged in the bill or not. *DeVendal v. Malone's Executors*, 25 Ala. 272; *Johnson v. Toulmin*, 18 Ala. 50.

20. The answer must put in issue all the facts on which the defendant relies in bar of the relief sought by the bill, and evidence cannot be adduced of facts outside of these issues. *Grady v. Robinson*, 28 Ala. 289; *Ozley v. Ikelheimer*, 26 Ala. 332.

21. Nothing can be considered impertinent in an answer, and subject to exception as such, which tends to disprove the case made by the bill. *Saltmarsh v. Bower & Co.*, 22 Ala. 221.

IV. WHAT RELIEF MAY BE PRAYED.

22. In cases of specific performance, where the contract set up in the answer and proved is materially different from that alleged in the bill, the defendant may, *it seems*, have a specific performance without filing a cross bill. *Sims v. McEwen's Adm'r*, 27 Ala. 184.

23. Under a bill for partition and account, filed by two tenants in common against the heirs and administrator of a deceased tenant, who executed the deed under which plaintiffs claim, the defense may be set up by answer, without filing a cross bill, that the deed was executed through mistake and misrepresentation as to a material fact, and therefore ought not to be sustained in equity. *Trippe v. Trippe*, 29 Ala. 637.

24. Under a bill, filed by a purchaser, for the rescission of a contract, where the facts only justify a decree allowing him a credit on the unpaid notes for the purchase-money, the defendant cannot, without a cross bill, have a decree in his favor for the balance of the unpaid purchase-money. *Gallagher v. Witherington*, 29 Ala. 420.

V. ADMISSIBILITY AND EFFECT AS EVIDENCE.

1. *For or against Respondent.*

25. An answer, which is responsive to the allegations of the bill, must prevail, unless disproved by two witnesses, or by one witness with strong corroborating circumstances. *May v. Barnard*, 20 Ala. 200; *Bryan & McPhail v. Cowart*, 21 Ala. 92; *Beene's Heir's v. Randall's Heirs*, 23 Ala. 514; *Garrett v. Garrett's Heirs*, 29 Ala. 439.

26. These witnesses must not only be credible, but must have had ample opportunities of knowing the facts to which they testify. *Bryan & McPhail v. Cowart*, 21 Ala. 92.

27. The corroborating circumstances must be such as, when disconnected from the evidence of the witness, would tend to establish the charges which are denied by the answer, and would, of themselves, be evidence for that purpose. *Beene's Heirs v. Randall's Heirs*, 23 Ala. 514.

28. Mere verbal admissions, unless deliberately made, and established and identified with reliable certainty, are not sufficient to overcome the positive denials of a sworn answer. *Garrett v. Garrett's Heirs*, 29 Ala. 439.

29. The answer of a corporation not being under oath, the same amount of evidence is not required to disprove its denials as in other cases. *State Bank v. Edwards & Walke*, 20 Ala. 512.

30. In divorce cases, a sworn answer not being required, the defendant cannot, by swearing to his answer, impose upon the complainant the necessity of disproving its denials by two witnesses, or one witness with corroborating circumstances. *Hughes v. Hughes*, 19 Ala. 307; *Mosser v. Mosser*, 29 Ala. 313.

31. An answer which denies the allegations of the bill upon information merely, and calls for proof of them, does not require to be disproved by two witnesses, or one witness with corroborating circumstances. *Paulding v. Watson and Eidson*, 21 Ala. 279.

32. Under a bill for redemption, filed by a creditor whose judgment was confessed, if the purchaser does not deny the existence of the indebtedness which was the foundation of the judgment, but alleges ignorance of it, and avers that he had offered to pay the amount of the judgment and retain the land, proof, by one witness, of his admission of the validity of the judgment and the right to redeem under it, is sufficient to establish the plaintiff's case. *Couthway v. Berghaus*, 25 Ala. 393.

33. Where the bill alleges a negative, (*e. g.*, the want of notice, or the want of consent,) which the answer denies, and alleges the reverse affirmative to be true, the burden of proof is on the defendant. *Walker v. Palmer*, 24 Ala. 358; *Carroll v. Malone*, 28 Ala. 521.

34. Where a bill is filed to enjoin a judgment at law, which was rendered against a non-resident defendant in attachment, predicated on a colorable levy upon a chattel of trifling value; and alleges that the defendant was not indebted to the plaintiff, which allegation the answer denies, the burden of proving the negative allegation of the bill is not on the complainant. *Grier v. Campbell*, 21 Ala. 327.

35. Where the defendants claim the benefit of the statute of non-claim by way of plea, but do not deny in their answers the presentation of the plaintiff's claim, proof of presentation by one witness is sufficient. *Pharis v. Leachman*, 20 Ala. 662.

36. Where the bill alleges that certain judgments, against which it seeks relief, have been fully paid off and satisfied, by the transfer of land-claims in Texas to the plaintiff's authorized agent; and the answer, admitting the transfer, insists that the transferred claims were fraudulent, and that the agent was only authorized to receive good and valid claims,—this is not responsive matter. *Hanson & Moore v. Patterson*, 17 Ala. 738.

37. Where a bill alleges the confession of a judgment by one defendant to another to have been made for the purpose of hindering, delaying and defrauding the creditors of the former; but makes no charge, and asks no discovery, touching the consideration of the judgment,—an allegation in the answer, that the judgment was confessed for a pre-existing, *bona-fide* debt, is not responsive to the bill. (*Per* PARSONS, J.; DARGAN, C. J., *dissenting*, and CHILTON, J., *not sitting*.) *Ware v. Jordan*, 21 Ala. 837.

38. Where a bill is filed by a married woman, against her trustee and certain judgment creditors of her husband, seeking the reformation of a deed on the ground of mistake, an injunction of the judgments, and the appointment of another trustee; and decrees *pro confesso* are entered against all the defendants except the trustee, who avers his ignorance of the alleged mistake, the clear and direct testimony of one witness is sufficient to authorize the reformation of the deed. *Godwin v. Yonge*, 22 Ala. 553.

39. Under a bill for a settlement and account of an assignment for the benefit of creditors, if the trustee alleges in his answer, that the assignor, with full knowledge of all the facts, assented to his settlement of a debt by receiving lands in payment, this is matter in avoidance, and requires evidence *aliunde* to sustain it. *Royall's Adm'r v. McKenzie*, 25 Ala. 363.

40. Two foreclosure suits, pending in the same court, were consolidated by consent of counsel, and it was agreed that the second bill should be taken as an answer and cross bill to the first; the complainant in the first bill admitted the validity of the other's mortgage, while the latter alleged, on information and belief, that the former's mortgage was intended to hinder and delay creditors, and that the debts secured by it were fictitious,—*held*, that it was incumbent on the first complainant, as against the second, to prove the existence and *bona fides* of the debt which constituted the consideration of his mortgage. *De Vendal v. Malone's Executors*, 25 Ala. 272.

41. Where a bill for specific performance alleges possession under the parol contract, and the answer admits the possession, but denies the alleged contract of sale, averring that the possession was acquired and held under a contract of rent, the burden of proof is on the complainant to show the character of the possession. *Danforth v. Laney*, 28 Ala. 274.

42. Where a bill for the reformation and specific performance of an antenuptial contract required the defendant to answer all the allegations, particularly as to the existence of the alleged mistake, and to say whether the deed contained the true contract of the parties; and the answer, admitting the alleged mistake, averred that another material stipulation of the contract was by mistake omitted from the deed,—*held*, that this averment was not responsive, but was affirmative matter requiring to be proved. *Webb v. Webb's Heirs*, 29 Ala. 588.

43. Although the answer is to be taken as true in every respect, when the cause is heard by consent on bill and answer only; yet, where the answer admits enough to sustain a decree for complainant, his bill should not be dismissed. *Lampley v. Weed & Co.*, 27 Ala. 621.

44. On motion to dissolve an injunction, the answer can be regarded only so far as it is responsive to the bill. *Rembert & Hale v. Brown*, 17 Ala. 667. (For decisions as to the sufficiency of the answer to authorize a dissolution of the injunction, *vide supra*, 15–18.)

45. When an account is called for by the bill, and given in the answer, it must be regarded as responsive matter, and as *prima facie* correct. *May v. Barnard*, 20 Ala. 200.

46. But memoranda from books, and written documents, when produced in response to a call in the bill, are not necessarily conclusive evidence of the facts which they tend to establish. *Tarleton v. Goldthwaite's Heirs*, 23 Ala. 346.

47. A general denial of a material allegation, although it might be held insufficient on exceptions, cannot be regarded, on account of its insufficiency, as an admission of the truth of the allegation. *Savage v. Benham*, 17 Ala. 119.

48. Where the bill states material facts, which are *prima facie* within the knowledge, information or belief of the defendant, his failure to deny them, or to express his belief of their falsity, or to state that he cannot form any belief respecting their truth, is a virtual admission that they are true. *Grady v. Robinson*, 28 Ala. 289.

49. When an answer is contradicted, or disproved, as to a material fact within the respondent's knowledge, it loses its weight as evidence. *Pharis v. Leachman*, 20 Ala. 662; *Gunn v. Brantley*, 21 Ala. 633.

50. An answer in chancery is admissible evidence against the respondent, in a subsequent suit, whether the parties are the same or not. *Royall's Adm'r v. McKenzie*, 25 Ala. 363.

51. When an answer in chancery is offered in evidence against the respondent, in an action at law subsequently instituted, the whole answer must be taken together, so far as it is pertinent to the issue, whether its allegations are strictly responsive, or set up affirmative matter in avoidance. *Crocker and Wife v. Clements' Adm'r*, 23 Ala. 296.

52. When an answer is thus used as evidence, it is not conclusive, but is to be treated like the testimony of any other witness, and is to prevail when not outweighed, in whole or in part, by other testimony; and, although the party offering it will not be allowed to impeach the general reputation of the respondent, yet he will not be precluded from proving the truth of any particular fact in direct contradiction of the answer, although such evidence may have the collateral effect of showing that the respondent is unworthy of belief. *Wilson v. Maria*, 21 Ala. 359.

2. *For or against Co-Defendant.*

53. Where two defendants, who are neither partners nor privies, are charged to be jointly concerned in the perpetration of a fraud, the answer of one cannot be read as evidence against the other. *May v. Barnard*, 20 Ala. 200.

54. The answer of one defendant cannot be used as evidence against the others, in stating an account before the master; but if the other answers and proof in the cause show a greater balance against them, than the account as stated on the basis furnished by the answer, it is error without injury. *Halstead v. Shepard*, 23 Ala. 558.

APPEAL.

See ERROR AND APPEAL.

ATTACHMENT.

I. WHEN ATTACHMENT LIES.

1. *Under Act of* 1846.
2. *For Contempt.*

II. PLEADING AND PRACTICE.

1. *Under Act of* 1846.
2. *In cases of Contempt.*

I. WHEN ATTACHMENT LIES.

1. *Under Act of* 1846.

1. The act of February 5, 1846, giving attachments in chancery, is remedial, and should receive a liberal construction; its object was, to enable the plaintiff, without first reducing his debt to judgment, to subject to its satisfaction whatever might be attached at law, and also money and effects of the debtor, in the hands of third persons, from their nature not liable to seizure. *Flake & Freeman v. Day & Co.*, 22 Ala. 132.

2. Where the debtor's property has been purchased by a third person, at a price less than its real value, with intent to hinder, delay and defraud creditors, and is afterwars resold by him, the proceeds of sale may be attached in his hands under this statute. *Ib.*

3. An attachment also lies, under this statute, against husband and wife, non-residents, to subject the wife's separate estate, secured by antenuptial contract, to the satisfaction of a debt contracted by her *dum sola*. *Crocker and Wife v. Clements' Adm'r*, 23 Ala. 296.

4. Although the allegations of the bill may be sufficient to bring the case within the statute; yet, if the complainant fails to comply with its requisitions, as to making affidavit and giving bond, his bill cannot be sustained under the statute. *McGown v. Sprague*, 23 Ala. 524; *Kirksey v. Fike*, 27 Ala. 383.

5. The note-holders of a foreign banking corporation, which has suspended payment and become insolvent, may proceed under this statute against the bank, where it has property and choses in action in this State; and if the bill further alleges, that the president is the principal stockholder and non-resident, and that the notes were issued and put in circulation by him in this State, it is also well filed against him. *Bank of St. Mary's v. St. John, Powers & Co.*, 25 Ala. 566.

6. Stock in a plank-road company may be subjected by attachment under this statute. *Ib.*

7. The jurisdiction of the court is not limited to the condemnation of the property attached: if its jurisdiction has once rightfully attached, the court may render it effectual to the complainant's relief, by sending out its process, upon a proper application, or widening the sphere of its action, so as to embrace and subject property enough to satisfy the debt. *Shearer v. Loftin*, 26 Ala. 703.

2. *For Contempt.*

8. Under the Code, (§§ 561, 3008–11,) a chancellor has power to issue an attachment for contempt of court, against any party to a cause who refuses obedience to his order. *Ex parte Walker*, 25 Ala. 81.

II. PLEADING AND PRACTICE.

1. *Under Act of* 1846.

9. The plaintiff must substantially comply with the requisitions of the statute, in making affidavit as to the amount of his debt, and giving bond as in attachment cases at law. *McGown v. Sprague*, 23 Ala. 524; *Kirksey v. Fike*, 27 Ala. 383.

10. The affidavit may be made by an agent or attorney. *Flake & Freeman v. Day & Co.*, 22 Ala. 132.

11. Where the legal and equitable remedies by attachment are concurrent, the statute of limitations is the same in both forums. *Crocker and Wife v. Clements' Adm'r*, 23 Ala. 296.

12. When the attachment is sued out on the ground of the debtor's non-residence, he cannot controvert the fact of his non-residence. *Bank of St. Mary's v. St. John, Powers & Co.*, 25 Ala. 566.

2. *In cases of Contempt.*

13. Where the refractory party is in court, and has personal notice of the order with which he refuses to comply, it is not necessary that he should be served with a writ of execution of the decretal order, nor with notice that a motion will be made for an attachment against him. *Ex parte Walker*, 25 Ala. 81.

14. It is not a valid objection to the order for the issue of an attachment, that it directs the imprisonment of

the refractory party until he complies with the violated decretal order, directing him to pay over certain moneys in his hands to a receiver, and also gives bond to appear at the next term and answer for his contempt. *Ib.*

15. Nor can the defendant claim, as a matter of right, that he should be allowed to give bond for the forthcoming of the money, before the order for an attachment is made: that is a matter to be addressed to the sound discretion of the chancellor, who may order the attachment without it. *Ib.*

AWARD.

See SPECIFIC PERFORMANCE.

BANKS.

1. The note-holders of a foreign banking corporation, which has suspended payment and become insolvent, may, without first obtaining a judgment at law, proceed in equity against the bank, its directors, stockholders, and agents; charging them with fraud and misapplication of the assets, and seeking a discovery and account. *Bank of St. Mary's v. St. John, Powers & Co.*, 25 Ala. 566.

2. Such a bill may be maintained under the general powers and jurisdiction of the court, which regards the capital stock and assets of the company as a trust fund for the payment of its creditors, and its directors, stockholders and agents as trustees. *Ib.*

3. The bill may also be sustained, as against the bank, under the attachment law of 1846, if it is properly verified by affidavit, and alleges that the bank has property and choses in action in this State; and equally against the president, if it alleges that he is a non-resident and stockholder, and that the notes were issued and put in circulation by him in this State. *Ib.*

4. If the president of the bank, in such case, is required by its charter to be a resident of the State in which it is located, he cannot be heard to deny the character in which he held himself out to the world, nor aver that he was disqualified to hold the office by reason of his residence. *Ib.*

5. The surrender of the notes to an agent of the bank, and the acceptance from him of his draft on a third person, are but the substitution of one security for another, and do not extinguish the original liability on the notes, unless the draft was drawn in good faith, and was accepted as an absolute payment of the notes; and even if it was so accepted, through the fraud of the agent, the fraud would prevent it from so operating. *Ib.*

6. An officer or stockholder of a foreign bank, who issues and puts its notes in circulation in this State, is individually liable for their payment. *Ib.*

7. If a bank allows its stockholders to withdraw its funds to the amount of their subscriptions, and to use them without security in their private business, such conduct is a fraud on its creditors, which renders the directors liable in equity for the amount so withdrawn, and each agent who participated in the fraud individually responsible for the amount traced to his hands, as well as for all profits from its use. *Ib.*

8. If a bank, on the eve of insolvency, having notes in circulation which it cannot redeem, and a large claim on a solvent stockholder for money lent, extends his debt, by taking his notes, at two and three years, with its president as sole surety, this is a fraud on its creditors, which entitles them to proceed in equity directly against such debtor, without a judgment at law or process of garnishment. *Ib.*

9. Where the defendants are held liable on the original notes held by the complainant, they are only liable for the amount of the notes and interest thereon, and not for statutory damages on the substituted draft which was protested for non-payment. *Ib.*

BANKRUPTS.

1. Although, as a general rule, to enable the creditor of a bankrupt to maintain a suit in equity for the purpose of subjecting to the satisfaction

of his debt property belonging to the bankrupt, he must allege some collusion between the assignee and bankrupt, or that the assignee refuses to bring suit; yet, where the assignee has neglected, for more than five years, to institute proceedings for the condemnation of the bankrupt's interest in certain trust property, which was not surrendered in his schedule, and in the meantime a creditor has ferreted out that interest, and has obtained a decree, after a protracted litigation, subjecting it to the satisfaction of his debt, the assignee will be presumed to have abandoned his claim. *Rugely & Harrison v. Robinson*, 19 Ala. 404.

2. To such a bill the other creditors of the bankrupt are not necessary parties. *Ib.*

3. The State courts have jurisdiction in such cases, and will apply to the bankrupt act the construction placed on it by the Federal courts. *Ib.*

4. In such case, neither the bankrupt himself, nor the other defendants to the bill, can take advantage of the discharge in bankruptcy as a bar or defense to the suit. *Ib.*

5. An allegation in the bill, that the bankrupt's failure to include in his schedule his interest in such trust property "amounted in law" to a fraud which should vacate his discharge, is not equivalent to a charge of fraud or willful concealment. *Ib.*

6. The bankrupt's failure to include in his schedule his interest in certain trust property, which was bequeathed by his father to a trustee for the use and benefit of him and his family, but with a stipulation that it should not be subject to the payment of his debts, does not render void his discharge in bankruptcy, although he has such interest in the property as may be separated and subjected by his creditors. *Ib.*

BASTARDY.

1. A suit cannot be maintained by an infant bastard, against its putative father, who is alleged to have removed from the State to avoid the statutory liability for its support, to have provision made for its maintenance out of property left by the father. *Simmons v. Bull*, 21 Ala. 501.

BILLS.

I. FORM, AND GENERAL SUFFICIENCY.

1. *Allegations.*
2. *Prayer.*

II. CROSS BILL.
III. REVIEW, BILL OF.
IV. REVIVOR, BILL OF.
V. SUPPLEMENTAL BILL.

Amended Bills, see AMENDMENT, I.
Creditors' Bill, see CREDITORS' BILL.
Discovery, Bill of, see DISCOVERY.
Interpleader, see INTERPLEADER.
Quia Timet, see QUIA TIMET.

I. FORM, AND GENERAL SUFFICIENCY.

1. *Allegations.*

1. When the equity of a bill rests upon the existence of a particular fact, that fact must be clearly and distinctly alleged: an allegation that complainant "is advised and believes," without more, is not sufficient. *Jones v. Cowles*, 26 Ala. 612; *Read v. Walker*, 18 Ala. 332.

2. Although the rule in equity, as to form in pleadings, is not as stringent as at law, yet the substance of the rules is the same in both courts; and it is a principle of universal application in pleading, founded in reason and good sense, that the plaintiff's title should be stated with sufficient certainty and clearness to enable the court to see plainly that he has such a right as warrants its interference, and to inform the defendant distinctly of the nature of the case which he is called on to defend. *Cockrell and Wife v. Gurley*, 26 Ala. 405.

3. It is not necessary to aver what the law implies from the facts stated. *Ozley v. Ikelheimer*, 26 Ala. 332.

4. Where the substantial allegations of the bill, if proved, entitle the complainant to the relief prayed, uncertainty in its immaterial allegations

constitutes no ground of demurrer. *Caple v. McCollum*, 27 Ala. 461.

5. When a letter is annexed as an exhibit to a bill, and prayed to be taken as part thereof, its statements, unless qualified or contradicted, become the statements of the bill. *Minter and Gayle v. Branch Bank at Mobile*, 23 Ala. 762.

6. A party asking equity, must offer to do equity. *Johnson v. Culbreath*, 19 Ala. 348; *Tucker v. Holley*, 20 Ala. 426; *Gunn v. Brantley*, 21 Ala. 633; *Montgomery v. Givhan*, 24 Ala. 568; *Martin's Heirs v. Tenison*, 26 Ala. 738.

7. But if no objection is raised in the primary court to a formal defect in the bill on this account, the objection is not available on error. *Johnson v. Culbreath*, 19 Ala. 348.

8. A bill, filed by a creditor who has a lien upon two funds, seeking to condemn one of them to the satisfaction of his debt, is not demurrable because it fails to show what disposition has been made of the other. *Chapman v. Hamilton*, 19 Ala. 121.

9. A creditors' bill, filed by the beneficiaries for the settlement of a deed of trust, which required that the secured creditors should assent to its provisions within six months, must allege that the complainants assented to the deed; but an averment, that they "have consented to the provisions of said deed," is sufficient. *Colgin v. Redman*, 20 Ala. 650.

10. A bill for discovery must allege that the facts, as to which a discovery is sought, cannot be proved without the defendant's answer. *Horton v. Moseley*, 17 Ala. 794; *Perrine v. Carlisle*, 19 Ala. 686; *Crothers v. Lee*, 29 Ala. 337.

11. It must state these facts with sufficient certainty, and allege that the defendant is capable of making the discovery sought. *Horton v. Moseley*, 17 Ala. 794.

12. A bill for divorce, on the ground of adultery, must allege the name of the person with whom the adultery was committed, or that the name is unknown to the complainant; but the failure to raise an objection on this account in the answer, is a waiver of it. *Holston v. Holston*, 23 Ala. 777.

13. Where a divorce is sought on the ground of abandonment, an averment that the husband drove his wife out of his house, and that he is living in adultery with another woman, is equivalent to an allegation of abandonment. *Morris v. Morris*, 20 Ala. 168.

14. Where a divorce is sought on the ground of cruelty, the facts constituting the cruelty must be particularly alleged; but when the bill charges the defendant's habitual intoxication, and his violence resulting therefrom, as evidenced by his threats and abuse—"that he used the most gross and abusive language towards complainant, cursing her, and compelling her through fear of his violence to seek safety in quitting his presence,—that he made threats of personal violence, such as would endanger her personal safety, as well as her life and limbs;" and specifies particular instances of his misconduct, it is sufficiently certain and definite. *Hughes v. Hughes*, 19 Ala. 307.

15. Every act of cruelty complained of need not be alleged in the bill with circumstantial particularity: one or two specifications will be sufficient, and others may be proved under the general charge. *Reese v. Reese*, 23 Ala. 785.

16. An allegation, in a bill for divorce filed by the wife, "that she has just cause to fear, and in fact does fear, that upon the filing and service of this bill the defendant will remove or dispose of his whole property," without stating the facts which cause her fears, does not authorize an injunction to prevent the removal of the defendant's property. *Norris v. Norris*, 27 Ala. 519.

17. In a bill filed by a remainderman to protect his interest in certain slaves, an allegation that one of the defendants seized upon and took possession of the slaves, from and out of the possession of the tenant for life; that he has ever since exercised and claims to exercise full control over them, and has placed them in the possession of his co-defendant, who still retains them,—does not warrant the presumption that he took them as a trespasser, or that he holds them otherwise than in subordination to the true title. *Land and Wife v. Cowan*, 19 Ala. 297.

18. A bill for redemption, filed by the judgment debtor or his assignee, must allege that possession was delivered to the purchaser without suit, or show some valid excuse for the failure. *Paulling v. Meade*, 23 Ala. 505; *Sandford v. Ochtalomi*, 23 Ala. 669.

19. An allegation in these words: "Your orator further shows, that at said sale of said lands, S. C., well knowing, as was the fact, that the same were sold as the property of your orator, became the purchaser thereof, at and for the sum of about $900; that said S., immediately thereafter, with the consent of your orator, took possession of the lands aforesaid, and received from the sheriff a deed therefor in due form,"—is a sufficient averment of the delivery of possession without suit. *Bondurant v. Sibley's Heirs*, 29 Ala. 570.

20. When a judgment creditor files a bill to redeem, he must allege a tender before suit brought. *Paulling v. Meade*, 23 Ala. 505; *Spoor v. Phillips*, 27 Ala. 193. (Overruling *Freeman & Warren v. Jordan*, 17 Ala. 500, as to principle asserted in first head-note.)

21. Or a valid and sufficient excuse for his failure to make such tender, without fault or neglect on his own part. *Spoor v. Phillips*, 27 Ala. 193.

22. If the complainant's judgment was confessed, and he alleges that he was a *bona-fide* creditor at the time, and exhibits with his bill an exemplification of the record, showing that the judgment was founded on a note bearing date prior to the defendant's purchase, the allegation is sufficient, without setting out the particulars of the consideration of the note. *Couthway v. Berghaus*, 25 Ala. 393.

23. In a bill for the rescission of a contract, filed by a purchaser who has a present right to the title, a general allegation, that the defendant has no title to the land, that it is encumbered with the dower-right of the wife of one D., its former owner, and that it will be impossible for the defendant to procure a title for many years to come, makes out at least a *prima-facie* case of equitable cognizance, and is sufficient to require an answer. *Read v. Walker*, 18 Ala. 323.

24. Under a bill for the specific performance of a parol contract, the court inclined to the opinion, that a specific performance might be refused, on the ground that the contract, as alleged, was too vague and uncertain; but the bill was dismissed on other grounds. *Sims v. McEwen's Adm'r*, 27 Ala. 184.

25. A bill, seeking to enforce the execution of a trust, in the name and for the benefit of a mere volunteer, must allege a declaration of the trust in his favor. *Crompton v. Vasser*, 19 Ala. 259.

26. An allegation in these words: "Your orator further showeth, that said defendant pretends that he has heretofore sold said property, as trustee as aforesaid, and purchased the same at said sale on his own individual account; but your orator insists, that if such is the case, which he denies, said defendant bought the same at a grossly inadequate price, and it would be contrary to equity and good conscience to maintain the validity of the sale,"—is not equivalent to an averment of the fact that a sale was made. *Charles v. Dubose*, 29 Ala. 367.

27. A bill, filed by the *cestui que trust*, seeking to set aside a sale at which the trustee himself became the purchaser, must offer to do what is equitable, by the repayment to the trustee of the amount actually expended by him; but if it alleges that the rents and profits received by the trustee are sufficient to reimburse him, and offers, if they are not sufficient, "to abide the decree of the court," this is sufficient. *Gunn v. Brantley*, 21 Ala. 633.

28. A bill, filed by the heirs-at-law of a decedent, seeking to hold the defendant a trustee for their benefit of the legal title to a certain tract of land, to which (they averred) their ancestor had a pre-emption right at the time of his death, and to which the defendant, by fraudulently colluding with one of the heirs, afterwards obtained a patent,—held demurrable, because it did not allege, 1st, that the time limited by acts of congress for their ancestor to make his entry had not expired when the defendant entered the land; 2d, that complainants were able and willing to enter the land, if it had not been entered by the defendant, or that they were prevented from doing so by his entry; and, 3d, a tender of

the money expended by the defendant in making the entry, or a willingness and readiness to repay it. *Martin's Heirs v. Tenison*, 26 Ala. 738.

29. A bill, filed to protect complainant's remainder in certain slaves, alleging that her father died in Kentucky in 1825, leaving a widow and only child; that letters of administration were granted on his estate, "and some time afterwards dower was allotted and assigned to the said widow in her husband's estate, and among the slaves so allotted was a negro woman," who was particularly described in the bill, and was alleged to be the mother of the other slaves in whom the remainder was claimed; and "that by the statute laws of Kentucky, at the time of the decedent's death, and the allotment of dower to the widow as aforesaid, she was only entitled to a life interest in said slaves, and the estate in remainder vested in complainant,"—held fatally defective, in not setting out the proceedings by which the widow's dower was assigned, and the statute which created the alleged remainder. *Cockrell and Wife v. Gurley*, 26 Ala. 405.

30. Although, in equity, as at law, a plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's; yet it is not necessary that he should show a good title against all the world, but it is enough that he shows a right to recover against the defendant. *Garrett v. Lyle*, 27 Ala. 586.

31. Relief cannot be granted for matters not alleged in the bill, although they may be apparent from other parts of the pleadings and evidence. *Land and Wife v. Cowan*, 19 Ala. 297; *Paulding v. Lee and Ivey*, 20 Ala. 753; *Sandford v. Ochtalomi*, 23 Ala. 669; *Steele v. Mealing*, 24 Ala. 285; *Spoor v. Phillips*, 27 Ala. 193; *Machem v. Machem*, 28 Ala. 374.

32. Nor can the complainant have a decree upon the case established by the evidence, when it is inconsistent with the allegations of his bill. *Skinner v. Barney*, 19 Ala. 698; *Crompton v. Vasser*, 19 Ala. 259; *Evans v. Battle*, 19 Ala. 398; *Aday v. Echols*, 18 Ala. 353; *Adams v. Garrett*, 22 Ala. 602; *Freeman v. Swan*, 22 Ala. 106; *Flake & Freeman v. Day & Co.*, 22 Ala. 132; *Sims v. McEwen's Adm'r*, 27 Ala. 184; *Williams v. Sturdevant*, 27 Ala. 598; *Charles v. Dubose*, 29 Ala. 367; *Williams v. Barnes*, 28 Ala. 613; *Crothers v. Lee*, 29 Ala. 337; *Lockhart and Wife v. Cameron*, 29 Ala. 355.

2. *Prayer.*

33. As a general rule, interest will not be decreed on a balance, unless it is specially prayed in the bill; but when the interest accrues subsequent to the filing of the bill, it is the practice of the court, upon further directions, to order that the interest be computed, although there is no prayer to that effect. *Godwin v. McGehee*, 19 Ala. 468.

34. The prayer for general relief is sufficient, and entitles the complainant, on final hearing, to such decree as his case may warrant. *Kelly v. Payne*, 18 Ala. 371.

35. Under the general prayer, the complainant may obtain the appropriate relief, although he is mistaken in the special relief prayed. *May v. Lewis*, 22 Ala. 646.

36. Under a bill, filed by the wife, asking the reformation of an antenuptial contract, an injunction against the judgment creditors of her husband, and general relief, if it also appears that the trustee named in the deed has resigned, the court may appoint another in his stead. *Love v. Graham*, 25 Ala. 187.

37. But no relief can be granted, under the general prayer, which is inconsistent with that specifically prayed. *Wiley, Banks & Co. v. Knight*, 27 Ala. 336; *Charles v. Dubose*, 29 Ala. 367.

38. Except when the bill is filed in a double aspect. *Simmons v. Williams*, 27 Ala. 507.

II. CROSS BILL.

39. In cases of specific performance, where the contract set up in the answer and proved is materially different from that alleged in the bill, the defendant may, *it seems*, have a specific performance without filing a cross bill. *Sims v. McEwen's Adm'r*, 27 Ala. 184.

40. Under a bill for partition and

account, filed by two tenants in common against the heirs and administrator of a deceased tenant, who executed the deed under which plaintiffs claim, the defense may be set up by answer, without filing cross bill, that the deed was executed through mistake and misrepresentation as to a material fact, and therefore ought not to be sustained in equity. *Trippe v. Trippe*, 29 Ala. 637.

41. Under a bill, filed by a purchaser, for the rescission of a contract, where the facts only justify a decree allowing him a credit on the unpaid notes for the purchase-money, the defendant cannot, without a cross bill, have a decree in his favor for the balance of the unpaid purchase-money. *Gallagher v. Witherington*, 29 Ala. 420.

42. A cross bill, which sets up matter not pertinent to the original bill, and seeks no relief against the original plaintiff, is without equity. *Andrews v. Hobson's Adm'r*, 23 Ala. 219.

43. A cross bill cannot be sustained, when it is inconsistent with the answer; nor when the original bill is without equity. *Dill v. Shahan*, 25 Ala. 694.

44. In a contest among the several creditors of an insolvent partnership, for the marshaling of its assets and the settlement of their respective liens, a creditor, who was not a party to the original bill, may be brought in as a defendant to a cross bill. *Coster's Executors v. Bank of Georgia*, 24 Ala. 37.

III. Review, Bill of.

45. A bill of review lies to bring forward new matter, which has arisen or been discovered since the publication of testimony in the original suit. *Cochran v. Rison*, 20 Ala. 463.

46. An agreement, entered into between the plaintiff and one of the defendants, after the publication of testimony in the original suit, whereby the former, for a valuable consideration paid by said defendant, agrees to proceed no further against him in the original suit, and reserves his right to proceed against the other defendant, is good matter for a bill of review, and entitles said defendant to relief against the original decree. *Ib.*

47. The objection that the original decree has not been obeyed or performed, when the bill of review seeks to annul or reverse it, cannot be raised by general demurrer: such objection goes only to the propriety of filing the bill, and not to the equity of it when filed. *Ib.*

48. The chancellor may direct the original decree to be stayed, in such manner as he may deem advisable; or he may allow a bill of review to be filed, and let the complainant proceed with the execution of the original decree. *Ib.*

IV. Revivor, Bill of.

49. A bill for the settlement and distribution of an estate must, as a general rule, be revived against the personal representative of a distributee, who dies after the commencement of the suit; and a failure so to revive will be error, although the objection is not raised in the primary court. *Frowner v. Johnson*, 20 Ala. 477.

50. In a suit for the foreclosure of a mortgage, if the mortgagor dies before the rendition of the final decree, and his will is admitted to probate by the court having jurisdiction, his heirs-at-law, as well as his personal representatives and devisees, are proper parties to the bill of revivor, since they have the statutory right to impeach the probate of the will, by bill in chancery, at any time within five years. *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

51. Where a decree has been rendered against the corporate authorities of a city, for the abatement of a public nuisance, on an information by sundry citizens in the name of the State, any citizen may interfere as relator, by a proceeding in the nature of a bill of revivor, and call on the court to carry the decree into execution. *The State, ex rel. Waring, v. Mayor &c. of Mobile*, 24 Ala. 701.

52. If the statute requiring the revival of a judgment by *sci. fa.*, where no execution was issued within a year and a day after its rendition, applies to a decree in chancery for the abatement of a public nuisance, (as to which, *quære?*) its only effect is, to compel the party who seeks to enforce

the decree to proceed by *sci. fa.* or bill of revivor. *Ib.*

53. There are cases in which the court will refuse to enforce the execution of an unjust decree, on an original bill filed for that purpose; but where the proceeding is in the nature of a bill of revivor, to enforce the execution of a decree for the abatement of a public nuisance, no objection can be raised to the merits of the decree, *Ib.*

V. SUPPLEMENTAL BILL.

54. A supplemental bill is the proper mode of bringing to the view of the court matter which has arisen since the filing of the original bill. *Collins v. Lavenberg & Co.*, 19 Ala. 682; *Barringer v. Burke*, 21 Ala. 765.

55. If the complainant is not entitled to relief under the original bill, the matter of the supplemental bill cannot cure the defect. *Land and. Wife v. Cowan*, 19 Ala. 297.

56. But, although a supplemental bill is a continuation of the original bill, and cannot support a bad title by bringing forward a good one subsequently acquired; yet, a supplemental bill may bring forward matter which would vary the relief to which the complainant is entitled, provided the subject-matter and title be the same in both bills. *Ramey v. Green*, 18 Ala. 771.

CANCELLATION.

1. A promissory note and a bill of sale of a slave, parts of the same transaction, purporting to have been executed on Saturday, but really executed on Sunday, decreed to be canceled, under a bill asking to have the transaction declared a mortgage. *Smith v. Pearson*, 24 Ala. 355.

CHARITIES.

1. The chancery court, in this State, has jurisdiction over bequests to charitable uses, by virtue of its original, common-law powers, without claiming prerogative powers, or invoking the aid of the statute 43d Eliz. *Carter and Wife v. Balfour's Adm'r*, 19 Ala. 814.

2. Whether the statute 43d Eliz. is in force here *quære? Ib.*

3. The doctrine of *cypres*, as applied to bequests to charitable uses, is not recognized in this State. *Ib.*

4. A bequest to the "Baptist Societies for Foreign and Domestic Missions, and the American and Foreign Bible Society," is valid, and sufficiently specific. If societies, organized and known by those names at the time of the testator's death, can be found, whether incorporated or not, they will take the legacy; otherwise, it must be considered and disposed of as a lapsed legacy. *Ib.*

CHAMPERTY.

1. Equity will not enforce a champertous contract. *Poe v. Davis*, 29 Ala. 676.

As to the construction and validity of champertous contracts, see title CONTRACTS, in PART IV.

CODE OF ALABAMA.

I. CONSTRUCTION.

1. § 602. (*Jurisdiction of Chancery Courts.*)
2. §§ 622, 2986. (*Appointment of Receivers.*)
3. §§ 1961, 1966. (*Divorce.*)
4. § 2131. (*Suits by and against Husband and Wife.*)
5. §§ 3008–11, 561. (*Contempts.*)
6. §§ 3016–20, 3041. (*Appeals.*)
7. § 3034. (*Judgment in Error.*)

II. CONSTITUTIONALITY. *See same title in* PART IV.

I. CONSTRUCTION.

1. § 602. (*Jurisdiction of Chancery Courts.*)

1. Under this statute, which defines the powers and jurisdiction of the

chancery courts in this State, the first subdivision, including all civil causes in which a plain and adequate remedy is not provided in the other judicial tribunals, is but the adoption of the pre-existing rule; the second and third subdivisions, including cases founded on a gaming consideration and cases to subject the equitable title to real estate to the payment of debts, are modifications, by way of enlargement, of the system of equity jurisprudence and jurisdiction which had been established in England prior to the American revolution; and the fourth subdivision, including "such other cases as may be provided for by law," embraces all cases which, at and before the adoption of the Code, were known to be within the jurisdiction of courts of equity, and which are not embraced in the first three subdivisions. *Waldron, Isley & Co. v. Simmons*, 28 Ala. 629.

2. A court of equity had original jurisdiction to enforce the payment of a partnership debt out of the estate of a deceased partner, and that jurisdiction is not taken away by any provision of the Code. *Ib.*

2. §§ 622, 2986. (*Appointment of Receivers.*)

3. The chancellor alone has power to appoint a receiver, and cannot delegate that power to the register. *Ex parte Smith*, 23 Ala. 94.

4. An interlocutory order, directing "that a receiver be appointed to take possession of the defendant's estate,"—"that he and the parties have leave to apply to the court for any other or further directions as to him may be necessary, and that it be referred to the register to appoint a fit and proper person to be the receiver aforesaid,—the person so to be appointed first giving bond," &c.; and ordering the defendant to deliver up his estate to the person appointed, is a nullity, and the supreme court will interfere by prohibition to revoke it. (CHILTON, C. J., and GIBBONS, J., *dissenting.*) *Ib.*

3. §§ 1961, 1966. (*Divorce.*)

5. Adultery, as the term is used in the statute making it a ground of divorce, may be committed with a slave. *Mosser v. Mosser*, 29 Ala. 313.

6. The statute does not make the confessions of the parties inadmissible as evidence, but only declares them insufficient, when they constitute the only evidence of the alleged cause of divorce. *King v. King*, 28 Ala. 315.

4. § 2131. (*Suits by and against Husband and Wife.*)

7. The statute only applies to separate estates created by statute, and not to those created by the act of the parties. *Gerald and Wife v. McKenzie*, 27 Ala. 166; *Friend v. Oliver*, 27 Ala. 532; *Willis v. Cadenhead*, 28 Ala. 472; *Pickens and Wife v. Oliver*, 29 Ala. 528.

5. §§ 3008–11, 561. (*Contempts.*)

8. A chancellor has power, under our statutes, to issue an attachment for contempt of court, against any party to a cause who refuses obedience to his orders. *Ex parte Walker*, 25 Ala. 81.

6. §§ 3016–20, 3041. (*Appeals.*)

9. Sections 3019–20 refer only to appeals from final judgmments or decrees, and not from those which are merely interlocutory. *Powell v. Central Plank-Road Co.*, 24 Ala. 441.

10. The register has power to grant an appeal from an interlocutory order of the chancellor, dissolving an injunction in vacation. (LIGON, J., *dissenting.*) *Ib.*

11. When an appeal is taken by "the solicitor of the complainants," some of whom are infants suing by their next friends, the appeal is not valid so far as the infants are concerned; but, as to the adult complainants, the authority of their solicitor will be presumed. *Riddle v. Hanna*, 25 Ala. 484.

12. A simple acknowledgment in writing is sufficient security for the costs, unless the appeal is intended to operate as a *supersedeas*. *Ib.*

13. A joinder in error is a waiver of the appeal, bond, or security for costs, and of all defects therein; and a motion to dismiss the appeal afterwards comes too late. (RICE, C. J., *dissenting.*) *Thompson v. Lea*, 28 Ala. 453.

7. § 3034. (*Judgment in Error.*)

14. When the chancellor dismisses a bill, on final hearing, without a decision on the merits, and his decree is reversed on error, the appellate court will remand the cause. *Byrd v. McDaniel*, 26 Ala. 582; *Bondurant v. Sibley's Heirs*, 29 Ala. 570.

15. In a divorce case, the chancellor's decree being reversed on error, and the complainant held entitled to a divorce, the cause will nevertheless be remanded, because it is the duty of the register to make out and transmit the record to the speaker of the house of representatives. *Hanberry v. Hanberry*, 29 Ala. 719; *Wiley v. Wiley*, 27 Ala. 704.

COMPENSATION.

See SPECIFIC PERFORMANCE.

CONTEMPTS.

I. ATTACHMENTS.

1. Under the Code, (§§ 561, 3008–11,) a chancellor has power to issue an attachment for contempt of court, against any party to a cause who refuses obedience to his orders. *Ex parte Walker*, 25 Ala. 81.

2. Where the refractory party is in court, and has personal notice of the order with which he refuses to comply, it is not necessary that he should be served with a writ of execution of the decretal order, nor with notice that a motion will be made for an attachment against him. *Ib.*

3. The order for the attachment may direct the imprisonment of the refractory party until he complies with the violated decree, requiring him to pay over certain moneys in his hands to a receiver, and also gives bond to appear at the next term and answer for his contempt. *Ib.*

4. Nor can the party claim, as a matter of right, that he should be allowed to give bond for the forthcoming of the money before the order for an attachment is made: that is a matter to be addressed to the sound discretion of the chancellor, who may order the attachment without it. *Ib.*

II. DECREES PRO CONFESSO.

5. A decree *pro confesso* cannot be rendered against a defendant who has not been served with process. *Hurter v. Robbins*, 21 Ala. 585.

6. Where the record fails to show that publication was made against a non-resident defendant as required by the 40th rule of chancery practice, a mere statement in the decree *pro confesso*, that publication was made "in the terms of the law," is not sufficient to sustain the decree. *Hanson & Moore v. Patterson*, 17 Ala. 738.

7. Where a commission is issued, after an amended bill has been filed, to take the answer of a non-resident defendant then in default; and the answer is general, not specifying whether it is to the original, or to the amended bill, or to both, it will be intended that the answer is to both bills, and the previous default must consequently be considered as cured. *Ib.*

8. After a decree *pro confesso* has been entered against a defendant, he has no right, except by consent or by leave of court, to file an answer after the master has made his report under an order of reference. *Hurter v. Robbins*, 21 Ala. 585.

9. Nor is he entitled to notice of the filing of interrogatories. *Attkisson v. Attkisson*, 17 Ala. 256; *Jordan v. Jordan*, 17 Ala. 466.

10. Nor is it necessary that the interrogatories should remain on file ten days prior to the issue of the commission. *Attkisson v. Attkisson*, 17 Ala. 256.

11. A decree *pro confesso* will not be set aside to allow a plea to be filed. *Bank of St. Mary's v. St. John, Powers & Co.*, 25 Ala. 566.

12. After an irregular decree *pro confesso* has been entered against a party, his subsequent appearance by solicitor, without objecting to the irregularity, is a waiver of it. *Ib.*

CONTRACTS.

1. In the construction of contracts, equity looks rather to the spirit and intention of the parties, than to the words in which it is expressed. *James v. State Bank*, 17 Ala. 69.

2. Equity has no power to change contracts fairly entered into; nor can it, unless under special circumstances, relieve against the consequences of the non-performance of a condition precedent. *Rives v. Toulmin*, 25 Ala. 452.

As to the reformation, rescission, and specific performance of contracts, see those titles respectively.

As to gaming contracts, see that title.

As to usurious contracts, see USURY.

As to other decisions on the law of contracts, see the same title in PART IV.

CONTRIBUTION.

1. The right of contribution among sureties results, not from any implied contract between them, but from an acknowledged principle of natural justice, which requires that those who voluntarily assume a common burden should bear it in equal proportions. *White v. Banks*, 21 Ala. 705; *Tyus v. DeJarnette*, 26 Ala. 280.

2. If a surety obtains indemnity for valuable consideration paid by him, his co-surety cannot, without paying his proportion of the consideration, claim the benefit of the indemnity; and if an offer of security be made to them by their principal, upon condition that they execute a release to them, which offer is accepted by one, and refused by the other, the latter would have the right to demand that the proceeds of such security should be applied to the reduction of the common debt, but could not claim the benefit of it in any other manner; and such payment, if it amounted to his proportion of the common debt, would discharge the former from contribution. *White v. Banks*, 21 Ala. 705.

3. Plaintiffs and defendant being bound as sureties for one S., to whom defendant was indebted, S. proposed to release defendant from his liability as surety, by giving a new note with other sureties, if defendant would give him a sight draft on his commission-merchant for the amount of his indebtedness; or, if he failed to procure defendant's release, that he would then place defendant's notes in the hands of a third person, to protect him alone against his suretyship,—*held*, that plaintiffs' assent to this arrangement was an express waiver of their right to participate in this indemnity. *Tyus v. DeJarnette*, 26 Ala. 280.

4. But a waiver by plaintiffs, in such case, of their legal right to participate in any indemnity or security which defendant might obtain, cannot be inferred from the facts, that they objected to their principal making an assignment for the benefit of his sureties, because it would injure his credit, and agreed that he might procure defendant's release from his suretyship, if the latter would pay the amount of his individual debt; and that defendant then said, in their hearing, that he should take measures to secure himself, if their principal failed to carry out this arrangement for his relief. *Ib.*

5. When parties stand *in equali jure*, with reference to liabilities arising *ex contractu*, equality of burden becomes equity; but this equality may be destroyed by subsequent contract, or by the act of one party in superinducing the loss. *Crayton v. Johnson*, 27 Ala. 503.

6. A party cannot come into equity to enjoin an action at law for contribution, when his bill shows that he has a plain, adequate, and complete remedy at law, and he does not ask a discovery. *Ib.*

7. Where lands are sold under execution against the principal debtor, and purchased by one of his sureties, with money belonging to himself and a co-surety, a third co-surety cannot claim to participate in the benefit of the purchase, as an indemnity against their common liability. *Crompton v. Vasser*, 19 Ala. 259.

8. The general rule, that an administrator, who, with knowledge of the existence of debts against the estate, makes distribution without requiring a refunding bond, cannot enforce con-

tribution from the distributees after payment of these debts,—does not apply, where such distribution is made for the accommodation of the distributees, without a full knowledge of the condition of the estate, and under an honest belief that such demands are unjust, and can be successfully resisted. *Alexander v. Fisher and Wife*, 18 Ala. 374.

9. Distributees, who have voluntarily contributed the respective sums with which they were chargeable by reason of over-advances by the administrator on partial distribution, are not necessary parties to a bill filed by the administrator to enforce contribution from another distributee who refuses to reimburse him. *Ib.*

10. If an administrator, after making distribution of the personal estate, is compelled to pay debts of the intestate to an amount beyond the value of the assets left in his hands, and then sells the lands for a sum fully sufficient to indemnify him, the widow, to whom dower in the lands had been previously allotted, cannot resist a bill filed by the administrator against her, to recover the sum chargeable on her distributive share, on the ground that the proceeds of sale should be applied to the discharge of her liability, and that the heirs are necessary parties before such application can be made. *Ib.*

CORPORATION.

I. ANSWER.
II. CHARTER; AMENDMENT, AND FORFEITURE OF.
III. LIABILITY OF DIRECTORS, AND RIGHTS OF STOCKHOLDERS.

I. ANSWER.

1. The answer of a corporation not being under oath, the same amount of evidence is not required to disprove its denials as in other cases. *State Bank v. Edwards & Walke*, 20 Ala. 512.

2. The answer of a corporation, under its corporate seal only, denying the allegations of the bill, is not sufficient to authorize the dissolution of an injunction. *Griffin v. State Bank*, 17 Ala. 258. (Overruling *Hogan v. Branch Bank at Decatur*, 10 Ala. 485.

II. CHARTER; AMENDMENT, AND FORFEITURE OF.

3. After the charter of a corporation is declared forfeited, it can do no act by which rights can be acquired, nor can it maintain a suit to enforce rights which were acquired during the existence of its charter, unless its power and capacity for that purpose are continued by statute after its corporate existence is ended. *Saltmarsh v. P. & M. Bank*, 17 Ala. 761.

4. An incorporated town retains its corporate capacity until its charter is declared forfeited in a direct judicial proceeding: it cannot be held, in any collateral proceeding, to have forfeited its charter by non-user. *Harris v. Nesbit*, 24 Ala. 398.

5. Where a municipal corporation is purely political in its character, and intended solely for the local government of a city, its charter may be amended, and its name changed, while the corporation itself remains the same. *The State, ex rel. Waring, v. Mayor &c. of Mobile*, 24 Ala. 701.

6. Where a statute does not, in express terms, annul a right or power given to a corporation by a former act, but only confers the same (with additional) rights and powers upon it by a new name, the latter act does not repeal the former. *Ib.*

7. Whether the legislature may, by statute, declare a forfeiture of the charter of an incorporated company without any judicial proceeding, was made a question in this case; but the court waived the consideration of the question as unnecessary, and only cited the authorities. *Mobile and Ohio Railroad Co. v. The State*, 29 Ala. 573.

8. An incorporated company may consent to a forfeiture of its charter, though such consent, *it seems*, can only be given by all the stockholders; and a statute which declares a forfeiture, with the consent of the company, does not impair the obligation of contracts. *Ib.*

III. LIABILITY OF DIRECTORS, AND RIGHTS OF STOCKHOLDERS.

9. The directors of an incorporated company, in whom is reposed by its constitution an enlarged discretion in the management of its business, are responsible to the stockholders only for good faith and reasonable diligence: a mere error of judgment on their part, in compromising a debt due to the company, does not entitle a stockholder to any relief against them in equity. *Smith v. Prattville Manufacturing Co.*, 29 Ala. 503.

10. Although a court of equity will interfere on the application of a stockholder in an incorporated company, and compel the directors to exercise the discretion reposed in them as to the declaration of dividends, if they improperly fail or refuse to exercise it; yet, where the constitution of the company provides that the directors "shall make such dividends, and such only, as in their discretion they may think the true interests of the company will warrant and allow," and it is shown that the directors did act upon the application of the stockholder, and refused to declare a dividend, because they thought the true interests of the company would not warrant it, equity will not control their action, unless they are proved to have been guilty of bad faith, a willful abuse of their discretion, or willful neglect or breach of duty. *Ib.*

COSTS.

1. Full costs will not be decreed to a successful appellant, when the error, for which the decree is reversed, might have been remedied, if the objection had been raised in the primary court. *Frowner v. Johnson*, 20 Ala. 477.

2. Where a bill was filed to enjoin a judgment at law, founded on a gaming consideration, more than seven years after its rendition, and no excuse was shown for the delay, all the costs were imposed on the complainant, although the judgment was enjoined. *Paulding v. Watson and Eidson*, 21 Ala. 279.

3. Under a bill filed by an executor, asking the direction of the court as to the construction of the will and the validity of certain trusts created by it, he was taxed with the costs, "to be allowed him on final settlement out of the estate." *Atwood's Heirs v. Beck*, 21 Ala. 590.

4. Costs cannot be decreed against an executor or administrator, for costs which accrued during the lifetime of his testator or intestate, in a suit to which he was a mere formal party in right of his wife. *Colvin v. Owens*, 22 Ala. 782.

5. The chancellor's decree being reversed on error, and the complainants held entitled to relief against one of the defendants, the costs of the appellate court were apportioned; one half being taxed against the complainants, and the other half against the unsuccessful defendant. *Tyus v. DeJarnette*, 26 Ala. 280.

6. A bill for divorce, filed by the wife, having been dismissed, on the ground that both parties were in fault, the costs were equally divided. *David v. David*, 27 Ala. 222.

7. The chancellor having granted a divorce to the wife, and his decree being reversed on error, on account of the insufficiency of the evidence, the costs of the appellate court were imposed on the next friend of the wife, and the costs of the court below on the husband. *Mosser v. Mosser*, 29 Ala. 313.

8. A bill for the rescission of a contract on the ground of fraud, where the evidence only showed an honest mistake, being dismissed on account of the variance between the allegations and proof, the costs were imposed on the complainant. *Williams v. Sturdevant*, 27 Ala. 598.

9. A bill for the specific performance of a contract being dismissed on error, but without prejudice, on account of a variance between the allegations and proof, the costs were equally divided. *Williams v. Barnes*, 28 Ala. 613.

10. A bill filed by a married woman, to protect her separate estate in certain slaves from the judgment creditors of the grantor, being dismissed on error, but without prejudice, on account of a variance between the allegations and

proof, the costs were imposed on her next friend. *Crabb's Adm'r v. Thomas*, 25 Ala. 212.

11. Where both parties assigned error, and each succeeded on some of his assignments, the costs of the appellate court were divided, and the costs of the primary court followed the decree of the chancellor. *Love v. Graham*, 25 Ala. 187.

12. On the trial of an issue at law, to test the validity of a will, judgment for the costs being erroneously rendered against the heir, and also certified to the chancellor, by whom they were decreed against the heir, the error in the judgment works no injury. *Dabbs v. Dabbs*, 27 Ala. 646.

13. The defendant having offered, before the filing of the bill, all the relief which the complainant obtained under the decree, the entire costs were imposed on the complainant. *Gallagher v. Witherington*, 29 Ala. 420.

14. When an execution against the unsuccessful party in the appellate court is returned "no property," and execution against the successful party thereupon issued, for the costs occasioned by himself, and returned "satisfied," an *alias* may be subsequently issued against the unsuccessful party. *Montgomery v. Montgomery*, 20 Ala. 350.

CREDITORS' BILL.

I. WHEN IT LIES, AND WHAT MAY BE SUBJECTED BY IT.
II. PLEADINGS, AND PRACTICE.
III. DECREE.

I. WHEN IT LIES, AND WHAT MAY BE SUBJECTED BY IT.

1. A simple-contract creditor, without a lien, cannot come into equity for the collection of his debt. *Turney's Adm'r v. Morrow*, 26 Ala. 339.

2. The general rule is, that to entitle a creditor to the assistance of chancery upon an allegation of fraud in his debtor, he must stand as a creditor with a lien, or must have exhausted his legal remedies; but this rule does not apply to the administration of estates, in relation to which courts of chancery have jurisdiction, by virtue of their original powers, in the direction and control of executors and administrators, in decreeing distribution of assets, and in protecting the rights of creditors generally. *Pharis v. Leachman*, 20 Ala. 662.

3. Nor does the rule apply, where a creditor seeks to charge his debtor's fraudulent grantee as executor *de son tort*, and to obtain satisfaction of his debt out of property which the defendant, being bound by the fraud of the decedent, cannot administer as the rightful representative. *Watts v. Gayle & Bower*, 20 Ala. 817.

4. The note-holders of a foreign banking corporation, which has suspended payment and become insolvent, may, without first obtaining a judgment at law, proceed in equity against the bank, its directors, stockholders, and agents; charging them with fraud and misapplication of the assets, and seeking a discovery and account. *Bank of St. Mary's v. St. John, Powers & Co.*, 25 Ala. 566.

5. If a bank, on the eve of insolvency, having notes out which it cannot redeem, and a large claim on a solvent stockholder for money lent, extends his debt, by taking his notes, at two and three years, with its president as sole surety,—this is a fraud on its creditors, which entitles them to proceed in equity directly against such debtor, without a judgment at law or process of garnishment. *Ib.*

6. A ward may come into equity, against the heirs and personal representatives of a deceased surety on his guardian's bond, to enforce satisfaction of a decree against the guardian, obtained after the death and distribution of the estate of such surety, on which an execution has been issued and returned "no property;" and if the surviving surety is insolvent, it is not necessary that the legal remedy against him should be first exhausted. *Moore v. Wallis*, 18 Ala. 458.

7. The equitable remedy against a married woman, to subject her separate estate to the payment of debts contracted by her jointly with her husband, is independent of the legal remedy against the husband, and may

be resorted to without first exhausting such legal remedy. *Bradford and Wife v. Greenway, Henry & Smith*, 17 Ala. 797.

8. Where a husband conveyed his entire property, consisting of slaves and other personalty, to a trustee, in trust, after the payment of all the debts which he then owed, "for the sole and exclusive use, benefit, maintenance and support of his wife and children, free from all debts and liabilities afterwards to be contracted by himself, to be held, used and enjoyed, without division or distribution, until his death; and after his death the said estate to vest absolutely, discharged from the trust, in his said wife and children, in equal parts, share and share alike;" and a creditor filed a bill against the trustee and beneficiaries, to enforce the collection of a note executed by the wife for necessaries furnished to her and her children,—*held*, that the *corpus* of the trust property could not be sold, during the life of the husband, for the satisfaction of the debt, but the wife's share of the profits might be separated and subjected; and that the property could not be hired out for the purpose of raising a fund, since this would violate the rights of the children. *Collins v. Lavenberg & Co.*, 19 Ala. 682.

9. Where a judgment creditor of one E. T. R. sought to subject his debtor's interest in certain slaves, which had been bequeathed to W. R. upon the following trusts: "To have and to hold the same in trust for the benefit of E. T. R., but not to be subject to the payment of any debt that he may owe, nor shall the rents and profits of the land or the hire of the slaves be applied for the same object, but the same shall be held for the use and benefit of the said E. T R. and his family, during the term of his natural life; and from and after his death, to the use of such persons as the same may be devised and bequeathed by the said E. T. R in his will; and in the event no will shall be made, then to the heirs-at-law of the said E. T. R.;" and proved that the testator, after making his will, had verbally requested W. R. to give E. T. R. a certain warehouse and ten acres of land,—that W. R. afterwards refused to comply with this request, but permitted E. T. R. to rent out the property and receive the rent for several years; that one of the tenants executed his note for the rent, payable to W. R., together with a mortgage on two slaves as security; that the slaves were sold under the mortgage, and bought in by W. R., who afterwards delivered them to E. T. R.; and that E. T. R. purchased three negroes from W. R., which were to be paid for out of the trust estate, but the purchase-money had not been paid,—*held*, that the debtor had such an interest, in that portion of the property from the employment of which a revenue was to be derived, as might be separated and subjected to the payment of his debts; that the three negroes purchased from W. R. were properly taken into the estimate in stating the account; that the legal title to the slaves purchased under the mortgage did not vest in the debtor until the delivery to him, and until that time he had not such an interest in them as could be subjected by his creditors. *Rugely & Harrison v. Robinson*, 19 Ala. 404.

10. A bequest to a trustee, "for the use and benefit" of the testator's son Thomas, contained these provisions: The property was to be held, used and managed by the trustee, who was also empowered, with the assent of said Thomas, to sell the slaves, and to re-invest the proceeds of sale in other property to be held on the same trusts. The trustee was expressly forbidden to pay any of the debts of the said Thomas, and was directed "to pay over to him, from time to time, such part of the income of said trust estate (or the whole thereof, if required) as may be necessary for the comfortable and reasonable support of the said Thomas, and of his wife and children, should he have any,—the same to be used by the said Thomas." On the death of Thomas, the property was to be disposed of in such manner as he might by his last will and testament direct; if he died intestate, leaving a wife or child, the property was to be delivered over to them; and if he left neither wife nor child, it was to return to the testator's estate, and be distributed as though no such bequest had ever been made. At the time of the testator's

death, Thomas was unmarried, but subsequently married; and his wife was living when a creditor filed a bill to subject the property to the payment of his debt. *Held*, that neither the property, nor any portion of the income, could be subjected to the payment of his debts. *Hill and Wife v. McRae*, 27 Ala. 175.

11. Where a husband purchases property with his individual means, and takes the title in his own name as trustee for his wife and children, such property will be subjected to the payment of his debts, on a deficiency of other assets; and in such case his personal representative must, if necessary to supply the deficiency, account for the rents and profits of the realty, and for the hire of the personalty, from the service of the bill. *Pharis v. Leachman*, 20 Ala. 662.

12. Where a husband purchases and holds bank-stock in his own name, as trustee for his wife, although this will be held, as against his personal representative, a valid gift to the wife; yet he may revoke it at any time during his life, and a court of equity will subject it to the payment of his debts. *Gannard v. Eslava*, 20 Ala. 732.

13. Where slaves are sent home with a newly married couple by the wife's father, and the husband elects to treat and hold them as the property of his wife, he is not thereby estopped from asserting title in himself, nor are his creditors, after his death, thereby precluded from subjecting them to the payment of his debts. *Burnett v. Branch Bank at Mobile*, 22 Ala. 642.

14. Where slaves are purchased by the husband, partly with his own money, and a bill of sale taken to himself as trustee for his wife, he has such an interest in them as may be subjected to the payment of his debts; but his creditors must file a bill for that purpose, to ascertain and separate his interest from that of his wife. *Bridges & Co. v. Phillips*, 25 Ala. 136; *Love v. Graham*, 25 Ala. 187.

15. Where a married woman is authorized, by special statute, "to take, receive, and hold, by gift, purchase, or inheritance, any property, real or personal, free from the molestation, hinderance, or authority of her husband, and free from any liability to pay his debts or contracts, and to dispose of the same by will, gift, or sale, in the same manner as if she were a *feme sole*,"—the remedy of her creditor, to subject her estate to the payment of his debt, is by bill in equity. *Hatton v. Wier*, 19 Ala. 127.

16. When property is settled upon a married woman, by a decree of the chancery court, under the provisions of the "married-women's law" of 1846, for the sole and separate use, support and maintenance of her and her family, she may create a charge upon it during coverture, which may be enforced, after her death, by a sale of the entire property under a decree of the court. *Blevins v. Buck*, 26 Ala. 292.

17. Where an insolvent debtor conveys his land to one of his creditors, by a deed which is fraudulent and void as to his other creditors; and such fraudulent grantee has sold the land to a *bona-fide* purchaser for valuable consideration, who is not made a party to the bill filed by the other creditors, the land itself cannot be subjected to the complainant's demands; but the proceeds of sale, in the hands of the fraudulent grantee, may be subjected; and so far as any portion of the money can be traced into other property purchased or exchanged by him, a court of equity will fasten a trust upon it in favor of the creditors. *Bryant v. Young*, 21 Ala. 264.

18. A distributee's undivided interest in an unsettled estate may be set apart in equity by his judgment creditor, and subjected to the satisfaction of his debt; but in order to do this, it is necessary to proceed to a final settlement of the administration, and to separate the distributive share of the debtor, before a final decree can be rendered for its condemnation. *Lang v. Brown*, 21 Ala. 179.

19. Property in the hands of a legatee may, if the other assets prove insufficient, be subjected in equity to the payment of the testator's debts. *Sanders v. Godley*, 23 Ala. 473.

20. The entire assets of a partnership are, in equity, subject to the payment of its debts. *Coster's Executors v. Bank of Georgia*, 24 Ala. 37.

II. PLEADINGS, AND PRACTICE.

21. If the complainant has a lien upon two funds for the security of his debt, and seeks to condemn one of them, his bill is not demurrable because it fails to show what disposition has been made of the other. *Chapman v. Hamilton*, 19 Ala. 121.

22. A creditors' bill, filed by the beneficiaries for the settlement of a deed of trust, which required that the secured creditors should assent to it within six months, must allege that the complainants assented to the deed; but an allegation, that they "have consented to the provisions of said deed," is sufficient. *Colgin v. Redman*, 20 Ala. 650.

23. The rule requiring the dismissal of the whole bill, if any one of the complainants fails to make out his case, has never been stringently applied to creditors' bills; and unless the misjoinder will affect the propriety of the bill, the objection will not be allowed to prevail in any case, when taken for the first time at the hearing. *Ib.*

24. If objection for misjoinder of complainants in creditors' bills is allowable, it should be taken by demurrer; and the cases are very rare, if they exist at all, in which a demurrer on that ground will be sustained. *Ib.*

25. The distributees of the estate are not necessary parties to a bill filed by a creditor against the executor *de son tort* of his deceased debtor, to reach property fraudulently conveyed by the debtor in his lifetime. *Watts v. Gayle & Bower*, 20 Ala. 817.

26. But all the distributees are necessary parties to a bill which seeks to subject the undivided interest of a distributee to the payment of debts. *Chapman v. Hamilton*, 19 Ala. 121.

27. The nominal plaintiff in a judgment at law is not an indispensable party to a bill, filed by the person for whose use it was recovered, to subject to its satisfaction property in the hands of the debtor's legatees. *Sanders v. Godley*, 23 Ala. 473.

28. Where the property is bequeathed to one for life, with remainder to her children, the remainder-men are necessary parties to the bill. *Ib.*

29. Where the judgment sought to be collected was rendered against the debtor's executor, and the bill alleges that the executor and his sureties were insolvent from the rendition of the judgment until his death, his personal representative is not a necessary party to the bill. *Ib.*

30. If the creditor seeks to follow the proceeds of his debtor's lands, in the hands of a fraudulent grantee, a *bona-fide* purchaser from such grantee is not a necessary party to the bill. *Bryant v. Young*, 21 Ala. 264.

31. Where the bill seeks to subject the separate estate of a married woman to the payment of a note executed during coverture, one who signed the note as co-maker with her, though he would be a proper party to the bill, is not an indispensable party, when it is alleged that he is a non-resident, and has no property in this State. *Ozley v. Ikelheimer*, 26 Ala. 332.

32. The wife's children are not necessary parties to a bill, filed after her death, to subject personal property settled upon her, under the provisions of the "married-women's law" of 1846, to the payment of a charge created by her during coverture. *Blevins v. Buck*, 26 Ala. 292.

33. Transferror and transferree may join in a bill to enforce payment, out of the wife's separate estate, of a note executed by husband and wife, and transferred for valuable consideration by delivery merely. *Ib.*

34. Where the bill seeks to subject certain real and personal property, alleged to have been fraudulently conveyed by the debtor to a trustee for his wife and children, and the settlement of his estate as insolvent is pending in the probate court, his administrator is a proper party defendant to the bill. *Pharis v. Leachman*, 20 Ala. 662.

35. Although, as a general rule, to enable the creditor of a bankrupt to maintain a suit in equity for the purpose of subjecting to the satisfaction of his debt property belonging to the bankrupt, he must allege some collusion between the assignee and bankrupt, or that the assignee refuses to bring suit; yet, where the assignee has neglected, for more than five years, to institute proceedings for the condemnation of the bankrupt's interest

in certain trust property which was not surrendered in his schedule, and in the meantime, a creditor has ferreted out that interest, and has obtained a decree, after a protracted litigation, subjecting it to the satisfaction of his debt, the assignee will be presumed to have abandoned his claim. *Rugely & Harrison v. Robinson*, 19 Ala. 404.

36. In such case, neither the bankrupt himself, his trustee, nor the other beneficiaries in the trust property, cannot take advantage of his discharge in bankruptcy as a bar or defense to the suit. *Ib.*

37. The other creditors of the bankrupt are not necessary parties to such a bill. *Ib.*

38. Nor is it necessary or proper, in stating the account of the trust property, in order to separate and ascertain the debtor's interest in the proceeds (*vide supra*, 9,) that any allowance should be reported for his family. *Ib.*

39. If the president of a foreign bank is required by its charter to be a resident of the State in which it is located, he cannot, when sued here by its creditors, be heard to deny the character in which he held himself out to the world, nor to aver that he was not qualified to hold that office by reason of his residence in another State. *Bank of St. Mary's v. St. John, Powers & Co.*, 25 Ala. 566.

III. DECREE.

40. Where the debtor sells to his judgment-creditor, at a stipulated price, certain slaves to which he has no title, under an agreement that the price is to be credited on the judgment, unless the slaves should be lost to the creditor from defect of title, in which event only the hire for the time during which they continued in the creditor's possession was to be credited on the judgment; and the slaves are afterwards recovered from the creditor, in an action of trover by the legal owner, together with damages from the time they went into his possession, the debtor is not entitled to a credit for the hire. *Pharis v. Leachman*, 20 Ala. 662.

41. Under a bill filed by the creditors of a railroad company, to subject equitable assets in the hands of its debtors, if such debtors do not offer to bring the money into court, but engage in a protracted litigation respecting it, and insist upon their right to retain it both as against the company and its creditors, they are properly chargeable with interest on the balance due from them to the company. *Godwin v. McGehee*, 19 Ala. 468.

42. A debtor placed certain railroad bonds in the hands of his surety, the proceeds of which, when collected, were to be applied to the payment of the debts for which the surety was bound. The railroad company being insolvent, certain of its creditors filed a bill against its stockholders and other debtors, to enforce satisfaction of their judgments. Before the service of process on the surety, he had paid some of the debts for which he was bound, and subsequently the whole amount of the assigned bonds was transferred to his credit on the books of the company. Afterwards, on settlement with his principal, the surety accounted for the bonds at fifty cents on the dollar, which was their market value. *Held*, that the surety was entitled, as against the complainants, to a credit for the amount paid by him for his principal before the service of the *subpœna;* but that his right of retainer, as against them, only extended to the amount actually paid by him, and was not affected by the depreciation in the market value of the bonds, nor by the settlement with his principal. *Ib.*

43. Where the bill seeks to subject a distributee's undivided interest in an unsettled estate, which renders a final settlement of the administration necessary, an account of the administration should be taken by the master, as on final settlement in the probate court; and when this is done, the chancellor should decree distribution among the parties interested, in a manner conformable as nearly as practicable to that pointed out by the statute for the government of the probate court, and then direct the sale of so much of the distributee's interest as shall be sufficient to satisfy the complainant's demand. *Lang v. Brown*, 21 Ala. 179.

44. Where the bill seeks to subject the widow's undivided interest in her

husband's estate, of which she is administratrix, and to set aside as fraudulent a deed conveying her interest in the estate to her children, who were the other distributees; to which bill the widow, individually and as administratrix, and all the other distributees, are made defendants,—a decree, directing "the defendants" to pay into court the amount of the complainant's debt, and awarding execution against them in default of payment, is erroneous. *Ib.*

45. Where the bill seeks to subject property in the hands of the debtor's legatees, all the legatees who are before the court must contribute their proportion: a money decree against two legatees jointly, one of whom has only a life estate, with remainder to her children, who are also parties to the bill, is erroneous. *Sanders v. Godley*, 23 Ala. 473.

46. Where the bill seeks to subject the separate estate of a married woman, and its annual proceeds are insufficient to discharge the debt, within a reasonable time, a sale of the property itself may properly be decreed. *Bradford and Wife v. Greenway, Henry & Smith*, 17 Ala. 797.

47. But, where such separate estate is created by deed, conveying the property to a trustee "for the sole and exclusive use, benefit, maintenance and support" of the grantor's wife and children, "to be held, used and enjoyed, without division or distribution, until his death; and after his death, the said estate to vest absolutely, discharged from the trust," in his said wife and children, "in equal parts, share and share alike,"—the property itself can neither be sold nor hired out during the life of the grantor, but the wife's share in the profits may be separated and subjected. *Collins v. Lavenberg & Co.*, 19 Ala. 682.

48. Where the bill is filed against an insolvent banking corporation, its directors and stockholders, seeking to hold them liable on the bank-notes held by complainants, they are liable only for the amount of the notes and interest, and not for statutory damages on a substituted draft which was protested for non-payment. *Bank of St. Mary's v. St. John, Powers & Co.*, 25 Ala. 566.

49. A decree will not be reversed on error, because the defendant who has in his hands the fund sought to be condemned, is sued as administrator instead of guardian, when it appears that the estate has been settled, that all the parties interested in the fund are before the court, and that no injury has been done to any one. *Chapman v. Hamilton*, 19 Ala. 121.

CROSS BILL.

See BILL, II.

DECREES.

I. FORM AND REQUISITES.

1. *Description of Parties.*
2. *Correspondence with Pleadings and Proof.*
3. *Refunding Bond in favor of Non-Residents.*
4. *Other Particulars.*

II. CONCLUSIVENESS AND EFFECT.
III. EXECUTION.
IV. DECREES PRO CONFESSO.
V. INTERLOCUTORY DECREES.

I. FORM AND REQUISITES.

1. *Description of Parties.*

1. A mistake in the christian name of a party against whom a decree is rendered, when the true name appears in the record, is a mere clerical misprision, and amendable at the costs of the plaintiff in error. *McBroom's Adm'r v. McBroom's Creditors*, 19 Ala. 173.

2. A decree of divorce, rendered against a non-resident defendant, will not be held fraudulent, when collaterally impeached, on account of a misnomer in the insertion of a letter as the initial of a middle name, when the description appears otherwise sufficiently accurate, and it is not alleged that she was not known or called by that name. *Harrison v. Harrison*, 19 Ala. 499.

3. When an infant defendant to a bill of revivor is described as the deceased defendant's "only infant son, whose name is unknown," the decree rendered against him is not void for uncertainty, and cannot be collaterally impeached; especially, when the infant, by his subsequent bill to redeem lands sold under the decree, shows that he is the person against whom the bill of revivor was filed. *Preston v. Dunn*, 25 Ala. 507.

2. *Correspondence with Pleadings and Proof.*

4. Relief cannot be granted for matters not alleged in the bill, although they may be apparent from other parts of the pleadings and evidence. *Land and Wife v. Cowan*, 19 Ala. 297; *Paulding v. Lee and Ivey*, 20 Ala. 753; *Sandford v. Ochtalomi*, 23 Ala. 669; *Steele v. Mealing*, 24 Ala. 285; *Spoor v. Phillips*, 27 Ala. 193; *Machem v. Machem*, 28 Ala. 374.

5. Nor can the complainant have a decree upon the case established by the evidence, when it is inconsistent with the allegations of his bill. *Skinner v. Barney*, 19 Ala. 698; *Crompton v. Vasser*, 19 Ala. 259; *Evans v. Battle*, 19 Ala. 398; *Aday v. Echols*, 18 Ala. 353; *Adams v. Garrett*, 22 Ala. 602; *Freeman v. Swan*, 22 Ala. 106; *Flake & Freeman v. Day & Co.*, 22 Ala. 132; *Sims v. McEwen's Adm'r*, 27 Ala. 184; *Williams v. Sturdevant*, 27 Ala. 598; *Williams v. Barnes*, 28 Ala. 613; *Crothers v. Lee*, 29 Ala. 337; *Lockhart and Wife v. Cameron*, 29 Ala. 355; *Charles v. Dubose*, 29 Ala. 367.

6. This rule, requiring a correspondence between the allegations and proof, is especially strict in cases for specific execution of parol contracts for the sale of land. *Williams v. Barnes*, 28 Ala. 613.

7. Where the alleged contract was, that the plaintiff should execute his note for one half of the purchase-money of two lots bought by the defendant, that the two lots should be equally divided between them by an east and west line, and that each party should immediately enter into the possion of his half; while the contract proved contained the additional stipulation, that whenever either of them wished to sell, the other should have the preference or refusal,—*held*, that the variance was fatal. *Ib.*

8. And where the bill alleged that payment was to be made in *five equal annual* instalments, while the proof was that it was to be made in *four or five annual* instalments, and it appeared that a part of the money was unpaid, a specific performance was refused on account of the variance. *Aday v. Echols*, 18 Ala. 353.

9. But the failure to prove an alleged stipulation, which the law implies, is no variance; as where the bill alleges an agreement by the husband to settle property on the wife for her sole and separate use, and the evidence fails to show the exclusiveness of the promised gift. *Andrews v. Andrews*, 28 Ala. 432.

10. Under a bill seeking to enforce an express trust, alleged to have been created by the defendant's agreement to receive and collect claims *for the security of a demand due R. S. & Co.*, proof of an agreement between defendant and the debtor of R. S. & Co., to the effect that the former should receive and collect the claims, and should pay the proceeds *either to the debtor himself, or to three firms, of which R. S. & Co. was one*, does not entitle the complainant to a decree. *Paulding v. Lee and Ivey*, 20 Ala. 753.

11. Where the bill alleges that complainant's debtor placed certain claims in the hands of defendant, as trustee, to collect and apply the proceeds to the payment of complainant's debt, which was then in defendant's hands for collection; while the proof shows that complainant received the claims as a payment, *pro tanto*, of his debt, and placed them for collection in the hands of defendant as an attorney-at-law, the variance between the allegations and proof is fatal. *Crothers v. Lee*, 29 Ala. 337.

12. So, also, if the bill alleges that the debtor placed the claims in the hands of defendant, as trustee, for the benefit of the complainant, while the proof shows that they were so placed in his hands for the benefit of all the debtor's creditors, the variance is fatal. *Ib.*

13. The title of the assignee of a note, in a bill filed jointly with his

assignor, alleging that the note was assigned as *collateral security*, is sufficiently established by proof that it was assigned *in liquidation of a debt*. *McLane & Plowman v. Riddle & Burt*, 19 Ala. 180.

14. Where a creditor's bill, seeking to attach and subject the proceeds of property in the hands of a fraudulent grantee, alleged that the property belonged to the firm who were complainant's debtors, while the proof showed that it was the individual property of one of the partners, the variance was held fatal. *Flake & Freeman v. Day & Co.*, 22 Ala. 132.

15. Under a bill filed by a partner, seeking to enforce a trust in lands alleged to have been purchased by his co-partner with partnership funds, and for partnership purposes, if the evidence shows that the purchase was made for partnership purposes, but with the defendant's individual funds, the variance is fatal. *Owens v. Collins & Langworthy*, 23 Ala. 837.

16. But where the bill, seeking an account and settlement from an executor, and to have complainant's portion of the estate settled to her separate use, alleged that certain slaves in the defendant's possession were purchased with the funds of the estate, while the proof showed that they were purchased with his individual funds, but under such circumstances that a court of equity would consider them assets of the estate, the variance was held immaterial. *Montgomery v. Givhan*, 24 Ala. 568.

17. If the bill seeks to enforce a trust, growing out of partnership transactions, between complainants and defendant, or a joint trust in favor of complainants individually, and the evidence shows a separate trust in favor of one of the complainants only, the discrepancy is fatal. *Owens v. Collins & Langworthy*, 23 Ala. 837.

18. A bill for the rescission of a contract alleged that the vendor sold and conveyed to two of the complainants, while the deed, which was made an exhibit to the bill, conveyed the land to one of the complainants alone; and it was held no material variance, because the defendant could not have been taken by surprise. *Lanier v. Hill*, 25 Ala. 554.

19. If the bill alleges a fraudulent misrepresentation of a material fact, and the evidence shows such a mistake, as, of itself, authorizes a rescission, the variance is not fatal, since the intent is immaterial. *Ib.*

20. But when a rescission is sought on the ground of fraud, and the evidence shows only an honest mistake, the variance is fatal. *Williams v. Sturdevant*, 27 Ala. 598.

21. When a bill seeks to impeach a decree on the ground of fraud, and an error or mistake only is admitted or proved, the complainant cannot have a decree, unless he amends his bill. *Cowan and Wife v. Jones*, 27 Ala. 317.

22. Under a bill filed by a married woman, seeking to protect her separate estate in certain slaves from her donor's creditors, and alleging that they were given "to her separate use *for life, with remainder to her children*," proof of a gift "*to her and the heirs of her body*," does not entitle her to a decree. *Crabb's Adm'r v. Thomas*, 25 Ala. 212.

23. So, where the allegation in the bill, seeking the reformation of a deed of gift, was, that the donor intended to convey the property "to the sole and separate use and behoof of his daughter, and of any children she might have, so that it should not be subject to any debts, rights or engagements of any husband whom she might marry, and at her death should be the property of her children;" while the proof was, that he "intended to bind the property to her and her children forever"—"never intended it to be subject to any man's debts"—"intended that it should go to her children at her death"—"gave it to her and her heirs"—"intended to entail the property on her and her children"—"made the deed to her, and considered the girl her property"—the variance was held fatal. *Lockhart and Wife v. Cameron*, 29 Ala. 355.

24. Where the bill, which sought to have an absolute sale held a trust or mortgage, alleged a single contract, by which complainant transferred six slaves to defendant, in consideration of defendant's promise to pay all his just debts; while the proof showed that there were two contracts, made on different days, and that defendant

promised to pay only those debts which were then in execution,—*held*, that the bill was properly dismissed on account of the variance. *Brantley v. West*, 27 Ala. 542.

25. A bill, seeking to enjoin a judgment at law founded on certain notes, alleged the consideration of the notes to be this: Plaintiff having purchased a tract of land from one M., who claimed under a void purchase from the father of certain children who held the legal title, afterwards purchased the interest of the children, and executed to them these notes, "upon the express understanding and agreement, that the notes were to be returned *if M. should say he had paid* for the lands." The proof showed the agreement to be, that the notes were to be given up *if M. had paid* for the land; and the variance was held fatal. *Freeman v. Swan*, 22 Ala. 106.

26. Under a bill for the redemption of slaves, filed by two joint mortgagors, if the evidence shows that the slaves belonged to one of them only, this is no material variance. *Locke's Executor v. Palmer*, 26 Ala. 312.

27. When a party defendant, who has in his hands the fund sought to be condemned, is sued as *administrator*, instead of *guardian*, the decree will not be reversed on account of the variance, where it appears that all the parties interested in the fund were before the court, and that no injury has been done to any one. *Chapman v. Hamilton*, 19 Ala. 121.

28. In a bill for divorce by the wife, alleging that her husband struck her several times with a stick, choked her down, drew his knife, and threatened to cut her throat, the evidence showed that he choked her, struck her with a whip, and pulled her hair; and the variance was held immaterial. *David v. David*, 27 Ala. 222.

29. As a general rule, interest will not be decreed on a balance, unless it is specially prayed in the bill; but when the interest accrues subsequent to the filing of the bill, it is the practice of the court, upon further directions, to order that the interest be computed, although there may be no prayer to that effect. *Godwin v. McGehee*, 19 Ala. 468.

30. Under the prayer for general relief, the complainant is entitled to such decree as his case may warrant. *Kelly v. Payne*, 18 Ala. 371; *Lanier v. Hill*, 25 Ala. 554.

31. Even though he is mistaken in the special relief prayed. *May v. Lewis*, 22 Ala. 646.

32. But no relief can be granted, under the general prayer, which is inconsistent with that specifically prayed. *Wiley, Banks & Co. v. Knight*, 27 Ala. 336; *Charles v. Dubose*, 29 Ala. 367.

33. Unless the bill is filed in a double aspect. *Simmons v. Williams*, 27 Ala. 507.

3. *Refunding Bond in favor of Non-Residents.*

34. A decree cannot be sustained against a non-resident defendant, who has neither answered, nor otherwise submitted to the jurisdiction of the court, unless the statutory bond in his favor has been executed. *Rowland v. Day*, 17 Ala. 681; *Beavers v. Davis*, 19 Ala. 82; *Eslava v. Lepretre*, 21 Ala. 504.

35. But, if such defendant answers, and submits to the jurisdiction of the court, it is not necessary that the bond should be executed. *Hanson & Moore v. Patterson*, 17 Ala. 738.

As to publication against non-residents, see PARTIES.

4. *Other Particulars.*

36. The prescribed forms of proceedings in equity are flexible, and may be suited to the different postures of the case: the court may so adjust its decrees, and vary, qualify, restrain or model the remedy, as to meet most (if not all) of the exigencies of the case, and to adjust the adverse claims, controlling equities, and substantial rights of all the parties. *Reese v. Kirk*, 29 Ala. 406.

37. Under a bill filed by a vendor, asking a reformation of his title-bond in the description of the land sold, and an injunction against an action on the bond, the proof showed that the land was misdescribed by mistake, and that the vendor did not have title to the land which he intended to sell. The mistake in the bond was corrected, but the action at law was not en-

joined; and it was expressly declared by the decree, that the purchaser might, at his election, either proceed with his action at law, or dismiss it and institute proceedings for a rescission of the contract; and further, that if he elected to proceed with his action, it should be considered in all respects an action on the bond as reformed. *Ib.*

38. On the rescission of a contract in favor of the purchaser, the court may declare the purchase-money a lien on the land, and order the land to be sold if the money be not refunded by a given day. *Foster v. Gressett's Heirs*, 29 Ala. 393.

39. Under a bill filed by the purchaser, for an abatement of the price on account of the vendor's misrepresentations as to the the quantity of land, the jurisdiction of the court having once attached, it is its duty to go on and do complete justice between the parties, without remitting them to a court of law for an adjustment of the credits for partial payments and other matters of account. *Stow v. Bozeman's Executors*, 29 Ala. 397.

40. In making an abatement of the purchase-money, it is a proper method of computing interest, to divide the amount of the damages by the number of notes originally given, and to allow interest on each sum, from the time the notes respectively fell due, to the time when new outstanding notes were substituted. *Ib.*

41. Where the annual proceeds of the separate estate of a married woman are not sufficient to discharge, within a reasonable time, a debt with which such estate is chargeable in equity, a sale of the property itself may be decreed. *Bradford and Wife v. Greenway, Henry & Smith*, 17 Ala. 797; *Blevins v. Buck*, 26 Ala. 292.

42. But, where such separate estate is created by deed, conveying the property to a trustee "for the sole and exclusive use, benefit, maintenance and support" of the grantor's wife and children, "to be held, used and enjoyed, without division or distribution, until his death; and after his death, the said estate to vest absolutely, discharged from the trust," in his said wife and children, "in equal parts, share and share alike,—the property itself can neither be sold nor hired out during the life of the grantor, but the wife's share in the profits may be separated and subjected. *Collins v. Lavenberg & Co.*, 19 Ala. 682.

43. Under a creditor's bill, seeking to subject a distributee's undivided interest in an estate, which renders a settlement of the administration necessary, an account of the administration should first be taken by the master, as on final settlement in the probate court; and when this is done, the chancellor should decree distribution among the parties interested, in a manner conformable as nearly as practicable to that pointed out by the statute for the government of the probate court, and then direct a sale of so much of the distributee's interest as shall be sufficient to satisfy the complainant's demand. *Lang v. Brown*, 21 Ala. 179.

44. Where the bill seeks to subject the widow's undivided interest in her husband's estate, of which she is administratrix, and to set aside as fraudulent a deed conveying her interest in the estate to her children, who were the other distributees; to which bill the widow, individually and as administratrix, and all the other distributees, are made defendants,—a decree, directing "the defendants" to pay into court the amount of the complainant's debt, and awarding execution against them in default of payment, is erroneous. *Ib.*

45. Where the bill seeks to subject property in the hands of the debtor's legatees, all the legatees who are before the court must contribute their proportion; a money decree against two legatees jointly, one of whom has only a life estate, with remainder to her children, who are also parties to the bill, is erroneous. *Sanders v. Godley*, 23 Ala. 473.

46. The jurisdiction of the court having attached, on bill filed against an administrator for a discovery of assets, it should go on and close the administration; and if it should be found necessary to sell the real estate for the payment of debts, a sale may be ordered by the chancellor, in the same manner, or as nearly as practicable, as in similar cases in the or-

phans' court. *Wilson and Wife v. Crook*, 17 Ala. 59.

47. Where the settlement of an estate is withdrawn from the orphans' court, and pending in chancery, it is competent for the court, if the exigencies of the estate require it, to order a sale of the slaves, for cash, at an unusual season of the year for selling such property, on the petition of the administrator or creditors; and this, even before an accounting is had with the administrator. *Pearson v. Darrington*, 21 Ala 169.

48. And if the administrator, in such case, invokes the aid of the orphans' court, obtains an order of sale, and purchases the slaves sold for himself, it is the duty of the chancery court to provide that such slaves shall be forthcoming to abide its final decree. *Ib.*

49. In a foreclosure suit, if the defendants do not suggest to the court that the mortgaged premises greatly exceed in value the amount of the mortgaged debt, and are capable of subdivision, and move for a reference to the master to ascertain these facts, the chancellor may properly decree a sale of the entire premises; and this, notwithstanding there are two mortgages, between the same parties, for the same debt, and differing only as to the premises conveyed. *Eslava v. Lepretre*, 21 Ala. 504.

50. But, if any of the defendants were infants, *non compotes mentis*, or under any other legal disability which would prevent them from appearing and contesting the matter with the complainant, a different rule would prevail. *Ib.*

51. The chancellor may, at his discretion, allow time for the payment of the sum reported by the master to be due on the mortgage debt, or he may decree a foreclosure and sale absolutely, without giving day to the mortgagor. *Ib.*

II. CONCLUSIVENESS AND EFFECT:

52. One who is neither a party nor a privy to a proceeding in equity, is not bound by it. *Lang's Heirs v. Waring*, 17 Ala. 145.

53. A decree rendered against an infant, who was represented by a guardian *ad litem*, cannot be collaterally impeached for want of jurisdiction, although the appointment was made without service of process. *Preston v. Dunn*, 25 Ala. 507.

54. An injunction in force against the negotiation of a note, does not destroy its negotiability. *Winston v. Westfeldt*, 22 Ala. 760.

55. An endorsee, who acquires a note before maturity, in good faith, for valuable consideration, and without notice, is not bound by a decree previously rendered against his endorser. *Ib.*

56. A decree in chancery, annulling the probate of a will, is final and conclusive, as to the invalidity of the will, in all courts and upon all persons, until reversed or set aside in some direct proceeding. *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

57. A decree of foreclosure under a mortgage does not prejudice the rights of those who ought to be, but are not parties: if the mortgagor dies before the rendition of the decree, and the suit is thereupon revived against his administrator and sole devisee, but not against his heirs-at-law, the decree of foreclosure, and the complainant's purchase of the premises at the master's sale, are both void, as against the heirs of the mortgagor, if they set aside the probate of their ancestor's will, by bill in equity, within the time allowed by the statute. *Ib.*

58. A decree in favor of the mortgagor, under a bill for the redemption of a portion of the property, is a bar to any other proceeding of a like nature under the same contract. *Locke's Executor v. Palmer*, 26 Ala. 312.

59. A decree, rendered in a suit instituted in the names of husband and wife jointly, will be conclusive on the wife, when the bill, in substance and effect, concerns only her separate estate, seeks only to establish and protect her rights and interests, and asks no relief for or against the husband. *Michan and Wife v. Wyatt*, 21 Ala. 813.

60. A decree of divorce *a vinculo*, in favor of the wife, defeats and determines all the rights and interest of her husband in and to her lands, and of others claiming under a mortgage executed by him, and restores her

rights precisely as her husband's death would have restored them. *Boykin v. Rain*, 28 Ala. 332.

61. A decree of divorce against a non-resident defendant, upon whom service has been duly perfected by publication, is equally as obligatory as if he had been personally served with process, or had appeared and answered. *Harrison v. Harrison*, 19 Ala. 499.

62. The general principle, that foreign judgments and decrees may be avoided, when the court had no jurisdiction of the defendant's person, and there was no appearance, does not apply to such a decree of divorce. *Thompson v. The State*, 28 Ala. 12.

63. A decree of divorce obtained in Arkansas, by a person domiciled in Alabama, would be void, if it was procured by fraud, or if the person did not go to Arkansas *animo manendi*, or if he went thither merely for the purpose of obtaining a divorce, and with the intention of remaining no longer than was necessary to accomplish that purpose. *Ib.*

64. But a foreign decree of divorce will not be held void for fraud, when collaterally attacked, because the bill omitted to state a fact which would have been a bar to the relief sought. *Harrison v. Harrison*, 19 Ala. 499.

65. A decree for maintenance, rendered by a chancery court in South Carolina, to continue until the death or reconciliation of the parties, cannot be here enforced against the husband, after he has obtained a valid decree of divorce in the courts of this State, except for the amount due on it when the decree of divorce became effectual; but, as to this amount, the decree of divorce is no estoppel, although the main allegations of the bills in the two cases are conflicting. *Harrison & Saunders v. Harrison*, 20 Ala. 629.

66. When a bill is dismissed without prejudice, the effect of the reservation is, to prevent the decree from constituting a bar to another bill brought upon the same title; but it does not at all compromit the court as a judicial determination in favor of that title. *Lang's Heirs v. Waring*, 25 Ala. 625.

67. The dismissal of a bill, seeking to impeach a decree on the ground of fraud, though no reservation be made of the complainant's right to file another for the purpose of surcharging and falsifying it, does not prejudice that right. *Cowan and Wife v. Jones*, 27 Ala. 317.

68. An opinion of the supreme court is the law of the case in which it is pronounced, and its correctness cannot be questioned when the case is brought back a second time, even by new parties since brought in. *Rugely & Harrison v. Robinson*, 19 Ala. 404.

69. But when two conflicting opinions are delivered in the same case at different times, and it is brought up a third time on error or appeal, neither one of the previous decisions is conclusive, but the case must be considered as if presented for the first time. *Moore v. Barclay*, 23 Ala. 739.

III. EXECUTION.

70. Where a decree has been rendered against the corporate authorities of a city, for the abatement of a public nuisance, on an information by sundry citizens in the name of the State, any citizen may interfere as relator, by a proceeding in the nature of a bill of revivor, and call on the court to carry the decree into effect. *The State, ex rel. Waring, v. Mayor &c. of Mobile*, 24 Ala. 701.

71. If the statute requiring the revival of a judgment by *sci. fa.*, where no execution was issued within a year and a day after its rendition, applies to a decree in chancery for the abatement of a public nuisance, (as to which, *quære?*) its only effect is, to compel the party who seeks to enforce the decree to proceed by *sci. fa.* or bill of revivor. *Ib.*

72. There are cases in which the court will refuse to enforce the execution of an unjust decree, on an original bill filed for that purpose; but where the proceeding is in the nature of a bill of revivor, to enforce the execution of a decree for the abatement of a public nuisance, no objection can be raised to the merits of the original decree. *Ib.*

73. Where the decree is voluntarily executed by the parties, and the com-

plainant receives the money decreed to him, he may nevertheless prosecute an appeal. *Tarleton v. Goldthwaite's Heirs*, 23 Ala. 346.

74. But, if the appellant has coerced satisfaction of the decree, he will not be allowed to assign errors until he has done what may be necessary to place the appellee *in statu quo*. *Riddle v. Hanna*, 25 Ala. 484.

IV. DECREES PRO CONFESSO.

75. A decree *pro confesso* cannot be rendered against a defendant who has not been served with process. *Hurter v. Robbins*, 21 Ala. 585.

76. Where the record fails to show that publication was made against a non-resident defendant as required by the 40th rule of chancery practice, a mere statement in the decree *pro confesso*, that publication was made "in the terms of the law," is not sufficient to sustain the decree. *Hanson & Moore v. Patterson*, 17 Ala. 738.

77. Where a commission is issued, after an amended bill has been filed, to take the answer of a non-resident defendant then in default; and the answer is general, not specifying whether it is to the original, or to the amended bill, or to both, it will be intended that the answer is to both bills, and the previous default must consequently be considered as cured. *Ib.*

78. A decree *pro confesso* will not be set aside to allow a plea to be filed. *Bank of St. Mary's v. St. John, Powers & Co.*, 25 Ala. 566.

79. After an irregular decree *pro confesso* has been entered against a party, his subsequent appearance by solicitor, without objecting to the irregularity, is a waiver of it. *Ib.*

80. After a decree *pro confesso* has been entered against a defendant, he has no right, except by consent or by leave of the court, to file an answer after the master has made his report under an order of reference. *Hurter v. Robbins*, 21 Ala. 585.

81. Nor is he entitled to notice of the filing of interrogatories. *Attkisson v. Attkisson*, 17 Ala. 256; *Jordan v. Jordan*, 17 Ala. 466.

82. Nor is it necessary that the interrogatories should remain on file ten days prior to the issue of the commission. *Attkisson v. Attkisson*, 17 Ala. 256.

83. When a decree *pro confesso* has been entered on personal service, whether the defendant be a resident or non-resident, a final decree may be rendered without proof. *Carradine v. O'Connor*, 21 Ala. 573.

V. INTERLOCUTORY DECREES.

84. It is irregular to take any order in a cause, generally affecting the merits, until it is at issue as to all the parties; if the person not before the court is regularly made a party, by proper allegations and prayer for subpœna, the irregularity cannot be excused by the supposition that he is not a necessary party. *Eslava v. Lepretre*, 21 Ala. 504.

85. An order, directing an issue at law, is interlocutory merely, and may therefore be set aside at a subsequent term. *Dabbs v. Dabbs*, 27 Ala. 646.

86. An appeal does not lie from an interlocutory order, refusing to dismiss a bill for want of equity; nor will the appellate court take jurisdiction of such appeal by consent of parties. *Benford v. Daniels*, 20 Ala. 445.

DEMURRER.

1. A demurrer lies to a bill, for the nonjoinder of necessary or proper parties. *Chapman v. Hamilton*, 19 Ala. 121; *Gould v. Hayes*, 19 Ala. 438; *Watts v. Gayle & Bower*, 20 Ala. 817; *McMaken v. McMaken*, 18 Ala. 576.

2. And for the misjoinder of parties or causes of action. *Tucker v. Holley*, 20 Ala. 426; *Plunkett v. Kelly*, 22 Ala. 655.

3. The cases are exceedingly rare, if they exist at all, in which a demurrer will be sustained to a creditors' bill on account of the misjoinder of complainants. *Colgin v. Redman*, 20 Ala. 650.

4. The misjoinder of defendants is an objection which is only available to the parties improperly brought in. *Horton v. Sledge*, 29 Ala. 478.

5. A demurrer to a bill, for the want of proper parties, must show who the

absent parties are, in such manner as to point out the defect in the bill, and enable the complainant to amend it. *Chapman v. Hamilton*, 19 Ala. 121.

6. The want of an indispensable party is available on general demurrer. *Gould v. Hayes*, 19 Ala. 438.

7. When the bill shows that the remedy is barred by the statute of limitations, the benefit of the statute may be invoked by general demurrer. *Nimmo v. Stewart*, 21 Ala. 682.

8. A demurrer lies to an amended bill, when it is inconsistent with the original bill. *Larkins v. Biddle*, 21 Ala. 252.

9. A general demurrer, to a bill of review, does not raise the objection, that the original decree has not been obeyed or performed. *Cochran v. Rison*, 20 Ala. 463.

DEPOSITIONS.

I. INTERROGATORIES; NOTICE THEREOF.
II. COMPETENCY OF COMMISSIONER.
III. EXECUTION AND RETURN OF COMMISSION.
IV. MOTIONS TO SUPPRESS.

I. INTERROGATORIES; NOTICE THEREOF.

1. An objection to interrogatories, as leading, must be brought to the notice of the primary court, and cannot be first raised in the appellate court. *Jordan v. Jordan*, 17 Ala. 466.

2. The interrogatory, or the particular portion which is objected to, must be specifically pointed out: a general objection, "to each interrogatory," as leading, is too indefinite. *Ib.*

3. After a decree *pro confesso* has been entered against a defendant, he is not entitled to notice of the filing of interrogatories. *Attkisson v. Attkisson*, 17 Ala. 256; *Jordan v. Jordan*, 17 Ala. 466.

4. Nor is it necessary that the interrogatories should remain on file ten days prior to the issue of the commission. *Attkisson v. Attkisson*, 17 Ala. 256.

II. COMPETENCY OF COMMISSIONER.

5. The brother of the next friend of the plaintiff, when he has no interest in the subject-matter of the suit, is competent to act as commissioner in taking testimony for the plaintiff. *Jordan v. Jordan*, 17 Ala. 466.

6. Mere identity of name is not, of itself, sufficient to establish the fact, that the commissioner is the same person who is shown by the papers of the cause to be an interested party, and therefore incompetent to act as commissioner; nor will the deposition be suppressed, on account of the bare identity of name. *Colgin v. Redman*, 20 Ala. 650.

7. An objection to a deposition, on account of the incompetency of the commissioner, cannot be raised for the first time at the hearing, when the party objecting was previously aware of such incompetency. *Jordan v. Jordan*, 17 Ala. 466; *Colgin v. Redman*, 20 Ala. 650.

III. EXECUTION AND RETURN OF COMMISSION.

8. The practice of including the answers of several witnesses in one, where their testimony is the same, instead of taking down the answer of each separately, is of doubtful propriety; but it is not a sufficient ground for suppressing a deposition at the hearing, when the objecting party, having been let in to defend after the publication of the testimony, proceeded to cross-examine the witnesses without noticing the irregularity. *Jordan v. Jordan*, 17 Ala. 466.

9. It is not a good ground for suppressing a deposition, that it was taken on the first day of the term to which the commission was returnable; the cause not having then been called for trial. *Ib.*

10. The commissioner has power to administer the necessary oath, and to make return of his proceedings to the court under whose authority he acts; and where his return embraces the commission, the interrogatories, the caption of the answers, and the certificate, all these together must be looked to, in determining whether he has performed his duty. A defect in one part of the return, when supplied in another part, is no ground for suppressing the deposition. If the return states that

the deposition was taken pursuant to the commission, it is not essential that it should also state the manner of pursuing the commission. If it states that the witness was sworn and examined by the commissioner, "by virtue of a commission" issued from the court to which the return is made; and the commission and interrogatories returned specify the particular case; and the deposition itself shows that the witness, at the time he was answering the interrogatories, knew that he was testifying in that particular case,—the presumption is, that the commissioner swore the witness by virtue of that commission, and in the case therein specified. *King v. King*, 28 Ala. 315.

11. A motion to suppress a deposition, for an irregularity in taking it, cannot be made for the first time at the hearing. *Beattie v. Abercrombie*, 18 Ala. 9.

IV. MOTIONS TO SUPPRESS.

12. A deposition will not be suppressed, at the instance of the party by whom it was taken, on account of the incompetency of the witness, when that incompetency was known to him at the time the deposition was taken. *Lyde v. Taylor*, 17 Ala. 270.

13. The appellate court will not undertake to say that the chancellor erred in refusing to suppress a deposition, when the record does not show that the facts, on which the motion was predicated, were established before him. *Beattie v. Abercrombie*, 18 Ala. 9.

14. A general motion to suppress a deposition, not specifying any particular grounds of objection, if it can be considered at all in the appellate court, will receive the strongest construction that it reasonably admits of against the objecting party. *Walker and Wife v. Smith*, 28 Ala. 569.

As to motions to suppress, on account of the incompetency of the commissioner, *vide supra*, 6, 7; and on account of irregularities in the execution or return of the commission, 8–11.

DISMISSAL.

See PRACTICE.

DISCOVERY.

I. OF THE BILL.
II. OF THE ANSWER.

I. OF THE BILL.

1. A bill lies against an administrator, at the suit of the distributees, for a discovery of assets which he failed to return in his inventory. *Wilson and Wife v. Crook*, 17 Ala. 59.

2. Also, at the suit of specific legatees, in order that such assets may be appropriated, in ease of their legacies, to the payment of debts; and this, notwithstanding the pendency of a settlement in the orphans' court. *Pearson v. Darrington*, 18 Ala. 348.

3. If a defendant at law desires a discovery from the plaintiff, he must file his bill, or propound interrogatories under the statute, while the cause is at issue; and if he fails to do so, and judgment is rendered against him, he cannot afterwards come into equity for relief without showing some other ground for its interposition. *Powell v. Stewart*, 17 Ala. 719.

4. The bill must allege, that the facts, as to which a discovery is sought, cannot be proved without the defendant's answer. *Horton v. Moseley*, 17 Ala. 794; *Perrine v. Carlisle*, 19 Ala. 686; *Crothers v. Lee*, 29 Ala. 337.

5. It must state those facts with sufficient certainty, and show that the defendant is capable of making the discovery. *Horton v. Moseley*, 17 Ala. 794.

6. When the bill is filed in aid of a defense at law, without application first made to the plaintiff for an admission of the facts sought to be elicited, if the answer denies some of the facts alleged, the bill may be dismissed, with costs; and if the action at law is in the name of one person, for the use of another, it is not sufficient to allege an application to the nominal plaintiff, and his refusal, to admit the facts as to which the discovery is sought. *Drake v. Foster*, 28 Ala. 649.

II. OF THE ANSWER.

7. The defendant may protect him-

self from a discovery, by a partial answer averring that the complainants are slaves. *Bentley v. Cleaveland*, 22 Ala. 814.

8. The court may reserve to the complainants the right to except to such answer, if they should be found entitled to the discovery; but has no power to order the answer to stand as a plea, and to be tried as such. *Ib.*

9. If, however, the answer is ordered to stand as a plea, and an issue is made up on it as such, under which the plaintiffs proceed to take proof to establish their case, the irregularity is only error without injury. *Ib.*

10. If the allegations of the answer are sufficient as to the slavery of those plaintiffs who are the real parties in interest, exceptions will not lie to it for the insufficiency of its allegations as to the slavery of the other plaintiffs. *Ib.*

11. In an answer to a bill of discovery, nothing that tends to disprove the existence of the cause of action or defense set up in the bill, whether purely responsive or affirmative matter in avoidance, can be considered impertinent. *Saltmarsh v. Bower & Co.*, 22 Ala. 221; *Crocker and Wife v. Clement's Adm'r*, 23 Ala. 296.

12. If the bill calls for an admission, the defendant has the right to state all that was said at the time on the same subject; if a discovery as to an act is sought, he may legitimately state in his answer whatever would be a part of the *res gestæ*. *Pritchett v. Munroe*, 22 Ala. 501.

13. When the answer is offered in evidence against the respondent, in an action at law subsequently instituted, it is not conclusive, but is to be treated like the testimony of any other witness, and is to prevail when not outweighed, in whole or in part, by other testimony; and, although the party offering it will not be allowed to impeach the general reputation of the respondent, yet he will not be precluded from proving the truth of any particular fact in direct contradiction of the answer, although such evidence may have the collateral effect of showing that the respondent is unworthy of belief. *Wilson v. Maria*, 21 Ala. 359.

DIVORCE.

(Statutory Provisions: Code, §§ 1961–80; Clay's Digest, 169–72, §§ 1–22.)

I. GROUNDS OF DIVORCE.

1. *Abandonment for Three Years.*
2. *Abandonment and Adultery.*
3. *Cruelty.*
4. *Insanity.*

II. JURISDICTION OF COURT.

III. PLEADINGS, PRACTICE, EVIDENCE.

1. *Bill.*
2. *Answer.*
3. *Condonation.*
4. *Laches.*
5. *Proof of Marriage.*
6. *Admissions of Parties.*

IV. DECREE; AND HEREIN OF ALIMONY.

1. *Effect and Validity of Decree.*
2. *Confirmation by Legislature.*
3. *Alimony, and Division of Property.*
4. *Costs.*
5. *Judgment on Error.*

I. GROUNDS OF DIVORCE.

1. *Abandonment for Three Years.*

1. Abandonment by the wife, on account of an unfounded charge of infidelity made by the husband and never retracted, does not entitle the husband to a divorce. *Hardin v. Hardin*, 17 Ala. 250.

2. Where the wife abandons her husband in this State, and removes to another State, he may, after the expiration of three years, proceed against her as an absent defendant: the desertion, with intention of abandonment, having originated here, the place of the defendant's residence during the three years next following is immaterial. *Harrison v. Harrison*, 19 Ala. 499.

3. Where the husband abandons his wife without just cause, on account of a difficulty between them respecting her property, and soon afterwards, through the medium of a third person, proposes a reconciliation, which the

wife refuses, declaring that "she had made up her mind not to live with him any longer," her declaration is evidence that she consented to the separation, and she cannot afterwards obtain a divorce on account of the abandonment. *Crow v. Crow*, 23 Ala. 583.

4. If the wife, having left her husband's abode without adequate cause, makes an unconditional offer in good faith to return to her conjugal duty, before her desertion has continued so long as to constitute a ground of divorce in his favor, it is his duty to receive her back; and his refusal to receive her, under such circumstances, amounts to desertion on his part, and, after the expiration of three years, entitles her to a divorce. *Hanberry v. Hanberry*, 29 Ala. 719.

5. The indulgence of ill-temper, jealousy, and improper language by the wife, cannot, under the most extensive import allowed to the doctrine of recrimination, justify or excuse her desertion by the husband. *Ib.*

2. *Abandonment and Adultery.*

6. Where the bill alleges, that the husband drove his wife out of his house, and that he is living in adultery with another woman, the averments are sufficient to bring the case within the statute. *Morris v. Morris*, 20 Ala. 168.

7. A divorce was granted to the wife in this case, on proof that she had separated from her husband, before the consummation of their nuptials, because she had just reasons to apprehend that he had another wife then living; that he consented to the separation at the time, and promised to produce sufficient evidence to remove her suspicions; that he entirely failed to produce such evidence, and showed no exertions to obtain it; and that he led a vagabond, roaming life, and committed adultery with different women, with one of whom he lived four months. *Holston v. Holston*, 23 Ala. 777.

8. Adultery on the part of the wife, while insane, does not entitle the husband to a divorce. *Wray v. Wray*, 19 Ala. 522.

9. Adultery, as the term is used in the statute, may be committed by sexual intercourse with a slave. *Mosser v. Mosser*, 29 Ala. 313.

10. Direct proof of the fact of adultery is not necessary, but it may be inferred from circumstances. *Ib.*

11. Where the bill alleged, that the husband, during his wife's absence from home, committed adultery with a negro girl, complainant's only witness, who had acted as housekeeper for the defendant during his wife's absence from home, testified, that he fondled about the girl, and seemed very fond of her company; that she saw the girl go into his room at 8 o'clock one night, when the door was shut-to, and there was no light in the room,—heard their voices in conversation, and heard defendant say, "lie down;" that the girl had not come out of the room at 2 o'clock, when she (witness) ceased watching; that she saw the girl, on several mornings, come out of the room with the defendant; and that his bed, on several occasions, after he had left his room, bore the impression of two persons having slept in it. It was proved, also, on the part of the defendant, that he was at the time under medical treatment for an eruption on his legs, which were much swollen and inflamed, and which required the application of poultices several times a day; that the girl was the only servant about the house; and that, on one occasion, at the request of complainant's witness, he had severely whipped the girl. *Held*, that the evidence was not sufficient to justify a divorce. (STONE, J., *dissenting.*) *Ib.*

3. *Cruelty.*

12. A divorce will not be granted on the ground of cruelty, unless there has been actual violence committed, attended with danger to life, limb, or health, or a reasonable apprehension of such violence. *Hughes v. Hughes*, 19 Ala. 307.

13. Evidence showing that the husband was habitually intoxicated,—that he was, when drunk, a quarrelsome, turbulent, and dangerous man; that he had used profane and abusive language towards his wife, and threatened to inflict personal violence upon her; that he chased her through the house and yard, and attempted to strike her

with a chair; and that, on one occasion, he had inflicted personal violence upon her by kicking her,—is sufficient to entitle the wife to a divorce. *Ib.*

14. Cruelty, where it does not affect life, limb, or health, is frequently a relative term, whose meaning must be determined by the particular circumstances of each case: between persons of education, refinement, and delicacy, the slightest blow, in anger, might be cruelty; while, between persons of a different character and walk in life, it might not mar, to any great extent, their conjugal relations, nor materially interfere with their happiness. *David v. David*, 27 Ala. 222.

15. If the evidence shows that the wife, by her own misconduct, has brought upon herself the ill-treatment of which she complains, and which is not wholly disproportioned to the provocation, she is required to make out a much stronger case for relief, than when her own conduct has been entirely blameless; and on this ground, a divorce was refused in this case. *Ib.*

16. Irritability of temper on the part of the husband, producing ungovernable passion, and occasionally ending in acts of personal violence, renders cohabitation unsafe, and is a peril from which the wife is entitled to protection, although she may not have been wholly blameless. When the passions of the husband are shown to be so much beyond his control, that his wife cannot, consistently with her personal safety, continue in his society, it is immaterial from what provocation such violence may have originated. *King v. King*, 28 Ala. 315.

As to condonation, and its effect, *vide infra*, 44–46.

4. *Insanity.*

17. If a marriage is void by reason of the insanity of either one of the contracting parties, no decree of divorce is necessary to restore the parties to their original rights; yet a decree of divorce, in such case, is conducive to good order and decorum, and to the peace and conscience of the party seeking it. *Rawdon v. Rawdon*, 28 Ala. 565.

18. The party who alleges insanity or lunacy, in avoidance of a marriage, must prove it; but, when the existence of the disease is once established, it then devolves on the opposite party to prove, by testimony equally convincing, that the marriage was contracted during a lucid interval. *Ib.*

II. JURISDICTION OF COURT.

19. The act of 1820, allowing the bill to be filed in the county of the complainant's residence, does not take away the right to file it in the county in which the defendant resides. *Reese v. Reese*, 23 Ala. 785; *Wiley v. Wiley*, 27 Ala. 704.

20. The jurisdiction of the courts of this State, to grant a divorce to a party here domiciled, is not dependent on the place where the alleged ground of divorce occurred. *Hanberry v. Hanberry*, 29 Ala. 719.

21. Under the statutes of Arkansas, as shown in evidence in this case, the fact that the cause of divorce occurred elsewhere, and was not continued or completed there, would not render void a decree there obtained by the husband after a residence of one year. *Thompson v. The State*, 28 Ala. 12.

22. In questions of divorce, the law of the domicile must govern, without regard to the law of the place where the marriage was solemnized. *Harrison v. Harrison*, 19 Ala. 499; *Thompson v. The State*, 28 Ala. 12.

23. A decree of divorce, regularly rendered by the proper tribunal in this State, in favor of a party here domiciled, is not invalid because the laws of the State in which the marriage was solemnized do not allow a divorce *a vinculo*. *Harrison v. Harrison*, 19 Ala. 499.

24. The English doctrine, holding that the dissolubility of the marriage contract depends upon the law of the country in which it was solemnized, is founded on the doctrine of perpetual allegiance, is therefore inconsistent with the spirit of our institutions, and is here repudiated. *Thompson v. The State*, 28 Ala. 12.

25. A decree of divorce against a non-resident defendant, upon whom service has been duly perfected by publication, is equally as obligatory as if he had been personally served

with process, or had appeared and answered. *Harrison v. Harrison*, 19 Ala. 499; *Thompson v. The State*, 28 Ala. 12.

26. The husband has a right to emigrate, and acquire a new domicile; and he thereby acquires, as a consequence, the right of having his matrimonial *status* controlled by the laws and judicial tribunals of the country of his new domicile, although his wife may remain at his former domicile. *Thompson v. The State*, 28 Ala. 12.

27. The domicile of the husband determines that of the wife. *Harrison & Saunders v. Harrison*, 20 Ala. 629.

28. But an exception to this general rule is, that the wife must be allowed, for the purpose of obtaining a divorce, to acquire a domicile in the State in which she is actually living at the time she is deserted by her husband; even where the desertion consists in his refusal to allow her to return, after having left his abode in another State. *Hanberry v. Hanberry*, 29 Ala. 719.

29. Where the parties were married in South Carolina, and, after residing there several years, removed to this State, where the husband permanently settled, the wife's legal domicile is in this State, although the cruelty of her husband may have forced her to abandon him, and to seek the protection of her friends in South Carolina. *Harrison & Saunders v. Harrison*, 20 Ala. 629.

30. No other State has jurisdiction, to annul, or materially to impair, the marriage relation between citizens of this State; and having no jurisdiction of the subject-matter, consent of parties cannot confer it. *Ib.*

31. A marriage was solemnized in South Carolina, where the parties were domiciled. The cruelty of the husband compelled the wife to abandon him, and return to her friends; but by promises of amendment, he persuaded her to return. These promises he violated, and, after removing with her to this State, again compelled her to seek the protection of her relatives in South Carolina; and she there filed a bill against him, to compel him to make provision for her and her infant child, and to enjoin him from molesting her. *Held*, that the decree, in accordance with the prayer of the bill, did not annul or materially impair the marriage relation, but only enforced its duties and obligations; that the subsequent ill-treatment of the husband rendered inoperative the condonation of his former cruelty, and remitted the wife to her original remedy against him; that this remedy was not affected by the removal of the parties to this State; that the wife's actual residence there entitled her to the legal remedies there afforded for her personal security, and to the provisions usually made there for maintenance in such cases, provided the court could acquire jurisdiction over the husband; and that the husband, by answering the bill without objecting to the jurisdiction of the court, waived the benefit of the objection. *Ib.*

III. PLEADINGS, PRACTICE, EVIDENCE.

1. *Bill.*

32. If the bill alleges several distinct grounds of divorce, it is not demurrable for multifariousness. *Quarles v. Quarles*, 19 Ala. 363; *Morris v. Morris*, 20 Ala. 168.

33. If the divorce is sought on the ground of adultery, the bill must allege the name of the person with whom the adultery was committed, or that the name is unknown to the complainant; but the failure to raise an objection on this account, in the answer, is a waiver of it. *Holston v. Holston*, 23 Ala. 777.

34. An allegation, that the husband drove his wife out of his house, is equivalent to an allegation that he abandoned her. *Morris v. Morris*, 20 Ala. 168.

35. If the divorce is sought on the ground of cruelty, the facts constituting the cruelty must be particularly alleged. *Hughes v. Hughes*, 19 Ala. 307.

36. But the bill is sufficiently certain and definite, when it alleges the defendant's habitual intoxication, and his violence resulting therefrom, as evidenced by his threats and abuse—"that he used the most gross and abusive language towards complainant, cursing her, and compelling her,

through fear of his violence, to seek safety in quitting his presence; that he made threats of personal violence, such as would endanger her personal safety, as well as her life and limbs,"—specifying particular instances of his misconduct. *Ib.*

37. The bill need not allege, with circumstantial particularity, every act of cruelty complained of: one or two specifications will be sufficient, and others may be proved under the general charge. *Reese v. Reese*, 23 Ala. 785.

38. Specific acts of cruelty, which, though established by the evidence, are not charged in the bill, cannot be made the foundation for a decree; but the court may well consider and give weight to them, as tending to explain and corroborate the charges particularly specified. *David v. David*, 27 Ala. 222.

39. Though the particular act of violence charged in the bill must be substantially proved, it is not necessary that all the non-essential circumstances attending it should be proved precisely as alleged; as, where the wife's bill charged, that her husband struck her several times with a stick, choked her down, drew his knife, and threatened to cut her throat, while the evidence proved that he choked her, struck her with a whip, and pulled her hair,—the variance was held immaterial. *Ib.*

40. A misnomer of the defendant, in the insertion of a letter as the initial of a middle name, will not render the decree fraudulent, when collaterally attacked; the description being otherwise sufficiently accurate, and there being no allegation that the party was not known or called by that name. *Harrison v. Harrison*, 19 Ala. 499.

41. The omission to state in the bill a fact which, if stated, would have been a bar to the relief sought, does not render the decree void, when collaterally impeached. *Ib.*

42. An allegation, in a bill filed by the wife, "that she has just cause to fear, and in fact does fear, that the defendant, upon the filing and service of this bill, will remove or dispose of his whole property," without stating the facts which cause her fears, does not authorize an injunction to prevent the removal of the defendant's property. *Norris v. Norris*, 27 Ala. 519.

As to the county in which the bill may be filed, *vide supra*, 19.

2. *Answer.*

43. As the statute does not require a sworn answer, the defendant cannot, by swearing to his answer, impose on the complainant the necessity of establishing her case by two witnesses, or by one witness with corroborating circumstances. *Hughes v. Hughes*, 19 Ala. 307; *Mosser v. Mosser*, 29 Ala. 313.

3. *Condonation.*

44. Condonation being always conditional, subsequent acts of cruelty revive the remedy for former acts. *Hughes v. Hughes*, 19 Ala. 307; *Harrison & Saunders v. Harrison*, 20 Ala. 629.

45. A proposal by the wife to return to her husband's house, from which she had been driven by his cruelty, which is rejected by the husband, cannot be construed into condonation of his cruelty. *Quarles v. Quarles*, 19 Ala. 363.

46. Where the wife continues to live with her husband for two years, after the commission on his part of an act of gross violence, this does not amount to condonation, nor estop her from afterwards complaining of such cruelty. *Reese v. Reese*, 23 Ala. 785.

4. *Laches.*

47. The lapse of twenty-two years after the discovery of the alleged insanity, before filing a bill to avoid the marriage on that ground, is a bar to the relief sought. *Rawdon v. Rawdon*, 28 Ala. 565.

5. *Proof of Marriage.*

48. If the answer admits the marriage, proof that the parties had lived together as man and wife for more than forty years, is sufficient. *Morris v. Morris*, 20 Ala. 168.

6. *Admissions of Parties.*

49. The admissions, or declarations

of the defendant, are not admissible to show a ground for divorce. *Jordan v. Jordan*, 17 Ala. 466.

50. But, under the Code, the confessions of the parties are only declared insufficient, when they constitute the only evidence of the alleged cause of divorce: a decree may be rendered on such confessions, in connection with corroborating proof of conduct and circumstances which tend to repel the idea of collusion. *King v. King*, 28 Ala. 315.

IV. DECREE; AND HEREIN OF ALIMONY.

1. *Effect and Validity of Decree.*

51. A decree of divorce *a vinculo*, in favor of the wife, defeats and determines all the rights and interest of her husband in and to her lands, and of others claiming under a mortgage executed by him, and restores her rights precisely as her husband's death would have restored them. *Boykin v. Rain*, 28 Ala. 332.

52. A decree for maintenance, in favor of the wife, rendered by the chancery court in South Carolina, to continue until the reconciliation or death of the parties, cannot be here enforced against the husband, who has since obtained a valid divorce in the courts of this State, except for the amount due upon the decree at the time the divorce became effectual; but, as to this amount, the decree of divorce is no estoppel, although the main allegations of the bills in the two cases are conflicting. *Harrison & Saunders v. Harrison*, 20 Ala. 629.

53. A decree of divorce obtained in Arkansas, by a person domiciled in Alabama, would be void, if procured by fraud; or, if the party did not go to Arkansas *animo manendi*; or, if he went thither, merely for the purpose of obtaining a divorce, and with the intention of remaining no longer than was necessary to accomplish that purpose. *Thompson v. The State*, 28 Ala. 12.

For decisions upon the validity of a decree of divorce, as affected by the jurisdiction of the court, *vide supra*, 20–31; and as affected by fraud, or by the defective allegations of the bill, 40–41.

2. *Confirmation by Legislature.*

54. A decree of divorce does not become ineffectual, because the confirmatory act of the legislature is not passed at the first ensuing session of the general assembly. *Harrison v. Harrison*, 19 Ala. 499.

3. *Alimony, and Division of Property.*

55. Where a divorce *a vinculo* is granted to the wife, it is error to decree alimony to her, instead of a division of the estate between the parties. *Quarles v. Quarles*, 19 Ala. 363.

56. The wife has a right to a support out of her husband's estate, pending a suit for divorce against him, and also to such sum as may be necessary to procure solicitors to conduct the suit for her; and whenever this right is denied by the chancellor, at any time before permanent alimony is finally set apart for her, the supreme court will award a *mandamus*, since there is no other adequate and specific remedy, to compel him to make the necessary order. *Ex parte King*, 27 Ala. 387.

57. On bill filed by the wife, an interlocutory order was made for the allowance of temporary alimony, and on final hearing a decree was rendered in her favor. A reference to the master was also made, to ascertain and report the value of the defendant's estate; and it was further ordered, that the cause "be retained in court for further orders." From this decree, before the report came in, the defendant took an appeal. *Held*, that the chancellor had jurisdiction, notwithstanding the pendency of the appeal, to grant an order, on the petition of the wife showing a necessity for it, to secure the prompt payment of the quarterly allowances made by the previous interlocutory decree, and to require the defendant to pay the complainant's solicitors such further sum as might be a reasonable compensation for their services in defending the appeal. *Ib.*

58. Where there are no children of the marriage to be provided for, and the husband's children by a former marriage have already received advancements, a sum of money equal to the legal interest on one-third of the

value of the husband's real estate, together with a gross sum equal to one-fifth of his personal estate, is not an unreasonable amount for alimony. *King v. King*, 28 Ala. 315.

4. *Costs.*

59. The wife's bill having been dismissed, on the ground that both parties were in fault, the costs were equally divided. *David v. David*, 27 Ala. 222.

60. Where the chancellor's decree, granting a divorce to the wife, was reversed on error, on account of the insufficiency of the evidence, the costs of the appellate court were imposed on the next friend of the wife, and the costs of the court below on the husband. *Mosser v. Mosser*, 29 Ala. 313.

5. *Judgment on Error.*

61. Where the decree of the chancellor, dismissing the bill for want of jurisdiction, is reversed on error, the cause will be remanded, although the evidence may show that the complainant is entitled to a divorce, whenever it may become necessary to make some provision for the wife, or some order in relation to her separate estate, which the appellate court cannot make. *Wiley v. Wiley*, 27 Ala. 704.

62. And where the complainant is held entitled to a decree, and the chancellor's decree therefore reversed, the cause will nevertheless be remanded, because it is the duty of the register to make out and transmit the record to the speaker of the house. *Hanberry v. Hanberry*, 29 Ala. 719.

DOWER.

1. The jurisdiction of chancery, in the allotment of dower, is not taken away by the statutory jurisdiction conferred on the probate court. *Owen v. Slatter*, 26 Ala. 547.

2. Where the lands were aliened by the husband in his lifetime, and the purchaser has put valuable improvements on them, chancery alone has power to render a proper decree; in such case, therefore, the purchaser may come into equity, to have the dower settled and deducted from the unpaid purchase-money. *Thrasher & Mitchell v. Pinckard's Heirs*, 23 Ala. 616.

3. If the widow institutes proceedings for dower, in lands in which it cannot be assigned by metes and bounds, she is not compelled to include in her application all the lands in the county in which she may be entitled to dower. *Owen v. Slatter*, 26 Ala. 547.

4. The dower must be computed according to the value of the land at the time of the alienation by the husband, and not according to its value at the time of the allotment. *Linn v. Robinson & Pollard*, 21 Ala. 547; *Thrasher & Mitchell v. Pinckard's Heirs*, 23 Ala. 616; *Francis v. Garrard*, 18 Ala. 794.

5. Where a compensation in money is allowed in lieu of dower, the decree should be, not for one-third of the net rents and profits annually during the life of the widow, but for one-third of such rents and profits from the filing of the bill, by way of damages, and for the annual interest thereafter on one-third of the value of the premises at the time of the alienation. *Francis v. Garrard*, 18 Ala. 794.

6. In making an abatement of the purchase-money, at the suit of the purchaser, where his vendor died without making title, and the widow's dower was assigned in part of the land, the same rule should be applied, as follows: The purchaser should be relieved, until the death of the widow, of the payment of so much of the purchase-money as may be equal to one-third of the value of the premises at the time of the alienation; and the payment of this sum, without interest, at the termination of the widow's life estate, should be secured by a lien on the land. *Springle's Heirs v. Shields & Paulling*, 17 Ala. 295.

7. A sale of real estate, by commissioners appointed under an order of the orphans' court, does not affect the widow's right of dower; and although the order was made on her application as administratrix, her failure to announce at the sale, that the land was sold subject to her dower, does not estop her from asserting her claim. *Owen v. Slatter*, 26 Ala. 547.

8. An ante-nuptial contract, barring dower, specifically enforced against the widow, at the suit of the heirs of her deceased husband. *Webb v. Webb's Heirs*, 29 Ala. 588.

For other decisions respecting dower, see same title in PART II.

ELECTION.

1. A trustee, who held possession of a tract of land of which one half belonged to an infant, purchased her interest from her father, who afterwards conveyed a negro to her in payment of the purchase-money; but the contract of sale was subsequently rescinded, and the trustee received from the father, in lieu of the repayment of the purchase-money, a stock of goods, and an indemnity against liability for rents. The infant having filed a bill against her tenant in common and the trustee, for a partition of the land, and an account of the rents and profits, the trustee filed a cross bill, alleging the insolvency of the father, and asking that the infant might be compelled to elect, whether she would hold the negro, or proceed for the rents, and that he might be subrogated to her rights in the negro if she elected to proceed for the rents. *Held*, that he was not entitled to the relief sought. *Horton v. Sledge*, 29 Ala. 478.

ERROR AND APPEAL.

I. WHEN ERROR OR APPEAL LIES.
II. PARTIES.
III. BOND, AND SECURITY FOR COSTS.
IV. LIMITATION.
V. PRACTICE.

1. *Coercing Satisfaction of Decree.*
2. *Assignment of Errors, and Joinder.*
3. *What is, or not, Revisable.*
4. *What Objections are, or not, Available.*
5. *Remandment of Cause.*

VI. COSTS.—*See that title.*

I. WHEN ERROR OR APPEAL LIES.

1. An appeal does not lie from an interlocutory order, refusing to dismiss a bill for want of equity; nor will the appellate court take jurisdiction of such appeal by consent of parties. *Benford v. Daniels*, 20 Ala. 445.

2. Sections 3019 and 3020 of the Code refer only to appeals from final judgments and decrees, and not from those which are merely interlocutory. *Powell v. Central Plank-Road Co.*, 24 Ala. 441.

3. The register has power, under the Code, to grant an appeal from an interlocutory order of the chancellor, dissolving an injunction in vacation. (LIGON, J., *dissenting.*) *Ib.*

II. PARTIES.

4. When a writ of error is sued out in the name of one of the defendants, "*et al.*," the abbreviation cannot, strictly considered, be construed to mean the other defendants in the cause below; but, under the statute allowing amendments of writs of error, the writ will be considered amended, so as to conform to the actual facts. *Colvin v. Owens*, 22 Ala. 782.

5. Where the husband is a party to a suit in right of his wife, and dies after the rendition of the final decree, but before a writ of error is sued out, his personal representative is not a necessary party to the writ, since the interest which he represented survives to his wife. *Ib.*

6. And the fact that the husband, in such case, adopted the answer of one of his co-defendants, who was his mother-in-law, and acted as her agent and assistant in the management of the suit, does not render it necessary to make his legal representatives parties to the writ of error. *Ib.*

7. When an appeal is taken by "the solicitor of the complainants," some of whom were infants suing by their next friend, the appeal is not valid so far as the infants are concerned; but, as to the adult complainants, the authority of their solicitor will be presumed. *Riddle v. Hanna*, 25 Ala. 484.

8. A final decree, which has been fully executed, will not be opened on

the petition of one who seeks to have it reviewed on error, and who shows, in his petition, that he had no interest in the subject-matter of the suit until long after its termination. *Boykin v. Kernochan*, 24 Ala. 697.

9. Nor will he be made a party to the suit, in such case, that he may prosecute an appeal or writ of error, when his petition shows that an appeal or writ of error is already barred by the statute of limitations. *Ib.*

III. BOND, AND SECURITY FOR COSTS.

10. A simple acknowledgment in writing is sufficient security for the costs of the appeal, unless the appeal is intended to operate as a *supersedeas*. *Riddle v. Hanna*, 25 Ala. 484.

11. The appellate jurisdiction of the supreme court is derived from the constitution, and is not restricted by the statutory provisions regulating appeals: the appeal, bond or security for costs, and certificate, required by the statute, (Code, §§ 3016, 3041,) are not jurisdictional facts, but are merely the prescribed means by which each particular case is brought under the pre-existing jurisdiction of the court. (*Per* WALKER and STONE, JJ.; while RICE, C. J., held that, however full and complete might be the appellate jurisdiction conferred by the constitution, the public policy of the State, as disclosed and declared by the Code, required that that jurisdiction should not be exercised in favor of a party who did not comply with the statutory requisitions. *Thompson v. Lea*, 28 Ala. 453.

12. A joinder in error is a waiver of the appeal, bond, or security for costs, and of all defects therein; and a motion to dismiss the appeal afterwards comes too late. (RICE, C. J., *dissenting*.) *Ib.*

For analogous decisions, see same title in PARTS II. IV.

IV. LIMITATIONS.

13. The act of 1818, prescribing three years as the limitation of writs of error, applies to final decrees in chancery, as well as to final judgments at law. *Boykin v. Kemochan*, 24 Ala. 697. (Note, that the limitation fixed by the Code, section 3040, is two years.)

14. When a stranger propounds his interest to the court by petition, praying to be made a party to a suit that he may prosecute an appeal or writ of error, the order making him a party would relate back to the time when the decree was rendered; consequently, if his petition shows that an appeal or writ of error is already barred by the statute of limitations, it will not be granted. *Ib.*; also, *Binford v. Binford*, 22 Ala. 682.

15. The doctrine of relation back to a past time is a fiction which is often indulged, in advancement of justice, to sustain legal proceedings; but it is never applied, where it would deprive a party of a clear legal right, or when it would work manifest injustice. *Pearson v. Darrington*, 21 Ala. 169.

16. The statute which limits an appeal from an interlocutory decree dissolving an injunction, "to the next term of the supreme court," means the next term to which an appeal may be taken according to the general law regulating appeals; and unless the decree is rendered a sufficient length of time, before the commencement of the next term of the supreme court, to enable the appellants to give the necessary citation the appeal is properly returnable to the next following term. *Ib.*

17. Where a cause was submitted, on motion to dissolve the injunction, during the regular term of the court, which commenced on the first Monday in December and was limited to one week, under an agreement of counsel that the chancellor should render his decree in vacation as of that term; and a decree, dissolving the injunction, was afterwards rendered, dated January 3d, but not filed in the office of the register until January 10th,—*held*, that an appeal from this decree was properly taken to the next June term of the supreme court. *Ib.*

V. PRACTICE.

1. *Coercing Satisfaction of Decree.*

18. Where the decree is voluntarily executed by the parties, and the complainant receives the money decreed

to him, he may nevertheless prosecute an appeal. *Tarleton v. Goldthwaite's Heirs*, 23 Ala. 346.

19. But, if the appellant has coerced satisfaction of the decree, he will not be allowed to assign errors until he has done what may be necessary to place the appellee *in statu quo*. *Riddle v. Hanna*, 25 Ala. 484.

2. *Assignment of Errors, and Joinder.*

20. All assignments of error should point to a particular part of the proceedings of the court below, in which the error complained of is thought to exist. *Eslava v. Lepretre*, 21 Ala. 504.

21. An assignment, alleging that "the bill and amended bill were not sufficient to warrant the proceedings had on them," is too general. *Ib.*

22. So is an assignment, alleging that "the proceedings were irregular, informal and insufficient, and not in accordance with the rules of chancery practice." *Ib.*

23. On appeal from a decree rendered on the final settlement of an estate, the assignment that "there is error in the decree of distribution," presents the question, whether distribution was made among the proper parties. *Frowner v. Johnson*, 20 Ala. 477.

24. The appellate court will decide no question on error, which was not made and acted on in the primary court, and that action assigned for error and insisted on; unless it be a want of jurisdiction, apparent on the face of the proceedings. *Freeman v. Swan*, 22 Ala. 106.

25. When the defendant in error, who was also defendant below, assigns no cross errors, he cannot be heard to question the action of the chancellor in overruling his demurrer to the bill. *Andrews v. Hobson's Adm'r*, 23 Ala. 319.

26. Cross assignments of error will not be considered by the court, except by consent of parties. *Charles v. Dubose*, 29 Ala. 367.

27. A joinder in error is a waiver of the appeal, bond, or security for costs, and certificate, and of all defects therein; and a motion to dismiss the appeal afterwards comes too late. *Thompson v. Lea*, 28 Ala. 453.

3. *What is, or not, Revisable.*

28. When an amendment to a bill is properly allowed, the appellate court will not review the decision of the chancellor in allowing it without terms. *McLane & Plowman v. Riddle & Burt*, 19 Ala. 180.

29. When leave to amend the bill is asked at the hearing, it is discretionary with the chancellor to grant or refuse it. *Michan and Wife v. Wyatt*, 21 Ala. 813.

30. When an objection to the frame of the bill, which may be remedied by amendment, is raised for the first time at the hearing, it is discretionary with the chancellor, either to allow it, or to dismiss the bill without prejudice. *Ib.*

31. In a case of interpleader, after the discharge of the complainant, the testimony having been published by consent without prejudice, it is discretionary with the chancellor to permit an amendment of one of the answers. *Lanier v. Driver*, 24 Ala. 149.

32. The appointment of a receiver is discretionary with the chancellor. *Ex parte Walker*, 25 Ala. 81.

33. Whether a refractory party should be allowed, before an order for an attachment against him is made, to give bond for the forthcoming of the money in his hands, is a matter addressed to the sound discretion of the chancellor. *Ib.*

4. *What Objections are, or not, Available.*

34. When a cause is submitted to the chancellor on an agreed state of facts, upon which he renders his decree, and it is not objected that the pleadings do not put these facts in issue, that objection cannot be raised in the appellate court, to prevent a revision of the decree. *Whitworth and Wife v. Hart*, 22 Ala. 343.

35. When the master's report is not on its face erroneous, and it is confirmed without objection or exception, an objection to it cannot be raised in the appellate court. *Gerald v. Miller's Distributees*, 21 Ala. 433.

36. When a decree *pro confesso* has been irregularly entered against a defendant, and he subsequently appears by solicitor, without objecting to such irregularity, he cannot take advantage

of it on error. *Bank of St. Mary's v. St. John, Powers & Co.*, 25 Ala. 566.

37. On error from a decree dismissing a bill for a want of equity, the appellate court cannot look to the answer, for the purpose of determining whether the injunction should have been dissolved. *Pearson v. Darrington*, 18 Ala. 348.

38. Although the court has no jurisdiction, after the dismissal of a bill for want of jurisdiction, to reinstate the cause at a subsequent term; yet, if it is thus reinstated, and the defendant, after craving an appeal from the order, engages in the defense—crossing interrogatories, entering into consent, &c.,—he thereby waives his objection to the reinstating of the cause, and cannot take advantage of it on error. *Byrd v. McDaniel*, 26 Ala. 582.

39. When a cause is submitted at a regular term of the court, and, on request of defendant's solicitor, held under advisement until vacation, the defendant cannot assign for error the rendition of the decree in vacation. *Bank of St. Mary's v. St. John, Powers & Co.*, 25 Ala. 566.

40. A formal objection to the bill, which, if it had been raised before the chancellor, might have been remedied by an amendment, is not available on error. *Johnson v. Culbreath*, 19 Ala. 348; *Walker and Wife v. Smith*, 28 Ala. 569; *Holston v. Holston*, 23 Ala. 777.

41. A correct decree, though rendered for a wrong reason, will be affirmed on error. *Stiles & Co. v. Lightfoot*, 26 Ala. 443; *Cave v. Webb*, 22 Ala. 583; *Stone v. Hale*, 17 Ala. 557.

42. Using the answer of one defendant as evidence against the others, in stating an account before the master, though erroneous, is not available on error, when the other answers and proof in the cause show a greater balance against them, than the account as stated on the basis furnished by the answer. *Halstead v. Shepard*, 23 Ala. 558.

43. Where issues at law are directed, to try the validity of a will and deed of gift, which are so connected by words of reference, that if the will is valid the deed cannot be held invalid; and the verdict of the jury establishes the validity of the will, the trial of the other issue is an immaterial matter, and its regularity will not be looked to on error. *Dabbs v. Dabbs*, 27 Ala. 646.

44. Where the verdict is in favor of the will, and the court trying the issue erroneously renders judgment for the costs against the heir, besides certifying the amount to the chancellor, by whom also they are decreed against the heir, the error is without injury. *Ib.*

45. The appellate court will decide no question, which was not made and act on in the primary court, and that action assigned for error and insisted on; unless it be the want of jurisdiction apparent on the face of the proceedings. *Freeman v. Swan*, 22 Ala. 106.

46. When non-resident infant defendants are not properly brought in as parties, the decree will be reversed by the appellate court, although the error escaped the notice of the solicitors and chancellor in the court below, and was not specially assigned as error. *Clark v. Gilmer*, 28 Ala. 265.

47. A failure to revive the suit against the legal representative of a deceased defendant, who was a necessary party to the bill, is erroneous, although the objection was not raised in the primary court. *Frowner v. Johnson*, 20 Ala. 477.

48. If the defendant does not take advantage, by plea or demurrer, of the want of proper parties to the bill, the objection is not available on error, unless the absent parties are indispensable to the rendition of a proper decree. *Ozley v. Ikelheimer*, 26 Ala. 332; *McMaken v. McMaken*, 18 Ala. 576; *Woodward v. Wood*, 19 Ala. 213; *Sanders v. Godley*, 23 Ala. 473.

49. The objection cannot be raised for the first time in the appellate court, that the order of publication against non-resident defendants was not accompanied by an abstract of the bill, as required by the seventeenth rule of chancery practice. *Gannard v. Eslava*, 20 Ala. 732.

50. An objection to the jurisdiction of the chancery court, on account of a mistake in the decree setting forth the reason why the cause was transferred from the probate court, cannot be raised in the appellate court, when the record discloses a sufficient rea-

son for the transfer, and the order itself assigns no reason. *McBroom's Adm'rs v. McBroom's Creditors*, 19 Ala. 173.

51. A mistake in the christian name of a party against whom a decree has been rendered, when the true name appears in the record, is a mere clerical misprision, which the appellate court will correct at the costs of the plaintiff in error. *Ib.*

52. A decree will not be reversed on error, because a party defendant, who has in his hands the fund sought to be condemned, is sued as administrator instead of guardian, when it appears that all the parties interested in the fund were before the court, and that no injury can result to any one. *Chapman v. Hamilton*, 19 Ala. 121.

53. Although the chancellor has no power to order a partial answer to stand for a plea, yet, if such an order is made, and issue is joined on the answer as a plea, and the complainants proceed under it to take proof to establish their case, the irregularity only amounts to error without injury. *Bentley v. Cleaveland*, 22 Ala. 814.

5. *Remandment of Cause.*

54. A cause will not be remanded, that the bill may be amended, when the amendment would make an entirely new case. *Crabb's Adm'r v. Thomas*, 25 Ala. 212; *Williams v. Barnes*, 28 Ala. 613.

55. In reversing the decree of the chancellor, dismissing the bill without a decision on the merits, the appellate court will remand the cause without determining its merits. *Byrd v. McDaniel*, 26 Ala. 582; *Bondurant v. Sibley's Heirs*, 29 Ala. 570.

56. When a bill is dismissed by the chancellor on final hearing, and his decree is reversed on error, the appellate court will not remand the cause, that further evidence may be taken, but will render such decree as the chancellor should have rendered. *Grier v. Campbell*, 21 Ala. 327.

57. In divorce cases, if the chancellor's decree, dismissing the bill for want of jurisdiction, is reversed on error, the cause will be remanded, although the evidence shows that the complainant is entitled to a decree when it may become necessary to make some provision for the wife, or some order in relation to her separate estate, which the appellate court cannot make. *Wiley v. Wiley*, 27 Ala. 704.

58. And even where the appellate court, reversing the decree of the chancellor, holds that the complainant is entitled to a divorce, the cause will nevertheless be remanded, because it is the duty of the register to make out and transmit the record to the speaker of the house of representatives. *Hanberry v. Hanberry*, 27 Ala. 719.

ESTATES OF DECEDENTS.

1. Prior to the passage of the act of 1846, the distributees of an estate might maintain a suit against the personal representative, after his removal from office, to compel a settlement and account of his administration; and where such a suit was properly commenced, the subsequent passage of that act could not operate to defeat it. *Gould v. Hayes*, 19 Ala. 438.

2. The distributees of an estate can maintain no suit, either at law or in equity, for the mere purpose of distribution, until letters of administration have been granted on the estate of the decedent. *Gardner v. Gantt*, 19 Ala. 666.

3. Where an estate is entirely free from debt, equity will decree distribution, on the application of the distributees, without the expense and delay of an administration; or the distributees, if adults, may agree upon a division, and chancery will uphold it, if no unfairness intervene. But, if the administrator, or any one of the distributees, seeks a settlement of the estate through an administration, the proceedings will not be restrained; and therefore, the administrator of a deceased distributee may file a bill in equity, to obtain his intestate's distributive share of the estate, although it is in the hands of the other distributees. *Marshall v. Crow's Adm'r*, 29 Ala. 278.

4. A distributee of an unsettled estate, who retains possession of slaves on the ground of an attachment for

them as family negroes, cannot come into equity to enjoin an action at law by the personal representative for their recovery, and to have them allotted to him as a part of his distributive share of the estate. *Machem v. Machem*, 28 Ala. 374.

5. Where a foreign administration, rightfully granted, is still pending, the chancery court here may entertain a bill *quia timet*, to prevent the destruction of the assets which have been brought within its jurisdiction; but, in such case, it will not proceed, at the instance of the distributees, to a final settlement of the administration, but will remit them for that purpose to the foreign forum. *Worthy v. Lyon*, 18 Ala. 784.

6. Chancery will entertain a bill against an administrator, at the suit of the distributees, for a discovery of assets not returned in his inventory; and having jurisdiction for that purpose, it will go on and close the administration. *Wilson and Wife v. Crook*, 17 Ala. 59.

7. Chancery will restrain the orphans' court from proceeding in the final settlement of an estate, where matters of purely equitable cognizance are to be adjudicated, or where a discovery is necessary to ascertain facts which cannot be otherwise established. *Horton v. Moseley*, 17 Ala. 794.

8. It will also take jurisdiction, at the instance of specific legatees, to compel the executor to discover and account for unadministered assets, and to appropriate them, in ease of the specific legacies, to the payment of the testator's debts; and this, notwithstanding the pendency of a settlement in the orphans' court. *Pearson v. Darrington*, 18 Ala. 348.

9. The settlement of an estate, which has been commenced in the orphans' court, may be withdrawn and carried into chancery, where there are complicated matters of account to be settled, or trusts to be executed, which the former court cannot enforce. *Gould v. Hayes*, 19 Ala. 438.

10. Where a creditor files a bill, seeking to condemn certain real and personal property, which is standing in the name of a trustee for the wife and children of his debtor, and which is alleged to have been fraudulently added to their estate; and the debtor's estate has been reported insolvent, chancery will take jurisdiction, and withdraw the administration from the probate court. *Pharis v. Leachman*, 20 Ala. 662.

11. And where a creditor seeks to subject to the satisfaction of his debt his debtor's distributive share of an unsettled estate, it is indispensably necessary that the chancellor should proceed to make a final settlement of the administration, and separate the debtor's distributive share from the residue of the estate, before a final decree can be rendered for its condemnation. To this end, the master should take an account of the administration, as on the final settlement of an estate in the probate court; and the chancellor should then direct the distribution of the estate among the parties in interest, in a manner conformable (or as nearly so as practicable) to the statutory practice of the probate court, and order the sale of so much of the debtor's distributive share as shall be sufficient to satisfy the creditor's demand. *Lang v. Brown*, 21 Ala. 179.

12. When it becomes necessary, in closing an administration in chancery, to sell the real estate for the payment of debts, the chanceller may order it to be sold in the manner prescribed by statute for similar sales under order of the orphans' court, or as near thereto as practicable. *Wilson and Wife v. Crook*, 17 Ala. 59.

13. It is competent for the chancellor, while the settlement of an administration is pending in his court, if the exigencies of the estate require it, to direct, by interlocutory decree, a sale of the slaves for cash, at an unusual season of the year for selling such property; and this, even before an accounting is had between the administrator and distributees. *Pearson v. Darrington*, 21 Ala. 169.

14. When the settlement of an estate has been removed from the probate court, and is rightfully pending in chancery, if the administrator proceeds in the probate court, it is at his peril, and chancery may divest any rights he may thereby acquire, if they should be found to embarrass the proper administration of the estate in

equity. If he obtains an order of sale from the probate court, and becomes himself the purchaser of the slaves sold; or, if he pays off demands against the estate, and seeks to indemnify himself by such sale and purchase of the property; or, if he has extinguished demands by giving his individual obligations, which have been reduced to judgment, and he seeks by such purchase to make the property subject to levy,—in either event, chancery will hold the property subject to its control, to abide whatever decision the justice and equity of the case may require on final hearing. *Ib.*

15. Where land is sold by an administrator, under an order of the probate court, and the purchaser dies before a decree is rendered divesting the legal title; a bill filed by the administrators of the two estates,—asking that the land might be resold, on the same terms and conditions as at the first sale, in order that the purchase-money might meet the payment of the notes executed by the deceased purchaser; and alleging that his other property was not sufficient to pay all his debts, —is without equity, since chancery has no power to direct the appropriation of such equitable assets to the payment of the notes in preference to the other debts. *Vaughan & Hatcher v. Heirs of Holmes and West*, 22 Ala. 593.

16. Where several plaintiffs, claiming to be the next of kin of a decedent, join in a bill for the settlement of his estate; and one of them claims through his father, who died after said decedent, there is a misjoinder of complainants, which is fatal on general demurrer. *Plunkett v. Kelly*, 22 Ala. 655.

17. If one of the distributees dies after the commencement of the suit, it must, as a general rule, be revived against his personal representative; and a failure so to revive it will be error, although the objection was not raised before the chancellor. *Frowner v. Johnson*, 20 Ala. 477.

18. On appeal from a decree of distribution among the children of a deceased distributee, the assignment that there is error in the decree, presents the question, whether distribution was made among the proper parties. *Ib.*

As to the marshaling of assets, see that title.

ESTOPPEL.

I. By Record.
II. By Deed.
III. By Matter en Pais.
IV. General Requisites.

I. By Record.

1. One who is neither a party nor a privy to a judicial proceeding, is not bound by it. *Lang's Heirs v. Waring*, 17 Ala. 145; *Rowland v. Day*, 17 Ala. 681.

2. A person who is not himself bound by a judgment, cannot set it up against another as an estoppel. *Gwynn and Wife v. Hamilton's Adm'r*, 29 Ala. 233.

3. A judgment recovered by the husband, as administrator of his wife, is, as to the distributees of the estate, *res inter alios acta*, and therefore no estoppel. *Ib.*

4. Where plaintiff and defendant both derive title from a purchaser at an administrator's sale, made under an order of the probate court, the defendant is estopped from denying the validity of the proceedings under which the sale was had. *Garrett v. Lyle*, 27 Ala. 586.

5. Where a judgment is freely and voluntarily confessed, with full knowledge on the part of the defendant of all the facts connected with it, and without any fraud or collusion on the part of the plaintiff, the defendant is estopped from setting up any defense to the debt which existed anterior to such confession, and cannot have relief against it in chancery, except upon some equity subsequently arising. *Moore v. Barclay*, 23 Ala. 739.

6. A decree of insolvency, rendered by a State court, does not preclude a creditor, even in the Federal chancery courts, from showing that the estate, when its assets are fairly stated, is not insolvent. *Byrne v. McDow*, 23 Ala. 404.

7. An endorsee, who acquires a note

before maturity, in good faith, for valuable consideration, and without notice, is not bound by a decree previously rendered against his endorser. *Winston v. Westfeldt*, 22 Ala. 760.

For analogous decisions, respecting the conclusiveness and effect of decrees, see DECREES, II.

II. BY DEED.

8. Where the husband releases his interest in certain slaves held adversely to his wife, he is estopped from questioning the validity of his deed, and therefore cannot join with his wife in a bill to recover her interest in the slaves. *Hamilton and Wife v. Clements' Adm'rs*, 17 Ala. 201.

9. If the maker of a note, having an equitable set-off which is available against an assignee after maturity, executes a mortgage to the assignee, to secure the payment of the note, this does not estop him from afterwards claiming the benefit of his set-off. *Carroll v. Malone*, 28 Ala. 521.

10. A trustee for a married woman, having taken upon himself the execution of the trust, cannot allege fraud in the execution of the deed, as a defense to a suit, instituted by the beneficiary, to reform the deed, and enjoin the judgment creditors of her husband from levying on the property. *Godwin v. Yonge*, 22 Ala. 553.

11. So, a trustee for a married woman, under appointment from the chancery court, knowing at the time of his acceptance that the deed creating the trust was fraudulent as to creditors, is estopped from setting up against the beneficiaries the claims of creditors or his own claims as surety of the debtor. *Henderson v. Segars*, 28 Ala. 352.

12. A trustee in a deed for the benefit of creditors, when sued for a settlement and account, is not estopped from showing that the actual amount of any of the assigned debts was less than that specified in the deed; and he would only be accountable for the actual amount. *Royall's Adm'r v. McKenzie*, 25 Ala. 363.

13. In a suit for dower, where the demandant's husband was a mere conduit for passing the title from his vendors, as trustees, back to them individually, a party deriving title from them is not estopped from showing that he had no beneficial seizin: his seizin is not thereby denied, but only explained. *Edmondson v. Welsh and Wife*, 27 Ala. 578.

14. When a purchaser files a bill for an abatement of the purchase-money, on account of a deficiency in the quantity of land, and does not allege either fraud or mistake in the execution of the deed, the deed of conveyance must be taken as conclusive evidence of the terms of the contract. *Frederick v. Youngblood*, 19 Ala. 680.

III. BY MATTER EN PAIS.

15. Where the plaintiff's conduct has not been the basis of the acts of the person through whom the defendant claims, and his silence has not misled any one, he will not be held to have forfeited his equitable rights by the mere failure to assert them. *Brewer v. Brewer & Logan*, 19 Ala. 481.

16. Where slaves are sent home with a newly married couple by the wife's father, and the husband elects to treat them as his wife's property, this might operate, in a controversy between the wife and her husband's personal representative, to vest in her the equitable title; but the husband would not be thereby estopped from asserting title in himself, nor would his creditors, after his death, be prevented from subjecting the slaves to the payment of his debts. *Burnett v. Branch Bank at Mobile*, 22 Ala. 642.

17. Where the sheriff, by the direction of the defendant in execution, levies on land to which the latter has an equitable title, sells it, and applies the proceeds to the satisfaction of the execution; and the defendant delivers possession to the purchaser, assuring him that the title is perfectly good, he will be held estopped from setting up, as against innocent purchasers for valuable consideration without notice, a legal title subsequently acquired, and will be enjoined from proceeding at law to recover the land. *Stone v. Britton*, 22 Ala. 543.

18. An act or admission, to conclude a party from afterwards asserting a right, must be plainly inconsistent with that right, and must have been

acted on by the other party: if it is susceptible of two constructions, one of which is consistent with that right, it forms no estoppel. *Ware v. Cowles*, 24 Ala. 446.

19. A bill, seeking to enjoin the defendant from asserting his legal title to a tract of land, which he had verbally sold to one W., who sold to S., who sold to plaintiff, alleged, that W. agreed to sell to S., if defendant would sanction the sale, and would recognize his said verbal contract, and that they together called on him, to ascertain whether he would do so; that defendant replied, that he did recognize the validity of his contract, was willing that W. might sell to S., and would look to the former for the payment of his purchase-money. The answer admitted these facts, but denied that defendant thereby intended to surrender his lien on the land, or to do more than recognize the validity of his verbal contract. *Held*, that the injunction was properly dissolved on this answer, since the facts admitted by it were not sufficient to create an estoppel. *Jones v. Cowles*, 26 Ala. 612.

20. If a person in possession of land, upon inquiry by one who is about to purchase it from another, advises him to purchase, assures him that there will be no difficulty about the title, and afterwards delivers possession to the purchaser's agent, these acts amount to an abandonment, or waiver, of a vendor's lien which he held against the person from whom the purchaser bought. *Burns v. Taylor*, 23 Ala. 255.

21. If the maker of a promissory note induces a third person to trade for it, by assuring him that he has no set-off against it, and that he will pay it promptly, he cannot afterwards assert any ground of relief against the purchaser. *Drake v. Foster*, 28 Ala. 649.

22. But where one of several joint makers of a note, given for the purchase-money of land, thus induces a third person to buy the note, although he will not be entitled to any relief against such purchaser, he may nevertheless join with the other makers of the note in a bill for the rescission of the contract. *Lanier v. Hill*, 25 Ala. 554.

23. Where real estate is sold under an order of the probate court, on the application of the widow as administratrix, her failure to announce at the sale that the land was sold subject to her dower, does not estop her from asserting her claim. *Owen v. Slatter*, 26 Ala. 547.

24. If the president of a foreign bank is required by its charter to be a resident of the State in which it is located, he cannot, when sued by its creditors here, be heard to deny the character in which he held himself out to the world, nor aver that he was not qualified to hold that office by reason of his residence. *Bank of St. Mary's v. St. John, Powers & Co.*, 25 Ala. 566.

25. Where an administrator agrees with his co-administrator, that they will buy certain lands for the estate at the Government land sales; procures him, in compliance with that agreement, to join in raising funds for that purpose; charges the estate with the expense of raising those funds; prevents his co-administrator and the decedent's only adult son from attending the sales, by assuring them that he will buy the lands for the estate; prevents other persons at the sale from bidding for the lands, by declaring that he had come expressly to buy them for the estate; by these means, and with these funds, buys the lands, for a sum greatly below what he would otherwise have had to pay for them; takes the title in his own name, and soon afterwards resells them at a large profit,—he is estopped in equity, as against those representing the estate, from denying that the funds belonged to the estate. (CHILTON, C. J., *dissenting*.) *Mosely v. Lane*, 27 Ala. 62.

IV. General Requisites.

26. Mutuality is an essential ingredient of an estoppel; therefore, a slave, or any other person who is not bound by an estoppel, cannot claim the benefit of it against another. *Bentley v. Cleaveland*, 22 Ala. 814; *Gwynn and Wife v. Hamilton's Adm'r*, 29 Ala. 233.

For analogous decisions, see same title in PART IV.

EVIDENCE.

See same title in PART IV.
Also, ANSWER, V.
DEPOSITIONS.
EXHIBITS.
PARTIES, IV.

EXCEPTIONS.

To Answer.—See ANSWER, III.
To Master's Report.—See MASTER AND REGISTER.

EXHIBITS.

1. When a letter is annexed as an exhibit to the bill, and prayed to be taken as part thereof, its statements, unless in some manner qualified or explained, thereby become the statements of the bill. *Minter & Gayle v. Branch Bank at Mobile*, 23 Ala. 762.

2. Memoranda from books, and documents, when produced in response to a call in the bill, are evidence in the cause, but not necessarily conclusive evidence of the facts which they tend to establish. *Tarleton v. Goldthwaite's Heirs*, 23 Ala. 346.

3. When an account is called for by the bill, and given in the answer, it must be regarded as responsive matter, and as *prima facie* correct. *May v. Barnard*, 20 Ala. 200.

FRAUD.

1. Courts of equity grant relief against conveyances obtained by misrepresentation or mistake; and if the parties occupy a relation from which an unusual degree of confidence, affection or sense of duty naturally springs, the utmost degree of good faith is required from the party in whom the trust is reposed, and he must show that the contract is in every respect just, fair, and equitable. *Boney v. Hollingsworth*, 23 Ala. 690.

2. Where a father executed a conveyance of certain lands to his son, but filed it away among his papers, and never delivered it; and after his death the sons obtained from their sister a voluntary relinquishment of all her interest in the lands, by representing to her that their father on his death-bed had declared it to be his intention that they should have the lands,—the relinquishment was set aside, because the grantees failed to show that they stated, fully and fairly, their father's dying declarations. *Ib.*

3. A deed, executed by a married woman, simultaneously with the execution by her husband of his last will and testament; purporting to be made in consideration of her love and affection for the two grantees, who were her husband's children by a former marriage, and of the settlement and provision made for her by her husband's will; conveying to each of the children an equal interest with herself in her separate estate secured by antenuptial contract, and reserving, as a consideration therefor, the right to become an equal heir with them in her husband's estate, with which her property is declared to be thereby incorporated,—will not be sustained in equity, at the suit of the grantees, against the heir and administrator of the grantor, where the provisions of the will, the confidence which the wife reposed in her husband, and other circumstances in proof, show that it was executed through mistake on the part of the wife, and misrepresentation on the part of the husband, as to the amount of his debts, in that the deed and will together appear to have constituted a plan, by which it was contemplated that, without a sale of any of the property, the joint plantation should continue to be kept up and worked with the slaves of both husband and wife, and the wife and children be maintained out of its proceeds, while the husband's estate was in fact so much embarrassed as to leave nothing for distribution after the payment of debts. *Trippe v. Trippe*, 29 Ala. 637.

4. Equity will not interfere to declare a contract, which is on its face an absolute sale, to be a trust or mortgage, when the evidence shows that the transaction was intended to defraud the creditors of the vendor. *Brantley v. West*, 27 Ala 542.

5. Equity will not entertain juris-

diction of a bill, of which the sole object is to recover money alleged to have been paid through ignorance or mistake of fact on the part of the complainant, and through fraudulent pretenses on the part of the defendant, where the remedy at law is adequate and complete. *Russell v. Little*, 28 Ala. 160.

6. Courts will not strive to force conclusions of fraud: if the circumstances relied on to sustain the allegation of fraud, are fairly susceptible of an honest intent, that construction will be placed upon them. *Ala. Life Ins. & Trust Co. v. Pettway*, 24 Ala. 544.

7. Where a part of the consideration of a mortgage, which is void for constructive fraud as against creditors, is the payment by the mortgagees of a previous incumbrance on a portion of the property, it cannot stand as a valid security for their reimbursement. *Wiley, Banks & Co. v. Knight*, 27 Ala. 336.

8. A deed, although fraudulent and void as against creditors whose debts are delayed, is nevertheless valid between the parties themselves, and neither can set up the fraud in avoidance of it. *Wiley, Banks & Co. v. Knight*, 27 Ala. 336; *Walton v. Bonham*, 24 Ala. 513.

9. A trustee, after accepting a trust created by a fraudulent deed, cannot set up the fraud against the beneficiaries. *Godwin v. Yonge*, 22 Ala. 553; *Henderson v. Segars*, 28 Ala. 352.

As to fraudulent conveyances, see that title in PART IV.

As to rescission of contracts on the ground of fraud, see RESCISSION.

GAMING CONTRACTS.

1. The right to enjoin a judgment at law, founded on a note given for a gaming consideration, is not limited, by the analogy between such a bill and a bill of review, to three years from the rendition of the judgment. *Paulding v. Watson & Eidson*, 21 Ala. 279.

2. Where a bill was filed in 1845, to enjoin a judgment on a note for $1030, dated Sept. 17, 1836, and payable Jan. 1, 1837; and the defendant to the bill, who was an assignee of the note, denied the alleged gaming consideration upon information merely, and called for proof; the only witness examined, as to the consideration, testified that, in the spring of 1836, he was present at a certain place while the maker and payee of the note were playing at cards,—that the former then gave the latter, on account of losses at cards, his promissory note "for $1000, perhaps a few dollars more;" that the note was dated at the time of the transaction, but he did not recollect when it was payable; and that the payee of the note was a gambler and horse-racer. *Held*, that this evidence, in the absence of all proof showing other transactions between the maker and payee of the note, was sufficient to outweigh the formal denial of the answer, and to establish the identity of the note. *Ib.*

3. Where the judgment was rendered by default, and the bill to enjoin it was not filed until after the lapse of more than ten years, and no excuse shown for the delay and neglect, all the costs were imposed on the plaintiff, though the judgment was enjoined. *Ib.*

4. The right to a perpetual injunction of a judgment at law founded on a gaming consideration, although the plaintiff therein is an innocent holder for valuable consideration, and no defense at law was attempted, is not affected by an erroneous decree of the chancellor, dismissing the bill, and dissolving the injunction; and on the reversal of his decree by the appellate court, after the collection of the money had been enforced by execution, it may be recovered in an action for money had and received, if commenced within six years from the reversal of the decree. *Paulling v. Watson*, 26 Ala. 205.

GIFTS.

See SPECIFIC PERFORMANCE.

GUARDIAN AND WARD.

See same title in PART II.

HUSBAND AND WIFE.

I. CONTRACTS BETWEEN HUSBAND AND WIFE.

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I. CONTRACTS BETWEEN HUSBAND AND WIFE.

1. *Ante-Nuptial.*

1. Where an ante-nuptial settlement, executed in South Carolina, the place of the parties' residence, conveyed the property of the wife to a trustee, to be held by him for her sole and separate use and benefit until the solemnization of the marriage, and afterwards "for the joint and equal benefit and behoof" of the husband and wife, "for and during the term of their joint lives, without being in any manner subject to the debts, contracts, and engagements" of the husband; and in trust to permit and suffer the husband and wife, "during their joint lives, to receive and take the profits, &c., to and for their joint and equal use, behoof and benefit; and from and after the death of either of them, then, to and for the sole and individual use of the survivor, during his or her natural life," with remainder over,—*held*, that by the law of South Carolina the wife took a joint interest with her husband in the trust; that the legal title continued in the trustee, until the execution of the trust by the death of husband or wife; and that the husband's interest in the property could not, during the joint lives of himself and wife, be sold under execution at law. *Peake v. Yeldell*, 17 Ala. 636.

2. An ante-nuptial contract stipulated, that a certain portion of the slaves and other property of the wife, in possession and remainder, should be settled and secured after the solemnization of the marriage, by some good and sufficient conveyance, upon a trustee for the use and benefit of the wife during her life; that the conveyance should provide, that this property might, by joint agreement of the husband and wife, be changed, sold and resold, or the whole trust annulled; and that the residue of the wife's property should be conveyed to such trustee, for the use of the wife, until the husband directed it to be sold, and the proceeds of such sale to be paid to him. *Held*, that the wife took a separate estate, in that portion of the property which was to be conveyed to the trustee, "for her use and benefit during her natural life;" that the power given to husband and wife, to annul the trust, did not subject the property to his debts; and that the husband, during the wife's life, did not take such an interest in the remainder, after the determination of her life estate, as was subject to levy and sale at law. *Strong v. Gregory*, 19 Ala. 146.

3. An ante-nuptial contract was in these words: "Whereas a marriage is about to be solemnized between B. and M., and the said M. is likely to bring into the marriage property of some value, and it being desirable that some provision should be made for her maintenance and support, it is therefore agreed and stipulated, that the real estate and negroes which were devised to said M. by her father, and all other property which she may hereafter otherwise inherit, shall be held and remain the separate property of the said M., not subject to any other disposition save by the joint consent of herself and one of the trustees hereinafter named; the said property, however, to be and remain in the possession of said B., for the benefit of

the parties. It is further stipulated, that said property shall descend and be inherited by the children of the said M., if she has any; but if none, or in case of their death before marriage or arriving at the age of twenty-one years, then said property to go to said B." Trustees were also appointed, "for the said M., to protect her interest, and attend to the execution of the instrument;" and by another provision, one of the trustees was given "full power to sell and dispose of the real estate of said M., whenever he may see proper to do so, and to appropriate the funds in such way as he may think best for her interest." *Held*, that the wife took such a separate estate in the slaves as entitled her exclusively to their labor and profits; that her rights could not be defeated by the husband, whose possession under the deed must be construed to mean for the use of the wife during her life, and at her death for those who might be entitled to the remainder; and that the property could not be subjected to the debts of the husband. *Petty v. Boothe*, 19 Ala. 633.

4. An ante-nuptial agreement, stipulating that the wife, "during her natural life, shall have the sole management and control" of the slaves owned by her before marriage, with the exclusive right to dispose of the same at her death," vested the entire estate in the wife, for her separate use, prior to the passage of the acts of 1848 and 1850; and on her death, without disposing of them, they passed to her administrator and next of kin, and not to her husband. *Randall v. Shrader*, 20 Ala. 338.

5. A contract between S. and M. provided, that each party should, after marriage, retain the exclusive interest in all property, of whatever kind, owned by him or her respectively at the time of the marriage, or afterwards acquired by purchase, gift, devise, bequest, or descent, and disclaim all interest in the property of the other; and also contained the following stipulations: "And it is here fully and expressly intended to be understood, and so agreed, covenanted, and sanctioned, that nothing is intended by this instrument, or other contract or understanding, to deprive either the said S. or M. from all and every right to have, hold and enjoy all the provisions, benefits, &c., of the law as now or may be hereafter provided or enacted, governing estates, after the death of either of the said parties; that the full intent and meaning of this instrument is, that at the death of either the said S. or M., this instrument, with all its meaning, shall cease to be of any effect, and of no avail, void and dead, and the surviving party enjoy all the privileges, rights and immunities, as though no contract ever existed, or written instrument had between them; and nothing is intended to prevent the law from the control, management, &c., as though no contract did ever exist; and nothing shall be so construed as to prevent the subscribing parties from mutually enjoying the goods, chattels, or effects of any kind, in the usual comforts and necessities of life, or for the peace, happiness, prosperity and advancement of the parties and their families. In witness whereof, and intending this instrument, with all its meaning, to cease to be of any effect, to be void, canceled, annihilated, and forever cease to be of any meaning, and of no effect, at the death of either of the parties, the parties have hereunto set their hands," &c. *Held*, that the wife, on the death of the husband, took an absolute estate in the property brought by her into the marriage. *Saunders v. Saunders*, 20 Ala. 710.

6. A deed, executed by a woman in contemplation of marriage, conveying all her property, consisting of bonds and mortgages, to a trustee, "to have and to hold," &c., "in trust, for and during the joint lives of" herself and her intended husband, "to and for their joint use, behoof and benefit, and to suffer and permit them to have, take and receive the issue, income, interest and profits arising from the said bonds and mortgages, to and for their joint use and benefit, without being in any manner subject to the debts, contracts, or control" of the husband, does not exclude the husband's marital rights, but the property may be taken under execution against him. *Geyer v. Branch Bank at Mobile*, 21 Ala. 414.

7. A deed, executed by a woman on

the day before her marriage with an insolvent man, conveying to a trustee all her property, both real and personal, in trust he "shall permit her to remain in quiet and peaceable possession" of it, "and take the profits thereof to her own use, and the increase, interest and income thereof to her own use and benefit during her natural life, and at her decease to go and descend to her heirs absolutely forever," does not exclude the husband's marital rights. *Mitchell v. Gates*, 23 Ala. 438.

8. An ante-nuptial contract stipulated, that the husband should receive and enjoy, "during the lifetimes of" himself and wife, "all the rights and profits" of the wife, "and at their decease to descend to the heirs of the body of" the wife "which may survive at that time;" and that the wife should "have no part or portion of the property now owned by" the husband. *Held*, that the husband's marital rights were not excluded by the deed, but, having reduced the wife's property to possession during coverture, he thereby became entitled to it absolutely until the death of himself and wife, subject to the contingent limitation to the heirs of the body of the wife who might be living at that time. *Williamson and Wife v. Mason*, 23 Ala. 488.

9. On an application for the probate of the wife's will, which was resisted by the husband, an ante-nuptial contract was established on the testimony of two witnesses, who had often seen and read it, in connection with evidence of the husband's subsequent declaration that he had burned it; although there was evidence of the wife's declarations, to several persons, that there never was any marriage contract between her and her husband; and although the witnesses, who testified to its existence, could not recollect its language, and did not agree as to its precise terms. *Wells v. Bransford*, 28 Ala. 200.

10. An ante-nuptial contract, which was drawn by the husband himself, and which, through his fraud or mistake, does not include all the property which was intended to be secured to the separate use of the wife, will be reformed in equity on her application. *Love v. Graham*, 25 Ala. 187.

11. An ante-nuptial contract, barring dower, specifically enforced against the wife, at the suit of her husband's heirs-at-law. *Webb v. Webb's Heirs*, 29 Ala. 588.

2. *Post-Nuptial.*

12. Although courts of law cannot regard contracts entered into between husband and wife while that relation exists, yet courts of equity will recognize and enforce them, as against the husband or his personal representative, where the rights of third persons will not be thereby injuriously affected. *Williams v. Maull*, 20 Ala. 721.

13. If the husband purchases slaves in his wife's name, takes the bills of sale in her name, and treats them during his life as her property; and the slaves thus purchased are a reasonable provision for the wife, equity will uphold the transaction, and secure the slaves to the wife against the claim of her husband's administrator. *Ib.*

14. The facts, that the husband took the bills of sale in the name of his wife, always recognized the property as belonging to her, and disclaimed all ownership in himself, are equivalent to a delivery to her, and equity will regard their joint possession during his life as the possession of the wife; and where the possession, under such circumstances, remains with the wife after the husband's death, equity will regard her as having a beneficial interest in the property, and not as holding it in trust for her husband's administrator. *Ib.*

15. If the husband purchases property, in his own name, as trustee for his wife, this will be held, as against his administrator, a valid gift to her; yet he may revoke it at any time during his life, and a court of equity will therefore subject it to the payment of his debts. *Gannard v. Eslava*, 20 Ala. 733; *Pharis v. Leachman*, 20 Ala. 662. See, also, *Bridges & Co. v. Phillips*, 25 Ala. 136; *Love v. Graham*, 25 Ala. 187.

16. Where slaves are sent home with a newly-married couple by the wife's father, and are afterwards bequeathed by him to the wife, for her sole and separate use; and the husband treats them, during his life, as

his wife's property under her father's will, he will be held in equity to have elected to treat them as a loan, and not as a gift, and his administrator will be bound by that election. *Williams v. Maull*, 20 Ala. 721.

17. But the husband, in such case, is not thereby estopped from asserting title in himself; nor are his creditors, after his death, thereby precluded from subjecting the property to the payment of his debts. *Burnett v. Br. Bank at Mobile*, 22 Ala. 642.

18. If the husband, after the delivery of such slaves by the wife's father, accepts a deed from the donor, conveying them to the wife and the heirs of her body, his marital rights, which were perfected by the delivery, are not thereby affected. *Rumbly v. Stainton and Wife*, 24 Ala. 712.

19. But, if slaves are given or bequeathed to the wife during coverture, by words which do not create a separate estate in her; and the husband receives and holds them, in ignorance of his marital rights, as the separate property of his wife, disclaiming all ownership in himself, and never attempting to assert his marital rights during the life of the wife,—this is not a reduction to possession as husband, and his marital rights do not attach. *Lockhart and Wife v. Cameron*, 29 Ala. 355; *Machem v. Machem*, 28 Ala. 374. See, also, *Jennings v. Blocker*, 25 Ala. 415; *Gillespie's Adm'r v. Burleson*, 28 Ala. 551.

20. If the husband, in ignorance of his marital rights, disclaim all interest in slaves received from his father-in-law, and admit that they belong to his wife, such admissions vest no title in the wife during coverture. *Lockhart and Wife v. Cameron*, 29 Ala. 355.

21. Where a father executes in favor of his daughter an instrument which he supposes creates in her a separate estate, but which is ineffectual as a conveyance, and on her marriage delivers the property to her husband, under the mistaken belief that the instrument secures it to her sole and separate use; and the husband accepts it under a similar belief,—a trust arises in favor of the wife, which a court of equity will enforce against the husband and his execution creditors. *Betts v. Betts*, 18 Ala. 787.

22. Where husband and wife conveyed certain personal property to a trustee, in trust for themselves during their joint lives, then for the survivor during his or her life, then to L. for life, and afterwards for his next of kin; and the husband afterwards conveyed his entire interest in the property to L., who then conveyed to the trustee, "to and for the only use and benefit" of the wife,—*held*, that the wife took a separate estate in the property, and that the husband had not such an interest as could be sold under execution at law. *Cuthbert v. Wolfe*, 19 Ala. 373.

23. Where the husband conveys personal property to a trustee, for the use and benefit of his wife, she takes a separate estate in the property as against him. *McWilliams v. Ramsay*, 23 Ala. 813; *Andrews v. Andrews*, 28 Ala. 432.

24. Equity will sustain a post-nuptial voluntary settlement in favor of the wife, when executed, and will specifically enforce, as against any other person than the husband, an agreement to make such a settlement; but it will not specifically enforce such an agreement against the husband, because it is revocable until executed. *Andrews v. Andrews*, 28 Ala. 432.

25. Neither the moral obligation of the husband to provide for his wife, nor the fact that he received property by her, nor both these considerations together, will justify a specific execution of a post-nuptial agreement to make a settlement on her; but when, superadded to these, there is a valuable consideration, irrevocably executed on the part of the wife, a specific performance will not be refused, on account of the inadequacy of that consideration. In this case, the court decreed the specific performance of an agreement to settle on the wife slaves valued at more than $4,000, in consideration of her relinquishment of dower in lands sold at $2,600; it appearing, also, that the husband received by her slaves and other property, and that there were no children of the marriage to be provided for. *Ib.*

26. If the husband purchases property with money belonging to the separate estate of the wife, other than the income or profits thereof, and takes

the title in his own name, equity will compel him at the instance of his wife, to convey the property to her; consequently, if he voluntarily conveys it to her, though for the purpose of preventing his creditors from taking it in payment of his debts, his conveyance will be sustained. *Wilson v. Sheppard*, 28 Ala. 623.

II. EQUITY OF WIFE TO SETTLEMENT.

27. The power, exercised by the chancery court in England, of compelling the husband who has married a ward of the court to execute a settlement, is based on the ground that the marriage is a contempt, and that the husband, before he can be relieved of it, must make a proper settlement on the wife. *Chambers v. Perry*, 17 Ala. 726.

28. Whether the power will be exercised by the chancery courts, as organized in this State, to the same extent as in England, *quære? Ib.*

29. Where the husband of a female legatee receives money from the executor, not as an advance on the legacy, but under a contract to refund it, the wife's equity remains unimpaired; and until a suitable settlement is made on her, the legacy cannot be appropriated to the payment of the debt to the executor. *Savage v. Benham*, 17 Ala. 119.

30. The wife's right, in such case, to a settlement of the property upon herself, is unaffected, as between herself and the executor, by any transactions between the latter and her husband, which had no reference to her estate in the executor's hands, and which were not designed to be credited to that fund; but if the property in the executor's hands is more than sufficient for the reasonable support and maintenance of the wife and her children, and her husband is indebted to the executor on the settlement of their accounts, the executor will be allowed, after making a reasonable settlement on her, to retain out of the residue the amount due from the husband. *Montgomery v. Givhan*, 24 Ala. 568.

31. Where the wife and her husband, after marriage, continue to board with the executor, who is also her guardian, it will be presumed, in the absence of any contract between the parties, that it was understood between them that the price of their board should be charged to the wife's property in the guardian's hands; and he will be allowed a credit for the amount, although the husband is insolvent. *Ib.*

32. He will also be allowed, in such case, a credit for the value of slaves delivered to the husband and wife when they commenced housekeeping, when the bill does not offer to return them, and the husband assents to having them settled upon the wife for her separate support and maintenance. *Ib.*

33. The act of 1846, "to protect the rights of married women," does not, *per se*, destroy the wife's right to a settlement of her choses in action and equitable interests, as it previously existed; but the intention of the act was, to tender to her what was supposed to be a more valuable right, and to leave it to her election, either to claim the benefit of the act, or to assert her equity to a settlement without regard to its provisions. *Blevins v. Buck*, 26 Ala. 292.

34. If the wife elects to claim the benefit of the statute, and the property is accordingly settled on her under its provisions by decree of the chancery court, her children are concluded by her election, and the property is governed by the provisions of the statute. *Ib.*

35. A post-nuptial agreement, upon valuable consideration, to make a settlement on the wife, specifically enforced against the husband. *Andrews v. Andrews*, 28 Ala. 432. (*Vide supra*, 24–26.)

III. SEPARATE ESTATE OF WIFE.

1. *How Created.*

36. A separate estate in slaves may be created by a parol gift to a married woman, consummated by delivery. *Crabb's Adm'r v. Thomas*, 25 Ala. 212; *Gillespie's Adm'r v. Burleson*, 28 Ala. 552; *Lockhart and Wife v. Cameron*, 29 Ala. 355. See, also, *Jennings v. Blocker's Adm'r*, 25 Ala. 415.

37. As against the husband, the wife takes a separate estate in property conveyed by him to a trustee for her

use and benefit. *McWilliams v. Ramsay*, 23 Ala. 813; *Andrews v. Andrews*, 28 Ala. 432.

38. No particular language or form is necessary to create a separate estate, by deed or will, but the intention must clearly appear. *Cuthbert v. Wolfe*, 19 Ala. 373; *Brown v. Johnson*, 17 Ala. 232; *Jenkins v. McConico*, 26 Ala. 213; *Ozley v. Ikelheimer*, 26 Ala. 332.

39. A stipulation, in a gift of slaves to a married woman, that they shall not be liable to her husband's debts, does not, *per se*, create a separate estate in the wife. *Gillespie's Adm'r v. Burleson*, 28 Ala. 552.

40. A deed, conveying a female slave and her increase to the grantor's daughter, then a married woman, "and her heirs after her, free from the claim or claims of any person or manner of persons whatever, absolutely, as their own property-right, as fully as though they had purchased them," excludes the husband's marital rights. *Brown v. Johnson*, 17 Ala. 232.

41. A conveyance of personal property to a trustee, "to and for the only use and benefit" of a married woman, creates in her a separate estate. *Cuthbert v. Wolfe*, 19 Ala. 373.

42. So does a deed of gift, conveying property to a married woman, "for her own use and benefit alone." *Ozley v. Ikelheimeir*, 26 Ala. 332.

43. And a deed of gift, executed in Virginia in 1824, conveying slaves to the grantor's daughter, then a married woman, "and the lawful heirs of her body," and containing this clause: "I do bind myself, my heirs, &c., to make to the above-named property a clear and undoubted a right, as much so as can be made by word or deed, from the claim and claims from every person or persons whatsoever, to my said daughter and her lawful heirs as above mentioned." *Jenkins v. McConico*, 26 Ala. 213.

44. In a bequest of slaves to a married daughter, a separate estate is created by the words, "exclusively to her and the heirs of her body forever." *Gould v. Hill*, 18 Ala. 84.

45. Where a testator bequeathed a slave to one of his daughters, by her maiden name, "entirely for her and her children," and gave others specific legacies of slaves with incumbrances on them,—*held*, that the word "*entirely*" did not exclude the husband's marital rights, but had reference only to the quantity of the estate which the legatee took, as compared with the others. *Furlow's Adm'r v. Merrell*, 23 Ala. 705.

46. By the first clause of his will, a testator bequeathed sixteen negroes specifically to his wife, and, by other clauses, made absolute specific bequests to four of his daughters, giving to one eleven slaves, to another four, and to another two; and the residuary clause was as follows: "It is my will and desire, that my beloved wife have the residue and remainder of my estate, both real and personal, during the term of her natural life, and that no sale or alteration of my plantation, stock, household furniture, or any other thing shall accrue until her death; then it is my will and desire, that my negroes be divided between my five daughters, share and share alike, for their use during the term of their natural life, and not subject to the debts of their husbands or any future husbands, and at their deaths to their heirs forever; and it is further my will and desire, that the residue and remainder of my estate, both real and personal, be divided between my four daughters." *Held*, that the residuary clause did not include the slaves specifically bequeathed to the daughters, so as to create in them a separate estate. *Frierson v. Frierson*, 21 Ala. 549.

47. A will contained this clause: "I give and bequeath to my daughter M., to be held in trust by my executors, for her use during her natural life, and then for the heirs of her body forever, the following negroes, together with their increase," &c.; "and it is my will and desire, that the labor and increase of the said negroes shall, in no manner whatever, be liable for the debts of her present or any future husband;" and further provided, that if M. should die "without leaving issue," then the executors should sell the slaves, and divide the proceeds among the living heirs-at-law of the testator. *Held*, that the will created a separate estate in the wife, as against the personal representative of the husband. *Williams v. Maull*, 20 Ala. 721.

48. The act of 1846, "to protect the rights of married women," does not invest the wife with a separate estate in the property possessed by her at the time of the marriage. *Maynard v. Williams*, 17 Ala. 676.

49. Ante-nuptial contracts construed to create separate estates. *Strong v. Gregory*, 19 Ala. 146 ; *Petty v. Boothe*, 19 Ala. 633 ; *Randall v. Shrader*, 20 Ala. 338. (*Vide supra*, 2, 3, 4.)

50. Ante-nuptial contracts construed not to create separate estates. *Geyer v. Branch Bank at Mobile*, 21 Ala. 414 ; *Mitchell v. Gates*, 23 Ala. 438 ; *Williamson and Wife v. Mason*, 23 Ala. 488. (*Vide supra*, 6, 7, 8.)

51. Where a father executes in favor of his daughter an instrument which he supposes creates in her a separate estate, but which is ineffectual as a conveyance, and on her marriage delivers the property to her husband, under the mistaken belief that the instrument secures it to her sole and separate use ; and the husband accepts it under a similar belief,—a trust arises in favor of the wife, which equity will enforce against the husband and his execution creditors. *Betts v. Betts*, 18 Ala. 787.

2. *How Charged.*

52. Where the deed, by which property is settled to the separate use of a married woman, provides that she shall have the "complete control of it as though no marriage had ever taken place," and contains no restraint on her power of alienation, she is deemed in equity, with respect to such property, as a *feme sole*, and may, by agreement freely entered into, charge it with her husband's debts. *Bradford and Wife v. Greenway, Henry & Smith*, 17 Ala. 797.

53. A written acknowledgment by the wife, that an account for medical services, which is made out against her individually, is just and correct, is tantamount to an express promise to pay, and creates a charge upon her separate estate. *Collins v. Rudolph*, 19 Ala. 616.

54. The wife's separate estate is bound for the payment of a promissory note, executed by her, for goods, wares and merchandize furnished to her and her family. *Collins v. Lavenberg & Co.*, 19 Ala. 682.

55. Where property is settled on a married woman, under the provisions of the act of 1846, for the separate support and maintenance of herself and her children, she may create a charge upon it during coverture. *Blevins v. Buck*, 26 Ala. 292.

56. If a married woman, having a separate personal estate, gives her written obligation for the payment of money, it will be presumed that she thereby intended to charge that estate ; therefore, it is not necessary that a creditor, seeking to subject it, should aver or prove that such was her intention. *Ozley v. Ikelheimer*, 26 Ala. 332.

57. If an adult married woman, having a separate estate secured to her by ante-nuptial contract, without any restriction upon her power to charge or dispose of it, authorizes her husband, as her acting trustee, with the intention thereby to charge her separate estate, to execute a note to a third person, for the amount expended by him, without obligation, but at the request of her brother-in-law, who afterwards became her husband, in maintaining and educating her while a poor orphan child ; and her husband accordingly executes the note, signing his name, with the addition of the words "acting trustee ;" and the payee then accepts the note, as a charge upon her separate estate,—a court of equity will enforce it as such, at the suit of a transferree or endorsee. *Baker v. Gregory and Wife*, 28 Ala. 544.

58. Although the wife's promissory note creates no personal liability on her, even when she has a separate estate ; yet, if there is no restriction on her power to charge or dispose of it, she may charge it with the payment of her husband's debt, by any promise or contract which, if she were sole and unmarried, would bind her personally. *Ib.*

59. If a married woman, owning a steam saw-mill as part of her separate estate, hires slaves to work in and about it, her separate estate may be subjected to the payment of the hire, although no note was given for it ; and if the slaves run away during the term of hiring, and are committed to jail as runaways, and she knowingly

permits them to remain in jail until after the expiration of the term, the owner is entitled to reimbursement, out of her separate estate, for the amount of jail-fees necessarily paid by him, after the expiration of the term, in order to regain the possession of the slaves. *Walker and Wife v. Smith*, 28 Ala. 569.

3. *How Subjected.*

60. The equitable remedy against the wife, to subject her separate estate to the payment of a debt contracted by her jointly with her husband, is independent of the legal remedy against the husband, and may be resorted to without exhausting such legal remedy. *Bradford and Wife v. Greenway, Henry & Smith*, 17 Ala. 797.

61. Under the act of February 5, 1846, an attachment lies against husband and wife, non-residents, to subject the wife's separate estate, secured by ante-nuptial contract, to the satisfaction of a debt contracted by her *dum sola*. *Crocker and Wife v. Clements' Adm'r*, 23 Ala. 296.

62. Where the wife's separate estate is liable for the hire of slaves under an express contract, and also for reimbursement of jail-fees necessarily paid by the owner, after the expiration of the term, to regain the possession of his slaves, the two demands may be joined in one bill. *Walker and Wife v. Smith*, 28 Ala. 569.

63. Transferror and transferree may join, in a bill to enforce payment out of the wife's separate estate of a note executed by her and her husband, and transferred by delivery merely for valuable consideration. *Blevins v. Buck*, 26 Ala. 292.

64. If the bill seeks to enforce a charge created by the wife during coverture, it is properly filed against her and her husband; and if it asserts no liability against the husband, and no claim for which either husband or wife can be charged personally, and its frame is such that, if a decree cannot be rendered against the wife's separate estate, no relief whatever can be granted under it, there is no misjoinder of defendants. *Walker and Wife v. Smith*, 28 Ala. 569.

65. Where the charge sought to be enforced is a promissory note executed by the wife, one who signed the note as co-maker with her, though he would be a proper party to the bill, is not an indispensable party, when it is alleged that he is a non-resident, and has no property in this State. *Ozley v. Ikelheimer*, 26 Ala. 332.

66. If the bill seeks to subject property settled on the wife, under the provisions of the act of 1846, for the separate support and maintenance of herself and children, her children are not necessary parties to the bill. *Blevins v. Buck*, 26 Ala. 292.

67. Where the annual proceeds of the wife's separate estate are not sufficient to discharge the debt within a reasonable time, the chancellor may properly order a sale of the property itself. *Bradford and Wife v. Greenway, Henry & Smith*, 17 Ala. 797.

68. So he may, if necessary, where the property is settled on the wife, under the provisions of the act of 1846, for the separate support and maintenance of herself and her children. *Blevins v. Buck*, 26 Ala. 292.

69. But, when such separate estate is created by deed, conveying the property to a trustee, "for the sole and exclusive use, benefit, maintenance and support" of the grantor's wife and children, "to be held, used, and enjoyed, without division or distribution, until his death; and after his death, the said estate to vest absolutely, discharged from the trust," in his said wife and children, "in equal parts, share and share alike," the property itself can neither be sold nor hired out during the life of the grantor, but the wife's share in the profits may be separated and subjected. *Collins v. Lavenberg & Co.*, 19 Ala. 682.

4. *Respective Rights of Husband and Wife.*

70. The wife has the same power over her separate estate that she would have if sole, and may by deed convey such interest as she herself possesses. *McCroan v. Pope*, 17 Ala. 612.

71. Where personal property is conveyed directly to the wife, to her sole and separate use, she and her husband may, by their joint deed, vest

the legal title in a trustee, for their use, and the use of the survivor for life; and the husband, surviving, may set up the deed, to defeat a recovery by the wife's personal representative. *Jenkins v. McConico*, 26 Ala. 213.

72. If the husband sells or disposes of the wife's separate personal estate, without her consent, her right of action is suspended during the coverture only. *Ib.*

73. If no trustee is provided for in the marriage-settlement, or other instrument creating the wife's separate estate, the legal title necessarily vests in the husband, if he reduces the property into possession; and having the legal title, he alone can sue at law for the property. *Gerald and Wife v. McKenzie*, 27 Ala. 166; *Friend v. Oliver*, 27 Ala. 532.

74. If the husband purchases a slave, in his own name, with the proceeds of the sale of property in another State secured to the wife by ante-nuptial contract there executed, and takes the bill of sale to himself, the legal title vests in him; and though he may deliver the slave to her, and recognize it as hers, she cannot interpose a claim at law, in her own name, when the slave is taken under attachment against her husband. *Irons v. Reynolds*, 28 Ala. 305.

75. The possession of slaves by husband and wife, under a deed of gift to the wife, "during her natural life, to her separate, sole and exclusive use and behoof," will be referred to the title, and the husband will be considered the trustee for the wife. *Michan and Wife v. Wyatt*, 21 Ala. 813.

76. Under the act of 1848, the wife may charge, sell, or dispose of her separate property, without the consent or concurrence of her husband. *Hooper's Executors v. Smith and Wife*, 23 Ala. 639.

77. Under the acts of 1848 and 1850, the husband is entitled, in his own right, to the money accruing during coverture from the hire of the wife's slaves, and the rent of her land; and to the crop growing or matured, whether gathered or not, at the death of the wife. *Weems v. Bryan and Wife*, 21 Ala. 302.

78. Also, to the hire of the wife's slaves for the unexpired portion of the term at the time of the marriage, although included in the notes taken for the entire term. *S. C.*, 25 Ala. 195.

79. Where the estate of the wife is secured to her by deed, and the naked legal title is vested in her husband as trustee, she is entitled, on application to a court of equity, to the possession and control of the property, when most of it is of such a character that its enjoyment consists in its use and possession, and it does not appear that she is incompetent to manage it, or that her possession would be inconsistent with the rights of any of the other *cestuis que trust*. *Roper v. Roper*, 29 Ala. 247.

80. The wife is entitled to the income and profits derived from her separate estate, when secured to her by ante-nuptial contract; but if the husband, while living with her, receives such income and profits, it will be presumed, in the absence of an express dissent on her part, that they were so received with her consent, and they will be regarded as a gift to him. *Ib.*

81. A slave, purchased by the husband at the request of the wife, and paid for partly with the proceeds of the cotton crop belonging to her separate estate, and partly by the wife herself, will not be regarded as part of her estate, when it is shown that the parties were living together at the time of the purchase, and that the husband received the income and profits of the wife's estate under an implied gift from her. *Ib.*

82. Where there is an agreement between husband and wife, before marriage, that she shall have the whole or a particular part of her personal property to her separate use, she may dispose of it by will, without the consent of her husband. *Wells v. Bransford*, 28 Ala. 200.

83. Under the act of 1846, the property possessed by the wife at the time of the marriage, vested in the husband, subject to the payment of debts contracted by her *dum sola*; and passed, on his death, to his personal representative, subject to distribution under the general law, after payment of the liabilities which had attached to it. *Maynard v. Williams*, 17 Ala. 676.

84. Under the acts of 1848 and 1850, if the wife dies intestate as to a portion only of her estate, her husband is entitled to one half of the personalty undisposed of. *Bryan v. Weems and Wife*, 25 Ala. 195.

85. Under the act of 1850, the husband is entitled, on the death of the wife intestate, to one half of the separate estate secured to her by that act or the act of 1848; but he takes nothing, under this statute, in property which vested in the wife, by bequest, before the passage of the act of 1848, although the period of its distribution did not arrive until 1854. *Hardy v. Boaz*, 29 Ala. 168.

86. Under the provisions of the Code, the husband is entitled, on the death of the wife intestate, to one half of her personalty absolutely, whether in possession or not. *Marshall v. Crow's Adm'r*, 29 Ala. 278.

87. But the provisions of the Code do not apply to separate estates created by deed before the 1st March, 1848, although the marriage took place after that day. *Willis v. Cadenhead*, 28 Ala. 472.

88. An indebtedness accruing from the husband to the wife, on account of her separate estate, does not create a specific lien on his property, and cannot be preferred in payment to debts due by him to third persons, who have acquired liens on such property by judgment and execution. *Betts v. Betts*, 18 Ala. 787.

5. *Removal of Husband as Trustee.*

89. Where the wife filed her petition in the chancery court, alleging her husband's incapacity and unfitness to act as her trustee, and asking that another trustee might be appointed to take charge of certain funds in court, which she held as her separate estate under the act of 1850; and the evidence, while it failed to establish the husband's alleged incapacity and unfitness, showed that the wife had abandoned him without sufficient cause, and had removed beyond the jurisdiction of the court with another man,—the petition was dismissed, at the costs of the petitioner's next friend. *Manning v. Manning*, 24 Ala. 386.

90. Where the bill seeks to compel the specific execution of an agreement to make a settlement, and does not allege that the wife is separated from her husband on account of his improper conduct, or that he intends to remove from the State without her, or that she has reason to apprehend a denial of her right to the property settled on her by the court, or that his habits render him incapable and unfit for the discreet and proper management of the estate, the court will not appoint another trustee in his stead, nor forbid his interference with the property. *Andrews v. Andrews*, 28 Ala. 432.

91. If the husband, by fraudulent design, or in disregard of the rights of the wife, or through indifference to the duties of his office, assumes the exclusive control and management of the trust property, a court of equity will remove him from the trusteeship; but, when his assumption of such authority is shown to be the result of a mere misapprehension of his own rights, and the trust estate has suffered no injury thereby, it is not a sufficient ground of removal; nor will he be removed on account of a mere disagreement between him and his wife, which is not shown to have originated from his culpable conduct. *Roper v. Roper*, 29 Ala. 247.

92. If the evidence does not establish a sufficient ground for the removal of the husband as trustee, but shows that he assumed, through misapprehension of his rights, the exclusive control and management of the trust property, the wife is entitled to a decree against him, establishing her in the possession and control of the property. *Ib.*

6. *Statutory Provisions.*

93. The act of 1848, "securing to married women their separate estates," has no retroactive effect to defeat the marital rights which had vested in the husband prior to its passage. *Kidd v. Montague*, 19 Ala. 619; *Manning v. Manning*, 24 Ala. 386.

94. The act of 1850, as regards the distribution of the separate estate of an intestate wife, applies only to separate estates held under that act or the act of 1848. *Hardy v. Boaz*, 29 Ala. 168.

95. The provisions of the Code, regulating the distribution of such estates, do not apply to separate estates created by deed before the 1st March, 1848, although the marriage took place after that day. *Willis v. Cadenhead*, 28 Ala. 472.

96. The provisions of the Code, regulating suits respecting the wife's separate estate, apply only to separate estates created by law. *Gerald and Wife v. McKenzie*, 27 Ala. 166; *Friend v. Oliver*, 27 Ala. 532; *Pickens and Wife v. Oliver*, 29 Ala. 528.

IV. SUITS BY AND AGAINST HUSBAND AND WIFE.

1. *When, and How, Wife may Sue.*

97. A court of equity is the proper forum, in which the wife may litigate with her husband's personal representative her right to property which she claims, under her father's will and by post-nuptial contract with her husband, as her separate estate. *Williams v. Maull*, 20 Ala. 721.

98. Where the wife takes, under an ante-nuptial contract, an absolute estate on the death of her husband in the property owned by her at the time of the marriage, she cannot come into equity to have the contract established, and to enjoin her husband's administrator from suing at law for the property; the contract, in such case, presenting a simple question of construction, for the determination of which a court of law is equally as competent as a court of equity. *Saunders v. Saunders*, 20 Ala. 710.

99. Nor can she enjoin an action by her husband's personal representative, for the recovery of slaves which were bequeathed to her, and which were never reduced to possession by her husband: her remedy at law, in such case, is adequate and complete. *Machem v. Machem*, 28 Ala. 374.

100. But she may come into equity to protect her separate estate in slaves, when taken under attachment or execution against her husband or donor, if she has no trustee, or if her trustee refuses to interpose a claim at law. *Gould v. Hill*, 18 Ala. 84; *Bridges & Co. v. Phillips*, 25 Ala. 136; *Love v. Graham*, 25 Ala. 187; *Crabb's Adm'r v. Thomas*, 25 Ala. 212.

101. Although the husband may interpose a claim at law, when no trustee is provided for in the deed creating the separate estate, yet the wife cannot compel him to do so, and she may therefore at once apply to equity for relief. *Gerald and Wife v. McKenzie*, 27 Ala. 166.

102. Where the wife has a purely equitable interest in the subject-matter of the suit, which, before the adoption of the Code, was cognizable only in a court of equity, her remedy is still in that court, and is not affected by section 2131 of the Code. *Pickens and Wife v. Oliver*, 29 Ala. 528.

103. She may come into equity, also, to obtain the reformation of an ante-nuptial contract, which was drawn by her husband, and which, through fraud or mistake on his part, fails to include all the property which was intended to be secured to her separate use. *Love v. Graham*, 25 Ala. 187.

104. When a bill is filed in the name of husband and wife, but concerns only the separate estate of the wife, seeks only to establish and protect her rights and interests, and asks no relief for or against the husband, it will be regarded as the bill of the wife alone, and the husband will be considered only her trustee, or next friend. *Michan and Wife v. Wyatt*, 21 Ala. 813; *Gerald and Wife v. McKenzie*, 27 Ala. 166.

105. But if the bill seeks relief either for or against the husband, the chancellor should order it to stand over and be reconstructed, so as to make the husband a defendant, and interpose a next friend to prosecute for the wife; and this, whether the objection be raised by demurrer, plea, answer, or at the hearing; but, in the last case, it is discretionary with the chancellor, either to allow it, or to dismiss the bill without prejudice to the wife. *Michan and Wife v. Wyatt*, 21 Ala. 813.

106. Where the husband has conveyed by deed all his right and title in and to certain slaves held adversely to the wife, he cannot join with her to recover her interest in the slaves, but the wife should sue by her next friend. *Hamilton and Wife v. Clement's Adm'r*, 17 Ala. 201.

2. *When and How Wife may be Sued.*

107. The equitable remedy against the wife, to subject her separate estate to the payment of a debt contracted by her jointly with her husband, is independent of the legal remedy against the husband, and may be resorted to without exhausting such legal remedy. *Bradford and Wife v. Greenway, Henry & Smith*, 17 Ala. 797.

108. An attachment lies against husband and wife, when non-residents, under the attachment law of 1846, to subject the wife's separate estate, secured by ante-nuptial contract, to the satisfaction of a debt contracted by her *dum sola*. *Crocker and Wife v. Clement's Adm'r*, 23 Ala. 296.

109. If the bill seeks to enforce a charge on the wife's separate estate created by her during coverture, it is properly filed against her and her husband; and if it asserts no liability against the husband, and no claim for which either husband or wife can be personally charged, and its frame is such that, if no decree can be rendered against the wife's separate estate, no relief whatever can be granted under it, there is no misjoinder of defendants. *Walker and Wife v. Smith*, 28 Ala. 569.

110. Where a subpœna is issued against husband and wife, and is returned by the proper officer "executed" generally, the service on the wife is sufficient. *Ib.*

111. If the wife is a resident of this State, publication against her as a non-resident, and her appearance by solicitor, do not give the court jurisdiction of her person, when there is no service of subpœna on the husband; no plea, answer, or demurrer filed by her and her husband, or by either of them; and no order that she might answer or defend separately, or that she might appear by solicitor or in any other manner. *Boykin v. Rain*, 28 Ala. 332.

112. If the bill seeks to foreclose two mortgages on land, one executed by husband and wife jointly, and the other by the husband and the wife's guardians under a void appointment by the orphans' court; and the guardians are properly brought in as parties, but the wife is not,—it is error to proceed to a final decree until the wife is properly brought in; nor can the neglect, in failing to proceed regularly against her, be excused by setting up her want of interest in the mortgaged property; nor is the error cured by the subsequent appointment of a guardian *ad litem* for her. (CHILTON, J., *dissenting*, on the ground that the wife was not a necessary party to the bill.) *Eslava v. Lepretre*, 21 Ala. 504.

INFANTS.

1. An infant, being entitled as sole distributee of his deceased infant sister to a slave belonging to her at the time of her death, and which passed, without administration on her estate, into the hands of her father, may come into equity, to enjoin the sale of the slave under execution against the father. *Gould v. Hill*, 18 Ala. 457.

2. Where an infant has a separate estate, of which the chancery court has appointed a trustee; and the father, by reason of his poverty and bodily infirmity, has become unable to support and educate her,—he may resort to equity, to have an allowance for her support and education decreed to him out of the annual income of her estate; and to such a bill the infant herself is not an indispensable party. *Watts v. Steele*, 19 Ala. 656.

3. The chancery court is the general guardian of all infants within its jurisdiction, and has authority, by virtue of its general powers, to protect their rights, when before it as defendants, by the appointment of a guardian *ad litem;* and, though the improper exercise of this power may be reviewed on error, the act itself is not void, and the decree cannot be collaterally impeached for want of jurisdiction, although the appointment was made without service of process. *Preston v. Dunn*, 25 Ala. 507.

4. When an infant defendant, to a bill of revivor, is described as the deceased defendant's "only infant son, whose name is unknown," the decree rendered against him is not void for uncertainty, and cannot be collaterally impeached; especially, when the infant, by his subsequent bill to redeem

lands sold under the decree, shows that he is the person against whom the bill of revivor was filed. *Ib.*

5. The service of subpœna on the surviving parent of infant defendants, for them, is sufficient, whether they are over or under fourteen years of age. *Sanders v. Godley*, 23 Ala. 473.

6. Where non-resident infant defendants are necessary parties to a bill, the record must show that publication as to them was made in the manner prescribed by the 3d and 41st rules of chancery practice. *Coster's Executors v. Bank of Georgia*, 24 Ala. 37.

7. If the father of such infants is dead, and their mother, with whom they live, is a non-resident, they may be made parties by publication, and sending a copy of the order to their mother at her known place of residence; but sending a copy of the order to *Elizabeth* Lewis, "as the mother of said infants," when their mother's name is shown by the record to be *Mary* A. Lewis, is not a compliance with the rule. *Clark v. Gilmer*, 28 Ala. 265.

8. Where non-resident infants are not properly brought in as defendants, the appellate court will reverse the decree, and remand the cause, although the error escaped the notice of the solicitors and chancellor in the court below, and was not specially assigned as error. *Ib.*

INJUNCTION.

I. OF THE BILL: WHEN IT LIES, AND WHAT IT MUST ALLEGE.

1. *For Abatement of Nuisance.*
2. *To Prevent Irreparable Damage.*
3. *To Prevent Removal of Property.*
4. *To Restrain Proceedings at Law.*

II. OF THE INJUNCTION: WHO MAY GRANT IT; ITS EFFECT, AND OPERATION.

III. OF THE DISSOLUTION AND CONTINUANCE OF THE INJUNCTION.

IV. RELEASE OF ERRORS.

As to Injunction Bonds, see title BONDS, in PART IV.

I. OF THE BILL: WHEN IT LIES, AND WHAT IT MUST ALLEGE.

1. *For Abatement of Nuisance.*

1. Chancery has jurisdiction to enjoin and abate a public nuisance, caused by the obstruction of a public road or highway; and this jurisdiction is not taken away, without an express provision to that effect, by the fact that the corporate authorities of the town, within whose limits the nuisance is erected, are invested by statute with power to abate such nuisances. *Hoole & Paullin v. Attorney-General*, 22 Ala. 190.

2. *To Prevent Irreparable Damage.*

2. Equity will decree a perpetual injunction, at the suit of the proprietor of an established bridge, against the owner of a neighboring private bridge, to restrain the latter from permitting persons to pass over his bridge when subject to the payment of toll at plaintiff's bridge; and will decree a pecuniary compensation for the losses already sustained. *Harrell & Croft v. Ellsworth*, 17 Ala. 576.

3. It will also entertain a bill by a riparian proprietor, whose title is clear, to restrain a diversion of water from his mill, without requiring him first to establish his right at law, or to allege that he has been in possession of the land for three years; and this on the two-fold ground, that the plaintiff cannot obtain full reparation in an action at law for damages, and that the injury may involve the necessity of a multiplicity of suits. *Burden v. Stein*, 27 Ala. 104.

4. Where the plaintiff's right is not clear until established by law, equity will refuse to enjoin, if it appears that he has been guilty of any improper delay in applying to the court; but, where his right is clear, and of such a character as entitles him to ask the interposition of equity without first resorting to law, this principle does not apply. *Ib.*

5. The statute of limitations, of six years, is no bar to such a suit. *Ib.*

3. *To Prevent Removal of Property.*

6. An allegation in a bill for divorce,

filed by the wife, "that she has just cause to fear, and in fact does fear, that upon the filing and service of this bill, the defendant will remove or dispose of his whole property," does not justify an injunction to prevent the removal of the defendant's property. *Norris v. Norris*, 27 Ala. 519.

For several analogous decisions, see QUIA TIMET.

4. *To Restrain Proceedings at Law.*

7. Equity will enjoin proceedings in the orphans' court, for the settlement of an estate, where a discovery is needed, or where complicated accounts are to be settled, or where trusts are to be executed, or where other matters of purely equitable cognizance are to be adjudicated. *Horton v. Moseley*, 17 Ala. 794; *Gould v. Hayes*, 19 Ala. 438; *Pharis v. Leachman*, 20 Ala. 662; *Pearson v. Darrington*, 21 Ala. 169.

8. An infant, being entitled as sole distributee of his deceased infant sister to a slave belonging to her at the time of her death, may come into equity, to enjoin the sale of the slave under execution against the father, into whose hands it had passed, on the death of the child intestate, without administration on her estate. *Gould v. Hill*, 18 Ala. 457.

9. A married woman, having a separate estate in slaves, may come into equity, to enjoin their sale under execution or attachment against her husband or donor, when she has no trustee, or when her trustee refuses to interpose a claim at law. *Gould v. Hill*, 18 Ala. 84; *Bridges & Co. v. Phillips*, 25 Ala. 136; *Love v. Graham*, 25 Ala. 187; *Crabb's Adm'r v. Thomas*, 25 Ala. 212.

10. Although the husband, as trustee, may interpose a claim at law, when no trustee is provided for in the deed creating the separate estate; yet, because the wife cannot compel him to do so, she may at once apply to equity for relief. *Gerald and Wife v. McKenzie*, 27 Ala. 166.

11. But, where a widow claims slaves under an ante-nuptial contract, which presents a simple question of construction, for the determination of which a court of law is equally as competent as a court of equity, she cannot come into equity, to have the contract established, and to enjoin her husband's administrator from suing at law for the property. *Saunders v. Saunders*, 20 Ala. 710.

12. Nor can she enjoin an action by her husband's personal representative, for the recovery of slaves which were bequeathed to her, and which were not reduced to possession by her husband during coverture: her remedy at law, in such case, is adequate and complete. *Machem v. Machem*, 28 Ala. 374.

13. Where land, to which the defendant in execution has an equitable title, is levied on and sold by his directions, and the proceeds applied to the satisfaction of the execution; and he delivers up possession to the purchaser, and assures him that the title is perfectly good,—equity will enjoin him from setting up the legal title, subsequently acquired, against sub-purchasers for valuable consideration, who have paid the purchase-money, and received conveyances, without notice of the defect of title. *Stone v. Britton*, 22 Ala. 543.

14. Equity will not enjoin a judgment at law, where the relief sought is predicated on a defense which was equally available at law, unless some special ground for its interference is shown. *Foster v. State Bank*, 17 Ala. 672; *Powell v. Stewart*, 17 Ala. 719.

15. To entitle a party to relief, in such case, he must show, first, that his failure to defend at law is not attributable to his own omission, neglect, or default; and, secondly, that he has a good defense to the entire cause of action, or to such part thereof as his bill proposes to litigate. *Hair & Labuzan v. Lowe*, 19 Ala. 224.

16. To entitle a garnishee to relief against a judgment, which was rendered by default, he must show by his bill, not only that he is not indebted to the defendant in attachment, but also that he has no effects in his hands belonging to said defendant. *Ib.*

17. The fact that a witness for the defendant did not testify on the trial to material facts within his knowledge, as to which he was not examined, does not entitle the party to equitable relief against the judgment, where it appears that, by the exercise of

proper diligence, he might have ascertained what the witness knew concerning the matters in controversy. *Powell v. Stewart*, 17 Ala. 719.

18. The death of the original counsel employed to defend the action, and the want of familiarity on the part of the succeeding counsel with the grounds of defense, do not furnish a sufficient reason for equitable interposition. *Ib.*

19. Nor will relief be granted against a judgment by default, on the ground that the attorney whom the defendant had retained, instead of appearing for him, appeared for the plaintiff, when the evidence shows that he had not mentioned the particular case to the attorney, but had only requested him to attend to any and all business for him. *Watts v. Gayle & Bower*, 20 Ala. 817.

20. Where equitable relief is sought on the ground that the party was ignorant of his defense until after the rendition of the judgment, he must show that his failure to discover and avail himself of it was attributable, not to any negligence or want of diligence on his part, but to fraud, accident, or the act of the opposite party. *Perrine v. Carlisle*, 19 Ala. 686; *Taliaferro's Adm'r v. Branch Bank at Montgomery*, 23 Ala. 755.

21. A part payment of a judgment constitutes no ground for a resort to equity, since the party has a complete remedy at law by *supersedeas*. *Perrine v. Carlisle*, 19 Ala. 686.

22. Relief will not be granted against a judgment, which was freely and voluntarily confessed, with full knowledge of all the facts, and without any fraud or collusion on the part of the plaintiff, except upon some equity subsequently arising. *Moore v. Barclay*, 23 Ala. 739.

23. Equity will not interfere, at the suit of one of the defendants in a judgment at law, to compel its collection by the plaintiff out of another defendant, who, by agreement with his co-defendant, bound himself to pay it. *Skinner v. Barney*, 19 Ala. 698.

24. On motion to set aside the sheriff's return on an execution, if the defendant fails to show that the money had been paid, as the return showed, or had been tendered and refused, he cannot afterwards come into equity for relief, unless he satisfactorily explains the omission. *Minter & Gayle v. Branch Bank at Mobile*, 23 Ala. 762.

25. A judgment at law, in the Federal courts, against the administrator of an estate which has been declared insolvent, will be enjoined in equity, when the estate is really insolvent, and the creditor be compelled to come in and take his place with the other creditors; but, if it appears that the estate is in fact solvent, the creditor will be allowed to prosecute his remedy against the administrator. *Byrne v. McDow*, 23 Ala. 404.

26. When land is sold under execution against a vendor, on a judgment rendered prior to his sale, and bought in by the purchaser, the latter may enjoin the collection of his bid, and all further proceedings under the judgment, if the judgment had been paid and satisfied before the issue of the execution. *Brewer v. Branch Bank at Montgomery*, 24 Ala. 439.

27. A purchaser may enjoin a judgment at law on the notes given for the purchase-money, upon alleging his vendor's fraudulent representations of title, a breach of his warranty of title, and the insolvency of his estate. *Walton v. Bonham*, 24 Ala. 513.

28. And where he is evicted from the land after the rendition of the judgment, and the defense could not have been made at law, he may enjoin the judgment, if the estate of his vendor is insolvent. *Wray's Adm'rs v. Furniss*, 27 Ala. 471.

29. He may also enjoin the collection of the purchase-money, without regard to the solvency of his vendor, when he makes out a case which entitles him to a rescission of the contract. *Lanier v. Hill*, 25 Ala. 554.

30. If the purchaser has received a deed, whose covenants are broken by the existence of an outstanding incumbrance, he may come into equity, when his vendor is insolvent, to restrain the collection of so much of the purchase-money as will compensate for the damages, or to order it to be appropriated to the payment of the incumbrance. *McLemore v. Mabson*, 20 Ala. 137.

31. But, after accepting a conveyance, he cannot, in the absence of

fraud or mistake, rescind the contract, and enjoin a judgment for the purchase-money, as on an executory contract. *Thompson's Adm'r v. Christian*, 28 Ala. 399.

32. Where a decree was rendered against an administrator, on final settlement, and the money collected under execution against the surety on his official bond; and, after the reversal of the decree on error, the surety brought an action at law to recover back the money,—*held*, that the defendant at law could not enjoin the judgment, by alleging that he had paid over the money to the distributees of the estate, of whom some were insolvent, and others non-residents; that he had since recovered another decree against the administrator, on which a *fi. fa.* had been issued, and returned "no property;" and that the surety had been indemnified by his principal. *Simmons v. Williams*, 27 Ala. 507.

33. The right to a perpetual injunction of a judgment at law founded on a gaming consideration, although no defense was attempted at law, and although the plaintiff therein is an innocent holder for valuable consideration, is not affected by an erroneous decree of the chancellor, dismissing the bill, and dissolving the injunction. *Paulding v. Watson*, 26 Ala. 205.

34. The right to enjoin such a judgment is not limited, by the analogy between such a bill and a bill of review, to three years from its rendition. *Paulling v. Watson & Eidson*, 21 Ala. 279.

35. Where the bill was filed after the lapse of more than ten years from the rendition of the judgment, and no excuse was shown for the delay, the judgment was perpetually enjoined, but all the costs were imposed on the plaintiff. *Ib.*

36. The lapse of two years and eight months from the rendition of a judgment at law, which was predicated on a mere colorable levy of an attachment without personal service, held not such as to bar relief against it in equity. *Grier v. Campbell*, 21 Ala. 327.

II. OF THE INJUNCTION: WHO MAY GRANT IT; ITS EFFECT, AND OPERATION.

37. Under the statute defining the jurisdiction of the city court of Mobile, (Session Acts 1851–2, p. 75,) construed in connection with the constitutional powers of the circuit judges, the judge of that court has power to grant writs of injunction, to be operative in that county. *Ex parte Greene & Graham*, 29 Ala. 52.

38. But, although he only has power to grant an injunction to be operative in that county, yet it is no objection to an injunction granted by him, in a cause pending in the chancery court at Mobile, that some of the defendants reside in another county. *Ib.*

39. An injunction in force, against the negotiation of a promissory note, does not destroy its negotiability. *Winston v. Westfeldt*, 22 Ala. 760.

III. OF THE DISSOLUTION AND CONTINUANCE OF THE INJUNCTION.

40. The answer of a corporation, under its corporate seal only, denying the allegations of the bill, is not sufficient to authorize the dissolution of an injunction. *Griffin v. State Bank*, 17 Ala. 258. (Overruling *Hogan v. Branch Bank at Decatur*, 10 Ala. 485.)

41. To authorize the dissolution of the injunction, the answer must clearly and explicitly deny the allegations of the bill: if it is evasive, or uncertain, or if the case made by it does not clearly show that the plaintiff is not entitled to relief, the injunction should be retained until the final hearing. *Rembert & Hale v. Brown*, 17 Ala. 667.

42. On motion to dissolve the injunction, the answer can be regarded only so far as it is responsive to the bill. *Ib.*

43. Where the answer admits that the complainant is entitled to some relief against the judgment at law, though not to the extent claimed by the bill, the injunction may be either dissolved in part, or continued on such terms as will insure ultimate justice; but, to authorize such dissolution, or a requirement that the complainant pay into court a portion of the judgment, as a condition to the continuance of the injunction, the answer should explicitly show the amount which is justly due on the judgment; otherwise, if there is no danger of the debt being lost, the injunction should

be retained until the final hearing. *Maulden, Montague & Co. v. Armistead*, 18 Ala. 500.

44. Where the bill seeks to enjoin the collection of a judgment or execution at law, and the answer so far denies its allegations, as to leave it without equity as respects the other facts not denied, the injunction may be dissolved on the answer. *Moore v. Barclay*, 23 Ala. 739; *Rogers v. Bradford*, 29 Ala. 274.

45. If the bill contains no equity, it is good ground for dissolving the injunction, even in vacation, after an answer has been filed. *Cave v. Webb*, 22 Ala. 583.

46. If the allegations of the bill are not sufficient to warrant the interference of the court by injunction, the injunction may be dissolved for want of equity, although the bill may be retained for other relief. *Norris v. Norris*, 27 Ala. 519.

47. When an action at law is founded on a penal bond, conditioned for the payment of money on the performance of a condition precedent; and the defendant files a bill, to obtain a discovery as to the execution of a trust, which constituted the condition, if the answer discloses that the trust has not been fully executed, the court may enjoin the action at law, without compelling the obligor to account for the benefit received from the partial performance. *Rives v. Toulmin*, 25 Ala. 452.

48. A bill, seeking to enjoin the defendant from asserting his legal title to a tract of land, which he had verbally sold to one W., who sold to S., who sold to complainant, alleged, that W. agreed to sell to S., if defendant would sanction the sale, and would recognize his verbal contract; that they together called on defendant, to ascertain whether he would do so; that defendant replied, that he did recognize the validity of his contract, was willing that W. might sell to S., and would look to the former for the payment of his purchase-money. The answer admitted these facts, but denied that defendant thereby intended to surrender his lien on the land, or to do more than recognize the validity of his verbal contract. *Held*, that the injunction was properly dissolved on this answer, because the facts admitted by it were not sufficient to create an estoppel. *Jones v. Cowles*, 26 Ala. 612.

49. H., being the owner of a ferry across the Chattahoochie river, and having opened a private way leading from his ferry into the public road on this side of the river, filed a bill against A., to abate an obstruction erected across said road. A. answered, averring that H. had previously obstructed the public road on the Georgia side of the river, so as to divert public travel from A.'s ferry to his own, and that the alleged obstruction had straightened the public road, placed it on better ground, and been accepted by the overseer of the road. *Held*, that the injunction was properly dissolved on this answer. *Hill v. Averett*, 27 Ala. 484.

50. The supreme court will not interfere by *mandamus* or otherwise, to compel the dissolution of an injunction on the filing of an answer. *Ex parte City Council of Montgomery*, 24 Ala. 98.

As to appeals from interlocutory orders, dissolving injunctions, see ERROR AND APPEAL, 15–17.

III. RELEASE OF ERRORS.

51. If the complainant, seeking to enjoin a judgment at law, fails to file a release of errors, the chancellor may dissolve the injunction on that account, but cannot dismiss the bill. *Paulding v. Watson & Eidson*, 21 Ala. 279.

INTEREST.

1. Courts of equity allow interest, whenever it would have been recoverable at law. *Crocker and Wife v. Clements' Adm'r*, 23 Ala. 296.

2. The law attaches interest as an incident to a debt from the moment it falls due, unless there is some agreement between the parties to the contrary. *Whitworth and Wife v. Hart*, 22 Ala. 343; *Cheek v. Waldrum and Wife*, 25 Ala. 152.

3. On bill being filed to enforce a vendor's lien, the purchaser is not relieved from the payment of interest, because the vendor acted in bad faith, and attempted to repudiate his con-

tract altogether. *Cheek v. Waldrum and Wife*, 25 Ala. 152.

4. A tenant in common, receiving rents under an implied trust for his co-tenant, is chargeable with interest on the amount found in his hands, from the time of its receipt. *Tarleton v. Goldthwaite's Heirs*, 23 Ala. 346.

5. Under a bill for an account and settlement of an assignment consisting principally of notes and accounts under twenty dollars, against debtors who reside in the same district with the trustee, the trustee should be allowed, in the absence of all special cause, twelve months from his acceptance of the trust for the collection of the debts, and should be charged with interest on the available assets from the expiration of that time. *Royall's Adm'r v. McKenzie*, 25 Ala. 363.

6. If the assignor agrees with the trustee, after the lapse of a sufficient time for closing the assignment, that, on the latter confessing judgments in favor of certain preferred creditors, the balance shall stand open for future adjustment, the trustee should nevertheless be charged with interest on that balance from that time. *Ib.*

7. When the borrower seeks relief in equity against a usurious loan, he will be compelled to pay the amount of the principal and legal interest thereon. *Pearson v. Bailey*, 23 Ala. 537.

8. But, when usury is set up as a defense to a foreclosure suit, and proved, it discharges the defendant from the payment of any interest whatever on the debt. *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

9. Where partners agree to invest equal sums in their common business, and one advances a larger amount than the other, he is entitled on settlement to interest on one half the excess, from the date of its appropriation to the use of the firm. *Reynolds v. Mardis' Heirs*, 17 Ala. 32.

10. The law will not, in the absence of an express stipulation between the parties, compel one partner to pay interest to his copartners on the amount by which their capital exceeds his; but partners may enter into such stipulations as they may see fit, respecting the division of the profits, or the advantages which each is to derive therefrom, unless their pretended contract is a mere device or cover for usury; and such contract, being legal, would form the rule for the ascertainment and adjustment of their respective rights in the settlement of their affairs. *Desha & Sheppard v. Smith*, 20 Ala. 747.

11. Under a bill filed by the creditors of a railroad company, seeking to subject money in the hands of its debtors to the payment of their demands, if such debtors, instead of offering to bring the money into court, engage in a protracted litigation respecting it, and insist upon their right to retain it as against both the company and its creditors, they are chargeable with interest on the balance found to be due from them. *Godwin v. McGehee*, 19 Ala. 468.

12. Generally, interest will not be decreed on a balance due at the filing of the bill, unless it is specially asked in the bill; but when the interest subsequently accrues, it is the practice of the court, upon further directions, to order that the interest be computed, although there may be no prayer to that effect. *Ib.*

13. In making an abatement of the purchase-money at the suit of the purchaser, it is a proper method of computing interest, to divide the amount of the damages by the number of notes originally given for the purchase-money, and to allow interest on each sum, from the time these notes respectively fell due, to the time when new outstanding notes were substituted. *Stow v. Bozeman's Executors*, 29 Ala. 397.

INTERPLEADER.

1. After the discharge of the complainant, the testimony having been published by consent without prejudice, it is discretionary with the court to permit an amendment of one of the answers. *Lanier v. Driver*, 24 Ala. 149.

ISSUE AT LAW.

See PRACTICE.

JURISDICTION.

I. AS AFFECTED BY AMOUNT.

1. The chancery court, in this State, has jurisdiction of purely equitable demands over twenty and under fifty dollars. *Hall v. Cannte and Wife,* 22 Ala. 650.

2. Under a bill seeking to impeach a decree of the orphans' court on the ground of fraud, the defendant admitted in his answer that a balance of $8,42 was due from him to the plaintiffs, but the bill was not sustained as to any of the other matters in controversy,—*held*, that this sum, of itself, was too small to justify a resort to equity, or to uphold its jurisdiction. *Cowan and Wife v. Jones,* 27 Ala. 317.

II. AS AFFCTED BY CONSENT.

3. Where the court has no jurisdiction of the subject-matter, consent of parties cannot confer jurisdiction. *Benford v. Daniels,* 20 Ala. 445; *Harrison & Saunders v. Harrison,* 20 Ala. 629.

4. But, if the court has jurisdiction of the subject-matter, the parties may, by appearing or answering without objection, give it jurisdiction of their persons. *Harrison & Saunders v. Harrison,* 20 Ala. 629; *Byrd v. McDaniel,* 26 Ala. 582.

III. AS AFFECTED BY REMEDY AT LAW.

5. When a party has a legal title, and an unembarrassed legal remedy, chancery will not take jurisdiction. *McCullough and Wife v. Walker and Wife,* 20 Ala. 389; *Elliott v. Branch Bank at Mobile,* 20 Ala. 345.

6. For this reason, a bill filed by a vendor, alleging that the purchase-money was to be paid out of the proceeds of certain mills situated on the lands, and that the purchaser had received enough to pay the purchase-money; and asking an account of the proceeds received,—is without equity. *May v. Lewis,* 22 Ala. 646.

7. For the same reason, a bill for an account will not lie against an attorney at law, charging him with negligence and a failure to pay, when there is no complexity or difficulty in the account. *Crothers v. Lee,* 29 Ala. 337.

8. When parties have a joint legal title to personal property, an equity existing between themselves will not enable them to join in a bill to redress an injury to their joint legal title. *Comby v. McMichael,* 19 Ala. 747.

9. A part payment of a judgment constitutes no ground for equitable relief against it, since the party has a full and complete remedy at law by *supersedeas. Perrine v. Carlisle,* 19 Ala. 686.

10. But the statutory remedy by *supersedeas* does not take away the jurisdiction of equity to remove a cloud on the title to land. *Brewer v. Branch Bank at Montgomery,* 24 Ala. 439.

11. Equity will afford specific relief, such as a court of law cannot give, against an instrument executed on Sunday, but purporting on its face to have been executed on Saturday, although the instrument may also be void at law. *Smith v. Pearson,* 24 Ala. 355.

12. A trustee cannot come into equity, to enforce the collection of a purely legal demand, when his remedy at law is adequate, specific, and perfect: the mere fact that the proceeds of the demand, when collected, will be trust property, does not give equity jurisdiction. *Kimball v. Moody,* 27 Ala. 130.

13. A party cannot enjoin an action at law for contribution, when his bill shows that he has a plain, adequate, and complete remedy at law. *Crayton v. Johnson,* 27 Ala. 503.

14. If the owner of slaves allows them to go into the possession of an intended purchaser, under an executory contract which does not pass the legal title, he cannot come into equity, to recover either the slaves themselves or their agreed price; his remedy at law, in either case, being adequate and complete. *Love v. Crook,* 27 Ala. 624.

15. Equity will not entertain jurisdiction of a bill, of which the sole object is to recover money alleged to have been paid through fraud and mistake, where the remedy at law is adequate and complete. *Russell v. Little*, 28 Ala. 160.

16. A distributee of an estate, who retains possession of slaves on the ground of an attachment to them as family negroes, cannot come into equity, to enjoin an action at law by the personal representative for their recovery, and to have them allotted as a part of his distributive share. *Machem v. Machem*, 28 Ala. 374.

17. Where a note, given for the purchase-money of town-lots, at a place which was the contemplated terminus of a railroad then in process of construction, was made payable "when the first locomotive engine on the M. railroad should arrive" at the place, the fact that the railroad company was sold out, and the road completed by another company subsequently incorporated, is available (if at all) as a defense at law, and therefore constitutes no ground for a resort to equity. *Askew v. Hooper*, 28 Ala. 634.

18. A mail-contractor cannot come into equity, to enforce a contract with a plank-road company for the transportation of the mail over its road, unless his bill shows that a court of law cannot compensate him in damages for the breach of contract. *Powell v. Central Plank-Road Co.*, 24 Ala. 441.

19. Although equity will not enforce the specific performance of an award, when the damages resulting from the breach are capable of being exactly measured, and complete redress afforded at law; yet, to bar the interference of equity, it is not enough that the party may successfully maintain an action at law on the award—he must be able to obtain by a verict all that the award intended to give him. *Kirksey v. Fike*, 27 Ala. 383.

20. As a general rule, equity will not specifically enforce contracts concerning personalty, because there is an adequate remedy at law in a suit for damages; but, there being no remedy at law in case of post-nuptial agreements between husband and wife, a specific performance may be decreed. *Andrews v. Andrews*, 28 Ala. 432.

21. A widow may come into equity, against the personal representative of her deceased husband, to enjoin an action at law for the recovery of slaves, which she claims as her separate estate under post-nuptial contract. *Williams v. Maull*, 20 Ala. 721.

22. But not where she claims the slaves under an ante-nuptial contract, which presents a simple question of construction, for the determination of which a court of law is equally as competent as a court of equity. *Saunders v. Saunders*, 20 Ala. 710.

23. Nor where the slaves were bequeathed to her during coverture, and were never reduced to possession by the husband. *Machem v. Machem*, 28 Ala. 374.

24. A married woman may come into equity, to protect her separate estate in slaves from levy and sale under attachment or execution against her husband or donor, when she has no trustee, or when her trustee refuses to interpose a claim at law. *Gould v. Hill*, 18 Ala. 84; *Bridges & Co. v. Phillips*, 25 Ala. 136; *Love v. Graham*, 25 Ala. 187; *Crabb's Adm'r v. Thomas*, 25 Ala. 212.

25. And even where her husband, as trustee, may interpose a claim at law, she may at once go into equity for relief, because she cannot compel him to interpose. *Gerald and Wife v. McKenzie*, 27 Ala. 166.

26. The fact that a mortgage contains a power of sale, does not deprive chancery of its jurisdiction to foreclose. *Carradine v. O'Connor*, 21 Ala. 573; *Ala. Life Insurance & Trust Co. v. Pettway*, 24 Ala. 544.

IV. As Affected by Statutory Provisions.

27. Under section 602 of the Code, which defines the powers and jurisdiction of the chancery court in this State, the first subdivision, including "all civil causes in which a plain and adequate remedy is not provided in the other judicial tribunals," is but the adoption of the pre-existing rule; the second and third subdivisions, including cases founded on gaming considerations, and cases to subject to

the payment of debts the equitable title to real estate, are modifications, by way of enlargement, of the system of equity jurisdiction and jurisprudence which had been established in England prior to the American revolution; and the fourth subdivision, including "such other cases as may be provided for by law," embraces all cases which, at and before the adoption of the Code, were known to be within the jurisdiction of courts of equity, and which are not embraced in the first three subdivisions. *Waldron, Isley & Co. v. Simmons*, 28 Ala. 629.

28. The original jurisdiction of courts of equity is not affected by legislative enactments conferring jurisdiction on other courts, unless the statute contains prohibitory or restrictive words: such enactments are uniformly held to confer concurrent remedies. *Pearson v. Darrington*, 18 Ala. 348; *Gould v. Hayes*, 19 Ala. 438; *Hoole & Paullin v. Attorney-General*, 22 Ala. 190; *Brewer v. Branch Bank at Montgomery*, 24 Ala. 439; *Owen v. Slatter*, 26 Ala. 547; *Waldron, Isley & Co. v. Simmons*, 28 Ala. 629.

29. The statutory jurisdiction of the probate court, over legacies, does not take away the jurisdiction of equity. *Pearson v. Darrington*, 18 Ala. 348.

30. Nor does its statutory jurisdiction, over the settlement and distribution of estates, take away the jurisdiction of chancery. *Gould v. Hayes*, 19 Ala. 438.

31. Nor its statutory jurisdiction in the allotment of dower. *Owen v. Slatter*, 26 Ala. 547.

32. The statutory remedy, by motion, to supersede an execution on a judgment, does not deprive the chancery court of its original jurisdiction to remove a cloud upon the title to land. *Brewer v. Branch Bank at Montgomery*, 24 Ala. 439.

33. The jurisdiction of chancery, to enjoin and abate a public nuisance, is not taken away by a statutory grant of jurisdiction to the corporate authorities of the town within which such nuisance is erected. *Hoole & Paullin v. Attorney-General*, 22 Ala. 190.

34. Equity had original jurisdiction, to enforce the payment of a partnership debt out of the estate of a deceased partner; and this jurisdiction is not taken away by any provision of the Code of Alabama. *Waldron, Isley & Co. v. Simmons*, 28 Ala. 629.

V. To Prevent Irreparable Damage, or a Multiplicity of Suits; and to Remove a Cloud on Titles.

35. An infant, being entitled as sole distributee of his deceased infant sister to a slave belonging to her at the time of her death, may come into equity, to enjoin the sale of the slave under execution against the father, into whose hands it had passed, on the death of the child intestate, without administration on her estate. *Gould v. Hill*, 18 Ala. 457.

36. A suit cannot be maintained by an infant bastard, against its putative father, who is alleged to have removed from the State to avoid the statutory liability for its support, to have provision made for its maintenance out of property left by the father. *Simmons v. Bull*, 21 Ala. 501.

37. When a partner purchases his copartner's entire interest in the firm, and undertakes to pay all the partnership debts; but afterwards absconds, leaving his individual debts and those of the partnership unpaid, equity will reinvest the retiring partner with his original rights, and give him a lien on the partnership assets for the payment of the partnership debts. *McGown v. Sprague*, 23 Ala. 524.

38. A riparian proprietor, whose title is clear, may come into equity to restrain a diversion of water from his mill, without first establishing his right at law, or alleging that he has been in possession of the land for three years; and this, on the two-fold ground, that he cannot obtain full reparation in an action at law for damages, and that the injury may involve the necessity of a multiplicity of suits. *Burden v. Stein*, 27 Ala. 104.

39. A trustee in a deed of trust for the benefit of creditors, who is also the principal beneficiary, may come into equity, on behalf of himself and the other beneficiaries, to prevent a sale of the property under executions and attachments at law, to foreclose the deed, and to settle the conflicting

liens: such a bill is maintainable, partly, on the grounds of preventing a multiplicity of suits, and removing a cloud upon the title to property. *Ala. Life Insurance & Trust Co. v. Pettway*, 24 Ala. 544.

40. A purchaser, whose land has been sold under execution against his vendor, on a judgment rendered before the sale, and bought in by himself, may come into equity, to enjoin the collection of his bid and all further proceedings under the judgment, upon an allegation that the judgment had been satisfied before the issue of the execution. *Brewer v. Branch Bank at Montgomery*, 24 Ala. 439.

41. Equity will direct the cancellation of an instrument executed on Sunday, but purporting on its face to have been executed on Saturday, although it may be void at law, where it is calculated to throw doubt upon the title. *Smith v. Pearson*, 24 Ala. 355.

42. If a mortgagee obtains a decree of foreclosure against the devisees and personal representatives of the mortgagor, without making the heirs-at-law parties to the suit, this constitutes such a cloud on the title of the heirs, after they have set aside the probate of the will by bill in chancery, as authorizes them to ask the interposition of equity for its removal. *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

LACHES.

See LIMITATIONS, STATUTE OF, II.

LEASE.

1. Where a lessee covenants to erect on the leasehold premises a building worth a specified sum, and to keep the premises insured; and after the building is erected, the builder obtains a decree in chancery under his building contract, and enters into possession of the premises under the decree,—his possession is unauthorized and permissive only, and does not make him an assignee of the lease, so as to render him liable on its covenants; and if the builder, while thus in possession, insures the premises to the extent of his interest in the lease, the policy does not enure to the benefit of the lessor or his assigns, nor does it make the builder liable on the covenant of insurance contained in the lease. *Merchants' Insurance Co. v. Mazange*, 22 Ala. 168.

2. A decree of sale in chancery, under a builder's lien, does not invest the plaintiff with either a right of entry or the legal title; nor will a court of equity compel him to take an assignment of the lease, so as to render him responsible on its covenants, until a privity is created by the purchase of the leasehold estate. *Ib.*

LEGACIES.

I. LIABILITY FOR DEBTS; AND PROCEEDINGS TO SUBJECT.

II. PROCEEDINGS FOR RECOVERY.

I. LIABILITY FOR DEBTS; AND PROCEEDINGS TO SUBJECT.

1. Property in the hands of a legatee may be subjected, in equity, to the payment of the testator's debts, if the assets prove otherwise insufficient. *Sanders v. Godley*, 23 Ala. 473.

2. Where the property sought to be subjected was bequeathed to one for life, with remainder to her children, the remainder-men are necessary parties to the bill. *Ib.*

3. All the legatees, who are before the court as defendants, must contribute their proportion to the satisfaction of the debt: a money decree against two defendants jointly, one of whom is only a tenant for life with remainder to the other defendants, is erroneous. *Ib.*

4. In England, descended lands are liable for the excess of debts, after the provision made by the testator is exhausted, before general pecuniary legacies, or other specific legacies; and a gift of all the property of a specified kind owned by the testator, when not given as a residuary bequest, is for this purpose considered specific.

Lightfoot v. Lightfoot's Executor, 27 Ala. 351.

5. In this State, descended lands are liable for such excess of debts, in exoneration of a legacy of "all the negroes not before bequeathed." *Ib.*

6. Where a testator bequeaths his entire estate, after the payment of debts, to his wife, charged with the payment at her death of a pecuniary legacy to certain charitable societies; and the wife afterwards bequeaths the whole of the personal estate in specific legacies, leaving the real estate undisposed of,—the real estate must be first subjected to the payment of the debts and charitable bequests. *Carter and Wife v. Balfour's Adm'r*, 19 Ala. 814.

II. PROCEEDINGS FOR RECOVERY.

7. Courts of chancery exercise jurisdiction over the subject of legacies, concurrently with all other courts having cognizance thereof; and this, whether the executor has assented to such legacies or not. *Pearson v. Darrington*, 18 Ala. 348.

8. A legatee may come into equity to enforce payment of his legacy from a refractory executor. *Huckabee v. Swoope*, 20 Ala. 491.

9. Another legatee, who has received his legacy, is not a necessary party to such a bill, when he has no interest in the fund sought to be charged; nor are the infant children of the testator necessary parties, although interested in the fund as legatees, when the executor has full power, as trustee, to protect their interests. *Ib.*

10. A suit cannot be maintained for a legacy, until the will has been admitted to probate here, although it may have been probated in a foreign jurisdiction. *Moore v. Lewis*, 21 Ala. 580.

LIEN.

Of Builder.—See LEASE.
Of Judgments.—See that title in PART IV.
Of Mortgages.—See that title.
Of Vendor.—See VENDORS AND PURCHASERS.

LIMITATIONS, STATUTE OF.

I. APPLICATION OF STATUTE IN EQUITY.
II. LACHES, AND STALE DEMANDS.

I. APPLICATION OF STATUTE IN EQUITY.

1. In cases of concurrent jurisdiction, the statutes of limitation are equally as obligatory in courts of equity, as in courts of common law. *Gunn v. Brantley*, 21 Ala. 633; *Crocker and Wife v. Clements' Adm'r*, 23 Ala. 296.

2. In making an application of the legal statute of limitations, courts of equity also adopt and give effect to the exceptions and qualifications. *Crocker and Wife v. Clements' Adm'r*, 23 Ala. 296.

3. Although the legal statutes of limitation are not binding on the chancery court, in cases of exclusively equitable cognizance; yet that court often adopts, in cases to which the statutes do not strictly apply, a period within which its aid must be sought, similar to that prescribed in analogous cases at law. *Johnson v. Toulmin*, 18 Ala. 50; *Nimmo v. Stewart*, 21 Ala. 682; *Askew v. Hooper*, 28 Ala. 634.

4. When the bill shows on its face that the plaintiff's remedy is barred by the statute of limitations, the benefit of the statute may be invoked by general demurrer. *Nimmo v. Stewart*, 21 Ala. 682.

5. When the legal title would be barred by six years adverse possession, the same limitation will be applied when a party comes into chancery on an equitable title, disconnected from a trust between him and the defendant. *Ib.*

6. The rule is well settled, that if a trustee delays the assertion of his rights until he is barred by the statute of limitations, the *cestui que trust* will also be barred. *Bryan and Wife v. Weems*, 29 Ala. 423.

7. When the separate property of the wife is allowed by her trustee to remain in the possession of her husband, who, at his death, disposes of it by will; and the trustee is cognizant, before the will is admitted to probate, of facts which are sufficient to charge him with implied notice of its con-

tents,—the adverse possession of the husband's executor, as against the trustee, begins to run from the probate of the will and possession under it. *Ib.*

8. The statute does not bar a married woman, whose separate property is sold under execution against her husband, from recovering it in equity, when her title accrued during coverture. *Michan and Wife v. Wyatt*, 21 Ala. 813.

9. The statute commences to run, in favor of a person who has received money under a decree which is afterwards reversed on error, from the time of the reversal. *Crocker and Wife v. Clements' Adm'r*, 23 Ala. 296.

10. The statute of six years bars a suit for an account of rents received by a tenant in common under an implied trust for his co-tenant. *Tarleton v. Goldthwaite's Heirs*, 23 Ala. 346.

11. A mortgagor may redeem, at any time within the period prescribed as the limitation of real actions. *Gunn v. Brantley*, 21 Ala. 633.

12. The statute of limitations does not begin to run against a mortgagee out of possession, as in favor of the mortgagor or his vendee, even after the law-day has passed, until there is some overt act, or open assertion of adverse title; and if a second mortgagee recovers the property (personal) by suit from the mortgagor, and afterwards purchases at his own sale, the first mortgagee is not barred of his right of foreclosure, at least until after the expiration of six years from the sale. *Boyd v. Beck*, 29 Ala. 703.

13. A non-resident, against whom a decree has been rendered without appearance or personal service, may file a petition for the rehearing of the cause, within three years from the rendition of the decree, although he has never been within the limits of the State. *Colomb & Iselin v. Branch Bank at Mobile*, 18 Ala. 454.

14. The right to enjoin a judgment at law, founded on a note given for a gaming consideration, is not limited, by the analogy between such a bill, and a bill of review, to three years from the rendition of the judgment. *Paulding v. Watson & Eidson*, 21 Ala. 279.

15. The statute of limitations of six years is no bar to a suit in equity, to enjoin and restain an unlawful diversion of water from plaintiff's mill. *Burden v. Stein*, 27 Ala. 104.

16. The act of 1818, prescribing three years as the limitation of writs of error, applies to final decrees in chancery, as well as to final judgments at law. *Boykin v. Kernochan*, 24 Ala. 697. (Note, that the limitation fixed by the Code, section 3040, is two years.)

II. LACHES, AND STALE DEMANDS.

17. In many cases to which statutes of limitation do not apply, courts of equity, acting on their own peculiar principles, will not grant relief against an adverse right, where the party out of possession has been guilty of laches. *Johnson v. Toulmin*, 18 Ala. 50; *Gunn v. Brantley*, 21 Ala. 633; *Askew v. Hooper*, 28 Ala. 634.

18. Equity will not impute laches to a party, seeking the correction of an alleged mistake, until after its discovery. *Stone v. Hale*, 17 Ala. 557.

19. The lapse of two years and eight months, from the rendition of a judgment at law, held no bar to equitable relief against it. *Grier v. Campbell*, 21 Ala. 328.

20. Where a bill was filed to enjoin a judgment at law, founded on a note given for a gaming consideration, after the lapse of more than seven years from its rendition, and no excuse was shown for the delay, the plaintiff was taxed with all the costs, although the judgment was enjoined. *Paulding v. Watson & Eidson*, 21 Ala. 279.

21. Equity will refuse to enjoin an unlawful diversion of water, where the plaintiff's right is not clear until established by law, if it is shown that he has been guilty of any improper delay in applying to the court; but this principle has no application, where the right is clear, and of such a character as authorizes a resort to equity in the first instance. *Burden v. Stein*, 27 Ala. 104.

22. The plaintiff's laches in failing to amend his bill, to avoid the effect of a variance between the allegations and proof, would be a good ground for refusing to modify the decree on error so as to dismiss the bill without prejudice. *Cowan and Wife v. Jones*, 27 Ala. 317.

23. The lapse of twenty-two years after the discovery of the alleged insanity, before filing a bill to avoid the marriage on that ground, is a bar to the relief sought. *Rawdon v. Rawdon*, 28 Ala. 565.

24. The right to a rescission of a contract, on account of a mutual mistake as to the vendor's title, does not depend on the purchaser's payment or tender of the purchase-money, nor upon the vendor's insolvency, but upon the promptness with which a rescission is sought. *Smith v. Robertson*, 23 Ala. 312.

25. A party who seeks the rescission of a contract, on the ground of fraud, must move within a reasonable time after the discovery of the fraud. What is a reasonable time, must depend on the circumstances of each particular case. Here a rescission was refused, because the infant, after attaining his majority, and with knowledge of the fraud, accepted from his guardian a deed for the land, remained in possession for more than seven years after the sale, and more than five years after the discovery of the fraud, and showed no excuse for his delay. *Kern v. Burnham*, 28 Ala. 428.

26. Where the bill was filed thirteen or fourteen years after the discovery of the fraud, and, although it alleged that the complainant abandoned the land on the discovery of the fraud, showed no act on his part which, if a favorable fluctuation in the price of the land had made it his interest to enforce a specific execution of the contract, would have precluded him from doing so,—the laches was held fatal to relief, on demurrer for want of equity. *Askew v. Hooper*, 28 Ala. 634.

27. The right to a rescission, on the ground of fraud, may be lost by a failure to manifest, within a reasonable time after the discovery of the fraud, the election to disaffirm the contract. What is a reasonable time, must be determined from the circumstances of each particular case. Where the purchaser died, about eight months after the sale, without having discovered the fraud; and his heirs, one of whom was still a minor, filed a bill to rescind the contract, within one year after the discovery of the fraud, and within four years after the sale,—*held*, that this was sufficient promptness. *Foster v. Gressett's Heirs*, 29 Ala. 393.

LIS PENDENS.

See title NOTICE in PART IV.

MANDAMUS.

1. *Mandamus* does not lie, to compel the dissolution of an injunction on the filing of an answer. *Ex parte City Council of Montgomery*, 24 Ala. 98.

2. Nor to compel the dismissal of a cause, on motion, in pursuance of a written agreement between the parties to that effect. *Ex parte Rowland*, 26 Ala. 133.

3. But it lies on the chancellor's refusal, pending a suit for divorce, to make the necessary order for the allowance of temporary alimony. *Ex parte King*, 27 Ala. 387.

MARSHALING ASSETS.

1. In England, though the personal estate is the primary fund for the payment of debts, yet the testator himself might, either by express direction or plain implication, devote his realty to that object instead of his personalty; and whenever debts are thus chargeable on land, while the personalty is given either pecuniarily or specifically, courts of equity, acting on the presumed intention of the testator, will so marshal the assets, as to exonerate the personalty, and throw the debts on the realty. *Lightfoot v. Lightfoot's Executor*, 27 Ala. 351.

2. Descended lands are liable for the excess of debts, after the provision made by the testator is exhausted, before general pecuniary, or other specific legacies; and for this purpose, a gift of all the property of a specified kind which the testator possesses, when not given as a residuary bequest, is considered specific. *Ib.*

3. In this State, although the personalty is the primary fund for the payment of debts, yet the real estate

is also bound for them, irrespective of their character, to the same extent that recognizances and debts by specialty bound real assets in England; and hence, with us, descended lands are liable for the excess of debts, in exoneration of a legacy of "all the negroes not before bequeathed." *Ib.*

4. Where a testator bequeaths his entire estate, after the payment of debts, to his wife, charged with the payment at her death of a pecuniary legacy to certain charitable societies; and the wife afterwards disposes by will of the entire personal estate in specific legacies, leaving the real estate undisposed of,—the real estate must first be subjected to the payment of the debts and charitable bequests. *Carter and Wife v. Balfour's Adm'r*, 19 Ala. 814.

5. Equity will take jurisdiction, at the instance of specific legatees, to compel the executor to discover and account for unadministered assets, and appropriate them, in case of such legacies, to the payment of the testator's debts; and this, notwithstanding the pendency of a settlement in the orphans' court. *Pearson v. Darrington*, 18 Ala. 348.

6. Where land is sold by an administrator, under an order of the orphans' court; and the purchaser afterwards dies, before a decree has been rendered divesting the legal title, and his other property is not sufficient to pay all his debts,—chancery has no jurisdiction, at the instance of the administrators of the two estates, to order the land to be resold, on the same terms and conditions as at the first sale, in order that the purchase-money might meet the payment of the notes executed by the deceased purchaser. *Vaughan & Hatcher v. Heirs of Holmes and West*, 22 Ala. 593.

7. In distributing the proceeds of property conveyed by an insolvent debtor for the benefit of his creditors, equity will make a *pro-rata* division, when the deed creates no preference. *Branch Bank at Mobile v. Robertson*, 19 Ala. 798; *Maulden, Montague & Co. v. Armistead*, 18 Ala. 500.

8. Although a creditor, having a lien upon two funds for the security of his debt, may be compelled in equity, by another creditor having a lien upon one of them only, to resort to the fund not bound by both liens; yet, if he seeks to condemn one of the funds, it is not necessary that his bill should show what disposition has been made of the other. *Chapman v. Hamilton*, 19 Ala. 121.

MASTER AND REGISTRAR.

I. OF THE POWERS OF THE MASTER OR REGISTRAR.

II. OF PROCEEDINGS IN THE MASTER'S OFFICE.

I. OF THE POWERS OF THE MASTER OR REGISTRAR.

1. The acts of 1843 and 1846, (Clay's Digest, 350, § 33; Session Acts 1845–6, p. 16,) conferring upon registrars in chancery power to appoint trustees in certain cases, are not unconstitutional, in vesting *quasi* judicial power in officers who are not elected, commissioned and qualified as judges are required to be by the constitution. *Gaines v. Harvin*, 19 Ala. 491.

2. *Semble*, that the proceedings of the registrar, in the appointment of a trustee, cannot be collaterally impeached. *Ib.*

3. A registrar has power, under the Code, to grant an appeal from an interlocutory order of the chancellor, dissolving an injunction in vacation. (LIGON, J., *dissenting*.) *Powell v. Central Plank-Road Co.*, 24 Ala. 441.

4. But he has no power to appoint a receiver, nor can that power be delegated to him by an order of the chancellor. *Ex parte Smith*, 23 Ala. 94.

II. OF PROCEEDINGS IN THE MASTER'S OFFICE.

5. When a receipt, or other writing, on which the equity of the bill was not at all dependent, and which was not acted on as evidence by the chancellor, is offered in evidence before the master, he is not precluded from inquiring into its genuineness, for reasons apparent on its face irrespective of the signature, by the fact that the

signature was proved at the hearing. *Aday v. Echols*, 18 Ala. 353.

6. The rule of practice, which authorizes the court to either sustain or overrule a general objection to a mass of testimony, of which a portion is legal, applies to proceedings before the master. *Brantley v. Gunn*, 29 Ala. 387.

7. In taking an account before the master, to ascertain the compensation to which an executor is entitled, a witness cannot be asked, after the pleadings and depositions in the cause have been read in his hearing, "to state, from his own knowledge, and the facts disclosed by the pleadings and evidence, what would be a reasonable compensation to the executor." *Gould v. Hayes*, 25 Ala. 426.

8. In taking an account of rents before the master, the witnesses should depose to the money value of the rents: proof of a custom to receive a part of the crop as compensation for the rent, is improper, because it tends to multiply the issues, and thus to embarrass the investigation. *Brantley v. Gunn*, 29 Ala. 387.

9. The answer of one defendant cannot be used as evidence against the others, in stating an account before the master; but, if the other answers and proof in the cause show a greater balance against them, than the account as stated on the basis furnished by the answer, it is error without injury. *Halstead v. Shepard*, 23 Ala. 558.

10. In stating the accounts of a mercantile partnership, the master should first ascertain whether the business resulted in profit or loss, and to what extent; and should also dispose of the uncollected debts. *Zimmerman v. Huber*, 29 Ala. 379.

11. It is the duty of the master to obey the instructions of the chancellor; and if it is desired that the chancellor should review his directions, the party who supposes himself aggrieved by the obedience of the master, may take exceptions, and by this means again bring the point to the attention of the chancellor; and if it should be made to appear, on the argument of these exceptions, that the justice of the case cannot be reached without an alteration of the decree, the chancellor should direct the report to stand over, and order a rehearing of that portion of the decree containing the erroneous directions. *Lang v. Brown*, 21 Ala. 179.

12. If the master disregards the instructions of the chancellor, or does not furnish in his report the facts necessary to enable the court to proceed to a final decree on the merits, the report should be set aside, even if no exceptions are taken to it. *Ib.*

13. An exception to the master's report must specifically point out the item or error complained of; otherwise, it may be overruled on account of its generality. *Royall's Adm'r v. McKenzie*, 25 Ala. 364; *O'Reilly's Adm'r v. Brady*, 28 Ala. 530; *Foster v. Gressett's Heirs*, 29 Ala. 393.

14. If the exception is directed to a particular part of the report, including several distinct items, and is bad in part, it may be overruled *in toto*. *O'Reilly's Adm'r v. Brady*, 28 Ala. 530; *Brantley v. Gunn*, 29 Ala. 387.

15. Or, at the discretion of the chancellor, it may be sustained in part, and overruled in part, unless it be so framed as to prevent such partial allowance. *Brantley v. Gunn*, 29 Ala. 387.

16. When the master's report is in direct opposition to the decree under which it was made, the appellate court may review its confirmation by the chancellor, although no exceptions were reserved to it. *Lang v. Brown*, 21 Ala. 179.

17. But, if the report is not on its face erroneous, and no exception was taken to it, nor any objection made to its confirmation, an objection to it cannot be raised in the appellate court. *Gerald v. Miller's Distributees*, 21 Ala. 433.

18. Where the order of reference directs the master to take an account of the expenses of executing a trust, and to ascertain what would be a reasonable compensation to the trustee, should the court decree compensation; and the master reports, as compensation, a certain per cent. on the amount of the available assets, which are also ascertained and reported under another part of the reference, the report conforms to the reference. *Royall's Adm'r v. McKenzie*, 25 Ala. 363.

19. When a decree is reversed on error, the master's report falls with it to the ground, although no exceptions were reserved to it; consequently, when suit is afterwards brought to recover money paid under the decree, the defendant can claim no benefit from the master's report. *Crocker and Wife v. Clement's Adm'r*, 23 Ala. 296.

MAXIMS.

1. *Caveat emptor.* *O'Neal v. Wilson*, 21 Ala. 288; *Lang's Heirs v. Waring*, 25 Ala. 626; *McCartney v. King*, 25 Ala. 681; *Dill v. Shahan*, 25 Ala. 694; *Thompson's Adm'r v. Christian*, 28 Ala. 399.

2. *De minimis non curat lex.* *Grier v. Campbell*, 21 Ala. 328; *Cowan and Wife v. Jones*, 27 Ala. 317.

3. Equality is equity. *Crayton v. Johnson*, 27 Ala. 503; *Branch Bank at Mobile v. Robertson*, 19 Ala. 798.

4. Equity will consider as done that which ought to have been done. *Kimball v. Moody*, 27 Ala. 130; *Henderson v. Segars*, 28 Ala. 352.

5. Every man is presumed to know the law. *Erwin v. Hamner*, 26 Ala. 296; *McCartney v. King*, 25 Ala. 681; *Dill v. Shahan*, 25 Ala. 694; *Gwynn and Wife v. Hamilton's Adm'r*, 29 Ala. 233; *Stone v. Hale*, 17 Ala. 557.

6. He who seeks equity, must offer to do equity. *Brantley v. Gunn*, 21 Ala. 633; *Tucker v. Holley*, 20 Ala. 426; *Martin's Heirs v. Tenison*, 26 Ala. 738; *Pearson v. Bailey*, 23 Ala. 537; *Montgomery v. Givhan*, 24 Ala. 568; *Johnson v. Culbreath*, 19 Ala. 348; *Rives v. Toulmin*, 25 Ala. 452; *Hill v. Averett*, 27 Ala. 484; *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

7. *In pari delicto, potior est conditio possidentis.* *Brantley v. West*, 27 Ala. 542.

MISTAKE AND IGNORANCE.

1. A deed, executed by a father to his married daughter, will be reformed in equity, as against the judgment creditors of the husband, when, through the mistake of the attorney by whom it was drawn, it fails to accomplish the grantor's intention to secure the property to the sole and separate use of the grantee; but a bill for this purpose should be filed by the grantee, and not by her trustee. *Stone v. Hale*, 17 Ala. 557.

2. A deed of gift, drawn by the grantor himself, and which, by reason of his ignorance of the law, fails to express his intention, may be reformed in equity. *Larkins v. Biddle*, 21 Ala. 252.

3. Where a mistake in a deed is shown by clear and satisfactory proof, equity will reform it, and decree an account against a party who, with notice of the mistake, purchased the property conveyed, and holds it against the rightful owner. *Whitehead v. Brown*, 18 Ala. 682.

4. But, where the donor is the only witness who testifies to the alleged mistake in the deed, and his testimony is confused and contradictory, a reformation will be refused. *Lockhart and Wife v. Cameron*, 29 Ala. 355.

5. Equity will decree the reformation of a written instrument which, through mistake, or from the ignorance or want of skill of the draftsman, or from any other cause, fails to express the true agreement between the parties; but, if the instrument expresses the real agreement of the parties, a reformation will not be decreed because they were mistaken as to its legal consequences. *Larkins v. Biddle*, 21 Ala. 252; *Trapp & Hill v. Moore & Border*, 21 Ala. 693.

6. A deed of trust executed by a debtor, to secure certain creditors and sureties, including certain notes on which one of the beneficiaries was supposed to be bound as surety, and so describing them, under the belief that, if the beneficiary was not bound, the misdescription would exclude the holder from any benefit under the deed,—reformed in equity, on proof of the mistake, and of the grantor's intention to secure the beneficiary and not the notes. *Trapp & Hill v. Moore & Border*, 21 Ala. 693.

7. An ante-nuptial contract, which was drawn by the husband himself, and which, through his fraud or mistake, does not include all the property which was intended to be secured to

the separate use of the wife, will be reformed on her application. *Love v. Graham*, 25 Ala. 187.

8. Where the vendor filed a bill, asking a reformation of his title-bond in the description of the land, and an injunction against an action at law on the bond; and the proof showed that the land was misdescribed by mistake, and that the vendor did not have title to the land which he intended to sell,—the mistake in the bond was corrected, but the action at law was not enjoined; and it was expressly declared by the decree, that the purchaser might, at his election, either proceed with his action at law, or dismiss it and institute proceedings for a rescission of the contract; and further, that if he elected to proceed with his action, it should be considered in all respects an action on the bond as reformed. *Reese v. Kirk*, 29 Ala. 406.

9. Two adjacent land proprietors, owning the two subdivisions of a fractional section, ran their division fence, by mutual mistake, along a line which they erroneously supposed to be the boundary of their respective tracts, and cleared and cultivated the lands up to the division fence for four or five years, when one sold and conveyed his tract to a third person; and on the discovery of the mistake, the other proprietor filed a bill against him and the purchaser, asking a reformation of the deed according to the supposed common boundary. *Held*, that the plaintiff was not entitled to the relief sought. *Teakle v. Teakle*, 29 Ala. 403.

10. In assumpsit on a promissory note, a judgment by default was rendered, and, through a clerical mistake in the computation of interest, was entered for less than the amount really due. The defendant carried up the case, by writ of error, to the next ensuing term of the supreme court, and the judgment was there affirmed on certificate. *Held*, that the plaintiff was entitled to come into equity, to have the mistake corrected. *Norris, Stodder & Co. v. Cottrell*, 20 Ala. 304.

11. Where a party seeks relief in equity against a judgment at law, on the ground that he was ignorant of the facts constituting his defense until after the rendition of the judgment, he must show that his failure to discover those facts is not attributable to any want of diligence on his part, but to fraud, accident, or the act of the opposite party. *Perrine v. Carlisle*, 19 Ala. 686; *Taliaferro's Adm'r v. Branch Bank at Montgomery*, 23 Ala. 755.

12. A contract of sale, made under a mutual mistake as to the vendor's title, will be rescinded at the instance of the purchaser, if he seeks a rescission within a reasonable time, abandons the possession of the land, and delivers or offers to deliver it to the vendor. *Smith v. Robertson*, 23 Ala. 312.

13. A misrepresentation of a material fact, which was believed and acted on by the party seeking relief, whether intentionally false or innocently made, entitles the injured party to a rescission of the contract. *Lanier v. Hill*, 25 Ala. 554.

14. But an innocent mistake, which the defendant offered to correct before the bill was filed, is no ground for a rescission, when the bill proceeds on the ground of fraud. *Williams v. Sturdevant*, 27 Ala. 598.

15. Under a bill seeking to impeach a decree of the orphans' court on the ground of fraud, proof of an error or mistake only, in the allowance of an improper credit, does not entitle the plaintiff to a decree, unless he amends his bill. *Cowan and Wife v. Jones*, 27 Ala. 317.

16. Equity will not interpose, at the instance of a purchaser at execution sale, to relieve him from the consequences of his own folly or temerity, when he purchased with knowledge that the property was under deed of trust, and after the sale had been forbidden by the trustee. *O'Neal v. Wilson*, 21 Ala. 288.

17. If an executor purchases lands belonging to his testator's estate, at a public sale made by himself and his co-executors, under the mistaken belief that the will conferred on them power to sell, he cannot be relieved of his purchase in equity. *Dill v. Shahan*, 25 Ala. 694.

18. Although courts of equity may, in certain cases, relieve against a mistake of law; yet the mistake must be gross and palpable, and such as would warrant the belief that an undue advantage was taken of the plaintiff,

owing to his imbecility of mind, or to the exercise of some improper influence over him, either by the party with whom he dealt, or by some other person with the knowledge, consent, or procurement of that party. *Ib.* (*Vide infra*, 25.)

19. Courts of equity grant relief against conveyances obtained by misrepresentation or mistake; and if the parties occupy a relation, from which naturally springs an unusual degree of confidence, affection, or sense of duty, the utmost degree of good faith is required from the party in whom the trust is reposed, and he must show that the contract is in every respect just, fair, and equitable. *Boney v. Hollingsworth*, 23 Ala. 690.

20. Where a father executed to his sons a conveyance of certain lands, but filed it away among his papers, and never delivered it; and the sons, after their father's death, obtained from their sister a voluntary relinquishment of her interest in the lands, by representing to her that their father, on his death-bed, had declared it to be his intention that they should have the lands,—the relinquishment was set aside, because the grantees failed to show that they had stated, fully and fairly, their father's dying declarations. *Ib.*

21. A deed executed by a married woman, simultaneously with the execution by her husband of his last will and testament; purporting to be made in consideration of her love and affection for the two grantees, who were her husband's children by a former marriage, and of the settlement and provision made for her by her husband's will; conveying to each of the children an equal interest with herself in her separate estate secured by antenuptial contract, and reserving, as a consideration therefor, the right to become equal heir with them in her husband's estate, with which her property is declared to be thereby incorporated,—will not be sustained in equity, at the suit of the grantees, against the heir and administrator of the grantor, where the provisions of the will, the confidence which the wife reposed in her husband, and other circumstances in proof, show that it was executed through mistake on the part of the wife, and misrepresentation on the part of the husband, as to the amount of his debts, in that the deed and will together appear to have constituted a plan, by which it was contemplated that, without a sale of any of the property, the joint plantation should continue to be kept up and worked with the slaves of both husband and wife, and the wife and children be maintained out of its proceeds, while the husband's estate was in fact so much embarrassed as to leave nothing for distribution after payment of debts. *Trippe v. Trippe*, 29 Ala. 637.

22. Chancery will not specifically enforce a contract founded in mutual mistake, when it would materially affect the rights of the defendant. *James v. State Bank*, 17 Ala. 69.

23. Equity will not entertain jurisdiction of a bill, of which the sole object is to recover money alleged to have been paid through fraud and mistake, where the remedy at law is adequate and complete. *Russell v. Little*, 28 Ala. 160.

24. A nuncupative will, bequeathing personal property of more than five hundred dollars in value, which is void under the Code, (§ 1615,) cannot be established in equity, on the ground of the decedent's ignorance or mistake as to the change made in the law. *Erwin v. Hamner*, 27 Ala. 296.

25. Equity will not relieve against a pure mistake of law, where there is no fraud, imposition, undue influence, imbecility of mind, or the like, inferrible from the transaction; and there is no distinction, in this respect, between mistake and ignorance of law. *Gwynn and Wife v. Hamilton's Adm'r*, 29 Ala. 233. (*Vide supra*, 18.)

26. If the husband, under the erroneous supposition that his marital rights had not attached to certain slaves belonging to his wife, delivers them to the distributees of her estate,—this is a pure mistake of law, against which equity will not grant relief. *Ib.*

27. Where a tenant for life, with power of disposition at her death, asserting that she intended the property for her only daughter, consulted a lawyer, to ascertain whether it was necessary that she should make a will, and was advised by him that the

property vested in her absolutely in fee-simple; and relying on this advice, she made no disposition of the property, as it was alleged she would otherwise have done,—*held*, that these facts did not amount either to an execution of the power of appointment, or to such an attempt to execute it as chancery would aid. *Mitchell and Wife v. Denson*, 29 Ala. 327.

28. Chancery will not, on the ground of mistake, aid or supply the defective execution of a statutory power; as where the deed of husband and wife, and a relinquishment of dower by the wife, are written on the same sheet of paper, and the officer's certificate of the wife's examination and acknowledgment is, by mistake, written under the relinquishment, and thereby made to apply to it, instead of the deed,—a court of equity will not, on the ground of mistake, apply the certificate to the deed. *McBryde's Heirs v. Wilkinson*, 29 Ala. 662.

MORTGAGES.

I. WHAT CONSTITUTES A MORTGAGE.

1. *Generally.*
2. *Absolute Conveyance held Mortgage.*
3. *Distinction between Conditional Sale and Mortgage.*
4. *Equitable Mortgage.*

II. RESPECTIVE RIGHTS AND INTERESTS OF THE PARTIES.

III. FORECLOSURE, AND ITS INCIDENTS.

IV. REDEMPTION, AND ITS INCIDENTS.

V. REGISTRATION; VALIDITY, AND PRIORITY.

I. WHAT CONSTITUTES A MORTGAGE.

1. *Generally.*

1. A writing, in these words: "This day received of R. $220, for the payment of which, by the 25th December next, I hereby assign over to said R. the free and full title to a certain negro girl, named Hulda,"—is a mortgage of the slave, and not a bill of sale. *Ross v. Ross*, 21 Ala. 322.

2. Articles of agreement, bipartite, whereby the party of the first part "doth hereby agree to bargain, sell, and convey" unto the party of the second part certain slaves, in consideration that the party of the second part "hereby delivers" to the said party of the first part, "by order, all his right, title, and interest, both in law and equity, to the sum of $2,000," part of an amount just recovered from the United States by an agent of the party of the second part; and conditioned that, if the party of the second part "will, by any means, with or without suit, either in law or equity, enable the said" party of the first part "to recover said sum of $2,000, with lawful interest, from said agent, then the said party of the first part "binds himself, his heirs, executors, &c., that the above bill of sale shall be absolute, and shall convey unto him, his heirs, executors, &c., all right, title, and interest in said slaves; otherwise, to be void, and of no effect,"—*held*, neither a mortgage, nor an absolute sale, but only an agreement to sell, which did not, *per se*, pass the legal title to the slaves. *Love v. Crook*, 27 Ala. 624.

3. A written contract, entered into between persons who have conflicting claims to slaves previously conveyed by mortgage, to which they were not parties; reciting the previous mortgage, and the conflicting claims which have arisen to the property; and stipulating, that one of the two negroes shall remain in the possession of each party, "until the sum for which they were respectively mortgaged be fully paid" unto the party of the second part, who claims to be the assignee of the original mortgagee,—the party of the first part "relinquishing all further right," and the party of the second part "obligating himself to convey to her perfect and complete titles whenever said sums are respectively paid,"—is not on its face a mortgage, and does not authorize a court of equity to grant relief to either party founded on it. *Murphy v. Barefield*, 27 Ala. 634.

4. A conveyance made in satisfaction of a precedent debt, although it may contain a redemption clause, can-

not take effect as a mortgage, since a mortgage is impossible where no debt exists. *West and Wife v. Hendrix*, 28 Ala. 226.

2. *Absolute Conveyance held Mortgage.*

5. The grantee of a deed, which is absolute on its face, may come into equity, to have it declared a mortgage. *Bryan & McPhail v. Cowart*, 21 Ala. 92.

6. In ascertaining whether an absolute deed was intended only as a mortgage, parol proof of the intention of the parties at the time of its execution is admissible. *Bryan & McPhail v. Cowart*, 21 Ala. 92; *Locke's Executor v. Palmer*, 26 Ala. 312; *Brantley v. West*, 27 Ala. 542; *West and Wife v. Hendrix*, 28 Ala. 226; *Parish v. Gates*, 29 Ala. 254.

7. To enable the court to declare an absolute deed a mortgage, the proof must be clear and convincing: loose declarations, especially after great lapse of time, are not sufficient to overturn the written contract of the parties. *Bryan & McPhail v. Cowart*, 21 Ala. 92.

8. It is not sufficient to raise a doubt, or suspicion, whether the writing expresses the true contract of the parties; nor is proof, by several witnesses, of the defendant's subsequent declarations, when not charged in the bill, sufficient to outweigh the positive denial of a sworn answer, the writing itself, and the testimony of the subscribing witness. *Brantley v. West*, 27 Ala. 542.

9. If the plaintiff fails to examine the subscribing witnesses to the deed, to prove what transpired at the time of its execution, the fair presumption is, that their testimony would militate against him; and such failure casts a shade of suspicion on his cause, which will induce the court to regard with greater jealousy, and examine with stricter scrutiny, the less convincing proof on which he relies. *Bryan & McPhail v. Cowart*, 21 Ala. 92.

10. An agreement, to make an absolute deed operate only as a mortgage, must be contemporaneous with the execution of the deed itself; otherwise, unless supported by some new consideration, it is *nudum pactum*, and no rights can arise under it. *Ib.*

11. To convert an absolute conveyance into a mortgage, the intention and understanding of both parties, to that effect, must concur: the fact that the party who executed the conveyance intended and considered it as a mortgage, is not sufficient to make it a mortgage. *West and Wife v. Hendrix*, 28 Ala. 226.

12. Mere inadequacy of consideration is not, *per se*, sufficient to convert an absolute conveyance into a mortgage. *Ib.*

13. An absolute bill of sale of a slave decreed to stand only as a mortgage, upon proof that the vendor was upwards of seventy years old, infirm, and embarrassed; that his property was levied on, and about to be sold; and that the vendee, who was his son-in-law, took advantage of all these circumstances, to make the transaction assume the form of an absolute sale, instead of a mortgage. *Smith v. Pearson*, 24 Ala. 355.

14. A bill of sale of slaves, absolute in form, decreed a mortgage, against the denial of the answer on information and belief, on proof, by the attorney who wrote it for the parties, that it was purposely made absolute on its face, but was intended only as a security for a debt assumed by the vendee, and that the vendor, on the repayment of the money, should have the slaves; it further appearing that the value of the slaves greatly exceeded the amount of the assumed debt, and that the slaves continued in the possession of the vendor. *Parish v. Gates*, 29 Ala. 254.

15. Equity will not interfere, to declare an absolute conveyance a mortgage, when the evidence shows that the transaction was intended to defraud the vendor's creditors. *Brantley v. West*, 27 Ala. 542.

16. Where the bill alleged a single contract, by which plaintiff, in consideration that defendant would assume all his just debts, transferred six slaves to defendant; while the proof showed that there were two contracts, made on different days, and that defendant assumed to pay only those debts which were then in execution,—*held*, that the variance was fatal. *Ib.*

3. *Distinction between Conditional Sale and Mortgage.*

17. The inclination of courts of equity always has been against conditional sales, because an error which converts a conditional sale into a mortgage is less injurious than an error which changes a mortgage into a conditional sale; and this inclination is strongly manifested, whenever the transaction had its origin in a proposition for a loan, or where the relation of debtor and creditor existed between the parties. *Locke's Executor v. Palmer*, 26 Ala. 312.

18. The fact that the debtor's notes are given up to him by the creditor, and no acknowledg ient or other evidence of the debt retained, is a strong circumstance to show that the relation of debtor and creditor was destroyed, but it is not conclusive. *Ib.*

19. A writing, executed by the grantee several months after the execution of the original deed; reciting that, at the time the deed was executed, it was agreed between him and the grantor, that if the latter repaid to him, by a specified day, the amount of the consideration money expressed in the deed, then he would reconvey all the property therein mentioned; and binding himself to reconvey accordingly,—is evidence of the highest character against the grantee; and, although it may not be sufficient, of itself, to show that the parties intended the deed to operate as a mortgage, yet, if the other evidence in the case, taken in connection with it, establishes that to have been the purpose of the parties, or even renders it doubtful whether a mortgage or a conditional sale was intended, it is enough to induce a court of equity to declare it a mortgage. *Ib.*

20. A deed, absolute on its face, declared a mortgage, on proof that the transaction originated in a loan of money; that the relation of debtor and creditor existed between the parties; that some of the articles of personal property conveyed, were not enumerated in the deed; that the creditor gave up the debtor's notes, and retained no evidence of the debt; that the creditor gave a written acknowledgment, about two months afterwards, to the effect that, at the time the deed was executed, it was agreed between the parties, that if the debtor repaid to him, by a specified day, the amount expressed as the consideration in the deed, then he would reconvey all the property therein mentioned, and bound himself to reconvey accordingly; and that all the property, both real and personal, remained in the debtor's possession, without any agreement on his part, so far as the evidence disclosed, to pay rent or hire. *Ib.*

21. A written contract for the sale of several slaves, at a specified price for each, using present words of conveyance, and containing the additional stipulations, that two of the slaves are to remain in the possession of the vendor until the first day of January next thereafter, and that he "may redeem any and all of the said negroes, at the valuation herein before affixed to them, within twelve months,"—is not a mortgage, but a conditional sale, with a reservation of the right to repurchase. *Murphy v. Barefield*, 27 Ala. 634.

22. When a deed is made for a consideration paid at the time, whether the payment is made in cash, or by the surrender and satisfaction of a precedent debt, an agreement on the part of the purchaser to allow the vendor to purchase at a future day, for the same or for an advanced price, does not convert the transaction into a mortgage. *West and Wife v. Hendrix*, 28 Ala. 226.

23. Where S. executed to H. an absolute conveyance of a tract of land, reciting therein a money consideration in hand paid, and took from him a receipt in full of an account held by him against W. for the same amount; and H. at the same time executed to S. a penal bond, which recited the sale, and was conditioned that he should "reconvey" the land on the payment, by a specified day, of a sum of money equal to the amount of the expressed consideration with interest,—*held*, that the transaction, as evidenced by the deed and bond, was not a mortgage, but a sale, with an agreement to resell on the payment by the specified day of the stipulated amount; and that the contemporaneous declarations of H., as proved by the subscribing witness, that the transaction was intended as a security

for his debt against W., and his subsequent declarations that the debt was still subsisting, with the additional facts, that the land was worth nearly three times as much as the amount expressed as the consideration, and that S. retained the possession of it without any agreement to pay rent, were not sufficient to convert it into a mortgage. *Ib.*

4. *Equitable Mortgage.*

24. Where the vendor of real estate has executed his bond, conditioned to make title on the payment of the purchase-money, a court of equity considers the contract in the nature of a mortgage, with all its equitable rights and incidents. *Conner v. Banks*, 18 Ala. 42 ; *Kelly v. Payne*, 18 Ala. 371.

25. Where money is loaned to a partnership, on the faith of the partnership property, a court of equity will consider the creditor, as between himself and the several partners, as a mortgagee, with a lien upon the property until his debt is paid. *Coster's Executors v. Bank of Georgia*, 24 Ala. 37.

As to the vendor's lien, and other incidents of such equitable mortgage, see VENDORS AND PURCHASERS.

II. RESPECTIVE RIGHTS AND INTERESTS OF THE PARTIES.

26. A mortgage on the real estate of a partnership, executed by the surviving partner to secure the payment of his individual debt, creates a lien only to the extent of his interest in the property. *Lang's Heirs v. Waring*, 17 Ala. 145.

27. A mortgage on the wife's lands, executed by the husband during coverture, and after issue born, conveys all his interest as husband and tenant by the curtesy initiate. *Boykin v. Rain*, 28 Ala. 332.

28. But a decree of divorce *a vinculo*, in favor of the wife, defeats and determines all the rights and interest of such mortgagee. *Ib.*

29. A vendor, who retains the legal title and a lien for the purchase-money, has such an interest in the land as is the subject of mortgage ; and a purchaser under the decree of foreclosure acquires, as against the vendor and his mortgagee, all the title which the vendor had. *Trammell v. Simmons*, 17 Ala. 411.

30. A mortgagor in possession may hire or lease the mortgaged property, and receive the rents and profits, until the mortgagee notifies the lessee or hirer not to pay such rents or profits to the mortgagor. *Hutchinson v. Dearing*, 20 Ala. 798.

31. Notice from the mortgagee, to the lessee or hirer, not to pay the rents or profits to the mortgagor, intercepts the rents and profits then due and unpaid, as well as those which may subsequently decree, and entitles the mortgagee to receive them. *Ib.*

32. Where a mortgagor of slaves puts them into the possession of his son-in-law, under the belief that they would be more profitable under his control, and for the purpose of enabling himself the more readily to pay off the mortgage debt, and with the agreement that, when the debt was paid, they should come to some understanding respecting the value and ownership of the slaves ; and the mortgagee is apprised of this agreement, and assents to it,—he may, after notice to the son-in-law, maintain assumpsit against him for the services of the slaves, notwithstanding he has previously obtained a decree of foreclosure ; provided, it appears that the son-in-law was not made to account for said hire by the bill. *Ib.*

33. If the tenant pays over rents to the mortgagor, after the law-day of the mortgage, but before notice of any claim by the mortgagee, the payment is effectual against the latter ; nor does the mortgage constitute any objection to a recovery by the mortgagor, against one who has wrongfully received the rents under an assertion of title, when it is not shown that the mortgagee has asserted any claim to the fund. *Branch Bank at Mobile v. Fry*, 23 Ala. 770.

34. The mortgagor is entitled, in the absence of an express stipulation to the contrary, to retain possession of the property until the law-day, and has the right to vindicate this possession against all persons who unlawfully withhold it ; it is also his duty to look after the property, and if a loss

occurs from the want of proper care and diligence, the consequences must fall primarily on him. *Ross v. Ross*, 21 Ala. 322.

35. A mortgagee, who is in possession of the mortgaged property before the law-day, is bound to account to the mortgagor for the rents and profits, unless the mortgage itself contains a stipulation to the contrary; nor can parol evidence be received to prove that the contract contained such a stipulation. *Davis v. Lassiter*, 20 Ala. 561.

36. The retention of possession by the mortgagor, after the law-day has passed, is not *prima-facie* evidence of fraud, nor is it a circumstance to which the law attaches the presumption of payment. *Steele v. Adams*, 21 Ala. 534.

37. The possession of the mortgagee, before the law-day, is not adverse to the mortgagor. *McGuire v. Shelby*, 20 Ala. 456.

38. The statute of limitations does not begin to run against a mortgagee out of possession, as in favor of the mortgagor or his vendee, even after the law-day has passed, until there has been some overt act, or open assertion of adverse title; because the mortgagor and his vendee are presumed to hold in subordination to the title of the mortgagee. *Boyd v. Beck*, 29 Ala. 703.

39. A mortgagor has no power, as against the mortgagee and those claiming under him, to make a dedication, or gift of the land, for public uses; but if the mortgagee assents to such dedication, he and those claiming under him will be bound by it. *Hoole & Paullin v. Attorney General*, 22 Ala. 190.

40. The widow of the mortgagor is not entitled, as against the mortgagee, to dower in the mortgaged lands, when the mortgage was executed on the same day with the conveyance to secure the payment of the purchase-money. *Eslava v. Lepretre*, 21 Ala. 504.

41. Where the mortgagor conveys by absolute deed, and the lands are afterwards sold under the mortgage, the widow of the first purchaser is not entitled to dower in them, because the sale under the mortgage divested her husband's estate. *Cheek v. Waldrum and Wife*, 25 Ala. 152.

42. The interest of the mortgagor, while in possession of the property before the law-day, is subject to levy and sale; but when the mortgagee becomes entitled to the possession, upon default being made, he may claim the property, and terminate the sheriff's possession. *Fontaine & Dent v. Beers & Smith*, 19 Ala. 722.

43. If, however, the mortgagor discharges the mortgage debt before the trial of the claim suit, the assertion of his intervening claim by the mortgagee cannot prevent a condemnation of the property. *Ib.*

44. The interest of the mortgagor, which may be sold under execution, consists of the right of possession until the law-day, and the equity of redemption. *Harbinson v. Harrell*, 19 Ala. 753; *O'Neal v. Wilson*, 21 Ala. 288.

45. The plaintiffs in execution, in such case, would be entitled to precedence over a stranger, to whom the mortgagor, after the law-day, had given an order on the mortgagee, which had been accepted by the latter, payable out of the surplus remaining after the mortgage debt was satisfied. *Harbinson v. Harrell*, 753.

46. The lien of the plaintiffs in execution would not be affected by a sale of the property, made by agreement between the mortgagor and mortgagee, after the levy, and before the law-day; but they would be entitled to recover the value of the property, from the time of the sale until the law-day, and to have an account taken of its value on the law-day. *Ib.*

47. When the mortgagee files a bill to separate his interest from that of the mortgagor, after the levy of an execution against the latter, he cannot be allowed out of the mortgage fund reasonable solicitor's fees incurred in the prosecution of the suit; nor can the plaintiffs in execution take advantage of usury in the mortgage debt. *Ib.*

48. If the sheriff assumes the responsibility of selling the entire interest in the property, declaring that the proceeds of sale will be applied first to the payment of the mortgage debt, and the surplus to the satisfaction of the execution, his sale does not divest the title of the mortgagee, but only transfers to the purchaser the interest of the defendant in execution. *O'Neal v. Wilson*, 21 Ala. 288.

49. When the mortgagor redeems the lands under the statute, after they have been sold under a decree of foreclosure, and takes the conveyance in the name of a trustee for his wife, he has not such an interest in them as is subject to levy and sale under execution at law. *Wilson v. Beard*, 19 Ala. 629.

50. When an execution, either from a court of record or from a justice's court, is levied on mortgaged property, the mortgagee or his assignee may, under the Code, (§ 2595,) interpose a claim, and try the right of property, before the law-day of the mortgage. *Floyd v. Morrow*, 26 Ala. 353.

51. An assignment of a note or bond, secured by mortgage, is an equitable assignment of the mortgage, unless there is some contract to the contrary. *Graham & Rogers v. Newman*, 21 Ala. 497; *Center v. P. & M. Bank*, 22 Ala. 743.

52. The assignee of the note, in such case, may use the name of the mortgagee at law; but if the mortgage itself is assigned in proper form, the legal title passes to the assignee, and he must sue in his own name. *Graham & Rogers v. Newman*, 21 Ala. 497.

53. If the mortgage is of land, a deed is necessary to convey the legal title to the assignee, either on a separate paper, or endorsed on the mortgage, with suitable words to convey the thing itself; but, where the mortgage is of a personal chattel, the legal title passes by an assignment of "all right, title and interest, in and to the within mortgage." *Ib.*

54. A mortgagee is estopped from setting up against his assignee a title which dwelt in him at the time of the assignment, or one subsequently acquired. *Center v. P. & M. Bank*, 22 Ala. 743.

55. Persons having conflicting claims to mortgaged property, when they are not parties to the mortgage, may, by subsequent contract, settle and adjust their respective rights to the property; and such contract, irrespective of the character of the mortgage, must be considered as the ascertainment and adjustment of their rights. *Murphy v. Barefield*, 27 Ala. 634.

56. Equity will control the action of a mortgagee, when his mortgage becomes oppressive to a third party; but this principle does not apply to such mortgages as operate in the nature of assignments by insolvent debtors. *Wiley, Banks & Co. v. Knight*, 27 Ala. 336.

57. A mortgage, given to a surety for his indemnity against a particular debt, enures to the benefit of his cosurety; and he cannot apply the funds, to the prejudice of his cosurety, to the payment of any other debt than that specified. *Steele v. Mealing*, 24 Ala. 285.

58. So, a mortgage, given to a surety, enures to the benefit of the creditor. *Cullum v. Branch Bank at Mobile*, 23 Ala. 797.

III. FORECLOSURE, AND ITS INCIDENTS.

59. A mortgagee may come into equity to foreclose, although his mortgage contains a power of sale. *Carradine v. O'Connor*, 21 Ala. 573; *Ala. Life Insurance & Trust Co. v. Pettway*, 24 Ala. 544.

60. Although the legal estate remains in the mortgagee, notwithstanding his assignment of the notes which it was intended to secure; yet he holds it in trust for such assignee, who may proceed in his own name to foreclose. *Center v. P. & M. Bank*, 22 Ala. 743.

61. A purchaser of the equity of redemption, at a sale made under an order of the orphans' court, is a necessary party to the bill. *Hall v. Huggins*, 19 Ala. 200.

62. If the mortgagor dies before the rendition of the final decree, and his will is admitted to probate by the court having jurisdiction, his heirs-at-law, as well as his devisees and personal representatives, are proper parties to the bill of revivor; and the plaintiff proceeds without them at his peril, since they have the statutory right to impeach the probate of the will, by bill in chancery, within five years. *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

63. Usury, in the transaction in which the mortgage had its origin, may be set up as a defense, *pro tanto*, to a bill for foreclosure; and its effect, if established, is to discharge the party from the payment of any interest whatever on the debt. *Ib.*

64. The mortgagor cannot resist a foreclosure, on the ground that the mortgage was intended to secure the payment of the purchase-money for land bought by him from the mortgagee, and that the latter has broken the covenants contained in his deed; it not appearing that the mortgagee is unable to respond to the damages occasioned by the breach. *McLemore v. Mabson*, 20 Ala. 137.

65. An agreement between mortgagor and mortgagee, made contemporaneously with the loan, that the interest shall be converted into principal as it becomes due, is oppressive, unjust, and tending to usury; but after interest has accrued, it then becomes a debt, and may, by subsequent agreement, be considered a part of the principal, and thenceforth bear interest, provided there is no extortion on the part of the mortgagee. *Eslava v. Lepretre*, 21 Ala. 504.

66. If the interest runs in arrear, and rests are made from time to time in the mortgagee's account of arrears, on which interest is calculated; and finally a general account of all arrears is had, calculated on the footing of the previous rests, which is signed by the mortgagor, and secured by a second mortgage, executed after the lapse of several years,—the transactions are not usurious, and equity will charge the mortgaged premises with the payment of the sum so found due, where there is no conflicting lien or subsequent incumbrance on the property at the time of this settlement. *Ib.*

67. Where the mortgage debt is created in this State, and the mortgagor, being unable to pay it, afterwards agrees to pay ten per cent. interest, as an indemnity to the mortgagee for interest paid by him on money borrowed in Louisiana at a higher rate of interest than is allowed by the laws of this State, the agreement is oppressive and unjust, and will not be upheld in equity. *Ib.*

68. If a mistake is made on general accounting between mortgagor and mortgagee, in consequence of which the new note and mortgage are taken for less than the amount actually due according to the basis on which the calculations are made, the sum thus omitted through mistake cannot, as against a subsequent mortgagee or purchaser whose rights intervene before the discovery and correction of the mistake, be considered a part of the mortgage debt. *Ib.*

69. Discounting a note on a third person, eleven months before its maturity, at four per cent. per month, and taking the endorsement of the holder, with a mortgage on his property to secure its payment, constitute a usurious loan, and not a *bona-fide* purchase of the note; and if the note and mortgage are then assigned to another person, at the same usurious rate of discount, and with notice of the usurious nature of the transaction, the mortgage is open in his hands to the defense of usury. *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

70. In taking an account of the mortgage fund to separate the interest of the mortgagee from that of the mortgagor, an execution having been levied on the latter, the plaintiffs in execution cannot take advantage of usury in the mortgage debt. *Harbinson v. Harrell*, 19 Ala. 753.

71. Where a creditor, whose debt is secured by the assignment of a mortgage, purchases a judgment which constitutes a prior lien on the mortgaged premises, at the request of the debtor, and with the express understanding that it shall be tacked to the mortgage, he is entitled to have it paid out of the mortgage fund. *Cullum v. Branch Bank at Mobile*, 23 Ala. 797.

72. The renewal of a note, secured by mortgage, does not affect the security. *Cullum v. Branch Bank at Mobile*, 23 Ala. 797; *Boyd v. Beck*, 29 Ala. 703.

73. Nor is the security impaired by the statute of limitations barring a recovery on the note. *Cullum v. Branch Bank at Mobile*, 23 Ala. 797.

74. Where a mortgage, which was given to secure an accommodation endorser in bank, became forfeited in 1838, while the bank debt was extended, from time to time, until 1842, and reduced to judgment in 1843; and the balance due on the judgment was paid by the mortgagee in January, 1845,—*held*, that the mortgage debt could not be presumed satisfied, so as to bar the right of foreclosure, at least until the expiration of six years from the time

of this payment. *Boyd v. Beck*, 29 Ala. 703.

75. Two foreclosure suits, pending in the same court, were consolidated by consent of counsel, and the second bill agreed to be taken as an answer and cross bill to the first; the complainant in the first bill admitted the validity of the other's mortgage, while the latter alleged, on information and belief, that the former's mortgage was intended to hinder and delay creditors, and that the debts secured by it were fictitious,—*held*, that it was incumbent on the first plaintiff, as against the second, to prove the existence and *bona fides* of the debt which constituted the consideration of his mortgage. *De-Vendal v. Malone's Executors*, 25 Ala. 272.

76. If the defendants, being adults, do not suggest to the court, that the mortgaged premises greatly exceed in value the amount of the mortgage debt, and are capable of subdivision; and move for a reference to the master, to ascertain these facts,—the chancellor may well decree a sale of the whole premises, notwithstanding there are two mortgages, between the same parties, for the same debt, and differing only as to the premises conveyed. *Eslava v. Lepretre*, 21 Ala. 504.

77. But, if any of the defendants are infants, *non compotes mentis*, or under any other legal disability, which would prevent them from appearing and contesting the matter with the plaintiff, a different rule would prevail. *Ib.*

78. It is discretionary with the chancellor, to allow time for the payment of the mortgage debt; or he may decree a foreclosure and sale absolutely, without giving day to the mortgagor. *Ib.*

79. When the decree of sale authorizes the registrar to receive the amount bid and to make a conveyance, the bidder must be considered as the purchaser from the time when he receives the registrar's deed: from that time, the property is at his risk, and he cannot repudiate the contract, although the sale may be set aside, before confirmation, for irregularities. *Jones & Blair v. Burden*, 20 Ala. 382.

80. A decree of foreclosure does not prejudice the rights of those who ought to be, but are not parties to the suit: if the mortgagor dies before the rendition of the decree, and the suit is thereupon revived against his devisees and personal representatives, but not against his heirs-at-law, the decree of foreclosure, and the plaintiff's purchase of the premises at the master's sale, are both void, as against the heirs, if they set aside the probate of their ancestor's will, by bill in chancery, within the time allowed by the statute. *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

IV. REDEMPTION, AND ITS INCIDENTS.

81. The mortgagor's statutory right of redemption, after the land has been sold under the mortgage, is a mere equitable right, and can only be enforced against an unwilling purchaser in a court of equity: the mere tender of the amount required by law does not reinvest him with the legal title. *Smith v. Anders*, 21 Ala. 782.

82. A sale under the mortgage, after the law-day, and in pursuance of its terms, vests in the purchaser all the title conveyed by it, divested of the equity of redemption. *Cheek v. Waldrum and Wife*, 25 Ala. 152.

83. But, if the mortgagee himself becomes the purchaser at such sale, without a decree of foreclosure, this does not divest the equity of redemption. *Gunn v. Brantley*, 21 Ala. 633.

84. If the mortgagee, through an agent, becomes himself the purchaser at the sale, the mortgagor may avoid the sale; but no other person can complain of it. *Edmondson v. Welsh and Wife*, 27 Ala. 578.

85. If the mortgagee obtains a decree of foreclosure, against the devisees and personal representatives of the mortgagor, without making the heirs-at-law parties, and becomes the purchaser at the master's sale, the heirs may come into equity, after setting aside the probate of their ancestor's will by bill in chancery, to redeem the premises, and to remove the cloud on their title. *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

86. Where the mortgage debt has been settled, by the creditor taking the mortgaged property in satisfaction of it, a court of equity will not open

the transaction, and allow a redemption, on the ground of usury alone. *Adams v. McKenzie*, 18 Ala. 698.

87. Where the mortgagee has paid the full value of the property, and has obtained from the mortgagor, without fraud, misrepresentation, or the exercise of undue influence, a release of the equity of redemption, equity will not disturb the transaction. *Ib.*

88. But equity looks with a jealous eye upon such a release, and requires it to be established by the clearest and most convincing proof. *Locke's Executor v. Palmer*, 26 Ala. 312.

89. If a portion of the mortgaged property has been sold, with the mortgagor's consent, and the proceeds applied towards the satisfaction of the debt, he may file a bill to redeem the residue. *Ib.*

90. *It seems*, however, that the mortgagor might, at his option, proceed for a redemption of all or any portion of the property, even if there had been no such sale; but a decree in his favor, under a bill to redeem a portion of the property only, would be a bar to any other proceeding of the like nature upon the same contract. *Ib.*

91. Two joint mortgagors may join in a bill to redeem, although the evidence shows that the mortgaged slaves belong to one of them only. *Ib.*

92. The statute of non-claim does not apply to equities of redemption. *Ib.*

93. The mortgagor may redeem at any time within the period prescribed by the statute as the limitation of real actions. *Gunn v. Brantley*, 21 Ala. 633.

94. All the mortgagees, in whom is vested the legal title, are necessary parties to a bill for redemption filed by an assignee. *Woodward v. Wood*, 19 Ala. 213.

95. When a special authority is vested in one or more of the mortgagees, for the benefit of all, a decree cannot be rendered, affecting their interests, unless they are all made parties to the bill. *Ib.*

96. If the mortgagee is only a trustee for another, the *cestui que trust* is a necessary party to a bill for redemption, unless some special reason why he may be dispensed with is shown. *Ib.*

97. Where a mortgage is executed by a bank-debtor to his sureties, and an assignee of the equity of redemption files a bill to redeem, the bank is a necessary party to the bill, unless it is alleged that the debt has been paid. *Ib.*

98. Where the mortgagor seeks to set aside a fraudulent sale, which was made without a decree of foreclosure, and at which the mortgagee became the purchaser, the latter is not entitled, on the taking of the account, to compensation for improvements made by him on the land. *Gunn v. Brantley*, 21 Ala. 633.

99. Where the heirs of the mortgagor come into equity, to redeem the mortgaged premises, and to set aside a decree of foreclosure, which was obtained by the creditor in a suit which was so conducted as to deprive them of the opportunity to appear and defend, they may take advantage of usury in the transaction, and thus avoid the payment of any interest whatever. (WALKER, J. *dissenting*, held that they should be required to pay legal interest.) *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

For analogous decisions, as to redemption by judgment debtor or creditor, see REDEMPTION OF REAL ESTATE.

V. REGISTRATION; VALIDITY, AND PRIORITY.

100. A mortgage may properly be admitted to record, on proof by the subscribing witness that he saw the same signed, sealed, and delivered, on the fourth day after its date: when it is not shown that any fraud was intended by the wrong date, nor any injury done or attempted, the probate will be held a substantial compliance with the statute, although it does not strictly accord with the prescribed form. *Harbinson v. Harrell*, 19 Ala. 753.

101. An unrecorded mortgage is void, as against a subsequent mortgagee without notice, although his deed is also unrecorded. *Coster's Executors v. Bank of Georgia*, 24 Ala. 37.

102. But it is valid and binding between the parties themselves. *Smith's Heirs v. Branch Bank at Mobile*, 21 Ala. 125; *Center v. P. & M. Bank*, 22 Ala. 743.

103. It is also valid as against subsequent creditors and purchasers with notice. *Smith's Heirs v. Branch Bank at Mobile*, 21 Ala. 125; *Boyd v. Beck*, 29 Ala. 703; *DeVendal v. Malone's Executors*, 25 Ala. 272.

104. If the mortgagor sells to an innocent *bona-fide* purchaser, taking a mortgage to secure the payment of the purchase-money; obtains a decree of sale in a foreclosure suit, and becomes himself the purchaser, he is not in a condition to invoke the protection afforded to a *bona-fide* purchaser without notice, so as to defeat his own mortgage to his vendor. *Smith's Heirs v. Branch Bank at Mobile*, 21 Ala. 125.

105. If a subsequent purchaser is put in possession of such facts, concerning the title of the vendor, as would cause a prudent man to make further inquiry before completing the purchase, he is not entitled to the protection afforded to *bona-fide* purchasers without notice. *Center v. P. & M. Bank*, 22 Ala. 743.

106. The pendency of a foreclosure suit is constructive notice of the mortgage, from the time service is perfected. *Hoole & Paullin v. Attorney-General*, 22 Ala. 190; *Center v. P. & M. Bank*, 22 Ala. 743.

107. When a mortgage, duly recorded, recites that the premises "are the same this day conveyed by the said" mortgagee to the mortgagor, "and now reconveyed to secure the payment of the purchase-money," the recital is sufficient to charge all persons, claiming through the mortgagee, with notice of the existence of his deed to the mortgagor. *Center v. P. & M. Bank*, 22 Ala. 743.

108. A compliance with the statutes of registration is equivalent to actual notice, so far as to charge a subsequent purchaser from the mortgagor. *Steele v. Adams*, 21 Ala. 534.

109. Where the mortgaged property is sold after the law-day, under execution against the mortgagor, which came to the hands of the sheriff after the registration of the mortgage; at which sale the mortgagee is present, but unknown to the purchaser, and does not disclose his claim, the purchaser and his privies are chargeable with notice of the mortgage. *Ib.*

110. Taking a second mortgage, as a further security for a pre-existing debt, without incurring any new liability, or parting with anything valuable, does not constitute the mortgagee either a creditor or purchaser under the act of 1828. *Boyd v. Beck*, 29 Ala. 703.

111. If the first purchaser fails to record his mortgage, the *onus* of proving notice to a subsequent creditor or purchaser is thrown on him. *Center v. P. & M. Bank*, 22 Ala. 743.

112. When a party sets up the defense of a *bona-fide* purchaser without notice, he must deny notice, whether charged in the bill or not. *Johnson v. Toulmin*, 18 Ala. 50; *DeVendal v. Malone's Executors*, 25 Ala. 272.

113. And if facts are charged, from which notice may be inferred, he must deny them. *Johnson v. Toulmin*, 18 Ala. 50.

114. If a person, having an incumbrance or security on an estate, conceals his interest, and thereby enables the owner to obtain an additional advance, he will be postponed in equity to the second incumbrancer. *Chapman v. Hamilton*, 19 Ala. 121.

115. The renewal of a note, secured by mortgage, is neither a payment nor a discharge of the lien of the mortgage. *Boyd v. Beck*, 29 Ala. 703; *Cullum v. Branch Bank at Mobile*, 23 Ala. 797.

116. A second mortgage, on the same and other property, postponing the law-day fixed by the first, does not destroy the lien of the first. *Boyd v. Beck*, 29 Ala. 703.

117. Conceding that a mortgagee, who, prior to the execution of his mortgage, consented to a postponement of the sale of the property under execution against the mortgagor, is thereby estopped, in a contest with the plaintiff in execution, from saying that the delay is constructively fraudulent as against his mortgage; yet this does not prevent him from taking advantage of a subsequent postponement without his consent. *Albertson, Douglass & Co. v. Goldsby*, 28 Ala. 711.

118. A mortgage, conveying (*inter alia*) "the hire" of certain slaves, "or the use of them the present year, and whatever negroes I may hire next year to make a crop with, and the entire crop I may make this year and next,"—is not void on its face. *Floyd v. Morrow*, 26 Ala. 353.

119. A *bona-fide* creditor, whose debt was past due, and who was chargeable with implied notice of the insolvency of his debtors, took from them, as the best means he could obtain for his security, a mortgage on all their property, of whatsoever description—to-wit, all their partnership effects, books, notes, and accounts; and all their individual property, consisting of lands and negroes, all the stock and provisions then on hand, or which might afterwards at any time be on hand, all the cotton and corn which might be produced until the law-day of the mortgage, all farming utensils, and household and kitchen furniture. The law-day was postponed for nearly six years, the possession in the meantime remaining with the mortgagors; and it was shown that the property conveyed greatly exceeded in value the amount of the mortgage debt. *Held*, that the mortgage was fraudulent and void as to the other creditors of the mortgagors. *Wiley, Banks & Co. v. Knight*, 27 Ala. 336.

120. Where a part of the consideration of a mortgage, which is void for constructive fraud as against creditors, is the payment by the mortgagees of a previous incumbrance on a portion of the property, it cannot stand as a valid security for their reimbursement. *Ib.*

121. A mortgage, executed by a man and his wife, who were engaged in the mercantile business as partners, to secure certain debts on which the mortgagees were bound as sureties and endorsers for them, and also a balance due one of the mortgagees on the original purchase of a stock of goods from him; conveying, by general words of description, the debtors' entire stock of goods with the outstanding notes and accounts; neither fixing a law-day, nor authorizing the mortgagees to sell or take possession on default being made in the payment of the secure debts; and providing that the mortgagors should continue to carry on their business as before, and to sell to responsible men in the usual way, (the mortgagees to have the entire control of the proceeds of sale, for the purpose of paying the secured debts,) and that all other goods which, through the assistance of the mortgagees, might be afterwards purchased for the purpose of replenishing the stock and keeping up the business, should be held liable to all the provisions of the mortgage,—is not fraudulent on its face, but becomes fraudulent and void, as against other creditors, on proof that the husband, at the time it was executed, was wholly insolvent; that it conveyed all the separate property of the wife, except the interest therein which had previously been mortgaged to secure the balance due on the purchase of the original stock of goods; that the mortgagees, at the time they agreed to become bound for the debts made in replenishing the stock of goods, knew that the mortgagors were somewhat embarrassed, and unable to purchase goods on their own credit; that they became bound for these debts, on the agreement of the mortgagors to secure them against all loss on account of their suretyship, and also to secure the balance due one of them on the purchase of the original stock of goods, although it was not shown that the first mortgage was an inadequate security; that there were other creditors at the time the mortgage was executed, one of whom had reduced his debt to judgment; and that the mortgagors packed up the goods, with the consent of the mortgagees, within a few months after the execution of the mortgage, and attempted to remove them beyond the limits of the State, although the mortgage stipulated that the business should continue to be carried on at the same place. *Constantine v. Twelves*, 29 Ala. 607.

MULTIFARIOUSNESS.

1. In determining the question of multifariousness, the court can look only to the bill, and not to the answers or proof. *Halstead v. Shepard*, 23 Ala. 558.

2. The question does not depend on the statements alone of the bill, but also on the prayer. *Carpenter and Wife v. Hall*, 18 Ala. 439.

3. A bill which joins two distinct demands, one equitable, and the other

of purely legal cognizance, is not multifarious, although it prays relief as to both demands. *Ib.*

4. Where slaves are conveyed by deed to a trustee, for the sole and separate use of a married woman and her children; and, after the trustee's removal from the State and abandonment of the trust, come to the possession of the husband, by whom they are sold to different persons, all having notice of the trust,—a bill filed by the wife and children, against the husband and several purchasers from him, is multifarious. *Felder v. Davis*, 17 Ala. 418.

5. But a bill which seeks to establish the plaintiff's interest, as a partner, in certain notes payable to the partnership, which are alleged to have been fraudulently transferred by his copartner to the other defendants, by separate assignments made at different times, is not multifarious. *Halstead v. Shepard*, 23 Ala. 558.

6. Where an executor, who is one of the residuary legatees under the will, converts the assets of the estate, and removes from the State without making a settlement, a bill filed by another legatee, against him and the administrator *de bonis non;* alleging that he and his sureties are insolvent, and praying an account and settlement of the two administrations, and an application of the executor's legacy, or so much thereof as may be necessary, to make good his default, is not multifarious. *Savage v. Benham*, 17 Ala. 119.

7. Nor is a bill multifarious, which is filed by a sole plaintiff, as administrator *cum test. ann.* of two estates, which are so blended, and so nearly the same, that it is necessary to proceed under both wills at the same time; and which asks the direction of the court, for the plaintiff's protection, in the construction of the wills, the administration and distribution of the estates, the establishment of certain charitable bequests under one of the wills, the marshaling of the assets, and contingent contribution from the legatees for the payment of debts. *Carter and Wife v. Balfour's Adm'r*, 19 Ala. 814.

8. A bill for divorce, which alleges several distinct grounds of divorce, is not demurrable for multifariousness. *Quarles v. Quarles*, 19 Ala. 363; *Morris v. Morris*, 20 Ala. 168.

9. A bill filed by a widow, asking the reformation of a deed of gift, under which she claims certain slaves as her separate estate, and an injunction against her husband's administrator, who was about to bring suit for the slaves, and also against certain judgment creditors of her husband, who were about to levy executions on the slaves,—is not multifarious. *Larkins v. Biddle*, 21 Ala. 252.

10. A bill filed by a married woman, against several execution creditors of her husband, seeking to enjoin the sale of her separate property under their executions, and to reform, if necessary, the deeds under which she claims, is not multifarious. *Bridges & Co. v. Phillips*, 25 Ala. 136.

11. A creditor, having two demands against the separate estate of a married woman, one for the hire of slaves under an express contract, and the other for the reimbursement of jail-fees necessarily paid by him, after the expiration of the term of hiring, to regain the possession of his slaves,—may join the two demands in one bill. *Walker and Wife v. Smith*, 28 Ala. 565.

12. A bill for partition and account of rents and profits, which unites as defendants a tenant in common, who has had possession of only a portion of the land, and a trustee who held possession of the entire tract until the delivery of a portion to his co-defendant, is not multifarious, since the accounts are so connected that one cannot be taken without the other. *Horton v. Sledge*, 29 Ala. 478.

13. The chancellor should seldom exercise his discretionary power of dismissing a bill, *ex mero motu*, for multifariousness; but, if he does so, and the bill is found liable to the objection, the appellate court cannot reverse the decree. *Felder v. Davis*, 17 Ala. 418.

14. Although a bill is multifarious, and a demurrer is interposed for that cause; yet, if the parties proceed to a hearing, and the chancellor renders a final decree on the merits as to one matter only, not noticing the demurrer, the appellate court will not dismiss the bill for multifariousness, but

will presume that the objectionable portion was abandoned. *Betts v. Betts*, 18 Ala. 787.

MULTIPLICITY OF SUITS.

See JURISDICTION, V.

NON-RESIDENTS.

1. A non-resident, against whom a final decree has been rendered without appearance or personal service, may file a petition for rehearing, within three years from the rendition of the decree, although he has never been within the limits of the State. *Colomb & Iselin v. Branch Bank at Mobile*, 18 Ala. 454.

2. The petition need only set forth the proceedings in the cause, or make such reference to them as will show its condition, and state that the petitioner is a non-resident, and that his application is made within three years from the date of the decree. *Ib.*

3. A decree cannot be sustained against a non-resident, who has neither answered, nor otherwise submitted to the jurisdiction of the court, unless the statutory bond in his favor has been executed. *Rowland v. Day*, 17 Ala. 681; *Beavers v. Davis*, 19 Ala. 82; *Eslava v. Lepretre*, 21 Ala. 504.

4. But if such defendant answers, and submits to the jurisdiction of the court, it is not necessary that the bond should be executed. *Hanson & Moore v. Patterson*, 17 Ala. 738.

5. When a decree *pro confesso* has been entered on personal service, whether the defendant be a resident or non-resident, a final decree may be rendered without proof. *Carradine v. O'Connor*, 21 Ala. 573.

6. A decree of divorce against a non-resident, upon whom service was duly perfected by publication, is equally as obligatory as if rendered on personal service, or as if the defendant had appeared and answered. *Harrison v. Harrison*, 19 Ala. 499.

7. When service has been perfected by publication only, the record must affirmatively show that publication was made in the mode pointed out by the 40th rule of practice. *Beavers v. Davis*, 19 Ala. 82.

8. A mere statement in a decree *pro confesso*, that publication was made "in the terms of the law," is not sufficient. *Hanson & Moore v. Patterson*, 17 Ala. 738.

9. When the record shows that the residence of a non-resident was known, it must also show that a copy of the order of publication was sent to him by mail, within forty days from the time it was made; and the omission of this will reverse the decree on error. *Cullum v. Branch Bank at Mobile*, 23 Ala. 797.

10. The objection, that the order of publication was not accompanied by an abstract of the bill, as required by the 17th rule of practice, cannot be raised for the first time in the appellate court. *Gannard v. Eslava*, 20 Ala. 732.

11. Where non-resident infant defendants are necessary parties to a bill, the record must show that publication as to them was made in the manner prescribed by the 3d and 41st rules of practice. *Coster's Executors v. Bank of Georgia*, 24 Ala. 37.

12. If the father of such infants is dead, and their mother, with whom they live, is a non-resident, they may be made parties by publication, and sending a copy of the order to their mother at her known place of residence; but sending a copy of the order to *Elizabeth* Lewis, "as the mother of said infants," when their mother's name is shown by the record to be *Mary* A. Lewis, is not a compliance with the rule. *Clark v. Gilmer*, 28 Ala. 265.

NOTICE.

See same title in PART IV.

NUISANCE.

1. Chancery has jurisdiction, to enjoin and abate a public nuisance, caused by the obstruction of a public road or highway; and this jurisdiction is not taken away, without an express

provision to that effect, by a statutory grant of power to the corporate authorities of the town, within whose limits such nuisance is erected, to abate nuisances. *Hoole & Paullin v. Attorney-General*, 22 Ala. 190.

2. When a decree has been rendered against the corporate authorities of a city, for the abatement of a public nuisance, on an information at the relation of certain citizens, any citizen may interpose as relator, by a proceeding in the nature of a bill of revivor, and call on the court to carry the decree into execution; and the objection cannot be raised, that the original decree is unjust. *The State, ex rel. Waring v. Mayor &c. of Mobile*, 24 Ala. 701.

PARENT AND CHILD.

1. A father is under no legal obligation, in the absence of statutory regulations, to support his illegitimate child; the statute prescribes the only legal mode of obtaining such support. *Simmons v. Bull*, 21 Ala. 501.

2. If the father removes from the State, for the purpose of avoiding the statutory liability for the support of his illegitimate child, the latter cannot come into equity, to have provision made for its support out of property left by the father. *Ib.*

3. Where an infant has a separate estate, of which the chancery court has appointed a trustee, its father may resort to equity, when, by reason of poverty and bodily infirmity, he is unable to maintain it, to have an allowance for its support and education made out of the annual income of its estate; and to such a bill the infant is not an indispensable party. *Watts v. Steele*, 19 Ala. 656.

4. The father is bound to provide for the maintenance and support of his children, and it is not allowed, as a matter of course, out of their own property; but, where this benefit is given to the father by the instrument creating the trust, he is entitled to the benefit of it. *Pharis v. Leachman*, 20 Ala. 662.

PARTIES.

I. WHO ARE NECESSARY OR PROPER PARTIES.

1. *Assignor and Assignee.*
2. *Creditors.*
3. *Executors and Administrators.*
4. *Husband and Wife.*
5. *Joint Obligors and Promisors.*
6. *Legal Title, Holder of.*
7. *Legatees, Heirs, and Distributees.*
8. *Lessor and Lessee.*
9. *Mortgagor and Mortgagee.*
10. *Partners.*
11. *Principal and Surety.*
12. *Remainder-men.*
13. *State.*
14. *Trustee and Cestui que Trust.*
15. *Vendor and Purchaser.*

II. MISJOINDER, AND NON-JOINDER.

1. *Misjoinder of Plaintiffs.*
2. *Misjoinder of Defendants.*
3. *Non-joinder.*

III. MODE OF BRINGING IN PARTIES.

1. *Absconding Defendant.*
2. *Infants.*
3. *Married Women.*
4. *Non-Residents.*

IV. COMPETENCY AND EXAMINATION OF PARTY AS WITNESS.

I. WHO ARE NECESSARY OR PROPER PARTIES.

1. *Assignor and Assignee.*

1. The transferror and transferree of a promissory note under seal, executed by husband and wife, and transferred for valuable consideration by delivery merely, may join in a bill to enforce its payment out of the wife's separate estate. *Blevins v. Buck*, 26 Ala. 292.

2. When the assignor and assignee of a note join in a bill, the admissions of the assignor, before the commencement of the suit, are sufficient evidence of the assignment. *McLane & Plowman v. Riddle & Burt*, 19 Ala. 180.

(Overruling *Moore v. Hubbard*, 4 Ala. 187.)

2. *Creditors.*

3. Where a debtor executes a mortgage, to secure his sureties on a debt due to a bank, the bank is a necessary party to a bill for redemption, filed by an assignee of the equity of redemption, unless the bill alleges that the debt has been paid. *Woodward v. Wood*, 19 Ala. 213.

4. Where a debtor conveys all his property to a trustee, in trust that he will, 1st, make a reasonable allowance to the grantor for the support and maintenance of his family, and the education of his children; 2dly, pay all the grantor's debts, and the debts incurred in the execution of the trust; and, 3dly, convey the legal title to the residue of the property to the grantor's children,—the creditors are not necessary parties to a bill, filed by the grantor's children, to enforce the trust, when it alleges that the trustee has paid all the debts. *Andrews v. Hobson*, 23 Ala. 219.

5. Where the creditor of a bankrupt seeks to obtain satisfaction of his debt out of certain property, which was bequeathed to a trustee for the use and benefit of the bankrupt's family, and which was not surrendered in his schedule, the other creditors of the bankrupt are not necessary parties to the bill. *Rugely & Harrison v. Robinson*, 19 Ala. 404.

6. Where the distributees of an estate, occupying the position of residuary legatees under the will, file a bill against the executor, after his removal from office, to compel an account and settlement of his administration, they are required to bring before the court all persons interested in the fund which they seek to appropriate, and must bring in the creditors, if any, as in case of a creditor's bill. *Gould v. Hayes*, 19 Ala. 438.

3. *Executors and Administrators.*

7. The administrator of a debtor, whose estate has been reported insolvent, is a proper party defendant to a creditor's bill, which seeks to subject certain real and personal property, standing in the name of a trustee for the debtor's wife and children, and alleged to have been fraudulently added to their estate by the debtor. *Pharis v. Leachman*, 20 Ala. 662.

8. The administrator *de bonis non* is a necessary party to a bill filed by the distributees, who occupy the position of residuary legatees under the will, to compel an account and settlement from the executor after his removal, where the estate is required by the will to be kept together. *Gould v. Hayes*, 19 Ala. 438.

9. One claiming to act as administrator, but under a void appointment, having wrongfully sold certain slaves, which were bequeathed for life with remainder over, may properly be made a defendant to a bill *quia timent* filed by the remainder-men. *Ramey v. Green*, 18 Ala. 771.

10. Where a creditor comes into equity, to obtain satisfaction of a judgment recovered against his debtor's executor in his representative capacity, out of property in the hands of the debtor's legatees; and alleges in his bill the insolvency of the executor and his sureties, from the time of the rendition of the judgment until his death, the personal representative of the executor is not a necessary party to the bill. *Sanders v. Godley*, 23 Ala. 473.

11. Under a bill seeking the distribution of an estate, if one of the distributees dies after the commencement of the suit, it must, as a general rule, be revived against his personal representative. *Frowner v. Johnson*, 20 Ala. 477.

12. Where a pecuniary legacy is bequeathed to children, who die during infancy, leaving no issue, brothers or sisters, and is afterwards received by their father, his title is *prima facie* good, and requires no action of the court to settle it; consequently, the administrator of the children is not a necessary party to a bill filed by their father's personal representative, asking the direction of the court in the construction of the two wills, the distribution of the estates, &c. *Carter and Wife v. Balfour's Adm'r*, 19 Ala. 814.

13. The surviving brothers and sisters of a deceased infant may recover

a legacy bequeathed to them jointly with him, without administration on his estate, when there are no debts against it. *Vanzant v. Morris*, 25 Ala. 285.

4. *Husband and Wife.*

14. Where the husband has conveyed by deed all his right and title in and to certain slaves held adversely to the wife, he cannot join with her in a bill to recover her interest in the slaves, but the wife should sue by her next friend. *Hamilton and Wife v. Clement's Adm'r*, 17 Ala. 201.

15. When a bill is filed in the name of husband and wife, but concerns only the separate estate of the wife, seeks only to establish and protect her rights and interests, and asks no relief for or against the husband, it will be regarded as the bill of the wife alone, and the husband will be considered only her trustee, or next friend. *Michan and Wife v. Wyatt*, 21 Ala. 813; *Gerald and Wife v. McKenzie*, 27 Ala. 166.

16. But, if the bill seeks relief either for or against the husband, the chancellor should order it to stand over and be reconstructed, so as to make the husband a defendant, and interpose a next friend to prosecute for the wife; yet if an objection to the frame of the bill is first raised at the hearing, the chancellor may either allow it, or dismiss the bill without prejudice to the wife. *Michan and Wife v. Wyatt*, 21 Ala. 813.

17. If the bill seeks to enforce a charge on the wife's separate estate created during coverture, it is properly filed against her and her husband; and if it asserts no liability against the husband, and no claim for which either husband or wife can be personally charged, and its frame is such that, if no decree can be rendered against the wife's separate estate, no relief whatever can be granted under it, there is no misjoinder of defendants. *Walker and Wife v. Smith*, 28 Ala. 569.

18. The husband of a distributee of an undivided estate is a necessary party to a bill which seeks to charge the estate with the payment of a debt created by the executor; but, if he dies after the rendition of a final decree, and before a writ of error is sued out, his interest survives to his wife. *Colvin v. Owens*, 22 Ala. 782.

5. *Joint Obligors and Promisors.*

19. If one of several joint makers of a promissory note, given for the purchase-money of land, induces a third person to purchase it, by assurances that he will pay it, he may nevertheless join with the other makers of the note in a bill for the rescission of the contract of sale, although he will not be entitled to any relief against such innocent purchaser. *Lanier v. Hill*, 25 Ala. 554.

20. One who signs a note as comaker with a married woman, though he would be a proper party to a creditor's bill seeking to subject her separate estate to its payment, is not an indispensable party, when it is averred that he is a non-resident, and that he has no property in this State. *Ozley v. Ikelheimer*, 26 Ala. 332.

21. The sureties on an administrator's official bond may be joined with him as defendants to a bill, filed by the distributees of the estate, seeking to set aside a release which he had fraudulently obtained from them, and to recover their distributive share; and none of the defendants, in such case, can complain that no decree, except for costs, is rendered against the sureties. *Gerald v. Miller's Distributees*, 21 Ala. 433.

22. All the obligors must, as a general rule, be made parties to a suit on an administrator's bond; otherwise, unless a sufficient excuse is shown for the omission, a demurrer will lie to the bill. *Watts v. Gayle & Bower*, 20 Ala. 817.

23. An allegation of the insolvency of those who are not joined, is a sufficient excuse for the omission. *Ib.*

6. *Legal Title, Holder of.*

24. Where judgments are impeached in equity for fraud, the plaintiffs therein are necessary parties to the bill. *May v. Barnard*, 20 Ala. 200.

25. The nominal plaintiff in a judgment at law is not an indispensable party to a bill filed by the person for

whose use it was recovered, to obtain satisfaction of it out of property in the hands of the debtor's legatees. *Sanders v. Godley*, 23 Ala. 473.

26. All the mortgagees, in whom is vested the legal title, are necessary parties to a bill to redeem, filed by an assignee of the equity of redemption. *Woodward v. Wood*, 19 Ala. 213.

7. *Legatees, Heirs, and Distributees.*

27. All the legatees are indispensable parties to a bill which seeks to set aside a will. *McMaken v. McMaken*, 18 Ala. 576.

28. Where property is bequeathed to one for life, with remainder to her children, the latter are necessary parties to a bill filed by a creditor of the testator, seeking to subject the property to the payment of his debt. *Sanders v. Godley*, 23 Ala. 473.

29. To a bill filed by an administrator with the will annexed of two decedents, asking the direction of the court in the construction of the wills, the establishment of certain charitable bequests created by one of them, the marshaling of the assets, and contingent contribution from the legatees for the payment of debts,—all persons interested in the two estates, either as legatees or distributees, are proper parties defendant. *Carter and Wife v. Balfour's Adm'r*, 19 Ala. 814.

30. To a creditor's bill, seeking to subject a distributee's interest in an estate yet in the hands of the administrator, all the other distributees are necessary parties. *Chapman v. Hamilton*, 19 Ala. 121.

31. The distributees of an estate are not necessary parties to a bill filed by a creditor against the executor *de son tort* of his deceased debtor, to reach property fraudulently conveyed by the debtor in his lifetime. *Watts v. Gayle & Bower*, 20 Ala. 817.

32. Distributees, who have voluntarily contributed the respective sums with which they were chargeable by reason of over-advances by the administrator on partial distribution, are not necessary parties to a bill filed by the administrator to enforce contribution from another distributee who refuses to reimburse him. *Alexander v. Fisher and Wife*, 18 Ala. 374.

33. A legatee who has received his legacy, and who has no interest in the fund remaining in the executor's hands, is not a necessary party to a bill filed by another legatee for the recovery of his legacy; nor are the infant children of the testator, although interested as legatees in the fund, necessary parties to such a bill, when their rights are represented by the executor as trustee. *Huckabee v. Swoope*, 20 Ala. 491.

34. Where a creditor's bill, seeking to subject property settled upon a married woman, under the provisions of the act of 1846, for the support and maintenance of her and her children, is filed after her death, her children are not necessary parties, since they are represented by the administrator. *Blevins v. Buck*, 26 Ala. 292.

35. In a suit for the foreclosure of a mortgage, if the mortgagor dies before the rendition of the final decree, and his will is admitted to probate by the court having jurisdiction, his heirs-at-law, as well as his personal representatives and devisees, are proper parties to the bill of revivor; and the plaintiff proceeds without them at his peril, since they have the statutory right to impeach the probate of the will, by bill in chancery, at any time within five years. *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

8. *Lessor and Lessee.*

36. To a bill filed by a riparian proprietor, against the lessee of the city water-works of Mobile, to restrain an unlawful diversion of water from plaintiff's mill, the corporate authorities of Mobile are not necessary parties. *Burden v. Stein*, 27 Ala. 104.

9. *Mortgagor and Mortgagee.*

37. All the mortgagees, in whom is vested the legal title, are necessary parties to a bill to redeem, filed by an assignee of the equity of redemption. *Woodward v. Wood*, 19 Ala. 213.

38. If a special authority is vested in one of the mortgagees, for the benefit of all, a decree cannot be rendered, affecting their interest, unless all are made parties to the bill, since all

have an interest in the exercise of that authority. *Ib.*

39. If the mortgagee is only a trustee for another, the *cestui que trust* is a necessary party to a bill for redemption, unless some reason why he may be dispensed with is shown. *Ib.*

40. Where the mortgage was executed by a debtor for the protection of his surety, the creditor is a necessary party to a bill to redeem, filed by an assignee of the equity of redemption, unless the bill alleges that the debt has been paid. *Ib.*

41. A purchaser of the equity of redemption, at a sale made under an order of the orphans' court, is a necessary party to a bill for foreclosure. *Hall v. Huggins*, 19 Ala. 200.

10. *Partners.*

42. Dormant partners are not necessary parties to a bill, filed by the principal partner, to enforce the payment of a firm debt from a debtor who contracted in ignorance of such dormant partners. *Bank of St. Marys' v. St. John, Powers & Co.*, 25 Ala. 566.

11. *Principal and Surety.*

43. The principal in a promissory note cannot join with his surety in a bill to obtain the benefit of an equitable set-off held by the surety against the payee. *Moore v. Moore*, 17 Ala. 631.

As to the necessity or propriety of joining the sureties of an administrator, in a suit against their principal, see *Watts v. Gayle & Bower*, 20 Ala. 817; *Gerald v. Miller's Distributees*, 21 Ala. 433. (*Vide supra*, 21–23.)

12. *Remainder-men.*

44. When several remainder-men are tenants in common of slaves, all of them are necessary parties to a bill which seeks a sale of the property for distribution, unless some reason is shown for dispensing with them. *Ramey v. Green*, 18 Ala. 771.

45. Where a creditor seeks to subject property in the hands of his debtor's legatees, which is bequeathed to one for life, with remainder over, the remainder-men are necessary parties to the bill. *Sanders v. Godley*, 23 Ala. 473.

13. *State.*

46. The constitution (Art. VI, § 9) having provided, that "the general assembly shall direct by law in what manner, and in what courts, suits may be brought against the State;" and the legislature having directed, (Code, § 2318,) that such suits may be brought "in the circuit court,"—the State cannot be sued in chancery. (*Per* STONE, J.) *Ex parte Greene & Graham*, 29 Ala. 52.

14. *Trustee and Cestui que Trust.*

47. Where the trustee of a married woman holds the naked legal title, without any beneficial interest in the property, the *cestui que trust* is the proper party to apply to equity for the reformation of the deed: a bill for that purpose, filed by the trustee alone, is wanting in equity, and should be dismissed. *Stone v. Hale*, 17 Ala. 557.

48. An infant is not a necessary party to a bill, filed by her father against her trustee, to have an allowance made for her support and education out of the annual income of her estate. *Watts v. Steele*, 19 Ala. 656.

49. Where a mortgagee is only a trustee for another, the *cestui que trust* is a necessary party to a bill for redemption, unless some special reason is shown why he may be dispensed with.. *Woodward v. Wood*, 19 Ala. 213.

50. Where the personal representative of an estate, as trustee, has full power to represent and protect the interests of the distributees, they are not necessary parties to the bill. *Huckabee v. Swoope*, 20 Ala. 491; *Blevins v. Buck*, 26 Ala. 292. (*Vide supra*, 33–34.)

15. *Vendor and Purchaser.*

51. A purchaser, holding his vendor's deed with covenants of warranty, and having conveyed in like manner portions of the land to others, may join with such sub-purchasers in a bill against his vendor, for reimbursement of losses sustained from an eviction of an undivided third part of the

land under title paramount. *Gannard v. Eslava*, 20 Ala. 732.

52. To a bill filed by one of two joint purchasers against the other, respecting transactions between them under a contract for the division of the land, their vendor is not a necessary party, when he has divested himself of all interest in the land, by making titles to one of the purchasers, and taking up his title-bond to the two jointly, and the plaintiff does not complain of his action in this respect. *Gunn v. Brantley*, 21 Ala. 633.

53. Where a creditor seeks to subject money in the hands of his debtor's fraudulent grantee, the proceeds of the sale of the lands by such grantee to an innocent purchaser, such subpurchaser is not a necessary party to the bill; but the land itself cannot be subjected, unless he is made a party. *Bryant v. Young & Hall*, 21 Ala. 264.

II. MISJOINDER, AND NON-JOINDER.

1. *Misjoinder of Plaintiffs.*

54. Where two join as plaintiffs in a bill, both must have an interest in the subject-matter of the suit, and both be entitled to relief; otherwise, the bill will be dismissed. *Moore v. Moore*, 17 Ala. 631.

55. If the bill itself shows that some of the plaintiffs are not entitled to relief, it is demurrable. *Tucker v. Holley*, 20 Ala. 426.

56. To authorize the dismissal of a bill, on final hearing, on account of a misjoinder of plaintiffs, the misjoinder must be of parties whose interests are so diverse that they cannot be included in one decree, or, at least, differ so widely as materially to affect the propriety of the decree. *Michan and Wife v. Wyatt*, 21 Ala. 813.

57. Where husband and wife improperly join in a bill concerning the wife's separate estate, asking relief either for or against the husband, the chancellor should order it to stand over until it can be reconstructed, so as to make the husband a defendant, and interpose a next friend to prosecute for the wife; and this, whether the objection be taken by demurrer, plea, answer, or at the hearing; but in the last case, the chancellor may, at his discretion, either allow an amendment, or dismiss the bill without prejudice to the wife. *Ib.*

58. Where several plaintiffs, claiming to be next of kin of a decedent, join in a bill for the settlement of his estate; and one of them claims through his father, who died after said decedent, there is a misjoinder of plaintiffs, which is fatal on general demurrer. *Plunkett v. Kelly*, 22 Ala. 655.

59. Two joint mortgagors may join in a bill for redemption, though the evidence shows that the slaves belonged to one of them only. *Locke's Executor v. Palmer*, 26 Ala. 312.

60. Where an administrator and the surviving sister of his intestate join as plaintiffs, as tenants in common, in a bill for the recovery of slaves bequeathed by the maternal grandfather of the two sisters to their mother and her children, and sold under execution against their father, the surviving sister thereby waives her right of survivorship, if any she had; and the defendant cannot raise the objection, that the will created a joint tenancy, and that there was consequently a misjoinder of plaintiffs. *Hair v. Avery*, 28 Ala. 267.

61. The rule requiring the dismissal of the whole bill, on the failure of any one of the plaintiffs to make out his case, has never been applied with any stringency to creditors' bills; and unless the misjoinder is such as will affect the propriety of the decree, the objection will not be allowed to prevail in any case, when raised for the first time at the hearing. *Colgin v. Redman*, 20 Ala. 650.

62. An objection to a creditors' bill, on account of a misjoinder of plaintiffs, if allowable in any case, should be interposed by demurrer; and the cases are very rare, if they exist at all, in which such a demurrer will be sustained. *Ib.*

2. *Misjoinder of Defendants.*

63. Where slaves are conveyed by deed to a trustee, for the sole and separate use of a married woman and her children; and, after the trustee's removal from the State and abandonment of the trust, come to the possession of the husband, by whom they

are sold to different persons, all having notice of the trust,—the several purchasers cannot be joined with the husband as defendants to a bill filed by the wife and children. *Felder v. Davis*, 17 Ala. 418.

64. But, where one partner fraudulently transfers, by separate assignments made at different times, certain notes payable to the partnership, his copartner may join him and the several transferrees as defendants in one bill. *Halstead v. Shepard*, 23 Ala. 558.

65. Where the husband's administrator is about to bring suit against the widow for certain slaves claimed by her as her separate estate, and several judgment creditors of the husband are about to levy their executions on the slaves, the widow may join them all as defendants to a bill, asking an injunction, and a reformation of the deed under which she claims. *Larkins v. Biddle*, 21 Ala. 252.

66. So, a married woman may maintain a single suit against several execution creditors of her husband, to enjoin the sale of her separate property under their executions, and to reform, if necessary, the deeds under which she claims. *Bridges & Co. v. Phillips*, 25 Ala. 136.

67. A tenant in common, whose cotenant has had possession of only a portion of the land, may join with him as defendant, to a bill seeking a partition and account of rents and profits, a trustee who held possession of the entire tract until the delivery of a portion to such co-tenant. *Horton v. Sledge*, 29 Ala. 478.

68. The misjoinder of defendants is an objection which is only available to the parties improperly brought in. *Ib.*

3. *Non-joinder.*

69. A bill should not be dismissed for the want of the proper parties, when it contains equity, without giving the plaintiff an opportunity to amend; but if it is wanting in equity, because filed by a naked trustee who has no interest, it may be dismissed. *Stone v. Hale*, 17 Ala. 557.

70. Nor should it be dismissed for the want of proper parties, unless the objection is raised in the court below; but if the objection is there taken, and the plaintiff refuses to amend, his bill may be dismissed without prejudice. *Andrews v. Hobson's Adm'r*, 23 Ala. 219.

71. If the bill is objectionable on its face for the want of proper parties, a demurrer lies to it. *Chapman v. Hamilton*, 19 Ala. 121; *Gould v. Hayes*, 19 Ala. 438; *Watts v. Gayle & Bower*, 20 Ala. 817.

72. A demurrer to a bill, for the want of proper parties, must show who the absent parties are, in such manner as to point out the defect in the bill, and enable the plaintiff to amend it. *Chapman v. Hamilton*, 19 Ala. 121.

73. But the want of an indispensable party is available on general demurrer. *Gould v. Hayes*, 19 Ala. 438.

74. Or the objection may be first raised at the hearing. *Woodward v. Wood*, 19 Ala. 213.

75. It is also an error for which the appellate court will reverse the decree, although the objection was not raised in the primary court. *McMaken v. McMaken*, 18 Ala. 576.

76. But the general rule is, that an objection for the want of parties must be taken by plea or demurrer, or be insisted on in the answer; and it is only the absence of an indispensable party that is available at the hearing, or on error. *McMaken v. McMaken*, 18 Ala. 576; *Woodward v. Wood*, 19 Ala. 213; *Sanders v. Godley*, 23 Ala. 473; *Ozley v. Ikelheimer*, 26 Ala. 332.

77. Where the bill is demurrable, for the want of proper parties; and the defendant answers, instead of demurring, and shows by his answer that there is no other indispensable party, the chancellor may proceed to a final decree, without regard to such formal defect in the bill. *Chapman v. Hamilton*, 19 Ala. 121.

III. MODE OF BRINGING IN PARTIES.

1. *Absconding Defendants.*

78. Where the acknowledged residence of a party is in this State, and the principal part of his property is here, his pretended-removal to another State, with the fraudulent intent of evading the jurisdiction of the chan-

cery court, does not oust that court of jurisdiction of a bill filed against him by a non-resident plaintiff: he may, in such case, be made a party by publication, in the mode prescribed by the statute.—Clay's Digest, 352, § 44. *Glover v. Glover*, 18 Ala. 367.

2. *Infants.*

79. The chancery court is the general guardian of all infants within its jurisdiction, and has authority, by virtue of its general powers, to protect their rights, when before it as defendants, by the appointment of a guardian *ad litem;* and though the improper exercise of this power may be reviewed on error, the act itself is not void, and the decree cannot be collaterally impeached for want of jurisdiction, because the appointment was made without service of process. *Preston v. Dunn*, 25 Ala. 507.

80. The service of subpœna on the surviving parent of infant defendants, for them, is sufficient, whether they are over or under fourteen years of age. *Sanders v. Godley*, 23 Ala. 473.

81. Where non-resident infant defendants are necessary parties to a bill, the record must show that publication as to them was made in the manner prescribed by the 3d and 41st rules of chancery practice. *Coster's Executors v. Bank of Georgia*, 24 Ala. 37.

82. If the father of such infants is dead, and their mother, with whom they live, is a non-resident, they may be made parties by publication, and sending a copy of the order to their mother, at her known place of residence; but sending a copy of the order to *Elizabeth* Lewis, "as the mother of said infants," when their mother's name is shown by the record to be *Mary* E. Lewis, is not a compliance with the rule. *Clark v. Gilmer*, 28 Ala. 265.

83. Where non-resident infants are not properly brought in as defendants, the appellate court will reverse the decree, and remand the cause, although the error escaped the notice of the solicitors and chancellor in the court below, and was not specially assigned as error. *Ib.*

3. *Married Women.*

84. Where a subpœna is issued against husband and wife, and is returned by the proper officer "executed" generally, the service on the wife is sufficient. *Walker and Wife v. Smith*, 28 Ala. 569.

85. If the wife is a resident of this State, publication against her as a non-resident, and her appearance by solicitor, do not give the court jurisdiction of her person, when there is no service of subpœna on the husband—no plea, answer, or demurrer, filed by her and her husband, or by either of them; and no order that she might answer or defend separately, or that she might appear by solicitor or in any other manner. *Boykin v. Rain*, 28 Ala. 332.

86. If the bill seeks to foreclose two mortgages on land, one executed by husband and wife jointly, and the other by the husband and the wife's guardians under a void appointment by the orphans' court; and the guardians are properly brought in as parties, but the wife is not,—it is error to proceed to a final decree until the wife is properly brought in; nor can the neglect, in failing to proceed regularly against her, be excused by setting up her want of interest in the mortgaged property; nor is the error cured by the subsequent appointment of a guardian *ad litem* for her as a lunatic. (CHILTON, J., *dissenting*, on the ground that the wife was not a necessary party to the bill.) *Eslava v. Lepretre*, 21 Ala. 504.

4. *Non-Residents.*

87. When service has been perfected on a non-resident by publication only, the record must affirmatively show that publication was made in the manner pointed out by the 40th rule of chancery practice. *Beavers v. Davis*, 19 Ala. 82.

88. A mere statement in a decree *pro confesso*, that publication was made "in the terms of the law," is not sufficient. *Hanson & Moore v. Patterson*, 17 Ala. 738.

89. When the record shows that the residence of a non-resident defendant was known, it must also show

that a copy of the order of publication was sent to him by mail, within forty days from the time it was made; and the omission of this will reverse the decree on error. *Cullum v. Branch Bank at Mobile*, 23 Ala. 797.

90. That the publication was not accompanied by an abstract of the bill, as required by the 17th rule of chancery practice, is an objection which cannot be first raised in the appellate court. *Gannard v. Eslava*, 20 Ala. 732.

As to the mode of bringing in non-resident infants, *vide supra*, 81–83.

IV. COMPETENCY AND EXAMINATION OF PARTY AS WITNESS.

91. Where an agent purchases land for himself and his principal jointly, and afterwards relinquishes all his interest to his principal; and the vendor afterwards files a bill against both, to enforce his lien for the purchase-money, and a decree *pro confesso* is entered against the agent,—he is a competent witness for the plaintiff, to prove the price agreed on. *Crawford v. Barkley*, 18 Ala. 270.

92. Where slaves are divided, by agreement among the several legatees, one of whom is a minor, before the time appointed by the will for the division; and the minor afterwards files a bill to set aside the division, a legatee who disclaims all interest in the slaves, having sold his interest to a co-legatee before the division was made, is a competent witness for the plaintiff, to prove his minority at the time the division was made. *Johnson v. Culbreath*, 19 Ala. 348.

93. A party is not necessarily incompetent as a witness: if he has no interest in that part of the litigation about which he is called to testify, or if, being interested, he is examined as to matters which militate against that interest, he is perfectly competent. *Colgin v. Redman*, 20 Ala. 650.

94. The maker of a deed of trust for the benefit of creditors, although a defendant to a bill filed by the secured creditors for the settlement of the deed, is a competent witness for one of the plaintiffs, to prove the *bona fides* of his debt, and his assent to the deed; it being shown that, after the execution of the deed, he obtained his discharge in bankruptcy. *Ib.*

95. An order for the examination of a defendant, as a witness for the plaintiff, is made as a matter of course, reserving the question of his competency to be made at the hearing; and there is no rule requiring an affidavit of his want of interest to be previously made. *Ib.*

96. Where the plaintiff has several times examined a defendant as a witness, (viz., once in chief, and twice on cross interrogatories,) without raising any objection to his competency on the ground of interest, he cannot spring that objection for the first time at the hearing. *DeVendal v. Malone's Executors*, 25 Ala. 272.

97. A defendant who is directly liable for costs in the cause, is not a competent witness to prove any fact which would relieve him from those costs. *Ware v. Jordan*, 21 Ala. 837.

98. A defendant who, as the husband of one of the heirs of an insolvent decedent, is a formal party to a bill, is a competent witness for his co-defendant, especially when he testifies against his own interest. *Burns v. Taylor*, 23 Ala. 255.

99. The correctness of the rule laid down in *Holman's Heirs v. Bank of Norfolk*, 12 Ala. 405, (viz., that if a defendant, who appears from the face of the proceedings to have no interest, makes a long and formal answer; setting up as a defense to the bill matters which do not properly concern him, and thereby subjecting himself to a liability for costs,—he is rendered incompetent to testify for his co-defendant,) questioned. *Ib.*

100. Where a bill is filed against two trustees, for an account and settlement of the trust, which both accepted, one is an incompetent witness for the other, to prove the insolvency of the debtors, although he permitted him to take the entire management and control of the trust and property. *Royall's Adm'r v. McKenzie*, 25 Ala. 363.

101. Where a purchaser files a bill for specific performance, and to enjoin an action at law by the vendor to recover possession of the land, the tenant in possession, who is a party to the suit, is not a competent witness for the plaintiff. *Bradford v. Harper* 25 Ala. 337.

PARTITION.

1. A bill lies for partition of personal property between tenants in common. *Marshall v. Crow's Adm'r*, 29 Ala. 278.

2. In such case, a mere denial in the answer, of the plaintiff's title, is no ground for dismissing the bill, or for directing an issue at law. *Smith v. Dunn*, 27 Ala. 315.

3. In a suit for partition of land, where the plaintiff's title presents a pure question of law, as to the construction of an uncontroverted deed, the denial of his title in the answer is not a sufficient reason for requiring the title to be established at law; but, where the answer denies a material fact, on which the plaintiff's title depends, the defendant is entitled to a jury trial. *Horton v. Sledge*, 29 Ala. 478.

4. When a trial at law is necessary before a decree for partition can be rendered, the proper practice is, not to dismiss the bill, but to stay proceedings until a trial at law can be had; and, in ordering a trial at law, the defendant may be required to admit an actual ouster. *Ib.*

5. A bill for partition and account of rents and profits, which unites as a defendant with the tenant in common, who has had possession of only a portion of the land, a trustee who held possession of the entire tract until the delivery of a portion to his co-defendant, is not multifarious, since the accounts against the two are so connected that one cannot be taken without the other. *Ib.*

6. The trustee, in such case, can only have compensation for valuable and permanent improvements made by him on the land, under a *bona-fide* claim of title, before he was apprised that his title was disputed; nor can the compensation, in any event, exceed the rents and profits charged against him. *Ib.*

PARTNERSHIP.

I. RIGHTS AND REMEDIES OF PARTNERS IN EQUITY.

II. LIABILITIES OF PARTNERS IN EQUITY.

III. DISSOLUTION, AND SETTLEMENT OF ACCOUNTS.

For other decisions on the law of partnership, see same title in Part IV.

I. RIGHTS AND REMEDIES OF PARTNERS IN EQUITY.

1. When, one partner purchases his copartner's entire interest in the firm, and undertakes to pay all the partnership debts; but afterwards absconds, leaving his individual debts and those of the partnership unpaid, a court of equity will reinvest the retiring partner with his original rights, and give him a lien on the partnership assets for the payment of the partnership debts. *McGown v. Sprague*, 23 Ala. 524.

2. If a partner transfers, in payment of his individual debts, a note payable to the partnership, the purchaser acquires only his assignor's interest, and holds the note subject, in equity, to the claim of the other partners; and if he purchases such note after maturity, and while it is in the hands of an attorney for collection, relying upon his assignor's representations as to the state of the partnership accounts and his right to dispose of the note, he is affected with notice of the other partners' interest on settlement of the partnership accounts. *Halstead v. Shepard*, 23 Ala. 558.

3. When a partnership, though not formally dissolved, has closed its business, and reduced all its assets to the shape of two notes payable to the firm, which are then fraudulently transferred by one of the partners, the purchasers take them subject to the equity of the other partner, who may maintain a single suit against them and their assignor, although the assignments were made separately and at different times. *Ib.*

4. The interest of a surviving partner, in his deceased partner's share of real estate held in the name of the firm, is equitable merely, and equity will not enforce the title acquired by a purchaser under judgment and execution against him. *Lang's Heirs v. Waring*, 17 Ala. 145.

5. A mortgage, or deed of trust, executed by the surviving partner on the

real estate of the firm, to secure the payment of an individual liability, creates a lien only to the extent of his interest. *Ib.*

6. Real estate belonging to a firm, purchased with partnership funds, and treated as partnership property, is considered in a court of equity as personal property; at least to this extent, that it is liable to pay the debts of the firm, and the surviving partner has a lien upon it for that purpose, which is superior to the title of the widow and heirs of the deceased partner. *Andrews' Heirs v. Brown's Adm'r*, 21 Ala. 437.

7. As the surviving partner is charged with the payment of the firm debts, he has an equitable right to dispose of its real estate for that purpose; and, though his deed will not convey the legal title to the purchaser, it will convey this equity, through which the purchaser may compel the heir to convey the legal title. *Ib.* (But see this case limited and explained in *Lang's Heirs v. Waring*, 25 Ala. 625, *infra*, 11.)

8. Where land is purchased by a partnership, at a sale under a decree of foreclosure in chancery, and the surviving partner afterwards comes into equity, to obtain the control of the real estate for the purpose of paying the debts of the firm,—if the land is redeemed pending the suit, the redemption money stands in the place of the land itself; and the surviving partner is entitled to it for the purpose of paying the debts. *Ib.*

9. Although equity considers and treats the real estate of a partnership, when purchased with partnership funds, and held for partnership purposes, as constituting part of the partnership stock; yet it leaves the legal title undisturbed, except so far as may be necessary to protect the equitable rights of the respective partners. *Lang's Heirs v. Waring*, 25 Ala. 625.

10. If the heirs of a deceased partner are sued in equity, by a derivative purchaser from the surviving partner, for a divestiture of title, they have the right to show that the alleged equity is founded in a wrongful conversion of the partnership effects, which a court of equity should not sanction; and the insolvency of the firm is no answer to their right to defend. *Ib.*

11. If the surviving partner disposes of the real estate of the firm, for a grossly inadequate consideration, and under such circumstances as were well calculated to cause it to sell for an almost nominal sum, equity will not lend its aid to perfect such a sale, especially when its action is invoked by one whose conduct contributed, in all probability, to bring about the sacrifice; nor was the case of *Andrews' Heirs v. Brown's Adm'r*, 21 Ala. 437, intended to establish the contrary doctrine. *Ib.*

12. The surviving partner having executed a mortgage, in his own name only, on real estate belonging to the firm, to secure the payment of notes which he, as surviving partner, had executed in the name of the firm, but which created no obligation as against the firm, the land was subsequently sold under judgments, older than the mortgage, which had been rendered against him as surviving partner, and purchased by one of the plaintiffs, who thereupon entered on the land, and was in possession at the time of the sale under the mortgage; at which sale, the land, though worth $8,000, brought only $250. The first purchaser, having bought the interest of the second, and compromised with the administrator of the deceased partner, filed a bill in equity against the heirs, to obtain a divestiture of their legal title. *Held*, that he was not entitled to relief. *Ib.*

13. By written contract between plaintiffs and one P., for the entry and purchase in partnership of lands to be used for mining purposes, it was stipulated that plaintiffs should advance the money, which was "to be refunded, with interest, out of the first funds realized by the company;" and that P. should enter the lands which he deemed most suitable, and superintend the working of the mines. P. entered several tracts of land in his own name, with money advanced by plaintiffs, and afterwards transferred them to plaintiffs, to whom patents were subsequently issued. Some of these lands were sold under execution against P. before the issue of plaintiffs' patents, and were purchased at the sale by the judgment creditor, against whom plaintiffs filed their bill, praying a sale

of the land, the reimbursement of the moneys expended by them in payment of the purchase-money, taxes, &c., and the distribution of the residue of the proceeds of sale according to the terms of the contract. *Held*, that plaintiffs were entitled to relief against the purchaser at execution sale, who only succeeded to the rights of P.; that the registration of his deed by the purchaser, coupled with the plaintiffs' failure to have the written evidence of their claim recorded, did not add any potency to the purchaser's title; and that the written contract of partnership, and the receipts subsequently executed by P. to the plaintiffs for moneys advanced by them, were admissible evidence for the plaintiffs. *Pool v. Cummings & Co.*, 20 Ala. 563.

14. When money is advanced by one partner out of his individual funds, to be invested, with other moneys belonging to the partnership, in the purchase of real estate for the benefit of all the partners; and the purchase is made by another partner, who takes the legal title in his own name,—a trust is created in favor of the partners individually, which equity will enforce. *Owens v. Collins & Langworthy*, 23 Ala. 837.

15. But the partner thus advancing his money would have the right, at any time before the appropriation was actually made, to change his intention, and direct a different application of the money; and the subsequent application of his funds, in the manner which he had first authorized, would create a trust, if at all, in his favor alone. *Ib.*

16. When lands are purchased with partnership funds, and for partnership purposes, equity regards them as partnership property, and it is immaterial in whose name the purchase is made; but when the bill alleges that the purchase was made with partnership funds and for partnership purposes, while the proof shows that the purchase was made with the individual funds of one partner, though for partnership purposes, the variance is fatal. *Ib.*

17. If the damaged goods of the firm are sold at auction on account of the insurers, and purchased by one of the partners, the benefits of the purchase enure to the firm, and not to himself individually. *Zimmerman v. Huber*, 29 Ala. 379.

18. Dormant partners are not necessary parties to a bill, filed by the principal partner, to enforce the payment of a firm debt from a debtor who contracted in ignorance of such dormant partners. *Bank of St. Mary's v. St. John, Powers & Co.*, 25 Ala. 566.

II. LIABILITIES OF PARTNERS IN EQUITY.

19. In equity, the entire assets of a partnership are subject to the payment of its debts. *Coster's Executors v. Bank of Georgia*, 24 Ala. 37.

20. Where money is loaned to a partnership, on the faith of the partnership property, equity will consider the creditor, as between himself and the several partners, as a mortgagee with a lien upon the property until his debt is paid. *Ib.*

21. The lien acquired by a partnership creditor, by a judgment against one of the partners individually, in whom is vested the legal title to real estate belonging to the firm, is subject to the equities already existing over the property; and a judgment against the partnership itself, in such case, would not operate as an effective lien on the land. *Ib.*

22. Where lands are bought by a partnership from one of its members, who guaranties that they can be resold, within five years, for at least the amount of the purchase-money, and pledges his entire interest in the company to indemnify it against any loss which it might sustain in the purchase, an assignee of the notes given for the purchase-money cannot assert a vendor's lien, as against a partner who had guarantied their payment, and had paid a part of them, while the lands remain unsold after the expiration of five years. *Ib.*

23. Nor can he assert a vendor's lien, as against a remote assignee of the vendor's interest in the company, who purchased *bona fide*, for valuable consideration, and without notice of any such outstanding claim or equity. *Ib.*

24. The vendor himself, being a member of the company, cannot assert

a vendor's lien, as against subsequent creditors, mortgagees, or purchasers, without proving that they advanced their money with notice of his lien. *Ib.*

25. A court of equity had original jurisdiction, to enforce the payment of a partnership debt out of the estate of a deceased partner; and that jurisdiction is not taken away by section 2142 of the Code, which provides a plain and adequate remedy at law in such case. *Waldron, Isley & Co. v. Simmons*, 28 Ala. 629.

26. In the administration of partnership assets, partnership creditors are entitled to priority over individual creditors; and in the administration of the separate estate of a deceased partner, his separate creditors are entitled to priority over the partnership creditors, so long as there is a joint fund to which the latter may resort. *Emanuel v. Bird*, 19 Ala. 596. Also, *Smith & Co. v. Mallory's Executor*, 24 Ala. 628; *Bridge & Co. v. McCullough's Adm'rs*, 27 Ala. 661; *VanWagner & Yeoman v. Chapman's Adm'r*, 29 Ala. 172.

27. But, when there is no joint fund to which the partnership creditors may resort, and the surviving partner is insolvent, the joint and separate creditors are entitled to share *pari passu* in the estate of the deceased partner. *Emanuel v. Bird*, 19 Ala. 596.

III. Dissolution, and Settlement of Accounts.

28. A court of equity may decree the dissolution of a partnership, during the term for which it was entered into, and declare it void *ab initio*, where there is fraud, imposition, misrepresentation, or oppression, in the original agreement; and may also decree a dissolution for causes arising subsequently to its formation, founded upon the misconduct, fraud, or violation of duty by one partner, or on account of his inability or incapacity to perform his obligations and to contribute his skill, labor and diligence in the promotion and accomplishment of the objects of the partnership, or for the existence of an impracticability in the undertaking for which the partnership was formed. *Fogg & Vanderslice v. Johnston*, 27 Ala. 432.

29. Where it is shown that the partner asking a dissolution, was deceived and misled by his copartner's misrepresentations, as to his skill and capacity as an engineer and machinist, and but for these misrepresentations would not have entered into the partnership; and that the defendant, since the formation of the partnership, has been guilty of misconduct and violation of duty,—a dissolution may be decreed, if the plaintiff's equities so require, to date from the time of his abandonment of the contract, and notice thereof to the defendant. *Ib.*

30. If partners agree to invest equal sums in their common business, and one advances a larger amount than the other, he is entitled, on settlement, to interest on one half of the excess, from the time of its appropriation to the use of the firm. *Reynolds v. Mardis' Heirs*, 17 Ala. 32.

31. The law will not, in the absence of an express stipulation between the parties, compel one partner to pay interest to his copartners on the amount by which their capital exceeds his; but partners may enter into such stipulations as they may see fit, respecting the division of the profits, and the advantages which each is to derive therefrom, unless their pretended contract is a mere device or cover for usury; and such contract, being legal, would form the rule for the ascertainment and adjustment of their respective rights in the settlement of their affairs. *Desha & Sheppard v. Smith*, 20 Ala. 747.

32. To induce a court of equity to open a partnership account, which was settled on full deliberation, clear and convincing proof of error must be shown; and further, that this error was unknown, at the time of the settlement, to the party complaining. *Ib.*

33. The books of the firm, to which all the partners have had free access, are evidence for and against each partner, in settling the partnership accounts; and the entries therein must be considered at least *prima facie* correct. *Ib.*

34. Where the business of a trading partnership is continued for a considerable length of time after the death of one of the partners, whose personal

representative, in seeking a settlement of the partnership accounts in equity, elects to have a report and decree of the profits which accrued during that time, the surviving partner is entitled, at least, to a credit for "tavern bills and other expenses incurred in the adjustment and settling up" of the partnership affairs. *O'Reilly's Adm'r v. Brady*, 28 Ala. 530.

35. In stating the accounts of a mercantile partnership, the master should first ascertain whether the business resulted in profit or loss, and to what extent; and should also dispose of the uncollected debts. *Zimmerman v. Huber*, 29 Ala. 379.

36. Each partner is bound to bestow his attention and services in the promotion of the general interest of the firm, and neither is entitled, in the absence of a special agreement, to compensation for such services; nor can either partner claim compensation for the services of apprentices, though their board, clothing, and other necessary expenses, are proper charges against the firm; but a partner may claim compensation for valuable services rendered by his child. *Ib.*

PLEADING.

See ANSWER.
BILL.
DEMURRER.
MULTIFARIOUSNESS.
PARTIES.

POWERS.

1. A power entrusted to several, when it concerns business of a public or judicial nature, may be exercised by a majority. *Chambers v. Perry*, 17 Ala. 726.

2. A power to two or more, coupled with a trust, may be executed by the survivor. *Parsons v. Boyd*, 20 Ala. 112.

3. One having a life estate in slaves, with power to divide them among his children as he may see fit, may, when the deed creating the power points out no mode for its execution, execute the power by deed in his lifetime, with a stipulation that the donee shall suffer him to retain the possession during his life. *Strong's Executors v. Brewer*, 17 Ala. 706.

4. A bequest to the separate use of a married daughter, by a widow having a life estate with a power of appointment in favor of her children, is a good execution of the power. *Friend v. Oliver*, 27 Ala. 532.

5. Where a tenant for life, with power of disposition at her death, asserting that she intended the property for her only daughter, consulted a lawyer, to ascertain whether it was necessary that she should make a will, and was advised by him that the property vested in her absolutely in fee-simple; and relying on this advice, she made no disposition of the property, as it was alleged she would otherwise have done,—*held*, that these facts did not amount either to an execution of the power of appointment, or to such an attempt to execute it as chancery would aid. *Mitchell and Wife v. Denson*, 29 Ala. 327.

6. Chancery will not, on the ground of mistake, aid or supply the defective execution of a statutory power; as where the deed of husband and wife, and a relinquishment of dower by the wife, are written on the same sheet of paper, and the officer's certificate of the wife's examination and acknowledgment is, by mistake, written under the relinquishment, and thereby made to apply to it instead of the deed,—a court of equity will not, on the ground of mistake, apply the certificate to the deed. *McBryde's Heirs v. Wilkinson*, 29 Ala. 662.

PRACTICE.

I. APPEARANCE.

1. If the court has jurisdiction of

the subject-matter of the suit, the appearance of the defendant, without objection, gives it jurisdiction of his person. *Harrison & Saunders v. Harrisson*, 20 Ala. 629; *Byrd v. McDaniel*, 26 Ala. 582.

2. Where husband and wife are defendants to a bill, and the wife is a resident of this State, her appearance by solicitor does not give the court jurisdiction of her person, when there has been no service of subpœna on the husband,—no plea, answer, or demurrer, filed by her and her husband, or by either of them, and no order that she might answer or defend separately, or that she might appear by solicitor or in any other manner. *Boykin v. Rain*, 28 Ala. 332.

II. DISMISSAL.

3. A sole plaintiff may, after answer filed, but before any order or decree taken, dismiss his bill at his own cost, without prejudice. *Howard v. Bugbee*, 25 Ala. 548. (But see the 28th rule of chancery practice, which took effect on the 1st November, 1854.)

4. After the dismissal of a bill for want of prosecution, the chancellor has no jurisdiction to reinstate it at a subsequent term; but if the cause is thus reinstated, and the defendant craves an appeal from the order, but afterwards engages in the defense, he cannot take advantage of the irregularity on error. *Byrd v. McDaniel*, 26 Ala. 582.

5. On reversing a decree in favor of the plaintiff, and dismissing his bill, the appellate court will dismiss without prejudice, where the justice and equity of the case may seem to require it. *Lang's Heirs v. Waring*, 17 Ala. 145. (The bill was dismissed without prejudice, in the following cases: *McCullough and Wife v. Walker and Wife*, 20 Ala. 389; *Larkins v. Biddle*, 21 Ala. 252; *Love v. Graham*, 25 Ala. 187; *Crabb's Adm'r v. Thomas*, 25 Ala. 212; *Stiles & Co. v. Lightfoot*, 26 Ala. 444.)

6. But, where the plaintiff has had ample opportunity to hunt up his testimony, and to prepare his case on the merits, the dismissal will be without reservation. *Rumbly v. Stainton and Wife*, 24 Ala. 712.

7. Where husband and wife are improperly joined as plaintiffs, and objection is raised at the hearing on account of the misjoinder, the chancellor may either allow an amendment, or dismiss the bill without prejudice to the wife. *Michan and Wife v. Wyatt*, 21 Ala. 813.

8. If an objection is raised in the court below for the want of proper parties, and the plaintiff refuses to amend, his bill may be dismissed without prejudice. *Andrews v. Hobson's Adm'r*, 23 Ala. 219.

9. When a bill is dismissed without prejudice, the reservation prevents the decree from constituting a bar to another bill founded on the same title, but does not compromit the court as a judicial determination in favor of that title. *Lang's Heirs v. Waring*, 25 Ala. 625.

10. The dismissal of a bill, which seeks to impeach a decree on the ground of fraud, does not prejudice the right to file another for the purpose of surcharging and falsifying the account; but, if the practice were otherwise, the plaintiff's laches, in failing to amend his bill, would be a good ground for refusing to modify the decree on error, so as to dismiss the bill without prejudice. *Cowan and Wife v. Jones*, 27 Ala. 317.

11. A bill will not be dismissed on error, on account of a defect which, if it had been raised before the chancellor, might have been remedied by an amendment. *Johnson v. Culbreath*, 19 Ala. 348; *Walker and Wife v. Smith*, 28 Ala. 569.

III. HEARING.

12. Although the answer is to be taken as true in every respect, when the cause is submitted by consent on bill and answer only; yet, where the answer admits enough to sustain a decree for the plaintiff, the bill should not be dismissed. *Lampley v. Weed & Co.*, 27 Ala. 621.

IV. ISSUE AT LAW.

13. Where an inquiry as to compensation or damages does not involve much complexity of facts or amounts, an issue at law is not necessary, but the usual practice is to refer the mat-

ter to the master. *Springle's Heirs v. Shields & Paulding*, 17 Ala. 295.

14. In a suit for the partition of a slave, if the defendant denies the plaintiff's title, and sets up an adverse possession and title in himself in severalty, this is no reason for directing an issue at law. *Smith v. Dunn*, 27 Ala. 315.

15. In a suit for the partition of land, where the plaintiff's title presents a pure question of law, as to the construction of an uncontroverted deed, the denial of his title in the answer is not a sufficient reason for directing an issue at law; but, where the answer denies a material fact, on which the plaintiff's title depends, the defendant is entitled to a jury trial. *Horton v. Sledge*, 29 Ala. 478.

16. When a trial at law is necessary before a decree for partition is rendered, the proper practice is, not to dismiss the bill, but to stay proceedings until a trial at law can be had; and in ordering the trial at law, the defendant may be required to admit an actual ouster. *Ib.*

17. An order, directing an issue at law, is interlocutory merely, and may be set aside at a subsequent term. *Dabbs v. Dabbs*, 27 Ala. 646.

18. Although the inheritance is concerned, a new trial of the issue may be refused to the heir, notwithstanding the erroneous rulings of the court trying the issue, when it is apparent, on all the evidence in the case, that a new trial should have been awarded if the verdict had been in his favor. *Ib.*

19. Where issues at law are directed, to try the validity of a will and of a deed of gift, which are so connected by words of reference that the deed cannot be held invalid if the will is valid; and the verdict of the jury establishes the validity of the will,—the trial of the other issue is immaterial, and its regularity will not be looked to on error. *Ib.*

20. Where the verdict is in favor of the will, and the court erroneously renders judgment for the costs against the heir, besides certifying the costs to the chancellor, by whom also they are decreed against the heir, the error is without injury. *Ib.*

V. REHEARING.

21. A non-resident, against whom a decree has been rendered without appearance or personal service, may file a petition for the rehearing of the cause, within three years from the rendition of the decree, although he has never been within the limits of the State. *Colomb & Iselin v. Branch Bank at Mobile*, 18 Ala. 454.

22. The petition, in such case, need only set forth the proceedings in the cause, or make such reference thereto as will show its condition; and allege the non-residence of the petitioner, and that his application is made within three years from the date of the decree. *Ib.*

23. A decree, predicated on the defendant's default, will not be opened on petition for rehearing, because the defendant's failure to appear and answer, as required by the subpœna, was under the supposition that the cause did not stand for hearing at the first term. *Read v. Walker*, 18 Ala. 323.

24. Nor will a decree, which has been fully executed, be opened on the petition of one who, by his own showing, had no interest whatever in the subject-matter of the controversy, until long after its termination. *Boykin v. Kernochan*, 24 Ala. 697.

25. If it is desired that the chancellor should review his directions to the master, the party who supposes himself aggrieved by the master's obedience to those instructions, may take exceptions, and thus bring the point again to the attention of the chancellor; and if it should be made to appear, on the argument of these exceptions, that the justice of the case cannot be reached without an alteration of the decree, the chancellor should direct the report to stand over, and order a rehearing of that portion of the decree containing the erroneous instructions. *Lang v. Brown*, 21 Ala. 179.

VI. TRANSFER OF CAUSES.

26. When the order, transferring a cause from the orphans' to the chancery court, assigns no reasons for the transfer, but the record discloses a sufficient reason; and the parties after-

wards appear, and proceed with the cause without objection,—a mistake in the decree, setting forth the reason of the transfer, does not affect the jurisdiction of the court, and is not available on error. *McBroom's Adm'rs v. McBroom's Creditors*, 19 Ala. 173.

PRAYER.

See BILLS, I, 2, 33–38.

PROHIBITION.

1. The supreme court has a discretionary power to grant writs of prohibition to all inferior courts; but the writ should never be granted, except where the inferior court has clearly exceeded its jurisdiction in the order complained of, and there is no other remedy to which the relator can resort. *Ex parte Smith*, 23 Ala. 94.

2. The writ will be granted, to revoke and prevent proceedings under an order of the chancellor, directing "that a receiver be appointed," and "that it be referred to the registrar to appoint a fit and proper person." (CHILTON, C. J., and GIBBONS, J., *dissenting*, held that the relator should have first applied to the chancellor, by petition, for a correction or modification of the order.) *Ib.*

3. The writ will not be granted, to compel the dissolution of an injunction on the filing of an answer. *Ex parte City Council of Montgomery*, 24 Ala. 98.

4. On application for a prohibition, the bill will not be examined and construed with the same degree of strictness as to technical accuracy, as on demurrer: if it shows that the court had jurisdiction of the parties, and of the subject-matter, (as where it is filed against a trustee, by persons who show an interest in the trust fund, to prevent its waste and misapplication,) although it may be defective in some matter which might be supplied by amendment, the writ will not be awarded. *Ex parte Walker*, 25 Ala. 81.

5. Although the bill may be fatally defective in necessary averments, may abound in imperfections, and may be filed in a district in which the defendants are not liable to be sued; yet these are matters of defense, and cannot be reached by prohibition. *Ex parte Greene and Graham*, 29 Ala. 52.

6. The writ will not be awarded to the chancellor, to restrain proceedings in an injunction suit, when it does not appear that he has done any act, or made any order in the premises, showing that he does or will entertain the cause; the injunction having been granted by another judicial officer. *Ib.*

QUIA TIMET.

1. A bill *quia timet* may be maintained by remainder-men, to protect their ultimate interest in slaves which have been conveyed absolutely by the tenant for life to persons who claim the entire interest. *Lyde v. Taylor*, 17 Ala. 270.

2. It also lies in favor of such remainder-men, where the slaves have been wrongfully sold by one claiming to act as administrator, and are adversely held by the purchaser; and to such a bill the vendor may be made a defendant. *Ramey v. Green*, 18 Ala. 771.

3. But a remainder-man cannot complain of a trespass upon the tenant for life, unless such trespass in some way endangers his remainder. *Land and Wife v. Cowan*, 19 Ala. 297.

4. An allegation in the bill, that one of the defendants seized upon the slaves, and took them from and out of the possession of the tenant for life; and that he has ever since exercised, and still claims to exercise full control over them, and has placed them in the possession of another defendant, who still retains them,—does not warrant the presumption that he took them as a trespasser, or that he holds them otherwise than in subordination to the true title. *Ib.*

RECEIVER.

1. A receiver can only be appointed

by the chancellor, who cannot delegate that power to the registrar and master. *Ex parte Smith*, 23 Ala. 94.

2. An order of the chancellor, directing "that a receiver be appointed," and "that it be referred to the registrar to appoint a fit and proper person," is a nullity; and the writ of prohibition will be awarded by the supreme court, to revoke and prevent proceedings under it. (CHILTON, C. J., and GIBBONS, J., *dissenting*.) *Ib.*

3. The appointment of a receiver is a matter of discretion with the chancellor; and where the creditors of an estate file a bill against a person who, by representing himself to be the executor, has obtained possession of funds belonging to it, and who is alleged to be insolvent, a receiver is properly appointed. *Ex parte Walker*, 25 Ala. 81.

REDEMPTION OF REAL ESTATE.

I. OF THE RIGHT OF REDEMPTION.
II. OF THE PLEADINGS, PRACTICE, AND DECREE.

As to a mortgagor's right of redemption, see MORTGAGES, IV.

I. OF THE RIGHT OF REDEMPTION.

1. A creditor, under whose judgment the land was sold, has the statutory right to redeem. *Freeman & Warren v. Jordan*, 17 Ala. 500.

2. But a creditor, whose judgment was rendered by a justice of the peace in another State, is not within the statute. *Ib.*

3. A judgment creditor by confession, if *bona fide*, is entitled to redeem; but the purchaser may, at his peril, compel a resort to equity, to establish the *bona fides* of the debt. *Couthway v. Berghaus*, 25 Ala. 393.

4. If the judgment was confessed before the expiration of the time allowed for redemption, though after the sale, the creditor may redeem. *Ib.*

5. Where the sheriff pays the amount due on an execution in his hands, but no entry of satisfaction is made of record, and the parties to the judgment waive their right to insist on the payment as a discharge,—if the plaintiff afterwards transfers the judgment to the sheriff, the latter may redeem. *Mooney & Black v. Parker*, 18 Ala. 708.

6. If the lands are sold under a decree of foreclosure in chancery, a judgment creditor may redeem before the confirmation of the sale, when the purchaser has paid the price, and received the registrar's deed. *Jones & Blair v. Burden*, 20 Ala. 382.

7. The death of the judgment debtor, after the sale under decree, does not affect a judgment creditor's right to redeem. *Ib.*

8. A purchaser who would prevent a redemption by a judgment creditor, by crediting the debtor with the amount proposed to be advanced, must also be a judgment creditor. *Ib.*

9. The purchaser has not six months, within which to make his election, but must make it within a reasonable time, must notify the creditor of his election, and tender a compliance: merely saying that he will pay the sum and retain the land, without offering to pay, or securing the payment, amounts to nothing. *Couthway v. Berghaus*, 25 Ala. 393.

10. The purchaser at sheriff's sale, on receiving the sheriff's deed, becomes the absolute owner, and is entitled to the rents and profits on entering into possession; and nothing is left in the debtor, or his judgment creditor, but the naked right of redemption, which must be asserted in the time and manner prescribed by the statute. *Spoor v. Phillips*, 27 Ala. 193.

11. The right to redeem is not perfect, and cannot be enforced in equity, until there has been either a full performance by the plaintiff of all the statutory requisitions, or a valid and sufficient excuse for his non-performance, without any fault or neglect on his own part. *Ib.*

12. A mortgagor's statutory right of redemption is a mere equitable right, which can only be enforced against an unwilling purchaser in a court of equity: the mere tender of the necessary sum does not reinvest him with the legal title. *Smith v. Anders*, 21 Ala. 782.

13. The statute does not authorize a redemption of lands sold, since its

passage, under a judgment rendered in one of the Federal courts prior to its passage. *Beck v. Burnett*, 22 Ala. 822.

II. OF THE PLEADINGS, PRACTICE, AND DECREE.

14. When the judgment debtor files a bill to redeem, he must allege that he delivered possession to the purchaser without suit, or that the latter consented to his retention of possession as tenant. *Sandford v. Ochtalomi*, 23 Ala. 669; *Paulling v. Meade*, 23 Ala. 505.

15. An allegation in these words: "Your orator further showeth unto your honor, that at said sale of said lands, C. S., well knowing, as was the fact, that the same were sold as the property of your orator, became the purchaser thereof, at and for the sum of about $900; that said S., immediately thereafter, with the consent of your orator, took possession of the lands aforesaid, and received from the sheriff a deed therefor in due form,"—held a sufficient averment of the delivery of possession without suit. *Bondurant v. Sibley's Heirs*, 29 Ala. 570.

16. When a judgment creditor files a bill to redeem, he must allege a tender of the amount of the purchaser's bid, with ten per cent. thereon, and an offer to credit his judgment with the further sum of ten per cent. on the amount of the bid. *Paulling v. Meade*, 23 Ala. 505.

17. Where the plaintiff's judgment was confessed, and he alleges that he was a *bona-fide* creditor at the time of its confession, and exhibits an exemplification of the record, showing that it was founded on a note bearing date anterior to the defendant's purchase, the allegations are sufficient, without setting out the particulars of the consideration of the note. *Couthway v. Berghaus*, 25 Ala. 393.

18. If the purchaser does not deny the existence of the indebtedness on which the judgment was confessed, but professes ignorance of it, and avers that he had offered to pay the amount of the judgment and retain the land, proof, by one witness, of his declaration "that he had satisfied himself the judgment was good, and that the right to redeem under it existed," is sufficient. *Ib.*

19. A tender under a valid judgment, which is afterwards reversed on error, does not entitle the creditor to redeem under another judgment recovered on the same cause of action after the expiration of two years. *Barringer v. Burke*, 21 Ala. 765.

20. Where the lands are purchased by the trustee of a married woman, and held in trust for her, a tender may be made to the trustee. *Ib.*

21. Where the legal title is in a naked trustee, who has no interest whatever in the land, and is a non-resident; while the *cestui que trust*, who can control the title, is in possession, and in perception of the rents and profits,—the tender may be made to the latter. *Couthway v. Berghaus*, 25 Ala. 393.

22. Although an agent to make a tender cannot delegate his authority to another, yet he may make the tender by letter sent by the hands of another. *Ib.*

23. If the purchaser only objects to the amount tendered, and declares that he is not satisfied that the plaintiff is a *bona-fide* creditor, he cannot afterwards raise an objection to the authority of the person through whom the tender was made, nor to the sufficiency of the tender because made in bank-notes. *Ib.*

24. Nor can he object in his answer to the authority of the person through whom the tender was made, unless he objected to the tender on that ground when it was made. *Lampley v. Weed & Co.*, 27 Ala. 621.

25. If the bill does not show that a tender was made before it was filed, a tender in it is not sufficient, unless the bill also shows, in connection with such offer, a valid and sufficient excuse for the failure to make a tender before it was filed. *Spoor v. Phillips*, 27 Ala. 193. (Correcting first head-note to *Freeman & Warren v. Jordan*, 17 Ala. 500.)

26. Where the action of the court is necessary to ascertain what sum is to be paid, an offer in the bill to pay such sum as the chancellor may decree, and to bring the same into court, is sufficient. *Freeman & Warren v. Jordan*, 17 Ala. 500.

27. It is error to decree that the purchaser convey the land by quit-claim deed, since he may have acquired some other interest than that which passed by the sale, while the statute only authorizes a redemption of "the interest that may have been sold." *Weathers v. Spears*, 27 Ala. 455.

28. The purchaser is entitled, on decree of redemption, to ten per cent. interest on his purchase-money until the tender and refusal, and to eight per cent. afterwards. *Ib.*

29. If he has extinguished a prior incumbrance on the land, he should be allowed the amount paid by him, with interest. *Couthway v. Berghaus*, 25 Ala. 393.

30. Rents and profits, accruing before a tender and refusal, may be set off against improvements made; but, if they exceed the value of the improvements, the purchaser is not liable for the excess: he is liable only for rents and profits accruing after the tender. *Weathers v. Spears*, 27 Ala. 455.

31. The purchaser's liability for rents and profits, except "by way of offset to the improvements made," does not arise until he is put in default. *Spoor v. Phillips*, 27 Ala. 193.

32. If no tender is made to the purchaser in his lifetime, he is not in default at his death; and if, upon his dying intestate, a judgment creditor files a bill for redemption against his personal representative and minor heirs, a tender in the bill, without the payment of the money into court, does not put the defendants in default; and no decree can be rendered against them for the rents and profits. *Ib.*

REFORMATION OF WRITTEN INSTRUMENTS.

1. A deed, executed by a father to his married daughter, will be reformed in equity, as against the judgment creditors of her husband, when through the mistake of the attorney by whom it was drawn, it fails to accomplish the grantor's intention to secure the property to the sole and separate use of the grantee; but a bill for this purpose should be filed by the grantee, and not by her trustee. *Stone v. Hale*, 17 Ala. 557.

2. A deed of gift, drawn by the grantor himself, and which, by reason of his ignorance of the law, fails to express his intention, may be reformed in equity. *Larkins v. Biddle*, 21 Ala. 252.

3. Where a mistake in a deed is shown by clear and satisfactory proof, equity will reform it, and decree an account against a party who, with notice of the mistake, purchased the property conveyed, and holds it against the rightful owner. *Whitehead v. Brown*, 18 Ala. 682.

4. But, where the donor is the only witness who testifies to the alleged mistake in the deed, and his testimony is confused and contradictory, a reformation will be refused. *Lockhart and Wife v. Cameron*, 29 Ala. 355. (A reformation was also refused, because there was not sufficient proof of the mistake, in *Rumbly v. Stainton and Wife*, 24 Ala. 712.)

5. Where the bill alleged, that the donor intended to convey the property "to the sole and separate use and behoof of his daughter, and of any children she might have, so that it should not be subject to any rights, debts, or engagements of any husband whom she might marry, and at her death should be the property of her children;" while the proof was, that he "intended to bind the property to her and her children forever,"—"never intended it to be subject to any man's debts,"—"intended that it should go to her children at her death,"—"gave it to her and her heirs,"—"intended to entail the property on her and her children,"—"made the deed to her, and considered the girl her property,"—*held*, that the variance was fatal. *Ib.*

6. Equity will decree the reformation of a written instrument, which, through mistake, or from the ignorance or want of skill of the draftsman, or from any other cause, fails to express the true agreement between the parties; but, if the instrument expresses the real agreement of the parties, a reformation will not be decreed because they were mistaken as to its legal consequences. *Larkins v. Biddle*, 21 Ala. 252; *Trapp & Hill v. Moore & Border*, 21 Ala. 693.

7. A deed of trust, executed by a

debtor for the protection of certain creditors and sureties, including certain notes, on which one of the beneficiaries was supposed to be bound as surety, and so describing them, under the belief that, if the beneficiary was not bound, the misdescription would exclude the holder from any benefit under the deed,—reformed on proof of the mistake, and of the grantor's intention to secure the beneficiary and not the notes. *Trapp & Hill v. Moore & Border*, 21 Ala. 693.

8. An ante-nuptial contract, which was drawn by the husband himself, and which, through his fraud or mistake, does not include all the property which was intended to be secured to the separate use of the wife, will be reformed on her application. *Love v. Graham*, 25 Ala. 187.

9. Where the wife files a bill against her trustee and certain judgment creditors of her husband, for the reformation of a deed which was intended to convey the property to her sole and separate use; and decrees *pro confesso* are taken against all the defendants except the trustee, who avers his ignorance of the alleged mistake,—the clear and direct testimony of one witness is sufficient to authorize a reformation of the deed. *Godwin v. Yonge*, 22 Ala. 553.

10. The trustee, in such case, having taken upon himself the execution of the trust, cannot allege fraud in the execution of the deed, as a defense to the relief sought by the bill. *Ib.*

11. Where the vendor filed a bill, asking a reformation of his title-bond in the description of the land, and an injunction against an action at law on the bond; and the proof showed that the land was misdescribed by mistake, and that the vendor did not have title to the land which he intended to sell,—the bond was reformed, but the action at law was not enjoined; and it was expressly declared by the decree, that the purchaser might, at his election, either proceed with his action at law, or dismiss it and institute proceedings for a rescission of the contract; and further, that if he elected to proceed with his action, it should be considered in all respects an action on the bond as reformed. *Reese v. Kirk*, 29 Ala. 406.

12. Two adjacent land proprietors, owning the two sub-divisions of a fractional section, ran their division fence, by mutual mistake, along a line which they erroneously supposed to be the boundary of their respective tracts, and cleared and cultivated the lands up to the division fence for four or five years, when one sold and conveyed his tract to a third person; and on the discovery of the mistake, the other proprietor filed a bill against him and the purchaser, asking a reformation of the deed according to the supposed common boundary. *Held*, that he was not entitled to the relief sought. *Teakle v. Teakle*, 29 Ala. 403.

13. A will cannot be reformed in equity, so as to make it create a separate estate in a married woman, on proof of an agreement, prior to her marriage, between her intended husband and her father, who was the testator, that the will of the latter should exclude the husband's marital rights. *Machem v. Machem*, 28 Ala. 374.

14. Where a lease of real estate, belonging to the State Bank, is executed in the name of the assistant commissioner, and the rent reserved is to be paid to the bank, equity will, *it seems*, decree a reformation of the contract against the bank. *Douglass & Easton v. Branch Bank at Mobile*, 19 Ala. 659.

As to the reformation of deeds absolute on their face, on parol proof that they were intended to operate only as mortgages, see MORTGAGES, 5–24.

REHEARING.

See PRACTICE, V.

REMEDY AT LAW.

See JURISDICTION, 5–26.

RESCISSION OF CONTRACTS.

1. Mere inadequacy of consideration, of itself, and disconnected from all other facts, is not a sufficient ground for rescinding a contract, or granting

relief against it in equity. *Judge v. Wilkins*, 19 Ala. 765.

2. Although a court of equity will sometimes interfere, in peculiar cases, to prevent fraud, or relieve against mistakes; yet it will not relieve a purchaser at execution sale from the consequences of his own folly or temerity, when he purchased with knowledge that the property was under deed of trust, and after the sale had been forbidden by the trustee. *O'Neal v. Wilson*, 21 Ala. 288.

3. If the plaintiff in execution purchases at the sheriff's sale, after having indemnified the sheriff, and with notice of a defect in the title, he cannot be relieved of his purchase in equity, after paying off a recovery had against him by the true owner. *McCartney v. King*, 25 Ala. 681.

4. If an executor purchases land belonging to his testator's estate, at a public sale made by himself and his co-executors, under a mistake of law as to the power of sale conferred on them by the will, he cannot be relieved of his purchase in equity. *Dill v. Shahan*, 25 Ala. 694.

5. Courts of equity grant relief against conveyances obtained by misrepresentation or mistake; and if the parties occupy a relation, from which naturally springs an unusual degree of confidence, affection, or sense of duty, the utmost degree of good faith is required from the party in whom the trust is reposed, and he must show that the contract is in every respect just, fair, and equitable. *Boney v. Hollingsworth*, 23 Ala. 690.

6. Where a father executed to his sons a conveyance of certain lands, but filed it away among his papers, and never delivered it; and the sons, after their father's death, obtained from their sister a voluntary relinquishment of her interest in the lands, by representing to her that their father, on his death-bed, had declared it to be his intention that they should have the lands,—the relinquishment was set aside, because the grantees failed to show that they had stated, fully and fairly, their father's dying declarations. *Ib.*

7. A contract of sale, made under a mutual mistake as to the vendor's title, will be rescinded at the instance of the purchaser, if he seeks a rescission within a reasonable time, abandons the possession of the land, and delivers or offers to deliver it to the vendor. *Smith v. Robertson*, 23 Ala. 312.

8. The right to a rescission, in such case, does not depend on the payment or tender of the purchase-money, nor upon the vendor's insolvency, but upon the promptness with which a rescission is sought. *Ib.*

9. But an innocent mistake, which the defendant offered to correct before the bill was filed, is no ground for a rescission, when the bill proceeds on the ground of fraud. *Williams v. Sturdevant*, 27 Ala. 598.

10. Suspicion of fraud on the part of the defendant, coupled with gross inadequacy of price, and the pressure of pecuniary embarrassment on the part of the plaintiff, is sufficient to induce a court of equity to rescind a contract of sale. *Lester v. Mahan*, 25 Ala. 445.

11. The contract in this case was rescinded, on proof that the plaintiff, whose property was levied on, and about to be sold under execution, sold his farm to defendant, received a part of the price in cash, and for the residue accepted a deed from defendant to a tract of land lying in Georgia, which plaintiff had never seen, and which was not worth more than one half of the amount at which it was estimated in the transaction. *Ib.*

12. A misrepresentation by the vendor, as to the existence of a material fact, which constituted an inducement to the contract, and on which the purchaser had a right to rely, entitles the injured party to a rescission of the contract; and it is immaterial, in such case, whether the misrepresentation was fraudulently or innocently made. *Read v. Walker*, 18 Ala. 323; *Lanier v. Hill*, 25 Ala. 554.

13. And this, whether the contract is executed or executory. *Foster v. Gressett's Heirs*, 29 Ala. 393.

14. An honest expression of opinion by the vendor, as to the location of one of the boundary lines, even though erroneous, is not such a misrepresentation as constitutes a fraud on the purchaser. *Stow v. Bozeman's Executors*, 29 Ala. 397.

15. Where a conveyance has been

executed and accepted, a rescission will not be decreed, in the absence of fraud or misrepresentation, on account of a mere defect in the title. *Lanier v. Hill*, 25 Ala. 554; *Thompson's Adm'r v. Christian*, 28 Ala. 399.

16. It was held in this case, that the pleadings and proof showed that the purchaser had accepted a conveyance, because, 1st, it was unreasonable to suppose that, after exhibiting the caution manifested by other facts connected with the purchase, he would have rested for so long a period (three years) after discovering his vendor's want of title, without any written evidence of his purchase, when the agreement was that a conveyance "was to be executed in a very short time;" 2dly, the bill did not allege, positively and explicitly, that he never accepted a deed, but only averred that the vendor "never complied with his promise in relation to the title to said land;" 3dly, he executed a mortgage on the land, of even date with the notes given for the purchase-money, to secure the payment of the notes, and recited therein that a deed had been executed to him; and, 4th, the registrar reported, under an order of reference, that he had constructive possession of the land by reason of the conveyance to him. *Ib.*

17. On discovering a defect of title, the purchaser may elect, either to take the necessary steps to entitle him to a rescission of the contract, or to sue at law for a breach of the covenant contained in the title-bond. This right of election can only be lost by his own act or laches, and cannot be exercised by any court for him; nor does he deprive himself of it by bringing suit on the title-bond, in which the lands are by mistake incorrectly described, and by defending a suit in equity for the correction of the mistake. *Reese v. Kirk*, 29 Ala. 406.

18. Where the purchaser, on discovering that one fourth of the land, including the dwelling-house and improvements, was public land, voluntarily entered it before his notes for the purchase-money were due, and then insisted on a rescission of the contract, but did not offer to restore the land; and the vendor, in reply to the proposition to rescind, offered to credit the notes for the purchase-money with a much larger sum than the costs and expenses of entering the land, which the purchaser refused,—*held*, that the purchaser was not entitled to a rescission of the contract, but was entitled to a credit for the costs and expenses of entering the land. *Gallagher v. Witherington*, 29 Ala. 420.

19. The purchaser's right to rescind the contract, on account of fraud or misrepresentation as to a material fact, may be waived or lost, either by an affirmance of the contract after the discovery of the fraud, or by the failure to institute proceedings for a rescission within a reasonable time after such discovery. *Foster v. Gressett's Heirs*, 29 Ala. 393.

20. What is a reasonable time, within which to institute proceedings for a rescission, must depend on the circumstances of each particular case. *Kern v. Burnham*, 28 Ala. 428; *Foster v. Gressett's Heirs*, 29 Ala. 393.

21. Where the purchaser died, about eight months after the sale, without having discovered the fraud; and his heirs, one of whom was still a minor, filed a bill to rescind within one year after the discovery of the fraud, and within four years after the sale,—*held*, that this was sufficient promptness. *Foster v. Gressett's Heirs*, 29 Ala. 393.

22. But where the purchaser, who was a minor at the time of the sale, accepted a deed for the land after attaining his majority, and with knowledge of the fraud; remained in possession for more than five years after the discovery of the fraud, and more than seven after the sale, and showed no excuse for the delay,—a rescission was refused on account of the laches. *Kern v. Burnham*, 28 Ala. 428.

23. And where the bill was filed thirteen or fourteen years after the discovery of the fraud, alleging that the plaintiff abandoned the land on the discovery of the fraud, but showing no act on his part which, if a favorable fluctuation in the price had made it his interest to enforce a specific execution of the contract, would have precluded him from doing so,—the laches was held fatal to relief, on demurrer for want of equity. *Askew v. Hooper*, 28 Ala. 634.

24. If the vendor has no title, and cannot procure or cause one to be made, the law does not impose on the purchaser the useless ceremony of preparing and tendering a deed, before he can apply to equity for a rescission of the contract. *Read v. Walker*, 18 Ala. 323.

25. The insolvency of the vendor constitutes a sufficient excuse for the purchaser's retention of possession, where he has paid the purchase-money, and expended a considerable sum in improvements. *Ib.*

26. What is a sufficient allegation of the vendor's insolvency. *Ib.*

27. Where the vendor removed from the State, with all his property, before the discovery of the fraud, after having collected one half of the purchase-money, and having transferred the note for the uncollected balance to a non-resident, who recovered judgment upon it, and was trying to collect it; and the purchaser having died a few months after the purchase, and before the discovery of the fraud, one of his heirs was a minor when the bill was filed,—*held*, that these facts justified the retention of the land, and rendered unnecessary an offer to rescind before filing the bill. *Foster v. Gressett's Heirs*, 29 Ala. 393.

28. Where the heirs of the purchaser seek a rescission, under circumstances which justify their retention of possession, they are entitled to a fair allowance for any improvements made by them upon the land, either before or after the filing of the bill, which were absolutely necessary to render the possession beneficial and profitable, such as necessary fencing, and all indispensable buildings on a plantation; and are chargeable not only with the rents, but with any deterioration in the value of the land caused by their injurious or injudicious cultivation. *Ib.*

29. On a rescission in favor of the purchaser, the court may declare the purchase-money a lien on the land, and order that the land be sold if the money be not refunded by a given day. *Ib.*

30. Where the purchaser makes out a case which entitles him to a rescission of the contract, the collection of the purchase-money will be enjoined, without regard to the solvency of the vendor; and the same rule obtains as against the vendor's assignee, unless the notes were mercantile, and passed in the course of trade to a *bona-fide* holder. *Lanier v. Hill*, 25 Ala. 554.

ROADS, BRIDGES, AND FERRIES.

1. Chancery has jurisdiction, to enjoin and abate a public nuisance, caused by the obstruction of a public road or highway; and this jurisdiction is not taken away, without an express provision to that effect, by a statutory grant of jurisdiction to the corporate authorities of the town within whose limits such nuisance is erected. *Hoole & Paullin v. Attorney-General*, 22 Ala. 190.

2. It will also decree a perpetual injunction, at the suit of the proprietor of an established bridge, against the owner of a neighboring private bridge, to restrain the latter from permitting persons to pass over his bridge when subject to the payment of toll at plaintiff's bridge; and will decree a pecuniary compensation for the losses already sustained. *Harrell & Croft v. Ellsworth*, 17 Ala. 576.

3. The defendant, in such case, cannot call in question the plaintiff's right to the enjoyment of his franchise, on the ground of his failure to perform a condition annexed to its grant: the commissioners' court only can question his right to the enjoyment of the franchise on that ground. *Ib.*

4. H., being the owner of a ferry across the Chattahoochie river, and having opened a private way leading from the ferry into the public road on this side of the river, filed a bill against A., to abate an obstruction erected across said road. A. answered, averring that H. had previously obstructed the public road on the Georgia side of the river, so as to divert public travel from A.'s ferry to his own, and that the alleged obstruction had straightened the public road, placed it on better ground, and been accepted by the overseer of the road. *Held*, that the injunction was properly dissolved on this answer. *Hill v. Averett*, 27 Ala. 484.

SET-OFF.

1. In the absence of all intervening equities, or peculiar circumstances which a court of law cannot regard, the law of set-off is the same in equity as at law. *McKinley v. Winston*, 19 Ala. 301; *Cave v. Webb*, 22 Ala. 583.

2. Where an action at law is founded on a debt due from defendant to plaintiff individually, defendant cannot set off in equity a debt due from plaintiff to a firm in which they are both partners. *McKinley v. Winston*, 19 Ala. 301.

3. Where the purchaser has received a deed from his vendor, the covenants of which are broken by the existence of an outstanding incumbrance, and the vendor is insolvent, equity will restrain the collection of so much of the purchase-money as will compensate for the injuries resulting from the breach, or order it to be appropriated to the extinguishment of the incumbrance; but, where it is not shown that the vendor is unable to respond in damages for the breach, the purchaser cannot resist a suit for the foreclosure of his mortgage to secure the payment of the purchase-money, by setting up the vendor's breach of covenant. *McLemore v. Mabson*, 20 Ala. 137.

4. Unliquidated damages, sounding in tort, are not the subject of a set-off, either at law or in equity. *Pulliam v. Owen & Russell*, 25 Ala. 492.

5. Therefore, a vendor, who has received full payment of the purchase-money, cannot resist a specific performance of his contract, at the suit of the purchaser's assignee, on the ground that the purchaser has committed trespasses on his other lands, and is insolvent. *Ib.*

6. The holder of endorsed mercantile paper before maturity, is presumed to have acquired it *bona fide* and for valuable consideration, and is not affected by any set-off or other equity existing against the payee or other intermediate holder; and the registration of a deed of trust, in which it is secured, does not operate as constructive notice, so as to charge him with knowledge of its recitals. *Minell & Co. v. Reed*, 26 Ala. 730.

7. A purchaser with covenants of warranty, against whom a judgment is recovered on the notes given for the purchase-money, and who is afterwards evicted from the land under title paramount, may enjoin the judgment in equity, when the estate of his vendor is insolvent, and the defense could not have been made at law. *Wray's Adm'rs v. Furniss*, 27 Ala. 471.

8. A demand for unliquidated damages, arising from a breach of covenant of title, may be set off in equity against a note founded on an independent consideration, when the estate of the deceased vendor is insolvent; but, to make it available as an equitable set-off against an assignee of the note, it must be shown to have accrued before notice of the assignment. *Ib.*

9. If a note under seal is assigned by endorsement after maturity, the assignee takes it subject to all equitable defenses existing in favor of the maker prior to notice of the assignment, whether they grow out of the same, or out of a different transaction. (WALKER, J., *dissenting*, held that the assignee ought to be protected, where he acquired the legal title by endorsement without notice of the maker's equity.) *Carroll v. Malone*, 28 Ala. 521.

10. If the maker of a note, having an equitable set-off which is available against an assignee after maturity, executes a mortgage to the assignee to secure the payment of the note, this does not estop him from afterwards insisting on his set-off. *Ib.*

11. The mere existence of mutual and independent demands does not authorize the interposition of equity to set them off against each other: to warrant the interference of equity, there must be circumstances, from which it can be inferred that one debt was contracted on the faith of the other; or that there was an agreement between the parties, that the one should be discounted from the other; or there must be some intervening equity, which renders the interposition of that court necessary for the protection of the demand sought to be set off. *Simmons v. Williams*, 27 Ala. 507.

12. An administrator *de bonis non* having recovered a decree, on final settlement, against the administrator

in chief, the money was collected under execution, against the surety on the latter's official bond; and the decree having been afterwards reversed on error, the surety sued at law to recover the money. *Held*, that the defendant could not enjoin the judgment at law, by alleging that he had paid over the money to the distributees of the estate, some of whom were insolvent and non-resident; that he had subsequently recovered another decree against the administrator in chief, on which execution had been issued and returned "no property;" and that the surety had been indemnified by his principal. *Ib.*

SPECIFIC PERFORMANCE.

I. WHEN EQUITY WILL DECREE A SPECIFIC PERFORMANCE.

1. *Generally.*
2. *Award.*
3. *Contracts between Husband and Wife.*
4. *Parol Gifts.*
5. *Parol Sale of Lands.*

II. OF THE PLEADINGS AND PROOF.

III. OF COMPENSATION.

I. WHEN EQUITY WILL DECREE A SPECIFIC PERFORMANCE.

1. *Generally.*

1. The enforcement of the specific execution of a contract is not a matter of right in either party, but a matter of sound, reasonable discretion in the court; and the court uniformly refuses to interfere, except where such a decree would be strictly equitable. *Blackwilder v. Loveless*, 21 Ala. 371.

2. This discretion, however, is not arbitrary or capricious, but is regulated, as nearly as may be, by general rules. *Pulliam v. Owen & Russell*, 25 Ala. 492.

3. A contract, founded in mutual mistake, will not be specifically enforced, when it would materially affect the rights of the defendant. *James v. State Bank*, 17 Ala. 69.

4. Where the contract passes neither the legal nor the equitable title to a chattel, a specific performance will not be decreed against a subsequent assignee of the legal title, although he acquired it with notice. *Maulden, Montague & Co. v. Armistead*, 18 Ala. 500.

5. A specific performance will not be decreed, where the contract is in contravention of the policy of the pre-emption laws; as where a father procures his son to enter on and occupy a tract of public land, for the purpose of acquiring a pre-emption right to the same, under an agreement that, so soon as the right of pre-emption was perfected, he would pay for the land, and the son should convey one half of it to him. *Dial v. Hair*, 18 Ala. 798.

6. It requires a much stronger case on the part of the plaintiff to maintain his bill, than on the part of the defendant to resist it; for, if the bargain be hard and unconscionable, or if its specific execution would, under all the circumstances, be inequitable, the chancellor will leave the parties to their legal remedies. *Blackwilder v. Loveless*, 21 Ala. 371.

7. Where plaintiff, having recovered a judgment against defendant for the unlawful detainer of certain lands, which were worth $300, to which defendant claimed title, and on which he had a growing crop, and having a writ of restitution in the hands of the sheriff, procured defendant to enter into a contract, by which defendant, in consideration of plaintiff's note for $30, and the retention of possession for the remainder of the year,—a period of four months and a half,—promised to deliver up the land at the expiration of the year, and executed to plaintiff a bond for titles,—the specific execution of the contract was refused. *Ib.*

8. In the exercise of a sound discretion, equity will refuse to enforce the specific execution of a contract in favor of one party, when it is uncertain whether he can fulfil the stipulations of the contract on his own part; as where his insolvency renders it doubtful whether he would be able to pay his share of the purchase-money, or to repay the advances made by defendant. *Sims v. McEwen's Adm'r*, 27 Ala. 184.

9. Where the alleged contract was, "that upon the purchase by said defendant of said lot and improvements, he and plaintiff were to have and own jointly all the estate purchased as aforesaid; that is to say, said defendant was to own one half of said property, and plaintiff one half of said property; plaintiff to superintend the erection of certain brick buildings, as mentioned in the deed of mortgage on said lots, to repay to said defendant the moneys by him paid out (with interest thereon) on account of said purchase, and on account of said buildings, and for all provisions, horses, and mules, furnished by him for the benefit of said firm; and plaintiff to take charge of the same as a hotel, and have one half of the profits thereof, and one half of the rents thereof, and the said proceeds to be applied to the payment of said debt,"—the court inclined to the opinion, that a specific performance might be refused, on the ground that the alleged agreement was too vague and uncertain; but the bill was dismissed on other grounds. *Ib.*

10. It was objected in this case, that the uncertainty in the terms of the contract was an insuperable obstacle to its specific execution; but the court, while admitting that great certainty and precision in the averment and proof of contracts, whether verbal or written, were indispensable pre-requisites to their specific execution, held that, in view of the looseness and inaccuracy of language which showed that the parties and witnesses were uneducated, and construing the inartificial expressions of the parties by their subsequent declarations as to the meaning which they attached to the words, the terms of the contract were sufficiently certain. *Andrews v. Andrews*, 28 Ala. 432.

11. It is an unquestioned doctrine of equity, that only those contracts which are fair, just and reasonable, will be specifically enforced. *Ib.*

12. When the inadequacy of consideration shows that the contract is unfair, inequitable, or unconscionable, even though it might not be sufficient to induce a court of equity to rescind or set aside an executed contract, a specific performance will be refused. *Ib.*

13. Generally, equity will not specifically enforce contracts concerning personal property, because there is a remedy at law in a suit for damages; but, where there is no remedy at law, a specific performance may be decreed. *Ib.*

14. A mail-contractor cannot specifically enforce a contract with a plank-road company for the transportation of the mail over its road, unless his bill shows that a court of law cannot fully compensate him in damages for the breach of contract. *Powell v. Central Plank-Road Co.*, 24 Ala. 441.

2. *Award.*

15. Although equity will not decree the specific performance of an award, where the damages resulting from the failure to perform are capable of being exactly measured, and complete redress afforded at law; yet, to bar the interference of equity, it is not enough that the party may successfully maintain an action at law on the award—he must be able to obtain by a verdict all that it was the object of the award to give him. *Kirksey v. Fike*, 27 Ala. 383.

16. Where a partner filed a bill against his copartner in a tannery, alleging an arbitration and award of the partnership transactions, and the insolvency of the defendant, and asking an injunction, attachment, account, discovery, and general relief; and by the terms of the award, as alleged, the partnership accounts, leather and skins on hand, and the use of the vats, were to be equally divided between the parties,—*held*, that the bill might be sustained, independent of the defendant's insolvency, for the purpose of enforcing a specific execution of the award, since a court of law could not afford full redress. *Ib.*

3. *Contracts between Husband and Wife.*

17. Equity will specifically enforce, as against any other person than the husband himself, a post-nuptial agreement to make a settlement on the wife; but it will not specifically enforce such an agreement against the husband, because, until executed, it is

revocable. *Andrews v. Andrews*, 28 Ala. 432.

18. Neither the moral obligation of the husband to provide for his wife, nor the fact that he received property by her, nor both these considerations together, will justify the specific execution of a post-nuptial agreement on his part to make a settlement on her; but when, superadded to these, there is a valuable consideration, irrevocably executed on the part of the wife, a specific performance will not be refused on account of the inadequacy of that consideration. *Ib.*

19. In this case, the court decreed a specific performance of an agreement to settle on the wife slaves valued at more than $4,000, in consideration of her relinquishment of dower in certain lands sold at $2,600; it being also alleged and proved, that the husband received the slaves, with other property, by the wife, and that there were no children of the marriage to be provided for. *Ib.*

20. That the contract concerns personal property, is no objection to its specific execution, since there is no remedy at law in a suit for damages. *Ib.*

21. A specific performance of an ante-nuptial contract, barring the wife of dower, decreed against her, at the suit of her deceased husband's heirs-at-law, where the contract secured to her separate use her interest in the estate of a former husband, which was worth about $1200, and further, "during her life or widowhood," in the event of her survivorship, "one third of the estate, both real and personal, of which he [the husband] should happen to die seized and possessed;" it being shown that the estate of the husband, who was between sixty and seventy years old at the time the contract was made, and had four children by a former wife, was worth about $25,000, of which $10,000 was in lands; that the wife, who was then over forty years old, was chiefly induced to make the contract, that she might be better enabled to educate her children by her former husband; and that the contract had been partially performed, so that the parties could not be placed *in statu quo*. *Webb v. Webb's Heirs*, 29 Ala. 588.

4. *Parol Gifts.*

22. Equity will not specifically enforce a parol gift of lands, against either the donor himself or his legal representatives after his death, though accompanied by delivery of possession. *Evans v. Battle*, 19 Ala. 398; *Pinckard & Pool v. Pinckard's Heirs*, 23 Ala. 649.

23. Nor will it enforce, as in favor of a volunteer, a purely voluntary executory trust; *aliter*, where a person has constituted himself trustee for another, and the relation of trustee and *cestui que trust* has been fully established. *Crompton v. Vasser*, 19 Ala. 259.

5. *Parol Sale of Lands.*

24. Equity will decree the specific execution of a parol agreement to sell or convey lands, notwithstanding the statute of frauds, where there has been such a part performance of the agreement that a refusal would work a fraud on the plaintiff. *Brewer v. Brewer & Logan*, 19 Ala. 481.

25. A purchaser, who has paid the purchase-money, and has obtained possession under the contract, is entitled to a specific execution of the contract. *Ib.*

26. Plaintiff, being in possession of a quarter-section of land to which he had a pre-emption right, agreed with defendant, that the latter should pay all the entrance-money, and in consideration thereof should have one half of the land; and defendant accordingly paid the money, and took a patent in his own name. *Held*, that these facts were tantamount to a payment of the purchase-money, and entitled plaintiff to a specific execution of the contract. *Ib.*

27. But, where plaintiff procured his son to enter upon and occupy a quarter-section of public land, for the purpose of acquiring a pre-emption right thereto, under an agreement that, so soon as the right of pre-emption was perfected, he would pay the entrance-money, and the son should convey one half of it to him,—a specific performance was refused, on the ground that the contract was in con-

travention of the policy of the pre-emption laws. *Dial v. Hair*, 18 Ala. 798.

28. Possession by the purchaser, with the consent of the vendor, under a parol contract of sale, takes the case out of the statute of frauds; but mere possession, when it is not shown to be under the contract, is not sufficient. *Danforth v. Laney*, 28 Ala. 274.

29. The vendor, after receiving full payment of the purchase-money, cannot resist a specific performance of the contract, at the suit of the purchaser's assignee, on the ground that the purchaser has committed trespasses on his other lands, and is insolvent. *Pulliam v. Owen & Russell*, 25 Ala. 492.

II. OF THE PLEADINGS AND PROOF.

30. To authorize the specific execution of a parol contract for the sale of land on the ground of part performance, the acts of partial performance, and the contract itself as alleged, must be clearly and definitely established. *Aday v. Echols*, 18 Ala. 353.

31. Where the bill alleged that the payments were to be made in five equal annual installments, while the proof showed that they were to be made in four or five annual installments, and that part of the purchase-money was still unpaid, a specific performance was refused on account of the variance. *Ib.*

32. Where the alleged contract was, that plaintiff should execute his note for one half of the purchase-money of two lots bought by defendant, that the two lots should be equally divided by an east and west line, and that each party should immediately enter into possession of his half; while the proof showed that the contract contained the additional stipulation, "that whenever either of them wished to sell, the other should have the preference or refusal,"—the variance was held fatal. *Williams v. Barnes*, 28 Ala. 613.

33. If the contract set up in the answer, and proved, is materially different from that alleged in the bill, the defendant may, *it seems*, have a specific performance without resorting to a cross bill; but the plaintiff, to entitle himself to a decree, must nevertheless prove the case made by his bill. *Sims v. McEwen's Adm'r*, 27 Ala. 184.

34. The failure to prove an alleged stipulation which the law implies from the other stipulations proved, is no variance; as where the bill alleges an agreement by the husband to settle property on the wife, for her sole and separate use, and the evidence fails to show the exclusiveness of the promised gift. *Andrews v. Andrews*, 28 Ala. 432.

35. Where the bill alleges possession under a parol contract of sale, and the answer admits the possession, but alleges that it was acquired and held under a contract of rent, and denies the alleged contract of sale, the *onus* is on the plaintiff to prove the character of the possession. *Danforth v. Laney*, 28 Ala. 274.

36. The plaintiff cannot have relief for matters which are outside of the alleged contract. *Sims v. McEwen's Adm'r*, 27 Ala. 184.

III. OF COMPENSATION.

37. Although equity will not specifically enforce a parol gift of lands, even when the donee has taken possession under it, yet it will not allow the donor to reclaim the possession, without making compensation for valuable improvements erected by the donee. *Evans v. Battle*, 19 Ala. 398.

38. If a purchaser has entered into possession under a parol contract, and erected valuable improvements on the land on the faith of it, but fails to prove a case which entitles him to a specific performance, his bill may be retained for the purpose of allowing him compensation, when he has not an adequate remedy at law. *Read v. Walker*, 18 Ala. 353.

39. In such case, the land should be charged, as against the vendor and his representatives, with the payment of the amount ascertained to be due to the plaintiff, unless some circumstance appears which would render it improper to do so; and the insolvency of the vendor's estate is not a sufficient reason for refusing so to charge it. *Ib.*

40. If the plaintiff fails to make out a case which entitles him to a specific performance, compensation for dama-

ges resulting from a breach of contract, or for services performed under it for which he may recover at law, will not be decreed him, unless some special equity intervenes. *Sims v. McEwen's Adm'r*, 27 Ala. 184.

SUBROGATION.

See SURETIES, 1–10.

SURETIES.

1. An agreement between the principal debtor and one of his sureties, to the effect that, if the principal will consent to a sale of property mortgaged by him to the creditor for the security of the debt, (the creditor refusing to sell without his consent,) at a time when the property would not be likely to bring its full value, and the property should bring less than its real value, he (the surety) will buy it, and hold it for the common benefit of himself and his co-sureties,—is supported by a sufficient consideration; and the purchase being made in accordance therewith, the surety is responsible to his co-sureties for the property, with its proceeds and profits, and for all losses which the ordinary care and diligence of trustees could have prevented, and should be allowed the sum paid for the property, with interest, unless he has been otherwise reimbursed. *Steele v. Brown*, 18 Ala. 700.

2. Where the lands of the principal are sold under execution, and purchased by one of his sureties with money belonging to himself and a co-surety, another surety cannot claim to participate in the benefit of the purchase, as an indemnity against their common liability. *Crompton v. Vasser*, 19 Ala. 259.

3. A mortgage, given to one surety for his indemnity against a particular debt, enures to the benefit of his co-surety; and he cannot apply the funds, to the prejudice of his co-surety, to any other debt than that specified in the mortgage. *Steele v. Mealing*, 24 Ala. 285.

4. If such mortgage contains a power of sale upon default being made in the payment of the debt, and the mortgagee permits the property to be levied on and sold, after the law-day, under execution against the mortgagor, he is chargeable, at the suit of his co-surety, with its value; but the latter must allege such neglect in his bill, or he cannot charge the mortgagee with it. *Ib.*

5. The mortgagor's cotton having been levied on, the mortgagee became surety on the replevy bond, and the cotton was delivered to the mortgagor, who shipped it to Mobile, where it was sold by the consignees, and the proceeds applied to the payment *pro tanto* of a debt due to them by the mortgagor, on which the mortgagee was surety, and which was one of the debts secured by the mortgage. *Held*, that the mortgagee was not entitled, as against his co-surety on the other mortgage debts, to a credit for what he was compelled to pay on the replevy bond. *Ib.*

6. If such mortgagee repudiates his trust, and thereby compels his co-surety to file a bill to establish it, he is not entitled, on taking the account, to commissions for selling the property. *Ib.*

7. The creditor is also entitled to the benefit of all securities placed by the principal debtor in the hands of the surety, to be applied to the payment of the debt. *Branch Bank at Mobile v. Robertson*, 19 Ala. 798; *Cullum v. Branch Bank at Mobile*, 23 Ala. 797.

8. A surety is entitled, on paying off the debt of his principal, to be subrogated to all the creditor's securities and equitable remedies for his reimbursement; but he can acquire no greater rights than the creditor himself had. *Colvin v. Owens*, 22 Ala. 782; *Houston v. Branch Bank at Huntsville*, 25 Ala. 250.

9. G. executed a deed of trust, to secure the acceptors of two bills of exchange, one of which, drawn by himself, and endorsed and accepted for his accommodation, was negotiated and held by the Branch Bank at Huntsville; and the other, to which he was no party, but which was drawn, endorsed and accepted for his accommodation, was negotiated and held by

the Branch Bank at Decatur. The latter debt was extended under the act of 1837; the bill delivered up to the drawer, and canceled; a new note executed by him, with the other endorser and G. as sureties; and another deed thereupon executed by G. to secure the payment of this note. *Held*, that the payment of this note by the surety did not entitle him, under the equitable doctrine of subrogation, to share in the security afforded by the first deed. *Houston v. Branch Bank at Huntsville*, 25 Ala. 250.

10. A trustee, who held possession of a tract of land of which one half belonged to an infant, purchased her interest from her father, who afterwards conveyed a slave to her in payment of the purchase-money; but the contract of sale being subsequently rescinded, the trustee received from the father, in lieu of the repayment of the purchase-money, a stock of goods, and an indemnity against liability for rents. The infant having filed a bill against her tenant in common and the trustee, for a partition of the land, and an account of the rents and profits, the trustee filed a cross bill, alleging, in addition to these facts, the insolvency of the father; and asking that the plaintiff might be compelled to elect, whether she would hold the slave, or proceed for the rents; and that he might be subrogated to her rights in the slave, in the event of her election to proceed for the rents. *Held*, that the cross bill contained no equity. *Horton v. Sledge*, 29 Ala. 478.

11. The right of contribution among sureties results, not from any implied contract between them, but from an acknowledged principle of natural justice, which requires that those who voluntarily assume a common burden should bear it in equal proportions. *White v. Banks*, 21 Ala. 705; *Tyus v. DeJarnette*, 26 Ala. 280.

12. If a surety obtains indemnity for valuable consideration paid by him, his co-surety cannot, without paying his proportion of the consideration, claim the benefit of the indemnity; and if an offer of security be made to them, by their principal, upon condition that they execute a release to him which offer is accepted by one, and refused by the other, the latter would have the right to demand that the proceeds of such security should be applied to the reduction of the common debt, but could not claim the benefit of it in any other manner; and such payment, if it amounted to his proportion of the common debt, would discharge the former from contribution. *White v. Banks*, 21 Ala. 705.

13. Plaintiffs and defendant being bound as sureties for one S., to whom defendant was indebted, S. proposed to release defendant from his liability as surety, by giving a new note with other sureties, if defendant would give him a sight draft on his commission-merchant for the amount of his indebtedness; or, if he failed to procure defendant's release, that he would then place defendant's notes in the hands of a third person, to protect him alone against his suretyship,—*held*, that plaintiffs' assent to this arrangement was an express waiver of their right to participate in this indemnity. *Tyus v. DeJarnette*, 26 Ala. 280.

14. But a waiver by plaintiffs, in such case, of their legal right to participate in any indemnity or security which defendant might obtain, cannot be inferred from the facts, that they objected to their principal making an assignment for the benefit of his sureties, because it would injure his credit, and agreed that he might procure defendant's release from his suretyship, if the latter would pay the amount of his individual debt; and that defendant then said, in their hearing, that he should take measures to secure himself, if their principal failed to carry out this arrangement for his relief. *Ib.*

15. When parties stand *in equali jure*, with reference to liabilities arising *ex contractu*, equality of burden becomes equity; but this equality may be destroyed by subsequent contract, or by the act of one party in superinducing the loss. *Crayton v. Johnson*, 27 Ala. 503.

16. A surety cannot come into equity to enjoin an action at law for contribution, when his bill shows that he has a plain, adequate, and complete remedy at law, and he does not ask a discovery. *Ib.*

TRUSTS.

I. EXPRESS.

1. *How Created, Discharged, or Enforced.*
2. *Appointment of Trustees.*
3. *Estate and Title of Trustees.*
4. *Compensation of Trustees.*
5. *Duties and Liabilities of Trustees.*
6. *Charges and Expenses of Trust Estate.*
7. *Purchases by Trustees at their own Sales.*
8. *Rights and Remedies of Cestuis que Trust and Trustees.*
9. *Resignation and Removal of Trustees.*

II. IMPLIED, OR CONSTRUCTIVE.

1. *Generally.*
2. *Between Debtor and Creditor.*
3. *Between Executor or Administrator and Heir or Legatee.*
4. *Between Parent and Child.*
5. *Between Partners.*
6. *Between Principal and Agent.*
7. *Between Tenants in Common.*

As to implied trusts between sureties, and between vendor and purchaser, see those respective titles.

I. EXPRESS.

1. *How Created, Discharged, or Enforced.*

1. Where a debtor conveys by deed all his property, both real and personal, to a trustee, in trust, 1st, that he will make to the grantor a reasonable allowance for the support and maintenance of his family, and for the education of his children; 2dly, that he will pay all the grantor's debts, and the debts incurred in the execution of the trust; and, 3dly, that he will convey the legal title to the residue of the property to the grantor's children; and delivers the deed, as also the possession of the property, to the trustee, who accepts the trust,—the trusts become perfect, and cannot be afterwards divested or revoked by any act of the grantor or trustee. *Andrews v. Hobson's Adm'r*, 23 Ala. 219.

2. In such case, a court of equity will enforce the trust, at the instance of the grantor's children; and if the bill alleges that all the debts have been paid, the creditors are not necessary parties to the bill. *Ib.*

3. Where slaves are delivered to the husband by the wife's father, with the understanding that they are intended for the wife, and are to be secured by deed of trust to her and her children, the presumption of a gift to the husband is thereby repelled; and a deed afterwards executed, in pursuance of such understanding, will vest the legal title, as against him, in the trustee. *Gunn v. Barrow*, 17 Ala. 743.

4. Where a father executes in favor of his daughter an instrument which he supposes creates in her a separate estate, but which is ineffectual as a conveyance, and on her marriage delivers the property to her husband, under the mistaken belief that the instrument secures it to her sole and separate use; and the husband accepts it under a similar belief,—a trust arises in favor of the wife, which a court of equity will enforce against the husband and his execution creditors. *Betts v. Betts*, 18 Ala. 787.

5. Equity will not enforce, in favor of a volunteer, a purely voluntary executory trust; but, where the relation of trustee and *cestui que trust* has been fully established, it may be enforced, even in favor of a mere volunteer. *Crompton v. Vasser*, 19 Ala. 259.

6. A bill which seeks to enforce the execution of a trust, in the name, and for the benefit of a mere volunteer, must allege a declaration of the trust in his favor. *Ib.*

7. The removal of a trustee from the State, without having executed the trust, gives a court of chancery authority to execute it. *Cullum v. Branch Bank at Mobile*, 23 Ala. 797.

8. A trust created by parol, whether express or implied, may also be discharged by parol. *Owens v. Collins & Langworthy*, 23 Ala. 837.

As to trusts established by parol in the face of written instruments, see MORTGAGES, 5–23.

2. *Appointment of Trustees.*

9. The acts of 1843 and 1846, (Clay's

Digest, 350 § 33 ; Session Acts 1845–6, p. 16,) conferring upon registrars in chancery power to appoint trustees in certain cases, are not unconstitutional, in vesting *quasi* judicial power in officers who are not elected, commissioned and qualified, as judges are required to be by the constitution. *Gaines v. Harvin*, 19 Ala. 491.

10. *Semble*, that the proceedings of the registrar, in the appointment of a trustee, cannot be collaterally impeached. *Ib.*

11. Under a bill filed by a married woman, asking the reformation of an ante-nuptial contract, an injunction against her husband's judgment creditors, and general relief, if it appears that the trustee named in the deed has resigned, the chancellor may appoint another in his stead. *Love v. Graham*, 25 Ala. 187.

3. *Estate and Title of Trustees.*

12. Where property is conveyed by deed to one person, "in trust, and for the use and benefit" of another, the legal title is vested in the trustee, although the deed contains covenants of warranty to both him and the beneficiary. *Norton and Wife v. Linton*, 18 Ala. 690.

13. The legal title continues in the trustee, so long as may be necessary to protect the equitable rights of the beneficiary; that is, until the legal title can be united with the equitable. *Peake v. Yeldell*, 17 Ala. 636 ; *Gunn v. Barrow*, 17 Ala. 743.

14. When the objects of a trust have been fully performed, the title of the trustee ceases, and the legal as well as the equitable title then vests in the beneficial owner, unless it clearly appears to have been the intention of the grantor that the legal title should continue in the trustee. *Comby v. McMichael*, 19 Ala. 747.

15. Where the legal title to slaves is bequeathed to executors as trustees, their title will not be continued beyond the time contemplated by the will for its determination. *Powell v. Glenn*, 21 Ala. 458.

16. Where slaves are conveyed by deed to a trustee, his heirs, executors and administrators, in trust for the sole and separate use of a married woman during her life, "and after her death for the use, benefit and behoof of her children by her present husband, and their heirs forever,"—the title of the trustee does not cease at the death of the first taker. *Bryan and Wife v. Weems*, 29 Ala. 423.

4. *Compensation of Trustees.*

17. Compensation, when applied to trustees, means but little (if anything) more than a liberal indemnity. *Gould v. Hays*, 25 Ala. 426.

As to the compensation of executors and administrators, see EXECUTORS AND ADMINISTRATORS, 53–62, p. 162.

5. *Duties and Liabilities of Trustees.*

18. Whether a trustee is responsible for a loss which ensues, where he lends the trust funds upon personal security alone, *quære? Lewis v. Cook & Mitchell*, 18 Ala. 334.

19. A trustee for a married woman, having taken upon himself the execution of the trust, cannot allege fraud in the execution of the deed, as a defense to a suit, instituted by the beneficiary, to reform the deed, and to enjoin the judgment creditors of her husband from levying their executions on the property. *Godwin v. Yonge*, 22 Ala. 553.

20. A trustee for a married woman and her children, under appointment from the chancery court; knowing, at the time of his acceptance, that the deed creating the trust was fraudulent as to creditors,—assumes all the duties, liabilities, and disabilities which attach to ordinary trustees, and is estopped from setting up against the beneficiaries the claims of creditors, or his own claims as surety of the debtor. *Henderson v. Segars*, 28 Ala. 352.

21. A trustee under an assignment for the benefit of creditors, when sued for a settlement and account of the trust, is not estopped from showing that the actual amount of any assigned debt is less than that specified in the deed, and is only accountable for the actual amount of it. *Royall's Adm'r v. McKenzie*, 25 Ala. 363.

22. If such trustee accepts the trust, and then voluntarily permits his co-

trustee to take the entire management, control and possession, he is liable equally with his co-trustee to account; and on a bill being filed against both, for an account and settlement of the trust, he is an incompetent witness for his co-defendant, to prove the insolvency of the debtors. *Ib.*

23. Where such assignment consists principally of notes and accounts under twenty dollars, against debtors who reside in the same district with the trustee, the latter should be allowed, in the absence of all special cause, twelve months from his acceptance of the trust for the collection of the debts, and should be charged with interest on the available assets from the expiration of that time. *Ib.*

24. If the assignor agrees with the trustee, after the lapse of a sufficient time for closing the assignment, that, on the latter confessing judgments in favor of certain preferred creditors, the balance shall stand open for future adjustment, the trustee should nevertheless be charged with interest on that balance from that time. *Ib.*

25. The trustee's own note, when included in the assignment, should be charged as cash in his hands from the time of its maturity. *Ib.*

26. It is the duty of the trustee, to use all necessary means, by suit or otherwise, to realize the debts; and if a debt is lost by his neglect of this duty, when the debtor had property sufficient to pay, he is personally responsible for the loss, although he may have acted without any improper motive. *Ib.*

27. If the trustee receives lands, without the sanction of the beneficiaries, in settlement and satisfaction of the assigned debts, equity will hold him responsible for whatever loss may ensue, and, if the beneficiaries so elect, will treat the lands as his own individual property. *Ib.*

28. He cannot compromise the debts, without the consent of the beneficiaries, unless the deed confers that authority on him. *Ib.*

29. If he buys up the secured debts, at less than their nominal value, he is only entitled to a credit for the amount actually paid by him. *Ib.*

30. He is chargeable with the amount of an assigned debt, although the evidence is conflicting as to the debtor's solvency, upon proof that he had a settlement with the debtor, and paid him in cash the balance found in his favor; also, with rents accruing under a lease included in the assignment, upon his own admission of the lease, and proof of the lessee's solvency; also, with the value of articles of personal property embraced in the assignment, to which he is shown to have asserted title, although he denies that they ever came to his possession. *Ib.*

31. The purchases of trustees, when made in obedience to the duties of the trust, impose upon them a personal liability: the seller must look to them for payment, and they must look to the trust estate for reimbursement. *Jones v. Dawson*, 19 Ala. 672; *Sanford v. Howard*, 29 Ala. 684.

6. *Charges and Expenses of Trust Estate.*

32. *Cestuis que trust* for life, who are in possession of the trust estate, are liable for all current expenses attending the enjoyment of the property; and such expenses constitute no charge upon the *corpus* of the trust. *Jones v. Dawson*, 19 Ala. 672.

33. Expenses, properly incurred by a trustee in the execution of his duties, are a charge or lien upon the trust estate; but persons employed by him, in and about the business of the trust property, must look to him personally for payment, and cannot proceed directly against the trust fund. (DARGAN, C. J., dissenting from the latter proposition.) *Ib.*

34. The purchases of trustees, when made in obedience to the duties of the trust, impose upon them a personal liability: the seller must look to them for payment, and they must look to the trust estate for reimbursement. *Sanford v. Howard*, 29 Ala. 684.

7. *Purchases by Trustees at their own Sales.*

35. A purchase by an administrator at his own sale, to be valid, must be fair and *bona fide:* if it appears that he purchased the property at less than its value, never accounted for the proceeds, and is insolvent, chancery will set aside the sale, not only as

against him, but as against purchasers under him with notice. *McCartney v. Calhoun*, 17 Ala. 301.

36. If he obtains an order of sale from the probate court, after the administration of the estate has been removed into chancery, and becomes himself the purchaser at his sale, the chancery court will provide that the property shall be forthcoming to abide the final decree in the cause. *Pearson v. Darrington*, 21 Ala. 169.

37. Where an executor made an arrangement with the creditors of the estate, by which he obtained indulgence on the debts, and was thus enabled to purchase some of the property at a sale under an order of the chancery court, which was had by consent, he was held to have purchased for the estate, and not for himself individually; there being, also, some evidence of his declarations, at the time of the sale, that he was purchasing for the estate. *Montgomery v. Givhan*, 24 Ala. 568.

38. A mortgagee or other trustee, who becomes himself the purchaser at a sale made without a decree of foreclosure, cannot thereby deprive the mortgagor or beneficiary of his right of redemption, nor create an adverse interest in himself. *Gunn v. Brantley*, 21 Ala. 633.

39. Where the defendant in execution had conveyed his property by deed of trust, and both he and the beneficiary, knowing that the sheriff had advanced the money on the execution, afterwards assented to a sale of the property under an *alias fi. fa.*, for the purpose of refunding to the sheriff the amount advanced by him, at which sale the trustee himself became the purchaser, equity will protect the trustee, against the suit of the *cestui que trust*, to the extent of the purchase-money advanced by him; but the trustee's equity extends only to his protection, and if he re-sells the property at an advanced price, the profit enures to the benefit of the trust estate. *Houston v. Crutchfield's Adm'r*, 22 Ala. 76.

40. A trustee's purchase at his own sale is liable to be set aside in equity, if the *cestuis que trust* make known their satisfaction within a reasonable time; provided they have never ratified or confirmed the sale, after being informed of every fact connected with it, within the knowledge of the trustee, necessary to enable them to form a correct judgment. *Andrews v. Hobson's Adm'r*, 23 Ala. 219.

41. The beneficiaries are not concluded by their grantor's ratification of the trustee's purchase, where the trust is voluntarily created by a father in favor of his minor children, and perfected by the delivery of the deed and the acceptance of the trustee. *Ib.*

42. A trustee's purchase at his own sale is not absolutely void, but voidable merely at the option of the beneficiaries seasonably expressed; but this principle, as applicable to purchases by executors and administrators, is subject to the qualifications settled by the previous decisions of this court. *Charles v. Dubose*, 29 Ala. 367.

43. The *cestui que trust* cannot have a decree setting aside a sale, when his bill denies that there was any sale; as where the allegation is in these words: "Your orator further showeth, that said defendant pretends that he has heretofore sold said property, as trustee as aforesaid, and purchased the same at said sale upon his own individual account; but your orator insists, that if such is the case, which he denies, said defendant bought the same at a grossly inadequate price, and it would be contrary to equity and good conscience to maintain the validity of the sale." *Ib.*

44. A bill, filed by the *cestui que trust*, seeking to set aside a sale at which the trustee became the purchaser, must contain an offer, or what is equivalent to an offer, to repay to the trustee the amount actually paid by him; but, if the bill alleges that the rents and profits received by the trustee are sufficient to reimburse him, and the plaintiff offers, if they are not sufficient, "to abide the decree of the court,"—this is sufficient. *Gunn v. Brantley*, 21 Ala. 633. (See the same principle applied in case of a constructive trust, in *Martin's Heirs v. Tenison*, 26 Ala. 738.)

45. Where the trustee's purchase is set aside, on the application of the beneficiaries, he is not entitled to compensation for improvements made by him on the land. *Ib.*

8. *Rights and Remedies of Cestuis que Trust and Trustees.*

46. A court of equity will not interfere, at the instance of one of the *cestuis que trust*, (the others being minors,) to compel the trustee to do an act which would violate the directions of the instrument creating the trust, and subject him to liability. *Lewis v. Cook & Mitchell*, 18 Ala. 334.

47. The *cestuis que trust* cannot compel the trustee to convey until his demands against the trust estate are satisfied. *Jones v. Dawson*, 19 Ala. 672.

48. Where the estate of the wife is secured, by ante-nuptial contract, to her sole and separate use during her life, and the naked legal title is vested in her husband as trustee, she is entitled, on application to a court of equity, to the possession and control of the property, when most of it is of such a character that its enjoyment consists in its use and possession, and it does not appear that she is incompetent to manage it, or that her possession would be inconsistent with the rights of any of the beneficiaries. *Roper v. Roper*, 29 Ala. 247.

49. Under a bill seeking the removal of the husband from the trusteeship, if the evidence does not establish sufficient ground for his removal, but shows that he assumed, through misapprehension of his own rights, the exclusive control and management of the trust property, the wife is entitled to a decree against him, establishing her in the possession and control of the property. *Ib.*

50. The rule is well settled, that if the trustee delays the assertion of his rights until he is barred by the statute of limitations, the *cestui que trust* will also be barred. *Bryan and Wife v. Weems*, 29 Ala. 423.

51. Where the separate property of the wife is allowed by her trustee to remain in the possession of her husband, who, at his death, disposes of it by his will; and the trustee is cognizant of facts which are sufficient to charge him with implied notice of the general provisions of the will before it is admitted to probate,—the adverse possession of the husband's executor, as against the trustee, commences to run from the probate of the will and possession under it. *Ib.*

52. The trustee in a deed of trust for the benefit of creditors, when sued at law by one of the beneficiaries, may, with the assent of the grantor, defeat a recovery, by showing that the deed was obtained by fraud, or that the debt has been paid. *Drake v. Moore*, 18 Ala. 597.

53. A trustee for a married woman, having taken upon himself the execution of the trust, cannot allege fraud in the execution of the deed, as a defense to a suit, instituted by the beneficiary, to reform the deed, and to enjoin the judgment creditors of her husband from levying their executions on the property. *Godwin v. Yonge*, 22 Ala. 553.

54. A trustee for a married woman and her children, under appointment from the chancery court; knowing, at the time of his acceptance of the trust, that the deed creating it was fraudulent as to creditors,—is estopped from setting up against the beneficiaries the claims of creditors, or his own claims as surety of the debtor. *Henderson v. Segars*, 28 Ala. 352.

55. If such trustee sells the trust property, under a power of attorney from the wife; applies the proceeds of sale, with her consent, to the payment of the debts on which he was bound as surety; obtains her receipt, showing that the proceeds had been applied for her support, and uses it as a voucher on the settlement of his trusteeship,—equity will not recognize such an execution of the trust, but will set aside the settlement on the application of the beneficiaries; and the trustee will be held estopped from insisting that the proceeds were applied as the court, on a proper application, would have directed. *Ib.*

56. A trustee, who is also the principal beneficiary, in a deed of trust for the benefit of creditors, may come into equity, on behalf of himself and the other beneficiaries, to prevent the sale of the property under executions and attachments at law, to foreclose the deed, and to settle the conflicting liens. *Ala. Life Insurance & Trust Co. v. Pettway*, 24 Ala. 544.

57. A trustee cannot come into equity, to enforce the collection of a purely legal demand, for which his remedy at law is adequate, specific, and per-

fect: the mere fact, that the proceeds of the demand, when collected, will be trust property, does not give chancery jurisdiction. *Kimball v. Moody*, 27 Ala. 130.

58. A bill filed against a trustee, by persons who show an interest in the trust fund, to prevent its waste and misapplication, is sufficient to uphold the jurisdiction of the court on motion for a prohibition, although it might be defective on demurrer. *Ex parte Walker*, 25 Ala. 81.

59. A bill for the reformation of an ante-nuptial contract should be filed by the beneficiary, where the naked legal title only is vested in her trustee; and if filed by the trustee alone, it may be dismissed for want of equity. *Stone v. Hale*, 17 Ala. 557.

9. *Resignation and Removal of Trustees.*

60. If the deed creating the trust makes no provision for the resignation of the trustee therein appointed, there are but two ways in which, after having once accepted the trust, he can resign it; that is, in the summary manner prescribed by the statute, (Clay's Digest, 581, § 2,) or by the permission of the chancery court: an instrument in writing, executed by the trustee, purporting to be a resignation of his trust, and a transfer of the trust estate to another person as trustee, with the consent and approbation of the beneficiary, creates no vacancy in the trusteeship, until ratified by the court. *Drane v. Gunter*, 19 Ala. 731.

61. Where a sum of money is bequeathed to a trustee, to be put at interest for the benefit of the *cestui que trust;* and the trustee lends it out at the legal rate of interest in the State in which the testator resided at the time of his death, and in which the funds then were,—he will not be removed from the trust, on account of his refusal to put the money at interest in another State, where the legal rate of interest is higher. *Lewis v. Cook & Mitchell*, 18 Ala. 334.

62. Where the wife filed her petition in the chancery court, alleging her husband's incapacity and unfitness to act as her trustee, and asking that another trustee might be appointed to take charge of certain funds in court, which she held as her separate estate under the act of 1850; and the evidence, while it failed to establish the husband's alleged incapacity and unfitness, showed that the wife had abandoned him without sufficient cause, and had removed beyond the jurisdiction of the court with another man,—the petition was dismissed, at the costs of the petitioner's next friend. *Manning v. Manning*, 24 Ala. 386.

63. Where the wife's bill, seeking to compel the specific execution of an agreement to make a settlement, does not allege that she is separated from her husband on account of his improper conduct, or that he intends to remove from the State without her, or that she has reason to apprehend a denial of her right to the property settled on her by the court, or that his habits render him incapable and unfit for the discreet and proper management of the estate,—the court will not appoint another trustee in his stead, nor forbid his interference with the property. *Andrews v. Andrews*, 28 Ala. 432.

64. If the husband, by fraudulent design, or in disregard of the rights of the wife, or through indifference to the duties of his office, assumes the exclusive control and management of the trust property, a court of equity will remove him from the trusteeship; but, when his assumption of such authority is shown to be the result of a mere misapprehension of his own rights, and the trust estate has suffered no injury thereby, it is not a sufficient ground of removal, though it entitles the wife to a decree establishing her in the possession and control of the property; nor will he be removed on account of a mere disagreement between him and his wife, which is not shown to have originated from his culpable conduct. *Roper v. Roper*, 29 Ala. 247.

II. IMPLIED, OR CONSTRUCTIVE.

1. *Generally.*

65. A court of chancery, looking only to the equities of parties, regards the holder of the naked legal title as a trustee for the benefit of all parties

equitably interested. *Pool v. Cummings & Co.*, 20 Ala. 563.

66. The assignee of a title-bond, who is apprised at the time of the transfer that a portion of the land had been previously sold to another, and who afterwards takes to himself a conveyance of the entire tract, will be held in equity a trustee of the legal title, for the benefit of the prior purchaser. *Dickinson & Winn v. Any*, 25 Ala. 424.

67. Where the purchaser of slaves at execution sale left them in the possession of the defendant in execution, under a written agreement that the latter might be allowed to re-purchase them, at a stipulated sum, within a specified time; and the defendant borrowed the money, and paid it over to the purchaser, who afterwards, without defendant's assent, assigned his bill of sale from the sheriff to the lender,—*held*, that the assignee could not assert a claim to the slaves for the reimbursement of the money which he had advanced to the defendant. *Turney's Adm'r v. Morrow*, 26 Ala. 339.

68. Plaintiff's land was sold under execution, and bought in by defendant at about one-sixth of its real value. At the time of the sale, defendant declared to several persons that he was buying in the land for plaintiff, and requested them not to bid for it; and after the sale, on several occasions, he declared that he had bought it for plaintiff, and that plaintiff was to have it on the repayment of the money by the next term of the court. Within a month after the sale, when defendant had paid nothing on the execution, plaintiff had an interview with him, went with him to the sheriff's office, and there counted out and paid, in his presence, the amount of the bid, which was thereupon credited on the execution. *Held*, that these facts made out a clear case of resulting trust. *Caple v. McCollum*, 27 Ala. 461.

69. A bill filed by the heirs-at-law of a decedent, seeking to hold the defendant a trustee for their benefit of the legal title to a certain tract of land, to which (as they averred) their ancestor had a pre-emption right at the time of his death, and to which the defendant, by fraudulently colluding with one of the heirs, obtained a patent,—*held* defective on demurrer, because it did not allege, 1st, that the time prescribed by acts of congress for their ancestor to make his entry had not expired when defendant entered the land; 2dly, that plaintiffs were able and willing to enter the land, if it had not been entered by defendant, or that his entry prevented them from doing so; and, 3dly, a tender of the money expended by defendant in making the entry, or a willingness and readiness on the part of plaintiffs to repay it. *Martin's Heirs v. Tenison*, 26 Ala. 738.

70. The resulting trust which, in equity, arises in favor of the person who advances the purchase-money of land, is founded upon presumptive intention, and is designed to carry that intention into effect: it will not be created in opposition to the declarations of the person who advances the money, nor in opposition to the obvious purpose and design of the transaction. *Hatton v. Landman*, 28 Ala. 127.

71. An executor, while keeping his testator's estate together under the directions of the will, drew his bill of exchange, in favor of one D., which was accepted for accommodation by K. A. & H., and then discounted in bank. The executor applied a small portion of the proceeds to the discharge of the debts of the estate, and loaned the residue to said D., as money belonging to the estate. D. afterwards confessed judgment, in favor of the executor, for the amount of his indebtedness to the estate, including this sum, and became insolvent. The executor also became insolvent, and removed from the State. A succeeding administrator collected a portion of the judgment, not exceeding the amount of the debt due to the estate; and the acceptors, after paying the bill, filed their bill in equity against him, claiming the right to share in the sum collected. *Held*, that the bill contained no equity. *Kirkman, Abernathy & Hanna v. Benham*, 28 Ala. 501.

72. The statute of frauds has no application to trusts created by operation of law alone, which may always be established by parol, except where some rule of evidence prevents. *Caple v. McCollum*, 27 Ala. 461.

2. *Between Debtor and Creditor.*

73. If an insolvent debtor convey his property by deed to one of his creditors, accompanied by a parol agreement that the conveyance shall operate only for the grantee's indemnity, equity will set aside the conveyance, at the instance of the other creditors; and if the grantee has sold the land to a *bona-fide* purchaser for valuable consideration, who is not made a party to the bill, although the land itself cannot be subjected to the creditors' demands, the proceeds of sale may be subjected, and so far as any portion of the same can be traced into other property purchased or procured in exchange by such fraudulent grantee, equity will fasten a trust upon it in favor of the creditors. *Bryant v. Young & Hall*, 21 Ala. 264.

74. The fact that the fraudulent grantee was also a creditor of the grantor, does not give him a superior equity to the other creditors. *Ib.*

75. Equity regards the capital stock and assets of a foreign banking corporation, which has suspended payment and become insolvent, as a trust fund for the payment of its creditors, and the directors, stockholders and agents as trustees. *Bank of St. Mary's v. St. John, Powers & Co.*, 25 Ala. 566.

76. If such bank allows its stockholders to withdraw its funds, to the amount of their subscriptions, and to use them, without security, in their private business,—this is a fraud on its creditors, which renders the directors liable in equity for the amount so withdrawn, and each agent who participated in the fraud individually responsible for the amount traced to his hands, and for all profits made from its use. *Ib.*

77. If such bank, when on the eve of insolvency, and having out notes which it cannot redeem, extends the debt of a solvent stockholder for money lent, by taking his notes, payable at two and three years, with its president as sole surety,—this is a fraud on its creditors, and entitles them to proceed in equity directly against such debtor, without a judgment at law, or process of garnishment. *Ib.*

3. *Between Executor or Administrator and Heir or Legatee.*

78. Where property is bequeathed to an executor, in trust for a specific object which fails or is declared invalid, he takes no personal interest in it, but a resulting trust then arises in favor of the next of kin. *Abercrombie's Executor v. Abercrombie's Heirs*, 27 Ala. 489.

79. If an administrator purchases property, real or personal, with the money of the estate, and afterwards resells it at a profit, the benefit of the purchase enures to the estate, and not to himself individually. *Mosely v. Lane*, 27 Ala. 62.

80. If he agrees with his co-administrator, that they will buy certain lands for the estate at the Government land sales, and thereby procures him, in compliance with that agreement, to join in raising funds for that purpose; charges the estate with the expense of raising those funds; prevents his co-administrator and the decedent's only adult son from attending the sales, by assuring them that he will buy the lands for the estate; prevents other persons at the sale from bidding for the lands, by declaring that he had come expressly to buy them for the estate; buys the lands by these means, and with these funds, for a sum greatly below what he would otherwise have had to pay for them; takes the title in his own name, and soon afterwards resells them at a large profit,—he is estopped in equity, as against those representing the estate, from denying that the funds belonged to the estate. (CHILTON, C. J., *dissenting.*) *Ib.*

81. If the agreement was to purchase the lands "for the estate," and the administrators knew at the time that the estate was free from debt, the resulting trust enures to the benefit of the residuary legatees. (CHILTON, C. J., *dissenting.*) *Ib.*

4. *Between Parent and Child.*

82. The mere fact that the purchase-money is advanced by a parent, while the conveyance is taken in the name of a child who is not shown to be provided for, is not sufficient to raise the

presumption of a resulting trust. *Hatton v. Landman*, 28 Ala. 127.

83. Two sisters filed a bill, against the widow and devisee of a deceased brother, to establish a resulting trust in lands purchased by the decedent in his own name, but paid for with money advanced by his mother. The plaintiffs were of lawful age when the purchase was made; the bill was filed after the expiration of more than nine years from the death of the old lady, and more than three years after the death of the son; and the only excuse alleged for the delay was disproved. The plaintiffs' evidence consisted principally of the old lady's declarations, made in her son's presence, that her money had paid for the land; the son's admissions of that fact; and his promise to his mother, that he would "do what was right between his sisters, after she was gone, in relation to the land." The other evidence in the cause showed, that the son lived with his mother, and managed her business, for six or seven years before the purchase was made, and from that time until her death; that his services to her, for which he was not shown to have received any compensation, were worth more than the price of the land; that he was an economical and industrious man; and that his mother knew, several years before her death, that he claimed the land as his own. The court held, that the declarations of the parties were reconcilable with the non-existence of the trust, or with its waiver and discharge before the old lady's death; and refused to establish the trust. *Ib.*

5. *Between Partners.*

84. By written contract between plaintiffs and one P., for the entry and purchase in partnership of lands to be used for mining purposes, it was stipulated that plaintiffs should advance the money, which was "to be refunded, with interest, out of the first funds realized by the company;" and that P. should enter the lands which he deemed most suitable, and superintend the working of the mines. P. entered several tracts of land in his own name, with money advanced by plaintiffs, and afterwards transferred them to plaintiffs, to whom patents were subsequently issued. Some of these lands were sold under execution against P., before the issue of plaintiffs' patents, and were purchased at the sale by the judgment creditor, against whom plaintiffs filed their bill, praying a sale of the land, the reimbursement of the moneys expended by them in payment of the purchase-money, taxes, &c., and the distribution of the residue of the proceeds of sale according to the terms of the contract. *Held*, that the plaintiffs were entitled to relief against the purchaser at execution sale, who only succeeded to the rights of P.; that the registration of his deed by the purchaser, coupled with the plaintiffs' failure to have the written evidence of their claim recorded, did not add any potency to the purchaser's title; and that the written contract of partnership, and the receipts subsequently executed by P. to the plaintiffs for moneys advanced by them, were admissible evidence for the plaintiffs. *Pool v. Cummings & Co.*, 20 Ala. 563.

85. When money is advanced by one partner, out of his individual funds, to be invested, with other moneys belonging to the partnership, in the purchase of real estate for the benefit of all the partners; and the purchase is made by another partner, who takes the legal title in his own name,—a trust is created in favor of the partners individually, which equity will enforce. *Owens v. Collins & Langworthy*, 23 Ala. 837.

86. But the partner thus advancing his money has the right, at any time before the appropriation is actually made, to change his intention, and direct a different application of the money; and the subsequent application of his funds, in the manner which he had first authorized, would create a trust, if at all, in his favor alone. *Ib.*

87. If the bill seeks to enforce a trust, growing out of partnership transactions, between plaintiffs and defendant, or a joint trust in favor of plaintiffs individually, while the evidence shows a separate trust in favor of one of the plaintiffs only, the variance is fatal. *Ib.*

88. The allegations of the bill in this case, as to the purchase of lands

with partnership funds, being denied by a sworn answer; the plaintiff's only proof consisting of verbal admissions, casually made, and detailed after the lapse of fifteen or eighteen years by witnesses whose accuracy was shown to be unreliable; there being, also, proof of similar admissions on the part of the plaintiff; and no reason being shown for his long delay in the assertion of important rights unjustly withheld from him, when he was in destitute circumstances,—the evidence was held insufficient to establish a resulting trust in the lands. *Garrett v. Garrett's Heirs*, 29 Ala. 439.

89. If the damaged goods of the firm are sold at auction on account of the insurers, and purchased by one of the partners, the benefits of the purchase enure to the firm, and not to himself individually. *Zimmerman v. Huber*, 29 Ala. 379.

6. *Between Principal and Agent.*

90. If an agent to sell become himself the purchaser, without his principal's consent, he will be held a trustee of the legal title for the benefit of his principal. *Walker v. Palmer*, 24 Ala. 358.

91. If such agent is surety of his principal on the notes given for the purchase-money, the deed taken to himself from his principal's vendor would give him a lien to the extent of the money paid by him; but if he had other moneys of his principal in his hands at the time of the purchase, his lien would be diminished to that extent. *Ib.*

7. *Between Tenants in Common.*

92. Where one tenant in common, having obtained a conveyance from his co-tenant for the purpose of mortgaging the entire estate, and bound himself to reconvey one half of the land after the mortgage is raised, rents out the premises, and collects the rents, he becomes, as to these rents and profits, a trustee by implication for his co-tenant, and is chargeable with interest on the amount found in his hands from the time of its receipt. *Tarleton v. Goldthwaite's Heirs*, 23 Ala. 346.

93. The statute of limitations of six years is a bar to a suit for an account of such rents and profits. *Ib.*

USURY.

1. If a contract is usurious in its inception, no renewal of the note, or other change in the form of the contract, can alter its original character, but the taint of usury follows it even into the hands of a *bona-fide* holder, unless he received it through the fraud of the maker. *Pearson v. Bailey*, 23 Ala. 537.

2. If an agent lends his principal's money at a usurious rate of interest, the fact of agency does not affect the illegality of the contract, nor avoid the effect of the statute against usury. *Ib.*

3. An agreement between mortgagor and mortgagee, made contemporaneously with the loan, that the interest shall be converted into principal as it becomes due, is oppressive, unjust, and tending to usury; but, after interest has accrued, it then becomes a debt, and may, by subsequent agreement, be considered a part of the principal, and thenceforth bear interest, provided there is no extortion on the part of the mortgagee. *Eslava v. Lepretre*, 21 Ala. 504.

4. If the interest runs in arrear, and rests are made from time to time in the mortgagee's account of arrears, on which interest is calculated; and finally a general account is had of all arrears, which is signed by the mortgagor, and secured by a second mortgage, executed after the lapse of several years,—the transactions are not usurious, and equity will charge the mortgaged premises with the payment of the sum so found due, where there is no conflicting lien or subsequent incumbrance on the property at the time of this settlement. *Ib.*

5. Where the mortgage debt is created in this State, and the mortgagor, being unable to pay it, afterwards agrees to pay ten per cent. interest, as an indemnity to the mortgagee for interest paid by him on money borrowed in Louisiana at a higher rate of interest than is allowed by the laws

of this State, the agreement is oppressive and unjust, and will not be upheld in equity. *Ib.*

6. Discounting a note on a third person, eleven months before its maturity, at four per cent. per month, and taking the endorsement of the holder, with a mortgage on his property to secure its payment, constitute a usurious loan, and not a *bona-fide* purchase of the note; and if the note and mortgage are then assigned to another person, at the same usurious rate of discount, and with notice of the usurious nature of the transaction, the mortgage is open in his hands to the defense of usury. *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

7. In taking an account of the mortgage fund, to separate the interest of the mortgagee from that of the mortgagor, (an execution having been levied on the latter,) the plaintiffs in execution cannot take advantage of usury in the mortgage debt. *Harbinson v. Harrell*, 19 Ala. 753.

8. Usury, in the transaction in which the mortgage had its origin, may be set up as a defense, *pro tanto*, to a bill for foreclosure; and its effect, if established, is to discharge the party from the payment of any interest whatever on the debt. *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

9. If the borrower comes into equity for relief against a usurious contract, he will be compelled to pay the amount of the principal and legal interest; and if the debt is secured by mortgage, the mortgage stands as a security for that amount. *Pearson v. Bailey*, 23 Ala. 537; also, *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

10. But, where the heirs of the mortgagor come into equity, to redeem the mortgaged premises, to set aside a decree of foreclosure, which was obtained by the creditor in a suit so conducted as to deprive them of the opportunity to appear and plead the usury, and to remove the cloud on their title created by the proceedings in the foreclosure suit, they will not be required to pay any interest whatever on the debt. *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580. (WALKER, J., *dissenting.*)

11. Where a usurious debt has been settled, by the creditor taking the mortgaged property in satisfaction of it, equity will not open the transaction, and allow a redemption, on the ground of usury alone. *Adams v. McKenzie*, 18 Ala. 698.

For other decisions on the subject of usury, see the same title in PART IV.

VARIANCE.

See DECREES, 5–28, pp. 242–3.

VENDOR AND PURCHASER.

I. EQUITABLE RIGHTS AND REMEDIES OF PURCHASER.

1. When a vendor represents his title to be good, it is equivalent to saying that he has a perfect title to the entire tract, unaffected by any gaps in the chain of title, and without any defect or incumbrance whatever. *Smith v. Robertson*, 23 Ala. 312; *Burns v. Taylor*, 23 Ala. 255; *Thrasher & Mitchell v. Pinckard's Heirs*, 23 Ala. 616.

2. An outstanding right of dower, whether perfect or inchoate, is an incumbrance on the title, which renders it defective, and which entitles the purchaser to come into equity to have compensation made out of the unpaid purchase-money. *Thrasher & Mitchell v. Pinckard's Heirs*, 23 Ala. 616.

3. The purchaser may, in such case, refuse to perform an executory contract on account of the incumbrance; or, if he has received a deed, the covenants of which are broken by the existence of such outstanding incumbrance, and the vendor is insolvent, equity will either restrain the collection of so much of the purchase-money as will compensate for the injuries resulting from the breach, or order it to be appropriated to the extinguishment of the incumbrance; but, where

the purchaser has received a deed, and has executed a mortgage on the land to secure the payment of the purchase-money, he cannot resist a foreclosure of the mortgage by setting up the breach of the vendor's covenants, when it is not shown that the vendor is unable to respond in damages for the breach. *McLemore v. Mabson*, 20 Ala. 137.

4. In making an abatement of the purchase-money, at the suit of the purchaser, where his vendor died without making title, and the widow's dower was assigned in part of the land, the purchaser should be relieved, until the death of the widow, of the payment of so much of the purchase-money as may be equal to one third of the value of the premises at the time of the alienation; and the payment of this sum, without interest, at the termination of the widow's life estate, should be secured by a lien on the land. *Springle's Heirs v. Shields & Paulding*, 17 Ala. 295.

5. Under a contract for the sale of three quarter-sections of land, at $1,000 each, the vendor executed to the purchaser a deed for two hundred acres, and a bond for titles to the residue; and the purchaser gave his three notes for the purchase-money, for $1,000 each, the two first falling due being payable absolutely, and the third on condition that full title should be made. The vendor afterwards made title to one hundred and twenty acres of the land embraced in the bond, transferred all the notes for valuable consideration, became insolvent, and removed from the State, without making or being able to make title to the remaining quarter-section of the land. *Held*, that the payment by the purchaser, in good faith, of the first and last notes, with notice of the transfer of the second, did not entitle him to equitable relief against the payment of the latter; it not appearing that the condition annexed to the last note afforded an insufficient indemnity against the damage sustained by the failure to make title. *Graham v. Nesmith*, 18 Ala. 763.

6. Where land, to which the defendant in execution has an equitable title, is levied on and sold by his directions, and the proceeds applied to the satisfaction of the execution; and he delivers up possession to the purchaser, assuring him that the title is perfectly good,—equity will enjoin him from setting up the legal title, subsequently acquired, against sub-purchasers for valuable consideration, who have paid the purchase-money, and received conveyances, without notice of the defect of title. *Stone v. Britton*, 22 Ala. 543.

7. Where the land is sold under execution against the vendor, on a judgment rendered prior to his sale, and bought in by the purchaser, the latter may enjoin the collection of his bid, and all further proceedings under the judgment, if the judgment was paid and satisfied before the issue of the execution. *Brewer v. Branch Bank at Montgomery*, 24 Ala. 439.

8. The purchaser may enjoin a judgment on the notes given for the purchase-money, upon alleging his vendor's fraudulent representations of title, a breach of the warranty of title, and the insolvency of the vendor's estate. *Walton v. Bonham*, 24 Ala. 513.

9. And where he is evicted from the land after the rendition of the judgment, and the defense could not have been made at law, he may enjoin the judgment, if the estate of his vendor is insolvent. *Wray's Adm'rs v. Furniss*, 27 Ala. 471.

10. He may also enjoin the collection of the purchase-money, without regard to the solvency of his vendor, when he makes out a case which entitles him to a rescission of the contract. *Lanier v. Hill*, 25 Ala. 554.

11. But, after accepting a conveyance, he cannot, in the absence of fraud or mistake, enjoin a judgment for the purchase-money as on an executory contract. *Thompson's Adm'r v. Christian*, 28 Ala. 399.

12. Where the purchaser seeks an abatement of the purchase-money, on account of a deficiency in the quantity of land, and does not allege that there was any fraud or mistake in the execution of the deed, the conveyance must be taken as conclusive evidence of the terms of the contract; and if it describes the land as containing a specified number of acres, "be the same more or less," such deficiency does

not entitle him to relief. *Frederick v. Youngblood*, 19 Ala. 680.

13. An honest expression of opinion by the vendor, as to the location of one of the boundary lines, even though erroneous, is not available in abatement of the purchase-money. *Stow v. Bozeman's Executors*, 29 Ala. 397.

14. Where the purchaser seeks to enjoin a judgment on the notes given for the purchase-money, on account of the vendor's false representations as to the title, when he had previously conveyed the land to his children, neither the vendor himself, nor his personal representatives, can insist that a good title passed notwithstanding the deed, because it was made to hinder and delay creditors. *Walton v. Bonham*, 24 Ala. 513.

15. In making an abatement of the purchase-money, it is a proper method of computing interest, to divide the amount of the damages by the number of notes originally given for the purchase-money, and to allow interest on each sum, from the time the notes respectively fell due, to the time when new outstanding notes were substituted. *Ib.*

16. In making an abatement of the purchase-money of two contiguous half-sections of land, which were represented by the vendor to contain 640 acres, but which are rendered fractional by the passage of a navigable river, it is erroneous to compute the damages resulting from the deficiency, by taking into consideration the quality of adjacent lands; but the correct rule is, after first deducting the value of the ferry and river privileges, to compute the average value of the lands per acre at the price agreed to be paid, and to multiply this average by the number of acres deficient. *Ib.*

17. Where the purchaser comes into equity, to obtain a rescission of the contract, but only establishes his claim to a credit on the outstanding notes for the purchase-money for the amount expended by him in entering a portion of the land, which amount is not equal to the unpaid portion of the purchase-money; while the title-bond is conditioned to convey on the payment of the purchase-money, he cannot have a decree for a conveyance of title. *Gallagher v. Witherington*, 29 Ala. 420.

18. A purchaser, holding his vendor's deed with covenants of warranty, and having conveyed in like manner portions of the land to others, may join with such sub-purchasers in a bill against his vendor, for reimbursement of losses sustained from an eviction of an undivided third part of the land under title paramount. *Gannard v. Eslava*, 20 Ala. 732.

19. A purchaser, with covenants of warranty, is a creditor of the vendor, within the statute of frauds, from the time of the execution of his deed, when there is at that time a paramount outstanding title, under which he may be or actually is afterwards evicted; and may, therefore, set aside a voluntary conveyance. *Ib.*

20. When a party purchases land in the possession of a third person, without inquiring into his right or the character of his possession, he is affected with all the equitable rights binding on his vendor, and cannot set up the want of notice to protect himself. *Brewer v. Brewer & Logan*, 19 Ala. 181; *Burns v. Taylor*, 23 Ala. 255.

21. If the purchaser holds only his vendor's bond, conditioned to make title on the full payment of the purchase-money, a sub-purchaser cannot be regarded as a *bona-fide* purchaser for valuable consideration without notice, although he saw in his vendor's possession his notes for the purchase-money; the conditional bond is sufficient to put such purchaser on inquiry, and, therefore, to charge him with notice. *Bradford v. Harper*, 25 Ala. 337.

22. Who are, or not, *bona-fide* purchasers for valuable consideration without notice, against whom an unrecorded mortgage is void. *Smith's Heirs v. Branch Bank at Mobile*, 21 Ala. 125; *Steele v. Adams*, 21 Ala. 534; *Center v. P. & M. Bank*, 22 Ala. 743; *Hoole & Paullin v. Attorney-General*, 22 Ala. 190; *Boyd v. Beck*, 29 Ala. 703. (*Vide* MORTGAGES, 104–111, p. 308.)

23. When a party sets up the defense of a *bona-fide* purchase without notice, he must deny notice, whether charged in the bill or not. *Johnson v. Toulmin*, 18 Ala. 50; *DeVendal v. Malone's Executors*, 25 Ala. 272.

24. And if facts are charged, from which notice may be inferred, he must deny them. *Johnson v. Toulmin*, 18 Ala. 50.

As to the purchaser's right to a rescission or specific performance of the contract, see those titles respectively.

II. EQUITABLE RIGHTS AND REMEDIES OF VENDOR.

25. Where the vendor has executed his bond to the purchaser, conditioned to make titles on the payment of the purchase-money, a court of chancery considers the contract as an equitable mortgage, and the legal title as a security for the payment of the purchase-money. *Conner v. Banks*, 18 Ala. 42; *Kelly v. Payne*, 18 Ala. 371.

26. If an agent, acting for himself and his principal, purchases land on their joint account, but exceeds his authority in the price agreed to be paid; and the principal repudiates the contract, the vendor's lien may then be enforced against the agent. *Crawford v. Barkley*, 18 Ala. 270.

27. Chancery will enforce a vendor's lien, when his bill alleges that he retained the title in himself as a security for the purchase-money, that the purchase-money is due, and that the purchasers are in default. *May v. Lewis*, 22 Ala. 646.

28. But, where he alleges that the purchase-money was to be paid out of the proceeds of certain mills situated on the land, and that the purchaser had received enough to make full payment; and asks an account of the proceeds received,—his bill is without equity, because his remedy at law is complete. *Ib.*

29. If the vendor transfers the notes to a stranger, and accepts for them a bill of exchange, his lien on the land is gone, and the purchaser becomes entitled to a conveyance on making payment to such transferree; but, if the transferree was acting as agent of the purchaser, or was jointly concerned with him in the purchase, and made the arrangement for their joint benefit, without an express promise on the part of the vendor to receive the bill in absolute payment of the notes, and thereby to abandon his lien, the land is still bound for the payment of the purchase-money on the non-payment of the bill. *Bradford v. Harper*, 25 Ala. 337.

30. The vendor's lien, when he takes no independent security for the purchase-money, may be enforced against either the purchaser or one claiming under him with notice; and this principle equally applies to exchanges, and whether a conveyance or bond for title only is executed. *Burns v. Taylor*, 23 Ala. 255.

31. The fact that the land is in possession of a third person, is sufficient to put the purchaser on inquiry, and to affect him with notice. *Brewer v. Brewer & Logan*, 19 Ala. 181; *Burns v. Taylor*, 23 Ala. 255.

32. If the purchaser holds only a bond from his vendor, conditioned to make titles on the full payment of the purchase-money, this is sufficient to charge a sub-purchaser from him with notice of the vendor's lien, although the original notes for the purchase-money are exhibited by the maker to his sub-purchaser. *Bradford v. Harper*, 25 Ala. 337.

33. But, where the vendor's bond is only conditioned to make title so soon as a patent is obtained from the Government, the presumption from its face is that the purchase-money has been paid. *Burns v. Taylor*, 23 Ala. 255.

34. If a person in possession of land, upon inquiry being made relative to the title by one who is about to purchase it from another, advises him to purchase, assures him that there will be no difficulty about the title, and afterwards delivers up the possession to the purchaser's agent,—his acts amount to an abandonment, or waiver, of a vendor's lien which he held against the person from whom the purchaser bought; and although he afterwards refuses to assign his title-bond to the purchaser, until assured by the latter that it will not affect his lien, and makes the assignment upon this understanding, this does not place him in any better or worse position, since his lien was already lost. *Ib.*

35. Where the vendor, at the request of the purchaser, executes a bond to a sub-purchaser, conditioned to make titles on the payment of the

sub-purchaser's notes for the purchase-money, one payable to the vendor, and the other to his purchaser, the representations of the vendor, made without the authority of his purchaser, by which the sub-purchaser was induced to buy under the belief that he would get a good title, are a discharge of his lien, but do not affect the lien of his purchaser. *Rowland v. Day*, 17 Ala. 681.

36. A bill, seeking to enjoin the defendant from asserting his legal title to a tract of land, which he had verbally sold to one W., who sold to S., who sold to plaintiff, alleged that W. agreed to sell to S., if defendant would sanction the sale, and would recognize his said verbal contract; that they together called on him, to ascertain whether he would do so; that defendant replied, that he did recognize the validity of his contract, was willing that W. might sell to S., and would look to the former for the payment of his purchase-money. The answer admitted these facts, but denied that defendant thereby intended to surrender his lien on the land, or to do more than recognize the validity of his verbal contract. *Held*, that the facts admitted by the answer were not sufficient to create an equitable estoppel. *Jones v. Cowles*, 26 Ala. 612.

37. Where lands are purchased by a partnership from one of its members, who guaranties that they can be resold within five years for at least the amount of the purchase-money, and pledges his entire interest in the company to indemnify it against any loss it might sustain in the purchase; and the lands remain unsold after the expiration of the five years,—a vendor's lien cannot be asserted, as against subsequent creditors, mortgagees, and purchasers, without proof that they advanced their money with notice of the lien. *Coster's Executors v. Bank of Georgia*, 24 Ala. 37.

38. An assignment of the notes for the purchase-money, without recourse, amounts to an abandonment of the lien; but whether the parties intended or not to abandon the lien, is a question of fact, to be determined from the evidence and the nature of the transaction. *Griggsby v. Hair*, 25 Ala. 327.

39. An assignment of the notes for the purchase-money, in the absence of a stipulation to the contrary, necessarily operates as a transfer of the vendor's lien. *Conner v. Banks*, 18 Ala. 42; *Kelly v. Payne*, 18 Ala. 370.

40. Where the several notes are assigned at different times, the assignment of each is, *pro tanto*, an assignment of the lien, unless expressly waived; and the liens of the several assignees are to be preferred according to the priority of their assignments, without reference to the maturity of the notes. *Griggsby v. Hair*, 25 Ala. 327.

41. If an assignee of the notes extends the day of payment, and takes a new note in his own name, his lien is not thereby lost, but continues to attend the debt until it is paid or extinguished, or until the lien itself is destroyed by the contract of the parties. *Conner v. Banks*, 18 Ala. 42.

42. If the note is secured by mortgage, a transfer of it is an equitable assignment of the mortgage, and the mortgagee holds the legal title in trust for the assignee, who may proceed in his own name to foreclose. *Center v. P. & M. Bank*, 22 Ala. 743.

43. But the assignee of a note, given for the purchase-money of land, cannot stand in a higher or better position than the vendor himself occupied. *Coster's Executors v. Bank of Georgia*, 24 Ala. 37.

44. Where lands are purchased by a firm from one of its partners, who guaranties that they can be resold, within five years, for at least the amount of the purchase-money, and pledges his entire interest in the company to indemnify it against any loss which might be sustained in the purchase; and the lands remain unsold after the expiration of the five years,—an assignee of the notes cannot assert a vendor's lien, as against a partner who had guarantied their payment, and had paid a part of them. *Ib.*

45. Nor can such assignee assert a vendor's lien, as against a remote assignee of the vendor's interest in the company, who purchased *bona fide*, for valuable consideration, and without notice. *Ib.*

46. If the vendor pays the notes, on

the purchaser's failure to do so, the debt revests in him, with the lien for its payment; and he may subject the land to its satisfaction. *Kelly v. Payne*, 18 Ala. 370.

47. If the statutory liability of the vendor, as endorser of the notes, has been perfected by the rendition of judgment against the maker, with the issue of execution thereon, and return of "no property," his payment of such judgment, being regarded as a discharge of his own liability merely, does not operate as a satisfaction of the debt, or a discharge of the lien, but entitles him to the equitable interest in the judgment; and he may subject the land to the satisfaction of the principal, interest, and costs. *Ib.*

48. The fact that the vendor acted in bad faith, and attempted to repudiate his contract altogether, does not relieve the purchaser from the payment of interest, on bill filed to enforce the vendor's lien. *Cheek v. Waldrum and Wife*, 25 Ala. 152.

As to the vendor's right to enforce a specific performance of the contract, see that title.

WILLS.

1. A nuncupative will, bequeathing personal property of more than five hundred dollars in value, which is void under the Code, (§ 1615,) cannot be established in equity, on the ground of the decedent's ignorance or mistake as to the change made in the law. *Erwin v. Hamner*, 27 Ala. 296.

2. A will cannot be reformed in equity, so as to make it create a separate estate in a married woman, on proof of an agreement, prior to her marriage, between her intended husband and her father, who was the testator, that the will of the latter should exclude the husband's marital rights. *Machem v. Machem*, 28 Ala. 374.

WITNESS.

See same title in PART IV.

As to the competency and examination of parties as witnesses, see PARTIES, IV, 91–101, p. 320.

PART FOURTH.

CIVIL CASES AT LAW.

DIGEST.

ABATEMENT.

As to the abatement and revival of actions, see ACTIONS.

As to pleas in abatement, see PLEADING.

ACCORD AND SATISFACTION.

1. The acceptance of a note, from either the debtor himself or a stranger, may be a satisfaction of a judgment. *Brewer v. Branch Bank at Montgomery*, 24 Ala. 439.

2. In an action on a promissory note, issue being joined on the plea of accord and satisfaction, evidence that plaintiff "had made an agreement with defendant to take a certain town-lot in payment and satisfaction of said note," is the first step towards proving satisfaction, or accord and satisfaction, and is therefore admissible. *Bigelow v. Ward*, 29 Ala. 471.

3. In trespass to recover damages for an assault and battery, an agreement, entered into after defendant had commenced a prosecution against plaintiff for an assault and battery, but before the return of the warrant, to the effect "that the parties would drop the matter, and be friends, and never do or say anything more in relation thereto, and that defendant would abandon the prosecution, and plaintiff would pay the costs;" and its performance by defendant,—though they might, if specially pleaded, bar plaintiff's action, cannot so operate when given in evidence under the general issue. *Phillips v. Kelty*, 29 Ala. 628.

ACCOUNTS.

1. An account founded on a contract, some term of which is left unsettled by the parties, is an open account, whether it consists of one or several items. *Mims' Executors v. Sturtevant*, 18 Ala. 359.

2. Where a creditor sends through the post office to his debtor, at the request of the latter, an account which is barred by the statute of limitations; and the debtor does not answer the letter for several years, nor make any objection to the account, it does not thereby become a stated account, so as to remove the bar of the statute. *Bryan v. Ware*, 20 Ala. 687.

3. If a trustee, under a deed voluntarily executed by a father in favor of his children, renders an account to the grantor, which is casually examined by one of the beneficiaries, not being at the time aware of his own interest in the trust, this does not render it, as to him, a stated account. *Andrews v. Hobson's Adm'r*, 23 Ala. 219.

4. The term account current, in its usual mercantile sense, means an account which contains items of debit and credit between the parties, from which the balance due is or can be ascertained. *Wilson v. Calvert*, 18 Ala. 275.

5. Where all the items of an account are on one side, the entire account is not taken out of the statute of limitations, because one or more items are not barred; but, where there are debits and credits on each side of the account, and a part of it is not barred, no part is barred. *Ib.*

6. Where one receives a slave under a promise to account for the hire, without any agreement as to the price or term, the hire is due and payable as it is earned, or, at most, within a convenient and reasonable time thereafter; and the bailor cannot, after permitting the slave to remain with the hirer for several years, treat the entire demand as one continuous item, so as to exempt it from the statute of three years. *Mims' Executors v. Sturtevant*, 18 Ala. 359.

7. An account, containing several items of debit for goods bought, and a single item of credit for cash paid, is not an account arising out of "the trade of merchandise between merchant and merchant," within the proviso of the statute. *McCulloch v. Judd, Sons & Co.*, 20 Ala. 703.

8. The fact that both parties were merchants at the time the goods were sold, is not, of itself, sufficient to prove that the account was between merchant and merchant. *Ib.*

9. The fact that the items of an account are not charged in the order of their dates, does not necessarily raise any legal presumption against its correctness, but is, at most, a circumstance whose weight must be determined by the jury. *Ross v. Pearson*, 21 Ala. 473.

10. A general admission of unsettled matters of account is not sufficient to take any particular account out of the statute of limitations, unless it is shown that the admission was made in reference to it. *Boxley v. Gayle*, 19 Ala. 151.

11. An assignment of accounts to be created in future vests in the assignee an equitable interest, which will be protected in a court of law, when put in suit in the name of the assignor for the use of the assignee, but not as against a debtor who acquired a legal set-off before actual notice of the assignment. *Stewart v. Kirkland*, 19 Ala. 162.

12. In such case, the registration of the deed, by which the accounts are assigned, does not operate as notice of the assignment. *Ib.*

As to the proof of accounts, see EVIDENCE.

ACTION.

I. ABATEMENT, REVIVOR, AND SURVIVORSHIP.
II. CAUSE OF ACTION.

1. *What will Support an Action.*
2. *When Right of Action Accrues.*
3. *Whether Joint or Several.*
4. *Whether Local or Transitory.*
5. *Splitting Cause of Action.*

III. COMMENCEMENT OF ACTION.
IV. DISTINCTIONS BETWEEN ACTIONS.

1. *Assumpsit and Case.*
2. *Case and Trespass.*
3. *Detinue, Trespass, and Trover.*
4. *Writ of Right and Writ of Entry.*
5. *How Character of Action is Determined.*

V. ELECTION; AND HEREIN OF CUMULATIVE REMEDIES.
VI. MERGER OF CIVIL ACTION IN FELONY.
VII. PARTIES.—See PLEADING.

I. ABATEMENT, REVIVOR, ANE SURVIVORSHIP.

1. In ejectment, the death of one of the several lessors of the plaintiff, after the commencement of the suit, does not abate it, nor destroy the survivors' right of action. *Baker v. Chastang's Heirs*, 18 Ala. 417.

2. At common law, an action of ejectment was not abated by the death of the plaintiff's sole lessor, but it might be continued in the name of the nominal plaintiff, for the recovery of the land and nominal damages; and where the action for mesne profits was commenced, as it might be, in the name of the nominal plaintiff, it would be unaffected by the death of any party in interest on the part of the plaintiff; but, by the act of 1835, (Clay's Digest, 320, § 46,) a judgment for damages can only be rendered in favor of the real plaintiff, and if he dies pending the suit, a judgment for damages in favor of the nominal plaintiff is void. *Ex parte Swan*, 23 Ala. 192.

3. If damages are sought as well as

the land, and the plaintiff's sole lessor dies pending the suit, it must be revived in the names of his personal representative and heirs-at-law. *Ib.*

4. If the defendant in such action dies, pending the suit, it must be revived in the names of his personal representatives and heirs-at-law. *Crutchfield's Heirs v. Hudson*, 23 Ala. 393.

5. In trespass to try titles, the death of one of several co-plaintiffs before suit brought, defeats the entire action, and may be pleaded either in abatement or in bar. *Crump v. Wallace*, 27 Ala. 277.

6. If such action is brought by a sole plaintiff, who dies pending the suit, it may be revived in the name of his heirs-at-law. *Rowland & Heifner v. Ladiga's Heirs*, 21 Ala. 9.

7. In such case, the court may require some evidence of heirship, before allowing the suit to be revived; but if the revivor is made without any proof at all, the action of the court in allowing it is not revisable on error, since the defendant may contest the heirship on the trial. *Ib.*

8. In trover, if one of several co-plaintiffs dies pending the suit, and his personal representative is not brought in, the objection is only available, if at all, to reduce the amount of the recovery. *Powell v. Glenn*, 21 Ala. 458.

9. An action of debt against a sheriff, for money had and received, may be revived against his administrator. *Chenault's Adm'rs v. Walker*, 22 Ala. 275.

10. If plaintiff in execution dies, pending a trial of the right of property under the statute, the proceeding may be revived in the name of his personal representative. *Gayle v. Bancroft's Adm'r*, 22 Ala. 316.

11. An attachment suit, commenced against a non-resident debtor, cannot be revived by *sci. fa.* against his foreign executor or administrator. *Branch Bank at Mobile v. McDonald*, 22 Ala. 474.

12. The act of 1802, (Clay's Digest, 313, § 1,) authorizing the revival of a suit against the personal representative of a deceased defendant, does not apply to foreign representatives. *Ib.*

13. When an executor brings trespass for injuries inflicted on a slave belonging to his testator's estate, and is removed pending the suit, it may be revived in the name of his testator's administrator. *Townsend v. Jeffries' Adm'r*, 24 Ala. 329.

14. Where a sole plaintiff, describing himself as administrator in right of his wife, declares on a cause of action accruing to himself individually, and dies pending the suit, it must be revived in the name of his personal representative. *Tate v. Shackleford's Adm'r*, 24 Ala. 510.

15. Where the plaintiff describes himself as executor or administrator, and declares on a note payable to himself in that capacity, but does not aver that the note is assets of the estate, the suit is properly revived, on his death, in the name of his personal representative. *Arrington v. Hair*, 19 Ala. 243.

16. If a sole plaintiff dies pending the suit, and judgment is afterwards rendered in his name, the court may set it aside at a subsequent term, and reinstate the cause on the docket; and if his personal representative fails, for more than two years, to have the judgment set aside and the suit revived, the action is not thereby discontinued. *Moore v. Easley*, 18 Ala. 619.

17. On the death of the plaintiff, pending the suit, after the defendant has been regularly brought in, it is not necessary to sue out a *sci. fa.*, but the practice is to suggest his death, and, if the suggestion is not denied, it is entered of record; and on the production of the letters testamentary or of administration, the cause is revived, and immediately proceeds in the name of the personal representative. *Ib.*

18. If a suit abates by the death of the plaintiff, and is afterwards revived on motion, without notice, in the name of a third person as his personal representative, the defendant may deny by plea the representative character of the new plaintiff, and contest his right to maintain the action. *Newman v. Pryor*, 18 Ala. 186.

19. When a *sci. fa.* to revive a suit is issued against several executors, and executed on all save one, there is no discontinuance in proceeding without him, if the record does not show

that he ever qualified; and if the record shows that he died several terms before the trial was had, and that the cause was afterwards treated by all the parties as regularly in court, the irregularity (if any) is not available on error. *Sherrod's Executors v. Hampton*, 25 Ala. 652.

20. Judgment having been rendered against the defendant in an action of slander, and the cause taken to the appellate court by writ of error, the death of the defendant in error does not abate the writ, but it may be revived in the name of his personal representative; yet, as the action does not survive, the cause will not be remanded. *Pope v. Welsh's Adm'r*, 18 Ala. 631.

21. In an action of *crim. con.*, the plaintiff in error, who was the defendant below, dying before errors assigned, the suit may be revived in the appellate court in the name of his personal representative. *Cox's Adm'r v. Whitfield*, 18 Ala. 738.

22. The marriage of a feme sole, pending a suit against her as administratrix, does not render it necessary to bring in her husband as a defendant. *Bobe v. Frowner and Wife*, 18 Ala. 89.

23. Under the "woman's law" of 1850, (Session Acts 1849–50, p. 65,) the right of action "for articles of family supply" survives against the wife, on the death of the husband before suit brought. *Cunningham v. Fontaine*, 25 Ala. 644.

24. If the husband sells or disposes of the wife's separate personal property, without her consent, express or implied, her right of action is suspended during coverture only: if she survive, she may sue his personal representative for the property; and if he survive, her personal representative may sue him. *Jenkins v. McConico*, 26 Ala. 213.

II. CAUSE OF ACTION.

1. *What will Support an Action.*

25. An action lies for an injury to a dog, and it is not necessary to show that he had pecuniary value. *Parker v. Mise.* 27 Ala. 480.

26. An order of the probate court, made on the application of two joint executors, for the allowance to each of a specified sum as annual compensation for his services in the management of the estate, will not support an action by one of them, or his assignee, against the other. *Carver v. Hallett*, 26 Ala. 722.

27. The rule of the common law, which still prevails except so far as it has been changed by particular statutes, held a judge exempt from a civil suit or indictment, for any act done or omitted by him in his official capacity. *Hamilton v. Williams*, 26 Ala. 527.

28. An action does not lie on the bond of a county-court judge, for his failure to require new security from a guardian, whose sureties have removed or become insolvent. *Ib.*

29. An action does not lie, to recover damages for the defendant's breach of duty and contract in not permitting plaintiff to cut and carry away timber, when the declaration shows that the injury complained of resulted from plaintiff's being enjoined and restrained by proceedings in chancery instituted by defendant. *McLaren, Ragan & Co. v. Bradford*, 26 Ala. 616.

30. The failure to exercise judicial power properly, in the absence of malice and corrupt intention, constitutes no ground of action. *Smoot v. Mayor of Wetumpka*, 24 Ala. 112.

31. An action does not lie against the commissioners' court of Mobile, for the hire of carriages procured by the sheriff, under the direction of the circuit judge, to convey the grand jurors to the county jail for the purpose of inspecting it; and the fact that said court, for many years past, has been in the habit of allowing such items, fixes no liability on the county. *VanEppes v. Comm'rs Court of Mobile*, 25 Ala. 460.

32. An action does not lie against a county-court clerk, for taking a writ-of-error bond without security. *Williams v. Hart*, 17 Ala. 102.

33. An action lies against a deputy clerk, at the suit of his principal, for taking insufficient security on a writ-of-error bond, whereby the principal was compelled to pay the debt. *Snedicor v. Davis*, 17 Ala. 472.

34. No action can be maintained against a bailee, who, asserting no title

in himself, restored the property in good faith to his bailor, in accordance with the terms of the bailment, before he was notified that the true owner would look to him for it. *Nelson v. Iverson*, 17 Ala. 216.

35. An action will not lie on a contract which is uncertain or indefinite in its terms. *Moore v. Smith*, 19 Ala. 774; *Erwin & Williams v. Erwin*, 25 Ala. 236; *Adams and Wife v. Adams*, 26 Ala. 272.

36. A stranger to a contract cannot enforce it by suit. *Foster v. Sykes*, 23 Ala. 796.

37. Nor can a stranger sue upon a deed, which only contains covenants between the parties, although it may contain an express covenant for his benefit. *Douglas & Easton v. Branch Bank at Mobile*, 19 Ala. 659.

38. A branch of the State Bank may sue in its own name on a lease of its real estate, when the rent is reserved to it, although the demise is in the name of the assistant commissioner. *Ib.*

39. When a sheriff collects money under execution, but not enough to satisfy the debt and lawful costs, and retains more than his lawful fees, the defendant in execution cannot, after paying the balance of the debt, recover from the sheriff the amount unlawfully retained by him. *Chenault's Adm'rs v. Walker*, 22 Ala. 275.

40. A witness for the State, in a criminal prosecution, cannot maintain an action against the defendant, after conviction, on his certificate of attendance. *Nicholas v. Trickey*, 19 Ala. 92.

As to actions by and against agents, attorneys, clerks, constables, executors and administrators, husband and wife, partners, sheriffs, and tax-collectors, see those titles respectively.

For decisions respecting particular actions—by whom, against whom, and for what, they may be maintained—see the titles of different forms of action.

2. *When Right of Action Accrues.*

41. The right of action against a deputy clerk, for the negligent or unskillful performance of his duty, whereby his principal is exposed to a suit for damages, accrues at the time the act complained of is done, and not when the consequent injury is developed. *Snedicor v. Davis*, 17 Ala. 472.

42. A right of action against a clerk, who has collected money on a judgment, does not accrue until his refusal to pay on demand, unless he has previously converted the money; what is a reasonable time, within which such demand must be made, depends on the circumstances of such particular case. *McDonnell v. Branch Bank at Montgomery*, 20 Ala. 313.

43. A right of action against an attorney-at-law, for failing to pay over money collected for his client, does not accrue until his failure or refusal to pay on demand; but the client cannot invoke this principle, to excuse his own laches in failing to make a demand within a reasonable time. *Kimbro v. Waller*, 21 Ala. 376.

44. Where the bailee of a slave promises to account for the hire, without any agreement as to the amount or term of hiring, the hire becomes due and payable as it is earned, or, at most, within a convenient and reasonable time thereafter. *Mims' Executors v. Sturtevant*, 18 Ala. 359.

45. If an administrator makes a loan or gratuitous bailment of a slave belonging to his intestate's estate, a right of action against the bailee does not accrue until the appointment of a succeeding administrator. *Lawson's Adm'r v. Lay's Executor*, 24 Ala. 184.

46. And if he sells personal property under an order of court which is void for want of jurisdiction, a right of action does not accrue against the purchaser until the appointment of his successor. *Wyatt's Adm'r v. Rambo*, 29 Ala. 510.

47. If a surety for the defendant in execution, having control of the judgment, under an agreement to hold and use it for the defendant's benefit on his payment of it, purchases his lands at execution sale, and afterwards resells them, taking a note for the purchase-money, which he places in the hands of a third person for the benefit of the defendant, a right of action accrues to the defendant on the receipt of the money, and not on his previous payment of the judgment. *Garrett's Adm'rs v. Garrett & Garrett*, 27 Ala. 687.

48. A recovery cannot be had on a cause of action which accrues after suit brought. *Chenault's Adm'rs v. Walker*, 22 Ala. 275.

49. But if the judgment is by *nil dicit*, and the complaint shows a good cause of action, the objection is not available on error, that one of the notes on which the suit was founded was not due when the action was commenced. *Blount v. McNeill*, 29 Ala. 473.

3. *Whether Joint or Several.*

50. A conversion of property by two persons gives the owner a joint cause of action, within the meaning of the act of 1807, (Clay's Digest, 322, § 59;) and if they live in different counties, he may sue both in the county of either's residence. *Williamson & Arrington v. Howell*, 17 Ala. 830.

51. A written contract between a schoolmaster and the persons by whom he is employed, which specifies the duties of the teacher, the rates of tuition, and the number of scholars to be sent by each subscriber, creates, *it seems*, a several obligation on the subscribers. *Henderson v. Hammond*, 19 Ala. 340.

52. Where two persons sign their names to the blank form at the bottom of a writ, thereby acknowledging themselves liable for the costs of suit, their contract is joint only, and not joint and several, either at common law or by statute. *Boswell v. Morton*, 20 Ala. 235.

53. Tenants in common of land may join in an action to recover the rents, or each may maintain a separate action for his share. *Price v. Pickett*, 21 Ala. 741; *Smith's Executors v. Wiley*, 22 Ala. 396.

54. Where property owned by them has been converted, they may waive the tort, and all join in assumpsit, or each may maintain a separate action for his interest. *Tankersley v. Childers*, 23 Ala. 781.

55. They may join in trespass *quare clausum fregit*. *Patton v. Crow*, 26 Ala. 426.

56. Or they may maintain separate actions of trespass to try titles. *Hines and Wife v. Trantham*, 27 Ala. 359.

57. A joint or several action, at the election of the injured party, lies against joint trespassers; but he can have only one satisfaction. *Blann v. Crocheron*, 19 Ala. 647; *S. C.*, 20 Ala. 320.

4. *Whether Local or Transitory.*

58. An action to recover damages for overflowing a mill, is local, and must be instituted in a court of the State in which the property is situated. *Howard v. Ingersoll*, 17 Ala. 780; S. C., 23 Ala. 673.

59. A motion for a summary judgment against the tax collector of any county in the State, may be made in the circuit court of Montgomery, under the acts of February 29, and March 3, 1848. *Walker v. Chapman*, 22 Ala. 116.

5. *Splitting Cause of Action.*

60. A single cause of action cannot be split up, or divided into several; and this rule applies, as well when the entire cause of action cannot, as when it can be recovered in the first action. *O'Neal v. Brown*, 21 Ala. 482; *Fireman's Insurance Co. v. Cochran & Co.*, 27 Ala. 228.

61. Therefore, where several chattels, the property of one person, and in his possession, are tortiously taken at one time, he has but one cause of action, although he was possessed of some of the chattels as trustee, and of others in his own right. *O'Neal v. Brown*, 21 Ala. 482.

62. A recovery in trover, without satisfaction, is no bar to a subsequent action against one claiming under the defendant. *Spivey v. Morris*, 18 Ala. 254.

63. On motion to set aside a constable's sale, (the purchaser and constable being defendants,) it is not a good plea, that the plaintiff had recovered a judgment in tresspass against the constable, for levying on and selling the property. *Staunton v. Simmons & Simmons*, 20 Ala. 243.

64. A recovery in action for the hire of a horse, buggy and harness, is no bar to another action to recover damages for injuries done to the buggy and harness while in the defendant's possession. *Shaw v. Beers*, 25 Ala. 449.

65. If the defendant contests only a part of the plaintiff's demand, and a continuance is granted to him on his confessing judgment for the sum admitted to be due, he cannot take advantage of the payment of the judgment by pleading a former recovery. *Gowen & Co. v. Jones*, 20 Ala. 128.

66. When a party, having a right to maintain trespass, trover, or detinue, elects either of the two former actions, he is bound to regard the wrongful act as indivisible, and cannot split it up into several causes of action; but, if he elects to bring detinue, he may maintain a separate action for the detention of each chattel. *Wittick v. Traun*, 27 Ala. 562.

III. COMMENCEMENT OF ACTION.

67. In summary proceedings, by notice and motion, against bank debtors, the notice serves the double purpose of writ and declaration, and is the commencement of the action. *Stanley v. Bank of Mobile*, 23 Ala. 652.

68. In a summary proceeding, by notice and motion, against a delinquent stockholder in a railroad company, the suit is commenced, within the meaning of the statute requiring security for the costs, when the notice is placed in the hands of the sheriff to be served. *Ala. & Tenn. Rivers Railroad & Co. v. Harris*, 25 Ala. 232.

IV. DISTINCTIONS BETWEEN ACTIONS.

1. *Assumpsit and Case.*

69. In determining whether an action is case or assumpsit, the best criterion, perhaps, is this: if the cause of action, as stated in the declaration arises from a breach of promise, the action is assumpsit; if from a breach of duty growing out of the contract, it is case. *Wilkinson v. Moseley*, 18 Ala. 288; *Myers v. Gilbert*, 18 Ala. 467.

70. In either form of action, however, the proof must correspond with the declaration: in stating that part of the contract out of which the breach of duty arises, a variance is equally fatal. *Wilkinson v. Moseley*, 18 Ala. 288.

71. But, in case, the contract itself out of which the breach of duty arises need not be formally stated in the declaration, except so far as it constitutes a material part of the cause of action; and a variance in the other terms is immaterial. *S. C.*, 24 Ala. 411.

72. A count, which sets out a contract for the sale of a negro by plaintiff to defendant, in consideration of a certain sum of money, which is alleged to be less than his real value, and for the further consideration that defendant would remove him from the State; and then avers, that defendant, at the time of the making of the contract, did not intend to remove the slave, "but falsely and fraudulently represented" that he would, "with intent to deceive and defraud plaintiff,"—is a count in case, and the statement of the contract is mere matter of inducement. *Dixon v. Barclay*, 22 Ala. 370.

73. Case and trover may be united in one declaration. *Ib.*

74. But assumpsit and trover cannot. *Copeland v. Flowers*, 21 Ala. 472.

2. *Case and Trespass.*

75 The character of a count is not always to be determined by the form of action adopted by the pleader, but depends upon the facts stated in it, and the conclusions which the law draws from those facts. *Sheppard v. Furniss*, 19 Ala. 760.

76. Case is the proper remedy, for the malicious use of process, regularly issued from a court of competent jurisdiction; but when the proceeding complained of is irregular merely, trespass is the remedy. *Ib.*

77. Trespass is the only remedy, for damages caused by the defendant's malicious act, in procuring an execution, issued against a third person, to be levied on plaintiff's property. *Tatum & Smith v. Morris*, 19 Ala. 302.

78. To maintain trespass, the plaintiff must have, at the time of the tortious taking, either actual possession, or the immediate right of possession; if he has neither, his remedy is case or trover. *Davis v. Young*, 20 Ala. 151.

3. *Detinue, Trespass, and Trover.*

79. The distinctions between the actions of detinue and trover are carefully preserved in the Code; and an

amendment of the complaint, which would convert one action into the other, cannot be allowed. *Harris v. Hillman*, 26 Ala. 380.

80. Where a party has a right to maintain, at his election, detinue, trespass, or trover, and elects to bring detinue, he may maintain a separate action for the detention of each chattel; but, in either of the other actions, he is bound to regard the act as indivisible, and cannot split it up into several causes of action. *Wittick v. Traun*, 27 Ala. 562.

4. *Writ of Right and Writ of Entry.*

81. A writ of right, at common law, lay ouly to recover a fee-simple estate, and in favor of him who had the fee-simple title; but in a writ of entry *sur disseizin*, the gist of the action was the wrongful disseizin, without regard to the right of property. *Lyon's Heirs v. Mottuse*, 19 Ala. 463.

82. A count, which does not allege a seizin in fee simple, either in the demandant or in the ancestor through whom he claims, is defective as a count in a writ of right, although it alleges the disseizin of the demandant's ancestor; but it is sufficient, especially after verdict, as a count in a writ of entry *sur disseizin*, and must therefore be considered a count in that action. *Ib.*

5. *How Character of Action is Determined.*

83. The character of an action is determined by the declaration, and not by the plea. *Lyon's Heirs v. Mottuse*, 19 Ala. 463.

84. The character of a count is determined by the facts stated in it, and the conclusions which the laws draws from those facts, and not by the form of action adopted by the pleader. *Sheppard v. Furniss*, 19 Ala. 760.

85. The character in which a party sues must be determined from the body of the declaration, and not from his description of himself in its caption. *Tate v. Shackelford's Adm'r*, 24 Ala. 510.

V. ELECTION; AND HEREIN OF CUMULATIVE REMEDIES.

86. Debt lies on a judgment, after the expiration of a year and a day, although an execution may legally issue upon it; the latter remedy being cumulative merely. *Kingsland & Co. v. Forrest*, 18 Ala. 519.

87. The act of 18—, (Aikin's Digest, 319, § 4,) giving to paymasters a right to institute suit against sheriffs and constables, for a failure to collect and pay over militia fines, is not repealed by the act of 1837, which gives a summary remedy against such officers for such a failure. *Chapman v. Weaver*, 19 Ala. 626.

88. The act of 1839, (Clay's Digest, 580, § 27,) which inflicts a penalty on a county treasurer for a breach of duty, does not deprive the party injured by such breach of his right of action on the treasurer's official bond. *Wilson v. Cantrell*, 19 Ala. 642.

89. The act of 1841, authorizing the lessee of the water-works of Mobile to sue out a writ of *ad quod damnum*, to ascertain the damages to a riparian proprietor from his diversion of the water of Three-mile creek, does not deprive such riparian proprietor of his common-law action for damages, on the lessee's failure to sue out the writ. *Stein v. Burden*, 24 Ala. 130.

90. Where a party enters into the possession of land under an executory contract of purchase, and fails to comply with the terms of the contract as to the payment of the money, the vendor may, at his election, either treat him as a tenant, and recover for the use and occupation of the land, or as a trespasser, and eject him by suit; and in neither case is he entitled to notice of the vendor's election, other than is given by the process of the court when the action is commenced. *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207.

91. Assumpsit and case are sometimes concurrent remedies. *Myers v. Gilbert*, 18 Ala. 467; *Wilkinson v. Moseley*, 18 Ala. 288; *Moore v. Appleton*, 26 Ala. 633.

92. Detinue, trespass, or trover, may, at the election of the party injured, sometimes be maintained for the same wrongful act. *Wittick v. Traun*, 27 Ala. 562.

93. A workman, who contracts to serve another for one year, at a stipulated sum payable monthly, and who is discharged, without any fault on his part, before the expiration of the year, may either treat the contract as still subsisting, and sue for wages due according to its terms, or consider it rescinded, and sue for unliquidated damages for its breach. If he sues on the contract, he can only recover the wages due at the institution of the suit; if for damages for the breach, he is entitled to recover the actual damage sustained up to the trial. *Fowler & Prout v. Armour*, 24 Ala. 194.

As to the right to waive a tort and sue in assumpsit for money had and received, see ASSUMPSIT.

VI. MERGER OF CIVIL ACTION IN FELONY.

94. Trover, for the conversion of a stolen slave, cannot be maintained against the thief, before the institution of a prosecution for the felony. *Martin's Executrix v. Martin*, 25 Ala. 201.

95. An action cannot be maintained, to recover damages for killing a slave, until there has been a prosecution for the felony; and the complaint must, therefore, aver such prosecution. *Morton v. Bradley*, 27 Ala. 640.

96. In averring such prosecution, it is not necessary to state with particularity everything that was done: it is sufficient to allege that a prosecution was duly instituted against the defendant before the grand jury of the county, who refused to find a true bill against him. *Nelson v. Bondurant*, 26 Ala. 341; *Morton v. Bradley*, 27 Ala. 640.

97. But the doctrine of merger does not apply to a statutory action by an administrator, (Code, § 1938,) to recover damages for the wrongful act or omission which caused the death of his intestate. *Lankford's Adm'r v. Barrett*, 27 Ala. 700.

98. An assault with intent to kill, when committed by one white person upon another, not being a felony, the failure to prosecute, or the compromise of a prosecution commenced, does not prevent a recovery in a civil action for damages. *Phillips v. Kelly*, 29 Ala. 628.

ACTION ON THE CASE.

I. WHEN THE ACTION LIES.

1. *Against Bailee of Hired Slave.*
2. *Against Master or Employer, for Injuries to Servant or Workman.*
3. *Against Municipal Corporation.*
4. *Against Public Officers.*
5. *Against Railroad and Steamboat Companies.*
6. *For Disturbance of Water-Privileges.*
7. *For Fraud and Deceit.*
8. *For Injuries to Stock.*
9. *For Malicious or Wrongful Use of Legal Process.*
10. *In Other Cases.*

II. OF THE PLEADINGS, EVIDENCE, AND DAMAGES.

1. *Joinder with other Actions.*
2. *For Disturbance of Water-Privileges.*
3. *For Fraud and Deceit.*
4. *For Injuries to Stock.*
5. *For Malicious Prosecution.*
6. *For Malicious or Wrongful Attachment or Injunction.*
7. *For Negligence.*
8. *In Other Cases.*

I. WHEN THE ACTION LIES.

1. *Against Bailee of Hired Slave.*

1. An action on the case lies against the hirer of a slave, for a tortious neglect of duty, whereby the slave was lost to his owner. *Myers v. Gilbert*, 18 Ala. 467; *Wilkinson v. Moseley*, 18 Ala. 288; *S. C.*, 24 Ala. 411.

2. If the slave is hired for a particular service, and is afterwards employed in a different service, by either the hirer or his sub-bailee, whereby his death is caused, the hirer is liable, although the loss was the result of inevitable accident, or of the slave's own disobedience. *Hooks v. Smith*, 18 Ala. 338; *Seay v. Marks*, 23 Ala. 532.

3. But, when the contract of hiring is general in its terms, not restricting the employment of the slave to any particular business, the hirer has the right to employ him in any business

to which slaves are usually put, not involving extraordinary peril to life or health; or to re-hire him to another, to be so employed. *Seay v. Marks*, 23 Ala. 532.

4. The hirer is only responsible for the omission of that care and diligence which the generality of mankind use and exercise, in relation to their own slaves, under similar circumstances; and is equally responsible for the same degree of negligence on the part of his sub-bailee. *Ala. & Tenn. Rivers Railroad Co. v. Burke*, 27 Ala. 535.

5. If the contract is general in its terms, it is the duty of the hirer to furnish the slave with suitable clothing and provisions, and with medical attendance in case of sickness. *Sims & Jones v. Knox*, 18 Ala. 236.

6. But the mere failure of the hirer to call in a physician, whenever the slave is sick, although he may not know what is the matter with him, does not amount to negligence. *Ala. & Tenn. Rivers Railroad Co. v. Burke*, 27 Ala. 535.

7. Where a slave is hired as a deck-hand on a steamboat, and is killed or injured by an explosion of the boat, caused by the habitual gross negligence of the first engineer, of which the captain had been informed, the owner of the boat is responsible. *Walker v. Bolling*, 22 Ala. 294.

8. If the loss or injury was caused by a collision with another boat, occasioned by the fault or negligence of the pilot, the hirer is responsible, if he had the means of knowing that the pilot was reckless and careless, although the owner of the slave had the same means of knowledge at the time he made the contract. *Cook & Scott v. Parham*, 24 Ala. 21.

9. If the death of the slave was caused by his own act in leaping into the river, when frightened out of his ordinary presence of mind by the excitement, confusion and danger produced by the collision, it would be the legitimate consequence of that collision, and the hirer would be responsible. *Ib.*

10. A guardian cannot maintain an action in his own name, against the hirer of his ward's slave, whose death was caused by the negligence or other tortious act of the hirer: the action should be in the name of the ward, although the contract was made with the guardian. *Hooks v. Smith*, 18 Ala. 338.

2. *Against Master or Employer, for Injuries to Servant or Workman.*

11. On principles of public policy, a master is liable to third persons, for the misfeasance, negligence, or omission of duty of his servant, while acting within the scope of his employment; but the courts have refused, upon considerations peculiar to the relation of master and servant, to apply this rule as between servants, acting in the common business of one master, where one receives an injury from the negligence of another. *Walker v. Bolling*, 22 Ala. 294.

12. The master is bound to use ordinary care towards his servant, and not to expose him to unnecessary risks; and this duty he does not discharge, when he associates with him, in a service of peril, those who are wanting in ordinary skill and prudence. *Ib.*

13. Where there is a general manager, or superintendent, invested by the common employer with the duty and authority of employing and dismissing the inferior agents and servants, the master is responsible for the negligence of such superintendent, in employing incompetent agents, or in not dismissing those who are proved to be incompetent. *Ib.*

14. Where two persons are employed in the same general business by a common employer, and one is injured by the negligence of the other, the employer is not responsible; but, whether this rule applies to owners of a steamboat, when sued for the loss of a slave who was hired as a deck-hand on the boat, and whose death was caused by a collision occasioned by the negligence of the captain, who was one of the owners, *quære*? *Cook & Scott v. Parham*, 24 Ala. 21. (*Vide supra*, 8, 9.)

15. In ordinary cases, where a workman is employed to do a dangerous job, or to perform a service of peril, he will be held to all the danger and risks which belong to such work or service; but, where there is no danger

in the work or service in itself, and the peril grows out of extrinsic causes or circumstances, which cannot be discovered by the use of ordinary precaution and prudence, the employer is liable, precisely as a third person would be, if a loss or injury is caused by his neglect or want of care. *Perry v. Marsh*, 25 Ala. 659.

16. If one employs a workman in a service which is apparently safe, but which becomes hazardous from causes disconnected from the service, which are not discoverable by the exercise of ordinary prudence, he is bound by the strongest principles of morality and good faith, if the danger is known to him, to disclose it; and if he fails to make the disclosure, and the workman, while engaged in the service, thereby sustains an injury, the employer is responsible in damages. *Ib.*

17. In such case, it is not necessary to aver or prove that the employer fraudulently concealed the danger, or that he fraudulently represented the service to be safe. *Ib.*

3. *Against Municipal Corporation.*

18. Where the act of incorporation makes it the duty of the corporate authorities of a town or city to keep in repair the streets and bridges within the corporate limits, and, in consideration thereof, relieves them from other duties, an action on the case lies against them for the neglect of this duty, in favor of any person who is thereby injured. *Snoot v. Mayor of Wetumpka*, 24 Ala. 112.

19. But their failure to abate as a nuisance, under the powers conferred on them by their charter, a private bridge not belonging to the corporation, which had become rotten and unsafe, does not, in the absence of malice and corrupt intention, constitute a ground of action against them. *Ib.*

4. *Against Public Officers.*

20. An action on the case lies against a sheriff, who, after a seizure of goods under attachment, wrongfully releases the levy, and abandons their custody. *Griffin v. Isbell*, 17 Ala. 184.

21. Also, for his wrongful representations, causing property seized by him under legal process to be sold for less than its real value. *Ib.*

22. He is not liable for failing to make the money on an execution, if the defendant had no property in his possession while the writ was in the sheriff's hands, and was not the owner of property which could have been levied on, and of which the sheriff had notice; but, if the defendant was in possession of property during such time, and the sheriff returns the execution unsatisfied, without resorting to the steps necessary to protect himself in making a levy, he assumes the *onus* of proving that such property was not subject to levy. *Governor v. Campbell*, 17 Ala. 566.

23. Where a sheriff sells land under execution, and consummates the sale by executing a deed to the purchaser, but never receives the purchase-money, he is liable to the plaintiff, and not to the defendant in execution, for failing to collect it. *Moore v. Barclay*, 18 Ala. 672.

24. The mere failure of the plaintiff to enforce satisfaction of his execution out of the defendant, when he might have done so, does not destroy his right of action against the sheriff, for a previous default. *Evans v. Governor*, 18 Ala. 659.

25. If the sheriff levies on the plaintiff's own property, and the plaintiff releases the property, this does not discharge the sheriff from liability for failing to make the money out of the defendant's property. *Poe v. Dorrah*, 20 Ala. 288.

26. Nor is the sheriff discharged from liability, because the plaintiff releases a levy on property which is claimed by a third person, who gives bond to try the right of property under the statute. *Ib.*

27. A deputy sheriff is not liable to a plaintiff in attachment, for failing to require sufficient security on a replevy bond. *Pond v. Vanderveer*, 17 Ala. 426.

28. An action does not lie against a clerk, for taking a writ-of-error bond without security. *Williams v. Hart*, 17 Ala. 102.

29. But, if he fails to take sufficient security, when tendered by the plaintiff in error, and yet certifies the bond as valid to the supreme court,

where the judgment is affirmed on certificate, and afterwards perpetually enjoined in chancery on account of his want of authority in filling up the bond,—an action lies against him. *Ib.*

30. A deputy clerk is responsible only to his principal, for a default committed while acting within the scope of his duties, and in the name of the principal. *Snedicor v. Davis*, 17 Ala. 472.

31. An action on the case cannot be maintained by the commissioners' court of Butler, against the keeper of the poor-house, for debauching and getting with child one of the inmates of said poor-house. *Comm'rs Court of Butler Co. v. McCann*, 23 Ala. 599.

5. *Against Railroad and Steamboat Companies.*

32. To entitle a party to a recovery against a railroad company under the act of 1852, "to regulate and define the liability of railroad companies," it is only necessary for him to prove property in the stock or cattle killed, their value, and that they were killed by the defendant's cars or locomotives: whether any degree of care and diligence on the part of the company will excuse it, *quære?* *Nashville & Chattanooga Railroad Co. v. Peacock*, 25 Ala. 229.

33. That the cattle were killed while roaming on lands which did not belong to their owner, is no defense to the action, since the doctrine of the common law relative to *damage feasant* has never been adopted in this State. *Ib.*

34. There is no inflexible rule, either of the river or of the road, the neglect of which by one party will dispense with the exercise of common caution by the other. *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189.

35. "Ordinary care" is altogether a relative term, and means, in such cases as this, nothing more than the failure to use those precautions which a just regard for the persons and property of others demands should be used under the circumstances of each particular case. *Ib.*

36. The general rule of the common law is, that if both vessels are in fault, neither can recover damages for injuries caused by the collision; but this rule only applies to faults which operated directly and immediately to produce the collision. *Ib.*; *Grant v. Moseley*, 29 Ala. 302.

37. The several acts of congress, regulating the duties and liabilities of steamboats engaged in carrying the mail, do not impose upon the owners of such boats, in favor of a person who contracts with them only for the diligence of a mandatory, the responsibility of common carriers. *Haynie v. Waring & Co.*, 29 Ala. 263.

38. It is no defense to a statutory action (Code, §§ 1010–11) against the owners of a steamboat, to recover the value of a slave transported on their boat without the written authority of his owner, that the slave was a runaway when he came on board the boat at Mobile; that he was not discovered, until after the boat had gone seventy-five miles up the river, on her trip to Montgomery; that he was then arrested, and chained until the arrival of the boat at Montgomery, when he was carried to the county jail, while the boat proceeded to Wetumpka; that he was at that time sick with pneumonia, and so continued until his death, which occurred a few days afterwards; and that the defendants furnished him with proper medical attendance during his sickness. *Mangham v. Cox & Waring*, 29 Ala. 81.

39. The same principles apply, when the action is brought to recover the statutory penalty of fifty dollars. *Massey v. Cole*, 29 Ala. 364.

6. *For Disturbance of Water-Privileges.*

40. If a riparian proprietor diverts the water of a running stream, in quantities sufficient to affect injuriously the rights of the proprietor below him, and does not restore it to its natural channel, without material diminution, before it reaches the lands of that proprietor, he is liable in damages for the injury; and that the means provided by him for its restoration are rendered insufficient for that purpose, after the water has left his land, by the act or interference of a third person, though it might mitigate the damages, is no excuse for the failure, since the right to divert is only con-

ditional, and ceases when the water cannot be restored. (RICE, C. J., *dissenting*.) *Stein v. Burden*, 29 Ala. 127.

41. A legislative grant to an incorporated company, conferring upon them "the exclusive right and privilege of conducting and bringing water for the supply of the city for the term of forty years," gives them no right to divert the water of a running stream, to the injury of a riparian proprietor, without making compensation. *S. C.*, 24 Ala. 130; *Stein v. Ashby*, 24 Ala. 521.

42. A municipal corporation, owning lands on a water-course from three to five miles distant from the city, has no right to divert the water from the stream, to the injury of other riparian proprietors, in quantities sufficient to supply the domestic wants of its inhabitants. *Ib.*

43. An act, authorizing the lessee of certain water-works to sue out a writ of *ad quod damnum*, to ascertain the damage caused to riparian proprietors by his diversion of the water, does not deprive a riparian proprietor of his common-law action for damages, on the lessee's failure to sue out the writ. *Stein v. Burden*, 24 Ala. 130.

44. Actual possession, under claim of title, is sufficient to sustain such an action. *Ib.*

45. The uniform and uninterrupted diversion of water from a running stream, for a period of twenty years, gives a title by prescription: it is not necessary that the water should be used or applied in precisely the same manner, but no change is allowed which would be injurious to those whose interests are involved. *Ib.*

46. But the use of such water for nine years confers no right. *Stein v. Ashby*, 24 Ala. 521.

47. The right of eminent domain, in the assumption and appropriation of private property for public uses, can only be exercised upon making just compensation to the owner; nor does it, in connection with the several acts of the legislature relating to the city water-works of Mobile, confer upon the lessee the right to deprive other riparian proprietors of their right to the water of Three-mile creek. *Burden v. Stein*, 27 Ala. 104.

7. *For Fraud and Deceit.*

48. An action on the case lies against the vendor, who, during the negotiation for the sale, makes a fraudulent representation in regard to a material fact, on which the purchaser has a right to rely, and by which he is misled to his prejudice. *Pritchett v. Munroe*, 22 Ala. 502.

49. In most cases, if the vendor discloses, at the time of making the contract, all that he knows in relation to the subject-matter of the sale, the purchaser cannot be deceived or misled, and no recovery can be had; but, if the vendor makes a false representation during the negotiation, it is a question for the determination of the jury, whether its effect on the purchaser's mind is done away by the vendor's subsequent disclosure of all that he knows. *Ib.*

50. Although it is the duty of the vendor, to disclose to the purchaser such intrinsic defects in the property as materially affect its nature and condition, which lie especially in his own knowledge, and which the purchaser cannot discover by the exercise of proper diligence; yet the law does not require him to disclose "the fullest extent of that unsoundness," by particularly describing the different stages and symptoms of the disease, and all the circumstances attending it. *Armstrong v. Huffstutler*, 19 Ala. 51.

51. Where a slave is sold at public auction by an administrator, representations of soundness, recklessly made by the auctioneer for the purpose of inducing the purchaser to buy, may amount to fraud, although he did not know at the time that they were false, and although he was not authorized to make them; and if the purchaser buys on the faith of such representations, the fact that the administrator gave public notice, before the sale was commenced, "that no warranty of soundness would be made, and that every purchaser must judge for himself," does not avoid the fraud. *Atwood's Adm'r v. Wright*, 29 Ala. 346.

52. But, if the purchaser, after being informed of the slave's unsoundness, and of facts which constitute a fraud in the sale, pays the purchase-money,

he cannot afterwards maintain an action on the case for the fraud. *Gilmer v. Ware*, 19 Ala. 252. (*Vide infra*, 58.)

53. An action on the case lies against the purchaser of a slave, for fraudulently representing that he would remove the slave from the State, and thereby inducing the vendor to sell him for less than his real value. *Dixon v. Barclay*, 22 Ala. 370.

54. It also lies to recover damages for the loss of a slave, who was killed while working on the defendant's house, if the defendant fraudulently concealed the dangerous condition of the house, or fraudulently represented that it was safe; and if the concealment of the danger amounts to a breach of duty, the allegation of fraud may be struck out, and a recovery still be had. *Perry v. Marsh*, 25 Ala. 659.

55. One who contracts with a workman, for services within his art or calling, has a right to rely on his representations as to his skill; and although the law will not seek to compel a man to do that which is impossible, yet it will not allow the workman, after he has obtained, by false and fraudulent representations as to his skill in his business, the price of stipulated services which he cannot perform, to defeat a recovery for the deceit and consequent injury, by setting up the impracticability of those services. *McGar v. Williams*, 26 Ala. 469.

56. Therefore, in an action for deceit against a tinner, for that he falsely and fraudulently represented that he would put a tin roof on plaintiff's house which would not leak for twenty years, whereas the said roof did leak before the expiration of two years,—the true question for the determination of the jury is, not whether it was practicable to put on a tin roof which would not leak for twenty years, but whether the representations (if made) were false, and whether plaintiff was thereby deceived and injured. *Ib.*

57. If the workman's representations related to the roofing of a house to be erected upon a specified plan, and the employer afterwards caused a material change to be made in it, without the workman's consent, thereby rendering it necessary to make a material change in the form of the roof, he must be considered as having abandoned the original contract, and cannot hold the workman bound by his representations; but, if the representations had no reference to any particular plan, and the workman made no objection to the change, his liability would not be affected by the alteration. *Ib.*

58. A partial payment, made after discovering that the roof leaked, without objecting to it on that ground, is a circumstance to be weighed by the jury, in determining whether any fraud was practiced, but does not operate as an estoppel or waiver. *Ib.* (*Vide supra*, 52.)

8. *For Injuries to Stock.*

59. At common law, no recovery could be had against the owner of dogs, or other domestic animals, which are not naturally inclined to do mischief, for an injury arising from carelessness in keeping them, unless it was averred and proved that he knew their vicious propensities, and kept them so carelessly and negligently that injury to plaintiff resulted therefrom. *Smith v. Causey*, 22 Ala. 569.

60. To authorize a recovery under the statute (Clay's Digest, 141, § 3) giving double damages for injuries to stock, which is highly penal in its character, it must be shown that the defendant's fence was insufficient, and that the injury to plaintiff's stock was caused by some act done, commanded, or directed by defendant: the mere negligence of a servant, acting in the ordinary business of his master, is not sufficient to sustain the action, although the damage actually resulted from such negligence, and although an action on the case would lie at common law. *Ib.*

61. But to authorize a recovery in an action on the case, it is not necessary to prove that the particular act complained of, if done by defendant's children and servants in the performance of their duty and service, was commanded by defendant; nor that his dogs were vicious, and that he knew it; nor that the injury was done entirely by his dogs. *S. C.*, 28 Ala. 655; *Lindsay v. Griffin*, 22 Ala. 629.

9. *For Malicious or Wrongful Use of Legal Process.*

62. An action on the case, to recover damages for the malicious suing out of an injunction, does not lie until the injunction is finally disposed of, or until the suit in which it was sued out is terminated. *Tatum & Smith v. Morris*, 19 Ala. 302.

63. It does not lie to recover damages for defendant's malicious act in causing an execution, issued against another, to be levied on plaintiff's property: trespass is the remedy. *Ib.*

64. It is the proper remedy for the malicious use of process, regularly issued from a court of competent jurisdiction; but, if the proceeding complained of is merely irregular, trespass is the remedy. *Sheppard v. Furniss*, 19 Ala. 760.

65. It lies to recover damages for the wrongful or malicious suing out of an original attachment, without waiting for the determination of the attachment suit. *Seay v. Greenwood*, 21 Ala. 491.

66. It does not lie, in the absence of malice, on defendant's breach of duty in not permitting plaintiff to cut and carry away timber, when the declaration shows that the injury complained of resulted from an injunction suit instituted by defendant. *McLaren, Ragan & Co. v. Bradford*, 26 Ala. 616.

67. It lies against an agent, for maliciously suing out an attachment without authority from his principal, before the termination of the attachment suit. *Forrest v. Collier*, 20 Ala. 175.

68. To sustain an action for a malicious prosecution, there must be both malice and want of probable cause. *Long v. Rodgers*, 19 Ala. 321; *Ewing v. Sanford*, 21 Ala. 157.

69. There may be facts and circumstances which do not amount to probable cause, but which, being evidence of a want of malice, may justify the acquittal of the defendant on the ground that there was an entire absence of malice; and, on the other hand, although an entire absence of actual malice may consist with the absence of every reasonable ground for a belief of the party's guilt, yet the law implies malice in such case, because there is no proof to extenuate the rash and indiscreet act of the prosecutor. *Long v. Rodgers*, 19 Ala. 321.

70. Although the defendant honestly believed that the plaintiff was guilty of the offense charged, and acted upon such honest conviction; yet such belief would not excuse him, if there was a want of probable cause, unless it was founded on facts and circumstances which would create such a belief in the minds of honest and reasonable men; if no probable cause in fact existed, and the defendant failed to use such precaution as a prudent man would use to ascertain that fact, although he acted entirely without malice, malice will be inferred from the want of probable cause. *Ib.*

71. No matter how far a man may be impelled by malice in prosecuting another criminally, the law will hold him harmless, provided he can show probable cause; but, on the other hand, if he cannot show probable cause, the law will imply malice from the want of probable cause, unless he can show, by way of repelling this implication, the existence of facts and circumstances which, although not amounting to probable cause, were well calculated to produce, in the mind of a prudent and reasonable man, a well grounded belief or suspicion of the party's guilt. *Ewing v. Sanford*, 21 Ala. 157.

72. If the prosecution was instituted in good faith, under the advice of counsel, given upon a full and fair disclosure of the facts, no action can be maintained. *Leaird v. Davis*, 17 Ala. 27.

73. Any charge, falsely and maliciously preferred, which will authorize a magistrate to issue his warrant for the arrest of the accused, touching a matter which will subject him to a criminal prosecution, is sufficient to sustain an action on the case for a malicious prosecution, although the charge is not expressed with technical accuracy. *Long v. Rogers*, 17 Ala. 540; *Ewing v. Sanford*, 19 Ala. 605; *Field v. Ireland*, 21 Ala. 240; *Crosby v. Hawthorn*, 25 Ala. 221.

74. Actual force, or a manual touching of the body, is not necessary to constitute an arrest: it is sufficient, if the party is within the power of the officer, and submits. *Field v. Ireland*, 21 Ala. 240.

10. *In Other Cases.*

75. An action lies against an attorney-at-law, for his negligence and want of skill in the preparation of an affidavit for an attachment, or of the attachment itself, whereby his client suffers an injury; also, for negligently "dismissing the levy of an attachment," and "releasing and relinquishing all liens which had accrued by reason of such levy," whereby his client "lost her demand and the means of recovering the same." *Walker v. Goodman & Mitchell*, 21 Ala. 647.

76. It does not lie against a hotel-keeper, for the loss of a watch belonging to his boarder, who fails to take such care of it as a person of ordinary prudence would take. *Chamberlain & Co. v. Masterson*, 26 Ala. 371.

77. An act, which is the result of an accident, may constitute a legal cause of action, since the term negligence, in its legal acceptation, includes acts of omission as well as commission, while diligence implies action as well as forbearance to act. *Grant v. Moseley*, 29 Ala. 302.

78. An agent may maintain either case or assumpsit against his principal, to recover for losses and damages which flow directly and immediately from his performance of an act, in the execution of his agency, which was not manifestly illegal, and which he did not know to be wrong; as where he is employed to take personal property, which, although claimed adversely by another, he has reasonable grounds to believe belongs to his principal, and a recovery is afterwards had against him for the trespass. *Moore v. Appleton*, 26 Ala. 633.

79. An action lies in favor of a common carrier, for an injury to the goods of another while in his possession; and a recovery by him, for such injury, will be a bar to a subsequent action by the owner. *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189.

80. An action does not lie, to recover damages for the defendant's fraudulent and wrongful act, in inducing the sheriff to release and discharge from his possession certain slaves, on which an execution had been levied in favor of plaintiff against a third person, and which defendant removed so that they could not afterwards be found; the defendant in execution being insolvent, and having no other property out of which said execution could be satisfied. *Kelly v. McCaw*, 29 Ala. 227.

II. OF THE PLEADINGS, EVIDENCE, AND DAMAGES.

1. *Joinder with other Actions.*

81. Case and trover may be united in the same declaration. *Dixon v. Barclay*, 22 Ala. 370.

82. But case and trespass cannot be united. *Sheppard v. Furniss*, 19 Ala. 760.

2. *For Disturbance of Water-Privileges.*

83. An action to recover damages for overflowing a mill, is local, and must be instituted in a court of the State in which the property is situated. *Howard v. Ingersoll*, 17 Ala. 780; *S. C.*, 23 Ala. 673.

84. Where a suit is brought in Alabama, for an injury to lands averred to be located "in the State of Georgia, to-wit, in the county aforesaid," a demurrer would not lie to the declaration; but, if the evidence showed that the land was located in Georgia, a joinder in issue by the defendant would not preclude him from taking advantage of the jurisdictional question which would then arise. *S. C.*, 23 Ala. 673.

85. In declaring for a diversion of water from plaintiff's mill, the declaration or complaint must show that the quantity of water which continued to flow to the mill was insufficent, or that the plaintiff or his mill was injured by such diversion. *Burden v. Mayor, &c. of Mobile*, 21 Ala. 309.

86. But it is sufficient to aver injury to plaintiff's mill privileges, without alleging the existence of a mill; nor is it necessary to aver the manner or means of the diversion. *Stein v. Ashby*, 24 Ala. 521.

87. The gist of the action being the invasion of the right, where the repetition or continuance of the diversion might become the foundation of an adverse right, the plaintiff is entitled to recover nominal damages, without any proof of actual damage. *Stein v.*

Burden, 24 Ala. 130 ; *Stein v. Ashby*, 24 Ala. 521.

88. No recovery can be had, except by a new action, for damages accruing subsequent to the commencement of the suit; but evidence is admissible to show the effect after suit brought of the diversion, with the view of affording information to the jury of the effect of the diversion under similar circumstances before suit brought. *Stein v. Burden*, 24 Ala. 130.

89. Evidence showing that plaintiff had no title to the land, on which the mill is situated, is not admissible for defendant. *Ib.*

90. A witness, who, though well acquainted with the mill business, is not informed of the size of the stream, its supply of water, or the quantity diverted, cannot give his opinion as to the damage sustained by the plaintiff. *Ib.*

91. Where the complaint alleges that the defendant wrongfully diverted the water, while the evidence shows that, though the water was originally diverted by him, he provided means for its return to its natural channel above plaintiff's lands, and that its return was prevented by the act of another person after it had left defendant's lands, there is no material variance between the allegations and proof. *S. C.*, 29 Ala. 127.

92. The plaintiff's right to the enjoyment of the privilege, of which he is in the quiet use or possession, cannot be questioned by one who shows no adverse claim. *Howard v. Ingersoll*, 17 Ala. 780.

93. A reservation by a riparian proprietor, in conveying the land to another, of a right to divert the water of the stream, cannot be implied from the fact that, at the time of the execution of the conveyance, he diverted the water to supply a mill on another tract of land owned by him ; especially, when the claim is set up by a stranger, *Stein v. Burden*, 27 Ala. 104.

3. *For Fraud and Deceit.*

94. In an action for the loss of a slave, who was killed while working on defendant's house, if the declaration avers that the defendant fraudulently concealed the dangerous condition of the house, and also fraudulently represented that it was safe, it is not demurrable for duplicity, but the latter averment may be struck out as surplusage. *Perry v. Marsh*, 25 Ala. 659.

95. A count, which sets forth a contract for the sale of a slave by plaintiff to defendant, in consideration of a certain sum of money, which is alleged to be less than his real value, and for the further consideration that defendant would remove him from the State ; and which then avers, that the defendant, when he made the contract, did not intend to remove said slave, "but falsely and fraudulently, and with intent to deceive and defraud plaintiff," represented that he would,—is a good count in case, and the statement of the contract is mere matter of inducement. *Dixon v. Barclay*, 22 Ala. 370.

96. In such action, although the consideration is stated in the bill of sale to be a certain sum of money, parol evidence is admissible to prove that, at the time of the sale, defendant also promised to carry the slave out of the State. *Ib.*

97. In an action against a tinner, for falsely and fraudulently representing that he would put a roof on plaintiff's house which would not leak for twenty years, whereas the said roof did leak before the expiration of two years, a partial payment by plaintiff, after discovering that the roof leaked, is a circumstance to be weighed by the jury, in determining whether any fraud was practiced by the defendant, but does not amount to an estoppel or waiver. *McGar v. Williams*, 26 Ala. 469.

98. But a payment of the agreed price by the purchaser of a slave, after being informed of the slave's unsoundness, and of facts which would constitute a fraud in the sale, prevents a recovery on the ground of fraud. *Gilmer v. Ware*, 19 Ala. 252.

99. Where the purchaser of a horse pays what would be an adequate price if the animal was sound, this is a circumstance to which the jury may look, in connection with other proof, in determining whether he was advised of the latent unsoundness of the animal. *Armstrong v. Huffstutler*, 19 Ala. 51.

4. *For Injuries to Stock.*

100. If the declaration avers that the injury to plaintiff's hogs was done with the defendant's dogs, the averment, though unnecessary, is descriptive of the cause of action, and cannot be disregarded. *Smith v. Causey*, 28 Ala. 655.

101. If it alleges that the injuries were done by the defendant's children and servants, plaintiff cannot be allowed to prove injuries done by defendant himself in person ; and defendant's threats, that he would kill the hogs, are therefore admissible, because they tend to show that he did kill them. *Ib.*

102. But defendant's declaration, "that plaintiff's hogs were in the habit of running in his field, and that they should not do it any more," is admissible evidence for plaintiff, because it tends, though remotely, to show that the hogs which were injured belonged to plaintiff. *Ib.*

5. *For Malicious Prosecution.*

103. In declaring for a malicious prosecution, it is necessary to aver the issue of process, properly describing it, and the plaintiff's arrest and imprisonment by virtue thereof. *Sheppard v. Furniss*, 19 Ala. 760.

104. But it is not necessary to describe by name the offense with which he was charged, nor to aver the legal conclusion resulting from the prosecutor's act. *Long v. Rogers*, 17 Ala. 540.

105. An averment of the plaintiff's examination before a magistrate, touching the offense with which he was charged, and his discharge therefrom by said magistrate, is a sufficient allegation that the prosecution is ended. *Ib.*

106. Where the action is brought against the prosecutor and magistrate, the affidavit and warrant for the plaintiff's arrest are competent evidence for him. *Cooper v. Turrentine & Freeman*, 17 Ala. 13.

107. A memorandum, made by the magistrate at the time of the preliminary trial before him, showing the judgment rendered by him, is admissible evidence for the plaintiff, to show the termination of the prosecution. *Long v. Rogers*, 19 Ala. 321.

108. The judgment of the magistrate, ordering the commitment of the plaintiff, is evidence, and, in the absence of countervailing proof, sufficient evidence, of the existence of probable cause ; but the plaintiff is not thereby precluded from introducing evidence to show that the prosecution was without probable cause. *Ewing v. Sanford*, 19 Ala. 605.

109. The defendant may prove, as evidence of probable cause, what he or his wife swore before the committing magistrate. *Gardner v. Randolph*, 18 Ala. 685.

110. It is competent for the plaintiff, for the purpose of showing the want of probable cause, and thereby raising the presumption of malice, to disprove the charge preferred against him. *Long v. Rogers*, 17 Ala. 540.

111. Where the prosecution was for the larceny of a slave, which the plaintiff afterwards recovered from the prosecutor in an action at law, the record of the civil suit was held admissible evidence for the plaintiff, as tending to disprove the charge preferred against him. *Ewing v. Sanford*, 21 Ala. 157.

112. The prosecution having been instituted for larceny, the defendant may introduce evidence of the plaintiff's general bad character, showing that his only occupation was that of gambling and horse-racing ; since it would require less stringent proof to make out probable cause for prosecuting a man of such character, than one who had always maintained a good reputation, and followed a lawful occupation. *Martin v. Hardesty*, 27 Ala. 458.

113. The accusation being that the plaintiff and one L. unlawfully took away and detained the prosecutor's daughter, without her consent, the declarations of the daughter, made about the time of the alleged abduction, and conducing to show her willingness to go, are admissible evidence, as part of the *res gestæ*. *Long v. Rogers*, 17 Ala. 540.

114. The defendant having offered evidence of his own declarations, made after the abduction of his daughter, and before the issue of the warrant,

expressing his willingness that L. might marry his daughter,—*held*, that plaintiff might prove that these declarations were communicated to L., although defendant was not present when the communication was made; also, that he might prove that the defendant, at the time of the institution of the prosecution, entertained unfriendly feelings towards the family of which plaintiff was a member. *S. C.*, 19 Ala. 321.

115. Probable cause is a question of fact or of law, according as the evidence is doubtful and conflicting, or the facts clear and undisputed. *Ewing v. Sanford*, 19 Ala. 605.

116. A charge, which asserts that, "if the facts established a want of probable cause, malice is a necessary implication, independent of the circumstances in proof," is erroneous. *Ib.*

117. The plaintiff may recover against one of the defendants, although the others are acquitted. *Cooper v. Turrentine & Freeman*, 17 Ala. 13.

6. *For Malicious or Wrongful Attachment or Injunction.*

118. In declaring for the malicious suing out of an injunction, it is necessary to aver that the injunction suit is ended, or that the injunction itself is finally disposed of. *Tatum & Smith v. Morris*, 19 Ala. 302.

119. But, in declaring for the wrongful or vexatious suing out of an attachment, it is not necessary to aver the termination of the attachment suit. *Forrest v. Collier*, 20 Ala. 175; *Seay v. Greenwood*, 21 Ala. 491.

120. Nor that the affidavit for the attachment was in writing. *Forrest v. Collier*, 20 Ala. 175.

121. An averment that the attachment was sued out "wrongfully, fraudulently, and in order to oppress and injure plaintiff," is equivalent to an averment that it was sued out maliciously. *Ib.*

122. The declaration, in such case, must specially deny the ground set forth in the affidavit for the attachment. *Tiller v. Shearer*, 20 Ala. 527.

123. If the attachment was sued out by the defendant as agent of another, and the declaration alleges that he acted without authority in so doing, it is not necessary to aver the want of probable cause for the issue of the attachment. *Forrest v. Collier*, 20 Ala. 175.

124. If the attachment was sued out before a justice of the peace of another State, the declaration must allege that he had authority by law to issue attachments, and must connect the defendant with its levy. *Marshall v. Betner*, 17 Ala. 832.

125. If an attachment is sued out against a merchant on the ground of fraud, the injury to his credit and business constitutes a legitimate ground of recovery in an action on the case. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

126. The loss of probable profits, consequent upon the seizure of his goods under the attachment, although it does not furnish the measure of damages, is a circumstance for the consideration of the jury, in arriving at a correct conclusion as to the injury sustained. *Donnell v. Jones*, 17 Ala. 689.

127. The costs of the justice's court, before whom the attachment was returnable, are recoverable as a part of the damage actually sustained; but the costs of the circuit court, to which the defendant removed the case by appeal, cannot be recovered, when it appears that, after there filing his pleas, he withdrew them for a valuable consideration paid him by plaintiff in attachment, and suffered judgment by *nil dicit*. *Seay v. Greenwood*, 21 Ala. 491.

128. The costs of the original suit, to which the attachment was ancillary, constitute no part of the plaintiff's damages. *White v. Wyley*, 17 Ala. 167.

129. Reasonable and necessary counsel fees, expended or incurred in the defense of the attachment suit, may be proved and considered in the assessment of damages caused by the vexations suing out of the writ. *Marshall v. Betner*, 17 Ala. 832.

130. They are equally recoverable, where the action is brought for the wrongful suing out of the writ. *Seay v. Greenwood*, 21 Ala. 491.

131. Where an attachment against one partner is levied on the goods of the partnership, and the other part-

ner, after recovering the goods in a claim suit under the statute, brings an action for damages against the plaintiff in attachment, counsel fees paid by him in the claim suit may be taken into consideration by the jury in assessing his damages. *Roberts v. Heim*, 27 Ala. 678.

132. When the action is founded on the malicious and vexations suing out of the writ, vindictive damages are recoverable. *Marshall v. Betner*, 17 Ala. 832; *Seay v. Greenwood*, 21 Ala. 491; *Roberts v. Heim*, 27 Ala. 678.

133. A judgment for the defendant in attachment does not estop the attaching creditor, when sued for the vexatious suing out of the writ, from proving that the debt was actually due: such evidence is admissible, to show probable cause, and thus repel the presumption of malice. *Marshall v. Betner*, 17 Ala. 832.

134. But a judgment for the claimant of the property seized, on a trial of the right of property, is conclusive on the attaching creditor, in an action for damages brought against him by the claimant, as to the fact that the defendant in attachment had no interest in the property. *Roberts v. Heim*, 27 Ala. 678.

135. Evidence of the plaintiff's general credit and reputation is not, *it seems*, admissible for him, until it has been assailed. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

136. The record of the attachment suit is admissible evidence for plaintiff. *Donnell v. Jones*, 17 Ala. 689.

137. Evidence of the fact that one of the defendants agreed, that if another creditor, whose attachment was first in the sheriff's hands, would yield the preference to their attachment, he would find property on which a levy might be made, and on which the attachment was subsequently levied, is admissible for plaintiff, as tending to show that said defendant was active and instrumental in causing the levy. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

138. A fraudulent assignment, made by the plaintiff three days after the defendant had sued out an ancillary attachment against him, is no defense to an action for the vexatious suing out of the writ, unless the fraudulent intent existed at the time the attachment was sued out. *Donnell v. Jones*, 17 Ala. 689.

139. But a deed of trust, executed by the plaintiff before the issue of the attachment, is admissible evidence for the defendant; also, any evidence tending to show that it was fraudulent, or that it was part of a plan to enable the plaintiff to dispose of his property fraudulently, or that he was in embarrassed circumstances at the time of its execution, or that the property conveyed by it was subsequently run off by the beneficiary to another State. *Yarbrough v. Hudson*, 19 Ala. 653.

140. Evidence showing that, at the time defendant's attachment was levied, another attachment against plaintiff was in the hands of the sheriff, and was levied on the same property, is not admissible for the defendant; but he may prove the issue of another attachment, and notice thereof to himself, previous to the issue of his own, as tending to rebut the presumption of malice. *Ib.*

141. Where the attachment was sued out as ancillary to an action against the plaintiff, as endorser of a promissory note on which suit had previously been instituted against the maker, with a return of *non est inventus*, the proceedings in the suit against the maker, although not sufficient to fix the liability of the endorser, are admissible evidence in mitigation of damages. *White v. Wyley*, 17 Ala. 167.

142. Where the attachment was sued out by the defendant as agent of another, he may show, in mitigation of damages, that he was plaintiff's surety on a stay-bond in the original suit, and that plaintiff was about to remove his property from the State. *Forrest v. Collier*, 20 Ala. 175.

143. Although the defendants, when sued as partners, cannot be held responsible for the separate act of one partner in procuring the levy of another attachment, in favor of another creditor; yet, where the attachment on which the action is founded, by the sheriff's return thereon endorsed, shows that the goods had been first taken under the other attachment, the plaintiff may show that the goods were more than sufficient to satisfy that attachment, and may for this pur-

pose introduce the attachment and levy. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

7. *For Negligence.*

144. Declaration against an attorney-at-law, for negligence, held sufficient. *Walker v. Goodman & Mitchell*, 21 Ala. 647.

145. In declaring against a municipal corporation, for injuries caused by the fall of a bridge within the corporate limits, it is not necessary to aver that the bridge was broken without any fault on the part of the plaintiff; nor that he could not pass the street, of which the bridge formed a part, without crossing the bridge: an averment that it was the defendant's duty to keep the bridge in repair, and that the injury resulted from its unsafe and rotten condition, which rendered it incapable of sustaining the customary burdens, is sufficient. *Smoot v. Mayor of Wetumpka*, 24 Ala. 112.

146. A count, which sets forth a contract for the hire of a slave, to be employed only in a particular service, and alleges a breach of duty on the part of the hirer, in putting the slave to a different service, and a consequent loss to the owner,—is good as a count in case. *Myers v. Gilbert*, 18 Ala. 467.

147. In declaring against the hirer of a slave, for negligence in his treatment, the consideration and terms of the contract of hiring need not be alleged; nor, if alleged, need they be proved as laid. *Moseley v. Wilkinson*, 24 Ala. 411.

148. But, under a declaration alleging a general contract of hiring, and the defendant's breach of duty in failing to treat the slave with proper care and attention while sick, a recovery cannot be had on proof of a particular contract, limiting the employment of the slave to a particular place and service, and stipulating that he should not be re-hired to another. *S. C.*, 18 Ala. 288.

149. The failure of the hirer to redeliver the slave, at the expiration of the term, renders him *prima-facie* liable; but, when it is shown that the slave died before the expiration of the term, it devolves on the owner to prove that the death resulted from a violation of duty on the part of the hirer. *Ib.*

150. Where the plaintiff has offered evidence of the slave's removal by railroad while sick, as an act tending to show negligence in his treatment, the defendant has a right to prove that he acted under the advice of a physician. *Ala. & Tenn. Rivers Railroad Co. v. Burke*, 27 Ala. 535.

151. In an action against the owner of a steamboat, to recover damages for the loss of a slave employed as a deck-hand, which was caused by an explosion attributable to the negligence of the engineer, the fact that said engineer was licensed is *prima facie* proof of his competency, but does not authorize the captain to retain him after being informed of his habitual gross negligence. *Walker v. Bolling*, 22 Ala. 294.

152. Where the death of the slave was occasioned by a collision with another boat, caused by the negligence and want of skill of the officers of the boat on which he was hired, one of the part-owners acting as captain at the time of the collision, evidence of his general reputation as a steamboat captain is admissible, as tending to prove notice to the defendants of his incompetency. *Cook & Scott v. Parham*, 24 Ala. 21.

153. A witness for the plaintiff, being asked "what was the general reputation of said defendant as a steamboat captain," answered, "that he had no reputation, for the reason that he had no experience, and that he regarded him as wholly incompetent for such a duty." *Held*, that the question and answer were admissible. *Ib.*

154. A person acquainted with the navigation of the river, who was a witness of the collision, may give his opinion, as an expert, whether the particular act which caused it was prudent and discreet on the part of the officers. *Ib.*

155. In an action against the owners of a steamboat, to recover damages for the loss of a stage, which was caused by a collision between the steamboat and a ferry-boat on which the stage was crossing the river, the statement of an eye-witness, "that he thought the stage could have been saved, if the

steamboat had returned to the assistance of the flat when the call for assistance was made," is mere matter of opinion, and therefore inadmissible. *Otis & Jayne v. Thom*, 23 Ala. 469.

156. In such action, evidence that the ferryman was expert and careful, is irrelevant and inadmissible. *Ib.*

157. An eye-witness of the collision testified, that the steamboat, after striking the flat, stopped her engine, and, when about fifty yards distant, was called upon by those on board of the latter for assistance; whereupon, some one on board of her was heard to say, in a loud and commanding tone, "*Go ahead, and let her sink; its nothing but a damned flat-boat any how;*" and that the steamboat then went on, without rendering any assistance. *Held*, that these words were admissible evidence for plaintiff. *Ib.*

158. Although a recovery by the owner of the flat-boat, who had charge of the goods when lost or injured by the collision, is a bar to a subsequent action by the owner of the goods; yet a plea, averring a former recovery for such injuries, "which are the same injuries in the plaintiff's declaration alleged to have been done to the goods of the said plaintiff," is defective on demurrer, because *non constat* that the recovery was not for damages done to the goods of some other person which were on board the flat-boat at the same time. *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189.

159. In declaring for the loss of a slave, who was killed while working on the defendant's house, if the concealment by the defendant of the dangerous condition of his house amounts to a breach of duty sufficient to support the action, an additional averment of fraud may be struck out as surplusage. *Perry v. Marsh*, 25 Ala. 659.

160. In an action against a sheriff, for failing to make the money on an execution, the fact that the defendant in execution "was in possession of a house and lot, as of his own property, prior to the day on which the execution came to the sheriff's hands, claiming ownership thereof, and continued in possession thereof until after the return day of the execution," is admissible evidence for plaintiff. *Whitsett, Garner & Co. v. Slatter*, 23 Ala. 626.

161. Evidence of general neighborhood rumor that certain slaves, in the possession of the defendant in execution, were the separate property of his wife, is not admissible for the sheriff, either to show an excuse for not levying the execution, or "as tending to show a reasonable excuse for not levying within a reasonable time for making necessary inquiries as to the title of the property." *Ib.*

162. What constitutes due diligence on the part of the sheriff, is a mixed question of law and fact: the jury must determine the facts, while the court must decide whether they constitute due diligence. *Ib.*

163. What constitutes due diligence on the part of a sheriff depends materially on the facts of each particular case, and no general rule of universal application can be laid down; but, where he receives an execution against a resident citizen of his county, who is in open possession of personal property sufficient to satisfy it, and makes no effort, for thirty days after its reception, either to levy or to give the plaintiff notice of any real doubts he may entertain of the liability of the property to the execution, he is guilty of a want of due diligence. *Ib.*

164. In such action, the amount of the execution is the measure of damages, although the defendant in execution may continue solvent. *Evans v. Governor*, 18 Ala. 659.

165. In an action against a clerk, to recover damages for his neglect of duty in the matter of a *supersedeas* bond, which he certified as valid to the supreme court, where the judgment was affirmed on certificate, and afterwards perpetually enjoined in chancery on account of his want of authority in filling up the bond with the names of the sureties, the plaintiff is entitled to recover the amount of the original judgment, with interest thereon, and such necessary costs as were expended by him in good faith in defending the chancery suit. *Williams v. Hart*, 17 Ala. 102.

166. Whether the clerk is liable, in such case, for the ten per cent. damages on the judgment of affirmance in the supreme court, *quære?* *Ib.*

167. In an action against a deputy clerk, for negligence or unskillfulness whereby his principal is exposed to a suit for damages, the lapse of six years from the default, or at least from its discovery, is a complete bar, although the actual damage to the principal may not then have been ascertained. Whether the recovery should be for nominal damages only, or for the probable prospective damages, where the suit is instituted before the actual injury is discovered, *quære? Snedicor v. Davis*, 17 Ala. 472.

168. In an action against a municipal corporation, for its neglect of duty in suffering plaintiff's land to be overflowed by the rain water which passed through the sewers in the streets of the city, and accumulated in a ravine emptying into the river, a witness cannot be asked, in behalf of the defendants, "if there were not other ravines in the city, which had increased in size, for the last twenty years, in as great proportion as this ravine had increased." *Gilmer & Taylor v. City Council of Montgomery*, 26 Ala. 665.

169. It being shown that plaintiff had built a wall and embankment on his land, which extended partly across the ravine, and narrowed the channel by which the water flowed into the river, a witness for the defense, who had been for many years engaged in building brick walls and houses, may be asked, "if he did not tell plaintiff that, if he built said wall in said ravine, it would fall by reason of the flood in said ravine." *Ib.*

8. *In Other Cases.*

170. In an action by an agent against his principal, on an implied promise of indemnity against losses and damages sustained by the agent from the performance of an act in the direct execution of his agency, the declaration must aver that the agent was ignorant of the illegal character of the act at the time of its performance. *Moore v. Appleton*, 26 Ala. 633.

171. In an action to recover damages for defendant's wrongful act in taking and withholding from plaintiff several hired slaves, plaintiff cannot be allowed to prove, that he had prepared for cultivation a larger tract of land than his other negroes could cultivate, and had procured horses to cultivate said land, provender to feed them, and a necessary supply of provisions for said negroes; and that, by reason of the loss of the services of the hired slaves, some of his horses were idle during the year, and he was compelled to leave a portion of the land uncultivated: such damage is not the natural and proximate consequence of the tortious act complained of. *Burton v. Holley*, 29 Ala. 318.

ADMIRALTY.

I. JURISDICTION.
II. PRACTICE.

I. JURISDICTION.

1. Prior to the act of 1836, (Clay's Digest, 139, § 22,) justices of the peace had no admiralty jurisdiction. *Schooner Louisiana v. Fettyplace, Goodman & Co.*, 21 Ala. 286.

2. The act of 1841, (Clay's Digest, 140, § 26,) which was designed to remove all doubts as to the construction of the act of 1836, confers upon justices of the peace the same jurisdiction, where the sum claimed is less than fifty dollars, that the former act gave to the circuit and county courts where the sum claimed was over that amount; and that jurisdiction is confined to demands which arise from "furnishing materials, labor or stores, for the use of any steamboat or other water-craft," and does not embrace debts or demands for dockage. *Ib.*

3. The courts of this State have no jurisdiction to proceed by admiralty process to enforce the collection of debts which do not constitute a lien on the vessel, or the lien of which has been lost or discharged. *Schooner Southron v. O'Riley*, 21 Ala. 228.

4. The court may look to the items of the account attached to the libel, for the purpose of determining whether they constitute a lien on the vessel; but, when the libel shows that the entire debt constitutes a lien, and the account attached may be construed

consistently with the libel, the appellate court will not, especially after a final decree, so construe the account as to infer that any part of the debt does not constitute a lien. *Ib.*

5. An objection to the jurisdiction of the court, on the ground that it did not have the possession or control of the vessel, cannot be raised, for the first time, after the boat has been sold under the order of the court, and the proceeds of sale are in the hands of the sheriff. *Stewart George v. Skeates & Co.*, 19 Ala. 738.

II. PRACTICE.

6. When a boat has been seized under a libel issuing from a court of competent jurisdiction, all persons having liens upon it may intervene by petition, without regard to the amount of their claims. *Stewart George v. Skeates & Co.*, 19 Ala. 738.

7. When an attachment has been sued out against a steamboat, under the act of January 17, 1844, the proceedings should so far conform to the admiralty practice, as that the declaration be filed against the boat itself, and not against the owners; and the latter be allowed to intervene, if they desire, and make themselves parties to the suit. *Otis v. Thorn*, 18 Ala. 395.

8. And this, notwithstanding the names of the owners are stated in the affidavit for the attachment, and the attachment bond is made payable to them. *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189.

9. But the proceedings under this statute, except so far as they are changed by the act itself, must be governed by the rules of the common law. *Ib.*

10. The act of 1848, requiring liens upon steamboats to be enforced within six months from the time of their creation, repeals the limitation prescribed by the act of 1836. *Stewart George v. Skeates & Co.*, 19 Ala. 738.

11. A steamboat, in the possession of the sheriff under a writ of seizure, being replevied, was delivered to the stipulators, who gave bond conditioned to pay the decree which might be rendered on the libel; but they afterwards re-delivered her to the sheriff, who returned the writ of seizure showing these facts in his return, with the bond given by the stipulators. A decree being afterwards rendered in favor of the libellant, and a sale of the boat ordered,—*held*, that the decree might be amended at a subsequent term, *nunc pro tunc*, by setting aside the order of sale, and rendering a decree against the stipulators on their bond. *Wainwright & Twelves v. Sanders*, 20 Ala. 602.

12. Under the rules of practice in the Federal courts, in causes of admiralty and maritime jurisdiction on the instance side of the court, the marshal acts, in the sale of the property condemned, immediately under the decree and order of the court. *Smith, Dabney & Co. v. Armistead*, 17 Ala. 282.

13. After the vessel has been sold under an order of court, and the proceeds of sale brought into court for distribution, an appeal or writ of error does not lie from the refusal of the court to order the proceeds to be paid to the claimant. *Stewart George v. Saunders*, 19 Ala. 744.

14. The provisions of the second section of the act of February 15, 1854, "to provide for the registration of the names of steamboat owners," which gives a remedy against the boat by admiralty process "in the same manner as is provided by the laws of this State for the recovery for work and materials furnished to steamboats," refers only to the form and mode of conducting the proceeding, but does not limit the suit to thirty days after the accrual of the cause of action. *Commissioners of Pilotage v. Steamboats Cuba, &c.*, 28 Ala. 185.

ADVERSE POSSESSION.

I. WHEN POSSESSION IS, OR IS NOT, ADVERSE.
II. EFFECT.
III. PLEADING AND PROOF.

I. WHEN POSSESSION IS, OR NOT, ADVERSE.

1. Adverse possession cannot be set up to defeat or avoid a patent from the United States, since there can be no adverse possession against the

government. *Iverson & Robinson v. Dubose*, 27 Ala. 418.

2. To enable a bailee to assert an adverse possession against his bailor, he must do some open and unequivocal act evincing such intention, and this must be brought to the knowledge of his bailor. *Benje v. Creagh's Adm'r*, 21 Ala. 151; *Knight v. Bell*, 22 Ala. 198.

3. The possession of the mortgagee, before the law-day, is not adverse to the mortgagor. *McGuire v. Shelby*, 20 Ala. 456.

4. The possession of the mortgagor or his vendee, even after the law-day has passed, is not adverse to the mortgagee, until there has been some overt act, or open assertion of hostile title. *Boyd v. Beck*, 29 Ala. 703.

5. The perception of the entire profits by one tenant in common is not, of itself, sufficient to divest the possession of his co-tenant, nor are acts of ownership by one necessarily to be construed into acts of disseizin; but an undisturbed and peaceable occupancy of the premises by one, for nearly thirty years, under an exclusive and notorious claim of title, without any payment of rents and profits, or any acknowledgment of the rights of the other, is sufficient to raise the presumption of an actual ouster. *Johnson v. Toulmin*, 18 Ala. 50.

6. Where a part-owner of a slave has possession, claiming only an undivided half interest, and acknowledging the title of the other part-owner to the other half, his possession is not adverse, although "he refused to deliver the possession to any one until his portion should be allotted to him." *Cotten v. Thompson*, 25 Ala 671.

7. A purchaser at an administrator's sale, who takes possession of the property, but does not give bond with approved security as required by the statute, holds adversely to the administrator. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

8. But the adverse possession of a loanee or gratuitous bailee of an administrator, or of a purchaser at a sale made under an order of court which is void for want of jurisdiction, does not commence, as against those representing the estate, until the appointment of a succeeding administrator. *S. C.*, 24 Ala. 184; *Wyatt's Adm'r v. Rambo*, 29 Ala. 510.

9. Where the separate property of the wife is allowed by her trustee to remain in the possession of the husband, who, at his death, disposes of it by will; and the trustee is cognizant, before the probate of the will, of facts which are sufficient to charge him with implied notice of its general provisions,—the adverse possession of the husband's executor, as against the trustee, commences to run from the probate of the will and possession under it. *Bryan and Wife v. Weems*, 29 Ala. 423.

10. In cases of express trusts, there can be no adverse possession between the trustee and beneficiaries; *secus*, as to trusts created by implication of law. *Tarleton v. Goldthwaite's Heirs*, 23 Ala. 346.

11. The possession of one who enters on land under an executory contract of purchase, and fails to comply with the terms of the contract in the payment of the purchase-money, is not adverse to his vendor. *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207; also, *Sellers & Cook v. Hayes*, 17 Ala. 749.

12. The possession of a vendee, acquired and held under a fraudulent conveyance, is not adverse to a creditor of the vendor, until after the discovery of the fraud. *Snodgrass v. Branch Bank at Decatur*, 25 Ala. 161.

13. The payment of rent by the terre-tenants to a stranger, under his false assertion of title in himself, does not create in him an adverse possession. *Branch Bank at Mobile v. Fry*, 23 Ala. 770.

II. EFFECT.

14. A conveyance of land, which is in the adverse possession of another, passes no title to the grantee, as against third persons. *Harvey v. Doe d. Carlisle*, 23 Ala. 635; *Abernathy v. Boazman*, 24 Ala. 189.

15. But it is nevertheless valid and binding, as between the parties themselves, and their privies. *Ib.*

16. And the fact that the purchaser is in possession, as tenant of the adverse holder, does not affect the principle. *Abernathy v. Boazman*, 24 Ala. 189.

17. The doctrine of adverse possession does not, *it seems*, apply to judicial sales. *Long v. McDougald's Adm'r*, 23 Ala. 413.

18. A purchaser at sheriff's sale, of land which is at the time in the actual possession of a third person, claiming it *bona fide* in his own right, whether by color of paper title or otherwise, acquires only a right of property, connected with a right of possession; which can only be enforced by action at law, and can neither be sold, nor asserted by force. *Coleman v. Hair*, 22 Ala. 596.

19. The transfer of a remainder in a chattel, which is known to be in the adverse possession of a purchaser from the tenant for life, under a *bona-fide* claim of the entire title, is void. *Price v. Talley's Adm'r*, 18 Ala. 21.

20. Adverse possession, for the length of time prescribed as a bar by the statute of limitations, not only bars the remedy, but perfects the title to property. *Jones v. Jones*, 18 Ala. 248; *Newcombe v. Leavitt*, 22 Ala. 631; *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

21. When the statute has effected a bar against the recovery of a female slave, the bar is also complete as to her children born after the commencement of the adverse possession. (RICE, C. J., *dissenting*, held that the bar as to the children was not complete until they were six years old, unless they were born after the completion of the bar as to their mother.) *Bryan and Wife v. Weems*, 29 Ala. 423.

22. A party in possession of land, holding in subordination to a title which has been perfected by the adverse possession of himself and those from whom he derived it, cannot, by purchasing a title barred by such adverse possession, give vitality to the barred title, and thus prevent a recovery on the title under which he held. *Baker v. Chastang's Heirs*, 18 Ala. 417.

III. PLEADING AND PROOF.

23. Adverse possession, for the length of time prescribed as a bar by the statute of limitations, may be given in evidence under plea of the general issue in detinue. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

24. In trespass *qu. cl. fr.*, if the defendant relies on the adverse possession of himself and those under whom he claims, he must show an actual possession of the *locus in quo*, or of some part of a legal subdivision of which it formed a portion. *Shipman v. Baxter*, 21 Ala. 456.

25. Adverse possession is a question of fact; and the weight of the circumstances tending to establish it must, therefore, be determined by the jury, and not by the court. *Benje v. Creagh's Adm'r*, 21 Ala. 151.

26. Where a bailee attempts to defeat a recovery by his bailor, by showing adverse possession, the character of that possession must be brought home to the knowledge of the plaintiff; and the jury are not bound to infer such knowledge, from the fact that the defendant claimed the property, publicly and notoriously, under an adverse title. *Ib.*

27. Where the character of the defendant's possession is in issue, it cannot be proved by general reputation, nor by the opinion of witnesses as to the actual condition of the property. *Ib.*

28. On a trial of the right of property in a slave, between plaintiff in execution and a daughter of the defendant in execution, the facts that said defendant resided on and claimed as his own the plantation on which the slave worked; that the slave was controlled by his son, avowedly as his overseer, who, with the claimant, also resided on the plantation; and that said defendant, while the slave was being thus controlled, declared that his son was his overseer, are admissible evidence for plaintiffs, to show adverse possession. *Thomas v. Henderson*, 27 Ala. 523.

29. The unrecorded evidence of a Spanish title to land situated within the territory of Louisiana, the written evidence of which was never presented to the United States commissioners, nor recorded under any of the different acts of congress, is admissible against a grantee of the United States, to show adverse possession under color of title, and thus protect the party in possession under the statute of limitations. *Hall v. Doe d. Root*, 19 Ala. 378. (*Vide supra*, 1.)

30. Where two tenants in common of an equitable title abandoned possession of the land, and removed from the State; and one afterwards returned, made a new contract of purchase with their vendor, received a deed to himself individually, and had it duly recorded,—the presumption of an adverse possession, arising from a long-continued, notorious, and peaceable occupancy under his new purchase, is not rebutted by the mere fact that he caused the original unexecuted contract, under which he and his co-tenant previously held, to be recorded about the same time. *Johnson v. Toulmin*, 18 Ala. 50.

AGENCY.

I. APPOINTMENT OF AGENT, AND PROOF THEREOF.
II. AUTHORITY OF AGENT.
III. COMPETENCY OF AGENT AS WITNESS FOR OR AGAINST PRINCIPAL.
IV. LIABILITY OF AGENT.
V. LIABILITY OF PRINCIPAL.

1. *To Agent.*
2. *To Third Persons.*

I. APPOINTMENT OF AGENT, AND PROOF THEREOF.

1. K. & Co., being indebted by note to C. H. & Co., of New York, directed them by letter to "return the note to R. S. & Co., our agents in Mobile, who will pay it on presentation;" and the note was accordingly remitted to R. S. & Co., who, in return, sent their receipt for it to C. H. & Co., promising "to account" to them for the note. *Held*, that R. S. & Co. did not thereby become the agents of C. H. & Co., and could not discharge K. & Co. from the debt without a payment to C. H. & Co. *Kidd & Co. v. Cromwell, Haight & Co.*, 17 Ala. 648.

2. An infant cannot appoint an agent. *Ware v. Cartledge*, 24 Ala. 622.

3. A slave may act as the agent of his owner or hirer. *Stanley v. Nelson*, 28 Ala. 514; *Powell v. The State*, 27 Ala. 51.

4. A married woman may act as the agent of her husband, during his absence from the State, and may, by her endorsement of a promissory note, confer a valid title on her transferee; and the assent of her husband may be presumed from circumstances. *Roland v. Logan*, 18 Ala. 307; *Krebs v. O'Grady*, 23 Ala. 726.

5. The husband's assent may be presumed, from the facts that he permitted his wife to take her children to another State, and there enter into business for their support and maintenance; that he never became a resident of that State, and never asserted any claim to rights and property which the wife there acquired by her industry. *Roland v. Logan*, 18 Ala. 307.

6. The husband having gone to California, his wife continued to carry on his business, (a bakery,) and sold a part of the furniture and fixtures, taking notes payable to herself, which she afterwards transferred. *Held*, that these facts did not amount to presumptive evidence of her agency, but the jury must decide whether they were sufficient to establish it. *Krebs v. O'Grady*, 23 Ala. 726.

7. Where a father pays, without objection, an account contracted by his minor son while attending school at a distance from home, the payment is equivalent to a recognition of the son's authority to bind him, and will render him liable on a similar account subsequently contracted. *McKenzie v. Stevens*, 19 Ala. 691.

8. When the authority of the son, in such case, is once shown to exist, the lapse of fifteen months will not overcome the presumption of the continuance of that authority, so as to discharge the father from liability for goods subsequently furnished; it being shown that the son, during all that time, was absent from the place where the two accounts were contracted. *Ib.*

9. The authority of the son, in such case, being established, his declaration respecting the subject-matter, if made at the time of the purchase, and constituting a part of the *res gestæ*, are admissible evidence against the father. *Ib.*

10. A railroad company has power,

independently of any provision in its charter, to appoint an agent in the construction of its road, or in the transportation of its freight. *Ala. & Tenn. Rivers Railroad Co. v. Kidd*, 29 Ala. 221.

11. The appointment of such agent need not be proved by the written vote of the corporation or its officers, but may be inferred from their adoption of the agent's acts. *Ib.*

12. In an action against a railroad company, to recover damages for its failure to deliver certain bales of cotton, the receipt for which was signed "R. B. S., R. R. agent, *per* J. R. B.," said B. testified, on behalf of the plaintiff, that he was appointed sub-agent of the company by said S.; that the president and superintendent of the road knew that he was acting as such agent, and made no objection; that the officers of the road had frequently given him directions about the business, and that freight had been delivered, on at least two occasions, on the production of his receipts, in similar form with the above. *Held*, that the evidence was admissible, as tending to prove a ratification of the agency. *Ib.*

13. In an action against the hirer of a slave, who defends on the ground that the contract was made with him as agent of another, a letter from his principal to him, written after the contract was made, and showing a ratification of it, is admissible evidence for him. *Waring v. Moseley*, 22 Ala. 667.

14. The institution of a suit by the principal, against a person to whom the agent has wrongfully paid money, is a ratification of the payment. *VanDyke v. The State*, 24 Ala. 81.

15. A payment to the comptroller, of moneys due to the State, can only be ratified by the sovereign power: no agent or officer of the State can ratify it. *Walker v. Chapman*, 22 Ala. 116; *VanDyke v. The State*, 24 Ala. 81.

16. B. & Co. received, as commission-merchants, a lot of cotton which they stored with defendants, who were warehouse-men; and afterwards, having obtained from plaintiffs an advance of money for their individual use, they pledged the cotton as security for its payment, and gave plaintiffs a delivery-order on defendants. Defendants acknowledged their title, and agreed to hold the cotton; they undertaking to pay the storage on it. B. & Co. afterwards sold the cotton to T. & S., and gave them a delivery-order on defendants, who delivered it to them, and received it from them again, on the same day, for storage. B. & Co. paid to plaintiff, on an account due to them prior to the pledge of the cotton, a part of the money which they received from T. & S. on its sale; and plaintiffs received the money in ignorance of the source from which it was derived, and credited it on B. & Co.'s prior indebtedness. *Held*, in detinue for the cotton, that the receipt of the money by plaintiff was not a ratification of the sale by B. & Co. to T. & S., and did not entitle defendants to a credit on the amount of the recovery against them. *Bott v. McCoy & Johnson*, 20 Ala. 578.

17. If an agent is discharging, as deputy, the duties of a public office conferred upon another; and his acts are of such a continuous character, as reasonably to justify the inference that the principal, if a faithful public officer, must have known of them, and would not have permitted the deputy thus to act without authority for so doing,—the acts themselves, in such case, become very strong evidence of the authority. *McDonnell v. Branch Bank at Montgomery*, 20 Ala. 313.

18. Conceding that an attorney-at-law has no authority to employ another attorney for his client; yet, if he soon afterwards informs his client of such unauthorized employment, and the latter does not dissent from it,—these facts are proper to be submitted to the jury, in an action brought by the second attorney to recover his fees, to enable them to determine whether the client did not assent to such employment. *King v. Pope*, 28 Ala. 601.

19. Agency is a question of fact for the determination of the jury. *McClung's Executors v. Spotswood*, 19 Ala. 165; *McDonnell v. Branch Bank at Montgomery*, 20 Ala. 313.

20. The acceptor of a bill of exchange may appoint an agent to pay it or to refuse payment; and a presentment to such agent is sufficient to charge the drawer and endorser. *Phillips v. Poindexter*, 18 Ala. 579.

21. When the payment of a foreign bill is demanded of an agent, and refused, the protest is evidence of the fact of agency. *Ib.*

22. The holder of a bill may constitute an agent for its collection, either by endorsing it himself, or through the blank endorsement of a prior holder. *Ib.*

II. AUTHORITY OF AGENT.

23. Authority "to settle" does not authorize an agent to submit to arbitration the matters in dispute. *Huber v. Zimmerman*, 21 Ala. 488.

24. The delivery of an account to an agent, for the purpose of collecting it, confers no authority to settle it in any other mode. *Powell's Adm'r v. Henry*, 27 Ala. 612.

25. An attorney-at-law may submit to arbitration the matters involved in a lawsuit, and consent of record that the award may be made the judgment of the court. *Beverly v. Stephens*, 17 Ala. 701.

26. An attorney's authority does not cease with the rendition of judgment, but continues for the purpose of controlling the process for its collection; and hence the lien of an execution may be lost, by the attorney's order to the sheriff, without instructions from his client, to postpone the sale of property levied on, and to allow the property to remain in the possession of the defendant in execution. *Albertson, Douglass & Co. v. Goldsby*, 28 Ala. 711.

27. As to the power of an attorney to bind his client by written admissions as to the facts of the case. *Harvey and Wife v. Thorpe*, 28 Ala. 250.

28. When an attorney has appeared in the court below, without objection, his authority cannot be questioned in the appellate court. *Moore v. Easley*, 18 Ala. 619.

29. Where an admission of record is made by counsel in the court below, for the purpose of obviating the necessity of proof, it will be presumed that he had authority to make it, and the admission cannot be withdrawn in the appellate court. *Montgomery v. Givhan*, 24 Ala. 568.

30. A factor, or commission-merchant, has no authority to pledge the goods of his principal for his own use; and his pledgee can acquire no title, as against the principal, although he dealt with the factor in ignorance of his title. *Bott v. McCoy & Johnson*, 20 Ala. 578.

31. But the factor himself cannot set aside the contract, on account of his want of authority; and a subsequent purchaser from him, at a sale made within the scope of his authority, acquires no better title than he himself had. *Ib.*

32. The captain and master of a steamboat has no authority, as such, to accept a bill of exchange. *May v. Kelly & Frazier*, 27 Ala. 497.

33. The comptroller of public accounts has no authority, as such, to receive payment of moneys due to the State; consequently, a payment to him does not discharge the debtor from liability to the State. *Walker v. Chapman*, 22 Ala. 116; *VanDyke v. The State*, 24 Ala. 81.

34. Parol authority to an agent to fill up a blank, to which his principal has only signed his name, confers no power to convert the writing into a sealed instrument. *Arrington v. Burton*, 19 Ala. 114.

35. A deed, executed by an agent with authority to sell, although ineffectual as a conveyance because the authority was not given under seal, will be upheld in equity as evidence of a contract to sell. *Morrow v. Higgins*, 29 Ala. 448.

36. A letter from H. to W., who were joint owners of a tract of land, was in these words: "My work has been such, that it has rendered me unable to come south this fall, and probably I shall not come before the next season; and it is so that I cannot get any money to send you, to make the next payment on the place, without going to Boston; and I think that I will let you sell my part of it, for what it will fetch; or, I should like for you to buy it of me, and pay me whatever you think is right for the place and all that is on it; and if you will conclude to buy it, you will oblige me very much, and you may have your own time to pay for it, or at least you may have two years. I would [not] sell, but the country is such that I cannot have my health; and

without that I am good for nothing. Probably I shall come out next season, and see you; or, if there is a good chance for work, the last part of this winter; and next summer you may write to me, and I may probably run the risk to try it again for a short time." * * * "If you have much work on hand, write to me soon. But I want you to sell my part of the place at some rate, and all that is on it; unless you want it yourself; and if you do, let me know what you will give." *Held*, that the letter conferred authority to sell the land. *Ib.*

37. An agent to sell cannot, without his principal's consent, become himself the purchaser. *Walker v. Palmer*, 24 Ala. 358.

38. An agent to make a tender cannot delegate his authority to another, but may make the tender by letter sent by the hands of another. *Couthway v. Berghaus*, 25 Ala. 393.

39. If the person to whom the tender is made, does not object at the time to the agent's want of authority, he cannot afterwards raise an objection on that ground. *Ib.; Lampley v. Weed & Co.*, 27 Ala. 621.

40. When one makes a demand as agent of another, reasonable evidence of his authority may be required; but, if the party fails to do this, and rests his refusal on the ground of right in himself, he cannot afterwards insist on his want of knowledge of the agent's authority. *McNeill & Furniss v. Easley*, 24 Ala. 455.

41. Where an agent places notes belonging to his principal in the hands of an attorney for collection, and takes a receipt to himself, he may maintain an action for the proceeds, when collected, in his own name. *Moore & Jones v. Henderson*, 18 Ala. 232.

42. Warehouse-men may maintain assumpsit, for cotton "shipped by them as warehouse-men only," and not delivered to the consignees; provided, the contract was made with them personally. *Fry v. Carter & Howell*, 25 Ala. 479.

43. If an agent lends the money of his principal, without authority, and takes a promissory for it, payable to himself as agent, he may maintain an action on the note in his own name, unless it is shown that he has been in some way discharged from the liability thus incurred. *Bryan v. Wilson*, 27 Ala. 208.

44. A receiving and forwarding merchant cannot, unless under some special contract, custom, or usage of trade, forward cotton to a port without instructions from his principal, and direct its delivery on arrival to a commission merchant. *Love & Co. v. Davis*, 25 Ala. 335.

45. One who deals with an agent is bound, at his peril, to ascertain the extent of his authority. *Powell's Adm'r v. Henry*, 27 Ala. 612; *VanEppes v. Smith*, 21 Ala. 317; *McDonnell v. Branch Bank at Montgomery*, 20 Ala. 313.

III. COMPETENCY OF AGENT AS WITNESS FOR OR AGAINST PRINCIPAL.

46. An agent is a competent witness for his principal, to prove that he has paid over money left with him by his principal for that purpose. *Governor v. Gee*, 19 Ala. 199.

47. An attorney-at-law may be a witness for his client, on grounds of public policy, when he has no other interest in the event of the suit than such as concerns his fees, and they are not contingent. *Quarles v. Waldron and Wife*, 20 Ala. 217.

48. An agent, who sues out an attachment in the name of his principal, executes an attachment bond purporting to bind the principal only, and signs the names of himself and his principal, is not a competent witness for his principal in the attachment suit. *Lankford v. Smith & Weir*, 21 Ala. 342.

49. An agent, who receives commissions on all the cotton which he procures and ships to his principal, (a commission-merchant,) is a competent witness for the latter, in a suit involving the title to certain bales of cotton, which he had procured and shipped, and on which he had received his commissions. *Bryan v. Smith*, 22 Ala. 534.

50. In an action against the owners of a steamboat, to recover damages for the loss of a stage, which was caused by a collision between the steamboat and a ferry-boat on which the stage was crossing the river, the stage-driver, who had the care and control

of the stage at the time, is not a competent witness for the plaintiff without a release. *Otis & Jayne v. Thom*, 23 Ala. 469.

51. Where such action is brought by the owner of goods which were on the flat-boat, and which were damaged by the collision, the owner of the flat-boat, who had charge of her at the time of the collision, is not a competent witness for the plaintiff, and is not rendered competent by section 2302 of the Code. *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189.

52. In trover for the conversion of a slave, a witness who, as agent of plaintiff, brought the slave to this State, is competent to prove his own agency; and although his testimony tends to show that the slave was sold under attachment against himself, sued out by the defendant, this does not render him incompetent, if it does not appear that he consented to the levy or sale. *Napier v. Barry*, 24 Ala. 511.

53. An agent, who, acting within the scope of his authority, executes a promissory note in the joint names of his principal and himself, is not a competent witness against his principal, when the latter is sued alone on the note. *Barney v. Earle*, 20 Ala. 405.

54. If such note was given for the purchase-money of goods bought from B., under authority to purchase from A., he is equally incompetent. *Ib.*

55. In assumpsit for the price of lumber furnished by plaintiffs to defendant, defendant's agent, by whom it was procured, is a competent witness for plaintiffs. *Ortez v. Jewett & Co.*, 23 Ala. 662.

56. As to the competency of an agent, when a co-defendant with his principal to a chancery suit, to prove the price agreed to be paid for a tract of land bought by him in the joint names of his principal and himself, see *Crawford v. Barkley*, 18 Ala. 270.

57. The declarations or admissions of an agent, made within the scope of his authority, and at the time of transacting the business of his agency, are a part of the *res gestæ*, and as such competent evidence for or against his principal. *Brown v. Harrison & Robinson*, 17 Ala. 774; *Cunningham's Executor v. Cochran & Estill*, 18 Ala. 479; *Lundie v. Cosper*, 20 Ala. 123; *Williams v. Fitzpatrick*, 20 Ala. 791; *McKenzie v. Stevens*, 19 Ala. 691.

IV. LIABILITY OF AGENT.

58. A deputy clerk is liable only to his principal for a default committed whilst acting within the scope of his duties, and in the name of his principal. *Snedicor v. Davis*, 17 Ala. 472.

59. A deputy sheriff is liable only to his principal, and not to the plaintiff in attachment, for failing to take sufficient security on a replevy bond. *Pond v. Vanderveer*, 17 Ala. 426.

60. It is the duty of a deputy sheriff to pay over to his principal, within a reasonable time, all moneys collected by him as such; and an action lies on his failure to do so, without a previous demand. *Nelms v. Williams*, 18 Ala. 650.

61. An agent, either with or without notice, is liable in trover for an act which, if done by his principal, would amount to a conversion of the property of another. *Perminter v. Kelly*, 18 Ala. 716.

62. Commissioners, appointed by the orphans' court to sell the real estate belonging to a decedent, who exceed their authority, and fail to bind the decedent's estate, are liable personally on their title-bond. *Whiteside v. Jennings*, 19 Ala. 784.

63. A covenant, to which the agent signs and affixes his name and seal, which contains apt words to charge him personally, and which is not binding as the deed of his principal, is binding on the agent personally, although he describes himself therein as agent, and the superadded words are a mere *descriptio personæ*. *Hall v. Cockrell*, 28 Ala. 507.

64. Where the charter of an incorporated town provides, that its corporate name shall be "the town of E.," and that all its corporate powers shall be vested in, and exercised by and through, an intendant and certain councillors, who shall constitute a board to be called "the intendant and council of the town of E.,"—the persons composing the board are but the directors and agents of the corporation, and, in making contracts under color of their authority as such agents,

are not to be considered public, or government agents, contracting in behalf of the public. *Ib.*

65. A sealed instrument, in these words: "Twenty days after date I promise to pay to J. T., or order, $442, value received. Given under my hand and seal," &c., and signed "B. W. [seal], agent for C. C.,"—*held* the obligation of B. W. only. *Dawson v. Cotton*, 26 Ala. 591.

66. If an agent purchases land for himself and his principal jointly, but exceeds his authority in the price agreed to be paid, and the principal repudiates the contract, the agent is personally bound by it, and the vendor's lien may be enforced against him. *Crawford v. Barkley*, 18 Ala. 270.

67. If the principal ratifies the unauthorized act of his agent, in paying money to a person who has no right to receive it, the agent is thereby discharged from all further responsibility. *VanDyke v. The State*, 24 Ala. 81.

V. LIABILITY OF PRINCIPAL.

1. *To Agent.*

68. If a debtor sanctions and adopts a payment voluntarily made for him by another, he thereby makes the payor his agent, and the law implies a promise to refund. *Ross v. Pearson*, 21 Ala. 473.

69. When an agent is employed by his principal to do an act which is not manifestly illegal, and which he does not know to be wrong, the law implies a promise of indemnity by the principal, for such losses and damages as flow directly and immediately from the execution of the agency; the rule, that contribution will not be enforced between wrong-doers, does not apply to such case. *Moore v. Appleton*, 26 Ala. 633.

70. On such implied promise, case and assumpsit are equally maintainable; but the declaration, in either action, must allege a breach. *Ib.*

71. The courts have refused, on considerations peculiar to the relation of master and servant, to hold the master liable for injuries received by one servant from the negligence of another, while both are acting in the common business of the master. *Walker v. Bolling*, 22 Ala. 294; *Cook & Scott v. Parham*, 24 Ala. 21.

72. Whether this rule applies to the owners of a steamboat, when sued for the loss of a slave who was hired as a deck-hand on the boat, and whose death was caused by a collision occasioned by the carelessness of the captain, who was one of the owners, *quære? Cook & Scott v. Parham*, 24 Ala. 21.

73. If the loss was caused by the explosion of the boat, though the habitual gross negligence of the engineer, of which the captain had been informed, the owners of the boat would be responsible. *Ib.*

74. The master is bound to use ordinary care towards his servant, and not expose him to unnecessary risks; and this duty he does not discharge, when he associates with him, in a service of peril, those who are wanting in ordinary skill and prudence. *Walker v. Bolling*, 22 Ala. 294.

75. If the collision was caused by the negligence or fault of the pilot, and the owners had the means of knowing that he was careless and reckless, they would be responsible. *Ib.*

2. *To Third Persons.*

76. As a general rule, to make the acts of an agent binding on his principal, the agency must be proved by other evidence than the acts themselves. *McDonnell v. Branch Bank at Montgomery*, 20 Ala. 313; *VanEppes v. Smith*, 21 Ala. 317.

77. When authority is given to an agent to do a particular act, and the manner of executing that authority is not prescribed, the principal is bound by the act of the agent, although it may not be done in the manner in which he desired it to be done, or in which he would himself have done it. *McClung's Executors v. Spotswood*, 19 Ala. 165.

78. If an agent, having parol authority to fill up a blank to which his principal has simply signed his name, converts the blank into a sealed instrument, the principal is not bound by it. *Arrington v. Burton*, 19 Ala. 114.

79. To make a conveyance under

seal, executed by an agent, the deed of the principal, he must appear from the body of it to be the grantor, and his name and seal must be signed and affixed to it. *Carter v. Doe d. Chaudron*, 21 Ala. 72.

80. A deed, purporting to be made by both principal and agent as parties of the first part, reciting the authority of the agent, whereby the principal, in consideration of a certain sum of money paid to him by the grantee, grants, bargains, &c.; purporting to be signed and sealed by the parties, and signed "S. H. G. [seal], attorney in fact for J. K.,"—held well executed as the deed of the principal. *Ib.*

81. A sealed instrument in these words: "Twenty days after date, I promise to pay to J. T. or order $442, value received. Given under my hand and seal," &c.; and signed "B. W. [seal], agent for C. C,"—held the obligation of B. W. only, and therefore not admissible evidence against C., when unaccompanied with the offer of extraneous explanatory proof. *Dawson v. Cotton*, 26 Ala. 591.

82. By a contract under seal, between plaintiff of the first part, and "the intendant and council of the town of E.," who were the executive board of the corporation styled "the town of E.," of the second part, plaintiff covenanted to perform certain services in repairing the streets of said town; "in consideration of which said services, the parties of the second part" agreed to pay him a stipulated sum of money, and "the said parties" signed their individual names, and affixed their seals to the contract. *Held*, that the instrument was not the deed of the corporation. *Hall v. Cockrell*, 28 Ala. 507.

83. A deed, executed by an agent with authority to sell, although ineffectual as a conveyance because the authority was not under seal, will be upheld in equity as evidence of a contract to sell. *Morrow v. Higgins*, 29 Ala. 448.

84. An endorsement of a note by one of the makers, purporting to transfer it by written power of attorney, in the name of the payee, must be held the act of the payee himself. *Garrett v. Holloway & Malone*, 24 Ala. 376.

85. Generally, to make the principal personally liable on a written contract made by his agent, it must be executed in his own name, and appear to be his own contract; but an exception to this rule is, that a bill of lading, signed by the master of a vessel in his own name, in the usual course of employment, will bind the owner. *McTyer v. Steele*, 26 Ala. 487.

86. The acceptance of a bill of exchange by the captain and master of a steamboat, in his own name as captain, does not bind the owner as acceptor. *May v. Kelly & Frazier*, 27 Ala. 497.

87. In declaring against the principal, on a bill accepted by his agent, the agent's authority to accept must be averred: it is not sufficient to allege that he was the agent, and as such agent accepted for the principal. *Ib.*

88. If the agent exceeds his authority, the principal may ratify his act; yet, to avoid it, he is not obliged to give notice that he repudiates it. *Powell's Adm'r v. Henry*, 27 Ala. 612.

89. But he cannot ratify it in part, and repudiate it in part. *Crawford v. Barkley*, 18 Ala. 270.

90. If notice, actual or implied, is brought home to an agent or attorney, it is immaterial whether the principal had personal knowledge of the fact, since he is presumed to know whatever his agent knows. *Wiley, Banks & Co. v. Knight*, 27 Ala. 336.

91. Although an agent is personally liable for money received by him, by authority of his principal, belonging to another; yet the principal also is liable, whether the money has been paid over to him, or not. *Cook v. Cook*, 28 Ala. 660.

92. In a suit on a note given for the purchase-money of a slave, at a sale made by an administrator under an order of court, the fraudulent representations of the auctioneer by whom the sale was made, although not authorized by the administrator, are a good defense. *Atwood's Adm'r v. Wright*, 29 Ala. 346.

93. If the husband turns his wife out of doors, or by his misconduct compels her to leave him, he is responsible for necessaries furnished her by another; but the labor and services of slaves, applied to the sup-

port and maintenance of the wife, cannot be regarded as necessaries, though their value was not more than sufficient for her necessary support and maintenance. *Zeigler & Hall v. David*, 23 Ala. 127.

94. The wife being separated from her husband without fault on her part, he is liable for necessaries furnished her while confined in a lunatic asylum, although the credit was given to the person who, as agent of plaintiff, made the contract, and paid the expenses, which were afterwards repaid to him by his principal; but, if the person who made the contract was acting for himself individually, and not as agent of the plaintiff, the latter cannot, by voluntarily paying the debt, make the husband his debtor. *Wray v. Cox*, 24 Ala. 337.

95. The husband is liable for necessary medical attendance on his wife, although the physician was called in against his objection, by his grown son, who lived with him, and who promised to assume the payment; it being shown that he was present while the physician was rendering his services, and that the latter had no notice whatever that he was not to look to the husband for payment. *Cothran v. Lee*, 24 Ala. 380.

96. Trespass does not lie against the master, for injuries to stock committed by his slaves under the direction of his overseer, of which he was ignorant, and which he neither authorized nor directed. *Lindsay v. Griffin*, 22 Ala. 629.

97. The mere negligence of a servant, acting in the ordinary business of his master, will not authorize a recovery against the master, under the statute which gives double damages for injuries to stock, although an action on the case would lie at common law. *Smith v. Causey*, 22 Ala. 569.

98. But an action on the case lies against the master, for the injuries done by his servants and children in the performance of their duty and service, although the particular act complained of was not commanded by him. *S. C.*, 28 Ala. 655; *Lindsay v. Griffin*, 22 Ala. 629.

99. As to the liability of the principal to a criminal prosecution, for the act of his agent, see *Patterson v. The State*, 21 Ala. 571.

As to the admissibility of an agent's declarations or admissions, as evidence against his principal, *vide supra*, 57.

ALIENS.

1. An alien cannot, unless permitted by statute, inherit lands situated within this State. *Etheridge v. Doe d. Malempre*, 18 Ala. 565.

2. The act of 1844, for the relief of Francis Malempre, (Session Acts 1843–4, p. 56,) is an unconditional legislative grant to him of all the lands of which Christopher Varner died seized and possessed; but said Christopher being incapable, by reason of alienage, at the death of his brother John, of inheriting the lands of the latter, and consequently having never acquired the legal seizin thereof, such lands did not pass by said act. *Ib.*

3. Although, since congress has exercised its constitutional power of establishing a uniform rule of naturalization, no State can pass a law for the naturalization of aliens; yet, having the right to regulate the descent and succession of property within its limits, it may permit an alien to inherit. *Ib.*

4. The right to inherit is not conferred by a patent, issued by the ministerial officers of the government, upon an ordinary purchase of public land by an alien. *Ib.*

5. A free negro, who was an inhabitant of Florida at the date of the treaty by which Spain ceded that territory to the United States, lost the character of an alien by the operation of that treaty, and would be entitled to take lands by descent in the United States, unless incapacitated by the laws of the State in which the lands were situated. *Tannis v. Doe d. St. Cyre*, 21 Ala. 449.

AMENDMENT.

I. OF PLEADINGS:
II. OF PROCESS, AND HEREIN OF OFFICERS' RETURNS.
III. OF RECORDS AND JUDGMENTS.

1. *Nunc Pro Tunc.*
2. *On Error.*

As to amendments of the constitution, see CONSTITUTIONAL LAW.

As to amendments in criminal, probate, or chancery cases, see same title in PARTS I, II, and III, respectively, pp. 5, 125, 217.

I. OF PLEADINGS.

1. The provisions of the Code, (§ 2403,) allowing amendments as to parties, do not apply to suits which were pending when it took effect. *Crump v. Wallace*, 27 Ala. 277.

2. When suit is brought in the name of a firm, on an open account for goods sold and delivered, if the evidence shows that a party not joined was a partner at the time the account was contracted, the complaint may be amended by adding his name. *Godbold v. Blair & Co.*, 27 Ala. 592.

3. Where the summons is in the name of the plaintiff individually, the complaint may be so amended as to authorize a recovery by him as administrator. *Crimm's Adm'rs v. Crawford*, 29 Ala. 623.

4. But the name of a sole plaintiff cannot be struck out, and that of another person substituted. *Leaird v. Moore*, 27 Ala. 326; *Friend v. Oliver*, 27 Ala. 532.

5. If, however, the defendant pleads to the amended complaint, without objecting to the leave to amend, or to the amendment itself, he cannot revise on error the action of the court in allowing it. *Bryan v. Wilson*, 27 Ala. 280.

6. If he suffers judgment by *nil dicit*, without objecting to the amendment, he cannot revise on error the action of the court in allowing it. *Stewart v. Goode & Ulrick*, 29 Ala. 476.

7. Where an action of trover is brought in the name of the assignor, for the use of the assignee, and the evidence shows that the conversion took place after the assignment, the complaint cannot be so amended as to authorize a recovery. *Stodder v. Grant & Nickels*, 27 Ala. 416.

8. An amendment of the complaint, which would convert an action of detinue into an action of trover, cannot be allowed. *Harris v. Hillman*, 26 Ala. 380.

9. An amendment of the complaint, after issue joined, but before the cause is submitted to the jury, is discretionary with the primary court. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

10. The primary court may, at its discretion, allow an amendment of the complaint by the addition of another count, even after the jury has been instructed. *Prater v. Miller*, 25 Ala. 320.

11. And, in giving a charge to the jury at the request of the defendant, it may suggest that the complaint may be so amended, if the plaintiff desires it, as to obviate the effect of the charge. *Crimm's Adm'rs v. Crawford*, 29 Ala. 623.

12. An amendment of the declaration may be allowed, even after the trial has been commenced, by the alteration of a date alleged under a *videlicet*. *Zeigler & Hall v. David*, 23 Ala. 127.

13. In a summary proceeding against a bank debtor, by a bank whose affairs have been placed in the hands of trustees for settlement and liquidation, the notice having been held defective on error, for the want of an averment that the proceeding was instituted by the direction and authority of the trustees, the primary court may, after the cause is remanded, permit an amendment of the notice by the addition of that averment. *Jemison v. P. & M. Bank*, 23 Ala. 168.

14. The amendment may be made, in such case, by annexing to the notice the certificate of the trustees, averring that the bank "by its trustees named in the certificate hereto annexed, appointed under the act therein specified, will move," &c. *Ib.*

15. A petition for *supersedeas*, which, under our practice, stands in lieu of a declaration, may be amended, after demurrer sustained to the original; provided, the amendment does not make an entirely different case as to the execution sought to be superseded. *Pearsall v. McCartney*, 28 Ala. 110.

16. Specifications of fraud, contesting a bankrupt's certificate, may be amended, after demurrer sustained to the original. *Stewart & Fontaine v.*

Hargrove, 23 Ala. 429; *Ashley's Adm'r v. Robinson*, 29 Ala. 112.

17. But the refusal of the court to allow an amendment, after the case has been put to the jury, is not revisable on error. *Ashley's Adm'r v. Robinson*, 29 Ala. 112.

18. In a claim suit under the statute, it is discretionary with the court, after the trial has been commenced, to allow an amendment of the title of the case, as prefixed to the issue, by adding the name of another defendant in execution, so as to make it correspond with the execution. *Gayle v. Bancroft's Adm'r*, 22 Ala. 316.

II. OF PROCESS, AND HEREIN OF OFFICERS' RETURNS.

19. It is discretionary with the court to allow the plaintiff to amend the endorsement on his writ, so that he may add special counts to his declaration. *Moore v. Smith*, 19 Ala. 774.

20. *Mandamus* does not lie, to vacate an amendment of an original attachment. *Ex parte Putnam*, 20 Ala. 592.

21. An execution, which is returnable on its face at a time anterior to the term to which it should have been made returnable, may be amended. *Forward v. Marsh*, 18 Ala. 645.

22. A *fi. fa.* on a void delivery bond, against the defendants in the judgment and their surety on the bond, if it correctly describes the judgment, by its date, amount, and names of parties, may be amended by striking out the surety's name. *Deloach v. State Bank*, 27 Ala. 437.

23. The amendment of an execution, by striking out the name of a person, not a party to the judgment, which had been improperly inserted, does not affect its lien. *Andress v. Roberts*, 18 Ala. 387.

24. A sheriff may, by leave of the court, amend his return on an execution, pending a motion against him for failing to pay over the money collected on it. *Niolin v. Hamner*, 22 Ala. 578.

25. A writ of error, which is not sued out in the name of all the defendants to the judgment, will be amended on error, so as to correspond with the judgment. *Cleaveland v. McAdams*, 21 Ala. 321; also, *Colvin v. Owens*, 22 Ala. 782.

III. OF RECORDS AND JUDGMENTS.

1. *Nunc Pro Tunc.*

26. A judgment cannot be altered or amended at a subsequent term, *nunc pro tunc*, so as to relieve one party from the costs, and adjudge them against the other. *Gibson v. Wilson*, 18 Ala. 63; *Harris v. Billingsley*, 18 Ala. 438.

27. The circuit court has authority, under the act of 1824, to amend a judgment at any time within three years after its rendition, by the correction of any clerical error or mistake, where there is sufficient matter apparent on the record to amend by. *Lee v. Houston*, 20 Ala. 301.

28. It also has power, under the act establishing courts of probate, to amend the judgments of the county court, in causes transferred under that act. *Glass v. Glass*, 24 Ala. 468.

29. Under the provisions of the Code, (§ 2401,) authorizing the amendment of clerical errors "at any time within three years after the rendition of final judgment," a judgment may be amended, *nunc pro tunc*, after the lapse of twelve years, when the record shows sufficient evidence. *Sartor v. Branch Bank at Montgomery*, 29 Ala. 353.

30. A judgment may be amended or rendered *nunc pro tunc*, on motion, without notice to the defendant. *Glass v. Glass*, 24 Ala. 468.

31. It may be amended, and revived by *scire facias*, at the same time; and there is no impropriety in uniting a notice of the motion to amend in the *sci. fa.* to revive. *Ib.*

32. A record can only be amended by some matter of record. *Kitchen v. Moye*, 17 Ala. 143; *Metcalf v. Metcalf*, 19 Ala. 319; *Kidd v. Montague*, 19 Ala. 619; *Saltmarsh v. Bird*, 19 Ala. 665; *Hudson v. Hudson*, 20 Ala. 364.

33. But this rule does not apply to cases in which the entry is impeached for fraud. *Dunham v. Roberts*, 28 Ala. 286.

34. In an action of assumpsit, a *remittitur* of the damages having been entered by mistake, the judgment was set aside at the next term of the court, on motion of the plaintiff, who then dismissed his suit; and the latter judgment

was amended at a subsequent term so as to show that the defendant had appeared and consented to the vacating of the first. *Held*, that the appearance and consent of the defendant must be considered a waiver of the proof required by the statute, or a judicial admission of the facts necessary to authorize the court to set aside the judgment. *Lee v. Houston*, 20 Ala. 301.

35. A steamboat, in the possession of the sheriff under a writ of seizure, being replevied, was delivered to the stipulators, who gave bond conditioned to pay the decree which might be rendered on the libel; but they afterwards re-delivered her to the sheriff, who returned the writ of seizure, showing these facts in his return, with the bond given by the stipulators. A decree being afterwards rendered in favor of the libellant, and a sale of the boat ordered,—*held*, that the decree might be amended at a subsequent term, *nunc pro tunc*, by setting aside the order of sale, and rendering a decree against the stipulators on their bond. *Wainwright & Twelves v. Sanders*, 20 Ala. 602.

36. Entries in the motion-docket are sufficient evidence to authorize the amendment or rendition of a judgment *nunc pro tunc*. *Yonge v. Broxson*, 23 Ala. 684.

37. In an appeal case from a justice of the peace, the judgment entry recited a verdict for plaintiff, but did not state the amount of it. *Held*, that a memorandum on the judge's docket, in his handwriting, in these words: "Jury and verdict for plaintiff, and fifteen per cent. damages;" with certain notes found among the papers in the cause, corresponding with the pleadings, was sufficient to authorize the entering of a judgment at a subsequent term, *nunc pro tunc*, for the amount of the notes. *Dickens v. Bush*, 23 Ala. 849.

38. A recital in the judgment *nunc pro tunc*, that it was made to appear to the court that a judgment had been duly rendered, which the clerk had omitted to enter, is sufficient to sustain the amendment, unless the evidence is shown to be insufficient. *Glass v. Glass*, 24 Ala 468.

39. So is a recital, that sufficient matter to authorize it was disclosed to the court "by sufficient, competent, and satisfactory evidence." *Price & Simpson v. Gillespie*, 28 Ala. 279.

40. After the rendition of a judgment for the plaintiff in ejectment, the parties entered into a written agreement, which was entered on the minutes, fixing a different boundary line from that ascertained by the judgment; and at the bottom of this agreement, in the handwriting of the presiding judge, was written this memorandum: "The judgment heretofore rendered in this case is set aside, and the foregoing agrement." *Held*, that this evidence was not sufficient to authorize the rendition of judgment at a subsequent term, *nunc pro tunc*, and that the former judgment was valid and subsisting. *Chighizola's Heirs v. Doe d. Eslava*, 24 Ala. 237.

41. An entry on the judge's docket, in the handwriting of the presiding judge, reciting that the plaintiff was ruled to give security for the costs by the next term, is not sufficient to authorize the entry of an order to that effect at a subsequent term, unless it shows the reason why the order was made. *Lewis v. Lewis*, 25 Ala. 315.

42. When a judgment entry is amended *nunc pro tunc* during the pendency of a writ of error, and the amendment is brought up under *certiorari* previously sued out, the amended judgment is properly before the court. *Cunningham v. Fontaine*, 25 Ala. 644.

43. But a *certiorari*, to bring up an amended record, cannot be awarded, unless by consent, until the amendment has been made in the court below. *Townsend v. Jeffries' Adm'r*, 24 Ala. 329.

2. *On Error.*

44. In an appeal case from a justice of the peace, if the judgment is rendered against the surety on the appeal bond, for more than the amount of the penalty, this will be regarded as a clerical misprision, and will be amended at the costs of the plaintiff in error. *Witherington v. Brantley*, 18 Ala. 197.

45. The rendition of a judgment final against a garnishee, for a larger sum than the judgment *nisi*, is a mere clerical misprision, which will be

amended on error at the costs of the plaintiff in error. *Drane v. King & Devitt*, 21 Ala. 556.

46. Where the judgment entry describes the plaintiffs in attachment as "plaintiffs in execution," and declares that the property levied on was found "subject to plaintiffs' execution," the error will be considered a mere clerical misprision, and will be held amended. *Powell v. Hadden's Executors*, 21 Ala. 745.

47. An error in the imposition of costs, being amendable in the primary court, will be amended in the appellate court at the costs of the appellant. *Commr's Court of Russell Co. v. Tarver*, 25 Ala. 480.

48. Where the name of a stranger is introduced in the judgment entry, as guardian of the plaintiff, who declared in his own name, the mistake may be amended by reference to the declaration on file; and the amendment will therefore be made, on error or appeal, at the costs of the appellant. *Kennedy & Merritt v. Young*, 25 Ala. 563.

49. The rendition of judgment against a defendant who was not served with process, and who did not appear, is a mere clerical misprision, and may be amended on motion in the court below; and if no motion to amend is made, the mistake furnishes no ground of reversal. *Savage & Darrington v. Walshe & Emanuel*, 26 Ala. 619.

50. Where the record shows that, after the expiration of the term at which final judgment was rendered, a petition for rehearing (Code, §§ 2407–2417) was filed; that a motion was also made, at the ensuing term, to set aside and correct the entry of judgment; that exceptions were reserved to the rulings of the court on the motion, and that the court rendered, as on the motion, such a judgment in substance as the petitioner was entitled to on his petition for rehearing,—the judgment will be corrected, on error, at the costs of the appellant, and made to conform to the proper judgment on the petition. *Pratt & McKenzie v. Keils & Sylvester*, 28 Ala. 390.

APPEAL.

See ERROR AND APPEAL.

As to appeals from magistrates, see JUSTICES OF THE PEACE.

APPRENTICES.

1. The contract of apprenticeship is a personal trust, and is not assignable. *Tucker and Wife v. Magee*, 18 Ala. 99.

2. If a person, to whom a slave is bound as an apprentice for a number of years, renounces his trust before the expiration of the term, and suffers the slave to be converted by a third person, the owner becomes entitled to the immediate possession, and may bring trover for the conversion. *Ib.*

ARBITRATION.

I. OF THE SUBMISSION.
II. OF THE AWARD, AND ACTIONS THEREON.

I. OF THE SUBMISSION.

1. An attorney-at-law may submit to arbitration the matters involved in a pending suit, and consent of record that the award may be made the judgment of the court. *Beverly v. Stephens*, 17 Ala. 701.

2. A guardian may submit for his ward, and is bound by the award as one man is ordinarily bound who binds himself for the acts of another. *Strong v. Beroujon*, 18 Ala. 168.

3. Authority to an agent "to settle" does not authorize him to submit to arbitration the matters in dispute. *Huber v. Zimmerman*, 21 Ala. 448.

4. Pending an injunction suit for the abatement of a livery-stable, the parties agreed to submit to arbitration the matters in controversy between them; and the agreement contained a stipulation, "that the award of the arbitrators, made in pursuance of this agreement, shall terminate and forever decide all matters of controversy, at law or in equity, in relation to the said livery-stable." *Held*, that the right of

action at law on the injunction bond, though it might not be included in the subject-matter to be directly decided by the arbitrators, was nevertheless to be settled by the award; and that, after the award was made, an action at law on the injunction bond could not be maintained, unless the award was not binding. *Jesse v. Cater*, 28 Ala. 475.

5. *Mandamus* does not lie, to compel the circuit court to strike a cause from the docket, on motion, on the ground that it has been discontinued by a submission to arbitration. *Ex parte Garlington*, 26 Ala. 170.

II. Of the Award, and Actions thereon.

6. An award is presumed to be made "of and upon the premises," unless the contrary appears. *Strong v. Beroujon*, 18 Ala. 168.

7. An award is not necessarily wanting in mutuality, because nothing is required to be done by one of the parties. *Ib.*

8. Nor is it objectionable for uncertainty, because it fails to show what is awarded to one party in his own right, and what as guardian, when the submission did not require that the arbitrators should separate his interests. *Ib.*

9. A suit in chancery, for the abatement of a livery-stable as a nuisance, was referred to arbitration under an order of the court; and it was ordered, that the bill should stand dismissed, if the complainant did not comply with the conditions of the award by the next term of the court. The arbitrators awarded an exchange of lots between the parties, and the payment by complainant of the estimated difference in value of the lots; and complainant having failed to comply with the award, her bill was afterwards dismissed.—*Held*, that the award was not final, until the parties had performed, or offered to perform, the acts required to be done by them respectively. *Jesse v. Cater*, 25 Ala. 351.

10. In awarding an exchange of lots, the arbitrators directed that the parties "can and do make" to each other respectively "a fee-simple title". *Held*, that the conveyances were to be executed concurrently; that a "fee-simple title" meant a good title; that the award did not ascertain that the defendant had a good title to the lot which he was to convey, but that he could procure it; and that his failure to procure the title was a good and legal excuse for plaintiff's failure to perform. *S. C.*, 28 Ala. 475.

11. Under a submission of the matters involved in a pending suit, if the award is returned into court by the arbitrators, deciding the matter in controversy in favor of one, and against the other party, and showing on its face that the arbitrators were duly sworn, judgment may be thereon rendered by the court in accordance with its terms. *Mobile Bay Road Co. v. Yeind*, 29 Ala. 325.

12. If the agreement, in such case, does not stipulate that notice of the award shall be given to the parties, notice, *it seems*, is not necessary; but, whether notice is necessary or not, the judgment will not be reversed on error, because the record does not affirmatively show that actual notice was given. *Ib.*

13. To such an award, no objection can be made in the appellate court which was not made in the primary court. *Ib.*

14. A judgment of the circuit court, rendered on an award, affirmed on error, because the record did not affirmatively show that the award was obnoxious to the objections urged against it. *Waring & Co. v. Gilbert & Bro.*, 25 Ala. 295.

15. Assumpsit does not lie on an award, when the submission to arbitration was under seal. *McCargo v. Crutcher*, 23 Ala. 575.

16. Gross partiality in the arbitrators is no defense to an action at law for the non-performance of the award, where the submission was not under an order of court, and contained no stipulation that the award should be made a rule of court. *Strong v. Beroujon*, 18 Ala. 168.

17. In an action on an injunction bond, (the matters in controversy in the injunction suit having been submitted to arbitration, and the arbitrators having awarded that certain acts should be done by the parties concurrently,) a plea, setting up the submis-

sion and award, must aver performance on the part of the pleader, or a readiness and offer to perform. *Jesse v. Cater*, 25 Ala. 351.

18. Or a valid excuse for the omission to do either. *S. C.*, 28 Ala. 475.

19. Where a submission to arbitration is made under an order of court, and the award is entered up as the judgment of the court, a party is not thereby estopped from pleading any matter not necessarily within the scope of the award. *Ib.*

20. A plea *puis darrein continuance*, averring that the matter in controversy had been submitted to arbitration, and that the arbitrators had made an award, must set out the submission and award, either substantially, or *in hæc verba*. *Henry v. Porter*, 29 Ala. 619.

ASSIGNMENT.

I. WHAT MAY BE ASSIGNED, AND HOW; AND HEREIN OF THE RIGHTS OF ASSIGNEES.

1. *Accounts.*
2. *Insurance Policy.*
3. *Judgments.*
4. *Mortgages.*
5. *Notes and Bills.*
6. *Other Choses in Action.*
7. *Personal License or Trust.*

II. ASSIGNMENTS FOR BENEFIT OF CREDITORS.—See DEEDS.

I. WHAT MAY BE ASSIGNED, AND HOW; AND HEREIN OF RIGHTS OF ASSIGNEES.

1. *Accounts.*

1. An assignment of accounts to be created in future vests in the assignee an equitable interest, which, when suit is brought in the name of the assignor for the use of the assignee, will be protected in a court of law; but not as against a debtor, who, without actual notice of the assignment, has acquired a legal set-off. *Stewart v. Kirkland*, 19 Ala. 162.

2. In assumpsit on an account, in the name of the assignor for the use of the assignee, it is not error to refuse to instruct the jury, at the instance of the defendant, that the assignee acquired no right by the transfer to maintain the action; and a charge, assuming that the assignee must have a right to maintain the suit as plaintiff, is properly refused. *Saltmarsh v. Bower & Co.*, 22 Ala. 221.

2. *Insurance Policy.*

3. When a policy of insurance is assigned after a loss has accrued, although it contains the usual stipulation against assignment, the assignee may maintain an action on it in his own name, either under the act of 1828, (Clay's Digest, 383, § 12,) or under the Code, (§ 2129.) *Perry v. Merchants' Insurance Co.*, 25 Ala. 355.

4. A stipulation for the renewal of the policy, which had expired without renewal before the assignment, does not affect the assignee's right to sue, when the right of renewal was gone with the partial destruction of the property. *Ib.*

5. An assignment of "all the loss or damage which had accrued under the policy prior to" a specified day, before which the loss had accrued and the policy expired, passes to the assignee the whole interest in the policy. *Ib.*

3. *Judgments.*

6. An assignment of a judgment is not required to be under seal. *Becton v. Ferguson*, 22 Ala. 599.

7. When judgment is recovered on a partnership debt against the two surviving partners, and the amount of it is afterwards paid to the plaintiff by a stranger, with money furnished him for that purpose by one of the defendants and the executor of the deceased partner, it cannot be kept alive, by assignment to such third person, for the purpose of enforcing its collection from the other defendant. *Hogan v. Reynolds*, 21 Ala. 56.

4. *Mortgage.*

8. The assignment of a note or bond, secured by mortgage, is an equitable assignment of the mortgage, unless there is some stipulation to the con-

trary; and the assignee may use the name of the mortgagee, to enforce the mortgage at law. *Graham & Rogers v. Newman*, 21 Ala. 497.

9. But, if the mortgage itself is assigned in proper form, the legal title passes to the assignee, who must then proceed in his own name to enforce it. *Ib.*

10. If the mortgage is of land, a deed is necessary to convey the legal title to the assignee, either on a separate paper, or endorsed on the mortgage with suitable words of conveyance; but, if of a personal chattel, the legal title will pass by the mortgagee's assignment, endorsed on the mortgage itself, of "all right, title and interest, in and to the within mortgage." *Ib.*

5. *Notes and Bills.*

11. Under the act of 1828, (Clay's Digest, 383, § 12,) the assignee of a promissory note may maintain an action of debt on it in his own name. *Barclay v. Moore*, 17 Ala. 634.

12. This statute was not intended to limit the assignee's right to sue to those cases only in which the payee could have maintained the action, but to confer upon the assignee the additional right of suing the maker in any form of action to which the payee could resort. *Murdock v. Caruthers*, 21 Ala. 785.

13. A promise in writing by one firm, to pay a specified sum on a day certain to the order of another firm, (the two firms having a common partner,) is not a promissory note until assignment; but, when assigned by the latter firm, the assignee must then be regarded as the real payee, and may maintain an action in his own name against the makers. *Ib.*

14. A written order, addressed to an attorney, in these words, "Please pay D. W. $293.75, and all interest on the same, the demand which I have against the estate of D. Y., deceased,"— is neither a bill of exchange, nor such a written instrument as can be so assigned as to entitle the assignee to sue in his own name. *West v. Foreman*, 22 Ala. 294.

15. When suit is brought on a promissory note, in the name of the payee, for the use of his assignee, the maker cannot defend himself by showing that, before the assignment of the note sued on, he was surety for the payee on a note to the Bank, that the payee became and continued to be insolvent, and that afterwards, on account of the payee's insolvency, he had been compelled to pay the Bank debt, unless he also shows that such payment was made before the transfer of the note sued on, and notice thereof. *Gildersleeve v. Caraway*, 19 Ala. 246.

16. An endorsement, before maturity, in these words: "I assign and guarty the within note to J. C., for value received," is an absolute, unconditional guaranty of the payment of the note at maturity. *Donley v. Camp*, 22 Ala. 659.

17. The holder of a note, endorsed in blank, may fill it up with any name he pleases. *Agee & Agee v. Medlock*, 25 Ala. 281.

18. Delivery by the surviving partner, of a note then assets of the firm, which had been endorsed by the deceased partner in his lifetime, does not pass the legal title to the purchaser. *Glasscock v. Smith*, 25 Ala. 474.

19. An endorser, who acquires a note after maturity, takes it subject to all defenses, existing in favor of the maker, as against the payee, or other party for whose accommodation it was made. *Ib.*

20. The holder of endorsed mercantile paper, before maturity, is presumed to have acquired it *bona fide*, and for valuable consideration; and is not affected by any set-off, or other equity existing against the payee or other intermediate holder. *Minell & Co. v. Reed*, 26 Ala. 730.

21. A demand for unliquidated damages, arising from a vendor's breach of covenant of title, is not available as an equitable set-off against an assignee of a note founded on an independent consideration, unless it is shown to have accrued before notice of the asment. *Wray's Adm'rs v. Furniss*, 27 Ala. 471.

22. If a note under seal is assigned by endorsement after maturity, the assignee takes it subject to all equitable defenses existing in favor of the maker prior to notice of the assignment, whether they grow out of the same, or out of a different transaction

(WALKER, J., *dissenting*, held that the assignee ought to be protected, where he acquired the legal title by endorsement without notice of the maker's equity.) *Carroll v. Malone*, 28 Ala. 521.

23. If a bill of exchange, which is endorsed for the accommodation of the acceptor, for the special purpose of enabling him to obtain an extension of a debt in bank, is transferred by him as collateral security for the payment of another pre-existing debt, the creditor takes it with implied notice of the fact and purpose of the accommodation endorsement, and subject to any defense which would be available against the acceptor himself. *McKenzie v. Branch Bank at Montgomery*, 28 Ala. 606.

24. An endorsement of a note or bill, after it has been protested for nonpayment, may bind the party as a regular endorser, whose liability is fixed, if such was his intention. *Hullum v. State Bank*, 18 Ala. 805.

25. A promissory note, which was executed under such circumstances as to constitute it a charge on the separate estate of a married woman, may be enforced against her estate, in equity, by an endorsee or other transferree. *Baker v. Gregory and Wife*, 28 Ala. 544.

26. An assignment of a note, given for the purchase-money of land, necessarily operates, unless there is a stipulation to the contrary, as a transfer of the vendor's lien. *Conner v. Banks*, 18 Ala. 42; *Kelly v. Payne*, 18 Ala. 370.

27. But an assignment without recourse amounts to an abandonment of the lien, if the parties so intend it to operate. *Griggsby v. Hair*, 25 Ala. 327.

28. Where there are several notes, which are assigned at different times, the assignment of each is, *pro tanto*, an assignment of the vendor's lien, unless expressly waived; and the liens of the several assignees are to be preferred according to the priority of their assignments, without reference to the maturity of the notes. *Ib.*

29. If the note is secured by mortgage, a transfer of it is an equitable assignment of the mortgage; and the mortgagee then holds the legal title in trust for the assignee, who may proceed in his own name to foreclose. *Center v. P. & M. Bank*, 22 Ala. 743.

30. But the assignee of such note cannot stand in a higher or better position than the vendor himself occupied. *Coster's Executors v. Bank of Georgia*, 24 Ala. 37.

6. *Other Choses in Action.*

31. The transfer of a remainder in a chattel, which is known to be in the adverse possession of a purchaser from the tenant for life, under a *bona-fide* claim of the entire title, is void. *Price v. Talley's Adm'rs*, 18 Ala. 21.

32. The sale of a chose in action by the assignee in bankruptcy, does not divest him of the legal title, nor authorize the purchaser to sue in his own name. *Camack v. Bisquay*, 18 Ala. 286.

33. A man, having a good cause of action, may sell it to another, and stipulate for indemnity against costs; but, if the cause of action is not assignable, the suit must be prosecuted in the name of the original owner, for the use of the transferree. *Smith v. Wooding*, 20 Ala. 324.

34. A mere right of action against another, for money had and received, cannot be so assigned as to authorize the assignee to sue in his own name. *Chenault's Adm'rs v. Walker*, 22 Ala. 275.

35. But this rule does not apply, where a debtor delivers property to one of his creditors, to be sold, and the proceeds to be appropriated, after the payment of his own debt, to a debt due to another creditor, who may maintain an action, in his own name, to recover the balance when ascertained. *Loftin v. Lyon & Baker*, 22 Ala. 540.

36. A purchaser at sheriff's sale, of land which is in the adverse possession of a third person, under a *bona-fide* claim of title, acquires only a right of property, connected with a right of possession, which can neither be sold, nor asserted by force. *Coleman v. Hair*, 22 Ala. 596.

37. A bill of exchange, until accepted, does not operate as an assignment of the funds in the hands of the drawee. *Sands & Co. v. Matthews, Finley & Co.*, 27 Ala. 399. (Overruling *Connoley v. Cheesborough*, 21 Ala. 166.)

7. *Personal License or Trust.*

38. A contract of apprenticeship, is a personal trust, and not assignable. *Tucker and Wife v. Magee*, 18 Ala. 99.

39. A verbal license "to dig and carry away ore" from the mine of another, is personal, and not assignable. *Riddle v. Brown*, 20 Ala. 412.

ASSUMPSIT.

I. WHEN THE ACTION LIES.

1. *For Goods Sold and Delivered.*
2. *For Money Had and Received, and herein of Waiving Torts.*
3. *For Money Lent or Paid.*
4. *For Use and Occupation.*
5. *For Work and Labor.*
6. *In Other Cases.*

II. OF THE PLEADINGS AND EVIDENCE.

1. *Declaration, and Evidence to support it.*
2. *General Issue, and Evidence to support it.*
3. *Special Pleas, and Evidence relative thereto.*

III. DAMAGES.
IV. JUDGMENT.

I. WHEN THE ACTION LIES.

1. *For Goods Sold and Delivered.*

1. This action lies against a father, for goods furnished to his minor son while attending school at a distance from home, upon proof of facts from which the son's authority to bind him may be inferred; as where he is shown to have paid, without objection, a similar account previously contracted. *McKenzie v. Stevens*, 19 Ala. 691.

2. It lies against the husband, for necessaries furnished to the wife when separated from him without fault on her part. *Wray v. Cox*, 24 Ala. 337; *Zeigler & Hall v. David*, 23 Ala. 127.

3. It lies against the wife, after the death of the husband, to charge her separate estate with "articles of family supply," under the act of 1850. *Cunningham v. Fontaine*, 25 Ala. 644.

4. But it does not lie in favor of the sheriff, (nor, *a fortiori*, in favor of the jailor, who is but his deputy,) against the sureties of the plaintiff in a suit for freedom, for board furnished their principal, who was surrendered by them, and committed to jail by the sheriff. *Jones v. Covey*, 26 Ala. 464.

2. *For Money Had and Received, and herein of Waiving Torts.*

5. This action lies in favor of a sheriff, against his deputy, for money collected by the latter and not paid over within a reasonable time; and a previous demand is not necessary. *Nelms v. Williams*, 18 Ala. 650.

6. It lies in favor of an administrator in chief, against his immediate successor in the administration individually, for money paid through mistake; but not against a remote administrator *de bonis non* in his representative character. *Weeks v. Love*, 19 Ala. 25.

7. Nor does it lie against an administrator *de bonis non*, in his representative character, for money received by him from the administrator in chief, arising from the sale of property, belonging to the estate, which was exempt from sale. *Godbold v. Roberts*, 20 Ala. 354.

8. Nor does it lie in favor of an administrator *de bonis non*, to recover money collected by the defendant on a note which was fully administered by the administrator in chief. *Abney v. Pickett*, 21 Ala. 739.

9. It does not lie against an attorney-at-law, for money collected by him for his client, until there has been a failure or refusal to pay on demand; but this principle cannot be invoked by the client, to excuse his laches in failing to make a demand within a reasonable time. *Kimbro v. Waller*, 21 Ala. 376.

10. It lies in favor of an administrator's surety, to recover money paid by him to the administrator *de bonis non*, on a decree against his principal which is afterwards reversed on error, although the money has been distributed among the parties interested in the estate. *Williams v. Simmons*, 22 Ala. 425.

11. It lies, without a previous demand, to recover money paid under a

mistake of fact. *Rutherford v. McIvor*, 21 Ala. 750.

12. But not to recover money voluntarily paid, with full knowledge of the facts; yet, having the means of ascertaining the facts is not tantamount to actual knowledge of them. *Ib.*

13. It lies to recover money paid under a *pluries fi. fa.*, pending a motion to quash a previous execution on the ground of the defendant's discharge in bankruptcy, unless the defendant can show some equity, arising out of the same transaction, which justifies its retention. *Ewing v. Peck*, 26 Ala. 413.

14. If the money was voluntarily paid, after the return day of the execution, and under no mistake by plaintiff as to his rights, it cannot be recovered; but the mere fact that the payment was made after the return day of the execution, when there was a subsisting levy on the party's land, does not show that it was voluntary. *Ib.*

15. The action lies to recover money collected under execution, on a judgment founded on a gaming consideration, if commenced within six years from the award of a perpetual injunction in chancery; and the right of recovery is not affected by the fact that the holder is an innocent purchaser for valuable consideration, and that no defense at law was attempted. *Paulling v. Watson*, 26 Ala. 205.

16. It lies in favor of the principal, against a person who, without authority, has received money from his agent; but the bringing of such an action discharges the agent from responsibility for the unauthorized payment. *VanDyke v. The State*, 24 Ala. 81.

17. It also lies against the principal, for money received by the agent, whether paid over to the principal or not. *Cook v. Cook*, 28 Ala. 660.

18. When a debtor delivers property to one of his creditors, to be sold, and the proceeds to be appropriated, after the payment of his own debt, to a debt due to another creditor, the latter creditor may maintain an action against the former, to recover this balance. *Loftin v. Lyon & Baker*, 22 Ala. 540.

19. Where one purchases land at execution sale, under a parol agreement to purchase for the defendant; re-sells the land, and places the note given for the purchase-money in the hands of another, for the benefit of the defendant, the latter may maintain an action for the proceeds, when collected, and the statute of frauds is no defense. *Garrett's Adm'rs v. Garrett & Garrett*, 27 Ala. 687.

20. A railroad company, of which both plaintiff and defendant were directors, transferred to the former, by resolution of the board, a quarter's pay due from the United States on a contract for carrying the mail, (which contract was in defendant's name,) as collateral security for his endorsement of a note for the benefit of the company; and afterwards, by another resolution, transferred the same quarter's pay to defendant, for the purpose of paying other debts, and defendant collected it. *Held*, that plaintiff, on paying off the note on which he was bound as surety for the company, might maintain an action against defendant for the amount. *Sherrod's Executors v. Hampton*, 25 Ala. 652.

21. A person who procures a note to be executed by others, whom he knows to be insolvent, for the purpose of getting it discounted in bank; and to be recommended to the bank as a good note, by a person who was from the same county with the makers, and who was in the habit of recommending notes to the bank for discount, by telling him that he intends to pay the note himself,—is liable to the bank for money had and received, and an express promise is not necessary. *Branch Bank at Montgomery v. Parrish*, 20 Ala. 433.

22. When land is recovered by suit from a purchaser, on the ground of the vendor's minority when the conveyance was made, an action lies to recover the purchase-money; especially, where he was induced to enter into the contract by the infant's false representation that he was of full age. *Manning v. Johnson*, 26 Ala. 446.

23. An administratrix, having received money, "to which plaintiff was entitled as one of the distributees of the estate, all the other distributees having received their respective shares," let her husband have some of it, at

his request, to lend to another person; and he loaned it out accordingly, taking a note payable to himself, which he "deposited with his said wife, for the use and benefit of plaintiff, that she might get the money." After the death of the husband, his executors demanded and received from his widow the said note and money on hand, with notice of these facts, and collected the money on the note. *Held*, that plaintiff might maintain an action against them for the money. *Prater v. Stinson and Wife*, 26 Ala. 456.

24. A person who has obtained a judgment in his own name, and promised in writing to pay a specified sum out of its proceeds, when collected, to another, is liable to an action if only the amount specified is collected. *Gliddon v. McKinstry*, 25 Ala. 246.

25. If the holder of a note, having bound himself by written contract to account for it to the owner, recovers judgment on it in his own name, and, by private agreement with the sheriff, after sale under execution, takes the property at the purchaser's bid,—he thereby becomes liable for the amount in money, and cannot raise any objections to the sale; and the *onus* of proving expenses, costs, and other necessary deductions from the amount, is on him. *Hudson v. Crow*, 26 Ala. 515.

26. The drawer of a bill, who has been discharged for want of due presentment and notice, does not become liable to the holder for money had and received, on account of the drawee's subsequent application to his use, without his knowledge or consent, of funds previously placed by him in the hands of the drawee to meet the bill. *Smith v. Rowland*, 18 Ala. 665.

27. A person who effects a policy of insurance, in his own name, on certain property some of which belonged to plaintiffs, is not liable to them for money received under the policy, when no portion of it was received on account of their property, and the policy did not in fact cover their property. *Turner v. Sietts, Allen & Gill*, 28 Ala. 420.

28. Rents, received by the defendant under an adverse holding, cannot be recovered in this form of action; *secus*, if the holding is not adverse. *Price v. Pickett*, 21 Ala. 741.

29. A landlord may maintain the action against a stranger, who has never had possession of the land, for rents received by him from the tenants under an assertion of title in himself. *Branch Bank at Mobile v. Fry*, 23 Ala. 770.

30. The heir-at-law cannot maintain an action against the administrator, to recover the rent of the plantation on which the decedent resided at the time of his death, and which the administrator rented out, when it appears that the widow's dower has not been assigned. *McLaughlin v. Godwin*, 23 Ala. 846.

31. Rents, received by an administrator from lands lying without the limits of this State, and belonging to several tenants in common, may be recovered in this form of action. *Smith's Executors v. Wiley*, 22 Ala. 396.

32. Money, arising from the conversion and sale of property belonging to another, may be recovered in this action; but a mere conversion, without a sale, will not sustain the action. *Strother's Adm'r v. Butler*, 17 Ala. 733; also, *Crow v. Boyd's Adm'rs*, 17 Ala. 51; *Pike v. Bright*, 29 Ala. 332.

33. Where there has been a conversion and sale of property belonging to several tenants in common, they may all waive the tort, and join in assumpsit to recover the money, or each may maintain a separate action. *Tankersley v. Childers*, 23 Ala. 781; *S. C.*, 20 Ala. 212; also, *Smith's Executors v. Wiley*, 22 Ala. 396.

34. Where an overseer contracts with his employer for a certain portion of the crop raised, as compensation for his services, and the entire crop is received and sold by his employer's administratrix, he may waive the tort, and maintain assumpsit against her individually. *Anderson v. Rice*, 20 Ala. 239.

3. *For Money Lent or Paid.*

35. Although, as a general proposition, money voluntarily paid for another, cannot be recovered from him; yet, if the payment is sanctioned and adopted by him, he thereby makes the payor his agent, and the law then implies a promise to refund. *Ross v. Pearson*, 21 Ala. 473.

36. This action lies against the husband, to recover money paid for nec-

essaries furnished to the wife while confined in a lunatic asylum, and separated from her husband without fault on her part, although the credit was given to plaintiff's agent, who made the contract, and paid the expenses in the first instance; but, if the person who made the contract was acting for himself individually, and not as plaintiff's agent, the voluntary payment of the debt by plaintiff does not render the husband liable. *Wray v. Cox*, 24 Ala. 337.

37. If a partner borrows money on the security of his firm's acceptance of another's draft, the acceptance, in the absence of matter which will avoid it, establishes the relation of debtor and creditor between the firm and the lender. *Saltmarsh v. Bower & Co.*, 22 Ala. 221.

38. Where a judgment against two joint executors, on a bond executed by their testator as surety for another, is paid off by one of them, an action against the principal obligor, for the recovery of the money so paid, can only be maintained by the two executors jointly, suing in their representative character. *Martin v. Nall*, 22 Ala. 610.

39. If a hired slave is committed to jail as a runaway, and the hirer refuses to pay the necessary jail fees, the owner may pay them after the expiration of the term, and thereby acquire a cause of action against the hirer. *Walker and Wife v. Smith*, 28 Ala. 569.

5. *For Use and Occupation.*

40. This action lies against one who enters into the possession of land under a parol contract of purchase, and who fails to comply with the stipulations of the contract in the payment of the purchase-money. *Smith v. Wooding*, 20 Ala. 324; *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207.

41. It lies also in favor of the heir, for rents accruing after the death of the ancestor, whose estate has been declared insolvent, if neither the administrator nor the creditors interpose any obstacle. *Branch Bank at Mobile v. Fry*, 23 Ala. 770.

42. It lies also, after a recovery in trespass to try titles, for the mesne profits accruing between the rendition of the judgment and the execution of the writ of possession, against the defendant in the first action, or any one who comes into possession under him; but not against a tenant who comes into possession under an express promise to pay rent to the defendant. *Shumake v. Nelms' Adm'r*, 25 Ala. 126.

43. It does not lie against a mere naked trespasser. *Weaver v. Jones*, 24 Ala. 420.

44. Nor does it lie to recover rents reserved by contract, to be paid in specific articles, when the contract does not fix their value, nor furnish a rule by which it may be ascertained by mere calculation. *Oswald v. Godbold*, 20 Ala. 811; *Eastland v. Sparks*, 22 Ala. 607.

5. *For Work and Labor.*

45. A tenant in common may maintain this action against his co-tenant, to recover contribution for services rendered in and about their common business, in pursuance of a contract between them for such services. *Strother's Adm'r v. Butler*, 17 Ala. 733.

46. A mother cannot recover for the work and labor of her minor son, unless his father is dead, or she is entitled to his services as guardian or otherwise. *Jones v. Buckley*, 19 Ala. 604.

47. A father is entitled to the services and labor of his minor children, so long as they remain members of his family. *Stovall v. Johnson*, 17 Ala. 14.

48. Where an overseer agrees with his employer to receive, as compensation for his services, a certain portion of the crop raised, he cannot maintain assumpsit for work and labor done. *Anderson v. Rice*, 20 Ala. 239.

49. Under an entire contract for the performance of work or services, a recovery cannot be had without averring and proving performance. *Wolfe v. Parham*, 18 Ala. 441; *Hawkins v. Gilbert & Maddox*, 19 Ala. 54; *Kirkland v. Oates*, 25 Ala. 465.

50. When a slave, who is hired for one month, does not work the full term, no recovery can be had on the contract. *Petty v. Gayle*, 25 Ala. 472.

51. Under an entire contract for the building of a house, which is destroyed by fire before its completion, the

workman can recover nothing; *secus*, if the contract is not entire. *Partridge v. Forsyth*, 29 Ala. 200.

52. If the work is not done according to the terms of the contract, but is nevertheless accepted by the employer, and is beneficial to him, its value may be recovered on a *quantum meruit*. *Hawkins v. Gilbert & Maddox*, 19 Ala. 54.

53. If the contract is mutually rescinded by the parties, after the performance of a portion of the work; and the work is used by the employer, and is of any benefit to him,—the workman may recover its value. *Kirkland v. Oates*, 25 Ala. 465.

54. If a written contract for the building of a house is varied by the parties, after the commencement of the work, so as to require a greater amount of labor and materials, as well as an alteration in the structure, and a longer time for its completion, the workman is not bound to sue on the original contract, but may recover on a *quantum meruit*. *Hutchinson v. Cullum*, 23 Ala. 622.

55. Where the employer contracts to pay in specific property or in money, and afterwards voluntarily disposes of the property, or loses it by title paramount, his election is thereby determined, and he becomes liable, on the performance of the services, to an action for the money. *Wolfe v. Parham*, 18 Ala. 441.

56. If the work is partially performed, and a further performance is waived by the employer, the act of a stranger, to which the workman is neither a party nor privy, cannot deprive him of his right to compensation. *Ib.*

57. If one contracts to serve another for one year, at a stipulated sum payable monthly, and is discharged, without fault on his part, before the expiration of the year, he may treat the contract as still subsisting, and sue for wages due according to its terms; or as rescinded, and sue for unliquidated damages for its breach. *Fowler & Prout v. Armour*, 24 Ala. 194.

58. Although an action cannot be maintained for the breach of a contract, which, because not reduced to writing, is void under the statute of frauds; yet a recovery may be had for services performed under it. *Sims v. McEwen's Adm'r*, 27 Ala. 184.

59. This action lies against the husband, for necessary medical attendance on his wife, although the physician was called in against his objection, by his grown son, who lived with him, and who promised him to assume the payment; it being shown that he was present while the physician was rendering his services, and that the latter had no notice whatever that he was not to look to the husband for payment. *Cothran v. Lee*, 24 Ala. 380.

60. But the labor and services of slaves, applied to the support and maintenance of the wife, when separated from the husband without fault on her part, cannot be regarded as necessaries, nor is the husband liable at law for their value, though not more than sufficient for the wife's necessary support and maintenance. *Zeigler & Hall v. David*, 23 Ala. 127.

61. The hirer of a slave, under a contract general in its terms, is liable for necessary medical services rendered him. *Sims & Jones v. Knox*, 18 Ala. 236; *Foster v. Sykes*, 23 Ala. 796.

62. But, if the services are rendered at the instance of the owner, and the contract of hiring does not render the hirer liable, an action lies against the owner. *Sims & Jones v. Knox*, 18 Ala. 236.

63. An unlicensed physician cannot maintain an action for his professional services, unless he practices on the botanic system only. *Mays v. Williams*, 27 Ala. 267; *Holland v. Adams*, 21 Ala. 680; *Richardson v. Dorman's Executrix*, 28 Ala. 679.

64. But he may nevertheless recover for drugs and medicines sold by him as a druggist and apothecary. *Holland v. Adams*, 21 Ala. 680.

65. A liability to pay hire for slaves, upon an implied promise, only lies against him who has had their possession and services. *Smith v. Pearson* 26 Ala. 603.

6. *In Other Cases.*

66. Assumpsit does not lie on an award, when the submission was under seal. *McCargo v. Crutcher*, 23 Ala. 575.

67. It does not lie to recover damages for the defendant's breach of duty, in not permitting plaintiff to cut and

carry away timber, when the declaration shows that the injury complained of resulted from an injunction out of chancery. *McLaren, Ragan & Co. v. Bradford*, 26 Ala. 616.

68. Assumpsit and case are equally maintainable, on the promise of indemnity which the law implies against the principal, for such losses and damages as flow directly and immediately from the execution of the agency, when the act itself is not manifestly illegal, and is not known by the agent to be wrong. *Moore v. Appleton*, 26 Ala. 633.

69. Warehouse-men maintain assumpsit, for cotton "shipped by them as warehouse-men only," and not delivered to the consignees; provided, the contract was made with personally. *Fry v. Carter & Howell*, 25 Ala. 479.

70. In assumpsit for a breach of warranty of the soundness of a slave, the court charged the jury, that, "if defendant made any false and fraudulent representations to plaintiff, they would be considered by the jury, with the other evidence in the cause, for the purpose of determining whether there was a warranty, a breach of that warranty, and the amount of plaintiff's damages for the breach, but not as a ground of recovery." *Held*, that the charge was erroneous, because such declarations, if they amounted to a warranty, would constitute a ground of recovery. *Sievenson v. Reaves*, 24 Ala. 425.

II. OF THE PLEADINGS AND EVIDENCE.

1. *Declaration, and Evidence to support it.*

71. A count, averring that, "in consideration that plaintiff would furnish three hands, and feed and clothe said servants for the year 1844, and pay all of their expenses, and work the same on said defendant's plantation in Perry county, and furnish provisions for himself, his family and said three hands, the lands, mules and horses of said defendant in the capacity of an overseer, he (the said defendant) agreed and promised to place on said plantation his hands, to-wit, the hands owned by him, and live on said farm, and his mules and horses, and furnish the said hands, &c., placed by him on said plantation, with provisions, and said hands with clothing, to pay all expenses of the said hands and mules, and to let said plaintiff cultivate said farm, until said hands and mules, so furnished as aforesaid by said plaintiff and defendant, and raise a crop thereon in said year 1844; for which said defendant agreed and promised, that said defendant should have and draw a part of the crop raised on said farm by said defendant, with the said hands, mules and horses, in the year 1844, in proportion to the said hands of plaintiff so placed on said farm," &c.; and that plaintiff performed the contract on his part, and raised a crop on said plantation, "of which his reasonable share was one third thereof,"—*held* demurrable for vagueness, indefiniteness and uncertainty. *Moore v. Smith*, 19 Ala. 774.

72. A complaint under the Code, which alleged the contract sued on to be "in substance as follows: That in consideration that plaintiffs would then and there buy out the store-house, situated in the town of C., then occupied by M. L. E. & Co. as a store-house, and the stock of dry goods then and there owned by them, he (defendant) would assist them, by endorsing their paper, and advancing them money, to enable them to carry on the mercantile business advantageously;" or, as alleged in another count, "would endorse for them in Charleston, and, if necessary, advance money to them, to enable them to carry on the mercantile business,"—*held* demurrable for indefiniteness and uncertainty. *Erwin & Williams v. Erwin*, 25 Ala. 236.

73. A count on a written lease, which avers the performance by plaintiff of his part of the agreement, and the non-payment of the rent by the defendant; and then alleges, that the buildings were destroyed by fire, and, in consequence thereof, were not delivered up, but were wholly lost,—is not demurrable, either for duplicity, or for misjoinder of breaches: the non-payment of the money is the only breach alleged, and the other stipulations are mere surplusage. *Nave v. Berry*, 22 Ala. 382.

74. Where a contract contains several stipulations, the pleader may assign in each count as many breaches as he pleases, each of which must be upon a

distinct stipulation; but he cannot assign in one count two breaches of the same stipulation. *Ib.*

75. In declaring on a written contract, containing several distinct stipulations to be performed by the defendant, some of which have been performed, it is not necessary that the breach assigned should negative the performance of the defendant's contract *in toto:* it is sufficient to aver non-performance in any one particular, which shows that the plaintiff has a good cause of action. *Montgomery Manufacturing Co. v. Thomas*, 20 Ala. 473.

76. When the declaration assigns a sufficient breach, and shows a good cause of action, unnecessary averments, which are added by way of inducing special damages, are mere surplusage. *Ib.*

77. Where a mother sues for the work and labor of her minor son, she must aver that his father is dead, or that she entitled to his services as guardian or otherwise. *Jones v. Buckley*, 19 Ala. 604.

78. In an action against husband and wife jointly, a count which shows a cause of action against the husband alone is demurrable. *Henry and Wife v. Hickman*, 22 Ala. 685.

79. When suit is brought against husband and wife, for articles of family supply under the act of 1850, the declaration must distinctly aver that the wife has a separate estate, which is sought to be charged. *Ib.*

80. The declaration, in such case, must aver that the wife holds her separate estate under the act of 1850 or of 1848: an averment that she has a separate estate, "which came to her after the first day of March, 1848," is not sufficient. *Cunningham v. Fontaine*, 25 Ala. 644.

81. In declaring, under the Code, for the defendant's neglect to use due diligence in the collection of a judgment, out of the proceeds of which, when collected, he had promised in writing to pay a specified sum, it is not necessary to aver in what respect he had failed to use due diligence: an averment that "he has failed and omitted to do so from mere neglect," is sufficient. *Gliddon v. McKinstry*, 25 Ala. 246.

82. A complaint in the form prescribed by the Code, (p. 551,) "on promissory note, by payee against maker," is sufficient to support a judgment by default; and its legal effect is the same as if it contained an averment, in express terms, that the note was payable to the plaintiff. *Lelondal v. Huguenin*, 26 Ala. 552.

83. In declaring against the principal, on a bill accepted by his agent, the agent's authority to accept must be averred: it is not sufficient to allege that he was the agent, and as such accepted for the principal. *May v. Kelly & Frazier*, 27 Ala. 497.

84. In declaring against an acceptor, if the declaration avers that the bill was payable at a particular counting-house, but not that it was directed in blank, or that it was drawn upon the defendant, or that he accepted it for honor, or that he resided or did business at said counting-house, it is demurrable. *Ib.*

85. A conditional promissory note is, *it seems*, admissible evidence under the common count on an account stated, on proof of its execution, and the performance of the condition. *Hooper v. Eiland*, 21 Ala. 714.

86. A bill of exchange is not admissible evidence under the common counts, unless its execution is proved. *May & Bell v. Miller & Co.*, 27 Ala. 515.

87. A recovery cannot be had on a collateral guaranty under the common counts; and a special count, which does not set out the terms of the contract between the creditor and principal debtor, is demurrable. *Walker v. Forbes*, 25 Ala. 139.

88. The declaration, in such case, must aver the terms of the credit given to the principal debtor, his failure to pay, and notice to the guarantor; but the general allegation of notice ("of all which aforesaid premises, the said defendant then and there had notice," &c.) is sufficient, when facts are stated on which it can operate. *Fay v. Hall*, 25 Ala. 704.

89. A recovery cannot be had under a special count, on proof of a contract substantially variant from that set out. *Hopper v. Eiland*, 21 Ala. 714; *Jordan v. Roney*, 23 Ala. 758; *Wilkinson v. Moseley*, 18 Ala. 288.

90. Whatever may be the effect of

the provisions of the Code, in dispensing with technical precision and accuracy in the complaint; yet, where the instrument offered in evidence varies from that described in the complaint, the variance renders it inadmissible. *May & Bell v. Miller & Co.*, 27 Ala. 515.

91. A bill of exchange, drawn by "Ebenezer Hearn," may be given in evidence under a count on a bill alleged to have been drawn by "*Ebenezer Hearne.*" *Coster, Robinson & Co. v. Thomason*, 19 Ala. 717.

92. Under a declaration on a note payable "one day after *date*," a note payable "one day after," the word "date" being omitted, is competent evidence, and the omission will be supplied by intendment. *White v. Word*, 22 Ala. 442.

93. In an action for a breach of warranty of the soundness of a horse, the written contract of sale is admissible to prove the warranty, although the consideration averred in the declaration is a certain sum of money, while that expressed in the writing is defendant's acceptance for that sum. *Brown v. Jones*, 24 Ala. 463.

94. Where a written contract for the building of a house is so varied by the parties, as to require a greater amount of work and materials, an alteration in the structure, and a longer time for its completion; and the workman declares on a *quantum meruit*, the written contract is admissible evidence, to show what the parties had agreed on as reasonable for that portion of the work embraced in it. *Hutchison v. Cullum*, 23 Ala. 622.

96. In an action for the value of services rendered, the fact that the defendant's intestate inserted, in a will executed after the rendition of the alleged services, a clause giving plaintiff certain property on condition that he set up no claim against his estate after his death, is irrelevant evidence: it contains neither an admission, nor any circumstance tending to show an admission, of any indebtedness past or present, but is at most an offer to purchase peace. *Ex parte Grantland*, 29 Ala. 69.

97. In an action on a contract made in compromise of an existing controversy, evidence of the fact that plaintiffs, at the time the contract was made, "were poor and in destitute circumstances," is not admissible for them. *Adams and Wife v. Adams*, 29 Ala. 433.

98. In an action on the common counts for services rendered, if the parties are both examined as witnesses under the statute, and contradict each other in some particulars; and the defendant then introduces a witness, who testifies to conversations with plaintiff, which contradict, in some particulars, her testimony on the trial,—the plaintiff cannot introduce evidence of her good character. *Owens v. White*, 28 Ala. 413.

99. Evidence of a proposition of compromise, and its refusal, is not competent evidence against the party refusing. *Kelly v. Brooks*, 25 Ala. 523.

100. Under a declaration containing the common counts and a special count, if the evidence entitles the plaintiff to a recovery on the special count, the judgment will not be reversed on account of the court below instructing the jury that he was entitled to recover on the common counts. *Herndon v. Givens*, 19 Ala. 313.

101. Where the writ and declaration proceed against the defendant as administratrix, and all the counts are so drawn as to charge her in her representative capacity, proof of a demand against her individually will not support the declaration. *Anderson v. Rice*, 20 Ala. 239.

102. Where the action is brought for a sum exceeding fifty dollars, it is not error to allow evidence to go to the jury proving an indebtedness of less than fifty dollars. *Kirkley v. Segar*, 29 Ala. 226.

103. In an action on a breach of warranty as to the quality of cotton, which was bought by sample in Montgomery, in January, was shipped to New Orleans, and there sold at public auction in May, after notice to the vendor,—the price brought at the resale may be looked to by the jury, in determining the actual value in Montgomery at the time of the sale, when the other evidence in the cause shows the value of the sampled cotton in Montgomery at the time of the sale, in New Orleans at the time of the resale, and that the relative value of the damaged and sampled cotton was the

same in both places. *Foster v. Rodgers*, 27 Ala. 602.

104. In an action for money had and received, plaintiff must show some certain amount to which he is entitled; but, if the evidence furnishes certain data, from which the jury may ascertain, by an arithmetical calculation, the amount to which he is entitled, it is sufficient. *Tankersley v. Childers*, 23 Ala. 781.

105. A merchant's books are not admissible evidence for him, in a suit on an account, except by the defendant's consent; nor, conceding their admissibility, would they be higher or better evidence than the positive testimony of his clerk, who swears to the sale and delivery of the articles, although he cannot recollect their dates, and has never compared the account with the books. *Godbold v. Blair & Co.*, 27 Ala. 592.

106. The fact that a merchant employs no clerk, furnishes no reason for dispensing with the ordinary rules of evidence in proving his accounts. *Scott v. Coxe's Adm'rs*, 20 Ala. 294.

107. The fact that the defendant was frequently seen to purchase groceries from the plaintiff, who was the only grocer in the village, does not warrant the presumption that he purchased his entire supply from him, so as to authorize proof of the amount of groceries necessary for his family, or actually consumed by them, during the time such purchases were being made. *Ib.*

108. The original entries in the books of a physician, which are declared by the Code (§ 2298) to be "evidence for him, in actions for the recovery of his medical services, that the service was rendered," are evidence of the items of his account for medicines administered and furnished to his patients in the course of his practice; but the value of the medicines, as well as of the active service rendered, must be otherwise proved. *Richardson v. Dorman's Executrix*, 28 Ala. 679.

109. In such an action, a diploma from a medical college would be admissible evidence for the plaintiff, if the services were rendered since the passage of the act of 1854, "to allow all regular graduates of any medical college in the United States to practice medicine;" *secus*, if the services were rendered before the passage of that act. *Ib.*

2. *General Issue, and Evidence to support it.*

110. Where the general issue is pleaded to an action by several co-plaintiffs, evidence showing a joint right of action in plaintiffs is admissible. *Kirkley v. Segar*, 20 Ala. 226.

111. Where the declaration contains the common counts and a special count, it is competent for the defendant, under the plea of the general issue, to show a contract different from that declared on. *Loughridge v. Thompson*, 20 Ala. 828.

112. The omission of other necessary parties defendants is not available under the plea of the general issue. *Henderson v. Hammond*, 19 Ala. 340.

113. In an action by the endorsee of a promissory note, the fact that the plaintiff is not the owner of the note is not a good defense under the general issue. *Agee & Agee v. Medlock*, 25 Ala. 281.

114. In an action to recover money over-paid by plaintiff to defendant, the fact of over-payment being contested, defendant may show plaintiff's inability to make it; and for this purpose, an unsatisfied mortgage, previously executed by plaintiff, is admissible evidence; also, a letter written by plaintiff to defendant after the alleged over-payment was made, showing that plaintiff was at that time pressed for money, and had had an interview with defendant the day before it was written, respecting a sum of money which defendant was liable to pay, and claiming from him that sum only; but, if the letter was written before the alleged overpayment was made, it would not be admissible. *Rutherford v. McIvor*, 21 Ala. 750.

115. In assumpsit by husband and wife, against the executors of the wife's father, on an alleged indebtedness of the testator to the wife, plaintiffs having introduced evidence of the testator's declarations, as to his intention to give each one of his daughters the same amount of property, and the amount given to the others,—*held*,

that defendants might rebut this evidence, by showing that the testator had given money and property to plaintiffs by way of advancement, and had supplied them for several years with the means of living. *Harrison's Executors v. Cordle and Wife*, 22 Ala. 457.

116. But a memorandum book, in the handwriting of the testator, containing entries made by him a few days before his death, and purporting to give a list of all the debts owing by him, is not admissible evidence for the defendants. *Ib.*

117. In an action to recover the amount of a tavern bill, consisting mostly of items for spirituous liquors, plaintiff having introduced evidence tending to show defendant's admission of the correctness of the account, defendant cannot adduce proof of his habits of sobriety, or that he was frequently at the tavern without drinking at all. *Jones v. Cooper*, 22 Ala. 551.

118. In an action to recover money paid to defendant by plaintiff's slave, on being detected in stealing goods from his store, the slave's confession, at the time of making the payment, that he had stolen other goods from defendant, equal in value to the money paid, is admissible evidence for defendant, as part of the *res gestæ*, to show the character of the payment, and the circumstances under which it was made. *Jones v. Nirdlinger*, 20 Ala. 488.

3. *Special Plea, and Evidence relative thereto.*

119. Where the declaration contains only the common counts, and the statute of limitations of three years is pleaded in bar, "in short by consent," the plea must aver that the demand sued on is an open account. *Brooks v. McFarland*, 20 Ala. 483.

120. An attorney-at-law, when sued by his client for failing to pay over money collected, may plead the statute of limitations. *Kimbro v. Waller*, 21 Ala. 376.

121. A replication to such plea, averring "that the money sued for was collected by defendant, as an attorney-at-law, in Tennessee; that no demand was made of him for said money, until a short time before the commencement of this suit; and that the statute only began to run from the demand,"—is demurrable. *Ib.*

122. If a surety for the defendant in execution, having control of the judgment, under an agreement to hold and use it for the defendant's benefit on his payment of it, purchases his lands at execution sale, afterwards resells them, and places the note taken for the purchase-money in the hands of another person, for the benefit of the defendant, who afterwards brings an action to recover the proceeds,—the statute of frauds is no defense to the action, and the statute of limitations begins to run, not from the payment of the judgment, but from the subsequent receipt of the money. *Garrett's Adm'rs v. Garrett & Garrett*, 27 Ala. 687.

123. When a party has the right to bring trover for the conversion of his slave, or assumpsit for the proceeds of sale, and elects to proceed in the latter action, the statute of limitations begins to run from the time that cause of action accrued, and the fact that the other remedy is barred does not defeat the action. *Ivey's Adm'r v. Owens and Wife*, 28 Ala. 641.

124. If an infant disaffirms his contract of sale, on arriving at his majority, and sues the purchaser for the use and occupation of the land, the latter may recoup for valuable improvements. *Weaver v. Jones*, 24 Ala. 420.

125. In an action to recover for advances made on cotton, which was destroyed by fire while stored in plaintiff's warehouse, there was some evidence tending to show that plaintiff had contracted to store the cotton in a fire-proof warehouse; and the defense was, that defendant was entitled to recoup for its loss. *Held*, that defendant might prove how another warehouse "was built, that it was not burned, and the special efforts by which it was saved," if he first proved that it was fire-proof, and that it was exposed to the same danger as plaintiff's; that any evidence, however slight, tending to show defendant's assent to the storing of his cotton in a house not fire-proof, was relevant and admissible for plaintiff; and the fact that a certain aperture in the wall, through

which the fire entered, was visible to the defendant, who had once entered and examined the warehouse after his cotton had been stored, was relevant for this purpose. *Gibson v. Hatcheit & Bro.*, 24 Ala. 201.

126. In assumpsit for the use and occupation of land for two years, it is not error to refuse to permit the plaintiff's voluntary statement to be proved to the jury, to the effect that the suit was brought at the instance, and for the benefit of another person, who had indemnified him against the costs, and that he had never claimed for more than one year's occupation; nor is it error for the court to refuse to dismiss the suit on account of such statement. *Smith v. Wooding*, 20 Ala. 127.

127. In an action by husband and wife jointly, for services rendered by the wife during coverture, her admissions of payment cannot be received in evidence. *Jordan's Adm'r v. Hubbard and Wife*, 26 Ala. 433.

III. DAMAGES.

128. In an action against a purchaser, for refusing to receive goods bought at a specified price, the measure of damages is the difference between the agreed price and the market value of the goods at the time of the breach. *Davis v. Adams*, 18 Ala. 264.

129. Where a party has a right to treat a contract for the performance of work as still subsisting, or as rescinded, and elects to sue on it as subsisting, he can only recover the wages due by its terms before the institution of the suit; but, if he elects to sue for unliquidated damages for its breach, he is entitled to recover the actual damage sustained up to the trial; and the sum specified in the contract is not, of itself, the exact measure of such actual damage. *Fowler & Prout v. Armour*, 24 Ala. 194. See, also, *Ramey v. Holcombe*, 21 Ala. 567.

130. The measure of damages for the breach of the contract, by which plaintiff undertook, for a specified time, and at a stipulated price payable quarterly, "to feed and have attended to the hack horses" of the defendant; "to treat said horses as well as stage horses are usually treated; to have them harnessed, or to assist the driver in doing so, when necessary; to have them taken to the shop to be shod, and to board the driver,"—is a *pro rata* compensation, according to its terms, for the time during which plaintiff performed its stipulations, and the profits which he could have made by it during the remainder of the specified time. *Ramcy v. Holcombe*, 21 Ala. 567.

For other decisions respecting the measure of damages, see title DAMAGES.

IV. JUDGMENT.

131. In an action against the endorser of a note not payable in bank, it is erroneous to render judgment by default, without the intervention of a jury, either under the common counts, or under a special count which contains no averment of suit against the maker, and no allegation dispensing with the necessity of such averment. *Langdon v. Williams*, 22 Ala. 681.

132. In an action under the Code, on a promissory note and an open account for work and labor done, it is erroneous to render judgment by default, for the aggregate amount of the sums claimed, without the intervention of a jury, or the execution of a writ of injury. *Beville v. Reese*, 25 Ala. 454.

133. In an action on a promisory note, if the defendant, after appearance, withdraws his plea, the court may render judgment, without the intervention of a jury, and without regard to the amount of damages laid in the declaration, for the amount of the note and interest. *Kennedy & Merritt v. Young*, 25 Ala. 563.

134. Unpaid calls for railroad stock are not "instruments of writing ascertaining the plaintiff's demand," within the meaning of section 2366 of the Code, authorizing the rendition of a final judgment by default without the intervention of a jury. *Connoly v. Ala. & Tenn. Rivers Railroad Co.*, 29 Ala. 373.

135. If the sum claimed is over $50, but the jury return a verdict for less than that amount, the plaintiff is entitled to judgment for the amount of the verdict, with costs, upon making the affidavit required by the statute. *Kirkley v. Segar*, 20 Ala. 226.

ATTACHMENT.

(Statutory Provisions: Code, §§ 2503–86, 2838–49; Clay's Digest, p. 54–64; Session Acts, 1853–4, p. 26.)

I. WHEN ATTACHMENT LIES.
II. SECURITY FOR COSTS.
III. ISSUE AND LEVY OF WRIT.
IV. REPLEVY AND SALE OF ATTACHED PROPERTY.
V. PLEADINGS, PRACTICE, AND JUDGMENT AGAINST DEFENDANT.
VI. PROCEEDINGS AGAINST GARNISHEES AND TRANSFERREES.
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3. *What may be reached by process of Garnishment.*
4. *Judgment against Garnishee, and Payment thereof.*
5. *Summons of Transferree, and subsequent Proceedings.*
VII. LIABILITIES FOR SUING OUT ATTACHMENTS.

I. WHEN ATTACHMENT LIES.

1. Prior to the passage of the act of 1850, (Session Acts 1849–50, p. 45,) an attachment could not be sued out on account of a fraudulent disposition of his property by a debtor, already consummated. *Yarbrough v. Hudson*, 19 Ala. 653.

2. Under the act of 1833, (Clay's Digest, 58, § 14,) an attachment lies in favor of a resident creditor, against the foreign personal representative of his deceased non-resident debtor, provided he was a non-resident at the time of his death. (GOLDTHWAITE, J., *dissenting*.) *Branch Bank at Mobile v. McDonald*, 22 Ala. 474.

3. But an attachment suit, commenced against a non-resident debtor himself while living, cannot be revived by *sci. fa.* against his foreign personal representative. *Ib.*

4. An attachment does not lie against a domestic executor or administrator, whose testator or intestate at the time of his death was a resident of this State. *Taliaferro v. Lane*, 23 Ala. 369.

5. The remedy by attachment in favor of a landlord, whose tenant or lessee attempts to remove the crop grown on the rented land without first having paid the rent, (Clay's Digest, 506, § 5,) cannot be resorted to, where the crop was sold before the creation of the tenancy, though not removed from the premises until subsequent thereto. *Hadden's Executors v. Powell*, 17 Ala. 314.

6. But the remedy extends to crops grown on the land after the relation of landlord and tenant is established, although they may have been planted prior to the existence of that relation. *S. C.*, 21 Ala. 745.

7. Where one enters into possession of land under a contract of purchase, which is afterwards rescinded, and agrees to pay rent for the year in consideration of the rescission, the relation of landlord and tenant is thereby created, and it is immaterial, so far as the landlord's remedy for the rent already accrued is concerned, whether any accrues after the rescission. *Ib.*

II. SECURITY FOR COSTS.

8. A suit commenced by attachment, by a non-resident, is within the statute (Code, § 2396) requiring security for the costs "to be endorsed on the complaint, or lodged with the clerk, previous to the issue of the summons." *Ex parte Robbins*, 29 Ala. 71.

9. Although the condition of the attachment bond is, that the plaintiff "shall prosecute his attachment with effect, or, failing therein, pay the defendant all such costs and damages as he may sustain from the wrongful suing out of said attachment." *Shepherd [& Gordon v. Spriggs*, 29 Ala. 673.

10. If the plaintiff wishes to sue out his attachment before any other officer than the clerk of the court to which it is returnable, he may annex his complaint to the attachment, and procure security for the costs to be endorsed on the complaint before the issue of the writ. *Ex parte Robbins*, 29 Ala. 71.

III. ISSUE AND LEVY OF WRIT.

11. The clerk of the city court of Mobile has no power to issue an original attachment. *Stevenson v. O'Hara*, 27 Ala. 362; *Matthews, Finley & Co. v.*

Sands & Co., 29 Ala. 136; *Flash, Hartwell & Co. v. Paul, Cook & Co.*, 29 Ala. 141; *Lewis v. Dubose & Co.*, 29 Ala. 219.

12. A circuit clerk may, upon the filing of the required affidavit, either in term time or in vacation, issue a judicial attachment against a party who avoids the service of process. (CHILTON, C. J., *dissenting.*) *Garner & Nevill v. Johnson*, 22 Ala. 494.

13. A constable may levy an attachment, issued by, and returnable before, a justice of the peace. *Langdon v. Raiford*, 20 Ala. 532.

14. The grantor in a deed of trust, who remains in possession of the personal property conveyed by it after default made, has not such an interest as is subject to levy under attachment, when the deed gives the trustee power to sell so much of the property as will pay the demands then due; and this, notwithstanding a portion only of the secured demands is due and unpaid at the time of the levy, and the property conveyed greatly exceeds in value the sum due. *Thompson v. Thornton*, 21 Ala. 808.

15. The levy of an attachment, in good faith, upon a brass candlestick, really the property of the debtor, would be sufficient to sustain a judgment against him, under the authority of *Thornton v. Winter*, 9 Ala. 613; but whether such a levy should not be disregarded, upon the maxim "*de minimis non curat lex*," *quære?* *Grier v. Campbell*, 21 Ala. 327.

16. Where a claim is interposed to the property levied on, and is dismissed for want of jurisdiction in the court to which it is made returnable, if no further steps are taken by the claimant to assert his rights, the levy is sufficient to support a judgment by default against the defendant. *Campbell v. Doss*, 17 Ala. 401.

17. If the only service of an original attachment is the summons of a garnishee, a judgment cannot be rendered against the defendant, until the garnishee has admitted a debt due, or property in his hands, or until a final judgment by default has been rendered against him. *Bratton v. McGlothlen*, 20 Ala. 146.

IV. REPLEVY AND SALE OF ATTACHED PROPERTY.

18. Where property levied on is replevied, a failure to deliver a part of it amounts to a forfeiture of the bond, unless the failure was caused by the fault of the plaintiff; but, if the plaintiff himself prevents a compliance with the condition of the bond, by causing a portion of it to be seized and sold under process against one of the sureties,—this discharges the obligors to the extent of the property sold. *Dunlap v. Clements*, 18 Ala. 778.

19. The statute giving to a replevy bond, when returned forfeited, the force and effect of a judgment, and authorizing the issue of execution thereon for the amount of the recovery in the attachment suit, does not deprive the obligors of any legal defense which they might have set up against the bond at common law. *Ib.*

20. After a judgment has been rendered against the defendant in attachment, the condition of the replevy bond can only be performed by delivering the property to the sheriff on his demand; and if the bond is returned forfeited, on account of a failure to deliver the property, the statute gives the attaching creditor a right to an execution against all the obligors, without any further action of the court. *Cooper v. Peck & Clark*, 22 Ala. 406; also, *Braley v. Clark*, 22 Ala. 361.

21. An order of court, directing the sheriff to "proceed to sell" the property attached, and "pay the proceeds into court," is a sufficient authority to him to make the sale, without any process or copy of the order from the clerk. *Millard's Adm'r v. Hall*, 24 Ala. 209.

22. The sale of slaves, under an order of court, as "perishable property," passes a good title to the purchaser. (LIGON, J., *dissenting.*) *Ib.*

V. PLEADINGS, PRACTICE, AND JUDGMENT AGAINST DEFENDANT.

23. If an attachment is issued without the statutory bond and affidavit, it can only be abated on plea of the defendant. *Kirkman & Rosser v. Patton*, 19 Ala. 32.

24. A variance between the attach-

ment and the bond and affidavit, if available at all to the defendant, can only be taken advantage of by plea in abatement. *Goldsticker v. Stetson & Co.*, 20 Ala. 404.

25. When an attachment is sued out in a case not authorized by law, a motion to quash it is not the proper remedy; nor is the refusal to quash revisable on error. *Gill v. Downs*, 26 Ala. 670.

26. But, even if a motion to quash were proper in such case, the objection is waived by failing to make it at the first term, and by afterwards appearing and pleading to the merits. *Ib.*

27. A motion to quash an original attachment is addressed to the sound discretion of the primary court, and its discretion will not be controlled by *mandamus;* nor does *mandamus* lie to vacate an amendment of the writ. *Ex parte Putnam*, 20 Ala. 592.

28. When a judicial attachment is sued out against a party who avoids the service of process, he cannot by plea put in issue the grounds on which it was sued out. *Garner & Nevill v. Johnson*, 22 Ala. 494.

29. The question whether the State can commence a suit by attachment, cannot be raised by a demurrer to the declaration. *VanDyke v. The State*, 24 Ala. 81.

30. When an attachment is sued out against a steamboat, under the act of January 17, 1844, the proceedings should so far conform to the admiralty practice, as that the declaration be filed against the boat itself, and not against the owners; and that the latter be allowed to intervene, if they desire it, and make themselves parties to the suit. *Otis v. Thorn*, 18 Ala. 395.

31. And this, although the names of the owners are stated in the affidavit for the attachment, and the attachment bond is made payable to them. *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189.

32. But the proceedings under this statute, except so far as they are changed by the act itself, must be governed by the rules of the common law; and any facts which, at common law, would defeat an action on the case against the owners, will have the same effect when pleaded to this statutory proceeding. *Ib.*

33. An ancillary attachment, sued out since the Code went into operation, in a suit commenced by ordinary process under the old law, must conform to the provisions of the old law. *Frankenheimer v. Slocum & Henderson*, 24 Ala. 373.

34. When an attachment is sued out against a resident debtor, and is levied on his goods and chattels, no garnishee being summoned, there is no law requiring any notice to be given. *Letondal v. Huguenin*, 26 Ala. 552.

35. Under the Code, (§ 2570,) judgment by default cannot be taken on the first day of the term to which the attachment is returnable; but, under the act of 1854, (Session Acts 1853-4, p. 91,) regulating the practice in the circuit and city courts of Mobile, if the suit is brought in either of those courts, and the attachment is levied more than twenty days before its return, judgment by default may be entered on the first day of the term. *Ib.*

36. Where there is no personal service on the defendant, a judgment cannot be rendered against him, until the garnishee has admitted a debt due, or property in his hands, or until a final judgment has been rendered against such garnishee. *Brailon v. McGlothlen*, 20 Ala. 146.

37. What is a sufficient levy of the writ to sustain a judgment by default. *Grier v. Campbell*, 21 Ala. 327; *Campbell v. Doss*, 17 Ala. 401. (*Vide supra*, 15, 16.)

38. A judgment by default, predicated on a void attachment, is also void for want of jurisdiction. *Flash, Hartwell & Co. v. Paul, Cook & Co.*, 29 Ala. 141.

39. A final judgment for the defendant, unless superseded by appeal or writ of error, discharges the lien of the attachment, and authorizes the sheriff to pay over to the defendant the proceeds of sale of the attached property. *Sherrod v. Davis*, 17 Ala. 312.

40. When an attachment, issued by a justice of the peace, is levied by a constable on the defendant's land, and, after the rendition of judgment, an execution issued thereon is levied on the same land in default of personal property, the lien of the judgment

creditor relates back to the date of the levy of the attachment. *Langdon v. Raiford*, 20 Ala. 532.

VI. PROCEEDINGS AGAINST GARNISHEES AND TRANSFERREES.

1. *Affidavit and Summons.*

41. When process of garnishment is sued out by a judgment creditor of a distributee, against the administrator of the estate, (Code, § 2520,) the affidavit should be made by the real owner of the judgment, and not by the plaintiff of record; but the process must be sued out in the name of the plaintiff of record. *Jackson v. Shipman*, 28 Ala. 488.

42. A garnishment may be sued out against an executor or administrator, as the debtor of a legatee or distributee, before the lapse of six months from the grant of letters. *Moore & Lyons v. Stainton*, 22 Ala. 831.

43. It is not necessary that the notice served on the garnishee should be signed by any one. *Ib.*

44. Under the Georgia statute of 1822, (Prince's Digest, p. 37,) process of garnishment cannot be sued out, to enforce satisfaction of a judgment, until an execution has been issued and returned "no property." *Gunn v. Howell*, 27 Ala. 633.

2. *Answer of Garnishee, and how Contested; and herein, what Defenses he may set up.*

45. Under the law which existed prior to the adoption of the Code, a garnishee was required to answer only as to his indebtedness at the time the summons was served on him. *Roby v. Labuzan*, 21 Ala. 60.

46. But under the Code, (§ 2517,) he is required to answer as to his indebtedness, not only at the time of the service, but also at the time of making his answer, and whether he will not be indebted in future by a contract then existing. *Central Plank Road Co. v. Sammons & Dotes*, 27 Ala. 380.

47. Under the former statutes, a garnishee might answer either orally or in writing; but his answer was no part of the record, unless so made by bill of exceptions, or by recitals in the judgment entry. *Bostwick & Kirkland v. Beach*, 18 Ala. 80.

48. Although the garnishee may answer in writing under the Code, yet the plaintiff has the right to require an oral answer in the presence of the court; and when the record shows that, after the garnishee had filed a written answer, he was again examined orally in open court, and that this oral answer, by order of the court, was reduced to writing and filed, the written and oral answers together constitute but one answer. *Easton v. Lowery*, 29 Ala. 454.

49. When the judgment purports to be founded on the answer of the garnishee "now on file," and the record does not show that the plaintiff required an oral answer, the appellate court will presume that the written answer set out in the record, though not marked filed, is the answer referred to in the judgment. *Lewis v. Dubose & Co.*, 29 Ala. 219.

50. When a garnishee, against whom a judgment has been rendered by a justice of the peace, removes the case to the circuit court, he is entitled to the privilege of answering over; but, if he does not offer to make further answer, he will be held to have waived the right. *Case & Pate v. Moore*, 21 Ala. 758.

51. A garnishee cannot claim the benefit of an equitable set-off against his indebtedness to the defendant. *Loftin v. Shackelford*, 17 Ala. 455.

52. When a garnishment is sued out against a partnership, and judgment by default is entered against it, if the names of the partners nowhere appear in the proceedings, the judgment will be reversed on error, and the whole proceeding quashed; it is not necessary, in such case, that the defect should be pleaded in abatement. *Reid & Co. v. McLeod*, 20 Ala. 576.

53. Where a garnishment is sued out against an administrator, to obtain satisfaction of a judgment against a distributee of the estate, the garnishee cannot raise any question as to the ownership of the judgment. *Jackson v. Shipman*, 28 Ala. 488.

54. Conceding that he may show satisfaction of the judgment, and that his statement of that fact, when not

controverted or disproved, must be taken as true; yet, his mere statement, "that he is advised and believes" that the judgment has been satisfied, is not an averment of the existence of that fact. *Ib.*

55. The original judgment must be proved; yet, where the record shows that the garnishee appeared in court, "and waived the objection that no judgment could be rendered because no execution could issue on the judgment," this is an admission of the existence of the judgment, and dispenses with further proof of it. *Ib.*

56. A garnishee cannot avail himself of any mere irregularities in the attachment, or in the judgment against the defendant; but he may raise the objection that the attachment is void for want of jurisdiction in the officer by whom it was issued. *Flash, Hartwell & Co. v. Paul, Cook & Co.*, 29 Ala. 141; *Matthews, Finley & Co. v. Sands & Co.*, 29 Ala. 136.

57. When a garnishee's answer is contested, an issue tendered by the plaintiff, averring "that the said garnishee is indebted to the said defendant in attachment, and was at the time of the service of the garnishment," is sufficient. *Harrell v. Whitman*, 19 Ala. 135.

58. On the trial of such issue, the record of a judgment recovered by the defendant against the garnishee, subsequent to the service of the garnishment, is competent evidence for the plaintiff, to show the fact of its recovery, and the time of its rendition. *S. C.*, 20 Ala. 519.

59. The court may instruct the jury, in such case, that they must find for the plaintiff, if they believe that the indebtedness, on which the judgment was rendered, existed prior to the service of the garnishment. *Ib.*

3. *What may be reached by Garnishment.*

60. Such demands only can be reached by process of garnishment, as the defendant in attachment might himself recover in debt or *indebitatus* assumpsit. *Harrell v. Whitman*, 19 Ala. 135; *Cook v. Walthall*, 20 Ala. 334; *Roby v. Labuzan*, 21 Ala. 60; *Self v. Kirkland*, 24 Ala. 275; *Lundie v. Bradford*, 26 Ala. 512; *Hall v. Magee & Reid*, 27 Ala. 414.

61. And such property as would be liable to seizure and sale under execution, if the sheriff could get possession of it. *Roby v. Labuzan*, 21 Ala. 60.

62. Two attachments, issued by a justice of the peace, were levied on certain personal property, and plaintiff's attachment was soon afterwards levied by the sheriff on the same property. Several other attachments were subsequently issued by the justice, and were levied by the constable on the same property; and judgments having been afterwards rendered in all the attachment cases pending before the justice, the property was sold by the constable, and the proceeds of sale paid over to the justice, who, being notified that plaintiff claimed the surplus remaining in his hands after the satisfaction of the two attachments first levied, nevertheless paid over the surplus to the junior creditor, and was afterwards summoned by process of garnishment. *Held*, that these facts showed no demand which could be reached by process of garnishment. *Cook v. Walthall*, 20 Ala. 334.

63. When perishable property is seized under a void attachment, and sold under an order of court, the proceeds of sale cannot be subjected in the hands of the clerk by a creditor of the defendant in attachment. *Lewis v. Dubose & Co.*, 29 Ala. 219.

64. Before the service of the garnishment, the garnishee had shipped to New Orleans a lot of cotton belonging to the defendant in attachment, to be reimbursed from the proceeds of sale for advances previously made by him to the defendant; and after the service of the garnishment, but before answer, the cotton was sold, and the proceeds paid to the garnishee, who retained the amount due him for advances, and paid the surplus to one claiming to be a transferree of the defendant. *Held*, that the plaintiff was not entitled to judgment on this answer. *Roby v. Labuzan*, 21 Ala. 60.

65. Garnishee answered, that he would have been indebted to the defendant in a larger amount than plaintiff's judgment, but before the service of the summons one H., who held a note against said defendant for a sum larger than garnishee's debt, pro-

posed to sell said note to him, and he consented to take it to the extent of his indebtedness to the defendant, the amount of which was not then ascertained; that the note, having been mislaid, was to be delivered to him when found, but nothing was said about an endorsement, and that the note was endorsed and delivered to him after the service of the summons, the endorsement being antedated to correspond with the agreement. *Held*, that plaintiff was entitled to judgment on this answer. *Self v. Kirkland*, 24 Ala. 275.

66. Where a garnishee answered, that the defendant in attachment had furnished him, during the year previous to the service of the summons, with $150 in money, and had given him his note for $51; that he agreed, in consideration of said note and money, to enter a tract of land at the land-office for said defendant, and subsequently filed a land warrant in said office, to be located for said defendant; that one of the officers doubted whether the location could be made in the form desired, and this caused a delay in the location; and that, after the service of the summons, he made no further effort to have the location made,—*held*, that plaintiff was not entitled to judgment on this answer. *Lundie v. Bradford*, 26 Ala. 512.

67. Where the garnishees answered, that the defendant in attachment, being indebted to their firm in the sum of $2,000, agreed to serve them as book-keeper for the year, at a salary of $1,500, payable monthly; that he was to receive in money only enough to pay the necessary expenses of his family, and the residue of his salary was to be applied to the liquidation of his said debt; and that they had paid him $500, which was a reasonable sum, for his family expenses,—*held*, that no judgment could be rendered against the garnishees on this answer. *Hall v. Magee & Reid*, 27 Ala. 414.

68. Money in the hands of a toll-gate keeper, belonging to an incorporated plank-road company, may be subjected by process of garnishment. *Central Plank-Road Co. v. Sammons & Dotes*, 27 Ala. 380.

69. Money in the hands of the drawee of a bill of exchange, may be reached by garnishment, at any time before the acceptance of the bill. *Sands & Co. v. Matthews, Finley & Co.*, 27 Ala. 399. (Overruling *Connoley v. Cheesborough*, 21 Ala. 166.)

70. A debt due by judgment may be reached by a garnishment issuing from the same court; and the payment of the money under execution, after service of the garnishment, is no defense to the garnishee. *Skipper v. Foster*, 29 Ala. 330.

71. The salary of a police officer cannot be reached by process of garnishment against the municipal corporation. *Mayor of Mobile v. Rowland & Co.*, 26 Ala. 498.

4. *Judgment against Garnishee, and Payment thereof.*

72. When a garnishee submits to answer, he continues before the court, the suit not being terminated by judgment against the defendant, for the purpose of receiving its judgment on his answer; and the mere refusal of a motion for judgment on the answer, before the plaintiff has obtained a judgment against the defendant, does not discharge him. *Bostwick & Kirkland v. Beach*, 18 Ala. 80.

73. If the record shows that a judgment has been rendered against the defendant in attachment, and that the garnishee, being summoned by the proper officer, admitted an indebtedness to said defendant which could be recovered in debt or *indebitatus* assumpsit,—this is sufficient to sustain a judgment against the garnishee, although his answer is not set out at length. *Ib.*

74. If the record does not show that the plaintiff has obtained judgment against the defendant in attachment, the judgment against the garnishee will be reversed on error. *Case & Pate v. Moore*, 21 Ala. 758.

75. Where the judgment against the defendant is void for want of jurisdiction, there can be no valid judgment against the garnishee. *Matthews, Finley & Co. v. Sands & Co.*, 29 Ala. 136; *Flash, Hartwell & Co. v. Paul, Cook & Co.*, 29 Ala. 141.

76. Judgment by default cannot be entered against a garnishee, until the fourth day of the term to which he is

summoned; but this rule does not apply, where the garnishee himself brings the case to the circuit court, by appeal or *certiorari* from a justice of the peace. *Case & Pate v. Moore*, 21 Ala. 758.

77. Nor can a final judgment by default be rendered against him, until a *sci. fa.* on the judgment *nisi* has been duly executed and returned by the sheriff of the county in which he resides, or in which he was summoned. *Morris v. Russell*, 20 Ala. 357; *Wood v. Russell*, 22 Ala. 645.

78. A judgment cannot be rendered against an executor or administrator, at the suit of a judgment creditor of a legatee or distributee, until the estate has been finally settled. *Moore & Lyons v. Stainton*, 22 Ala. 831.

79. The judgment must be rendered, in such case, in the name of the plaintiff of record, and not in the name of the real owner of the judgment; yet, where the affidavit for the garnishment is properly made by the real owner, and the original judgment is correctly described, the judgment against the garnishee will be corrected on error, and rendered in the name of the plaintiff of record. *Jackson v. Shipman*, 28 Ala. 488.

80. Under the Georgia statute of 1822, (Prince's Digest, 37,) the record of the garnishment case consists only of the affidavit and summons, the return of the officer, the answer of the garnishee, and the judgment thereon rendered against him; but neither the original judgment, of which satisfaction is sought, nor the execution thereon issued, constitutes any portion of the garnishment suit, unless incorporated into the judgment against the garnishee, or made part of the record by bill of exceptions. *Gunn v. Howell*, 27 Ala. 663.

81. When a judgment debtor is summoned by process of garnishment at the suit of his creditor's creditor, and pays the amount of the judgment to the attaching creditor, he may avail himself of the payment by motion to enter satisfaction of the judgment against him. *Hagadon v. Campbell*, 24 Ala. 375.

82. Plaintiff, having undertaken for valuable consideration to pay all defendant's debts, afterwards commenced suit by attachment against one of his creditors, and summoned defendant as garnishee; and defendant suffered judgment to be entered against him, on which an execution was afterwards issued. *Held*, that the execution could not be superseded, and satisfaction of the judgment be entered, on proof of this agreement. *Matthews v. Robinson*, 20 Ala. 130.

As to the effect and validity of a judgment against the garnishee, as against a transferree of the debt who was not summoned, *vide infra*, 88–90.

5. *Summons of Transferree, and subsequent Proceedings.*

83. If the answer of the garnishee discloses the fact that the debt has been transferred, or that another person claims an interest in it, such person must be summoned to contest with the attaching creditor his right to it. *Connoley v. Cheesborough*, 21 Ala. 166; *Easton v. Lowery*, 29 Ala. 454.

84. If the garnishee answers, that, being indebted to defendant, he executed certain bills of exchange, payable at a future day to a third person, which the defendant accepted in discharge of his indebtedness, and that he had never been notified of their transfer,—the payee of the bills must be summoned, if the plaintiff wishes to contest the actual ownership of the debt. *Andrews v. Union Bank of Tennessee*, 21 Ala. 576.

85. On the trial of an issue between the plaintiff and such transferree, the former is entitled to open and close the argument, although the issue is so framed that the latter is made to affirm the validity of the alleged transfer. *Grady's Adm'r v. Hammond*, 21 Ala. 427.

86. After the plaintiff has shown that the money once belonged to the defendant in attachment, it is competent for the claimant to show that its ownership was changed before the service of the garnishment, and that he has become entitled to it; and any evidence, tending to establish this fact, is admissible for him. *Brooks v. Hildreth & Moseley*, 22 Ala. 469.

87. Where the garnishee received the money from the defendant in attachment, to be handed over to the

claimant, who had incurred a liability for him which would form a sufficient consideration for a promise of indemnity on his part; and the claimant afterwards assented to the payment, and requested the garnishee to hold the money for him, and the latter promised to do so, the claimant is entitled to the money. *Ib.*

88. If the garnishee answers, admitting an indebtedness by note to the defendant, but not disclosing the fact that he has been notified of the transfer of the note, the payment of the judgment rendered against him does not discharge him from liability to the real owner of the note; but, where two joint makers of a note are thus summoned, and one discloses the fact that they have been notified of its transfer, the transferree will be estopped from setting up any claim against them, if he fails to appear and assert his rights when summoned. *Smoot & Ketchum v. Eslava*, 23 Ala. 659.

89. In a subsequent contest between such garnishees and the transferree, evidence of the fact that they paid the money to the clerk in court, who immediately paid it back to one of them, as the attorney of the plaintiff in the judgment, is irrelevant. *Ib.*

90. Where a note, given for the purchase-money of land, is, by the direction of the vendor, made payable to a third person, who had agreed to advance the money on it; and the maker is afterwards summoned as the debtor of his vendor, and suffers judgment to be rendered against him, without the payee of the note being made a party to the proceedings,—his answer to the garnishment is not admissible evidence for him, in a subsequent action by the payee of the note. *McClellan v. Young*, 17 Ala. 498.

91. Where a judgment, discharging the garnishee, was reversed on error at the instance of the plaintiffs, and the fund held subject to their attachment, which was afterwards found to be void on its face for want of jurisdiction,—*held*, that a claimant of the fund, who was a party to the former appeal, could not question the validity of the attachment. *Matthews, Finley & Co. v. Sands & Co.*, 29 Ala. 136.

VII. LIABILITIES FOR SUING OUT ATTACHMENTS.

92. An action on the case lies, to recover damages for the wrongful or vexatious suing out of an original attachment, without waiting for the determination of the attachment suit. *Seay v. Greenwood*, 21 Ala. 491.

93. It lies against an agent for maliciously suing out an attachment without authority from his principal, before the termination of the attachment suit. *Forrest v. Collier*, 20 Ala. 175.

94. It is not necessary, in such case, to aver the want of probable cause for the issue of the attachment; nor that the affidavit was in writing. *Ib.*

95. An averment that the writ was sued out "wrongfully, fraudulently, and in order to oppress and injure plaintiff," is equivalent to an averment that it was sued out maliciously. *Ib.*

96. The declaration must specially deny the ground set forth in the affidavit for the attachment. *Tiller v. Shearer*, 20 Ala. 527.

97. If the writ was sued out before a justice of the peace of another State, the declaration must allege that he had authority by law to issue attachments, and must connect the defendant with its levy. *Marshall v. Betner*, 17 Ala. 832.

98. In an action on the bond, to recover the damages actually sustained, it is only necessary to aver that the writ was wrongfully sued out. *Dickson v. Bachelder*, 21 Ala. 699.

99. When an attachment is sued out against a merchant on the ground of fraud, the loss of probable profits, consequent upon the seizure of his goods, although it does not furnish the measure of damages in an action on the case, is a circumstance for the consideration of the jury, in arriving at a correct conclusion as to the injury sustained. *Donnell v. Jones*, 17 Ala. 689.

100. The injury to his credit and business as a merchant constitutes a legitimate ground of recovery. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

101. Reasonable and necessary counsel fees, expended or incurred in the defense of the attachment suit, may

be proved and considered in the assessment of damages caused by the vexatious suing out of the writ. *Marshall v. Betner*, 17 Ala. 832.

102. They are recoverable, also, where the suit is brought for the wrongful suing out of the writ. *Seay v. Greenwood*, 21 Ala. 491.

103. The costs of the justice's court, before whom the attachment was returnable, are recoverable as a part of the damage actually sustained; but the costs of the circuit court, to which the defendant in attachment removed the case by appeal, cannot be recovered, when it appears that, after there filing his pleas, he withdrew them for a valuable consideration paid him by plaintiff, and suffered judgment by *nil dicit*. *Ib.*

104. The sureties on the attachment bond are not liable for the costs accruing on the trial of a claim suit respecting the attached property. *Thompson v. Gates*, 18 Ala. 32.

105. Nor for the costs of the original suit, to which the attachment was ancillary. *White v. Wyley*, 17 Ala. 167.

106. Where an attachment against one partner is levied on the goods of the partnership, and the other partner, after recovering the goods in a claim suit under the statute, brings an action for damages against the plaintiff in attachment, counsel fees paid by him in the claim suit may be taken into consideration by the jury in assessing his damages. *Roberts v. Heim*, 27 Ala. 678.

107. When the attachment was sued out maliciously and vexatiously, vindictive damages are recoverable. *Marshall v. Betner*, 17 Ala. 832; *Seay v. Greenwood*, 21 Ala. 491; *Roberts v. Heim*, 27 Ala. 678.

108. A judgment on verdict for the defendant in attachment does not estop the attaching creditor, when sued for damages, from proving that his debt was actually due: such evidence is admissible, to show probable cause, and thus repell the presumption of malice. *Marshall v. Betner*, 17 Ala. 832.

109. Nor is such judgment conclusive evidence, in a subsequent suit on the bond, that the attachment was wrongfully sued out. *Sackett & Shelton v. McCord*, 23 Ala. 851.

110. But a judgment for the claimant of the property attached, on a trial of the right of property, is conclusive on the attaching creditor, in an action for damages by the claimant, that the defendant in attachment had no interest in the property. *Roberts v. Heim*, 27 Ala. 678.

111. Where the attachment was sued out as ancillary to an action against the defendant therein, as endorser of a promissory note on which suit had previously been instituted against the maker, with a return of *non est inventus*, the proceedings in the suit against the maker, although not sufficient to fix the liability of the endorser, are admissible evidence in mitigation of damages. *White v. Wyley*, 17 Ala. 167.

112. Where the attachment was sued out by the defendant as agent of another, he may show, in mitigation of damages, that he was plaintiff's surety on a stay-bond in the original suit, and that plaintiff was about to remove his property from the State. *Forrest v. Collier*, 20 Ala. 175.

113. A fraudulent assignment, made by the plaintiff three days after the defendant had sued out an ancillary attachment against him, is no defense to an action for the vexatious suing out of the writ, unless the fraudulent intent existed at the time the attachment was sued out. *Donnell v. Jones*, 17 Ala. 689.

114. But a deed of trust, executed by the plaintiff before the issue of the attachment, is admissible evidence for the defendant; also, any evidence tending to show that it was fraudulent, or that it was part of a plan to enable plaintiff to dispose of his property fraudulently, or that he was in embarrassed circumstances at the time of its execution, or that the property conveyed by it was subsequently run off by the beneficiary to another State. *Yarbrough v. Hudson*, 19 Ala. 653.

115. Evidence of the fact that, at the time defendant's attachment was levied, another attachment against plaintiff was in the hands of the sheriff, and was levied on the same property, is not admissible for defendant; but he may show the issue of another attachment, and notice thereof to himself, previous to the issue of his own,

as tending to rebut the presumption of malice. *Ib.*

116. Although the defendants, when sued as partners, cannot be held responsible for the separate act of one partner, in procuring the levy of another attachment, in favor of another creditor; yet, where the attachment, on which the action is founded, by the sheriff's return thereon endorsed, shows that the goods had been first taken under the other attachment, the plaintiff may show that the goods were more than sufficient to satisfy that attachment, and may, for this purpose, introduce the attachment and levy. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

117. Evidence of the fact, that one of the defendants agreed to find property on which a levy might be made, if another creditor, whose attachment was first in the sheriff's hands, would yield the preference to their attachment, is admissible for plaintiff, as tending to show that said defendant was active in causing the levy. *Ib.*

118. Evidence of the plaintiff's general credit and reputation is not, *it seems*, admissible for him, until it has been assailed. *Ib.*

119. Where the declaration, in debt, proceeds on a bond given for an *ancillary* attachment, while the bond set out on oyer is for an *original* attachment, the variance is immaterial. *Dickson v. Bachelder*, 21 Ala. 699.

120. Nor is it a material variance, that the bond set out in the declaration alleges that the attachment was sued out by "*Robert Cornell and Charles Cornell*," in a suit brought by them as partners, while the bond set out on oyer recites that the attachment was sued out by "*John J. Steiner*, at the suit of Robert Cornell and Charles Cornell," &c. *Ib.*

121. In debt on an attachment bond, if the plaintiff recovers less than five dollars damages, he is nevertheless entitled to full costs. *McAllister v. McDow*, 26 Ala. 453.

122. A plea averring that the attachment "was not sued out wrongfully, maliciously, or vexatiously, or without reasonable or probable cause," presents a substantial defense to an action on the case, and is not demurrable. *Marshall v. Betner*, 17 Ala. 832.

ATTORNEY-AT-LAW.

I. APPOINTMENT AND AUTHORITY.
II. COMPENSATION, AND FEES.
III. COMPETENCY AS WITNESS; AND HEREIN, OF PRIVILEGED COMMUNICATIONS.
IV. DUTIES AND LIABILITIES; AND HEREIN, OF ACTIONS AGAINST ATTORNEYS.

I. APPOINTMENT AND AUTHORITY.

1. Conceding that an attorney has no authority to employ another attorney to act for his client; yet, if he soon afterwards informs his client of such unauthorized employment, and the latter does not dissent from it, these facts are proper to be submitted to the jury, in an action by the second attorney to recover his fees, to enable them to determine whether the client did not assent to such employment. *King v. Pope*, 28 Ala. 602.

2. An attorney may submit to arbitration the matters involved in a pending lawsuit, and consent of record that the award may be made the judgment of the court. *Beverly v. Stephens*, 17 Ala. 701.

3. An attorney's authority does not cease with the rendition of judgment, but continues for the purpose of controlling the process for its collection; and hence the lien of an execution may be lost, by the attorney's order to the sheriff, without instructions from his client, to postpone the sale of property levied on, and to allow the property to remain in the possession of the defendant in execution. *Albertson, Douglass & Co. v. Goldsby*, 28 Ala. 711.

4. When an attorney has appeared in the primary court, without objection, his authority cannot be questioned in the appellate court. *Moore v. Easley*, 18 Ala. 619.

5. Conceding that attorneys have power to bind their clients by written admissions as to the facts of the case; yet, where such admissions are made improvidently, or through mistake, the court may relieve against them, by means of its coercive powers over its own officers, and may set them aside

upon such terms as will meet the justice of the particular case. *Harvey and Wife v. Thorpe*, 28 Ala. 250.

6. Where an admission of record is made by counsel in the primary court, for the purpose of obviating the necessity of proof, it will be presumed that he had authority to make it, and the admission cannot be withdrawn in the appellate court. *Montgomery v. Givhan*, 24 Ala. 568.

7. When an appeal is taken by "the solicitor of the complainants," some of whom were infants suing by their next friends, it is not valid so far as the infants are concerned; but, as to the adult complainants, the authority of their solicitor will be presumed. *Riddle v. Hanna*, 25 Ala. 484.

8. When an appeal is sued out by an infant in his own name, and errors are assigned by attorney, on the fact of such infancy being brought to the knowledge of the court by affidavits, the appeal will be dismissed on motion. *Cook v. Adams*, 27 Ala. 294.

9. A party has the constitutional right to appear *in propria persona*, and is not compelled to employ counsel to conduct his suit. *May & Tindal v. Williams*, 17 Ala. 23.

II. COMPENSATION, AND FEES.

10. The attorney of the successful party, and not the party himself, is entitled to the tax-fee. *Gillis v. Holly*, 16 Ala. 653.

11. A contract, by which an attorney is to collect money for his client, and for his services "to retain twenty per cent. on the sums collected, or be paid $200, as he shall elect," is void for champerty. *Elliott v. McClelland*, 17 Ala. 206.

12. So, where the client gives his note for services to be rendered, and, at the same time, executes another instrument, agreeing to give the attorney one half of the damages that may be recovered,—the note and agreement form but one contract, and are both champertous. *Dumas v. Smith*, 17 Ala. 305.

13. A contract, by which an attorney agrees to indemnify his client against all liability in a pending suit, or to refund his fee, extends, if valid, only to such liabilities as the law would recognize and enforce; and if the client suffers judgment to be rendered against him, in favor of another attorney whom he had never employed, for professional services in the same suit, he cannot resort to his contract of indemnity. *Lindsey v. Jones*, 23 Ala. 835.

III. COMPETENCY AS WITNESS; AND HEREIN, OF PRIVILEGED COMMUNICATIONS.

14. On grounds of public policy, an attorney may be a witness for his client, when he has no other interest in the event of the suit than such as concerns his fees, and they are not contingent in their nature. *Quarles v. Waldron and Wife*, 20 Ala. 217.

15. The rule which protects professional communications, is founded in public policy, and extends to all information acquired by an attorney from his client, touching matters that come within the ordinary scope of professional employment; but, where two contracting parties employ an attorney to draw up their contract, and make their communications to him in the presence of each other, each thereby waives, as against the other, his right to treat those communications as confidential, and each is entitled, in asserting his rights under the contract, to a disclosure of its stipulations from the attorney. *Parish v. Gates*, 29 Ala. 254.

IV. DUTIES AND LIABILITIES; AND HEREIN, OF ACTIONS AGAINST ATTORNEYS.

16. An action on the case lies against an attorney, for his negligence and want of skill, in the preparation of an affidavit for an attachment, or of the attachment itself, whereby his client suffers an injury. *Walker v. Goodman & Mitchell*, 21 Ala. 647.

17. The action also lies, for negligently "dismissing the levy of an attachment," and for "releasing and relinquishing all liens which had accrued by reason of such levy," whereby his client "lost her demand and the means of recovering the same." *Ib.*

18. Although an action cannot be maintained against an attorney, for failing to pay over money collected for his client, until there has been a demand; yet, the client cannot invoke

this principle, to excuse his own laches in failing to make the demand within a reasonable time. *Kimbro v. Waller*, 21 Ala. 376.

19. To such an action, an attorney may plead the statute of limitations. *Ib.*

20. A replication to such plea, averring "that the money was collected by defendant, as an attorney-at-law, in the State of Tennessee; that no demand was made of him, for said money, until a short time before the commencement of this suit; and that the statute only begins to run from the demand,"—is demurrable. *Ib.*

21. An attorney will be presumed to have read a declaration, to which pleas are filed in the name of the firm of which he is a partner; and the record of the suit, in which such proceedings were had, is admissible evidence against him, to prove actual notice of the plaintiff's title as set out in the declaration. *Parsons v. Boyd*, 20 Ala. 112.

AUDITA QUERELA.

See SUPERSEDEAS.

BAIL.

(Statutory Provisions: Code, §§ 2175–91; Clay's Digest, pp. 70–75.)

As to bail in criminal cases, see same title in PART I, p. 11.

I. OF THE AFFIDAVIT, WRIT, AND BOND.

1. An affidavit to hold to bail is sufficient to authorize the issue of a *ca. sa.* after judgment. *Stewart v. Cunningham & Rippetoe*, 22 Ala. 626.

2. Where the writ, after commanding the sheriff to take the defendant's body to satisfy the plaintiff's debt and costs, contains the further direction, "and that you have the said moneys at our next circuit court, to render to the said plaintiffs, for their damages and costs aforesaid," the latter direction is mere surplusage, and does not vitiate the writ. *Ib.*

3. In debt on a prison-bounds bond, assigning breaches, it is a good plea by the surety, that the debtor surrendered himself to the jailor, within sixty days from the date of the bond, having committed no escape in the meantime. *Harlan v. Thompson*, 20 Ala. 94.

4. In an action against a sheriff and his sureties, for the escape of a debtor in custody under bail process, an allegation that the writ was "marked and endorsed for bail," is sufficient to show that it required him to hold the defendant to bail. *Hutchisson v. Governor*, 23 Ala. 809.

II. OF THE PROCEEDINGS TO OBTAIN DISCHARGE.

5. A debtor, in custody under bail process, and wishing to discharge himself by rendering a schedule of his property, may make application to any justice of the peace, and the latter is authorized to act upon it alone. *Hutchisson v. Governor*, 23 Ala. 809. (Overruling *Morrow & Nelson v. Weaver & Frow*, 8 Ala. 295.)

6. The proceedings to obtain a discharge, where the debtor was in custody before the Code went into operation, but was surrendered by his bail after that time, must conform to the provisions of the Code. *Goldsmith, Forcheimer & Co. v. Lang*, 25 Ala. 486.

7. An affidavit by such debtor, "that he has no money, estate, or effects, real or personal, in possession or expectancy, within the State of Alabama, subject to levy and sale by execution," without adding "whereby to satisfy the debt," is sufficient under the Code, but was not sufficient under the former law. *Ib.*

8. Where the debtor takes an appeal to the circuit court, and gives the bond required by section 2185 of the Code, he is entitled to be discharged from custody. *Ex parte Whitehead*, 23 Ala. 93.

9. When a non-resident is arrested under a *ca. sa.*, and compelled to give bond in order to keep out of jail,

mandamus does not lie, to compel the circuit court to discharge the bail. *Ex parte Small*, 25 Ala. 72.

BAILMENT.

I. GENERALLY.
II. COLLATERAL SECURITY.
III. COMMON CARRIERS.
IV. FACTORS, AND COMMISSION-MERCHANTS.
V. HIRERS OF SLAVES.
VI. INNKEEPERS.

I. GENERALLY.

1. At common law, a bailee, who fraudulently converted the deposit, was not guilty of larceny. *Wright v. Lindsay*, 20 Ala. 428.

2. Unless he broke the bulk or package, or acquired possession of the goods with intent to steal them. *Spivey v. The State*, 26 Ala. 90.

3. But, under the statute of this State respecting the stealing and inveigling of slaves, (Code, § 3130,) there is no exception in favor of a bailee. *Ib.*

4. A bailment terminates when the objects for which it was made are accomplished, and it then devolves on the bailee to return the property; and, on his failure to do so, detinue may be maintained against him without a special demand. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

5. If a bailee, asserting no title in himself, restores the property in good faith to his bailor, in accordance with the terms of the bailment, before he is notified that the true owner will look to him for it, no action can be maintained against him, for either the property or its value. *Nelson v. Iverson*, 17 Ala. 216.

6. To enable a bailee to assert an adverse possession against his bailor, he must do some open and unequivocal act evincing such intention, and this must be brought to the knowledge of his bailor. *Benje v. Creagh's Adm'r*, 21 Ala. 151; *Knight v. Bell*, 22 Ala. 198.

7. The declarations of the mother of an infant, while in possession of a slave as guardian or bailee of the infant, cannot be received in evidence to defeat his rights; yet, if she claims the slave as his property, asserting his title in an open and notorious manner, her acts and declarations, contemporaneous with and explanatory of her possession, and tending to show that she held the slave as the property of another, would be competent evidence. *Nelson v. Iverson*, 19 Ala. 95.

8. In detinue by the bailor, for a horse which the bailee had sold or exchanged without authority, the bailee is a competent witness for plaintiff, his interest being exactly balanced. *Oliver v. McClellan*, 21 Ala. 675.

9. In an action against the owners of a steamboat, to recover damages for the loss of a stage, which was caused by a collision between the steamboat and a ferry-boat on which the stage was crossing the river, the stage-driver, who had the care and control of the stage at the time, is not a competent witness for the plaintiff without a release. *Otis & Jayne v. Thom*, 23 Ala. 469.

10. Where such action is brought by the owner of goods which were on the flat-boat, and which were damaged by the collision, the owner of the flat-boat, who had charge of her at the time of the collision, is not a competent witness for the plaintiff, and is not rendered competent by section 2302 of the Code. *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189.

11. In an action against the hirer of a slave, for negligence, his sub-bailee, in whose possession the slave died, is a competent witness for him, unless the complaint is so framed as to authorize a recovery for the negligence of such sub-bailee. *Ala. & Tenn. Rivers Railroad & Co. v. Burke*, 27 Ala. 535.

12. When detinue is brought against the bailee of a slave, his bailor is not a competent witness for him without a release, although the slave was hired for his victuals and clothes only. *Nelson v. Iverson*, 24 Ala. 9.

13. A bailee, being responsible for money rightfully deposited with him, may charge an embezzlement of it as of his own money, or may prove an embezzlement of it under an averment

of the embezzlement of his own money. *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

II. COLLATERAL SECURITY.

14. If a debtor deposits with his creditor, unconditionally, notes on a third person as collateral security, the creditor thereby acquires the control and direction of their collection, and it becomes his duty to take all necessary measures to prevent the discharge of any of the parties thereto; and in such case, notice to bring suit on them should be given to him. *Pickens v. Yarborough's Adm'r*, 26 Ala. 417.

15. If the creditor receives the note under a special agreement, authorizing him to collect in any other mode than by suit, he must be regarded, as to all persons without notice of the extent of his powers, as the general holder; and notice to sue may then be given to him. *Ib.*

16. If a creditor takes a note on a third person as collateral security for his debt, he is bound to the use of due diligence in the collection of it, and is responsible to his debtor for any damages caused by his laches; but, if the note is on an insolvent person, its retention for never so long a period will not justify the inference of payment of the original debt. *Powell's Adm'r v. Henry*, 27 Ala. 612.

17. A creditor is entitled to the benefit of all securities placed by his debtor in the hands of a surety, to be applied to the payment of the debt. *Branch Bank at Mobile v. Robertson*, 19 Ala. 798; *Cullum v. Branch Bank at Mobile*, 23 Ala. 797.

As to the rights of sureties, *inter sese*, and against the creditor, to the benefit of collateral securities, see SURETIES, p. 341.

III. COMMON CARRIERS.

18. A common carrier may be liable, by the terms of his contract, or by force of a custom, for the overland transportation of goods, after they have been landed at the accustomed port of destination, to the place where the consignee usually receives goods, or until delivered to him; his contract, therefore, and that of the insurer against marine risks, are not necessarily co-extensive. *Mobile Marine Dock & Mutual Insurance Co. v. McMillan & Son*, 27 Ala. 77.

19. As he is not absolved from liability to the owners of the goods by the torts of third persons, he has a right to maintain an action for the wrong; and a recovery by him, for the injury done to the goods, is a bar to a subsequent action by the owner for damages resulting from the same injury. *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189.

20. If the several proprietors of different portions of a public line of travel, by agreement among themselves, appoint a common agent at each end of the route, to receive the fare and give through tickets, this does not, *per se*, constitute them partners as to passengers who purchase through tickets, so as to render each liable for losses occurring on any portion of the line. *Ellsworth v. Tartt*, 26 Ala. 733.

21. The several acts of congress, regulating the duties and liabilities of steamboats engaged in carrying the mail, do not impose upon the owners of such boats, in favor of a person who contracts with them only for the diligence of a mandatory, the responsibility of common carriers. *Haynie v. Waring & Co.*, 29 Ala. 263.

22. A mandatory, or bailee who undertakes to carry goods for another gratuitously, is liable only for gross negligence. *Ib.*

IV. FACTORS, AND COMMISSION-MERCHANTS.

23. A factor, or commission-merchant, has no authority to pledge the goods of his principal for his own use; and his pledgee can acquire no title, as against the principal, although he dealt with the factor in ignorance of his title. *Bott v. McCoy & Johnson*, 20 Ala. 578.

24. But the factor himself cannot set aside the contract, on account of his want of authority; and a subsequent purchaser from him, at a sale made within the scope of his authority, acquires no better title than he himself had. *Ib.*

25. A factor, who receives goods from an administrator, cannot, without the assent of the administrator, hold them or their proceeds on account of advances made to the decedent in his lifetime. *Swilley & Riley v. Lyon & Baker*, 18 Ala. 552.

26. A want of ordinary care in one particular, on the part of a warehouse-man, does not render him responsible for a loss occasioned by other independent causes. *Gibson v. Hatchett & Brother*, 24 Ala. 201.

27. Warehouse-men may maintain assumpsit, for cotton "shipped by them as warehouse-men only," and not delivered to the consignees; provided, the contract was made with them personally. *Fry v. Carter & Howell*, 25 Ala. 479.

28. A receiving and forwarding merchant cannot, unless under some special contract, custom, or usage of trade, forward cotton to a port without instructions from his principal, and direct its delivery on arrival to a commission-merchant. *Love & Co. v. Davis*, 25 Ala. 335.

29. As to the compensation which a commission-merchant may lawfully charge, see *Brown v. Harrison & Robinson*, 17 Ala. 774; *Swilley & Riley v. Lyon & Baker*, 18 Ala. 552.

V. HIRERS OF SLAVES.

30. When a slave is hired for a particular service, and is afterwards employed in a different service, whereby his death is caused, the owner may maintain case or trover against the hirer. *Hooks v. Smith*, 18 Ala. 338; *Myers v. Gilbert*, 18 Ala. 467; *Moseley v. Wilkinson*, 24 Ala. 411.

31. And this, notwithstanding the death of the slave was caused by his own disobedience, or was the result of inevitable accident. *Hooks v. Smith*, 18 Ala. 338; *Seay v. Marks*, 23 Ala. 532.

32. But, where the contract of hiring is general in its terms, not restricting the employment of the slave to any particular business, the hirer has the right to employ him in any business to which slaves are usually put, not involving extraordinary peril to life or limb, or to re-hire him to another to be so employed; and where such contract is in writing, its terms cannot be varied by parol. *Seay v. Marks*, 23 Ala. 532.

33. Where slaves are hired to work at a saw-mill, they may be employed in rafting logs down an adjacent river; that being, at the time of the hiring, and for a long time previously, a part of the ordinary labor performed by the hands at said mill. *Nesbitt v. Drew*, 17 Ala. 379.

34. A stipulation in the contract, that the owner shall "deduct or account for all time lost by sickness or otherwise," being evidently intended for the benefit of the hirer, must be so construed as to effectuate that intention; and the term "otherwise" must be taken to refer to death or other cause, unmixed with the fault of either party, by which the slave is rendered incapable of performing the expected service. *Ib.*

35. In an action against the owners of a steamboat, to recover the value of a hired slave alleged to have been lost by reason of a breach of contract on the part of the defendants, the fact that the boat, before and at the time of hiring, was running as a regular packet between Mobile and New Orleans, and was so advertised in the newspapers, is not conclusive evidence of a contract that the boat should run only on that line during the term of hiring, but is merely a circumstance for the consideration of the jury in ascertaining what the contract really was. *Myers v. Gilbert*, 18 Ala. 467.

36. It is the duty of the hirer, under a contract general in its terms, to furnish the slave with suitable clothing and provisions, and with medical attendance in case of sickness. *Sims & Jones v. Knox*, 18 Ala. 236; also, *Foster v. Sykes*, 23 Ala. 796.

37. But, where the contract merely specifies the agreed price and term of hiring, and binds the hirer to furnish the slave with board and clothing, a liability for medical services cannot be implied. *Sims & Jones v. Knox*, 18 Ala. 236.

38. The mere failure of the hirer to call in a physician when the slave is sick, although he may not know what is the matter with him, does not amount to negligence. *Ala. & Tenn. Rivers Railroad Co. v. Burke*, 27 Ala. 535.

39. The hirer is only responsible for that degree of care and diligence which the generality of mankind use and exercise in relation to their own slaves, under similar circumstances; and is equally responsible for the same degree of care on the part of his sub-bailee. *Ib.*

40. As to the liability of the owners of a steamboat, for the loss of a slave who was hired as a deck hand on the boat, and whose death was caused by an explosion or collision occasioned through the negligence of the officers of the boat, see *Walker v. Bolling*, 22 Ala. 294; *Cook & Scott v. Parham*, 24 Ala. 21. (ACTION ON THE CASE, 7, 8, 9, p. 370.)

41. It is the duty of the hirer, in the absence of an express stipulation to the contrary, to return the slave at the termination of the bailment, and his failure to do so renders him *prima-facie* liable for his value; but, when it is shown that the slave died during the term, it devolves on the owner to show that the death resulted from a breach of duty on the part of the hirer. *Wilkinson v. Moseley*, 18 Ala. 288.

42. On the failure of the hirer to return the slave at the expiration of the term, the owner may either treat the bailment as ended, and bring his action; or, where the hiring is from year to year, or for a less period, as continuing or renewed. *Benje v. Creagh's Adm'r*, 21 Ala. 151.

43. In the absence of an express stipulation, the owner delegates to the hirer the same right to punish and correct the slave which he himself has; but, if the punishment inflicted by the hirer, when considered with a just regard to all the attendant circumstances, is either cruel or barbarous, he becomes a trespasser *ab initio*, and is liable to damages at the suit of the owner. *Nelson v. Bondurant*, 26 Ala. 341.

44. But the mere fact that the slave was tied when the punishment was inflicted, and so secured as to prevent resistance on his part, does not affect the rights or liabilities of the parties. *Ib.*

45. If a hired slave runs away during the term, and is committed to jail as a runaway, it is the duty of the hirer to pay the necessary jail fees; and if, on his refusal to do so, the owner pays them at the expiration of the term, a cause of action thereby accrues against the hirer. *Walker and Wife v. Smith*, 28 Ala. 569.

46. If the owner retakes the possession of a hired slave before the expiration of the term, without the consent of the hirer, he loses his right to the hire. *Nesbitt v. Drew*, 17 Ala. 379; *Camp v. Dill*, 22 Ala. 249; *S. C.*, 27 Ala. 553; *McNeill & Forniss v. Easley*, 24 Ala. 456.

47. If, in such case, he refuses to deliver the slave on demand of the hirer, the fact that he afterwards sends the slave away alone, with instructions to return to the hirer, (which instructions the slave disobeys,) does not excuse the refusal. *McNeill & Forniss v. Easley*, 24 Ala. 456.

48. To make a guardian responsible for the act of his ward, in harboring a hired slave, in must be shown to have been done by his directions, or with his assent: the fact that he had previously allowed his ward to make contracts relative to his own property, and had refused to entertain a proposition to rescind the contract until he had consulted his ward, does not render him liable. *Camp v. Dill*, 27 Ala. 553.

49. Where two slaves are hired for a year, at a gross sum, the contract is entire; and if the owner retakes the possession of one of them before the expiration of the term, without the consent of the hirer, he cannot recover any part of the hire. *Nesbitt v. Drew*, 17 Ala. 379.

50. But, if two slaves are put up separately at public auction, to be hired, and are knocked off to the same bidder, who was induced by the representations of the owner to bid for each under the expectation that he would get both; and a single note is given for the amount of the hire,—the two contracts are not thereby so consolidated, that a breach of one would warrant a rescission of both. *Camp v. Dill*, 27 Ala. 553.

51. If a slave is hired for one month, and does not work the full term, no part of the hire can be recovered; nor can evidence be received of a particular usage to pay *pro rata* on such

contract, since the usage, if proved, could not be recognized. *Petty v. Gayle*, 25 Ala. 472.

52. The rules which govern other contracts, as to the right of rescission, and the promptness with which it must be sought, are equally applicable to contracts of hire. *Dill v. Camp*, 22 Ala. 549.

53. Under a promise to account for the hire of a slave, without any stipulation as to the amount to be paid, or the time when the hiring should terminate, the hire becomes due and payable as it is earned, or, at most, within a convenient and reasonable time thereafter. *Mim's Executors v. Sturtevant*, 18 Ala. 360.

54. If the owner brings an action of trover for the conversion of a hired slave, and damages are assessed to him for the value of the slave at the time of conversion, he cannot, after receiving satisfaction of the judgment, recover the hire for the unexpired portion of the term. *Smith v. Hooks*, 19 Ala. 101.

55. On the other hand, if he receives the stipulated hire for the entire term, with full knowledge of the conversion before the expiration of the term, he is estopped from afterwards bringing trover. *Moseley v. Wilkinson*, 24 Ala. 411.

VI. INNKEEPERS.

56. If a boarder at a hotel fails to take such care of his watch, as a person of ordinary prudence should take, the landlord is not responsible for its loss. *Chamberlain & Co. v. Masterson*, 26 Ala. 371.

57. As to the distinction between guests and boarders, and the liability of the landlord to each for the loss of goods. *Ib.*

BANKRUPTCY.

I. RIGHTS OF ASSIGNEE IN BANKRUPTCY.
II. RIGHTS OF BANKRUPT; AND HEREIN, HOW HIS DISCHARGE MAY BE PLEADED, CONTESTED, OR AVOIDED.
III. COMPETENCY OF BANKRUPT AS WITNESS.

I. RIGHTS OF ASSIGNEE IN BANKRUPTCY.

1. The assignee is invested with all the rights, title, and powers, in and over the assets of the bankrupt, that were possessed by the bankrupt himself before the discharge, but nothing more: it was not the design or intention of the act of congress, to enable the assignee to convey a legal title, where the bankrupt could not; consequently, a sale by the assignee, of a chose in action, does not authorize the purchaser to sue on it in his own name. *Camack v. Bisquay*, 18 Ala. 286.

2. Where the assignee has neglected, for more than five years, to institute proceedings for the condemnation of the bankrupt's interest in certain trust property, which was not surrendered in his schedule; and in the meantime, a creditor has ferreted out that interest, and has obtained, after a protracted litigation, a decree subjecting it to the satisfaction of his debt,—the assignee will be presumed to have abandoned his claim. *Rugely & Harrison v. Robinson*, 19 Ala. 404.

3. The franchise of a toll-bridge is property, within the meaning of the bankrupt law, and passes to the assignee. *Stewart & Fontaine v. Hargrove*, 23 Ala. 429.

4. Property conveyed by the bankrupt, prior to the filing of his petition, by deed of assignment fraudulent as to his creditors, vests in the assignee, unless the preferred creditors have expressly assented to it; and it is the duty of the bankrupt, if he still retains the possession of the property, to surrender it in his schedule. *Ashley's Adm'r v. Robinson*, 29 Ala. 112.

II. RIGHTS OF BANKRUPT; AND HEREIN, HOW HIS DISCHARGE MAY BE PLEADED, CONTESTED, OR AVOIDED.

5. An execution, issued on a judgment which was rendered during the pendency of the proceedings in bankruptcy, but before the debtor obtained his discharge, is mere voidable, and, until avoided, authorizes the creditor (Clay's Digest, 256, § 6) to pay off a debt secured by deed of trust, and to have the property sold under the deed. *Roden v. Jaco*, 17 Ala. 344.

6. Where the bankrupt obtains his discharge after the rendition of a judgment by default against him, but before the execution of a writ of inquiry, he cannot plead, nor otherwise take advantage of his discharge, on the execution of the writ; but he may supersede and quash an execution on the judgment. *Ewing v. Peck & Clark*, 17 Ala. 339.

7. He cannot, however, have his discharge entered of record, before the plaintiff has sued out an execution on the judgment, for the purpose of preventing the issue of execution. (CHILTON and LIGON, JJ., *dissenting*.) *Brown v. Branch Bank at Montgomery*, 20 Ala. 420.

8. Yet, where the record does not purport to set out all the evidence, and the motion itself is wanting, the appellate court will not presume that an execution had not been issued, nor that the motion did not allege that fact. *Stewart & Fontaine v. Hargrove*, 23 Ala. 429.

9. Bankruptcy may be pleaded to a *sci. fa.* to revive a judgment; and when it is pleaded "in short by consent," the appellate court will presume that it was well pleaded. *Duncan v. Hargrove*, 22 Ala. 150.

10. A judgment quashing an execution on the ground of defendant's discharge in bankruptcy, although the court may refuse to order satisfaction of the judgment to be entered, or a perpetual stay of execution, relates back to the original judgment, and vacates all process issued for its satisfaction; and if the money has been collected under a *pluries fi. fa.*, pending the motion to quash, it may be recovered in an action for money had and received, unless the party receiving it can show some equity, arising out of the same transaction, which will justify its retention. *Ewing v. Peck*, 26 Ala. 413.

11. Under a creditor's bill, seeking to condemn to the satisfaction of his debt his debtor's interest in certain trust property, which was not surrendered in his schedule, and to which the assignee has never asserted any claim, neither the bankrupt himself, nor the other beneficiaries of the trust property, can set up the discharge in bankruptcy as a defense to the suit. *Rugely & Harrison v. Robinson*, 19 Ala. 404.

12. When a bankrupt's discharge is impeached for fraud, the facts relied on to impeach it must be stated with certainty to a common intent. *Stewart & Fontaine v. Hargrove*, 23 Ala. 429.

13. A general allegation, that he failed to file a full schedule of his notes and accounts, without specifying those which were omitted, is demurrable for want of precision and certainty, and because it is but the statement of a legal conclusion. *Ib.*

14. An allegation, that he had made a fraudulent conveyance of his property, without stating to whom the conveyance was made, is demurrable for the same reasons. *Ib.*

15. An allegation of the fraudulent omission of a decree, which does not state the amount nor the time of the rendition of such decree, is wanting in requisite certainty and precision. *Ib.*

16. A plea by the judgment creditor, whose execution is sought to be superseded, alleging that a lien was created in his favor, before the bankrupt's application for the benefit of the statute, by the delivery of an execution to the sheriff of a county in which the defendant had personal property, is substantially defective, unless it alleges that the lien was continued up to the rendition of the decree. *Ib.*

17. An allegation, in a creditor's bill in equity, that the bankrupt's failure to include in his schedule his interest in certain trust property, "amounted in law" to a fraud which should vacate his discharge, is not equivalent to a charge of fraud or willful concealment. *Rugely & Harrison v. Robinson*, 19 Ala. 404.

18. The specifications of fraud, contesting the bankrupt's discharge, of which notice has been served on him, are within the statute allowing amendments on terms after a demurrer has been sustained. *Stewart & Fontaine v. Hargrove*, 23 Ala. 429; *Ashley's Adm'r v. Robinson*, 29 Ala. 112.

19. But the refusal of the court to allow an amendment, after the case has been put to the jury, is not revisable on error. *Ashley's Adm'r v. Robinson*, 29 Ala. 112.

20. The bankrupt's failure to include

in his schedule his interest in certain trust property, which was bequeathed to a trustee for the use and benefit of him and his family, but with a stipulation that it should not be subject to the payment of his debts, does not render void his discharge, although he has such an interest in the property as may be separated and subjected by his creditors by bill in equity. *Rugely & Harrison v. Robinson*, 19 Ala. 404.

21. The execution by a voluntary bankrupt, after the 1st January, 1841, of a deed of trust giving a preference to some of his creditors, does not invalidate his discharge, under the second section of the bankrupt law, unless the act was "done in contemplation of the passage of a bankrupt law." *Pearsall v. McCartney*, 28 Ala. 110.

22. The execution by the bankrupt, before filing his petition, of a fraudulent assignment which does not come within the provisions of the second section of the law, does not, of itself, affect the validity of his discharge; nor does his omission to surrender the property thus fraudulently conveyed, although he retains possession of it, necessarily prove a fraud or willful concealment under the fourth section; but these facts are admissible evidence, when his discharge is impeached by a creditor, as affecting the question of fraud or willful concealment. *Ashley's Adm'r v. Robinson*, 29 Ala. 112.

23. Issue being joined on an allegation that the bankrupt fraudulently omitted and withheld money, and the defendant having introduced evidence showing that the business in which he was engaged, for several years prior to the filing of his petition in bankruptcy, was generally disastrous to persons engaged in it at the same time, he cannot adduce evidence as to the amount of losses sustained by another person, who was not at all connected with himself. *Edgar v. McArn*, 22 Ala. 796.

24. But, after the attacking creditor has proved that the defendant, before filing his petition, had received considerable sums of money, was engaged in merchandizing, had purchased cotton, &c., defendant may show, in rebuttal, the general failure of all those who were at that time engaged in the purchase of cotton; and this, although it is shown that he sold his goods for cash, while the others had sold on a credit. *Ib.*

25. Plaintiff having proved that the defendant, during the three years immediately preceding the trial, which was several years after the discharge in bankruptcy was obtained, purchased a large quantity of cotton, defendant cannot be allowed to prove, in rebuttal, that nine-tenths of the persons engaged in that business at the same time were insolvent, nor that merchants in a neighboring city were in the habit of employing persons, in the city in which he lived, to buy cotton for them on commission. *Ib.*

26. Evidence showing that the defendant was a reckless cotton buyer, is admissible for him. *Ib.*

27. Evidence of the bankrupt's general good character is not admissible for him. *Pearsall v. McCartney*, 28 Ala. 110.

28. The collection of a judgment by the bankrupt, before or about the time of filing his petition in bankruptcy, is relevant and admissible, to sustain an allegation of the fraudulent omission or concealment of the money, if the circumstances tend to show that he had not parted with the money at the time of his application for the benefit of the act; *aliter*, if the money was collected after the institution of the proceedings in bankruptcy. *Ashley's Adm'r v. Robinson*, 29 Ala. 112.

29. Under an allegation of the fraudulent omission of a judgment for $122.81, evidence cannot be received of a judgment for $132.81, although it corresponds in every other respect with the judgment described. *Ib.*

30. The bankrupt's declaration, at the time of purchasing a horse, soon after the filing of his petition, that he "wanted him to send to North Carolina for four or five negroes he had hid out there," is not admissible evidence under an allegation of the fraudulent omission and concealment of certain notes, accounts, claims, "two negroes, Esther and Rhoda, and a large sum of money." *Ib.*

31. A set-off, acquired in good faith, by the maker against the payee of a

note, is not defeated by the subsequent discharge of the payee as a bankrupt. *Harwell v. Steel*, 17 Ala. 372.

32. The bankruptcy of the maker of a note does not suspend the operation of the statute of limitations. *Ib.*

33. Nothing less than an express promise will revive a debt which has been discharged by a decree in bankruptcy; but it is not necessary that the words should be spoken to the creditor or his agent, although the fact that they were spoken to a third person may well be considered, in connection with the other facts, in determining whether they amount, in law, to an express promise. *Evans v. Carey*, 29 Ala. 99.

34. Where the creditor met the bankrupt, at the house of a common relative, and refused to speak to him; and, on the bankrupt afterwards complaining of this to his relative, the latter told him, that the creditor "considered he had treated him badly, in permitting him to suffer largely as his endorser in bank;" at which the bankrupt "seemed surprised, and said 'if plaintiff had paid anything on account of such endorsement, he was able and willing to pay it to plaintiff,'"—*held*, that the words amounted, in law, to an express promise, and, on proof of the payment by plaintiff, avoided the plea of bankruptcy. *Ib.*

III. COMPETENCY OF BANKRUPT AS WITNESS.

35. A bankrupt may be made a competent witness to sustain a deed of trust executed by him before obtaining his discharge, upon releasing to the assignee all interest which he may have in the suit. *Kirksey v. Dubose*, 19 Ala. 43.

36. A bankrupt is not a competent witness for his assignee, for the purpose of increasing the funds in the hands of the latter; but, when his testimony tends to decrease that fund, he is considered as swearing against his interest, and is competent. *Colgin v. Redman*, 20 Ala. 650.

BANKS.

1. The courts of this State are bound to take judicial notice, that the assets of the State Bank and its several branches have been placed in the hands of commissioners, who are authorized to sell or lease its real estate, and to appoint assistant commissioners to aid in the settlement of its affairs. *Douglass & Easton v. Branch Bank at Mobile*, 19 Ala. 659.

2. The several acts providing for the settlement of the affairs of the Planters' and Merchants' Bank of Mobile, are public statutes, which will be judicially noticed. *Jemison v. P. & M. Bank*, 17 Ala. 754.

3. The trustees of said bank, appointed under the act of 1845, were authorized to take individual notes to secure a balance due from a suspended foreign bank, and to institute summary proceedings thereon. *S. C.*, 23 Ala. 168.

4. They were also authorized to enter into a contract with a third person, without the consent of a bank debtor, to secure the payment of a doubtful debt, and to transfer the debt for that purpose to such person. *Saltmarsh v. P. & M. Bank*, 17 Ala. 761.

5. The act of 1845 is not repealed by the subsequent act of 1850, which directed a sale of the remaining assets of said bank; and a sale, pursuant to the latter act, of notes then in suit, does not affect the further prosecution of the suit for the benefit of the purchaser. *Jemison v. P. & M. Bank*, 23 Ala. 168.

6. The reversal by the supreme court of the judgment on *quo warranto*, declaring the charter of said bank forfeited, does not affect a suit previously instituted by the trustees against a bank debtor, nor can he take advantage of that reversal to protect himself against the rendition of judgment. *Ib.*

7. The object of the act of 1843, for the final settlement of the affairs of said bank, was to obtain a dissolution of its charter according to law; and although it provides for the institution of judicial proceedings to obtain a judgment of forfeiture, and declares that, "if no cause of forfeiture be found, this act shall have no force or validity," yet the bank, by surrendering its

charter, and accepting the provisions of the act, might dispense with the judicial proceeding, and the State might resume its franchises when thus surrendered. *Savage & Darrington v. Walshe & Emanuel*, 26 Ala. 619.

8. The power of sale conferred on the trustees by the act of 1850, gave them, by necessary implication, the authority to transfer negotiable securities so as to enable their assignee to sue in his own name. *Ib.*

9. The provision contained in the second section of the said act, requiring the trustees to sell the remaining assets "within thirty days from the first Monday in November next," is not mandatory, but merely directory; consequently, a sale made after the expiration of the specified time is sufficient to pass a good title to the purchaser. *Ib.*

10. A judgment, obtained by said bank before the surrender of its charter, and afterwards sold under the act of 1850, is not rendered dormant by the operation of the several acts for the settlement of the affairs of the bank, nor is the purchaser required to revive it by *sci. fa.* *DeVendell v. Doe d. Hamilton*, 27 Ala. 156.

11. A contract, by which the trustees obtain a bill of exchange from a stranger, in exchange for a doubtful debt of a larger amount, is not a discount of the bill; nor is it usurious, unless intended as a mere device to evade the statute. *Saltmarsh v. P. & M. Bank*, 17 Ala. 761.

12. The fact that a note, taken by the trustees after the surrender of the bank's charter, was made "negotiable and payable at said bank," does not raise a legal presumption that it was discounted, instead of being taken in settlement of an existing debt. *Savage & Darrington v. Walshe & Emanuel*, 26 Ala. 619.

13. In summary proceedings against bank debtors, by notice and motion, the notice serves the double purpose of a writ and declaration. *Jemison v. P. & M. Bank*, 17 Ala. 754; *Stanley v. Bank of Mobile*, 23 Ala. 652.

14. It therefore prevents the statute of limitations from creating a bar, although the motion for judgment is afterwards delayed. *Stanley v. Bank of Mobile*, 23 Ala. 652.

15. Where such summary proceeding is instituted in the name of the Planters' and Merchants' Bank of Mobile, since the surrender of its charter, the notice must show that the suit was instituted by the direction of the trustees, or for their use. *Jemison v. P. & M. Bank*, 17 Ala. 754.

16. The notice having been held defective for want of such averment, and the cause remanded to the primary court, the notice may be there amended, by annexing to it the certificate of the trustees, averring that the bank, "by its trustees named in the certificate hereto annexed, appointed under the act therein specified, will move," &c. *S. C.*, 23 Ala. 168.

17. The statutory certificate, that the debt is really the property of the bank, is intended merely to give the court jurisdiction, and cannot cure a defect in the notice. *S. C.*, 17 Ala. 754.

18. But it is proof of the jurisdictional fact to the end of the suit, although the note on which the suit is founded may be sold or assigned before judgment. *S. C.*, 23 Ala. 168.

19. Where suit is brought by the purchaser of a negotiable note, at a sale made by the trustees under the act of 1850, an allegation in the declaration, that the charter was surrendered, but continued by virtue of the provisions of the several acts for the settlement of the bank, is not, when construed with reference to those acts, repugnant or contradictory. *Savage & Darrington v. Walshe & Emanuel*, 26 Ala. 619.

20. A plea to such suit, averring "that the charter of the bank was not forfeited, and its corporate existence was not dissolved," is demurrable: the first allegation is no answer to a declaration averring the surrender of the charter, and the second is of matter of law. *Ib.*

21. A plea, averring that the trustees "were not invested with the legal ownership and control of said note, and did not make a legal transfer and endorsement of the same to the plaintiffs," is but the allegation of a legal conclusion, and not of facts. *Ib.*

22. The same objection applies to a plea, averring "that the said bank, at the date of said note, had no power or

authority to make a contract, and that said note is null and void." *Ib.*

23. The State Bank may sue in its own name on a lease of its real estate, when the rent is reserved to it by the terms of the lease, although the demise is in the name of the assistant commissioner. *Douglass & Easton v. Branch Bank at Mobile*, 19 Ala. 659.

24. In a summary proceeding against a bank debtor, on a note purporting on its face to have been given for the amount of the maker's indebtedness to the bank, parol evidence is admissible, to show that the consideration was the extinguishment of the debt of a third person, and that the proceeds were so applied. *Murrah v. Branch Bank at Decatur*, 20 Ala. 392.

25. The question whether the bank exceeded its powers, by taking more than legal interest in the note sued on, cannot be raised on error, when the only assignment of error is the admission of certain evidence touching the consideration of the note. *Ib.*

26. The Mississippi statute of 1840, (Hutchinson's Code, 324,) which forbids the banks of that State to "transfer, by endorsement or otherwise, any note, bill receivable, or other evidence of debt," is unconstitutional, being violative of the provision which declares that no State shall pass any law impairing the obligation of contracts. *Jemison v. P. & M. Bank*, 23 Ala. 168.

BILL OF EXCEPTIONS.

(Statutory Provisions: Code, §§ 2353–58; Clay's Digest, 307, § 5.)

I. WHEN NECESSARY OR PROPER.
II. EXECUTION AND CONTENTS.
III. CONSTRUCTION.

I. WHEN NECESSARY OR PROPER.

1. When interrogatories are filed to a party under the statute, and his answers are excepted to, if he wishes to revise on error the action of the court in sustaining the exceptions, he must reserve the question by bill of exceptions. *Saltmarsh v. Bower & Co.*, 22 Ala. 221.

2. When it becomes necessary, on account of any decision of the court on the trial, for the plaintiff to suffer a nonsuit, he must reserve the point by bill of exceptions, even when the ruling of the court is otherwise disclosed by the record. *Palmer v. Bice*, 28 Ala. 430.

3. When a bill of exceptions is necessary in a criminal case, see *Johnson v. The State*, 29 Ala. 62, (*ante*, p. 18, § 12;) and when necessary in probate cases, see *Crothers v. Heirs of Ross*, 17 Ala. 816; *Gordon v. McLeod*, 20 Ala. 242; *Clack's Heirs v. Clack's Admr's*, 20 Ala. 461; *Croft v. Ferrell*, 21 Ala. 351; *Smith's Distributees v. King*, 22 Ala. 558; *Williams and Wife v. Gunter*, 28 Ala. 681; *Reese v. Gresham*, 29 Ala. 91, (*ante*, pp. 126–7, §§ 1–5.)

II. EXECUTION AND CONTENTS.

4. Under the act of December 20, 1844, it was necessary that the record should affirmatively show that the bill of exceptions was signed by the presiding judge before the adjournment of the court, or, by consent of counsel, within ten days thereafter. *Kitchen v. Moye*, 17 Ala. 143; *Haden v. Brown*, 22 Ala. 572.

5. When the bill does not show that it was signed and sealed as required by the statute, the presiding judge has no authority to add to it, in vacation, so as to cure the defect; and if he does so, the act is void. *Kitchen v. Moye*, 17 Ala. 394.

6. But, when the date of the execution of the bill does not appear on its face, an entry on the minutes of the term may be looked to, to ascertain when it was executed. *Cox's Adm'r v. Whitfield*, 18 Ala. 738.

7. Where the record contains a bill of exceptions signed and sealed in term time, and also other exceptions which are without date, with nothing on their face to show when they were taken, and entirely disconnected from the first bill, but purporting to have been taken "during the further progress of the cause," the latter will be rejected as forming no part of the record. *Murrah v. Branch Bank at Decatur*, 20 Ala. 392.

8. If the bill of exceptions is not under the seal of the presiding judge, it

does not conform to the requisitions of the statute, and cannot be regarded as any part of the record. *Floyd v. Fountain*, 17 Ala. 700; *Godden v. LeGrand*, 28 Ala. 158. (Changed by section 2354 of the Code.)

9. The addition of the seal or scroll of the judge is necessary to constitute a valid bill in this particular, even when it purports on its face to have been signed and sealed by him. *Godden v. LeGrand*, 28 Ala. 158.

10. The taking of a bill of exceptions is a "proceeding" in the cause, within the meaning of the 12th section of the Code; consequently, in an action commenced before the adoption of the Code, although the trial is had since that time, the bill of exceptions must be governed by the old law. *Ib.*

11. Under the act of 1854, "to regulate the sessions of the circuit and city courts of Mobile," (Session Acts 1853–4, p. 92,) a bill of exceptions, which is not reduced to writing, and presented to the judge for signature, until after the expiration of twenty days from the rendition of the judgment, will be regarded as not presented until after the adjournment of the court. *Stein v. McArdle & Waters*, 25 Ala. 561.

12. When the judge fails to act upon the bill within the time required by law, although it is otherwise perfected, if the failure is not attributable to the party excepting, the exceptions may be established under the act of 1814; and this, notwithstanding the bill is afterwards signed by the judge, and stricken from the record as invalid. *Haden v. Brown*, 22 Ala. 572.

13. If the bill was not reduced to writing, and presented to the judge for signature, within the prescribed time, it cannot be established under the Code, upon proof that the cause, which involved less than $20, was submitted to the judge for decision, and was held under advisement by him; that the counsel of the party excepting frequently inquired of the judge whether he had decided it, and was told by him that he had not; that a judgment was afterwards rendered by him, without notice to the counsel, although they were in daily attendance on the court; and that they had no notice whatever of the judgment, until after the expiration of the time prescribed for signing bills of exceptions. *Stein v. McArdle & Waters*, 25 Ala. 561.

14. When the bill of exceptions states that the defendant "then read a transcript in the words and figures following," but the transcript itself is not set out, and the clerk certifies that it is not on file in his office, a transcript which is afterwards sent up on *certiorari*, and which cannot be identified by any reference to it in the original record, cannot be regarded as forming part of the bill. *Branch Bank at Decatur v. Moseley*, 19 Ala. 222.

15. Letters, copied into the transcript as exhibits, but not made part of the record by appropriate reference in the bill of exceptions, cannot be considered as any part of the record. *Stodder v. Grant & Nickels*, 28 Ala. 416.

16. It is incumbent on the party excepting to set out in his bill so much of the evidence as may be necessary to show that the court erred, to his prejudice, in the rulings complained of. *Brazier & Co. v. Burt*, 18 Ala. 201; *Schooner Southron v. O'Riley*, 21 Ala. 228.

17. He must, therefore, when excepting to the refusal of a charge requested, make the record affirmatively show that the charge was not abstract. *Dent v. Portwood*, 17 Ala. 242; *Leverett's Heirs v. Carlisle*. 19 Ala. 80; *Jones v. Stewart*, 19 Ala. 701; *Brazier & Co. v. Burt*, 18 Ala. 200.

18. When excepting to a charge given, on the ground that it was abstract, he must set out all the evidence on the point. *Wilson v. Calvert*, 18 Ala. 274; *Kirkland v. Oates*, 25 Ala. 465.

19. And, when excepting to a general charge in favor of his adversary, he must either set out all the evidence, or show that there was conflicting evidence on the point. *Gaines v. Harvin*, 19 Ala. 491; *Barnes & Barnes v. Mobley*, 21 Ala. 232.

20. But, when the record affirmatively shows error, a reversal necessarily follows, unless all the evidence is set out, and shows that no injury resulted from that error. *Sackett & Shelton v. McCord*, 23 Ala. 851; *Moore v. Clay*, 24 Ala. 235; *Kirksey v. Dubose*, 19 Ala. 44; *Foust v. Yielding*, 28 Ala. 658; *Hines and Wife v. Trantham*, 27 Ala. 359.

21. Where a defaulting witness appeared, in answer to a *sci. fa.*, and rendered his excuse, and the bill of exceptions stated that he "had been duly subpœnaed," it is not necessary that the subpœna should be set out in the record, to enable the appellate court to consider the errors assigned. *Maclin v. Wilson*, 21 Ala. 670.

III. CONSTRUCTION.

22. A recital in the bill of exceptions, that the defendant offered evidence, "to which the plaintiff objected, but his objection was overruled, and he excepted," is sufficient to show that the evidence was actually given to the jury. *Yarbrough v. Hudson*, 19 Ala. 653.

23. When the bill sets out several distinct charges and refusals to charge on request, and concludes with the words, "to which the defendant excepted," the exception must be construed to apply only to the charge and refusal contained in the paragraph immediately preceding it. *Andress v. Broughton*, 21 Ala. 200.

24. So, where the bill set out several distinct rulings of the court against the appellant, in the rendition of judgment and the rejection of evidence, and concluded with the words, "to which the defendant excepted," the exception was construed as applying only to the ruling of the court immediately preceding it. *Sammis v. Johnson*, 22 Ala. 690.

25. And where it set out a charge requested by the defendant, and concluded with the words, "which charge the court refused, and the defendant excepted," the exception was held applicable only to the refusal of the charge asked, and not to charges previously given. *Agee & Agee v. Medlock*, 25 Ala. 281.

26. When the bill of exceptions states that the ruling of the court "was objected to" at the time it was made on the trial, this is sufficient to show that an exception was reserved to the ruling. *Sackett & Shelton v. McCord*, 23 Ala 851.

27. Where the bill stated that the defendants objected to the reading of a deposition, on the ground that the witness was incompetent, and then proceeded thus: "This objection was overruled; and the defendants, by their counsel, then objected to the entire deposition, as improper and illegal testimony. This objection was overruled, and the defendants excepted,"—*held*, that the exception only referred to the last ruling of the court, and did not reserve the question of the competency of the witness. *Chamberlain & Co. v. Masterson*, 29 Ala. 299.

28. Where the bill stated that the plaintiff offered in evidence a certain deed, "to the introduction of which the defendant objected; and the court overruled the objection, and permitted it to be read to the jury against the objection of the defendant,"—*held*, that no objection or exception was reserved to the ruling of the court. *Gager v. Doe d. Gordon*, 29 Ala. 341.

29. A bill of exceptions must be construed most strongly against the party excepting. *Andress v. Broughton*, 21 Ala. 200; *Sammis v. Johnson*, 22 Ala. 690; *Harris v. Rowland's Adm'rs*, 23 Ala. 644; *Furlow's Adm'r v. Merrell*, 23 Ala. 705; *Nash & Robinson v. Shrader*, 27 Ala. 377; *Gillespie's Adm'r v. Burleson*, 28 Ala. 552; *Perminter v. Kelly*, 18 Ala. 716; *Donnell v. Jones*, 17 Ala. 689; *Mitchell v. Cowsert and Wife*, 20 Ala. 186.

30. Therefore, where it appears that proper charges to the jury were requested, and the bill of exceptions does not show that they were refused, the appellate court will presume that they were given. *Donnell v. Jones*, 17 Ala. 689.

31. Where the bill does not show whether a notice was written or verbal, the appellate court will, if necessary, presume that it was written. *Harris v. Rowland's Adm'rs*, 23 Ala. 644.

32. When a paper is appended to the answer to an interrogatory, and the interrogatory itself is not set out in the record, it will be presumed that the answer was responsive to the interrogatory. *Furlow's Adm'r v. Merrell*, 23 Ala. 705.

33. In detinue by the husband's administrator, after the death of the wife, for a slave bequeathed to her, by her maiden name, "entirely for her and her children," the will was construed to give her a life estate only if she

was unmarried at the death of the testator, but an absolute estate jointly with her children if she was then married and had children; and the record contained no evidence of her marriage. *Held*, that it must be presumed, against the party excepting, that she was then unmarried. *Ib.*

34. On motion to amend or render a judgment *nunc pro tunc*, if the minute entry recites that it was made to appear to the court that a judgment had been duly rendered which the clerk had omitted to enter, it will be presumed, on error, that it was made to appear by sufficient legal evidence, unless the insufficiency of the evidence is affirmatively shown. *Glass v. Glass*, 24 Ala. 468; *Price & Simpson v. Gillespie*, 28 Ala. 279.

35. In an action on an open account for work done, defendant proved an agreement, made "in the spring of 1852," that goods to be furnished by him to plaintiff's sons, who were over twenty-one years of age, should be received in payment for the work then being done; and his accounts against the sons, "for goods furnished in 1852," were also produced and proved, but were not set out in the record. The court ruled out these accounts, and the defendant excepted. *Held*, that it must be presumed, on error, in favor of the ruling of the primary court, that some items in the accounts were for goods furnished to the sons before the making of the agreement proved. *Nash & Robinson v. Shrader*, 27 Ala. 377.

36. Where the bill of exceptions stated that the slaves in controversy were given to the wife of plaintiff's intestate "in the fall of 1833," and that a witness for the defendant, who stated that the slaves were delivered "in 1833," was allowed to testify to declarations made by the donor "six or eight months afterwards;" to which ruling of the court an exception was reserved,—*held*, that the appellate court would presume that the declarations were made prior to the gift. *Gillespie's Adm'r v. Burleson*, 28 Ala. 552.

37. In detinue by husband and wife jointly, when the record shows such title in the wife as would vest a chose in action absolutely in the husband, and is silent as to the time of the defendant's wrongful taking and detention, the appellate court will presume, against the party excepting, that the proof showed such unlawful taking and detainer to have been before the marriage. *Mitchell v. Cowsert and Wife*, 20 Ala. 186.

For analogous decisions, as to the presumptions which will be indulged on error in favor of the ruling of the primary court, see ERROR AND APPEAL.

BILLS OF EXCHANGE, AND PROMISSORY NOTES.

I. FORM AND REQUISITES.

1. A written promise by one firm, to pay a specified sum on a day certain, to the order of another firm, which has a common partner, is not a promissory note until assignment; but, when assigned by the latter firm, the assignee must be regarded as the real payee. *Murdock v. Caruthers*, 21 Ala. 785.

2. A writing in these words, "By the 25th day of December next I promise date to pay to Wm. H. Butler or bearer the sum of one hundred and interest from and two dollars for value rec'd of him this Feb. 23d, 1850," (signed) "Stephen Burns," is a promissory note within the statute against forgery. *Butler v. The State*, 22 Ala. 43.

3. A written order, addressed to an attorney, in these words, "Please pay D. W. $293.75, and all interest on the

same, the demand which I have against the estate of D. Y., deceased," is not a bill of exchange. *West v. Foreman*, 21 Ala. 400.

4. A written order, requesting the person to whom it is addressed to pay a specified sum out of the proceeds of a certain judgment when collected, is not a bill of exchange. *Gliddon v. McKinstry*, 28 Ala. 408.

5. To hold one liable as the drawer of a bill, his name must be either inserted in it, or subscribed to it. *May & Bell v. Miller & Co.*, 27 Ala. 515.

II. CONSIDERATION.

6. The consideration of a note may be impeached without a sworn plea. *Holt v. Robinson*, 21 Ala. 106.

7. The note itself, which is the foundation of the suit, imports a consideration, unless its execution is denied by plea; and the fact that the payee, who sues for the use of another person, "never was the owner of the note, and never put it in circulation, nor authorized it to be done," does not repel this presumption. *Bird v. Wooley*, 23 Ala. 717.

8. When the consideration is not expressed in the note itself, parol evidence may be received, to show what the consideration was, and that the contract, of which the note formed a part, had been rescinded. *Newton v. Jackson*, 23 Ala. 335.

9. Parol evidence is admissible, to show that the consideration has failed, either in whole or in part. *Corbin v. Sistrunk*, 19 Ala. 203.

10. Where A. executed her note to B., for services to be rendered by him as an overseer, but told him, before delivering the note, that she could not employ him unless he brought a recommendation from C.; which recommendation B. promised to procure, but failed to do so, and A. then refused to employ him,—*held*, in an action on the note, that the procuring of C.'s recommendation formed a part of the consideration of the note; that B., having failed to procure this recommendation, was not entitled to recover; and that parol evidence was admissible, to prove what was said about the recommendation before the delivery of the note. *Ib.*

11. Where a note is given in consideration of the payee's professional services as an attorney, payable three months after date, parol evidence is admissible, to show that a portion of the contemplated services were never performed; and a recovery can then be had only for the value of services performed. *Long v. Davis*, 18 Ala. 801.

12. In an action on a note payable on a day certain, and purporting to have been given in consideration of professional services to be rendered by the payee as an attorney, parol evidence cannot be received, to show that the note was not to be paid unless the attorney was successful in the suit. *West & West v. Kelly's Executors*, 19 Ala. 353.

13. Where the consideration of a note, which is made payable "six months after date, for value received," is the agreement of the payee to perform certain professional services as an attorney for the maker; and no time is fixed for the performance of those services, parol evidence cannot be received, to show that the note was not to be paid until the contemplated services had been performed; nor can the maker defeat a recovery on the note, on the ground that the stipulated services had not been fully performed, when the payee was in no default, but able, ready, and willing to perform his contract. *Walker v. Clay & Clay*, 21 Ala. 797.

14. Parol evidence is admissible, to show that the consideration of a note, purporting to have been given for the amount of the maker's indebtedness to the bank, was the extinguishment of the debt of another person, and that the proceeds were so applied. *Murrah v. Branch Bank at Decatur*, 20 Ala. 392.

15. In an action on a note purporting to have been given "for the rent of land," parol evidence is not admissible, to show that the payee also agreed to repair the fencing around the land, and that, in consequence of his failure to do so, the maker's crop was damaged by the breaking in of stock. *Evans v. Bell*, 20 Ala. 509.

16. Where a note is signed by the husband, with the addition of the words "acting trustee," parol evidence is admissible, to show that its conside-

ration and purpose, with the character of the transaction, constitute it a charge on the separate estate of the wife. *Baker v. Gregory and Wife*, 28 Ala. 544.

17. The acceptor of a written order, payable out of the proceeds of a certain judgment when collected, may, when sued by the payee, prove the consideration on which his acceptance was based; and may, for this purpose, show that a portion of the judgment was not collected, and that the entire amount collected was paid to persons who had prior claims on the fund. *Gliddon v. McKinstry*, 28 Ala. 408.

18. When it becomes necessary to prove the consideration of a note, the most regular mode of proceeding is, first to introduce the note itself, and then go on to show its consideration. *Pennington v. Woodall*, 17 Ala. 685.

19. The payee cannot recover against the maker of a note, which was given in payment of the debt of a third person, and a receipt for the payment taken in the name of the debtor, without proving the privity or assent of the debtor. *Williams v. Sims*, 22 Ala. 512.

20. A note, given in consideration of professional services rendered by an unlicensed physician, is made void by statute; yet, where a part of the consideration is the price of the drugs and medicines furnished by him as an apothecary, apart from his professional business as a physician, a recovery may be had for them. *Holland v. Adams*, 21 Ala. 680.

21. A recovery cannot be had on a note given for medical services rendered by the payee as a physician, unless it is shown that he was not within the prohibition of the statute. *Mays v. Williams*, 27 Ala. 267.

22. When a person, being about to purchase a note, applies to the maker for information concerning it, and is assured by the latter that he has no defense against it, this does not estop the maker, when sued by such purchaser, from setting up a subsequent failure of consideration. *Maury v. Coleman*, 24 Ala. 381.

23. As to what amounts to an equitable estoppel in favor of such purchaser, see *Lanier v. Hill*, 25 Ala. 554; *Drake v. Foster*, 28 Ala. 649.

III. CONSTRUCTION.

24. A note, payable in "solvent notes or accounts of other men," is not equivalent to a note payable in money, but is a contract to pay the specified sum, at or before maturity, dollar for dollar, in such solvent notes or accounts; or, if paid after maturity, the value in money of that amount of such solvent notes and accounts at the time of the maturity of the note. *Williams v. Sims*, 22 Ala. 512.

25. When a note is payable at a specified day for a sum certain, which may be discharged by the payment of a less sum at an earlier day, the greater sum is not in the nature of a penalty, but is the debt actually due, and is recoverable if the less sum is not paid as stipulated. *Carter v. Corley*, 23 Ala. 612.

26. When a note is made payable on a specified day, and contains a stipulation that it shall not bear interest until another specified day after maturity, an action may be maintained on its non-payment at maturity, although the judgment will bear interest from the time of its rendition; but the judgment must be for the principal only, without interest. *Billingsley's Adm'r v. Billingsley*, 24 Ala. 518.

27. The fact that a note, taken by the trustees of a bank which has surrendered its charter and is in process of liquidation, is made "negotiable and payable at said bank," does not raise a legal presumption that it was discounted, instead of being taken in settlement of an existing debt. *Savage & Darrington v. Walshe & Emanuel*, 26 Ala. 619.

IV. NEGOTIABILITY, AND TRANSFER.

28. The negotiability of a note is not destroyed by an injunction in force against its negotiation. *Winston v. Westfeldt*, 22 Ala. 760.

29. The doctrine of *lis pendens* does not apply to negotiable paper. *Ib.*

30. When a note is endorsed in blank, the holder may fill it up with any name he pleases. *Agee & Agee v. Medlock*, 25 Ala. 281.

31. An endorsement, before maturity, in these words, "I assign and guaranty the within note to J. C., for value

received," is an absolute, unconditional guaranty of the note at maturity, which is an affirmance of the genuineness of the note and of the prior endorsements, and dispenses with the necessity of notice. *Donley v. Camp*, 22 Ala. 659.

32. An endorsement of a bill or note, after it has been protested for non-payment, is to be construed according to the intention of the party making it; and if it is clear that he intended to bind himself as a regular endorser, whose liability is fixed, he may be sued as such. (CHILTON, J., *dissenting*.) *Hullum v. State Bank*, 18 Ala. 805.

33. An endorsement of a note by one partner, without the consent of his copartner, but in the partnership name, and for the benefit of a third person, imposes no liability on the firm. *Lang's Heirs v. Waring*, 17 Ala. 145.

34. Delivery by the surviving partner, of a note then assets of the firm, which had been endorsed by the deceased partner in his lifetime, does not pass the legal title to the purchaser *Glasscock v. Smith*, 25 Ala. 474.

35. When a bill of exchange, endorsed by the payee, and accepted by a firm, is put in circulation before maturity by one of the partners, his act must be considered the act of his copartners, and estops them from denying the genuineness of the endorsement; and the legal presumption, in such case, is, that the acceptors have discharged the bill, and again put it in circulation for their benefit. *Sprague & Winston v. Zunts*, 18 Ala. 382.

36. If one endorses a bill or note in blank, and parts with its possession, with the view of its being filled up and made a negotiable security; and it afterwards comes, before maturity, to the hands of a *bona fide* holder for valuable consideration without notice, the endorser cannot raise an objection to the authority of the person by whom the blank was filled. *Robertson v. Smith*, 18 Ala. 220.

37. An endorsement by one of the makers of a note, purporting to transfer it by written power of attorney in the name of the payee, must be held the act of the payee himself. *Garrett v. Holloway & Malone*, 24 Ala. 376.

38. A married woman may, with the assent of her husband, express or implied, endorse a promissory note payable to her, in her own name, and confer a valid title on her endorsee. *Roland v. Logan*, 18 Ala. 307; *Krebs v. O'Grady*, 23 Ala. 726.

39. The genuineness of an endorsement can only be denied by a sworn plea. *Agee & Agee v. Medlock*, 25 Ala. 281; *Savage & Darrington v. Walshe & Emanuel*, 26 Ala. 619.

40. The holder of endorsed mercantile paper, before maturity, is presumed to have acquired it *bona fide*, and for valuable consideration; and is not affected by any set-off, or other equity, existing against the payee or other intermediate holder. *Minell & Co. v. Reed*, 26 Ala. 730.

41. But an endorsee, who acquires a note after maturity, takes it subject to all defenses, existing in favor of the maker, as against the payee or other party for whose accommodation it was made. *Glasscock v. Smith*, 25 Ala. 474.

42. An endorsee, after maturity, of a note under seal, takes it subject to all equitable defenses existing in favor of the maker prior to notice of the assignment, whether they grow out of the same, or out of a different transaction. (WALKER, J., *dissenting*, held that the assignee ought to be protected, where he acquired the legal title by the endorsement without notice of the maker's equity.) *Carroll v. Malone*, 28 Ala. 521.

43. If a bill of exchange is endorsed for the accommodation of the acceptor, for the special purpose of enabling him to obtain an extension of a bank debt, and is transferred by him as collateral security for the payment of another pre-existing debt, the creditor takes it with implied notice of the fact and purpose of the accommodation endorsement, and subject to any defense which would be available against the acceptor himself. *McKenzie v. Branch Bank at Montgomery*, 28 Ala. 606.

44. A promissory note, which was executed under such circumstances as to constitute it a charge on the separate estate of a married woman, may be enforced, in equity, against her separate estate, by an endorsee or other transferree. *Baker v. Gregory and Wife*, 28 Ala. 544.

45. An assignment of a note, given for the purchase-money of land, necessarily operates as a transfer of the vendor's lien, unless there is a stipulation to the contrary. *Conner v. Banks*, 18 Ala. 42; *Kelly v. Payne*, 18 Ala. 370.

46. But an assignment without recourse amounts to an abandonment of the vendor's lien, if the parties intend it so to operate. *Griggsby v. Hair*, 25 Ala. 327.

47. Where there are several notes, which are assigned at different times, the assignment of each is, *pro tanto*, an assignment of the vendor's lien, unless expressly waived; and the liens of the several assignees are to be preferred according to the priority of their assignments, without reference to the maturity of the notes. *Ib.*

48. If such note is secured by mortgage, an assignment of it is an equitable assignment of the mortgage; and the mortgagee then holds the legal title in trust for the assignee, who may proceed in his own name to foreclose. *Center v. P. & M. Bank*, 22 Ala. 743.

49. But the assignee of such note cannot stand in a higher or better position than the vendor himself occupied. *Coster's Executors v. Bank of Georgia*, 24 Ala. 37.

50. An endorsee before maturity, for valuable consideration, and without notice, is not bound by a decree in a chancery suit to which his endorser was a party, although he acquired the note after the rendition of the decree. *Winston v. Westfeldt*, 22 Ala. 760.

51. If a debtor deposits notes on a third person with his creditor as collateral security, either unconditionally, or under a special agreement authorizing the creditor to collect in any other manner than by suit, notice to sue on them may be given to such creditor. *Pickens v. Yarborough's Adm'r*, 26 Ala. 417.

52. Where the payee of a note, not payable in bank, assigns it for valuable consideration, and binds himself "for the payment of the same until paid," he thereby waives the necessity of suit against the maker to the first court, and his liability is complete whenever the endorsee shall have exhausted his legal remedy against the maker. *Lockett v. Howze*, 18 Ala. 613.

53. If the endorser waives suit against the maker to the first court to which it can be brought, under the apprehension that the time intervening between the endorsement and the commencement of the court is not sufficient to get service of process, the endorsee is not bound to sue to the next succeeding term, but only to prosecute the maker to insolvency at some time after the expiration of the period stipulated for delay. *Lodor v. Gayle*, 29 Ala. 412.

54. In an action against the endorser, where the holder failed to sue the maker to the first court, the excuse for the failure must be distinctly averred, and not left to implication: an averment that the court, to which suit was brought, was the first court to which it could be brought, "after plaintiff, by prompt and diligent inquiry, ascertained that the maker resided in said county," is not sufficient. *Lindsay v. Williams*, 17 Ala. 229.

55. If the holder is ignorant of the maker's residence, and cannot by diligent inquiry ascertain it in time to sue to the first court, this is a sufficient excuse for his failure to do so. *Ib.*

56. The endorser and endorsee may, by subsequent contract, rescind or modify the endorsement; and such subsequent contract will control the endorsement, so far as the two conflict. *Young v. Fuller*, 29 Ala. 464.

V. PRESENTATION, AND ACCEPTANCE.

57. If the drawee of a bill absents himself from his place of business, and makes no provision for its payment, a presentation to his bookkeeper at his place of business is sufficient. *Branch Bank at Decatur v. Hodges*, 17 Ala. 42.

58. The acceptor of a bill may appoint an agent to pay it, or to refuse payment; and a presentation to such agent is sufficient. *Phillips v. Poindexter*, 18 Ala. 579.

59. Under the provisions of the Code, no right can accrue to any one from a verbal promise to pay or accept a bill, unless the party to whom such promise is made negotiates the bill on the faith of it. *Sands & Co. v. Matthews, Finley & Co.*, 27 Ala. 399.

60. If the drawee retains the bill,

for examination, by permission of the holder's agent, from Saturday until the following Monday, no legal obligation is thereby created against him as acceptor. *Ib.*

61. The acceptance of a bill by the captain and master of a steamboat, in his own name as captain, does not bind the owner as acceptor. *May v. Kelly & Frazier*, 27 Ala. 497.

62. When a bill is directed to a particular person, no other person can accept it, except for honor. *Ib.*

63. A bill of exchange, until accepted, does not operate as an assignment of the funds in the drawee's hands; such funds may, therefore, be attached by process of garnishment. *Sands & Co. v. Matthews, Finley & Co.*, 27 Ala. 399. (Overruling *Connoley v. Cheesborough*, 21 Ala. 166.)

64. An accommodation acceptor of a bill drawn by an executor, after paying it, has no claim against the estate. *Kirkman, Abernathy & Hanna v. Benham*, 28 Ala. 501.

65. A right of action for non-acceptance is not waived by a subsequent presentation and protest for non-payment. *Branch Bank at Decatur v. Hodges*, 17 Ala. 42.

VI. PROTEST, AND NOTICE THEREOF.

66. At common law, the protest of a notary public was not evidence of notice, although it contained an averment that notice had been given; but the statute of 1828 makes such averment evidence of that fact. *Rives v. Parmley*, 18 Ala. 256.

67. The proper construction of this statute is, that all notices not sent through the postoffice, whether handed to the party himself who is entitled to it, or properly left at his residence or place of business, are to be deemed personal. *Ib.*

68. If the notice is left at the party's residence or place of business, it must be shown to have been left in such manner, and under such circumstances, as are sufficient to charge him: when left at his place of business, it should be delivered to his clerk, if any; and when at his residence, to some proper person there, if any. *Ib.*

69. Where the demand is made of an agent, the protest of a foreign bill is evidence of the fact of agency. *Phillips v. Poindexter*, 18 Ala. 579.

70. A recital in the notary's protest, that "notice of protest [has been] left at the offices of the endorsers," is not, of itself, sufficient to charge an endorser with notice. *Coster, Robinson & Co. v. Thomason*, 19 Ala. 717.

71. When a bill, endorsed by a partnership, is dishonored after the dissolution of the firm, notice of protest to any one of partners is sufficient to bind all. *Ib.*

72. Notice may be sent by the notary through the mail, although the holder and the party sought to be charged reside in the same place. *Greene v. Farley*, 20 Ala. 322.

73. When notice is left at the office of an endorser, who is an attorney and keeps no clerk, on the evening of the day on which it is required to be given, the legal presumption is that he received it, and it is sufficient to charge him. *Stanley v. Bank of Mobile*, 23 Ala. 652.

74. An accommodation endorser who has received the benefit of the bill, or an endorser who has been fully indemnified, is not entitled to notice of protest for non-payment. *Holman v. Whiting*, 19 Ala. 703.

75. An attorney, having recovered a judgment for his client against two defendants, but being unable to obtain satisfaction by legal process, accepted from one of the debtors, in full satisfaction of the judgment, his individual note for about one third of the amount, with his mother as endorser, payable in bank; assigned the judgment to the endorser, in accordance with the debtor's proposition to that effect, and delivered the assignment to the debtor. *Held*, in an action by a second endorsee against the first endorser, on demurrer to the evidence, that these facts were not sufficient to excuse the want of notice. *Ib.*

76. The books of a notary public, in which he keeps the minutes of his official proceedings, are public records; and the protest therein registered being the true and only original protest, a certified copy of it is admissible evidence. *Phillips v. Poindexter*, 18 Ala. 579.

77. In an action against the drawer or endorser of a bill, it is incumbent

on the plaintiff, as a pre-requisite to his recovery, to prove due diligence in giving notice. *Rives v. Parmley*, 18 Ala. 256.

78. It is the province of the jury to ascertain the facts, while the court must determine their legal sufficiency to constitute notice; a charge, therefore, which refers it to the jury "to decide as to the sufficiency of the notice," is erroneous. *Stanley v. Bank of Mobile*, 23 Ala. 652.

79. In an action against an endorser, parol evidence being adduced, in support of the notary's certificate of notice, that he kept no clerk, and that the notice was left at his office on the day of protest, the whole evidence should be referred to the jury, to decide whether notice was actually received. *Ib.*

80. A witness cannot be allowed to testify, "that the habits of business and intimacy between himself and the defendant were such, that he had no doubt, if said defendant had received notice of protest of said bill, it would at once have been communicated to witness;" such a statement is a mere expression of opinion. *Coster, Robinson & Co. v. Thomason*, 19 Ala. 717.

VII. ACTIONS ON BILLS AND NOTES.

1. *Against Whom, and by Whom, an Action may be Maintained.*

81. Under the act of 1828, the assignee of a promissory note may maintain an action of debt on it in his own name. *Barclay v. Moore*, 17 Ala. 634.

82. The statute was not intended to limit the assignee's right of action to those cases only in which the payee could have sued, but to confer upon him the additional right of suing the maker in any form of action to which the payee could resort. *Murdock v. Caruthers*, 21 Ala. 785.

83. The assignee of a note made by a firm, payable to the order of another firm, (the two firms having a common partner,) must be regarded as the real payee, and may maintain an action in his own name against the makers. *Ib.*

84. The purchaser of a negotiable note, at a sale made by the trustees of the Planters' and Merchants' Bank of Mobile under the act of 1850, acquires the legal title by the trustees' assignment, and may maintain an action in his own name. *Savage & Darrington v. Walshe & Emanuel*, 26 Ala. 619.

85. The assignee of a written order, addressed to an attorney, in these words, "Please pay D. W. $293.75, and all interest on the same, the demand which I have against the estate of D. Y., deceased," cannot sue on it in his own name. *West v. Foreman*, 21 Ala. 400.

86. If an agent lends the money of his principal, without authority, and takes a promissory note for it, payable to himself as agent, he may maintain an action on the note in his own name, unless it is shown that he has been in some way discharged from the liability thus incurred. *Bryan v. Wilson*, 27 Ala. 208.

87. The holder of a bill, which has been endorsed by him to an agent for collection, may, when it has been restored to him, strike out his own endorsement, and sue in his own name as if such endorsement had never been made; and his possession of the bill, in such case, is presumptive evidence that the legal title is in him. *Phillips v. Poindexter*, 18 Ala. 579.

88. A party who endorses a bill after it has been protested for non-payment may, if such be his intention, bind himself as a regular endorser whose liability is fixed, and may be sued as such. *Hullum v. State Bank*, 18 Ala. 805.

89. An accommodation endorser of a bill of exchange is not entitled to a summary judgment, on notice and motion, against his principal. *Stodder v. Cardwell*, 20 Ala. 223.

90. A party who, for a sufficient legal consideration, signs his name to a promissory note after it has become due, may be declared against as a maker. *Tiller v. Shearer*, 20 Ala. 596. (CHILTON and LIGON, JJ., *dissenting*.)

91. Persons who sign their names to a note, will be presumed to be joint makers, in the absence of anything to the contrary on its face. *Johnson and Wife v. King*, 20 Ala. 270.

92. But parol evidence is admissible, to show the intention of the parties at the time the note was executed,

with regard to their several liabilities among themselves, and their relations to the note. *Branch Bank at Mobile v. Coleman*, 20 Ala. 140.

93. A surety, who unites with his principal in drawing a bill, and whose liability is not shown to be limited, is liable as a drawer to all the other parties. *Swilley & Riley v. Lyon & Baker*, 18 Ala. 552.

94. The drawer of a bill, after being discharged for want of due presentation and notice, does not become liable to the holder for money had and received, on account of the drawee's subsequent application to his use, without his knowledge or consent, of funds previously placed by him in the hands of the drawee to meet the bill. *Smith v. Rowland*, 18 Ala. 665.

2. *Competency of Parties as Witnesses.*

95. In an action by an endorsee against the maker, the payee is a competent witness to impeach the validity of the bill. *State Bank v. Seawell*, 18 Ala. 616. (*Vide infra*, 101.)

96. An accommodation endorser may, by releasing his principal, thereby render him a competent witness to prove satisfaction of a judgment rendered against such endorser. *Branch Bank at Mobile v. Coleman*, 20 Ala. 140.

97. A partner, who executes a note in the name of the partnership, on which his copartner alone is sued, is not a competent witness against the latter. *Barney v. Earle*, 20 Ala. 405.

98. An agent, who executes a note in the joint names of his principal and himself, whether acting within or beyond the scope of his authority, is not a competent witness against his principal, when the latter is sued alone on the note. *Ib.*

99. The principal is not a competent witness for his surety, without a release, when the surety alone is sued on the note. *Garrett v. Holloway & Malone*, 24 Ala. 376.

100. In an action against the principal, on a note executed by him in this State jointly with several sureties, a surety who is not sued is a competent witness for him. *Atwood's Adm'r v. Wright*, 29 Ala. 346.

101. Under the Code, (§ 2290,) the transferror, or assignor of the note sued on, is not a competent witness for the plaintiff. *Hudson & Stokes v. Weir & Tate*, 29 Ala. 294.

3. *Declaration, or Complaint.*

102. A complaint in the form prescribed by the Code, (p. 551,) "on promissory note, by payee against maker," is sufficient to support a judgment by default; and its legal effect is the same as if it contained an averment, in express terms, that the note was payable to the plaintiff. *Letondal v. Huguenin*, 26 Ala. 552.

103. In declaring against the principal, on a bill accepted by his agent, the agent's authority to accept must be averred: it is not sufficient to allege that he was the agent, and as such accepted for the principal. *May v. Kelly & Frazier*, 27 Ala. 497.

104. In declaring against an acceptor, if the declaration avers that the bill was payable at a particular counting-house, but not that it was drawn upon the defendant, or that he accepted it for honor, or that he resided or did business at said counting-house, it is demurrable. *Ib.*

105. In declaring on an absolute, unconditional guaranty of the payment of a note at maturity, it is not necessary to aver or prove the insolvency of the maker. *Donley v. Camp*, 22 Ala. 659.

106. In declaring against an endorser, the excuse for failing to sue the maker to the first court must be distinctly averred: it is not sufficient to allege, that suit was brought against the maker, to the first court to which it could be brought, "after plaintiff ascertained, by prompt and diligent inquiry, that he resided in said county." *Lindsay v. Williams*, 17 Ala. 229.

107. In an action of debt, a count on a promissory note may be joined with a count on a bond. *Barclay v. Moore*, 17 Ala. 634.

108. A bill of exchange is not admissible evidence, under the common counts in assumpsit, unless its execution is proved. *May & Bell v. Miller & Co.*, 27 Ala. 515.

109. *Semble*, that a conditional promissory note is admissible evidence, under the common count on an account stated, on proof of its execution, and

the performance of the condition. *Hooper v. Eiland*, 21 Ala. 714.

110. A bill of exchange, drawn by "Ebenezer *Hearn*," may be given in evidence under a count on a bill alleged to have been drawn by "Ebenezer *Hearne*." *Coster, Robinson & Co. v. Thomason*, 19 Ala. 717.

111. Under a declaration on a note payable "one day after *date*," a note payable "one day after," the word "*date*" being omitted, is competent evidence, and the omission will be supplied by intendment. *White v. Word*, 22 Ala. 442.

112. Whatever may be the effect of the provisions of the Code, in dispensing with technical accuracy and precision in the complaint; yet, where the instrument offered in evidence varies from that described in the complaint, the variance renders it inadmissible. *May & Bell v. Miller & Co.*, 27 Ala. 515.

4. *Plea, or Defense.*

113. If the owner of a promissory note gives it up to one of the makers, with the understanding that another note is to be executed in its stead, this does not discharge either of the makers. *Smith & Garey v. Awbrey*, 19 Ala. 63.

114. If the word "*paid*" is written across the face of a note by mistake, or by one without authority, this does not discharge the maker. *Lowremore v. Berry*, 19 Ala. 130.

115. The drawer or endorser of a blank bill or note, who parts with its possession with the view of its being filled up and made a negotiable security, cannot defend against a *bona-fide* holder for valuable consideration without notice before maturity, on account of the want of authority of the person by whom the blank was filled. *Robertson v. Smith*, 18 Ala. 220.

116. A parol agreement between vendor and purchaser, made on discovering that the former had no title to a portion of the land conveyed, to the effect that the latter should be discharged from the payment of the balance due on the note for the purchase-money, unless the vendor made him a good title to that portion of the land within a reasonable time, constitutes a valid defense to an action on the note to recover the balance. *Hussey v. Roquemore*, 27 Ala. 281.

117. A contract between endorser and endorsee, by which the former agrees to extend the statutory time for the institution of suit against the maker, and to repay the consideration in the event the note is proved to be void for fraud, or for want of consideration, or to have been paid, or reduced by sets-off, imposes on him the risk of the specified defenses only, but not that of the statute of limitations; and if a recovery on the note is defeated alone on the plea of the statute of limitations, the contract is no defense to an action on the endorsement. *Young v. Fuller*, 29 Ala. 464.

118. The postponement of the day of payment of a bill or note, by agreement between the creditor and principal debtor, founded on valuable consideration, discharges the surety, without regard to the time of the extension, or whether it has operated to the prejudice of the surety or not. *Haden v. Brown*, 18 Ala. 641.

119. But the surety is not discharged by the refusal of the creditor, on his request, to sell property conveyed by the principal debtor to secure the payment of the debt. *Ib.*

120. If the surety on a note, given for the purchase-money of a slave, executes his own note to the payee, "in discharge of the balance remaining due," and takes up the original note, he cannot defeat a recovery on the new note, by setting up fraud in the sale of the negro, or a breach of the warranty of soundness. *Fluker v. Henry's Adm'r*, 27 Ala. 403.

121. The maker of a promissory note, given for the purchase-money of a slave, at a public sale made by an administrator under an order of court, may set up fraud in the sale as a defense to an action on the note. *Atwood's Adm'r v. Wright*, 29 Ala. 346.

122. In assumpsit by the endorsee of a promissory note, the fact that plaintiff is not the owner of the note is not a good defense under the general issue. *Agee & Agee v. Medlock*, 25 Ala. 281.

123. A plea to such action, averring that plaintiff was not, at the commencement of the suit, the legal owner

of the note, only puts in issue the genuineness of the endorsement, and must be verified by affidavit. *Ib.*

124. The genuineness of an endorsement, can only be denied by a sworn plea. *Savage & Darrington v. Walshe & Emanuel*, 26 Ala. 619.

125. In an action by the payee against the maker of a promissory note, a plea in bar, averring that plaintiff was not the party really interested in the note, was demurrable, under the practice existing before the adoption of the Code, because the action was then required to be brought in the name of the party having the legal interest; but such a plea is now good, because the action is required (Code, § 2129) to be prosecuted "in the name of the party really interested, whether he have the legal title or not." *Bryan v. Wilson*, 27 Ala. 208.

126. A special plea, averring facts which amount to nothing more than a denial of the execution of the note in such a manner as to make it binding on the defendants, must be verified by affidavit. *Ib.*

127. An absolute, unconditional guaranty of a note is an affirmance of the genuineness of the note itself and the prior endorsements; and in an action on such guaranty, its execution can only be put in issue by a plea of *non est factum*, verified by affidavit. *Donley v. Camp*, 22 Ala. 659.

128. The consideration of a note may be impeached without a sworn plea. *Holt v. Robinson*, 21 Ala. 106.

129. When suit is brought on a note, in the name of the payee, for the use of his assignee, the maker cannot defend by showing that, before the assignment of the note, he was surety for the payee on a note payable in bank; that the payee became and continued insolvent; and that he was afterwards compelled, on account of the payee's insolvency, to pay the bank debt: to make these facts available as a defense, he must show that the payment was made before the transfer of the note, and notice thereof. *Gildersleeve v. Caraway*, 19 Ala. 246.

130. In an action against husband and wife, on a note executed by the wife *dum sola*, the husband may set off one half of the amount paid by him, before suit brought, on a judgment rendered against the wife *dum sola* and the plaintiff, on a note executed by them jointly; *secus*, as to a payment made after the institution of the suit. *Johnson and Wife v. King*, 20 Ala. 270.

131. In an action by the payee of a promissory note, for the use of a *bona-fide* transferree from a prior beneficial holder, the maker cannot set off a demand against such beneficial holder, although the note was delivered and belonged to him at the time of its execution. *Sykes v. Lewis*, 17 Ala. 261.

132. In an action on a note given for the purchase-money of land, the purchaser is entitled to set off the amount paid by him in buying in an outstanding vendor's lien, with interest thereon. *Holley v. Younge*, 27 Ala. 203.

133. In an action on a note given for the purchase-money of a slave, at a public sale by an administrator, whose letters were void, because the supposed decedent was actually alive, the maker cannot defend on the ground of the administrator's want of authority; and if the action is brought by the supposed decedent himself, as endorsee of his administrator, a recovery may be had, notwithstanding the death of the slave prior to the endorsement. *Duncan & Hooper v. Stewart*, 25 Ala. 408.

134. Where a note, given for the purchase-money of town lots, at a place which was the contemplated terminus of a railroad then in process of construction, was made payable "when the first locomotive engine on the M. railroad should arrive" at the town, the fact that the railroad company was sold out, and the road completed by another company subsequently incorporated, is available (if at all) as a defense at law, and therefore constitutes no ground for a resort to equity. *Askew v. Hooper*, 28 Ala. 634.

As to defenses arising out of the failure, illegality, or insufficiency of the consideration, *vide supra*, 6–22.

For decisions respecting the plea of set-off, see that title.

5. *Damages.*

135. A surety, who unites with his principal in drawing a bill, is liable to

an accommodation acceptor, in the absence of evidence limiting his liability, not only for the amount of the bill, but for the usual commissions incident to its acceptance and payment. (CHILTON, J., *dissenting*) *Swilley & Riley v. Lyon & Baker*, 18 Aa. 582.

136. The holder of a bill, endorsed by the payee, accepted by a firm, put in circulation before maturity by one of the partners, and purchased by the holder from an agent of the firm, at a greater discount than the legal rate of interest, can only recover from the acceptors the principal sum paid, notwithstanding his purchase was made in entire ignorance of the facts. *Sprague & Winston v. Zunts*, 18 Ala. 382.

137. Where a note fails to designate the place of payment, the law implies that it is to be paid at the place where it was made, and the law of that place determines the rate of interest; nor is parol evidence admissible, to show that it was to be paid elsewhere. *Moore & Jones v. Davidson*, 18 Ala. 209.

138. In an action on a note containing a stipulation that interest shall not accrue until a specified day after maturity, if commenced before the arrival of the specified day, the judgment must be for the principal only, without interest. *Billingsley's Adm'r v. Billingsley*, 24 Ala. 518.

6. *Judgment.*

139. In an action against the endorser of a note not payable in bank, it is erroneous to render judgment by default, without the intervention of a jury, either under the common counts, or under a special count which contains no averment of suit against the maker, and no allegation dispensing with the necessity of such averment. *Langdon v. Williams*, 22 Ala. 681.

140. In an action under the Code, on a promissory note and an open account for work and labor done, it is erroneous to render judgment by default, for the aggregate amount of the sums claimed, without the intervention of a jury, or the execution of a writ of inquiry. *Beville v. Reese*, 25 Ala. 454.

141. In an action on a promissory note, if the defendant, after appearance, withdraws his plea, the court may render judgment, without the intervention of a jury, and without regard to the amount of damages laid in the declaration, for the amount of the note and interest. *Kennedy & Merritt v. Young*, 25 Ala. 563.

BONDS.

I. EXECUTION, AND DELIVERY.
II. CONSIDERATION, CONSTRUCTION, AND VALIDITY.
III. PERFORMANCE, AND BREACH.
IV. ACTIONS ON BONDS.

1. *Who may sue, and when.*
2. *Declaration, or Complaint.*
3. *Plea, or Defense.*
4. *Damages.*
5. *Judgment.*

I. EXECUTION, AND DELIVERY.

1. A writing, executed prior to the statute of 1839, with nothing on its face to indicate that the parties intended it to operate as a specialty, except a scroll after the signature, with the word *seal* written within it, is not a sealed instrument. *Moore v. Leseur and Wife*, 18 Ala. 606. (Note, that in *Godden v. LeGrand*, 28 Ala. 158, a bill of exceptions, purporting on its face to be under seal, but without the addition of the scroll, was held defective.)

2. Where there is nothing ambiguous on the face of the instrument sued on, the question whether it is a specialty or not must be determined by the construction of the instrument itself, and is peculiarly within the province of the court. *Ib.*

3. Delivery is essential to a complete and effectual execution and acceptance of a bond, but an actual delivery is not necessary: mere words, or words and actions, indicating an intention that the instrument shall be considered as executed, may amount to a good delivery in law. *McLure v. Colclough*, 17 Ala. 89.

4. The delivery of a bond to the party in whom resides the beneficial interest, although the legal title is

vested in another, is sufficient. *Sykes v. Lewis*, 17 Ala. 261.

5. A bond may be delivered as an escrow to any other person than the obligee, but it cannot be so delivered to him. *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

6. When a bond is found in the possession of the obligee, the presumption is that it was delivered to him. *Ib.*

7. Where the name of one of several intended sureties is affixed to a bond, under an authority which the other sureties have an opportunity at the time to examine; and all is done that was contemplated to render the bond effectual,—the other sureties cannot claim exemption from liability, because the authority was defective and insufficient to bind him. *McLure v. Colclough*, 17 Ala. 89.

8. Parol authority to an agent to fill up a blank writing, to which the principal has only signed his name, confers no authority to convert the instrument into a bond. *Arrington v. Burton*, 19 Ala. 114.

9. A bond, in these words, "Twenty days after date I promise to pay J. T. or order $442, value received. Given under my hand and seal," &c.; and signed, "B. W. [seal,] agent for C. C.," —*held* the obligation of the agent only. *Dawson v. Cotton*, 26 Ala. 591.

II. CONSIDERATION, CONSTRUCTION, AND VALIDITY.

10. Although the condition of a bond, given by a public officer, is more specific than the statute provides; yet, if it substantially conforms to the requirements of the law, and imposes no additional obligation, it is good as a statutory bond. *Boring v. Williams*, 17 Ala. 510.

11. The validity of such bond is not affected by a superadded condition which the statute does not require: the superadded condition will be rejected as surplusage. *Walker v. Chapman*, 22 Ala. 116.

12. A claim bond, conditioned as the statute directs, binds the surety for the costs of the trial of the right of property, in the event of a judgment of condemnation, although the claim may not have been put in for delay. *Robertson v. Patterson*, 17 Ala. 407.

13. When a bond is conditioned for the payment of money on a day certain, the whole debt accrues on that day, and does not await the damnification, although it may appear that the bond was given by way of indemnity merely. *Hogan's Executor v. Calvert*, 21 Ala. 194.

14. A bond of indemnity, given to induce the sheriff to levy a void execution, is itself void, and cannot be enforced by suit. *Collier's Adm'r v. Windham*, 27 Ala. 291.

15. A bond for titles, executed by commissioners appointed by the orphans' court to sell a decedent's real estate, is binding on the obligors personally, when they exceed their authority, and thereby fail to bind the estate; and the obligee's notes for the purchase-money constitute a sufficient legal consideration for such bond. *Whiteside v. Jennings*, 19 Ala. 784.

16. A bond, conditioned as follows: "Whereas the said C. [obligee] guarantied for one J. W. on his bid for carrying the mail on route 3315, from Gainsville to Spring Place, in, through, and by said W.'s [obligor] influence and persuasion, which contract the said J. W. has refused to execute; now, if said W. does and will stand between said C. and the general post office department, so that said C. has no more trouble and expense, and releases said C. from all responsibility in said matter, then the above bond to be void,"—held supported by a sufficient consideration, and not void for uncertainty. *Carr's Executor v. Wiley*, 23 Ala. 821.

17. A bond for titles, executed by an infant, is voidable only, and not absolutely void. *Weaver v. Jones*, 24 Ala. 420.

18. Under the acts of 1848 and 1850, (Session Acts 1848, p. 223; *Ib.* 1849–50, p. 348,) amending the charter of the city of Wetumpka, the corporation was authorized to dispose of its bonds in aid of the Tallassee branch of the Central Plank-Road Company; the supervision and direction," enjoined on the mayor and aldermen, relate only to the appropriation of the money arising from the sale of the bonds, and not to the performance of the work; and if the bonds were transferred to a purchaser, in consideration of his

assuming the corporation's liability for stock subscribed to the amount of the bonds, the contingent advantage which the purchaser might obtain, from the fact that the stock might be called in by installments, does not render the contract usurious or illegal. *Mayor and Aldermen of Wetumpka v. Winter*, 29 Ala. 651.

19. A bond which is not the foundation of the suit, but which is set up as a defense, does not import a consideration. *Keep v. Kelly & Levin*, 29 Ala. 322.

III. PERFORMANCE, AND BREACH.

20. The condition of a bond, after reciting that the obligor, one G. M. R. and two others had become sureties for one M. as receiver in a chancery suit, that M. had made default, and that the obligee, as administrator of G. M. R., had paid a large sum on account of such default, and, to secure the same, had taken six promissory notes from M., with a mortgage on his real and personal property, concluded thus: "Now, in the event said M. shall fail to pay said notes, and the mortgaged property prove insufficient to pay the same on a sale thereof, and the said W. H. R. [obligee] be unable to collect said notes of said M. at law; then shall I pay said W. H. R. one fourth of the final amount of loss he may sustain, by reason of his paying up said default as aforesaid, this obligation to be void," &c. The mortgage, which was executed on the same day with the bond, and which was held to be a part of the same contract, after reciting the same facts as are above recited, provided that, in the event said M. should fail to pay each of said notes at maturity, or within ninety days thereafter, then all of said notes should be forthwith due and payable, and plaintiff might forthwith commence suit, either at law or in chancery, "for the recovery of the whole debt covered by said six notes;" and contained a power of sale in the event of such default, the proceeds of sale to be applied to the payment of said debt and interest, and the balance (if any) to be paid to said M. *Held*, in an action on the bond, to recover the balance remaining unpaid after the sale of the mortgaged property, that the institution of a suit against M., for the aggregate amount of the notes, according to the stipulations of the mortgage, and the recovery of judgment against him, with a return of "no property found," perfected the right of action. *Rives v. Toulmin*, 19 Ala. 288.

21. Although the courts will not require the performance of every minute particular of a condition precedent, unless its full and exact performance is part of the essence of the contract; yet, where the execution of a trust deed is a condition precedent to the payment of money secured by a penal bond, the obligor has a right to insist upon a complete execution of the trust, before he can be held liable on his bond. *Rives v. Baptiste*, 25 Ala. 382.

22. The doctrine in relation to partial performance of mutual covenants which go to a part of the consideration on both sides, where the part unperformed can be compensated in damages, has no application to such penal bond. *Ib.*

23. When a title-bond is conditioned to make title within a reasonable time, the purchaser is bound to prepare and tender a deed, although he has been evicted by the vendor under a recovery in ejectment; but the inability of the vendor to make title, according to the condition of his bond, is a sufficient excuse for the failure to prepare and tender a deed. *Johnson and Wife v. Collins*, 17 Ala. 318.

24. The refusal of the vendor to convey, in accordance with the terms of his contract, is a breach of the condition of his bond, although the purchaser has not presented him a deed to execute. *Garnett v. Yoe*, 17 Ala. 74.

25. If the vendor neglects, for more than two years, to make an effort to procure the title, when his bond is conditioned to make title so soon as he can obtain it,—this is, *prima facie*, a breach of the condition; and it is incumbent on him to show that he could not, with reasonable diligence, have obtained the title. *Ib.*

26. Where the bond shows that the title is in a third person, and is conditioned to make title, no time being

limited, the failure of the obligor, for more than three years, to make an effort to procure the title, is, *prima facie*, a breach of the condition. *Allen v. Greene*, 19 Ala. 34.

27. Where the contract was made on the 8th December, 1849, and the condition of the bond was to make title "within a short time" thereafter, the tender of a deed "after the 13th October, 1851," and after the purchaser had abandoned the land, was held not to be a compliance with the condition. *Hussey v. Roquemore*, 27 Ala. 281.

28. If the bond is conditioned "to make a valid title" to the land, the purchaser is not bound to accept the deed of a stranger, which, though it conveyed a good title, might yet involve the trouble and expense of an inquiry to ascertain its validity. *Ib.*

29. Where several are bound by an executory contract to make titles to the obligee, all must join in the conveyance, in order to a complete performance; but, where several are bound for the performance of one duty, and the obligee accepts from one of them something in satisfaction of that duty, and in lieu of a strict performance, this shall discharge all. *Johnson and Wife v. Collins*, 20 Ala. 435.

30. Where the obligee, holding a title-bond executed by two jointly, accepts from one of them the deed of himself and a third person, it is a question for the jury to determine whether the deed was accepted in satisfaction of the bond. *Ib.*

31. If the obligors insist upon satisfaction in lieu of a strict performance, the *onus* is on them to prove that the thing done or given was intended and accepted as a satisfaction. *Ib.*

32. Where the condition of a *ne exeat* bond was, that the obligors should "prosecute their said bill and writ to effect," or, failing therein, should pay to the defendant all such costs and damages as he might "sustain from the wrongful filing of said bill, or the wrongful suing out of said writ,"—*held*, that to sustain an action on the bond, it must be shown that the writ was wrongfully sued out, and that the plaintiff therein failed to prosecute his suit to effect. *Spivey v. McGehee*, 21 Ala. 417.

33. *Held*, also, that an order discharging the defendant from custody under the writ, upon his delivering up to the plaintiffs therein certain slaves in his possession, was not a failure to prosecute the writ to effect, within the meaning of the condition of the bond. *S. C.*, 24 Ala. 476.

34. If the obligor in a claim bond is absent from the county, a demand of the property from his general agent is sufficient. *Alexander v. Trask*, 20 Ala. 805.

35. After the rendition of judgment against the defendant in attachment, the condition of a replevy bond can only be complied with by a delivery of the property to the sheriff, on his demand. *Cooper v. Peck & Clark*, 22 Ala. 406; *Braley v. Clark*, 22 Ala. 361.

36. The act of a county-court clerk, in issuing a marriage license to a female under eighteen years of age, without the consent of her parent or guardian, is not a breach of the condition of his official bond. *Brooks v. Governor*, 17 Ala. 806.

37. The sureties of a justice of the peace are only liable on their bond for the faithful performance of his ministerial duties, and not for errors, mistakes, and omissions of a judicial character. *McGrew & Beck v. Governor*, 19 Ala. 89.

38. The failure of a county-court judge to require a guardian to renew his bond, or to give further security, on account of the insolvency or removal of the original sureties, is not a breach of the condition of his official bond. *Hamilton v. Williams*, 26 Ala. 527.

39. If money is received on deposit by an incorporated company, without authority under its charter, and fraudulently embezzled by its secretary, the surety on his official bond is not responsible for it. *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

As to the liability of clerks, constables, coroners, and sheriffs, on their official bonds, see those respective titles.

IV. Actions on Bonds.

1. *Who may sue, and when.*

40. An action on a sheriff's official

bond, payable to the governor for the time being and his successors in office, cannot be maintained in the name of the governor individually. *Bagby v. Baker*, 18 Ala. 653; *Chapman v. Spence*, 22 Ala. 588.

41. Nor can an action be maintained on such bond in the name of the obligee officially, after he has gone out of office, unless brought for the use of a third person. *Chaudron v. Fitzpatrick*, 19 Ala. 649.

42. Where the official bond of a county treasurer is defective as a statutory bond, but good as a common-law bond, an action on it can only be maintained in the name of the obligee. *Wilson v. Cantrell*, 19 Ala. 642.

43. An action lies on an administrator's bond, at the suit of a party injured, either in his own name, or in the name of the obligee for his use. *Amason v. Nash*, 24 Ala. 279.

44. The administrator of the deceased obligee is the proper party to sue for the breach of a title-bond which accrued in the lifetime of the intestate; and the action lies though the purchase-money has not been paid. *Allen v. Greene*, 19 Ala. 34.

45. Where such bond shows that the title is in a third person, and the obligor never procures a conveyance to either himself or the obligee, the heir of the obligee cannot sue in his own name for a breach, whether accruing before or after the death of his ancestor. *Ib.*

46. After a bond has been paid by a third person at the request of the obligor, an action cannot be maintained on it in the name of the obligee, for the use of such third person. *Simmons and Wife v. Walker*, 18 Ala. 664.

47. The act of 1839, which inflicts a penalty on a county treasurer for a breach of official duty, does not take away the right of action of a party thereby injured. *Wilson v. Cantrell*, 19 Ala. 642.

48. An action lies on an injunction bond, when the writ was sued out vexatiously, without a previous action on the case to ascertain the damages. *Garrett & Hill v. Logan*, 19 Ala. 344.

49. There can be no statutory judgment on an injunction bond, unless a writ of injunction was issued. *Shorter's Adm'r v. Mims*, 18 Ala. 655.

50. An action lies on an injunction bond, after the dismissal of the suit for want of prosecution, without the chancellor's permission being first asked and obtained. *Zeigler & Hall v. David*, 23 Ala. 127.

51. A return of forfeiture is not necessary to the maintenance of a common-law action of debt on a claim bond. *Alexander v. Trask*, 20 Ala. 805.

52. An action lies on the bond of a deputy sheriff, in favor of his principal, without previous notice of default to the sureties. *McGehee v. Gewin*, 25 Ala. 176.

53. To authorize a recovery against the sureties of a clerk on his official bond, the plaintiff must show not only a breach of the bond, but injury to himself from such breach. *Brooks v. Governor*, 17 Ala. 806.

54. Where the payment of money, secured by a penal bond, is made to depend on the performance of a condition precedent, an action cannot be maintained on the bond until the condition has been fully performed. *Rives v. Baptiste*, 25 Ala. 382.

55. No demand is necessary, in order to sustain an action on an administrator's bond. *Kyle v. Mays, use of Pond*, 22 Ala. 692.

56. A decree of the orphans' court, against an administrator, in favor of a distributee, is sufficient to sustain an action on the administrator's bond. *Holley v. Acre*, 23 Ala. 603; *Kyle v. Mays, use of Pond*, 22 Ala. 692. See, also, as to the conclusiveness of such decree, *Lampkin v. Heyer*, 19 Ala. 228.

57. But, where the decree is in favor of "the legal representative" of a distributee, and therefore void for uncertainty, the failure to pay it does not amount to a *devastavit*, so as to authorize an action on the bond, until after the person who is to receive it is judicially ascertained. *Kyle v. Mays, use of Hatchett*, 22 Ala. 673.

58. A decree against the administrator of an executor, under the act of 1845, will not support an action against the sureties on the executor's bond. *Gray v. Jenkins*, 24 Ala. 516.

2. *Declaration, or Complaint.*

59. In an action of debt on a bond,

the breaches assigned must show that the plaintiff has a cause of action. *Garrett & Hill v. Logan*, 19 Ala. 344.

60. But it is sufficient, generally, to assign a breach in the words of the condition, and negative its performance. *Pryor v. Beck*, 21 Ala. 393.

61. If several breaches, some of which are good, are assigned in one count, a demurrer will not lie to it. *Wilson v. Cantrell*, 19 Ala. 642.

62. In such action, a general demurrer will not lie to the declaration, for surplusage, argumentativeness, or duplicity in the assignment of the breach. *Garnett v. Yoe*, 17 Ala. 74.

63. In debt on an administrator's bond, a count on the penalty alone, not noticing the condition, is sufficient. *Holley v. Acre*, 23 Ala. 603.

64. When such action is brought to charge the sureties with a judgment rendered against the administrator, to be levied *de bonis intestatis*, it is not necessary to allege that the judgment was rendered on a debt which was a proper charge against the estate, or against the administrator as such. *Reid v. Nash*, 23 Ala. 733.

65. In declaring on an injunction bond, or a bond required by the chancellor as a pre-requisite to the issue of a writ of seizure, it is sufficient to aver that the suit was dismissed, without alleging the grounds of the dismissal. *Zeigler & Hall v. David*, 23 Ala. 127.

66. It is unnecessary, in such case, to aver notice of the dismissal to the obligors, since they are presumed, being parties to the record, to know the disposition made of the cause. *Ib.*

67. In an action of debt, a count on a bond may be joined with a count on a promissory note. *Barclay v. Moore*, 17 Ala. 634.

68. In an action of debt on an attachment bond, to recover the damages actually sustained, it is only necessary to aver that the writ was wrongfully sued out. *Dickson v. Bachelder*, 21 Ala. 699.

69. In an action of debt on bond given as security for costs, it is not necessary to allege that a written account or bill, containing the particulars of the fees, was produced, or ready to be produced to the defendant; nor that the clerk and sheriff kept fee books, in which were entered the fees sought to be recovered. *Pryor v. Beck*, 21 Ala. 393.

3. *Plea, or Defense.*

70. In debt on a prison-bounds bond, assigning breaches, it is a good plea by the sureties, that the prisoner surrendered himself to the jailor, within sixty days from the date of the bond, without having committed an escape in the meantime. *Harlan v. Thompson*, 20 Ala. 94.

71. The only fraud which can be set up, at law, to avoid the execution of a sealed instrument, is that which goes to its execution. *Holley v. Younge*, 27 Ala. 204.

72. In an action on an administrator's bond, seeking to charge the sureties with a judgment rendered against their principal, to be levied *de bonis intestatis*, a plea by the sureties, averring that the judgment was not a proper charge against the intestate, nor against his administrator as such, is but the statement of a legal conclusion, and therefore demurrable. *Reid v. Nash*, 23 Ala. 733.

73. A plea, averring that the intestate's estate has been duly declared insolvent, and is in progress of settlement as such, is fatally defective on demurrer. *Ib.*

74. So, also, is a plea containing the additional averment, that plaintiff failed to present his judgment as a claim against the estate within six months after the declaration of insolvency. *Ib.*

75. A plea of *plene administravit* is demurrable, unless it alleges that the assets were fully administered before suit brought. *Ib.*

76. To debt on an administrator's bond, "jointly and severally defendants plead fully administered;" to which the plaintiff "demurred in short by consent." *Held*, that the plea was equivalent to a joint and several plea of *plene administravit*, and was good as to the sureties. *Amason v. Nash*, 24 Ala. 279.

77. The death of a surety on a guardian's bond does not discharge his liability. *Moore v. Wallis*, 18 Ala. 458.

78. The liability of the sureties of

a county officer does not cease on their application to the judge to require a new bond from their principal, but continues until the new bond is given, or until the office is declared vacant on account of the failure to give it. *Armstrong v. Pugh*, 19 Ala. 209.

79. The statute giving to a replevy bond, when returned forfeited, the force and effect of a judgment, and authorizing the issue of execution thereon for the amount of the recovery in the attachment suit, does not deprive the obligors of any legal defense which they might have set up against the bond at common law. *Dunlap v. Clements*, 18 Ala. 778.

80. If the plaintiff himself prevents a compliance with the condition of the bond, by causing a portion of the property to be seized and sold under legal process against one of the sureties,—this discharges the obligors, to the extent of the property sold. *Ib.*

81. The sureties of a deputy sheriff cannot discharge themselves from liability on their bond, by giving notice to the sheriff that they will no longer be bound. *McGehee v. Gewin*, 25 Ala. 176.

82. Where two execute a bond for titles, and the obligee afterwards accepts a deed executed by one of them and a stranger, and subsequently releases the obligor who executed the deed from all the covenants therein contained, the release does not affect the liability of the obligors on their bond. *Johnson and Wife v. Collins*, 20 Ala. 435.

As to other defenses, arising out of the defective execution of the bond, satisfaction, or performance of the condition, *vide supra*.

4. *Damages.*

83. In an action on an attachment bond, the sureties are not liable for the costs accruing on the trial of a claim suit respecting the attached property. *Thompson v. Gates*, 18 Ala. 32.

84. Nor for the costs of the original suit, to which the attachment was ancillary. *White v. Wyley*, 17 Ala. 167.

85. The original suit, in such case, being founded on the defendant's endorsement of a promissory note, on which suit had been previously instituted against the maker with a return of *non est inventus*, the proceedings in the suit against the maker, though not sufficient to fix the liability of the endorser, are admissible evidence in mitigation of damages. *Ib.*

86. Counsel fees, necessarily incurred in the defense of an injunction suit, though not actually paid, are recoverable in an action on the bond. *Garrett & Hill v. Logan*, 19 Ala. 344.

87. In an action on a bond given to secure costs, a recovery may be had for the fees of witnesses summoned by the plaintiff in the original suit. *Pryor v. Beck*, 21 Ala. 393.

88. In an action on a *ne-exeat* bond, conditioned that, if the plaintiff therein fail to prosecute his suit and writ to effect, he shall pay to the defendant "all such costs as he may sustain from the wrongful suing out of said writ," a recovery can only be had for the damages actually sustained by the wrongful suing out of the writ. *Spivey v. McGehee*, 21 Ala. 417.

89. In an action on a writ-of-seizure bond, conditioned to indemnify the obligee for all costs and damages sustained by the wrongful suing out of the writ, a recovery may be had for the damage actually sustained, without proof of malice. *Zeigler & Hall v. David*, 23 Ala. 127.

90. The death of one of the slaves seized, before the trial, does not affect the defendant's liability for hire. *Ib.*

91. If the possession of the slaves is not restored to the plaintiff, he is entitled to recover their hire down to the time of trial, although a second bill was filed for the same purpose, after the dismissal of the first for the want of prosecution, and a new bond given conditioned for the forthcoming of the slaves to abide the final order and decree of the court. *Ib.*

92. In an action on a bond for titles, the measure of damages, *it seems*, is the value of the land at the time of the breach. *Whiteside v. Jennings*, 19 Ala. 784.

93. In an action on the bond of a county clerk or treasurer, a recovery can only be had for injuries necessarily affecting the rights of the party for whose use the suit is brought.

Wilson v. Cantrell, 19 Ala. 642; *Brooks v. Governor*, 17 Ala. 806.

94. In an action on a detinue bond, counsel fees for defending the suit in the circuit court are recoverable; *secus*, as to counsel fees in the supreme court, to which the cause was removed by the plaintiff below. (GOLDTHWAITE, J., dissenting on the second point.) *Ferguson & Scott v. Baber's Adm'rs*, 24 Ala. 402.

95. A recovery may be had in such action, under a special allegation, for the value of the hire of the property during the whole time the defendant was deprived of its use, although he failed to give the statutory bond, and the property was afterwards delivered to the plaintiff upon his execution of a forthcoming bond; and this value may be proved by evidence of the "value of the use of the property per day, over and above expenses, during the time it was in the plaintiff's possession." *Hudson v. Young*, 25 Ala. 376.

96. In an action on an administrator's bond, to recover the amount of a decree rendered against the administrator, interest from the rendition of the decree is recoverable. *Kyle v. Mays, use of Pond*, 22 Ala. 692.

5. *Judgment.*

97. In an action on a bond for the performance of covenants, the judgment should be for the penalty, with nominal damages and costs. *Garnett v. Yoe*, 17 Ala. 74.

98. In debt on an administrator's bond, it is erroneous to render judgment final, without the intervention of a jury, against the principal and his sureties. *Amason v. Nash*, 24 Ala. 279.

99. In a summary proceeding against a circuit clerk and his sureties, a confession of judgment by the clerk does not authorize the rendition of judgment against either him or his sureties. *Armstrong v. Holley*, 29 Ala. 305.

For analogous decisions, see DEBT, ACTION OF.

BOUNDARIES.

1. The boundary line between Georgia and Alabama is low water-mark on the west bank of the Chattahoochee river, from the point at which said river enters the State of Florida, to "the great bend" next above the mouth of Uchee creek. *Howard v. Ingersoll*, 17 Ala. 780. (Note, that this case was carried, by writ of error, to the supreme court of the United States; where it was held, that the boundary line runs along the top of the high western bank of said river.—See the case reported in 13 Howard's U. S. Reports, 381.)

2. The boundaries, lines and corners of sections of land, as fixed and marked by the United States surveyors, cannot be altered or controlled by any other survey; but the lines run to divide the sections into halves and quarters, if erroneous, may be corrected, by running the line according to law. *Nolin v. Parmer*, 21 Ala. 66.

3. The acts of congress of 1805 and 1820, "concerning the mode of surveying the public lands of the United States," do not establish, as the true corners of sub-divisions of fractional sections, the corners fixed by the United States surveyors in their official surveys; but the corners of quarter-sections are to be placed equidistant from the section corners on the same lines. *S. C.*, 24 Ala. 391.

4. Where the course of a running stream through a fractional section prevents the sub-division of the quarter-sections into eighty-acre tracts, under the act of congress of April 24, 1820, the sub-division of the quarter-section into two tracts, divided by the stream, is not in contravention of the act. *Stein v. Ashby*, 24 Ala. 521.

5. Although an *ex-parte* survey, made by a county surveyor without an order of court, may not, of itself, be competent evidence; yet the surveyor may be examined personally to prove the boundaries of the land, and may illustrate his evidence by his own survey; and when the accuracy of the survey has thus been proved, it may go to the jury as evidence tending to prove the locality of the land and its boundaries. *Nolin v. Parmer*, 21 Ala. 66.

6. In such case, the parol testimony of the surveyor is admissible, although he testifies that all his knowledge respecting the boundaries of the land was derived from the survey which he had made. *Ib.*

7. A map, not made under the authority of this State, or of the United States, is not admissible evidence, although "generally received as a correct representation of what purports to be shown or described therein." *Stein v. Ashby*, 24 Ala. 521.

8. In designating lands, certain boundaries are of more importance than quantity; consequently, where a patent calls for a sub-division of a fractional section, described as lying north of a certain creek and containing a specified number of acres, it embraces all the land in the sub-division north of the creek, although the actual number of acres exceeds the number specified in the patent. *Ib.*

9. In fixing the boundaries of lands, streets which are well-defined, and designated by some natural or artificial monument, must govern course and distance; but streets which, in the infancy of a city or town, are only undefined portions of land dedicated to public use, themselves requiring to be located, would furnish very uncertain guides in arriving at the boundaries of other lands. *Doe d. Saltonstall and Wife v. Riley & Dawson*, 28 Ala. 164.

10. When the boundary lines of a grant are fixed by the grant itself, the question what these lines are is purely a question of law. *Magee v. Doe d. Hallett & Walker*, 22 Ala. 699.

11. The plat of the Collins survey, as corrected by Pintado, which accompanied the Orange-Grove grant, was a part of the grant itself; and the grant is of all the lands included within the lines of this survey, extended without variation to the channel of the river, or low water-mark. *Ib.*

12. The lines fixed by this corrected Collins survey are obligatory on the United States, and on all persons claiming under the United States since the act of confirmation, and cannot be impeached or changed by an evidence tending to show that they were incorrectly located, by either mistake or fraud, on the part of the Spanish government or its officers, prior to the date of the grant. *Ib.*

13. Where the location and survey of an incomplete Spanish grant, made under the provisions of the act of congress confirming it, recognizes and adopts one of the lines of another grant as one of its boundary lines, and the parties agree to such survey and location, the grantees and the United States are mutually bound by it, and are estopped from disputing that line. *Ib.*

14. Where the Mobile river formed the eastern boundary of an incomplete Spanish grant, and the confirmatory act of congress was passed after the admission of Alabama into the Union, the lines of the grant could extend only to high water-mark at that time. *Ib.*

15. In determining the riparian rights, as to reclaimed lands in Mobile, of a proprietor claiming under a Spanish grant confirmed by act of congress as a perfect title, where the lines of the grant extended by its terms to low water-mark at its date, the lines should be drawn from the termination of the river lines, as they existed at the date of the grant, perpendicularly to the channel of the river. *Ib.*

CERTIORARI.

I. WHEN THE WRIT LIES.
II. PLEADINGS, AND PRACTICE.

I. WHEN THE WRIT LIES.

1. *Certiorari* is a writ revisatory in its nature, and is the proper remedy to enable a superior court to correct the erroneous action of an inferior tribunal; while *mandamus* is the proper remedy to compel action where the inferior court improperly refuses to proceed. *Lamar v. Comm'rs' Court of Marshall Co.*, 21 Ala. 772.

2. A *certiorari* does not lie from the circuit to the commissioners' court, on the refusal of the latter court to establish a private road. *Brooks v. Kirby*, 19 Ala. 72.

3. But it lies to review the proceedings of the commissioners' court in the establishment of a road, where the petitioner shows that the road was illegally established, and that it runs through his land. *Ex parte Keenan*, 21 Ala. 558.

4. It does not lie from the county court to a justice of the peace, to remove the proceedings in an action for damages under the act of 1841, (Clay's Digest, 358, § 3,) where the amount claimed is less than fifty dollars. *Winn v. Freele*, 19 Ala. 171.

5. It should not be granted, to remove into the circuit court proceedings had before a justice of the peace, when the petitioner does not show any reason why he did not appeal from the judgment of the justice. *Wright v. Gray*, 20 Ala. 363.

6. It may be granted by a judge of probate, to remove a cause from a justice's court to the circuit court; and when the writ is signed and issued by him, it is operative as his *fiat*, even if he has no authority to issue it. *Hatter v. Eastland*, 22 Ala. 688.

7. It does not lie, to review the proceedings had before a justice of the peace, after the expiration of three years from the rendition of the judgment. *Enis v. Ross*, 19 Ala. 239.

8. It will not be granted by the supreme court, unless by consent, to bring up an amended record, until the amendment has been made in the primary court. *Townsend v. Jeffries' Adm'r*, 24 Ala. 329.

9. But, when a judgment is amended *nunc pro tunc*, during the pendency of a writ of error, and the amendment is brought up on *certiorari* previously sued out, the amended judgment is properly before the court. *Cunningham v. Fontaine*, 25 Ala. 644.

10. When the certificate of the clerk does not show when the security for the costs was given, and affidavits are submitted that the security was not given when the appeal was taken, a special *certiorari* will be awarded, on motion, requiring the clerk to certify the time when the security was taken. *Carey v. McDougald's Adm'r*, 25 Ala. 109.

11. And where the endorsement on the appeal bond referred its approval to a day subsequent to that on which the appeal was taken, but the appellant produced satisfactory presumptive evidence that the bond was approved at the same time the appeal was taken, a special *certiorari* was awarded, on motion, requiring the clerk to certify the time when the bond was accepted and approved, without reference to his endorsement. *Williams v. McConico*, 25 Ala. 538.

When the writ lies in a criminal case. *Harrall v. The State*, 26 Ala. 52. (*Ante*, p. 18.)

II. PLEADINGS, AND PRACTICE.

12. The writ of *certiorari*, being simply the means by which the cause is removed to the circuit court, may be dispensed with by the parties, without affecting the jurisdiction of the court. *Hatter v. Eastland*, 22 Ala. 688.

13. Where the writ is sued out by the defendant below, and the plaintiff files his statement in the circuit court, and there continues the cause, he cannot afterwards raise an objection to the *certiorari*. *Ib.*

14. Although the statute, requiring notice of an appeal to be given to the appellee, does not apply to cases removed by *certiorari*; yet, where the writ is sued out by the defendant below, a judgment of *non pros.* cannot be rendered against the plaintiff, unless he has been notified of the issue of the writ. *Crownover v. Srygley*, 19 Ala. 251.

15. Two distinct final orders or decrees of the commissioners' court, one establishing a road, and the other granting a license to keep a ferry, cannot be removed by one writ, although the ferry is a part of the road. *Cresswell & Monette v. Comm'rs' Court of Greene Co.*, 24 Ala. 282.

16. Three distinct judgments, in cases between different parties, cannot be removed from a justice's court by one writ, sued out by a party who was a defendant in each case. *Davis v. Calhoun*, 24 Ala. 437.

17. When the writ is issued upon a defective petition, the circuit court should not dismiss the cause for that reason, but should proceed with the trial *de novo*, without noticing the defects of the petition. *Wright v. Gray*, 20 Ala. 363; *Van Eppes v. Smith*, 21 Ala. 317.

18. Nor should the cause be dismissed because the bond is defective, unless the appellant fails or refuses, when required, to make a good one. *McClellan v. Allison*, 19 Ala. 671; *Davis v. Calhoun*, 24 Ala. 455.

19. In cases of forcible entry and detainer, unlawful detainer, &c., removed to the circuit court previous to the passage of the act of 1850, (Session Acts 1849–50, p. 81,) the trial was had, not *de novo*, but on an assignment of errors in the record sent up by the justice; and if the appellant failed or refused to assign errors, the judgment of the justice was affirmed. *Mahan v. Lester*, 20 Ala. 162.

20. The act of 1850, requiring a trial *de novo* to be had in the circuit court, does not apply to a case in which the *fiat* of the judge had been obtained, and filed, with the petition, with the clerk of the circuit court, prior to the passage of the act; although the bond was executed, and the writ issued, subsequent to its passage. *Ib.*

21. In such case, a trial *de novo* being improperly had, and judgment rendered on the verdict of the jury, the judgment will be reversed on error, although the plaintiff in error is the party who failed to assign errors in the circuit court. *Ib.*

22. When a judgment against a garnishee is removed by *certiorari* to the circuit court, the garnishee is entitled to the privilege of answering over; but, if he does not offer to make further answer, he will be held to have waived this privilege. *Case & Pate v. Moore*, 21 Ala. 758.

23. A judgment by default, in such case, may be rendered against the garnishee before the fourth day of the term. *Ib.*

24. A judgment of the circuit court, quashing the proceedings of the commissioners' court in the establishment of a public road, applies only to the proceedings then before the court, and has no effect on an order subsequently made on a new and distinct application. *Thompson v. The State*, 20 Ala. 54

For analogous decisions, respecting the practice in cases of appeal from the judgments of magistrates, see JUSTICES OF THE PEACE.

CHAMPERTY.

See CONTRACTS.

CHARGE OF COURT.

(Statutory Provisions: Code, §§ 2274, 2355; Clay's Digest, 340, § 149.)

As to charges in criminal and probate cases, see same title in PARTS I and II, pp. 19, 127.

I ABSTRACT.

1. An abstract charge, even though it may assert a correct legal proposition, should be refused. *Brown v. Jones*, 24 Ala. 463; *Garrett v. Holloway & Malone*, 24 Ala. 376; *Stewart v. Bradford*, 26 Ala. 410; *Dunlap v. Robinson*, 28 Ala. 100; *Gliddon v. McKinstry*, 28 Ala. 408.

2. In assumpsit for a breach of warranty of the soundness of a horse, which became blind within a month after the sale, a charge is abstract which is based on the condition of his eyes at the time of the sale, when the only evidence before the jury relates to their condition a month previous to that time. *Brown v. Jones*, 24 Ala. 463.

3. A charge is abstract, also, when partly based on facts of which there is no evidence. *Garrett v. Holloway & Malone*, 24 Ala. 376.

4. So is a charge upon a question which is not shown, either by the pleadings or the bill of exceptions, to have been raised in the case. *Gliddon v. McKinstry*, 28 Ala. 408.

5. But a charge cannot be considered abstract, when there is any evidence, however weak, tending to support it. *Hair v. Little*, 28 Ala. 236; *Partridge v. Forsyth*, 29 Ala. 200.

6. A charge upon the requisites of a custom, the existence of which is proved by only witness, is not abstract. *Partridge v. Forsyth*, 29 Ala. 200.

7. An abstract charge is no ground for a reversal of the judgment, when the record clearly shows that it could not have misled the jury, to the ap-

pellant's prejudice. *Salmons v. Roundtree*, 24 Ala. 458; *Johnson v. Boyles*, 26 Ala. 576; *Rolston v. Langdon*, 26 Ala. 660; *Taylor v. Morrison*, 26 Ala. 728; *Partridge v. Forsyth*, 29 Ala. 200.

8. And this, even though it may assert an incorrect legal proposition. *Salmons v. Roundtree*, 24 Ala. 458; *Johnson v. Boyles*, 26 Ala. 576; *Rolston v. Langdon*, 26 Ala. 660.

9. When the record shows testimony, on which, if the abstract charge were stricken out, and no instructions on the sufficiency of the evidence were requested, the jury might still have found the same verdict, the appellate court will presume that the abstract charge, asserting a correct legal proposition, could not have misled the jury. *Partridge v. Forsyth*, 29 Ala. 200.

10. When the bill of exceptions does not set out the evidence, the appellate court will presume that a charge given by the court was not abstract. *Wilson v. Calvert*, 18 Ala. 274; *Jones v. Stewart*, 19 Ala. 701.

11. But, when an exception is reserved to the refusal of a charge requested, the appellant must make the record affirmatively show that the charge was not abstract. *Dent v. Portwood*, 17 Ala. 242; *Wilson v. Calvert*, 18 Ala. 274; *Leverett's Heirs v. Carlisle*, 19 Ala. 80.

12. When an erroneous affirmative charge is given by the court, either of its own motion, or on request of a party, the appellate court will not presume that it was abstract, because the bill of exceptions does not set out the evidence on which it was founded. *Carter v. Doe d. Chaudron*, 21 Ala. 72.

II. INVADING PROVINCE OF JURY.

13. A general charge in favor of either party, when there is the slightest conflict in the evidence on a material point, is an invasion of the province of the jury, and therefore erroneous. *Knight v. Bell*, 22 Ala. 198; *Woolfork's Adm'r v. Sullivan*, 23 Ala. 548; *Lawler v. Norris*, 28 Ala. 675; *Freeman v. Scurlock*, 27 Ala. 407; *Allman v. Gann*, 29 Ala. 240; *Crum v. Williams*, 29 Ala. 446.

14. And this, though the facts of the case are admitted by the parties, and the bill of exceptions states that there was no conflict in the evidence. *Allman v. Gann*, 29 Ala. 240.

15. But, when there is no conflict in the evidence, and it is only necessary to draw a legal conclusion from the facts, such a charge may be given. *Abney v. Pickett*, 21 Ala. 739; *Stokes v. Jones*, 21 Ala. 731; *Bryan v. Ware*, 20 Ala. 687; *McKenzie v. Stevens*, 19 Ala. 691.

16. Such a charge is equivalent to a demurrer to the evidence. *Hollingsworth v. Martin*, 23 Ala. 591.

17. In charging the jury, the court should not assume that any fact is proved, unless there is some testimony tending to prove it; and even then it should be stated hypothetically. *Ib.*

18. But, when a fact is not controverted, the court may charge upon it directly, and without hypothesis. *Nelms v. Williams*, 18 Ala. 650.

19. When a party excepts to a general charge in favor of his adversary, he must make the record show that there was conflicting evidence before the jury, or that the charge was not authorized by the evidence. *Gaines v. Harvin*, 19 Ala. 491.

20. A charge, assuming that there is an irreconcilable conflict in the testimony of two witnesses, is an invasion of the province of the jury; as where it asserts, that if the jury believe the testimony of one witness, they must find for the plaintiff, but if they believe the testimony of the other, they must find for the defendant. *Cain v. Penix*, 29 Ala. 374.

21. A charge, beginning thus, "When the defendant shows," &c., assumes that the fact stated is proved, and, when the evidence on the point is conflicting, is erroneous. *McKenzie v. Branch Bank at Montgomery*, 28 Ala. 606.

22. A charge, which denies to the jury the right to draw any reasonable inference from the facts stated, is an invasion of their province. *King v. Pope*, 28 Ala. 602.

23. But a charge, which authorizes the jury to draw an inference opposed to all the testimony, is also erroneous. *Carey v. Hughes*, 17 Ala. 388; *Dunlap v. Robinson*, 28 Ala. 100.

24. When there is no evidence tending to prove a particular fact, the

court may so instruct the jury; but, where many witnesses are examined orally, and the facts detailed by them are numerous, such a charge may be refused. *Knox v. Fair*, 17 Ala. 503.

25. Where there is conflicting evidence of a custom, it should be left to the jury to determine whether the custom is proved; but, where the only evidence is the testimony of one witness, which tends to prove the law merchant to be other than it really is, the court may instruct the jury that there is no evidence of custom before them. *Jewell v. Center & Co.*, 25 Ala. 498.

26. A charge upon the effect of evidence, which is susceptible of a construction different from that placed on it by the court, is an invasion of the province of the jury. *Stanley v. Nelson*, 28 Ala. 514.

27. In charging the jury that they might, in an action of trespass, give exemplary damages if there were circumstances of aggravation, the judge "playfully remarked, in the way of illustration, 'such damages as would teach the old gentleman not to violate the sabbath, nor injure his health by riding in the night, nor interfere with the rights of others.'" *Held*, that the instructions were erroneous, because the remarks were calculated to make the jury believe that the judge thought the facts justified heavy exemplary damages. *Hair v. Little*, 28 Ala. 236.

28. A charge, which instructs the jury that, "in civil cases, all that is required is that the proof shall preponderate in favor of one party or the other, and that they must find according to the preponderance of proof," is an invasion of their province. *Mays v. Williams*, 27 Ala. 267.

29. On the request of the jury for further instructions, the presiding judge said, "I perceive from your questions that your minds have been misled by a case read by the defendant's counsel;" and then stated to them, "that they should receive the law only from the court—that counsel often read books to the jury, to explain themselves more clearly and forcibly; but that they must not receive them as law, except so far as sanctioned by the court." *Held*, that there was no error in these instructions. *Chamberlain & Co. v. Masterson*, 26 Ala. 371.

30. A charge which assumes a fact to be proved, without referring to the jury the credibility of the testimony tending to establish it, is an invasion of their province. *Waters v. Spencer*, 22 Ala. 460; *Brooks v. Hildreth & Moseley*, 22 Ala. 469; *Whitsett, Garner & Co. v. Slater*, 23 Ala. 626; *McKenzie v. Branch Bank at Montgomery*, 28 Ala. 606; *Knight's Adm'rs v. Vardeman*, 25 Ala. 262; *Hudson & Stokes v. Weir & Tate*, 29 Ala. 294.

31. Even though the fact itself is immaterial. *Waters v. Spencer*, 22 Ala. 640.

32. A charge assuming that a conversion is proved, when the evidence only establishes an intention to convert, is liable to this objection. *Knight's Adm'rs v. Vardeman*, 25 Ala. 262.

33. So is a charge which asserts, without hypothesis, "that the defendant is entitled to recover" the amount of a set-off claimed. *Foust v. Yielding*, 28 Ala. 658.

34. When the charge of the court assumes a fact as proved, the appellate court will presume that the evidence justified the assumption, unless the bill of exceptions repels such presumption: a statement that the evidence "tended to show" the fact, without showing that the evidence was conflicting or uncertain, is not sufficient to put the court in error. *Kirkland v. Oates*, 25 Ala. 465.

35. A charge, which assumes a question of fact to be a question of law, is an invasion of the province of the jury. *Pritchett v. Munroe*, 22 Ala. 501; *Newton v. Jackson*, 23 Ala. 335; *Ewing v. Sanford*, 19 Ala. 606; *McGonegal v. Walker*, 23 Ala. 361.

36. A charge which assumes the sufficiency of the parol evidence in a cause, tending to show that a person, though no party to the record, was the real defendant in the action, is an invasion of the province of the jury. *Tarleton & Pollard v. Johnson*, 25 Ala. 300.

37. The question of fraudulent intention, is a question for the determination of the jury, and one which the court cannot properly assume to decide. *Thomas v. Degroffenreid*, 17 Ala. 602; *Lanier v. Branch Bank at Montgomery*, 18 Ala. 625; *Stokes v. Jones*, 21 Ala. 731.

38. But, where a deed is fraudulent

on its face, it is the duty of the court so to declare it. *Johnson v. Thweatt*, 18 Ala. 741.

39. And where the bill of exceptions recites that "it was expressly proved that the conveyance was made to hinder and delay the grantor's creditors," and that there was no conflict in the evidence, the court may give a general charge upon the effect of the evidence. *Stokes v. Jones*, 21 Ala. 731.

40. And where fraud in the execution of plaintiff's deed is the only defense, but no evidence is offered tending to prove fraud, or to raise a presumption of fraud, the court may instruct the jury, "that the matters in proof do not make out a case of fraud." *Hopkins v. Scott*, 20 Ala. 179.

41. Where the facts are clear and undisputed, fraud *vel non* is a pure question of law for the determination of the court; but, where the facts are not clear and indisputable, or where there is any conflict in the evidence, the question should be left to the decision of the jury. *Upson v. Raiford*, 29 Ala. 188.

42. Whether a payment was voluntarily made or not, is a question of fact for the determination of the jury, and one which the court cannot assume to decide. *Ewing v. Peck*, 26 Ala. 413.

43. Where the words relied on to take a case out of the statute of limitations, amount in law to an express promise, there is no necessity for referring their construction to the jury, but the court may instruct them as to the legal effect of the words. *Evans v. Carey*, 29 Ala. 99.

44. Notice is a question of fact for the determination of the jury. *Saltmarsh v. Bower & Co.*, 22 Ala. 221.

45. Whether the facts are sufficient to put a purchaser on his guard, and thus charge him with implied notice, is a question for the jury. *Pritchett v. Munroe*, 22 Ala. 501.

46. In an action against an endorser, it is the province of the jury to ascertain the facts, while the court determines their legal sufficiency to constitute notice. *Stanley v. Bank of Mobile*, 23 Ala. 652.

47. What constitutes due diligence on the part of the sheriff, is a mixed question of law and fact. *Whitsett, Garner & Co. v. Slater*, 23 Ala. 626.

48. What is a reasonable time for the completion of work under a contract, when no time is specified in the contract, is, generally speaking, a question of fact for the jury. *Drake v. Gorce*, 22 Ala. 409.

49. Whether a charge by a commission-merchant of five per cent., in addition to legal interest, for accepting and advancing the money to pay bills drawn on him by his customers, is intended merely as a fair compensation for the risk, trouble and expense incurred, or is designed as a cover for usury, is a question for the determination of the jury. *Brown v. Harrison & Robinson*, 17 Ala. 774.

50. Whether or not there has been a delivery of a chattel, is a question of fact for the determination of the jury. *Thomas v. Degraffenreid*, 17 Ala. 602. See, also, *Nelson v. Iverson*, 19 Ala. 95.

51. Whether a party abandoned the possession of land, or merely left it *animo revertendi*, is a question for the determination of the jury; but the court may decide whether or not the question arises. *McCall v. Doe d. Pryor*, 17 Ala. 533.

52. Whether the acceptance of partial performance is intended as a waiver of the entire fulfillment of a contract, is a question for the decision of the jury. *Wolfe v. Parham*, 18 Ala. 441.

53. In an action on a bond, where the defendant relies on satisfaction in lieu of performance, the question whether the thing done or given in lieu of performance was intended and accepted as a satisfaction, should be left to the decision of the jury. *Johnson and Wife v. Collins*, 20 Ala. 435.

54. Adverse possession is a question of fact for the decision of the jury. *Benje v. Creagh's Adm'rs*, 21 Ala. 151.

55. It is the peculiar province of the jury to determine whether a contract, consummated on Sunday, was justified by the necessity of the case. *Hooper v. Edwards*, 18 Ala. 280.

56. Agency is a question of fact, which falls within the peculiar province of the jury. *McClung's Executors v. Spotswood*, 19 Ala. 165; *McDonnell v. Branch Bank at Montgomery*, 20 Ala.

313. (But see *McKenzie v. Stevens*, 19 Ala. 691, where it is said to be a mixed question of law and fact.)

57. In an action for malicious prosecution, the facts being undisputed, probable cause is a question of law for the decision of the court; but, where the facts are to be ascertained from evidence which is doubtful or conflicting, it becomes a question for the jury. *Ewing v. Sanford*, 19 Ala. 605. See, also, *Long v. Rodgers*, 19 Ala. 321.

58. Whether a partnership existed between two or more persons, after the facts are ascertained, is a question of law. *McGrew & Harris v. Walker*, 17 Ala. 824.

59. It is the peculiar province of the court to construe written instruments, and to declare their legal effect. *Long v. Rodgers*, 17 Ala. 540; *S. C.*, 19 Ala. 321; *Kidd & Co. v. Cromwell, Haight & Co.*, 17 Ala. 648; *Moore v. Leseur and Wife*, 18 Ala. 606; *Magee v. Doe d. Hallett & Walker*, 22 Ala. 699; *Allen v. Harper*, 26 Ala. 686; *Wyatt's Adm'r v. Steele*, 26 Ala. 639; *Chamberlain v. Gaillard*, 26 Ala. 505.

60. Where the admissibility of evidence depends upon the existence of a preliminary fact, it is the duty of the court to decide whether that fact exists; but the question may, at the discretion of the court, be submitted to the jury. *Scott v. Coxe's Adm'rs*, 20 Ala. 294.

III. MISLEADING JURY.

61. A charge admitting of two constructions, one of which asserts an incorrect legal proposition, is calculated to mislead the jury, and should therefore be refused. *Ross v. Ross*, 20 Ala. 105; *Rolston v. Langdon*, 26 Ala. 660.

62. A charge requiring explanation or qualification is obnoxious to the same objection. *Long v. Rodgers*, 19 Ala. 321; *Johnson and Wife v. King*, 20 Ala. 270; *Rolston v. Langdon*, 26 Ala. 660; *Godbold v. Blair & Co.*, 27 Ala. 592; *Partridge v. Forsyth*, 29 Ala. 200.

63. But an affirmative charge, asserting a correct legal proposition, although it may be objectionable on account of its generality, is no ground for a reversal of the judgment: the party ought to request an explanatory charge. *Ewing v. Sanford*, 19 Ala. 605; *Hutchinson v. Dearing*, 20 Ala. 799; *Ivey's Adm'r v. Owens and Wife*, 28 Ala. 641; *Partridge v. Forsyth*, 29 Ala. 200.

64. Where the evidence renders the general rule of law inapplicable to the case, the court may refuse to give it in charge to the jury. *Ross v. Pearson*, 21 Ala. 473.

65. It is the duty of the court, in charging the jury, to confine itself to the testimony. *Hollingsworth v. Martin*, 23 Ala. 591.

66. Where issue is joined on a defective replication, the defendant cannot, by a request for instructions to the jury, claim advantage of the plaintiff's failure to prove a fact, which, because not alleged in the replication, is outside of the issue. *Nunn v. Mills*, 28 Ala. 600.

67. A charge, assuming that an immaterial question of fact is an issue to be tried and determined by the jury, is well calculated to mislead them, by withdrawing their minds from the true issues in the case. *Dunlap v. Robinson*, 28 Ala. 100.

68. A charge which has the effect of placing the burden of proof on the wrong party, is calculated to mislead the jury. *Pennington v. Woodall*, 17 Ala. 685.

69. The court is not obliged to give a charge in the language in which it is asked; provided, the charge given is a full and fair exposition of the law. *Long v. Rodgers*, 19 Ala. 321; *Ewing v. Sanford*, 21 Ala. 157. (Changed by section 2355 of the Code.)

70. Where the plaintiff's right of recovery, or the defendant's entire defense, depends upon the existence of three or more distinct facts, a charge in his favor, omitting or disregarding one of those facts, and making the case turn on the other facts only, is erroneous. *Rowland & Heifner v. Ladiga's Heirs*, 21 Ala. 9; *Dill v. Camp*, 22 Ala. 249.

71. A charge which withdraws from the consideration of the jury any evidence, however weak, which tends to establish the point in issue, is calculated to mislead them, and is therefore improper. *Edgar v. McArn*, 22 Ala.

796; *Pritchett v. Munroe*, 22 Ala. 501; *Reese v. Beck*, 24 Ala. 651; *Upson v. Raiford*, 29 Ala. 188.

72. Where the evidence of a single witness tends to prove certain facts which present a particular phase of the case, the court may properly instruct the jury on the effect of his testimony (if believed by them), without noticing the other evidence in the cause: such a charge does not, either expressly or by implication, exclude the other evidence from the consideration of the jury; and if such an inference should be apprehended, it may be guarded against by asking other instructions. *Garrett's Adm'rs v. Garrett & Garrett*, 27 Ala. 687.

73. A charge, asserting that a recovery cannot be had on a partial performance of an entire contract, predicated on a portion of the evidence, cannot be refused, because another portion of the evidence tended to show a waiver of full performance. *Wolfe v. Parham*, 18 Ala. 441.

74. The court may refuse to instruct the jury upon the effect of a particular portion of a conversation in evidence before them, and let them determine the question in issue from the whole conversation. *Ward v. Winston & Co.*, 20 Ala. 167.

75. It is error to instruct the jury, "that the main charge was to be with them the controlling part of the charge." *Chamberlain & Co. v. Masterson*, 26 Ala. 371.

IV. Referring Question of Law to Jury.

76. A charge, which has the effect of referring to the jury the decision of a question of law, is erroneous. *Wright v. Bolling*, 27 Ala. 259; *Chamberlain & Co. v. Masterson*, 26 Ala. 371; *Stanley v. Bank of Mobile*, 23 Ala. 652; *Ewing v. Sanford*, 19 Ala. 605.

77. If the court, after deciding a question of law against the plaintiff, refuses to instruct the jury, on his request, that they have nothing to do with the decision of that question,—this is an implied admission of their right to revise the decision of the court; but, since the refusal of the charge gives the plaintiff an additional chance for a verdict, it is no cause of reversal in his favor. *Wyatt's Adm'r v. Steele*, 26 Ala. 639.

As to what are questions of law, as distinguished from questions of fact, *vide supra*, 36–60.

V. Rules of Construction on Error.

78. Instructions to the jury must be construed in connection with the evidence in the cause. *Kirkland v. Oates*, 25 Ala. 465; *Waters v. Spencer*, 22 Ala. 460; *Miller v. Jones' Adm'r*, 29 Ala. 174.

79. But the appellate court will not undertake to determine the weight of evidence, nor construe the charge upon the hypothesis that the preponderance was on one side or the other. *Upson v. Raiford*, 29 Ala. 188; *Dill v. Camp*, 22 Ala. 249.

As to presumptions in favor of the correctness of a charge, *vide supra*, 7–12, 34.

When an erroneous charge is a reversible error, see Error and Appeal, V.

CHOSE IN ACTION.

1. A sale by the tenant for life, of the absolute interest in a chattel, converts the interest of the remainderman into a chose in action. *Price v. Talley's Adm'rs*, 18 Ala. 21.

2. Personal property, belonging to a female ward, and in the possession of her guardian, is not a chose in action, since the possession of the guardian is the possession of the ward. *Chambers v. Perry*, 17 Ala. 726.

3. When personal property, belonging to several wards, is held by their common guardian under appointment by the chancery court, the interest of each is not a chose in action. *Ib.*

4. The undivided interest of each of several donees of personal property, in the hands of a common bailee, is not a chose in action, but property in possession. *Hopper v. McWhorter*, 18 Ala. 229.

As to the assignment of choses in action, see title Assignment, *ante*, p. 400.

CLERKS.

I. AUTHORITY.

1. Under the acts of 1833 and 1845, (Clay's Digest, 54, § 1 ; Session Acts 1844–5, p. 137,) the clerk of the circuit court may issue a judicial attachment against a defendant who avoids the service of process, upon the filing of the required affidavit, either in term time or vacation. (CHILTON, C. J., *dissenting.*) *Garner & Nevill v. Johnson*, 22 Ala. 494.

2. The clerk of the city court of Mobile has no authority to issue an original attachment. *Stevenson v. O'Hara*, 27 Ala. 362 ; *Matthews, Finley & Co. v. Sands & Co.*, 29 Ala. 136 ; *Flash, Hartwell & Co. v. Paul, Cook & Co.*, 29 Ala. 141 ; *Lewis v. Dubose & Co.*, 29 Ala. 219. (Changed by statute.—Session Acts 1855–6, p. 117.)

II. LIABILITY.

3. An action on the case does not lie against a clerk, for taking a writ of error bond without security. *Williams v. Hart*, 17 Ala. 102.

4. But, if he fails to take sufficient security when tendered by the plaintiff in error, and yet certifies the bond as valid to the supreme court, where the judgment is affirmed on certificate, and afterwards perpetually enjoined in chancery on account of his want of authority in filling up the bond,—an action lies against him. *Ib.*

5. The clerk is liable, in such case, for the amount of the original judgment, with interest thereon, and for necessary costs expended in good faith in defense of the chancery suit; whether he is liable also for the ten per cent. damages to which, if the bond had been valid, the plaintiff would have been entitled on the affirmance of the judgment in the supreme court, *quære?* *Ib.*

6. When a clerk has collected money on a judgment, the statute of limitations does not begin to run in his favor, until there has been either a conversion by him, or a refusal to pay on demand. *McDonnell v. Branch Bank at Montgomery*, 20 Ala. 313.

7. If he is shown to have converted the money, a demand is unnecessary; otherwise, a demand must be made within a reasonable time after the collection ; and what is a reasonable time must depend upon the circumstances of each particular case. *Ib.*

8. Process of garnishment does not lie against a clerk, to subject the proceeds of sale of perishable property, seized under a void attachment, and sold under an order of court. *Lewis v. Dubose & Co.*, 29 Ala. 219.

9. The act of 1848, (Session Acts 1847–8, p. 86,) imposing a penalty upon county clerks for receiving unlawful fees, is not confined to matters touching the administration of estates. *Foster v. Blount*, 18 Ala. 687.

III. DEPUTIES.

10. When a person is discharging, as deputy, the duties of a circuit clerk ; and his acts are of such a continuous character as reasonably to justify the inference that the clerk, if a faithful public officer, must have known of them, and would not have permitted them unless done by his authority,—the acts themselves become very strong evidence of the deputy's authority as such. *McDonnell v. Branch Bank at Montgomery*, 20 Ala. 313.

11. When the clerk's name is affixed to a writ, to which is appended an affidavit that the name was subscribed by the affiant by the authority of the clerk, the affiant must be presumed to have been the clerk's deputy, and the writ held to have been properly issued. *Yonge v. Broxson*, 23 Ala. 684.

12. A deputy clerk is responsible only to his principal, for a default committed while acting within the scope of his duties, and in the name of the principal. *Snedicor v. Davis*, 17 Ala. 472.

13. An action accrues to the principal, in such case, from the time of the commission of the act, and does not await the development of the consequent injury ; and the lapse of six

years from the time of the default bars the action. *Ib.*

14. Whether the recovery should be for nominal damages only, or for the probable prospective damages, where the suit is instituted before the actual injury is ascertained, *quære? Ib.*

IV. SURETIES.

15. The liability of the sureties of a county clerk does not cease on their application to the judge to require a new bond from their principal, but continues until the new bond is given, or until the office is declared vacant on account of the failure to give it. *Armstrong v. Pugh*, 19 Ala. 209.

16. An action does not lie against the sureties on the official bond of a county clerk, to recover the penalty imposed by statute for issuing a marriage license to a female under eighteen years of age without the consent of her parent or guardian. *Brooks v. Governor*, 17 Ala. 806.

17. A summary proceeding against a circuit clerk and his sureties, for his failure to pay over to the county treasurer, on demand, all fines, forfeitures, or other moneys belonging to the county, (Code, §§ 2596–7, 2616–21,) is, as to the parties who have received notice of the motion, joint only, and is governed by the rules applicable to joint actions. *Armstrong v. Holley*, 29 Ala. 305.

18. A confession of judgment by the clerk, in such case, does not authorize the rendition of judgment against either himself or the other defendants. *Ib.*

CODE OF ALABAMA.

I. CONSTITUTIONALITY.
II. CONSTRUCTION.

1. *Generally.*
2. § 1, (*Meaning of word "Person."*)
3. § 12, (*Exception as to Pending Actions.*)
4. § 573, (*Jurisdiction of Special Supreme Court.*)
5. §§ 1010–11, (*Liability of Steamboat for Transportation of Slave.*)
6. §§ 1133–36, (*Establishment of Public Road.*)
7. §§ 1532–36, (*Acceptance of Bill of Exchange.*)
8. §§ 1883–87, (*Statute of Non-Claim.*)
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10. §§ 2129–42, (*Parties to Actions.*)
11. § 2165, (*Service of Summons and Complaint.*)
12. §§ 2175–88, (*Bail in Civil Actions.*)
13. §§ 2211–13, (*Pleadings in Real Actions.*)
14. § 2234, and Appendix, (*Forms of Complaint.*)
15. §§ 2240–43, (*Set-Off.*)
16. § 2253, (*Demurrer.*)
17. §§ 2290, 2302, (*Competency of Witnesses.*)
18. § 2298, (*Entries on Physician's Books.*)
19. § 2313, (*Proof of Demand by Plaintiff's Oath.*)
20. §§ 2318–28, (*Depositions.*)
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22. § 2366, (*Judgment by Default Final.*)
23. §§ 2396–2400, (*Security for Costs.*)
24. §§ 2401–05, (*Amendments.*)
25. §§ 2407–17, (*Rehearing.*)
26. § 2418, (*Revival of Judgment.*)
27. § 2456, (*Lien of Execution.*)
28. § 2462, (*Exemption Law.*)
29. §§ 2471–73, 2520–22, (*Garnishment on Judgments.*)
30. § 2490, (*Statute of Limitations.*)
31. §§ 2517–73, (*Attachment and Garnishment.*)
32. §§ 2595, 2833, (*Trial of Right of Property.*)
33. §§ 2596–97, 2616–21, 2645, (*Summary Judgments.*)
34. §§ 2850–52, (*Entry and Detainer; Forcible and Unlawful.*)
35. §§ 3016–41, (*Appeals.*)
36. §§ 3042–47, (*Sheriff's Fees.*)

See, also, the same title in PARTS, I, II, and III, pp. 21, 128, 230.

I. CONSTITUTIONALITY.

1. The constitutional provision contained in the 23d section of the third

article, that no bill shall have the force of a law until it be read on three several days in each house of the general assembly, does not require that everything which is to become a law by the adoption of the bill shall be thus read; nor does the provision of the 1st section of said article, prescribing the style of laws, affect the validity of a body of laws, when the bill by which they were adopted pursued the prescribed form. *Dew v. Cunningham*, 28 Ala. 466.

II. CONSTRUCTION.

1. *Generally.*

2. The re-enactment in the Code, of a previous statute, must be taken as a legislative adoption of the judicial construction which it had received. *Duramus v. Harrison & Whitman*, 26 Ala. 326; *Sartor v. Branch Bank at Montgomery*, 29 Ala. 353.

2. § 1, (*Meaning of word "Person."*)

3. This section does not so control the subsequent sections (2516, *et seq.*) giving process of garnishment against "any person indebted," &c., as to authorize a garnishment against a public municipal corporation, to whom those sections do not apply. *Mayor and Aldermen of Mobile v. Rowland & Co.*, 26 Ala. 498.

3. § 12, (*Exception as to Pending Actions.*)

4. An appeal, or writ of error, being in the nature of a new action, must be governed by the provisions of the Code, which abolishes writs of error. *Mazange v. Slocum & Henderson*, 23 Ala. 668.

5. An ancillary attachment is a part of the original suit, and must be governed by the provisions of the old law. *Frankenheimer v. Slocum & Henderson*, 24 Ala. 373.

6. A bill of exceptions must be governed by the provisions of the old law, although the trial is had since the adoption of the Code. *Godden v. LeGrand*, 28 Ala. 158.

7. The provisions of the Code, respecting testimony, or the mode of taking depositions, do not apply to causes pending on the 17th January, 1853, the day on which it went into operation. *Hiscox v. Hendree*, 27 Ala. 216; *Doe d. Kennedy's Heirs v. Reynolds*, 27 Ala. 364; *Broadnax v. Sullivan*, 29 Ala. 320.

8. The competency of a witness must be determined by the old law. *Hiscox v. Hendree*, 27 Ala. 216.

9. Section 2211, which gives the defendant in real actions a right to demand an abstract of the plaintiff's title, does not apply to causes pending when the Code went into operation. *Doe d. Kennedy's Heirs v. Reynolds*, 27 Ala. 364.

10. Section 2403, allowing amendments as to parties, does not apply to such causes. *Crump v. Wallace*, 27 Ala. 277.

11. Proceedings instituted by a debtor, to obtain his discharge from custody under bail process, sued out before the Code went into operation, must conform to the provisions of the Code, where the debtor was surrendered by his bail after the Code went into operation. *Goldsmith, Forcheimer & Co. v. Lang*, 25 Ala. 486.

12. The lien of a judgment, rendered before the adoption of the Code, must be determined by its provisions. *Daily v. Burke*, 28 Ala. 328.

4. § 573, (*Jurisdiction of Special Supreme Court.*)

13. Where a cause was regularly heard before a special court, consisting of one judge of the supreme court and two circuit judges, and was by them reversed and remanded; and on a subsequent day of the term, before the minutes of the regular court were signed, two of the members of the special court, in the absence of one of the circuit judges, granted a rehearing,—*held* by STONE, J., sitting alone, that the order was not void for want of jurisdiction. *Goodman & Mitchell v. Walker*, 29 Ala. 444.

5. §§ 1010–11, (*Liability of Steamboat for Transportation of Slave.*)

14. It is no defense to an action against the owners of a steamboat, to recover the value of a slave transported on their boat without the writen

authority of his owner, that the slave was a runaway, when he came on board the boat at Mobile; that he was not discovered, until after the boat had gone seventy-five miles up the river, on her trip to Montgomery; that he was then arrested, and chained until the arrival of the boat at Montgomery, when he was carried to the county jail, while the boat proceeded to Wetumpka; that he was at the time sick with pneumonia, and so continued until his death, which occurred a few days afterwards; and that the defendants furnished him with proper medical attendance during his illness. *Mangham v. Cox & Waring*, 29 Ala. 81.

15. The same principles apply, where the action is brought to recover the penalty of fifty dollars. *Massey v. Cole*, 29 Ala. 364.

6. §§ 1133–36, (*Establishment of Public Road.*)

16. The form of oath prescribed for viewers must be precisely pursued, and fully set out in the record: a recital in their return, that they were "duly sworn before acting," is not sufficient. *Keenan v. Comm'rs' Court of Dallas Co.*, 26 Ala. 568.

17. The record must show, also, that the road was viewed and marked out by the jury, "to the greatest advantage to the public, and with as little prejudice to individuals as possible, and without partiality or favor:" where the order of the court directs the jury "to view and mark out the best route for the said road," and they report that, "being duly sworn before acting," they performed the duty assigned them in the order, to the best of their ability, without partiality or favor,"—this is not a sufficient compliance with the requisitions of the statute. *Ib.*

7. §§ 1532–36, (*Acceptance of Bill of Exchange.*)

18. No right can accrue from a verbal promise to accept a bill of exchange, unless the party to whom the promise is made negotiates the bill on the faith of it. *Sands & Co. v. Matthews, Finley & Co.*, 27 Ala. 399.

19. If the drawee retains the bill, by permission of the holder's agent, for examination, from Saturday until the following Monday, no legal obligation is thereby created against him as acceptor. *Ib.*

8. §§ 1883–87, (*Statute of Non-Claim.*)

20. A bar cannot be made out, under this statute, by adding together the periods which elapsed before and after the Code went into operation. *McHenry v. Wells*, 28 Ala. 451.

21. In an action instituted against an executor or administrator, if the defendant intends to raise the question of the presentation of the claim, with the view of throwing the costs on the plaintiff, he must present it on the record by plea or suggestion, so that the plaintiff may have an opportunity of proving the presentation, and the issue must be tried by the jury; but, in the absence of such plea or suggestion, if the plaintiff has a general verdict on the issues joined, he is entitled to full costs. *Wallace v. Nelson*, 28 Ala. 282.

9. §§ 1917, 1938, (*Suits by and against Executors and Administrators.*)

22. Process of garnishment may be sued out against an executor or administrator, as the debtor of a legatee or distributee, before the lapse of six months from the grant of letters; but no judgment can be rendered against him, as such, until the estate is finally settled. *Moore & Lyons v. Stainton*, 22 Ala. 831.

23. The common-law doctrine, as to the merger of a civil action in a felony, does not apply to the statutory action by an administrator to recover damages for the wrongful act or omission which caused the death of his intestate. *Lankford's Adm'r v. Barrett*, 29 Ala. 700.

10. §§ 2129–42, (*Parties to Actions.*)

24. The assignee of a policy of insurance after a loss has accrued, although it contains the usual stipulation against assignment, may maintain an action on it in his own name. *Perry v. Merchants' Insurance Co.*, 25 Ala. 355.

25. The transfer of a judgment upon condition that the transferree "was to pay for it if he could make anything out of it," does not constitute him the "party really interested in it," nor invest him with such property that he can sue on it before a justice of the peace. *Pike v. Bright*, 29 Ala. 332.

26. In an action on a promissory note, by payee against maker, it is a good plea in bar, that the plaintiff is not the party really interested in the note. *Bryan v. Wilson*, 27 Ala. 208.

27. Husband and wife may join, as at common law, to recover on a promise made to the wife for services rendered by her during coverture. *Jordan's Adm'r v. Hubbard and Wife*, 26 Ala. 432.

28. Where the separate estate of the wife was created by will before the adoption of the Code, and no trustee was appointed, the husband must sue alone for the recovery of the property. *Friend v. Oliver*, 27 Ala. 532. Also, *Gerald and Wife v. McKenzie*, 27 Ala. 166.

29. In suits relating to the wife's separate estate created by statute, she must sue and be sued alone, where the suit is for the *corpus* of the property, or for damages to the property itself as distinguished from its use; and where the rents, income and profits of the property are the mere incident of a suit, she may recover them. *Pickens and Wife v. Oliver*, 29 Ala. 528.

30. Where the wife's separate estate is created by contract, and such contract appoints no trustee, the husband alone has the right of action, after he has once reduced the property to possession; and where the rents, income and profits are the foundation of the suit, although the separate estate is created by statute, he must sue alone. *Ib.*

31. Husband and wife must be joined, either as plaintiffs or defendants, in suits not relating to her separate estate created by statute, where the marriage took place prior to the 1st March, 1848, and the object of the suit is to reduce to possession some chose in action belonging to the wife, of which the husband has never had possession, either actual or constructive; or where the separate estate is created by contract, which contract appoints no trustee, and the husband has never reduced the property to possession; or where the action is brought for a tort, committed by or upon the wife; or where it was necessary, at common law, on account of her interest, that the wife should be joined. *Ib.*

32. The wife cannot be joined with her husband, as a defendant in an action on a note, executed by them jointly, during coverture, for the purchase-money of a tract of land. *Gibson v. Marquis and Wife*, 29 Ala. 668.

33. Section 3132, relating to suits by and against infants, applies only to suits in the common-law courts of original jurisdiction, and not to appeals. *Cook v. Adams*, 27 Ala. 294.

34. In an action by or against "the wife and mother," under section 2136, it must appear that the wife is also a mother, and the husband a father; and if the husband is a non-resident at the commencement of the suit, the wife must give security for the costs, as in other cases where the plaintiff is a non-resident. *Ex parte Cole*, 28 Ala. 50.

35. Section 2142, in reference to suits against partners, provides a plain and adequate remedy at law to enforce the payment of a partnership debt out of the estate of a deceased partner, but does not take away the original jurisdiction of equity. *Waldron, Isley & Co. v. Simmons*, 28 Ala. 629.

11. § 2165, (*Service of Summons and Complaint.*)

36. The sheriff's failure to serve a copy of the complaint, with the summons, is a mere irregularity, which, after judgment by default, is not available on error. *Dew v. Cunningham*, 28 Ala. 466.

12. §§ 2175–88, (*Bail in Civil Actions.*)

37. Where the debtor takes an appeal to the circuit court, and gives the bond required by section 2185, he is entitled to be discharged from custody. *Ex parte Whitehead*, 23 Ala. 93.

38. Where the debtor was in custo-

dy before the Code went into operation, but was surrendered by his bail after that time, the proceedings to obtain a discharge must conform to the provisions of the Code. *Goldsmith, Forcheimer & Co. v. Lang*, 25 Ala. 486.

39. An affidavit by such debtor, "that he has no money, estate, or effects, real or personal, in possession or expectancy, within the State of Alabama, subject to levy and sale by execution," without adding "whereby to satisfy the debt," is sufficient. *Ib.*

13. §§ 2211–13, (*Pleadings in Real Actions.*)

40. Section 2211, giving the defendant in a real action a right to demand an abstract of the plaintiff's title, does not apply to suits pending when the Code went into operation. *Doe d. Kennedy's Heirs v. Reynolds*, 27 Ala. 364.

41. The plea of not guilty is equivalent to the consent rule, and is an admission of the defendant's possession at the commencement of the suit. *King v. Kent's Heirs*, 29 Ala. 542.

14. § 2234, and Appendix, (*Forms of Complaints.*)

42. A complaint in the prescribed form, "on promissory note, by payee against maker," is sufficient to support a judgment by default; and its legal effect is the same as if it contained an averment, in express terms, that the note was payable to the plaintiff. *Letondal v. Huguenin*, 26 Ala. 552.

43. In an action by husband and wife, to recover slaves which are alleged to be the separate property of the wife, a complaint in the prescribed form, "for the recovery of chattels in specie," is sufficiently certain and definite, on demurrer, although it does not allege whether the wife's separate estate was created by contract or by statute, or whether the husband ever reduced the property to possession; but no recovery can be had under such a complaint, upon a cause of action which does not authorize the joinder of husband and wife as plaintiffs. *Pickens and Wife v. Oliver*, 29 Ala. 528.

44. In suing for the recovery of slaves belonging to his intestate's estate, an administrator may declare in the prescribed form, with the additional averment that he sues "as administrator," &c. *Crimm's Adm'rs v. Crawford*, 29 Ala. 623; *Wyatt's Adm'r v. Rambo*, 29 Ala. 510.

15. §§ 2240–43, (*Set-Off.*)

45. In an action on a debt due from defendant to plaintiff individually, a debt due to defendant, by open account, from a firm of which plaintiff is a member, is not available as a set-off. *Duramus v. Harrison & Whitman*, 26 Ala. 326.

46. A demand "not sounding in damages merely," is one which, when the facts upon which it is based are established, the law is capable of measuring accurately by a pecuniary standard. *Holley v. Younge*, 27 Ala. 203.

47. If a purchaser, with covenants of warranty, buys in an outstanding vendor's lien, at a price less than the amount of the purchase-money and interest, this demand, if reasonable, is available as a set-off in an action on the note for the purchase-money. *Ib.*

48. The vendor's false representations, that the lands were not subject to overflow, and that the tract embraced other valuable lands outside of its boundaries, constitute a good set-off in such action. *Gibson v. Marquis and Wife*, 29 Ala. 668.

49. A promissory note, of which the defendant is the equitable owner, although he may not have the legal title, is a good set-off. *Hudson & Stokes v. Wier & Tate*, 29 Ala. 294.

16. § 2253, (*Demurrer.*)

50. Under a demurrer to a complaint, on the ground that it does not show a sufficient prosecution for the felony in which the civil action is merged, the objection cannot be raised that the venue is not well laid. *Morton v. Bradley*, 27 Ala. 640.

17. §§ 2290, 2302, (*Competency of Witnesses.*)

51. The transferror, or assignor of

the note sued on, is not a competent witness for the plaintiff. *Hudson & Stokes v. Weir & Tate*, 29 Ala. 294.

52. In an action against a steamboat, to recover damages for injuries to goods caused by a collision with a flat-boat, the owner of the flat-boat, who had charge of her at the time of the collision, is not a competent witness for the plaintiff. *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189.

53. In an action on a promissory note, a surety, who is not sued, is a competent witness for his principal. *Atwood's Adm'r v. Wright*, 29 Ala. 346.

54. As to the competency of one of the proponents of a will, as a witness to sustain it, see *Deslonde & James v. Darrington's Heirs*, 29 Ala. 92.

18. § 2298, (*Entries on Physician's Books.*)

55. Under this statute, the original entries in a physician's books are evidence for him, in an action to recover for medical services, of the items of his account for medicines administered and furnished to his patients in the course of his practice; but the value of the medicines, as well as of the active services rendered, must be otherwise proved. *Richardson v. Dorman's Executrix*, 28 Ala. 679.

19. § 2313, (*Proof of Demand by Plaintiff's Oath.*)

56. If the plaintiff seeks to establish "the correctness of his demand" by his own oath, he cannot be permitted so to shape the facts to which he swears, as to deprive the defendant of the right to prove, by his own oath, that the demand has been paid: he must, therefore, not only state facts which, if proved by other witnesses, would make out a *prima-facie* case of indebtedness on the part of the defendant, but he must also swear to the fact of non-payment; and if he fails to do this, the court may exclude his testimony from the jury. *Jordan v. Owen*, 27 Ala. 152.

20. §§ 2318–28, (*Depositions.*)

57. These provisions of the Code are not applicable in cases which were pending when the Code went into operation. *Broadnax v. Sullivan*, 29 Ala. 320.

As to their construction, see *May's Heirs v. May's Adm'r*, 28 Ala. 141. (*Ante*, p. 132, §§ 39, 40.)

21. §§ 2353–58, (*Bill of Exceptions, and Nonsuit.*)

58. A bill of exceptions, when taken in a cause which was pending when the Code went into operation, although the trial is had since that time, must conform to the provisions of the old law. *Godden v. LeGrand*, 28 Ala. 158.

59. When it becomes necessary for the plaintiff to suffer a nonsuit, on account of any decision of the court during the trial, he must reserve the point by bill of exceptions, even when the ruling is otherwise disclosed by the record. *Palmer v. Bice*, 28 Ala. 430.

60. If the bill was not reduced to writing, and presented to the judge for signature, within the prescribed time, it cannot be established in the supreme court, upon proof that the cause which, involved less than $20, was submttted to the judge for decision, and was held under advisement by him; that the counsel of the party excepting frequently asked the judge whether he had decided it, and was told by him that he had not; that a judgment was afterwards rendered, without notice to the counsel, although they were in daily attendance on the court; and that they had no notice whatever of the judgment, until after the expiration of the time prescribed for signing bills of exception. *Stein v. McArdle & Waters*, 25 Ala. 561.

22. § 2366, (*Judgment by Default Final.*)

61. In an action on a promissory note and an open account for work and labor, judgment by default final cannot be rendered, for the aggregate amount of the sums claimed, without the intervention of a jury, or the execution of a writ of inquiry. *Beville v. Reese*, 25 Ala. 451.

62. Nor is such judgment proper, where the action is founded on unpaid calls for railroad stock. *Connoly v.*

Ala. & Tenn. Rivers Railroad Co., 29 Ala. 373.

23. §§ 2396–2400, (*Security for Costs.*)

63. A proceeding by notice and motion, on the part of a railroad company, against a delinquent stockholder, is a suit within the meaning of section 2398; and security for the costs must be given when the notice is placed in the hands of the sheriff to be served. *Ala. & Tenn. Rivers Railroad Co. v. Harris*, 25 Ala. 232.

64. An action brought by the wife, under section 2136, is within the provisions of section 2396, where the husband is a non-resident. *Ex parte Cole*, 28 Ala. 50.

65. An action commenced by original attachment is also within the provisions of said section. *Ex parte Robbins*, 29 Ala. 71.

66. And this, notwithstanding the attachment bond is conditioned that the plaintiff "shall prosecute his attachment with effect, or, failing therein, pay the defendant all such costs and damages as he may sustain for the wrongful suing out of said attachment." *Shepherd & Gordon v. Spriggs*, 29 Ala. 673.

67. But an action instituted by a non-resident nominal plaintiff, for the use of a resident, is not within the provisions of the statute, although the complaint shows that the action ought to have been brought in the name of the beneficiary. *Ex parte Bush*, 29 Ala. 50.

68. The security must be endorsed on the complaint, or lodged with the clerk, before the issue of the summons. *Ala. & Tenn. Rivers Railroad Co. v. Harris*, 25 Ala. 232; *Ex parte Cole*, 28 Ala. 50.

69. In a suit commenced by an original attachment, if the plaintiff wishes to sue out his attachment before some other officer than the clerk of the court to which it is returnable, he may annex his complaint to the attachment, and procure security for the costs to be endorsed on the complaint before the issue of the writ. *Ex parte Robbins*, 29 Ala. 71.

70. A motion to dismiss, on account of the failure to give security for the costs, may be made at any time before a plea is filed, or judgment rendered. *Ib.*

71. If the court improperly refuses to dismiss the suit on motion, *mandamus* lies to compel its dismissal, when no final judgment has been rendered in the cause. *Ex parte Cole*, 28 Ala. 50; *Ex parte Robbins*, 29 Ala. 71.

72. After the rendition of final judgment, the error is available on appeal; and the cause will be remanded, with instructions to the primary court to dismiss it. *Steamboat Empire v. Ala. Coal Mining Co.*, 29 Ala. 698.

73. Although the statute gives a summary judgment against the surety for the costs, only in the event of the plaintiff being unsuccessful in the suit; yet he is liable for them, equally with the plaintiff, if they cannot be collected when adjudged against the defendant. *Shepherd & Gordon v. Spriggs*, 29 Ala. 673.

24. §§ 2401–05, (*Amendments.*)

74. A judment may be amended, *nunc pro tunc*, after the lapse of twelve years, when the record shows sufficient evidence to authorize it. *Sartor v. Branch Bank at Montgomery*, 29 Ala. 353.

75. Section 2403 does not apply to suits which were pending when the Code went into operation. *Crump v. Wallace*, 27 Ala. 277.

76. An amendment of the complaint, which would convert an action of detinue into an action of trover, cannot be allowed. *Harris v. Hillman*, 26 Ala. 380.

77. In an action by a partnership, on an open account for goods sold and delivered, if the evidence shows that a party not joined was a partner at the time the account was contracted, the complaint may be amended by adding his name. *Godbold v. Blair & Co.*, 27 Ala. 592.

78. When the summons is in the name of the plaintiff individually, the complaint may be so amended as to authorize a recovery by him as administrator. *Crimm's Adm'rs v. Crawford*, 29 Ala. 623.

79. In trover by the assignor, for the use of his assignee, if the evidence shows that the conversion took place after the assignment, the complaint

cannot be so amended as to authorize a recovery. *Stodder v. Grant & Nickels*, 27 Ala. 416.

80. The name of a sole plaintiff cannot be struck out, and that of another person be substituted. *Leaird v. Moore*, 27 Ala. 326; *Friend v. Oliver*, 27 Ala. 532.

81. If, however, the defendant pleads to the amended complaint, without objecting to the leave to amend, or to the amendment itself, he cannot revise on error the action of the court in allowing it. *Bryan v. Wilson*, 27 Ala. 280.

82. If he suffers judgment by *nil dicit*, without objecting to the amendment, he cannot revise on error the action of the court in allowing it. *Stewart v. Goode & Ulrick*, 29 Ala. 476.

83. An amendment of the complaint after issue joined, but before the cause has been submitted to the jury, is discretionary with the primary court. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

84. An amendment of the complaint, by the addition of another count, is allowable, even after the jury has been instructed. *Prater v. Miller*, 25 Ala. 320.

85. In giving a charge to the jury at the request of the defendant, the court may suggest that, if the plaintiff desires it, the complaint may be so amended as to obviate the effect of the charge. *Crimm's Adm'rs v. Crawford*, 29 Ala. 623.

86. After judgment by *nil dicit*, where the complaint shows a substantial cause of action, advantage cannot be taken on error of defects to which no objection was taken in the primary court, although they might have been available on demurrer. *Stewart v. Goode & Ulrick*, 29 Ala. 476.

87. The fact that one of the notes on which the suit is founded was not due when the action was commenced, is such a defect. *Blount v. McNeill*, 29 Ala. 473.

25. §§ 2407–17, (*Rehearing.*)

88. A petition for rehearing, under this statute, on the ground of "surprise, accident, mistake, or fraud," is a new action, on the trial of which it is only necessary for the petitioner to prove the truth of the facts which constitute the alleged surprise, accident, mistake, or fraud: where the pleas filed to the original action are legally sufficient, he is not required to prove that they are true, or that the defense therein set up ought to prevail. *Pratt & McKenzie v. Keils & Sylvester*, 28 Ala. 390.

89. If the trial of the petition results adversely to the petitioner, he cannot have a rehearing of the original cause; but, if the trial results in his favor, the proper judgment is, that the original judgment be vacated, that the execution issued under it be quashed, that a rehearing of the original action be granted, that the petitioner be let in to make his defense to that action, and that he recover of the plaintiff the costs which have accrued on the petition for rehearing. *Ib.*

26. § 2418, (*Revival of Judgment.*)

90. A judgment rendered by a justice of the peace before the adoption of the Code, upon which an execution was issued within a year, and was returned "no property found," is not presumed satisfied after the lapse of more than ten years without the issue of another execution, and may be revived by *sci. fa.* on proof of these facts. *Shelley v. Graves*, 29 Ala. 385.

27. § 2456, (*Lien of Execution.*)

91. This statute applies to judgments rendered before the Code went into operation. *Daily v. Burke*, 28 Ala. 328.

28. § 2462, (*Exemption Law.*)

92. A stallion may be exempt from levy and sale under execution, if one of the purposes for which he is kept is the use of the debtor's family in the performance of the ordinary services of a work-horse, although he is sometimes used for other purposes. *Allman v. Gann*, 29 Ala. 240.

29. §§ 2471–73, 2520–22, (*Garnishments on Judgments.*)

93. A garnishment may be sued out against an executor or administrator,

as the debtor of a legatee or distributee, before the lapse of six months from the grant of letters; but no judgment can be rendered against him, as such, until the estate is finally settled. *Moore & Lyons v. Stainton*, 22 Ala. 831.

94. When the process is sued out by a judgment creditor, the affidavit should be made by the real owner of the judgment, and not by the plaintiff of record; but the process must be sued out, and the judgment on the answer taken, in the name of the plaintiff of record. *Jackson v. Shipman*, 28 Ala. 488.

95. The garnishee cannot raise any question as to the ownership of the original judgment; and conceding that he may set up satisfaction of the original judgment, yet his mere statement, "that he is advised and believes" that the judgment has been satisfied, is not an averment of satisfaction. *Ib.*

96. It is erroneous to render judgment against the garnishee, without proof of the original judgment; but, where the record shows that he appeared in court, and "waived the objection that no judgment could be rendered because no execution could issue on the judgment," this is an admission of the original judgment, and dispenses with further proof of it. *Ib.*

30. § 2490, (*Statute of Limitations.*)

97. This statute applies only to partial payments and subsequent promises made since the Code went into effect, and not to verbal promises made prior to that time. *Jordan's Adm'r v. Hubbard and Wife*, 26 Ala. 433.

31. §§ 2517–73, (*Attachment and Garnishment.*)

98. Process of garnishment may be sued out against an executor or administrator, as the debtor of a legatee or distributee, before the lapse of six months from the grant of letters; but no judgment can be rendered against him, as garnishee, until the final settlement of the estate. *Moore & Lyons v. Stainton*, 22 Ala. 831.

99. A garnishment does not lie against a public municipal corporation, to subject the salary of one of its police officers. *Mayor of Mobile v. Rowland & Co.*, 26 Ala. 498.

100. A debt due by judgment may be reached by a garnishment issuing out of the same court. *Skipper v. Foster*, 29 Ala. 330.

101. The garnishee must answer as to his indebtedness, not only at the time of the service, but also at the time of making his answer, and whether he will not be indebted in future by an existing contract. *Central Plank-Road Co. v. Sammons & Dotes*, 27 Ala. 380.

102. Although the garnishee may answer in writing, yet the plaintiff has a right to require an oral answer in the presence of the court; and when the record shows that, after the garnishee had filed a written answer, he was again examined, orally, in open court; and that this oral answer was, by order of the court, reduced to writing and filed, the written and oral answers together constitute but one answer. *Easton v. Lowery*, 29 Ala. 454.

103. When the judgment purports to be founded on the answer of the garnishee "now on file," and the record does not show that the plaintiff required an oral answer, the appellate court will presume, that the written answer set out in the record, though not marked filed, is the answer referred to in the judgment. *Lewis v. Dubose & Co.*, 29 Ala. 219.

104. A judgment by default against the defendant, in a suit commenced by attachment, cannot be entered on the first day of the term to which the writ is returnable. *Letondal v. Huguenin*, 26 Ala. 552.

32. §§ 2595, 2833, (*Trial of Right of Property.*)

105. When mortgaged property is taken under execution, issuing from either a court of record or a justice's court, the mortgagee or his assignee may interpose a claim, and try the right of property, before the law-day of the mortgage. *Floyd v. Morrow*, 26 Ala. 353.

33. §§ 2596–97, 2616–21, 2645, (*Summary Judgments.*)

106. When a judgment is rendered

against the three sureties on a guardian's bond after the death of their principal, and paid by one of them, he is entitled to a summary judgment against one of the others, for one half of the amount paid, when the third surety is insolvent. *Waller v. Campbell*, 25 Ala. 544.

107. A summary proceeding against a circuit clerk and his sureties, for his failure to pay over to the county treasurer, on demand, all fines, forfeitures, or other moneys belonging to the county, is joint only, as to the parties who have received notice of the motion, and is governed by the rules applicable to joint actions. *Armstrong v. Holley*, 29 Ala. 305.

108. A confession of judgment by the clerk does not authorize the rendition of a judgment against either himself or the other parties. *Ib.*

34. §§ 2850–52, (*Entry and Detainer, Forcible and Unlawful.*)

109. An action for unlawful detainer does not lie against one who, in 1850, took possession of premises which were abandoned in 1829 by the tenant to whom they had previously been leased. *Russell v. Desplous*, 29 Ala. 308.

35. §§ 3016–41, (*Appeals.*)

110. Section 3016 applies equally to all judgments, whether rendered before or since the adoption of the Code. *Mazange v. Slocum & Henderson*, 23 Ala. 688.

111. When the appellant is an infant, the appeal must be sued out by his guardian or next friend, who may either give bond to supersede the judgment, or security for the costs of the appeal. *Cook v. Adams*, 27 Ala. 294.

112. When the appellees are infants, who sued by their next friend, the appeal bond should be made payable to them, and not to their next friend. *Cooper v. Maclin's Heirs*, 25 Ala. 298.

113. The validity of an appeal is not affected by the appellant's failure to apply for a citation: the appellee may avoid delay by appearing. *Ib.*

114. One surety to an appeal bond is sufficient. *Ib.*

115. When the names of the sureties for the costs are shown by the record, it is not necessary that they should also be mentioned in the clerk's certificate. *Hall and Wife v. Wallace*, 25 Ala. 438.

116. An acknowledgment of liability "for the costs of an appeal by all the plaintiffs except R." is sufficient. *Crump v. Wallace*, 27 Ala. 277.

117. But an obligation, binding the surety to pay the costs "if the judgment is affirmed," is not sufficient. *Hinson v. Preslor*, 27 Ala. 643.

118. If neither bond nor security for the costs is given, the cause will be struck from the docket, on motion, although the clerk certifies that "no bond was given because all costs have been paid." *King & Owen v. McCann*, 25 Ala. 471.

119. If the bond misdescribes the judgment, the appeal will be dismissed, on motion. *Dumas v. Hunter*, 28 Ala. 688.

120. There is no limitation to an appeal from a judgment of the circuit court, which was rendered less than three years before the Code was adopted and went into operation. (*Per* STONE, J., sitting alone.) *Green v. Maclin*, 29 Ala. 695.

36. §§ 3042–47, (*Sheriff's Fees.*)

121. A sheriff is not entitled to a fee "for levying *fi. fa.* and making money thereon," and to another fee, under the same execution, "for levying *fi. fa.* when sale is stayed, after levy, by a restraining order." Where the restraining order stays the sale of only a portion of the property levied on, and leaves the sheriff free to sell the other portion, and to levy on and sell any other property found in his county, he is not entitled to a fee of "one per cent. on the amount of the judgment;" and if, after levy, a sale of a portion of the property is prevented by injunction, he is not entitled to any fee or commission from the plaintiff in the injunction suit. *Mastin v. Cullom & Co.*, 28 Ala. 670.

COLLATERAL SECURITY.

See BAILMENTS, II.

COMMISSION MERCHANTS.

See BAILMENTS, IV.

COMMON CARRIERS.

See BAILMENT, III.

COMMON LAW.

1. The common law of England, as changed and modified by our statutes, is part and parcel of the law of this State, so far as applicable to our institutions and government. *Barlow v. Lambert*, 28 Ala. 704.

2. English statutes, enacted before the immigration of our ancestors to America, so far as they are applicable to our situation, and not inconsistent with our institutions and government, constitute a part of our common law. *Carter and Wife v. Balfour's Adm'r*, 19 Ala. 814.

3. The doctrine of the common law, in relation to damage feasant by cattle, has never been adopted in this State. *Nashville & Chattanooga Railroad Co. v. Peacock*, 25 Ala. 229.

4. It is at least very questionable, whether slavery, as it exists among us, was not at one period recognized in England by the common law; but however this may be, the rules of the common law, the expensive nature of which adapts it to the necessities and exigencies of society, are applicable to slave property, in the absence of statutory and constitutional provisions. *Atwood's Heirs v. Beck*, 21 Ala. 590.

5. The courts of this State will presume that the common law is in force in a sister State, except so far as it is shown to have been modified or repealed by statute. *Reese v. Harris*, 27 Ala. 301; *Foster v. Glazener*, 27 Ala. 391; *Ellis v. White*, 25 Ala. 540; *Hinson v. Wall*, 20 Ala. 298.

COMPTROLLER.

1. The tenure of office of the comptroller of public accounts, as fixed by the constitution, is one year; which constitutional provision is still of force, inasmuch as the amendment proposed by the general assembly of 1844–5 was not properly ratified at the next session. *Collier v. Frierson*, 24 Ala. 100.

2. The comptroller has no authority to receive from a tax-collector payment of moneys due to the State; consequently, a payment to him does not discharge the party making it from responsibility to the State. *Walker v. Chapman*, 22 Ala. 116; *Van Dyke v. The State*, 24 Ala. 81.

3. Such a payment can only be ratified by the sovereign power of the State: no agent or officer of the State can ratify it. *Ib.*

CONFLICT OF LAWS.

I. ADMINISTRATION.
II. BANKRUPTCY, AND INSOLVENCY.
III. CONTRACTS.
IV. JUDGMENTS, AND DECREES.
V. LIMITATION OF ACTIONS.
VI. MARRIAGE, AND DIVORCE.
VII. WILLS, AND DEEDS.

I. ADMINISTRATION.

1. The orphans' court here has no jurisdiction of personal property which, at the time of the testator's death, was at his domicile in another State, and which was afterwards removed by the executor to this State. *Varner v. Bevil*, 17 Ala. 286.

2. Nor has it jurisdiction of slaves brought into this State by a foreign executor, to whom a life estate in them was bequeathed in another State, and who there qualified and took possession of them. *Ramey v. Green*, 18 Ala. 771.

3. If property belonging to the estate of an intestate, who neither resided nor had property here at the time of his death, is afterwards brought into any county of this State, the orphans' court of that county may grant administration on it. *Miller v. Jones' Adm'r*, 26 Ala. 247.

4. The fact that there is property

belonging to the estate in the county, and not the allegation of that fact in the petition, gives the court jurisdiction. *Ib.*

5. The grant of letters testamentary or of administration, though conclusive where the court had power to act, may be assailed collaterally for want of jurisdiction. *Ib.*

6. Where joint debtors of an estate reside in different jurisdictions, an administrator in either may settle and release the demand as against all. *Beattie v. Abercrombie*, 18 Ala. 9.

7. A probate court in this State can confer no authority on an administrator or guardian, to receive the rent of lands lying in another State. *Smith's Executors v. Wiley*, 22 Ala. 396.

8. Where a foreign administration, rightfully granted, is still pending, the chancery court here may entertain a bill *quia timet*, to prevent the destruction of the assets which have been brought within its jurisdiction; but, in such case, it will not proceed, at the instance of the distributees, to a final settlement of the administration, but will remit them for that purpose to the foreign forum. *Worthy v. Lyon*, 18 Ala. 784.

II. BANKRUPTCY, AND INSOLVENCY.

9. The State courts have jurisdiction of a bill, filed by a judgment creditor of a bankrupt, to separate and condemn the bankrupt's equitable interest in certain trust property, which was never surrendered in his schedule, nor claimed by the assignee in bankruptcy; and, in such case, will apply the construction placed on the bankrupt act by the Federal courts. *Rugely & Harrison v. Robinson*, 19 Ala. 404.

10. A plea by an administrator, to an action at law in the Federal courts, setting up a decree of insolvency rendered by a State court, is no bar to the rendition of judgment; but, if the estate of the intestate is actually insolvent, the judgment will be enjoined by a Federal chancery court, and the creditor compelled to come in and take his place with the other creditors of the estate. *Byrne v. McDow*, 23 Ala. 404.

11. A decree of insolvency, rendered by a State court, does not preclude a creditor, even in the Federal chancery courts, from showing that the estate is actually solvent. *Ib.*

12. In an action at law against an administrator in the Federal courts, judgment being rendered against him, notwithstanding a plea of the insolvency of his intestate's estate, and execution thereon being returned "no property found;" and an action of debt on the judgment being then instituted, as for a *devastavit*, and this action enjoined by bill in equity in a State court,—if the proof shows that the estate is really solvent, the bill will be dismissed, and the creditor allowed to pursue his remedy. *Ib.*

III. CONTRACTS.

13. The construction, interpretation, and validity of a contract are governed by the law of the place where it was made. *Peake v. Yeldell*, 17 Ala. 636; *Jones v. Jones*, 18 Ala. 248; *Thomas v. Degraffenreid*, 17 Ala. 609.

14. The remedy for its breach is governed by the law of the forum in which it is sought to be enforced. *Jones v. Jones*, 18 Ala. 248.

15. A promissory note, or bond for the payment of money, executed in this State, and not made payable elsewhere, bears Alabama interest; and parol evidence is not admissible to show that it was to be paid elsewhere. *Moore & Jones v. Davidson*, 18 Ala. 209.

16. Sureties, endorsers, and guarantors are liable according to the law of the place of their contract. *Walker v. Forbes*, 25 Ala. 139.

IV. JUDGMENTS, AND DECREES.

17. As the sentences of foreign courts do not operate, except as evidence, beyond the limits of their jurisdiction, the probate of a will in Cuba confers no authority to sue in this State for the recovery of a legacy. *Moore v. Lewis*, 21 Ala. 580.

18. Where proceedings are instituted for the recovery of fugitive slaves, under the act of congress of 1793, and the certificate of the justices obtained in favor of the claimant, the proceedings only affect those who are arrested and brought before the jus-

tices; and although the certificate declares, that other persons, children of a woman who was arrested and remanded, are also slaves, and owe service to the claimant, yet, as to them, the sentence is a nullity. *Fields v. Walker*, 23 Ala. 155.

19. It is a well-settled principle of international law, that every attempt by legislation, on the part of one nation, to grant jurisdiction to its courts over persons or property not within its jurisdiction, is elsewhere regarded as mere usurpation; and all judicial proceedings, in virtue of it, are held utterly void for every purpose. *Foster v. Glazener*, 27 Ala. 391.

20. Any foreign statute or rule of court, authorizing proceedings against a defendant upon publication only, without notice, being in contravention of the principles of the common law, must be affirmatively shown by the record, or the proceedings will be held void for want of jurisdiction. *Ib.*

21. A summary judgment, rendered in Georgia under the statute giving the superior court "power and authority to establish copies of lost papers," &c., "under such rules and precautions as are or may be customary and according to law and equity,"—held void for want of jurisdiction of the person, because the record did not show the statute authorizing the court to proceed without notice. *Ib.*

22. As a general rule, where a party claims a right based upon a foreign statute, he is required to prove the statute as a fact, and to set it out in pleading, in order that the court may see that the right claimed is in conformity with it; but, in pleading the judgment of a sister State, to which the constitution requires "full faith and credit" to be given, it is not necessary to set out affirmatively the facts upon which the authority of the court depended. *Gunn v. Howell*, 27 Ala. 663.

23. A transcript from the records of a foreign court, whether of general or special jurisdiction, if properly authenticated, is admissible evidence here; and our courts are bound to presume, until the contrary appears, that the foreign court had jurisdiction of the subject-matter. *Slaughter v. Cunningham*, 24 Ala. 260.

As to the validity of foreign decrees of divorce, *vide infra*, 30–40.

V. Limitation of Actions.

24. The statute of limitations of another State, in which the contract was made, although a complete bar to a suit there instituted, is not an available defense to an action in this State. *Jones v. Jones*, 18 Ala. 248. (Overruling *Goodman v. Monk*, 8 Porter, 94.)

25. When personal property, to which a lien has attached by the delivery of an execution to the sheriff, is removed to another State, where it is acquired and held by a *bona-fide* purchaser until the statute of limitations of that State has barred its recovery, and is then brought back by him to this State, his title is perfect against the judgment creditor, although executions have been regularly issued from term to term. *Newcombe v. Leavitt*, 22 Ala. 631.

26. It is not a good replication to a plea of the statute of limitations of another State, in an action of detinue, that the property was converted in this State, and carried into another, where it was purchased by defendant and brought back again; and that it has not been in this State more than four years since the conversion. *Thomason v. Odum*, 23 Ala. 480.

27. But to make out a bar under the statute of limitations of this State, when the cause of action accrued here, the defendant and those through whom he claims must have resided here during the entire period prescribed by the statute. *Bohannon v. Chapman*, 17 Ala. 696.

VI. Marriage, and Divorce.

28. The laws of the State in which a marriage is celebrated govern the rights of the respective parties to the property of each other, and their subsequent removal to another State only affects after-acquired property. *Doss v. Campbell*, 19 Ala. 590.

29. Therefore, where a marriage was celebrated in Texas, where the husband acquires by marriage no interest in the wife's property, the subsequent removal of the parties to this State, with their property, does not

subject the wife's property to the husband's debts. *Ib.*

30. A decree of divorce, regularly rendered by the proper tribunal, in this State, in favor of a party here domiciled, is not invalid because the laws of the State in which the marriage was solemnized do not allow a divorce *a vinculo*. *Harrison v. Harrison*, 19 Ala. 499.

31. The English doctrine, that the dissolubility of the marriage contract depends upon the law of the country in which it was solemnized, is founded on the doctrine of perpetual allegiance; is, therefore, inconsistent with the spirit of our institutions, and is here repudiated. *Thompson v. The State*, 28 Ala. 12.

32. A decree of divorce against a non-resident defendant, upon whom service has been duly perfected by publication, is equally as obligatory as if he had been personally served with process, or had appeared and answered. *Harrison v. Harrison*, 19 Ala. 499; *Thompson v. The State*, 28 Ala. 12.

33. Such decree will not be held void for fraud, when collaterally attacked, because the bill omitted to state a fact which, if stated, would have been a bar to the relief sought; nor because of a misnomer in the insertion of a letter as the initial of a middle name, when the description appears otherwise sufficiently accurate, and it is not averred that the party was not known or called by that name. *Harrison v. Harrison*, 19 Ala. 499.

34. Under the statute of Arkansas, as shown in evidence in this case, the fact that the cause of divorce occurred elsewhere, and was not continued or completed there, would not render void a decree there obtained by the husband after a residence of one year, although the wife continued to reside at their former domicile. *Thompson v. The State*, 28 Ala. 12.

35. But a decree there obtained by a person domiciled in Alabama, would be void, if procured by fraud; or, if the party did not go thither *animo manendi*; or, if he went merely for the purpose of obtaining a divorce, and with the intention of remaining no longer than was necessary to accomplish that purpose. *Ib.*

36. The jurisdiction of the courts of this State, to grant a divorce to a party here domiciled, is not dependent on the place where the alleged ground of divorce occurred. *Hanberry v. Hanberry*, 29 Ala. 719.

37. Although, as a general rule, the domicile of the husband determines that of the wife; yet the wife is allowed, for the purpose of obtaining a divorce, to acquire a domicile in the State in which she is actually living at the time she is deserted by the husband; even where the desertion consists in his refusal to allow her to return, after having left his abode in another State. *Ib.*

38. No other State has jurisdiction to annul, or materially to impair, the marriage relation between citizens of this State; and having no jurisdiction of the subject-matter, consent of parties cannot confer it. *Harrison & Saunders v. Harrison*, 20 Ala. 629.

39. A marriage was solemnized in South Carolina, where the parties were domiciled. The cruelty of the husband compelled the wife to abandon him, and to return to her friends; but, by promises of amendment, he persuaded her to return. These promises he violated, and, after removing with her to this State, again compelled her to seek the protection of her relatives in South Carolina; and she there filed a bill against him, to compel him to make provision for her and her infant child, and to enjoin him from molesting her. *Held*, that the decree, in accordance with the prayer of the bill, did not annul or materially impair the marriage relation, but only enforced its duties and obligations; that the subsequent ill-treatment by the husband remitted the wife to her original remedy against him, which was not affected by the removal of the parties to this State; that the wife's actual residence in South Carolina entitled her to the legal remedies there afforded for her personal security, and to the provision usually made there for maintenance in such cases, provided the court could acquire jurisdiction over the husband; and that the husband, by answering the bill, without objecting to the jurisdiction of the court, waived the benefit of the objection. *Ib.*

40. Such a decree for maintenance, however, cannot be here enforced against the husband, after he has obtained a valid divorce in this State, except for the amount due upon it at the time the divorce became effectual; but, as to this amount, the decree of divorce is no estoppel, although the main allegations of the bills in the two cases are conflicting. *Ib.*

VII. Wills, and Deeds.

41. The testamentary disposition of real property being governed by the law of the place where it is situated, and that of personal property by the law of the testator's domicile, the validity of a will, as respects the capacity of the testator, and the formalities necessary to give it effect, must be tested by the laws of these respective jurisdictions. *Varner v. Bevil*, 17 Ala. 286.

42. The validity of every transfer of personal property, whether *inter vivos* or *post mortem*, must be determined by the law of the grantor's or testator's domicile, unless there is some positive or customary law of the country where the property is situated, providing for special cases, or where the nature of the property gives it a necessarily implied locality. *Turner v. Fenner*, 19 Ala. 355.

43. The South Carolina statute of 1841, prohibiting the manumission of slaves by deed or will, cannot affect the rights of a legatee, who there received possession of the slaves bequeathed to him, from the executor, and brought them to this State, prior to the passage of the statute. *Hunter v. Green*, 22 Ala. 329.

CONSTABLE.

1. A justice of the peace has authority, in cases of emergency, to appoint a special constable; and he must himself judge whether the emergency exists. *Noles v. The State*, 24 Ala. 672.

2. A constable may levy an attachment, when issued by, and returnable before a justice of the peace. *Langdon v. Raiford*, 20 Ala. 532.

3. When he has levied an execution, while in force, on personal property, he may sell after the return day of the writ; and his receipt of the money, in such case, and failure to pay it over according to law, render his sureties liable. *Dennis & Strickland v. Chapman*, 19 Ala. 29.

4. The admissions of the constable are not evidence against his sureties, unless made in the performance of some official act or duty connected with the transaction out of which the breach of his bond is alleged to have arisen. *Ib.*

5. In a summary proceeding, before a justice of the peace, against a constable and sureties, for his failure to return an execution, a statement, or declaration, is not necessary. *Henderson v. Plumb & Robbins*, 18 Ala. 74.

6. If the plaintiff's demand, in such case, is over fifty dollars, he may remit the excess, and thus bring the case within the jurisdiction of the justice. *Ib.*

7. In an action against a justice of the peace and his sureties, for his failure to pay over money collected under execution, the constable by whom it was collected is not, without a release, a competent witness to prove that he paid it over to the justice. *McGrew & Beck v. Governor*, 19 Ala. 89.

8. If a constable attempts to execute a warrant, which shows on its face that it was issued without authority, he may be treated as a trespasser. *Noles v. The State*, 24 Ala. 672.

CONSTITUTIONAL LAW.

See, also, same title in PART I, p. 32.

I. ALIENS.

1. Since congress has exercised its constitutional power of establishing a uniform rule of naturalization, no State can enact a law by which aliens may be naturalized; yet each State has the right to regulate by law the descent and succession of property, and, consequently, may permit an alien to inherit it. *Etheridge v. Doe d. Malempre*, 18 Ala. 565.

2. The act of January 16, 1844, for the relief of Francis Malempre, (Session Acts 1843–4, p. 56,) is an unconditional grant to him of all the lands of which Christopher Vanner died seized and possessed, and is not unconstitutional. *Ib.*

II. AMENDMENT OF CONSTITUTION.

3. The State constitution can only be changed by the people in convention, or in the mode prescribed by the constitution itself; and if the latter mode is adopted, every requisition must be observed. *Collier v. Frierson*, 24 Ala. 100.

4. The general assembly of 1844–5 having proposed several amendments, joint resolutions were adopted at the next ensuing session, reciting in the preamble that, "whereas the general assembly of this State, at the last session of the same, duly submitted to the people of the State proposed amendments to the constitution; and whereas the people of this State, in manner and form as provided by the constitution, have accepted the said amendments, which are in words and figures following," &c., setting them all out except one; and then adding the usual enacting clause, "that the aforesaid amendments to the constitution, proposed as aforesaid, and accepted by the people as aforesaid, be ratified," &c. *Held*, that the omitted amendment was not constitutionally ratified, and therefore failed.

5. In consequence of the failure to ratify this amendment, which proposed biennial instead of annual elections of the State treasurer and comptroller of public accounts, those officers hold their respective offices for the term of one year only. *Ib.*

III. COMMERCE, AND TAXATION.

6. The power of congress to regulate commerce between the several States, necessarily includes the power to regulate navigation, and, where the navigation extends into the interior, is not arrested by the intervention of State boundaries; but the grant of this power to congress does not operate as an absolute prohibition on the States to legislate on the subject. *Commissioners of Pilotage v. Steamboats Cuba, &c.*, 28 Ala. 185.

7. The act of February 15, 1854, (Session Acts 1853–4, p. 50,) "to provide for the registration of the names of steamboat owners," is not a regulation of commerce, within the constitutional grant of that power to Congress; nor does it conflict with the laws of the United States regulating the coasting trade. *Ib.*

8. Nor are the requisitions of this statute violative of the ordinance of 1819, by which Alabama accepted the conditions of the act of congress admitting her into the Union. *Ib.*

9. The only legitimate object of taxation, is the support and maintenance of the government; but this does not mean only the expenses incurred by the mere machinery necessarily employed in its conduct and administration: on the contrary, the power extends to the employment of all those means and appliances, which are ordinarily adapted, or which may be calculated, to develop the resources of the State, and add to the aggregate wealth and prosperity of her citizens; such, *e. g.*, as providing outlets for commerce, opening up channels of intercommunication between different portions of the State, improving the condition of her people, social, moral, and physical, by wholesome police regulations, and by a judicious system of public instruction, as also for the protection, security, and perpetuity of her institutions and government. *Stein v. Mayor of Mobile*, 24 Ala. 591.

10. The power to levy a tax, for local purposes, may be delegated by the legislature to a municipal corporation; and it is no objection to the act delegating such power, that it requires the assent of three-fifths of the tax-

payers to be obtained before the tax is levied. *Ib.*

11. The fact that the railroad, to aid in the construction of which the tax is levied, extends beyond the limits of the city, or even of the State, does not render it less local, nor in any way affect the validity of either the statute or the tax. *Ib.*

12. The acts of 1850 and 1851, authorizing the corporate authorities of the city of Mobile to levy, with the concurrence of three-fifths of the taxpayers, a tax on the owners of real estate within the limits of the city, to aid in the construction of the Mobile and Ohio Railroad, are not unconstitutional. *Ib.*

IV. EMINENT DOMAIN.

13. A legislative grant to an incorporated company, conferring on them "the exclusive right and privilege of conducting and bringing water for the supply of the city for the term of forty years," gives them no right to divert the water of a running stream, to the injury of riparian proprietors, without making compensation. *Stein v. Burden*, 24 Ala. 130; *Stein v. Ashby*, 24 Ala. 521.

14. The right of eminent domain, in the assumption and appropriation of private property for public uses, is recognized and admitted; and supplying a city with water is admitted to be a public use, within the meaning of the constitution. *Burden v. Stein*, 27 Ala. 104.

15. But this right can only be exercised, upon making just compensation to the owner; nor does it, in connection with the several acts of the legislature relating to the city water-works of Mobile, confer upon the lessee of said water-works the right to deprive other riparian proprietors of their right to the water of Bayou Chataque, without pursuing the course pointed out in the statutes. *Ib.*

V. EXECUTIVE DEPARTMENT.

16. The governor alone has power to remit fines and forfeitures; consequently, an act of the legislature which, directly or indirectly, attempts to remit a fine, either before or after it has been paid, is unconstitutional. *Haley v. Clarke*, 26 Ala. 439.

17. The act of February 2d, 1850, (Session Acts 1849–50, p. 452,) entitled "an act for the relief of the securities of John Douglass, late clerk of the circuit court of Marion county," is obnoxious to this objection. *Ib.*

18. The governor cannot, by directing the institution of a suit against the comptroller of public accounts, to recover moneys paid to him without authority by a tax-collector, thereby ratify the payment, and discharge the tax-collector from further liability. *Walker v. Chapman*, 22 Ala. 116; *Van-Dyke v. The State*, 24 Ala. 81.

VI. JUDICIAL DEPARTMENT.

19. The acts of 1843 and 1846, (Clay's Digest, 350, § 33; Session Acts 1845–6, p. 16,) conferring upon registrars in chancery the power to appoint trustees in certain cases, are not obnoxious to the constitutional objection, that they vest *quasi* judicial power in officers who are not elected, commissioned and qualified as judges are required to be. *Gaines v. Harvin*, 19 Ala. 491.

20. The 33d section of the judiciary act of 1789, which empowers justices of the peace, and other officers therein named, to arrest and commit, or bail, as the case may require, persons charged with a violation of the criminal law of the United States, is not unconstitutional. The authority thus conferred on justices of the peace, is not "judicial power," within the meaning of the third article of the Federal constitution; nor does the exercise of it make them Federal officers, within the second section of the second article. *Ex parte Gist*, 26 Ala. 156.

21. The jurisdiction of a justice of the peace, in civil cases, being limited to fifty dollars, when suit is instituted before him on a promissory note which, with the legal interest thereon accruing up to the rendition of the judgment, exceeds fifty dollars, he cannot render judgment for fifty dollars or less, unless the plaintiff enters a credit for the excess, or otherwise releases it, at or before the rendition of judgment. *Crabtree v. Cliatt*, 22 Ala. 181.

22. But the plaintiff, by releasing a portion of his demand, may bring it within the jurisdiction of the justice. *Rose v. Thompson*, 17 Ala. 629; *Henderson v. Plumb & Robbins*, 18 Ala. 74; *Crabtree v. Cliatt*, 22 Ala. 181.

23. In appeal cases, the defendant, by failing to plead in abatement to the jurisdiction of the justice, waives all objections to the manner in which he is brought into court, although the case involves more than fifty dollars; and the circuit court, by virtue of its general jurisdiction, may render judgment for the amount due. *Vaughan v. Robinson*, 20 Ala. 229.

24. The circuit court has jurisdiction of a summary proceeding against a sheriff and his sureties, for a failure to return an execution to the supreme court, although the amount of the judgment may be less than fifty dollars. *Huggins v. Ball*, 19 Ala. 587.

25. In an action on a contract, commenced in the circuit court, if the complaint shows a cause of action for only a nominal sum, it is not sufficient to sustain the jurisdiction. *Cahuzac & Co. v. Samini*, 29 Ala. 288.

26. If the plaintiff recovers a verdict for less than fifty dollars, in an action commenced in the circuit court, he may have judgment for the amount of the verdict, with costs, on making the affidavit required by the statute. *Kirkley v. Segar*, 20 Ala. 226.

27. An inferior court, within the meaning of the first section of the fifth article of the constitution, is a court whose judgments or decrees can be reviewed on error or appeal by a higher tribunal, whether that tribunal be the circuit, or the supreme court. *Nugent v. The State*, 18 Ala. 521.

28. The judgments of the city court of Mobile being subject to the revision of the supreme court in like manner with those of the circuit courts, the act creating it is not unconstitutional. *Ib.*

29. Under the statute defining the jurisdiction of the city court of Mobile, (Session Acts 1851–2, p. 75,) construed in connection with the constitutional powers of the circuit judges, the judge of that court has power to grant writs of injunction, to be operative in Mobile county. *Ex parte Greene and Graham*, 29 Ala. 52.

30. The supreme court will take original jurisdiction of an application by a member of the house of representatives, for a *mandamus* against the speaker of the house, to compel him to certify to the comptroller of public accounts the amount to which the petitioner, as a member of said house, is entitled for mileage or *per-diem* compensation. *Ex parte Pickett*, 24 Ala. 91.

31. As to the constitutional power of the supreme court, to award a prohibition to an inferior court, see *Ex parte Smith*, 23 Ala. 94; *Ex parte Walker*, 25 Ala. 81; *Ex parte Greene and Graham*, 29 Ala. 52; *Ex parte Russell*, 29 Ala. 717; *Ex parte City Council of Montgomery*, 24 Ala. 98.

32. The appellate jurisdiction of the supreme court, in the revision of final judgments and decrees of the inferior courts, is derived from the constitution, and is not restricted by the statutory provisions regulating appeals, which merely prescribe the means by which each particular case may be brought under the pre-existing jurisdiction of the court. (*Per* WALKER and STONE, JJ.; while RICE, C. J., held that, however full and complete might be the appellate jurisdiction conferred by the constitution, the public policy of the State required that that jurisdiction should not be exercised in favor of a party who did not comply with the statutory requisitions. *Thompson v. Lea*, 28 Ala. 453.

33. The act of February 14, 1856, (Session Acts 1855–6, p. 3,) "for the further security and protection of the State in railroad loans," is not obnoxious to the constitutional objection, that it requires any railroad company applying for a loan, or for the extension of a loan, to consent to the exercise of judicial power by the legislature. *Mobile & Ohio Railroad Co. v. The State*, 29 Ala. 573.

34. Whether the legislature may, by statute, declare a forfeiture of the charter of an incorporated company, without any judicial proceeding, was made a question in this case; but the court waived the consideration of the question as unnecessary, and only cited the authorities. *Ib.*

VII. LEGISLATIVE DEPARTMENT.

35. Where the general assembly, by a joint resolution of the two houses during its regular session, adjourned on the 20th December, 1853, to meet again on the ensuing 9th January,—*held*, that a member who went home, and returned, during the recess, was entitled to mileage, but not to *per-diem* compensation during the recess; and that, on the refusal of the speaker of the house to draw his warrant on the comptroller, in favor of a member who was entitled to this mileage, the supreme court would interfere by *mandamus* to compel him. *Ex parte Pickett*, 24 Ala. 91.

36. The constitutional provision, requiring a bill to be read on three several days in each house of the general assembly, does not mean that every thing which is to become a law by the adoption of the bill shall be thus read; nor does the additional provision, prescribing the style of laws, affect the validity of a body of laws, when the prescribed form was pursued in the bill by which they were adopted. *Dew v. Cunningham*, 28 Ala. 466.

37. Tested by these principles, the Code of Alabama is not unconstitutional. *Ib.*

38. It is competent for the legislature, by a subsequent statute, to modify or repeal a previous act of the same session: the legislative rules, as to the entertainment of propositions to alter or repeal acts or resolutions during the session of their adoption, do not invalidate such subsequent statute. *Mobile & Ohio Railroad Co. v. The State*, 29 Ala. 573.

39. The general assembly, or the attorney-general, may direct the institution of a suit against an incorporated turnpike company, for a forfeiture of its charter. *The State v. Moore & Ligon*, 19 Ala. 514.

40. The general assembly only has power, by directing the institution of a suit against the comptroller of public accounts, to recover moneys paid to him without authority by a tax-collector, to ratify the payment, and thereby discharge the party making it from further liability to the State. *Walker v. Chapman*, 22 Ala. 116; *Van-Dyke v. The State*, 24 Ala. 81.

41. But it has no power to remit a fine, either before or after it has been paid; consequently, the act of February 2d, 1850, "for the relief of the securities of John Douglass, late clerk of the circuit court of Marion county," is unconstitutional. *Haley v. Clark*, 26 Ala. 439.

As to the validity of a statute usurping judicial power, *vide supra*, 33, 34; and as to the validity of a statute delegating to a municipal corporation the power to levy a tax, *vide supra*, 10–12.

VIII. OFFICERS.

42. The tenure of office of the State treasurer and comptroller of public accounts, as fixed by the constitution, is one year; which constitutional provision is still of force, in consequence of the failure to ratify the amendment proposed by the joint resolutions of 1844–5. *Collier v. Frierson*, 24 Ala. 100.

43. The act of 1843, (Clay's Digest, 118, § 86,) conferring on bank marshals power to serve process, does not violate the 24th section of the 4th article of the constitution, relative to the election and qualification of sheriffs. *Andress v. Roberts*, 18 Ala. 387.

As to judicial officers, *vide supra*, 19, 20.

IX. RETROSPECTIVE LAWS, AND LAWS IMPAIRING CONTRACTS OR VESTED RIGHTS.

44. The legislature has power to prescribe statutory rules for the execution of wills, whether made before or after the passage of the statute, if rights have not become vested by the testator's death. *Hoffman v. Hoffman*, 26 Ala. 535.

45. Section 1611 of the Code, requiring two witnesses to a will disposing of either realty or personalty, applies to a will of realty excuted before the adoption of the Code, if the testator died since its adoption; but a will of personalty only would be governed by the old law. *Ib.*

46. Section 2490 of the Code, relative to partial payments and subsequent promises to avoid the statute of limitations, does not apply to verbal promises made before the Code went into operation. *Jordan's Adm'r v. Hubbard and Wife*, 26 Ala. 433.

47. The retroactive effect given by judicial construction to the act of 1843, relative to the settlement of insolvent estates, does not conflict with any constitutional provision, nor does it deprive the executor of any vested right, personal to himself, which he could have insisted on under the former law. *Weaver's Executors v. Weaver's Creditors*, 23 Ala. 789.

48. A retrospective operation will never be given to a statute, unless the intention that it should so operate clearly appears. *Barnes v. Mayor of Mobile*, 19 Ala. 707; *Barron v. Tart*, 18 Ala. 668; *Gould v. Hays*, 19 Ala. 438.

49. The validity of a contract must be determined by the statute in force at the time it is made: if it is valid when made, a subsequent change or repeal of the law cannot impair its validity; and if it is void when made, no subsequent law can impart to it any validity. *Mays v. Williams*, 27 Ala. 267; *Walker v. Chapman*, 22 Ala. 116.

50. The act of 1854, (Session Acts 1853–4, p. 48,) "to allow all graduates of any medical college in the United States to practice medicine," does not authorize a recovery for medical services rendered by an unlicensed physician before its passage. *Richardson v. Dorman's Executrix*, 28 Ala. 679.

51. The bar created by the statute of limitations, does not extinguish or discharge a contract, but merely takes away the remedy provided for its enforcement. *Jones v. Jones*, 18 Ala. 248.

52. The statute of limitations of 1843, (Clay's Digest, 329, § 93,) has no retroactive operation. *Rawls v. Doe d. Kennedy*, 23 Ala. 240; *Cox v. Davis*, 17 Ala. 714.

53. The proviso to the first section of said act, which applies only to that section, was intended to prevent its retrospective operation. *Ib.*

54. The Mississippi statute of 1840, forbidding the banks of that State to "transfer, by endorsement or otherwise, any note, bill receivable, or other evidence of debt," is unconstitutional in that it impairs the obligation of contracts. *Jemison v. P. & M. Bank*, 23 Ala. 168.

55. A statute which declares a forfeiture of the charter of an incorporated company, with the consent of the company itself, does not impair the obligation of contracts. *Mobile & Ohio Railroad Co. v. The State*, 29 Ala. 573.

56. The act of February 14, 1856, "for the further security and protection of the State in railroad loans," (Session Acts 1855–6, p. 3,) which applies to the extension of the loan to the Mobile and Ohio Railroad Company under a previous act of the same session, is not unconstitutional, and must be complied with by any railroad company desiring a loan or extension of a debt, however difficult such compliance may be. *Ib.*

X. SLAVES.

57. There is no constitutional provision, which restricts or prohibits the owner of slaves from removing them to a non-slaveholding State, and there emancipating them. *Atwood's Heirs v. Beck*, 21 Ala. 590; *Prater's Adm'r v. Darby*, 24 Ala. 496.

58. A testator may direct his executor to remove his slaves to another State, and there emancipate them; and chancery will uphold the trusts. *Atwood's Heirs v. Beck*, 21 Ala. 590; *Abercrombie's Executor v. Abercrombie's Heirs*, 27 Ala. 489.

59. But he cannot emancipate his slaves by will while they remain in this State. *Pool'v. Harrison*, 18 Ala. 514; *Roberson's Heirs v. Roberson's Executors*, 21 Ala. 273; *Atwood's Heirs v. Beck*, 21 Ala. 590; *Abercrombie's Executor v. Abercrombie's Heirs*, 27 Ala. 489.

60. Where the owner of certain slaves, being about to remove with them to Illinois for the purpose of emancipating them, conveyed them by absolute bill of sale to another, and took from him a bond, which formed a part of the same contract, and which was conditioned that, when reasonable compensation had been made to him for his trouble and expenses with the slaves, he should emancipate them,—*held*, that the bond was not void, inasmuch as there was nothing on its face requiring the emancipation of the slaves within this State. *Prater's Adm'r v. Darby*, 24 Ala. 496.

61. The constitutional delegation of authority to the legislature, "to pass laws to permit the owners of slaves

to emancipate them," is not an inhibition of the right of the owner to emancipate them except under such regulations as the legislature may prescribe. *Ib.* (Overruling *Trotter v. Blocker and Wife*, 6 Porter, 269; and *Atwood's Heirs v. Beck*, 21 Ala. 590.)

62. Children, born in this State, of a negro woman who is a fugitive slave, cannot be regarded as fugitive slaves, nor as slaves which have escaped from service in another State, within the meaning of the Federal constitution, and of the act of congress of 1793. *Fields v. Walker*, 23 Ala. 155.

As to the importation of slaves, and criminal offenses against slaves, see same title, on page 32, §§ 16–18.

XI. TRIAL BY JURY.

63. The provision in the Federal constitution, relative to the right of trial by jury, is restrictive upon the General Government only, and does not apply to the States. *Boring v. Williams*, 17 Ala. 510.

64. A statute creating an office not specially provided for in the constitution, and subjecting the officer to a summary proceeding for his defaults, without the intervention of a jury, is not unconstitutional, since the right of trial by jury never existed in such case. *Ib.*

65. An issue of freedom *vel non* cannot be tried on *habeas corpus*, sued out at the instance of a person claimed and held as a slave. *Field v. Walker*, 17 Ala. 80.

66. But, when the sheriff levies a *fi. fa.* on negroes as the property of the defendant therein, they may try the question of their freedom, as between the sheriff and themselves, by petition for *habeas corpus*. *Union Bank of Tennessee v. Benham*, 23 Ala. 143.

As to the right of trial by jury in criminal cases, and what that right includes, see *Tims v. The State*, 26 Ala. 165; *McCauley v. The State*, 26 Ala. 135. (*Ante*, p. 32, §§ 19–23.)

XII. OTHER MATTERS.

67. A part to a suit has the constitutional right to appear for himself, and is not compelled to employ counsel to conduct or defend it. *May & Tindal v. Williams*, 17 Ala. 23.

68. It is not necessary that a decree of divorce should be confirmed by the legislature at its first ensuing session after the rendition of such decree. *Harrison v. Harrison*, 19 Ala. 499.

69. In a summary proceeding against a delinquent tax-collector and his sureties, if the caption of the notice is, "Comptroller's Office, State of Alabama," this is a sufficient compliance with the constitutional requisition as to the style of process. *Walker v. Chapman*, 22 Ala. 116.

70. The common-law doctrine as to the merger of a civil action in a felony, which is recognized in this State, is not violative of any constitutional provision. *Martin's Executrix v. Martin*, 25 Ala. 201.

71. The State cannot be sued in the chancery courts. (*Per* STONE, J.) *Ex parte Greene and Graham*, 29 Ala. 52.

72. Questions of State policy cannot be determined by the courts, in the absence of constitutional and statutory provisions. *Atwood's Heirs v. Beck*, 21 Ala. 590; *Tannis v. Doe d. St. Cyre*, 21 Ala. 449.

73. A repealing clause in an unconstitutional statute, declaring that "all laws, contravening the provisions of this act, be and the same are hereby repealed," does not affect the previous laws. *Tims v. The State*, 26 Ala. 165.

74. An unconstitutional provision in a statute does not affect the validity of other independent provisions, which may be maintained separate and apart from it; but the courts will strike out the former, and give effect to the latter. *Mobile & Ohio Railroad Co. v. The State*, 29 Ala. 573.

CONTINUANCE.

1. When notice of a motion to set aside a judgment of nonsuit is merely entered on the motion docket, but neither acted on, nor called to the attention of the court, a general order, continuing "all causes, motions, or other proceedings, now pending and not otherwise disposed of," does not continue the motion in court, so as to authorize the setting aside of the nonsuit at the next term. *Gunnels v. State Bank*, 18 Ala. 676.

2. Where the defendant contests only a part of the plaintiff's demand, and asks a continuance of the cause, the court may require a confession of judgment for the sum admitted to be due, and grant a continuance as to the residue. (LIGON, J., *dissenting*.) *Gowen & Co. v. Jones*, 20 Ala. 128.

3. Where a witness has stated, through inadvertence on his part or that of the commissioner, that another material witness was interested as a partner with plaintiff; and application is made for a continuance, in order that his deposition may be retaken,—the court may, in its discretion, grant a continuance unless the defendant will consent that the other witness may testify. *Jewell v. Center & Co.*, 25 Ala. 498.

4. On a trial of the right of property under the statute, a continuance having been granted to the claimant on his payment of all the costs, which condition he failed and refused to comply with, the court would not permit him, on the trial at the next term, to offer evidence of title in himself, but confined him to evidence merely of the value of the property. *Held*, that the action of the court was erroneous. *Montgomery & Wetumpka Plank-Road Co. v. Persse, Taylor & Co.*, 25 Ala. 536.

5. Where an application is made for a continuance, on account of the absence of a material witness; and the adverse party admits, that the witness, if present in court, would swear to the facts stated in the affidavit, this is neither an admission that the facts stated are true, nor that the witness is competent to testify. *Montgomery & Wetumpka Plank-Road Co. v. Webb*, 27 Ala. 618; also, on first point, *Starr v. The State*, 25 Ala. 49.

CONTRACTS.

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V. PERFORMANCE, AND BREACH.
VI. WAIVER, AND DISCHARGE.
VII. ALTERATION, AND RESCISSION.

I. WHAT CONSTITUTES A CONTRACT.

1. *Assent of Parties.*

1. A proposition, or offer, made by letter, which is not replied to within a reasonable time, does not constitute a contract. *Martin v. Black's Executors*, 21 Ala. 721.

2. A conditional note, signed by the maker with the distinct admission, on the part of the payee, that it does not contain the terms of their contract, and on the understanding that they will meet again, at a convenient time and place, and execute another instrument which shall truly embody their

contract,—is not a complete contract, for want of an absolute, unconditional delivery. *Hopper v. Eiland*, 21 Ala. 714.

3. Notice of acceptance is not necessary to charge a party, on whose original undertaking, evidenced by written order, goods are furnished to another. *Scott v. Myatt & Moore*, 24 Ala. 489; *Donley v. Camp*, 22 Ala. 659.

4. But, to charge a party on a collateral guaranty, notice of acceptance must be given to him within a reasonable time. *Walker v. Forbes*, 25 Ala. 139; *Fay v. Hall*, 25 Ala. 704; *Cahuzac & Co. v. Samini*, 29 Ala. 288.

5. It is not necessary that the mutual assent of the parties should be concurrent: if the party making the offer does not require an immediate response, and the offer itself seems to assume and contemplate its acceptance, the assent of the other party will be implied, in the absence of a revocation of the offer, from his acting upon it within a reasonable time. *Sanford v. Howard*, 29 Ala. 684.

6. To constitute an express promise, such as will revive a debt discharged by bankruptcy, it is not necessary that the words should be spoken to the creditor, or to his agent; but the fact that they were spoken to a third person, may well be considered, in connection with the other facts, in determining whether they amount, in law, to an express promise. *Evans v. Carey*, 29 Ala. 99.

7. If one tenant in common, having the management of the joint property, employs his own minor son, a member of his family, in and about the common business; and his co-tenant, having knowledge of this, does not object to it,—this is a circumstance, tending to show a contract between them for the services of the son; and if the business actually required such services, the presumption of a contract would be more reasonable. *Strother's Adm'r v. Butler*, 17 Ala. 733.

8. In the absence of an express contract between the owners of a steamboat and the owner of a slave hired as a boat hand, the fact that the boat, at and before the time of the hiring, was running as a regular packet between Mobile and New Orleans, and was so advertised in the newspapers, is not conclusive evidence of a contract that she should run only on that line during the term of hiring, but is merely a circumstance for the consideration of the jury, in connection with the other evidence, in ascertaining what the real contract was. *Myers v. Gilbert*, 18 Ala. 467.

2. *Certainty and Definiteness.*

9. A contract, as set out in a count in assumpsit, in these words: "That in consideration that said plaintiff would furnish three hands, and feed and clothe said servants for the year 1844, and pay all their expenses, and work the same on defendant's plantation in Perry county, and furnish provisions for himself, his family and said three hands, the lands, mules and horses of said defendant in the capacity of an overseer, said defendant agreed and promised to place on said plantation his hands, to-wit, the hands owned by him, and live on said farm, and his mules and horses, and to furnish the said hands &c. placed by him on said plantation with provisions, and said hands with clothing, to pay all expenses of said hands and mules, and to let plaintiff cultivate said farm, until said hands and mules, so furnished as aforesaid by said plaintiff and defendant, and raise a crop thereon for the year 1844; for which said defendant agreed and promised, that said defendant should have and draw a part of the crop raised on said farm by said defendant, with said hands, mule and horses, in the year 1844, in proportion to said hands of plaintiff, so placed on said farm," &c.; which contract plaintiff performed on his part, and raised a crop on said plantation, "of which his reasonable share was one-third thereof,"—held too indefinite and uncertain to support an action. *Moore v. Smith*, 19 Ala. 774.

10. So is a contract, alleged to be "in substance as follows: That in consideration that plaintiff would then and there buy out the storehouse and lot, situate in the town of C., then occuped by E. & Co. as a storehouse, and the stock of dry goods then and there owned by them, said defendant would assist them, by endorsing their paper,

and advancing them money, to enable them to carry on the mercantile business advantageously;" or, as alleged in another count, "would endorse for them in Charleston, and, if necessary, advance money to them, to enable them to carry on the mercantile business." *Erwin & Williams v. Erwin*, 25 Ala. 236.

11. So is a promise by a father, upon valuable consideration, to give his daughter "a full share of his property, which then and there was worth $25,000." *Adams and Wife v. Adams*, 26 Ala. 272.

12. *Semble*, however, that a promise by a father, upon valuable consideration, to make his daughter equal in property to his other children, or to give her so much as would make her share equal to one-fourth, one-fifth, or any other given portion of his estate, is sufficient to support an action, if the parties contemplated its present execution upon the performance of the consideration. *Ib.*

13. A penal bond, conditioned as follows: "Whereas the said C. [obligee] guarantied for one J. W. W. on his bid for carrying the mail on route 3315, from Gainesville to Spring Place, in, by, and through said W.'s [obligor's] persuasion, which contract said W. has refused to execute; now, if said W. does and will stand between said C. and the general postoffice department, so that said C. has no more trouble and expense, and releases said C. from all responsibility in said matter, then the above bond to be void," &c.,—is not void for uncertainty. *Carr's Executor v. Wyley*, 23 Ala. 821.

3. *Mutuality.*

14. If both parties are not bound by a contract, neither is bound. *Whitworth and Wife v. Hart*, 22 Ala. 343.

4. *Implied Promises.*

15. When money is voluntarily paid for another, without his privity or consent, the law will not imply a promise on his part to refund. But, if the debtor sanctions and adopts such payment, he thereby makes the payor his agent, and becomes liable on an implied promise to refund. *Ross v. Pearson*, 21 Ala. 473; *Wray v. Cox*, 24 Ala. 337.

16. When an agent is employed by his principal to do an act which is not manifestly illegal, and which he does not know to be wrong, the law implies a promise of indemnity by the principal, for such losses and damages as flow directly and immediately from the execution of the agency. *Moore v. Appleton*, 26 Ala. 633.

17. If a hired slave runs away during the term of the hiring, and is committed to jail as a runaway, and the hirer refuses to pay the necessary jail fees, the owner may pay them after the expiration of the term, and thereby acquire a cause of action against the hirer. *Walker and Wife v. Smith*, 28 Ala. 569.

18. An implied promise to pay hire for slaves will only be raised against him who has had their possession and services. *Smith v. Pearson*, 26 Ala. 603.

19. A promise to pay rent to one person cannot be implied against a tenant who came into possession under an express promise to pay another. *Shumake v. Nelms' Adm'r*, 25 Ala. 126.

20. A recovery may be had, on an implied promise, for services rendered under a contract which, because not reduced to writing, is void under the statute of frauds. *Sims v. McEwen's Adm'r*, 27 Ala. 184.

21. It is the duty of the hirer, under a contract general in its terms, to furnish the slave with suitable clothing and provisions, and with medical attendance in case of sickness; but, where the contract merely specifies the agreed price and term of hiring, and binds the hirer to furnish board and clothing, a liability for medical services cannot be implied. *Sims & Jones v. Knox*, 18 Ala. 236.

22. No recovery can be had against a person, for money lent to his step-son, in his absence, and without his promise or request; nor upon a contract, made with the step-son, for the use of a stock-pasture, in the making of which contract defendant did "not have anything to do;" nor for the use of the stock-pasture, merely upon proof that his stock went into it and used it, without proof of an express

promise on his part to pay for it, or of facts from which the law would imply a promise. *Pike v. Bright*, 29 Ala. 332.

23. When the law will raise an implied promise by the father to pay an account contracted by his minor son while attending school at a distance from home, see *McKenzie v. Stevens*, 19 Ala. 691.

24. When the husband is liable, on an implied promise, for necessaries furnished to the wife, see *Zeigler & Hall v. David*, 23 Ala. 127; *Wray v. Cox*, 24 Ala. 337; *Cothran v. Lee*, 24 Ala. 380.

25. When a party is liable, on an implied promise, to refund money paid to him through mistake, see *Weeks v. Love*, 19 Ala. 25; *Rutherford v. McIvor*, 21 Ala. 750; *Ewing v. Peck*, 26 Ala. 413; *Williams v. Simmons*, 22 Ala. 425.

For other instances of implied promises, see ASSUMPSIT.

II. VALIDITY.

1. *Determined by what Law.*

26. The validity of a contract must be determined by the law of the place where it was made. *Peake v. Yeldell*, 17 Ala. 636; *Thomas v. Degraffenreid*, 17 Ala. 602; *Jones v. Jones*, 18 Ala. 248.

27. And by the then existing law. *Mays v. Williams*, 27 Ala. 267; *Walker v. Chapman*, 22 Ala. 116.

2. *Champerty, and Maintenance.*

28. A contract, by which an attorney undertakes to collect money for his client, and, as compensation for his services, is "to retain twenty per cent. on the sums collected, or be paid $200, as he shall elect," is void for champerty. *Elliot v. McClelland*, 17 Ala. 206.

29. So, where the client gives his note for a sum certain, and, at the same time, executes another instrument, by which he agrees to allow the attorney one-half of the damages that may be recovered in the suit, the note and agreement are both champertous and void. *Dumas v. Smith*, 17 Ala. 305.

30. P., having traded horses with M., claimed of the latter $20 for cheating him; but he afterwards sold the horse which he obtained by the exchange to W., on the understanding and agreement between them, that P. should sue M. for the $20, but W. should have the recovery if any, and should pay the costs if the suit failed. Judgment for the costs having been rendered against P., W. promised the clerk of the court that he would pay them; but having failed to do so, P. paid the costs, and then sued W. to recover them. *Held*, that the contract was champertous and void. *Wheeler v. Pounds*, 24 Ala. 472.

31. A contract, by which a distributee, pending a protracted litigation respecting the validity of the decedent's will, assigns to a stranger, in consideration of $100 in hand paid, all his interest in the estate, which proves to be worth about $1,000; reciting in the assignment, that he is "becoming uneasy, and willing and desirous to sell his interest in said will and estate for a sum certain, to be released of all the trouble and expense of contesting said will,"—is champertous. *Poe v. Davis*, 29 Ala. 676.

32. A contract, by which a trespasser agrees to sell the possession of lands acquired by the trespass, cannot be sustained; but it is not maintenance to promote a suit or defense in which one has, or believes he has, a legal interest. *McCall's Adm'r v. Capehart & Harbin*, 20 Ala. 521.

33. A remainder in a chattel, known to be in the adverse possession of a purchaser from the tenant for life, cannot be sold. *Price v. Talley's Adm'rs*, 18 Ala. 21.

34. A purchaser at sheriff's sale, of land which is at the time in the actual possession of a person holding adversely to the defendant in execution, acquires only a right of property, connected with a right of possession, which he cannot sell to another. *Coleman v. Hair*, 22 Ala. 596.

3. *Contrary to Public Policy.*

35. A contract, by which a father procures his son to enter on and occupy a tract of public land, for the purpose of acquiring a pre-emption right to the same, under an agreement that, so soon as the right of pre-emption was perfected, he would pay for the land, and the son should convey one-half of it to him, is in contraven-

tion of the policy of the pre-emption laws. *Dial v. Hair*, 18 Ala. 798.

36. H., having purchased from D. "a claim on public land" for $50, and D. being indebted to P. in that amount, due by open account; by mutual agreement between the three, H. executed his note to P., "in payment of D.'s indebtedness." *Held*, that this was a sufficient consideration to support an action on the note by P. or his assignee. *Hughes v. Young*, 25 Ala. 483.

37. A bond of indemnity, given to induce a sheriff to levy a void execution, is itself void. *Collier's Adm'r v. Windham*, 27 Ala. 291.

38. Where plaintiff and defendant were both bound as sureties and endorsers for an insolvent debtor, who was about to make an assignment for the benefit of his creditors, and who refused to make any assignment of which plaintiff did not approve, and which did not place in the preferred class of creditors the debts on which the plaintiff was bound; and, in consideration that the plaintiff would consent to the execution by the debtor of an assignment postponing the claims on which he was bound, and preferring the claims on which defendant was bound, the latter promised to pay a specified sum, and the deed was made in pursuance of this contract,—*held*, that the contract was not contrary to any principle of public policy. *Hatton's Adm'rs v. Jordan*, 29 Ala. 266.

39. The owner of certain slaves being about to remove with them to Illinois for the purpose of emancipating them, conveyed them by absolute bill of sale to another, and took from him a bond, which was construed to form part of the same contract, and which was conditioned that, when reasonable compensation had been made to him for his trouble and expense with the slaves, he should emancipate them; but there was nothing on the face of the bond, requiring the obligor to emancipate the slaves in this State. *Held*, that the undertaking evidenced by the bond was not void, but formed a sufficient consideration for the bill of sale. *Prater's Adm'r v. Darby*, 24 Ala. 496.

40. If a slave, while permitted by his owner or hirer to go at large, contrary to the provisions of the act of 1805, (Clay's Digest, 541, § 12,) and to act as a freeman, makes a contract for the hire of another slave to work with him, and a white man gives his written obligation for the hire,—such bond is void. *Stanley v. Nelson*, 28 Ala. 514.

41. A contract, directly founded on an illegal consideration, whether the illegal act is in terms prohibited by the statute, or only punished by a penalty, is void. *Ib.*

42. Questions of State policy can only be determined by the courts from constitutional or statutory provisions. *Atwood's Heirs v. Beck*, 21 Ala. 590; *Tannis v. Doe d. St. Cyre*, 21 Ala. 449.

4. *Fraud, and Mistake.*

43. If the parties to a pending suit, under the erroneous impression that the costs have been adjudged against the defendant, enter into a verbal contract, by which plaintiff agrees to pay the costs in the first instance, and defendant promises to repay them, and also the note on which the suit is founded, and which he admits to be just, in good accounts due the 1st January next thereafter, the validity of the contract is not affected by the mutual mistake. *Eastman v. Hobbs*, 26 Ala. 741.

44. And if, when the verbal contract is afterwards reduced to writing, the plaintiff fails to inform the defendant of the mistake, which he had himself discovered, and of which he knew defendant was still ignorant, and conceals from him the fact that he had taken a nonsuit,—this does not amount to a fraud on the defendant, nor enable him to avoid the written contract. *Ib.*

45. A contract for the purchase and sale of a tract of land, of which the purchaser had possession, and to which the vendor was supposed to have title, was entered into under a mutual mistake as to the title, and a conveyance with full covenants executed; but it afterwards appeared that the vendor had no title to the tract intended to be conveyed, and that his deed conveyed another tract; whereupon the purchaser offered to rescind the

contract, and, on the vendor's refusal, sued at law to recover the purchase-money which he had paid. *Held*, that he could not recover, and that equity alone could afford relief. *Homer v. Purser*, 20 Ala. 573.

46. Where the purchaser of a slave accepts a bill of sale without a warranty, which shows on its face that he took the slave at his own risk, he cannot defend a suit on the notes given for the purchase-money, on the ground of "misrepresentation, without fraud." *Stewart v. Bradford*, 26 Ala. 410.

47. The maker of a promissory note, given for the purchase-money of a slave, at a public sale made by an administrator under an order of court, may set up fraud in the sale as a defense; even though the fraud consists in the unauthorized misrepresentations of the auctioneer, by whom the sale was conducted. *Atwood's Adm'r v. Wright*, 29 Ala. 346.

48. A misrepresentation by the vendor, in regard to a material fact, which operated as an inducement to the purchase, and on which the purchaser had a right to rely, and by which he was actually deceived and injured, amounts to a fraud in law. *Foster v. Gressett's Heirs*, 29 Ala. 393; *Pritchett v. Munroe*, 22 Ala. 501; *Read v. Walker*, 18 Ala. 323.

49. An honest expression of opinion by the vendor, as to the location of one of the boundary lines of the land, even though erroneous, is not such a misrepresentation as constitutes a fraud. *Stow v. Bozeman's Executors*, 29 Ala. 397.

50. In detinue, the defendant cannot take advantage of fraud in the contract under which plaintiff acquired the possession of the chattel sued for, without connecting such fraud with his own title. *McGuire v. Shelby*, 20 Ala. 456.

51. The only fraud which, at law, can be set up to avoid the operation of a sealed instrument, relates to its execution. *Holley v. Younge*, 27 Ala. 204; *Stokes v. Jones*, 18 Ala. 734.

52. A deed, though fraudulent and void as to creditors, is nevertheless valid between the parties, and neither can set up the fraud in avoidance of it. *Wiley, Banks & Co. v. Knight*, 27 Ala. 236; *Walton v. Bonham*, 24 Ala. 513.

53. The trustee in a deed of trust for the benefit of creditors, when sued by one of the beneficiaries, may, with the assent of the grantor, set up fraud in obtaining the security. *Drake v. Moore*, 18 Ala. 597.

54. If the surety on a note, given for the purchase-money of a slave, executes his own note to the payee, "in discharge of the balance remaining due," he cannot defeat a recovery on the new note, by setting up fraud in the sale. *Fluker v. Henry's Adm'r*, 27 Ala. 403.

As to equitable relief against contracts procured by fraud, or executed through mistake, see FRAUD, p. 267; MISTAKE AND IGNORANCE, p. 296.

5. *Executed on Sunday.*

55. A contract, executed on Sunday, is made void by statute, (Clay's Digest, 592, § 1,) unless executed under a necessity to prevent a threatened loss. *Hooper v. Edwards*, 18 Ala. 280: *S. C.*, 25 Ala. 528.

56. The existence of such necessity is a question for the jury. *Ib.*

57. An agreement for the rent of land, executed on Sunday, cannot be set up by either party as a contract; yet it may be looked to, in connection with other circumstances, to explain the character of the defendant's possession, and the subsequent conduct of both parties in relation to the land. *Rainey v. Capps*, 22 Ala. 288.

58. A promise, made on Sunday, to pay the balance due on a promissory note, against which the party has a valid defense, does not estop him from setting up that defense. *Hussey v. Roquemore*, 27 Ala. 281.

59. Nor is such a promise, whether express or implied, sufficient to remove the bar of the statute of limitations. *Bumgardner v. Taylor*, 28 Ala. 687.

60. In an action on a note, which bears date on Sunday, it is competent to allege and prove that it was, in fact, executed and delivered on another day. *Aldridge v. Branch Bank at Decatur*, 17 Ala. 45.

6. *Duress, and Undue Influence.*

61. Duress of imprisonment of their

principal, is a good plea by the sureties on a forfeited recognizance. *The State v. Brantley*, 27 Ala. 44.

62. A contract between an execution debtor and the sheriff, which is not void for fraud as against creditors, cannot be avoided by them on the ground that it was procured by undue influence. *Hooper v. Edwards*, 18 Ala. 280.

63. As to the relief which equity will afford against a contract procured by undue influence, see *Boney v. Hollingsworth*, 23 Ala. 690; *Trippe v. Trippe*, 29 Ala. 637. (FRAUD, p. 267.)

7. *Gaming.*

64. Money collected under execution, on a judgment founded on a gaming consideration, may be recovered in an action at law, if commenced within six years from the award of a perpetual injunction in chancery. *Paulling v. Watson*, 26 Ala. 205.

8. *Mental or Legal Incapacity.*

65. A lunatic cannot, except during a lucid interval, contract a valid marriage, nor enter into any other contract; but mere weakness of mind, which does not amount to derangement, is not sufficient to avoid the marriage. *Rawdon v. Rawdon*, 28 Ala. 565.

66. The contract of an infant may be avoided by him on coming of age. *Wilson v. Judge of Pike County Court*, 18 Ala. 757; *Ware v. Cartledge*, 24 Ala. 622.

67. A bond for title, executed by an infant, is voidable only, and not absolutely void. *Weaver v. Jones*, 24 Ala. 420.

68. So is his deed. *Slaughter v. Cunningham*, 24 Ala. 260; *Manning v. Johnson*, 26 Ala. 446.

69. The contract of a married woman, which was void at common law, imposes no personal liability on her, and does not subject her to an action at law. *Hall v. Cannte and Wife*, 22 Ala. 650; *Gibson v. Marquis and Wife*, 29 Ala. 668.

As to the contracts of married women generally, see HUSBAND AND WIFE.

As to contracts for medical services rendered by unlicensed physicians, see PHYSICIANS.

As to contracts with slaves, *vide supra*, 40.

III. CONSIDERATION.

1. *General Sufficiency; and herein, of Gratuitous Promises.*

70. Any benefit to the promisor, or detriment to the promisee, is a sufficient consideration to support a contract. *Holt v. Robinson*, 21 Ala. 107; *Steele v. Brown*, 18 Ala. 700; *Salmons v. Roundtree*, 24 Ala. 458; *Erwin & Williams v. Erwin*, 25 Ala. 236; *Hatton's Adm'rs v. Jordan*, 29 Ala. 266; *Whiteside v. Jennings*, 19 Ala. 784.

71. An agreement between a debtor and one of his sureties, to the effect that, if the former will consent that certain property, mortgaged by him to the creditor for the payment of the debt, may be sold at a time when it is not likely to bring its full value, and when, therefore, the creditor would not sell, without the debtor's consent, the latter promises to buy in the property if it does not bring its full value, and to hold it as a common indemnity for himself and his cosureties,—is supported by a sufficient consideration. *Steele v. Brown*, 18 Ala. 700.

72. Where plaintiff and defendant were both bound as sureties and endorsers for an insolvent debtor, who was about to make an assignment for the benefit of his creditors, and who refused to make any assignment of which plaintiff did not approve, and which did not place in the preferred class of creditors the debts on which plaintiff was bound; and, in consideration that plaintiff would consent to the execution by the debtor of a deed postponing the claims on which he was bound, and preferring the claims on which defendant was bound, the latter promised to pay a specified sum; and the deed was made in pursuance of this contract,—*held*, that the contract was supported by a sufficient consideration. *Hatton's Adm'rs v. Jordan*, 29 Ala. 266.

73. Where a sheriff, having an execution in his hands, is referred by the debtor to a third person for payment, and takes the notes of such third person in settlement of the debt, and then

returns the execution satisfied,—a promissory note, executed to the sheriff by the executor of the defendant, with full knowledge of all the facts, in consideration that the sheriff should himself pay the judgment, and should not set aside or amend his return, is without consideration. *Holt v. Robinson*, 21 Ala. 106.

74. An agreement that an absolute deed shall operate only as a mortgage, unless contemporaneous with the execution of the deed itself, or supported by a new consideration, is *nudum pactum*. *Bryan & McPhail v. Cowart*, 21 Ala. 92.

75. A promise by the master to pay money stolen by his slave, which has not come to his own hands, is without consideration. *Jelks v. McRae*, 25 Ala. 440.

76. The agreement of a father, in consideration of natural love and affection, to permit his minor son, a member of his family, to cultivate a crop and receive the proceeds, is revocable at any time before the son has gathered and disposed of the crop. *Stovall v. Johnson*, 17 Ala. 14.

77. As to the distinction, between propositions which, when accepted, amount to a valid contract, and proposals to render a gratuitous kindness, which are not designed to create legal obligations, see *Erwin & Williams v. Erwin*, 25 Ala. 236.

2. *Moral and Equitable Obligation.*

78. A liability for costs accruing against the claimant on a trial of the right of property, is sufficient to support a promise of indemnity by the defendant in execution, at whose request the claimant interposed as trustee for his wife; the suit having failed in consequence of some fraud in the deed of trust, to which the claimant was not originally a party. *Brooks v. Hildreth & Mosley*, 22 Ala. 469.

79. A guaranty of a third person, given by plaintiff at defendant's request, is not a moral, but a valuable consideration, especially when connected with an express promise of indemnity. *Carr's Executor v. Wyley*, 23 Ala. 821.

80. If a stranger expends his own funds, without obligation, in maintaining and educating an orphan child, who meanwhile becomes entitled to a large estate, out of which no allowance for maintenance or education is asked or made, this is a sufficient consideration to support an express promise on her part, after coming of age, to repay the amount so expended. *Baker v. Gregory and Wife*, 28 Ala. 544.

81. And if such expenditure was made at the request of her brother-in-law, who thereby became liable for the amount expended, this liability on his part is sufficient to support an express promise by her, after coming of age, to indemnify him against any loss which he might thereby sustain. *Ib.*

3. *Compromise.*

82. A promise by a devisee to pay a specified sum to the heir-at-law, who had employed counsel to contest the will, in consideration that the latter would withdraw all opposition to the probate of the will,—is without consideration, when it is not shown that there was any doubt as to the validity of the will, or any ground for contesting its probate. *Prater v. Miller*, 25 Ala. 320.

83. In an action on a note given for the price of a slave, it is not error to refuse to instruct the jury, at the defendant's request, "that if they believed there was a controversy between the parties as to whether plaintiff had defrauded defendant in the sale of the slave, and that plaintiff, in settlement of the controversy, agreed to knock off $100 on the note, then defendant would be entitled to a deduction for that sum." *Stewart v. Bradford*, 26 Ala. 410.

84. Defendant in execution agreed to pay, in compromise and satisfaction of the judgment against him, a certain sum in money, and the costs of a claim suit then pending; but, when the suit was called in court next morning, refused to pay or to confess judgment for the costs, and denied that he had promised to do so. A trial of the claim suit, at a subsequent term, resulted in a verdict for the claimant; and plaintiff in execution, having paid the costs, then sued on the contract, and was held entitled to recover. *Salmons v. Roundtree*, 24 Ala. 458.

85. Persons having conflicting claims

to slaves previously conveyed by mortgage or conditional sale, to which they were not parties, may, by subsequent contract, settle and adjust their rights to the property; and such subsequent contract itself, irrespective of the character of the former contract, must be considered as the adjustment of their respective rights. *Murphy v. Barefield*, 27 Ala. 634.

86. As to the effect of a covenant between heirs-at-law and devisee, in compromise of a controversy respecting the probate of the testator's will, see *Bean v. Welsh*, 17 Ala. 770.

4. *Forbearance to Sue.*

87. A promise to pay the debt of another, in consideration of the creditor's forbearance to sue, is founded on sufficient consideration; *secus*, if the creditor has not the legal right to sue during the time of the promised forbearance. *Martin v. Black's Executors*, 20 Ala. 309.

88. Letters of administration on the estate of the deceased debtor having been granted on the 1st October, 1847, his mother promised to pay the debt, in consideration that the creditor would not proceed against the property of the estate, "until the crop of cotton made on the plantation of the deceased in the year 1847 was sold, which probably would be during the ensuing spring." *Held*, that the promise was supported by a sufficient consideration. *Ib.*

89. An agreement under seal, whereby several creditors, at the request of their common debtor, covenant and promise to grant indulgence on their respective debts, and to forbear suit for the term of two years, and that the debtor shall be discharged from the demand of any creditor who may violate the agreement, is without consideration, and constitutes no defense to an action by one of the creditors. *Keep v. Kelly & Levin*, 29 Ala. 322.

5. *Promise for Promise.*

90. The notes given for the purchase-money of land, at a sale made by commissioners under an order of the orphans' court, constitute a sufficient consideration to make the commissioners' title-bond binding on them personally, when, by exceeding their authority, they fail to bind the decedent's estate. *Whiteside v. Jennings*, 19 Ala. 784.

91. A subsequent contract between endorser and endorsee, rescinding or modifying the endorsement, is supported by a sufficient consideration. *Young v. Fuller*, 29 Ala. 464.

92. A warranty of the soundness of a slave, given by the vendor to induce the purchaser to comply with the terms of the contract made on a former day, when it was distinctly announced that no warranty would be given, is founded on a sufficient consideration. *Stoudenmeier v. Williamson*, 29 Ala. 558.

6. *Promise to Pay Another's Debt.*

93. A promise to pay the debt of another, unless founded on some new consideration, is *nudum pactum*. *Beall & Co. v. Ridgeway*, 18 Ala. 117; *Blount v. Hawkins*, 19 Ala. 100; *Martin v. Black's Executors*, 20 Ala. 309; *S. C.*, 21 Ala. 721; *Williams v. Sims*, 22 Ala. 512; *Hollingsworth v. Martin*, 23 Ala. 591.

94. Forbearance to sue the debtor is a sufficient consideration. *Martin v. Black's Executors*, 20 Ala. 309.

95. A promise by the surety on a replevy bond, in consideration of the plaintiff's dismissal of the attachment suit, to pay the debt, is supported by a sufficient consideration. *Blount v. Hawkins*, 19 Ala. 100.

96. The payee of a note, given in payment of the debt of another, cannot recover against the maker, without proving the privity or assent of the debtor. *Williams v. Sims*, 22 Ala. 512.

97. A promise by an administrator, to pay out of assets of the deceased debtor, is not binding on him personally, unless founded on some new consideration. *Martin v. Black's Executors*, 20 Ala. 309.

98. A promise by a mother, to pay a debt against the estate of her deceased son, if the creditor's attorney would also act as her attorney, in having the administrator of the estate removed, and herself appointed administratrix *de bonis non*, for which services she paid the attorney the fee

charged by him, is without consideration. *S. C.*, 21 Ala. 721.

99. As to the distinction between original promises and promises to pay the debt of another, see the following cases: *Donley v. Camp*, 22 Ala. 659; *Scott v. Myatt & Moore*, 24 Ala. 489; *Walker v. Forbes*, 25 Ala. 139; *Fay v. Hall*, 25 Ala. 704; *Jolley v. Walker's Adm'rs*, 26 Ala. 690; *Cahuzac & Co. v. Samini*, 29 Ala. 288; *Sanford v. Howard*, 29 Ala. 684. (*Vide* GUARANTY.)

7. *Impossible Considerations.*

100. Although the law will not seek to compel a man to perform that which is impossible, yet it will not allow a workman, after he has obtained the price of stipulated services which he cannot perform, by false and fraudulent representations of skill in his business, to defeat a recovery for the deceit, and consequent injury, by setting up the impracticability of those services. *McGar v. Williams*, 26 Ala. 469.

8. *Proof and Failure of Consideration.*

101. A note, which is the foundation of the suit, imports a consideration, unless its execution is denied by proper plea; and the fact that the payee, who sues for the use of another person, "never was the owner of the note, and never put it in circulation, nor authorized it to be done," does not repel this presumption. *Bird v. Wooley*, 23 Ala. 717.

102. A bond, which is set up as a defense, does not import a consideration. *Keep v. Kelly & Levin*, 29 Ala. 322.

103. When it becomes necessary to prove the consideration of a note, the most regular mode of proceeding is, first to introduce the note itself, and then go on to show its consideration. *Pennington v. Woodall*, 17 Ala. 685.

104. The consideration of a note may be impeached without a sworn plea. *Holt v. Robinson*, 21 Ala. 106.

105. In an action on a note, or other written contract, parol evidence is admissible, to show a total or partial failure of consideration. *Long v. Davis*, 18 Ala. 801; *Corbin v. Sistrunk*, 19 Ala. 203; *Newton v. Jackson*, 23 Ala. 335.

106. Where A. executed her note to B. for services to be rendered by him as an overseer, but told him, before delivering the note, that she could not employ him unless he brought a recommendation from C.; which recommendation B. promised to procure, but failed to do so, and A. then refused to employ him,—*held*, in an action on the note, that the procuring of C.'s recommendation formed a part of the consideration of the note; and that, in consequence of the failure to procure it, B. was not entitled to recover. *Corbin v. Sistrunk*, 19 Ala. 203.

107. In an action on a note payable on a day certain, and purporting to have been given in consideration of professional services to be rendered by the payee as an attorney, parol evidence cannot be received, to show that the note was not to be paid unless the attorney was successful in the suit. *West & West v. Kelly's Executors*, 19 Ala. 353.

108. In an action on such note, no time being fixed for the performance of the contemplated services, parol evidence cannot be received, to show that the note was not to be paid until the performance of the services; nor can the maker defeat a recovery, on the ground that the stipulated services have not been fully performed, when the payee is in no default, but able, ready and willing to perform his contract. *Walker v. Clay & Clay*, 21 Ala. 797.

109. Parol evidence is admissible, to show that the consideration of a note, purporting to have been given for the amount of the maker's indebtedness to the bank, was the extinguishment of the debt of another person, and that the proceeds were so applied. *Murrah v. Branch Bank at Decatur*, 20 Ala. 392.

110. In an action on a note purporting to have been given "for the rent of land," parol evidence is not admissible, to show that the payee also agreed to repair the fencing around the land, and that, in consequence of his failure to do so, the maker's crop was damaged by the breaking in of stock. *Evans v. Bell*, 20 Ala. 509.

111. Where the consideration expressed in a bill of sale, under seal, is a certain sum of money, it may be

shown by parol to have been another slave. *Eckles & Brown v. Carter*, 26 Ala. 573.

112. Where a deed purports to have been made in consideration of natural love and affection, and also "for divers other good considerations," which are not specified, parol evidence is admissible to show what the other considerations were. *Johnson v. Boyles*, 26 Ala. 576.

113. And where the consideration expressed in a deed is a certain sum of money in hand paid, parol evidence is admissible, to show that a part was paid in money, and that the balance was to be applied in discharge of debts due from the grantor to third persons. *Hair v. Little*, 28 Ala. 236.

114. Where a note is signed by the husband, with the addition of the words "acting trustee, parol evidence is admissible, to show that its consideration and purpose, with the character of the transaction, constitute it a charge on the separate estate of the wife. *Baker v. Gregory & Wife*, 28 Ala. 544.

115. The acceptor of a written order, payable out of the proceeds of a certain judgment when collected, may, when sued by the payee, prove the consideration on which his acceptance was based; and may, for this purpose, show that a portion of the judgment was not collected, and that the entire amount collected was paid to persons who had prior claims on the fund. *Gliddon v. McKinstry*, 28 Ala. 408.

116. In action on a note given for the purchase-money of a slave, at a public sale by an administrator, whose letters were void because the supposed decedent was actually alive, the administrator's want of authority is no defense; and a recovery may be had by the supposed decedent himself, as assignee of his administrator, notwithstanding the death of the slave prior to the endorsement, if the purchaser retained possession until the death. *Duncan & Hooper v. Stewart*, 25 Ala. 408.

117. When a person, being about to purchase a note, applies to the maker for information concerning it, and is assured by the latter that he has no defense against it, this does not estop the maker, when sued by such purchaser, from availing himself of a subsequent failure of consideration as a defense. *Maury v. Coleman*, 24 Ala. 381. (As to what amounts to an equitable estoppel in favor of such purchaser, see *Lanier v. Hill*, 25 Ala. 554; *Drake v. Foster*, 28 Ala. 649.)

118. A purchaser of property at an administrator's sale cannot, in the absence of either fraud or a warranty, resist the payment of the purchase-money, on the ground that he has been dispossessed of the property, under title paramount to that of the estate, of which title he had notice at the time of his purchase. *Pool v. Hodnett & Hays*, 18 Ala. 752.

119. In an action to recover the purchase-money of several slaves, issue being joined on the plea of failure of consideration, the fact that the vendor had offered them for sale, within the twelve months preceding, at $350 less than the price agreed to be paid by the purchaser, is relevant, as tending to show, especially in connection with other evidence, the unsoundness of one of the slaves. *Rowland v. Walker*, 18 Ala. 749.

120. If the surety on a note, given for the purchase-money of a slave, executes his own note to the payee, "in discharge of the balance remaining due," he cannot defeat a recovery on the new note, by setting up a breach of the warranty of soundness. *Fluker v. Henry's Adm'r*, 27 Ala. 403.

IV. CONSTRUCTION.

1. *Governed by what Law.*

121. The construction and interpretation of a contract are to be governed by the law of the place where it was made. *Peake v. Yeldell*, 17 Ala. 636; *Jones v. Jones*, 18 Ala. 248; *Thomas v. DeGraffenreid*, 17 Ala. 609; *Walker v. Forbes*, 25 Ala. 139.

122. A promissory note, or bond for the payment of money, executed in this State, and not made payable elsewhere, bears Alabama interest; and parol evidence is not admissible, to show that it was to be paid elsewhere. *Moore & Jones v. Davidson*, 18 Ala. 209.

123. The laws of the State in which a marriage is celebrated govern the rights of the respective parties to the

property of each other, and their subsequent removal to another State only affects after-acquired property. *Doss v. Campbell*, 19 Ala. 590.

2. *Intention of Parties.*

124. In the construction of contracts, the cardinal rule is, to effectuate, if possible, the intention of the parties. *Strong v. Gregory*, 19 Ala. 146; *Nesbitt v. Drew*, 17 Ala. 379; *Cuthbert v. Wolfe*, 19 Ala. 373; *Hamner v. Smith*, 22 Ala. 433; *Saunders v. Saunders*, 20 Ala. 710.

125. In ascertaining this intention, regard must be had to the situation and relative position of the parties, the objects which they had in view, and the nature of the contract itself. *Strong v. Gregory*, 19 Ala. 146; *Pollard v. Maddox*, 28 Ala. 321; *Mitchell v. Gates*, 23 Ala. 438.

126. When a deed, or other written contract, shows on its face that it was drawn up by an ignorant person, a greater latitude of construction is indulged. *Saunders v. Saunders*, 20 Ala. 710.

127. A court of equity looks rather to the spirit and intention of the parties, than to the form of the contract. *James v. State Bank*, 17 Ala. 69.

128. A contract which the parties intended to make, but did not make, cannot be set up in place of one which they did make, but did not intend to make. *Sanford v. Howard*, 29 Ala. 684.

3. *Implied Stipulations.*

129. Under a contract of hiring which merely specifies the agreed price and term, there is an implied stipulation, on the part of the hirer, to furnish suitable clothing and provisions, and medical attendance in case of sickness; but, where there is an express stipulation that the hirer shall furnish board and clothing, a liability for medical services cannot be implied. *Sims & Jones v. Knox*, 18 Ala. 236; also, *Foster v. Sykes*, 23 Ala. 796.

130. There is, also, an implied stipulation on the part of the hirer, in the absence of an express stipulation to the contrary, to return the slave to the owner at the termination of the bailment. *Wilkinson v. Moseley*, 18 Ala. 288; *Benje v. Creagh's Adm'r*, 21 Ala. 151.

131. Under a general contract of hiring, not restricting the employment of the slave to any particular business, the hirer has the right to employ him in any business to which slaves are usually put, not involving extraordinary peril to life or limb; or to rehire him to another, to be so employed. *Seay v. Marks*, 23 Ala. 532; *Ala. & Tenn. Rivers Railroad Co. v. Burke*, 27 Ala. 535.

132. In the absence of an express stipulation, the owner delegates to the hirer the same right to punish and correct the slave which he himself has. *Nelson v. Bondurant*, 26 Ala. 341.

133. There is an implied obligation on the part of a lessee, when the lease is silent, to use the property in a proper and tenant-like manner, without exposing the buildings to ruin or waste by acts of omission or commission, and not to use or employ them in a manner materially different from that in which they are usually employed. *Nave v. Berry*, 22 Ala. 382.

134. The lessee has an implied right to use the premises for any purpose, not materially different from that in which they are usually employed, to which they are adapted, and for which they were constructed; or to assign the lease to another, with all his own rights and privileges under it; and these rights can only be restrained by express stipulation. *Ib.*

135. When no time is specified for the performance of a contract, the law implies that it is to be performed within a reasonable time. *Wolfe v. Parham*, 18 Ala. 441; *Drake v. Goree*, 22 Ala. 409; *Adams and Wife v. Adams*, 26 Ala. 272; *Hussey v. Roquemore*, 27 Ala. 281; *Allen v. Greene*, 19 Ala. 34; *Garnett v. Yoe*, 17 Ala. 74.

136. There is an implied stipulation, on the part of a person who, having obtained a judgment in his own name, has promised to pay a specified sum out of the proceeds, when collected, that he will use due diligence in the collection. *Gliddon v. McKinstry*, 25 Ala. 246.

137. In a contract for the sale of a certain number of bales of cotton, which is silent as to the weight of the

bales, there is an implied stipulation that they shall be of the usual weight. *Davis v. Adams*, 18 Ala. 364.

138. In a contract relative to a growing crop of cotton, which is silent as to its quality, there is an implied stipulation that the there is shall correspond with that usually produced in the region of country where it is grown. *Ib.*

139. Under an agreement to receive a slave, and account for his hire, without any express stipulation as to the price or term, the hire becomes due and payable as it is earned, or, at most, within a convenient and reasonable time thereafter. *Mims' Executors v. Sturtevant*, 18 Ala. 359.

140. Implied stipulations are to be construed as though they were expressed in the contract, and, in the case of written contracts, cannot be contradicted by parol evidence. *Moore & Jones v. Davidson*, 18 Ala. 209; *Nave v. Berry*, 22 Ala. 382; *Seay v. Marks*, 23 Ala. 532; *Davis v. Lassiter*, 20 Ala. 561.

4. *Dependent and Independent Stipulations.*

141. Whenever a written contract contains a stipulation that the money shall be paid before the completion of the work which constitutes its consideration, or on a day certain, without reference to the completion of the work by that day, the stipulations are independent, and the performance of the work is not a condition precedent to the payment of money; *secus*, where no time is specified for the performance of the work, and the day fixed for the payment of the money is beyond the expiration of the reasonable time which the laws implies for the performance. *Drake v Goree*, 22 Ala. 409.

142. Under a contract for the sale of goods, to be paid for on delivery, both parties being present at the agreed time and place, and able to perform their respective undertakings, it is incumbent on him who would put the other in default to offer to perform his part of the contract; otherwise, the time will pass, and the contract be annulled, because neither has offered to execute it. *Davis v. Adams*, 18 Ala. 264.

143. When a note is given, payable on a day certain, in consideration of the payee's agreement to perform certain services for the maker, but no time is fixed for the performance of those services, the maker cannot defeat a recovery, on the ground that the contemplated services have not been performed, when the payee is in no default, but able and willing to perform his contract; nor is parol evidence admissible, to show that the note was not to be paid until the contemplated services had been rendered. *Walker v. Clay & Clay*, 21 Ala. 797.

144. A written contract contained the following provisions: "The said M. covenants and agrees to deliver to the said N., at the water's edge, at his steam-mills at Cedar Bluff, all the stocks for string timber for the Memphis Branch Railroad, agreeably to the said N.'s contract, made January 18th, with the engineer of said road;" the stocks to be of a specified size and quality, and "the timber to be delivered as fast as required for sawing, say one hundred stocks per day, more or less, as may be necessary. And the said N., on his part, covenants and agrees to pay the said M., when the above contract shall have been faithfully complied with, at the following rates, to-wit, forty-cents per stock; and that he will make his payments in the following manner, that is to say, on the 20th day of every month, during the progress of this contract, he will pay seventy-five per cent. of the relative value of such timber as may be delivered, until the whole of the timber herein contracted for shall have been delivered agreeably to contract, when the balance shall be forthwith delivered to the said M." *Held*, that the weekly delivery by M., at the specified place, from the date of the agreement to the next 20th day of the month, of such a number of stocks, not exceeding one hundred per week, as was necessary to afford constant employment to N.'s steam-mills during the usual working hours of each day of the week, was a condition precedent to N.'s liability to pay, and that his failure to perform the condition vested an immediate right of action in N. *Nesbitt v. McGehee*, 26 Ala. 748.

5. *Ambiguous Stipulations.*

145. An ambiguous term or stipulation will be limited by the subject-matter and obvious nature and design of the contract, and will be liberally construed to effectuate the intent. *Nesbitt v. Drew*, 17 Ala. 379.

146. When a contract admits of two constructions, one of which will destroy, and the other uphold it, the latter construction must prevail. *Prater's Adm'r v. Darby*, 24 Ala. 496; *Adams and Wife v. Adams*, 26 Ala. 272.

147. A written instrument, capable of two constructions, or containing language of doubtful import, will be construed most strongly against the maker. *Livingston v. Arrington*, 28 Ala. 424.

148. A policy of insurance is to be construed liberally for the benefit of the assured; and if any doubt should arise on the whole instrument, greater effect should be allowed to the written than to the printed words. *Mobile Marine Dock & Mutual Insurance Co. v. McMillan & Son*, 27 Ala. 77.

6. *Entire and Severable.*

149. A contract for services is said to be entire, when a gross sum is to be paid for a certain and definite consideration. *Wolfe v. Parham*, 18 Ala. 441.

150. Where the consideration is susceptible of apportionment, on either side, the contract is severable; but, where the complete fulfillment of the promise by either is a condition precedent to the fulfillment of any part of the promise by the other, the contract is entire. *Kirkland v. Oates*, 25 Ala. 465.

151. A contract by which, in consideration of $400, the owner of several slaves hires them to another for one year, and agrees to superintend and work with them as an overseer and laborer, is entire; but the discharge of the overseer, for good and sufficient cause, after he had entered on the performance of his duties, does not divest the hirer of the title to the slaves. *Leaird v. Davis*, 17 Ala. 448.

152. A contract for the hire of two slaves, for a year, at a gross sum, is entire. *Nesbitt v. Drew*, 17 Ala. 379.

153. So is a contract for the hire of one slave, for a month, at a gross sum. *Petty v. Gayle*, 25 Ala. 472.

154. If two slaves are put up separately at auction, to be hired, and knocked off to the same bidder, who was induced by the representations of the owner to bid for each under the expectation that he would get both; and one note is given for the amount of the hire, the two contracts are not thereby consolidated into one entire contract. *Camp v. Dill*, 27 Ala. 553.

155. A marine policy of insurance on 198 bales of cotton, valued at $9.900, at a premium of three-sixteenths, is so far a severable contract, that the underwriters are discharged from liability for whatever portion is safely landed at the port of destination. *Mobile Marine Dock & Mutual Insurance Co. v. McMillan & Son*, 27 Ala. 77.

156. A contract for the building of a house, in which it is stipulated that the whole work is to be completed before any part of the compensation is demandable, is entire; but, when it is shown that the owner, before the completion of the work, made a partial payment under the contract, and endeavored to get the house insured against fire, these circumstances rebut, to some extent, the idea that the contract was entire, and might authorize the jury to so find. *Partridge v. Forsyth*, 29 Ala. 200.

157. A recovery cannot be had under an entire contract, without averring and proving full performance. *Nesbitt v. Drew*, 17 Ala. 379; *Wolfe v. Parham*, 18 Ala. 441; *Kirkland v. Oates*, 25 Ala. 465; *Petty v. Gayle*, 25 Ala. 472; *Partridge v. Forsyth*, 29 Ala. 200.

158. *Secus*, as to a severable contract. *Mobile Marine Dock & Mutual Insurance Co. v. McMillan & Son*, 27 Ala. 77; *Partridge v. Forsyth*, 29 Ala. 200.

7. *Joint and Several.*

159. When two persons sign their names to the blank form at the bottom of a writ, thereby acknowledging themselves bound as sureties for the costs of suit, their contract is joint only, and not joint and several. *Boswell v. Morton*, 20 Ala. 235.

160. A written contract between a

schoolmaster and his employers, specifying the rates of tuition, the duties of the teacher, and the number of scholars to be sent by each subscriber, imposes, *it seems*, a several liability on each subscriber to pay the tuition of the children which he agreed to send, but no more. *Henderson v. Hammond*, 19 Ala. 340.

161. Under the act of 1818, (Clay's Digest, 323, § 63,) a creditor may sue one or all of the members of a firm, on a debt contracted in the firm name, and declare on the demand as the individual liability of the parties sued. *McCulloch v. Judd, Sons & Co.*, 20 Ala. 703.

3. *Different Instruments Construed as One.*

162. A bond, given to an attorney, for professional services to be rendered by him in the collection of certain claims, and a receipt for the claims, taken from him at the same time, together constitute but one contract. *Elliott v. McClelland*, 17 Ala. 206.

163. So do a promissory note, given by a client to his attorney, for professional services to be rendered by the latter, and a written agreement, executed at the same time, by which it is stipulated that the attorney shall be allowed one-half of the damages which may be recovered. *Dumas v. Smith*, 17 Ala. 305.

164. A deed of gift, conveying all the grantor's property, and a bond executed at the same time by the grantee, conditioned that he would let the grantor retain the possession of the property during the lifetimes of himself and his wife, or until he might think proper to make a division of said property among his children,—construed as parts of one and the same transaction. *Strong's Executors v. Brewer*, 17 Ala. 706.

165. An absolute bill of sale of slaves, and a penal bond contemporaneously executed by the purchaser, conditioned that he shall emancipate the slaves, construed as one contract. *Prater's Adm'r v. Darby*, 24 Ala. 496.

166. A mortgage, referred to in the recitals and condition of a penal bond, and part of the subject-matter of the same contract, held and construed as part of the condition in effect. *Rives v. Toulmin*, 19 Ala. 288.

167. When an assignment is written on the back of a deed, refers to it in express language, and conveys the same property, the deed may be looked to in construing the assignment. *Cuthbert v. Wolfe*, 19 Ala. 373.

168. A deed, executed by a married woman, partly in consideration of the settlement and provision made for her by her husband's will, and conveying to his two children by a former marriage an equal interest with herself in her separate estate; and the husband's will, executed at the same time,—held parts of one and the same transaction. *Trippe v. Trippe*, 29 Ala. 637.

9. *Particular Contracts.*

169. A written contract between a schoolmaster and his employers specified the duties of the teacher, the rates of tuition, and the number of scholars to be sent by each subscriber; and provided that the school was to be taught in the house belonging to the sixteenth sextion. *Held*, that the teacher was responsible for his conduct to the subscribers only, and that the trustees of the township had no right to control the school. *Henderson v. Hammond*, 19 Ala. 340.

170. A written contract, by which plaintiff undertook, for a specified time, and at a stipulated price, payable quarterly, "to feed and have attended to the hack horses of" the defendant; "to treat said horses as well as stage horses are usually treated; to have them harnessed, or to assist the driver in doing so, when necessary; to have them taken to the shop, to be shod;" and to board the driver, —is not a contract for the personal services of the plaintiff, but may be assimulated to a contract for work to be performed, or materials to be furnished, at a stipulated price. *Ramey v. Holcombe*, 21 Ala 567.

171. A contract between an attorney and his client, by which the former agrees to save his client harmless from all responsibility in a pending suit or to refund his fee, extends, if valid at all, only to such liabilities as the law would recognize and enforce; and if

the client suffers judgment to be rendered against him, in favor of another attorney whom he had never employed, he cannot resort to his contract of indemnity. *Lindsey v. Jones*, 23 Ala. 835.

172. Under a written contract between an overseer and his employer, whereby the latter promises to give the former "three-sixteenths of all the cotton raised on the place, and to gin and haul his cotton, with his own, free of charge," the overseer is also entitled to three-sixteenths of the cotton-seed, and is a co-owner with his employer in the seed and cotton, until a division is made between them; but a delivery of the cotton, after ginning, would not operate as a delivery of the seed. *Allen v. Harper*, 26 Ala. 686.

173. R. agreed to take charge of a certain negro belonging to J., "and to effect a cure of the same free of any charge for board;" and J. promised, in consideration thereof, to pay $100 "six months from the time that the cure of said negro is effected, or from the date that he is returned and pronounced well; the intention and understanding of the parties being that a sound and perfect cure is to be effected, for which the said J. is willing to pay the above sum; otherwise, he is not to pay anything." *Held*, that the legal effect of J.'s promise was, to pay the stipulated sum six months after a perfect cure had been effected, or six months from the time when the slave was returned perfectly cured; that R.'s declaration, when he returned the slave, "that he was well," was admissible evidence for him, in an action on the contract, not to prove the fact that a cure had been effected, but to show that he returned him as well, and thus fix the time when the six months would begin to run; and that evidence of the slave's condition, more than six months after his return, was admissible, to show that he was not perfectly cured when returned. *Jordan v. Roney*, 23 Ala. 758.

174. A warranty, contained in a bill of sale of a slave, a boy eight years old, in these words: "I also do warrant Joe to be sound in mind and body, with the exception of his legs; and I do hereby bind myself, if his legs should injure him from being a serviceable boy at the age of fifteen years, to make him good,"—means, not that the boy shall have, at the age of fifteen, a market value equal to that of a boy capable of doing ordinary work on a plantation, but that, if the injury to his legs then lessens his capacity for useful service, the vendor shall make good that injury; and evidence of the boy's condition, both before and after arriving at the age of fifteen, but not so remote as to furnish no reasonable presumption as to his condition at that time, is admissible evidence, in an action on the warranty. *Gingles v. Caldwell*, 21 Ala. 444.

175. A note, payable in "solvent notes or accounts of other men," is not equivalent to a note payable in money, but binds the maker to pay the specified sum, at or before maturity, dollar for dollar, in such solvent notes and accounts, or their value at the time of the maturity of the note. *Williams v. Sims*, 22 Ala. 512.

176. A promise to pay "in Alabama bank-notes," is not equivalent to a promise to pay in money. *Jolley v. Walker's Adm'rs*, 26 Ala. 690.

177. A promise to pay in specific property, or in money, gives the promisor the right to elect as to the mode of payment; but, if he voluntarily disposes of the property, or loses it by title paramount, his election is determined, and he becomes liable to pay in money. *Wolfe v. Parham*, 18 Ala. 441.

178. A stipulation in a contract of hiring, that the owner shall "deduct or account for all time lost by sickness or otherwise," being evidently intended for the benefit of the hirer, the term "otherwise" must be construed to refer to death or any other cause, unmixed with the fault of either party, by which the slaves are rendered incapable of performing the expected service. *Nesbitt v. Drew*, 17 Ala. 379.

179. Where it is stipulated that the hirer shall "lose the negro's lost time," evidence of a custom cannot be received, to show that the term relates "to time lost by sickness or running away, and not to time lost in consequence of the negro's death." *Barlow v. Lambert*, 28 Ala. 704.

180. A contract between endorser

and endorsee, by which the former agrees to extend the statutory time for the institution of a suit against the maker, and to repay the consideration in the event of the note being proved void for fraud, or for want of consideration, or to have been paid, or reduced by sets-off, imposes on him the risk of the specified defenses only, but not that of the statute of limitations. *Young v. Fuller*, 29 Ala. 464.

As to contracts of insurance and guaranty, see those titles.

As to contracts of hiring, common carriers, and other kinds of bailment, see that title.

V. PERFORMANCE, AND BREACH.

181. Under a contract for the sale of goods, to be paid for on delivery, both parties being present at the agreed time and place, and able to perform their respective undertakings, it is incumbent on him who seeks to enforce the contract to make an offer of performance. *Davis v. Adams*, 18 Ala. 264.

182. If the vendor contracts to deliver 50 bales of cotton, of his first gathering and packing, a tender of the first 55 bales, with the privilege to the purchaser of selecting 50 out of them, is a substantial offer of performance, when it does not appear that there is any material difference in the quality of the bales. *Ib.*

183. A tender of bales materially different in weight from those specified in the contract, would not be sufficient; but, if the contract is silent as to the weight of the bales, there is an implied stipulation that they are to be of the usual weight. *Ib.*

184. When no time is specified for the performance of a contract, the law requires that it shall be performed within a reasonable time. *Garnett v. Yoe*, 17 Ala. 74; *Wolfe v. Parham*, 18 Ala. 441; *Allen v. Greene*, 19 Ala. 34; *Drake v. Goree*, 22 Ala. 409; *Adams and Wife v. Adams*, 26 Ala. 272; *Hussey v. Roquemore*, 27 Ala. 281.

185. What is a reasonable time, is generally a question of fact for the determination of the jury, under all the circumstances of the particular case. *Drake v. Goree*, 22 Ala. 409.

186. If the vendor neglects, for more than two years, to make an effort to procure the title to the land sold, when his bond is conditioned to make title so soon as he can obtain it,—this is, *prima facie*, a breach of the condition; and it is incumbent on him to show, that he could not, with reasonable diligence, have obtained the title. *Garnett v. Yoe*, 17 Ala. 74.

187. Under a promise to make title within a reasonable time, when the bond shows that the title is in a third person, the failure of the vendor, for more than three years, to make an effort to procure the title, is, *prima facie*, a breach of the condition. *Allen v. Greene*, 19 Ala. 34.

188. Under a contract, made on the 8th December, 1849, to make titles "within a short time" thereafter, the tender of a deed "after the 13th October, 1851," and after the purchaser had abandoned the land, is not a sufficient compliance. *Hussey v. Roquemore*, 27 Ala. 281.

189. If the bond is conditioned to "make a valid title" to the land, the purchaser is not bound to accept the deed of a stranger, which, though it conveyed a good title, might yet involve the trouble and expense of an inquiry to ascertain its validity. *Ib.*

190. Where several are bound by an executory contract to make title to the purchaser, all must join in the conveyance, in order to a complete performance; but, where several are bound for the performance of one duty, and the obligee accepts from one of them something in satisfaction of that duty, and in lieu of a strict performance, this shall discharge all. *Johnson and Wife v. Collins*, 20 Ala. 435.

191. Where the obligor insists upon satisfaction, in lieu of strict performance, the *onus* is on him to show that the thing done or given was intended and accepted as satisfaction. *Ib.*

192. It is the duty of the purchaser to prepare and tender a deed for the vendor's execution; and the fact that he has been evicted by the vendor, under a recovery in ejectment, does not dispense with its performance. *S. C.*, 17 Ala. 318.

193. But the inability of the vendor to make title, in accordance with the condition of his bond, excuses the purchaser from this duty. *Ib.*

194. The refusal of the vendor to convey, in accordance with the terms of his contract, is a breach of the condition of his bond, although the purchaser has not presented him a deed to execute. *Garnett v. Yoe*, 17 Ala. 74.

195. A tender, by the vendor, of a deed signed by himself and wife, and attested by two witnesses, is a sufficient compliance with his bond; it is the duty of the purchaser to have it probated, if he desires it. *Carter v. Corley*, 23 Ala. 612.

196. The employment of a hired slave, in a service different from that particularly specified in the contract, is a breach on the part of the hirer. *Hooks v. Smith*, 18 Ala. 338; *Myers v. Gilbert*, 18 Ala. 467; *Seay v. Marks*, 23 Ala. 532; *Moseley v. Wilkinson*, 24 Ala. 411.

197. Where a slave is hired to work at a saw-mill, it is not a breach of the contract to employ him in rafting logs down an adjacent river; that being, at the time of hiring, and for a long time previously, a part of the ordinary labor performed by the hands at said mill. *Nesbitt v. Drew*, 17 Ala. 379.

198. Under an entire contract for the performance of work or services, a recovery cannot be had without averring and proving full performance. *Wolfe v. Parham*, 18 Ala. 441; *Nesbitt v. Drew*, 17 Ala. 379; *Hawkins v. Gilbert & Maddox*, 19 Ala. 54; *Kirkland v. Oates*, 25 Ala. 465; *Petty v. Gayle*, 25 Ala. 472; *Partridge v. Forsyth*, 29 Ala. 200.

199. Therefore, if the owner of a hired slave retakes possession of him, before the expiration of the term, without the consent of the hirer, he cannot recover any part of the hire. *Nesbitt v. Drew*, 17 Ala. 379; *Camp v. Dill*, 22 Ala. 249; *S. C.*, 27 Ala. 553; *McNeill & Forniss v. Easley*, 24 Ala. 456.

200. And if he refuses to deliver up the slave, on demand of the hirer, the fact that he afterwards sends the slave away alone, with instructions to return to the hirer, (which instructions the slave disobeys,) does not excuse the refusal. *McNeill & Forniss v. Easley*, 24 Ala. 456.

201. To make a guardian responsible for the act of his ward, in harboring a hired slave, it must be shown to have been done by his directions, or with his assent: the fact that he had previously allowed his ward to make contracts relative to his own property, and had refused to entertain a proposition to rescind the contract until he had consulted his ward, does not render him liable. *Camp v. Dill*, 27 Ala. 553.

202. If a workman partially complies with his contract, and a further performance is waived by the employer, the act of a stranger, to which the workman is neither a party nor a privy, cannot deprive him of compensation. *Wolfe v. Parham*, 18 Ala. 441.

203. If the work is not done according to the terms of the contract, but is nevertheless accepted by the employer, and is of any benefit to him, the workman may recover its value on a *quantum meruit*. *Hawkins v. Gilbert & Maddox*, 19 Ala. 54.

204. If the contract is mutually rescinded by the parties, after the performance of a portion of the work; and the work is used by the employer, and is of any benefit to him,—the workman may recover its value. *Kirkland v. Oates*, 25 Ala. 465.

205. Under an entire contract for the building of a house, which is destroyed by fire before its completion, the workman can recover nothing; *secus*, if the contract is not entire. *Partridge v. Forsyth*, 29 Ala. 200.

206. Under an entire contract, by which, in consideration of $400, the owner of several slaves hires them to another for one year, and agrees to superintend and work with them, his discharge by the employer, for good and sufficient cause, before the expiration of the year, is not a breach of contract by the hirer, and does not divest his title to the slaves. *Leaird v. Davis*, 17 Ala. 448.

207. Under a contract for the performance of personal services for a specified period, if the workman is discharged by the employer, without cause, before the expiration of the term of engagement, he may treat the contract as still subsisting, and sue for wages due according to its terms; or as rescinded, and sue for unliquidated damages for its breach. *Fowler & Prout v. Armour*, 24 Ala. 194; *Ramey v. Holcombe*, 21 Ala. 567.

208. There is a difference, as to the measure of damages for a breach, between a contract for personal services, and a contract for the performance of work, or the furnishing of materials. *Ramey v. Holcombe*, 21 Ala. 567.

209. Defendant, having goods at A., contracted with plaintiff for the hauling of them to his house in another county. Plaintiff agreed to start for the goods, with his wagons, on Sunday, but did not start until the following Tuesday; and, on arriving at A., was informed by the forwarding agent, that defendant's goods had been sent off ten days previous, and that he then had no goods there. *Held*, in an action on the contract, that the removal of the goods, of which plaintiff had no notice, did not justify him in failing to start for them on the stipulated day. *Lundie v. Cosper*, 20 Ala. 123.

210. Although the courts will not require the performance of every minute particular of a condition precedent, unless its full and exact performance is part of the essence of the contract; yet, where the execution of a trust deed is a condition precedent to the payment of money secured by a penal bond, the obligor has a right to insist upon the complete execution of the trust, before he can be held liable on his bond. *Rives v. Baptiste*, 25 Ala. 382.

211. The doctrine in relation to partial performance of mutual covenants which go to a part of the consideration on both sides, where the part unperformed can be compensated in damages, has no application to such penal bond. *Ib.*

212. In declaring for a breach of a written contract, containing several distinct stipulations, some of which have been performed, it is sufficient to aver non-performance of any particular stipulation which shows a good cause of action. *Montgomery Manufacturing Co. v. Thomas*, 20 Ala. 473.

213. In declaring on such contract, the pleader may assign in each count as many breaches as he pleases; but he cannot assign, in the same count, two breaches of the same stipulation. *Nave v. Berry*, 22 Ala. 382.

214. It is sufficient, generally, to assign a breach in the words of the contract. *Pryor v. Beck*, 21 Ala. 393.

VI. WAIVER, AND DISCHARGE.

215. A parol executory agreement, founded on no new consideration, and productive of no injury to the party who is to perform it, is not a waiver or discharge of a prior written contract. *Hunt & Hunt v. Barefield*, 19 Ala. 117; *Walker v. Greene*, 22 Ala. 679.

216. If the purchaser of a slave pays the purchase-money, after having been informed of facts which would constitute a fraud in the sale, he cannot afterwards recover damages in an action of deceit. *Gilmer v. Ware*, 19 Ala. 252.

217. Under a contract for the roofing of a house, a partial payment, made after discovering that the roof leaked, is a circumstance for the consideration of the jury, in determining whether any fraud was practiced by the workman, but is not a waiver of an existing cause of action for the fraud. *McGar v. Williams*, 26 Ala. 469.

218. A cause of action, accruing from a breach of covenant, cannot be discharged by any act short of a release, or the acceptance of something in satisfaction. *Nesbitt v. McGehee*, 26 Ala. 748.

219. A parol agreement between vendor and purchaser, made on discovering that the former had no title to a portion of the land, to the effect that, unless the vendor made a good title to that portion of the land within a reasonable time, the purchaser should be discharged from the payment of the balance due on the note for the purchase-money, constitutes a valid defense to an action on the note. *Hussey v. Roquemore*, 27 Ala. 281.

220. The retention of possession by the purchaser, in such case, might operate as a waiver or extension of the time for the delivery of the deed; but, if he abandons it within a reasonable time, the note cannot be enforced against him, even though he retains possession of the other portions. *Ib.*

VII. ALTERATION, AND RESCISSION.

221. If a written contract for the building of a house is so varied by the parties, after the commencement of

the work, as to require a greater amount of labor and materials, as well as an alteration in the structure, and a longer time for its completion, the workman is not bound to sue on the original contract, but may recover on a *quantum meruit;* and the written contract is then admissible evidence, to show what the parties had agreed on as reasonable for that portion of the work embraced in it. *Hutchison v. Cullum*, 23 Ala. 622.

222. If a person contracts with a workman for the roofing of a house, to be erected on a specified plan, and afterwards causes a material change to be made in the building, without the workman's consent, thereby rendering it necessary to make a material change in the form of the roof, he must be considered as having abandoned the original contract, and cannot hold the workman bound by his representations as to the original plan; but, if the workman's representations as to the character of the roof had no reference to any particular plan, and he proceeded under his contract to put on the roof, without making any objection to the alteration of the plan, the change would not affect his liability. *McGar v. Williams*, 26 Ala. 469.

223. Where a covenant or contract is materially varied by a subsequent valid contract, a recovery cannot be had on a declaration which only sets out the first contract and its breach; and if the declaration sets out both contracts, and alleges an appropriate breach, a plea of performance of the obligations imposed by the original contract, not noticing the additional obligations created by the second, is defective. *Nesbitt v. McGehee*, 26 Ala. 748.

224. One party cannot, at his election, without any fault or misconduct on the part of the other, annul a contract. *Walker v. Clay & Clay*, 21 Ala. 797.

225. If, while the contract is executory, the party by whom the work is to be performed does an act which shows conclusively that he does not intend to perform his part of it, this justifies the other party in treating it as ended. *Drake v. Goree*, 22 Ala. 409.

226. The inability of one party to complete his contract justifies the other in rescinding it. *Robertson v. Davenport & Patterson*, 27 Ala. 574.

227. If a workman is discharged by his employer, without sufficient cause, before the completion of the work or term of service, he may, at his election, treat the contract either as rescinded or as continuing. *Ramey v. Holcombe*, 21 Ala. 567; *Fowler & Prout v. Armour*, 24 Ala. 194.

228. If the employer, on discovering a violation of contract by the workman, discharges him, telling him to make out his bill for the work done, and promising to pay it to get rid of him; and the workman accordingly presents his account, and quits the service,—this is a mutual rescission of the contract. *Kirkland v. Oates*, 25 Ala. 465.

229. A slave was sold at public auction under a mortgage, and bought in by the mortgagee's agent, who sold him the next day to W.; but, on discovering that the slave was unsound, W. refused to give his note for the purchase-money, but tendered back the slave to the agent, and demanded a rescission of the contract. The agent refused to receive the slave, but afterwards agreed that he should be re-sold under the mortgage, and that W. should pay the difference between the original price and that brought at the re-sale; and this was accordingly done. *Held*, that these facts did not amount to a rescission of the contract. *Gilmer v. Ware*, 19 Ala. 252.

230. Where the purchaser of slaves, on discovering their unsoundness, wrote to the vendor, informing him of that fact, and tendering them back; and the vendor, in reply, objected that the offer to rescind was made too late, and referred the purchaser to his warranty for indemnity,—*held*, that this did not constitute a rescission, when it was shown that the purchaser did bring suit on the warranty. *Bennett v. Fail & Patterson*, 26 Ala. 605.

231. Where a contract is made under a mutual mistake as to the vendor's title to the land, and a deed is executed by the vendor for another tract, an offer to rescind by the purchaser, and to return the deed, does not entitle him to recover back the purchase-money at law. *Homer v. Purser*, 20 Ala. 573.

232. The party who seeks a rescission, on the ground of fraud, must act with promptness on the discovery of it, by an offer to return the property in a reasonable time, if the parties live at a distance from each other; or, if they reside near each other, and the property is susceptible of easy transportation, by an actual re-delivery, or by a tender with a view to its re-delivery. *Dill v. Camp*, 22 Ala. 249; *S. C.*, 27 Ala. 553.

233. If the purchaser retains the possession of the property, after an offer to rescind, he is merely the bailee of the vendor, and must not use or employ the property in any manner inconsistent with the vendor's rights. *Ib.*

234. If the vendor refuses to accept the property when the purchaser offers to return it, this will dispense with a more formal tender; but, if the purchaser retains the property, he must yield it up on the reasonable demand of the vendor; and his refusal to surrender on such demand, even after suit brought, will destroy the effect of his previous tender. *Bennett v. Fail & Patterson*, 26 Ala. 605.

235. The purchaser of a clock, which was warranted to keep good time, gave his note, under $20, for the price; and suit being brought on the note, it was shown that, though the clock was worthless as a time-piece, the case alone, without the works, was worth more than a nominal sum; and that the purchaser failed to rescind the contract, and kept the clock. *Held*, that judgment must go against the defendant for the actual value. *Davis v. Dickey*, 23 Ala. 848.

As to the rescission of contracts in equity, see that title in PART III, p. 334.

CONTRIBUTION.

See same title in PART III, p. 233.

CORONER.

1. The penalty to which a coroner is subjected by the act of 1833, (Clay's Digest, 159, § 2,) for a default in the execution of process, may be recovered in the summary mode provided by the act of 1807, (*Ib.* 217, § 80.) *Patterson v. Gaston*, 17 Ala. 223.

CORPORATIONS.

1. A municipal corporation may be authorized by statute to subscribe for stock in a plank-road company; and the contract of the corporation, made pursuant to the terms of the statute, is binding on it. *Mayor & Aldermen of Wetumpka v. Winter*, 29 Ala. 651.

2. A railroad company is a private corporation, and has power, independently of any provision in its charter, to appoint an agent in the construction of its road, or in the transportation of its freight. *Ala. & Tenn. Rivers Railroad Co. v. Kidd*, 29 Ala. 221.

3. The appointment of an agent need not be evidenced by the written vote of the corporation or its officers, but may be inferred from their adoption of the agent's acts. *Ib.*

4. Where the charter of an incorporated town provides, that its corporate name shall be "the town of E.," and that all its corporate powers shall be vested in, and exercised by and through, an intendant and certain councillors, who shall constitute a board to be called "the intendant and council of the town of E.,"—the persons composing the board are but the directors and agents of the corporation, and, in making contracts under color of their authority as such agents, are not to be considered public, or government agents, contracting in behalf of the public. *Hall v. Cockrell*, 28 Ala. 507.

5. The stockholders of a private corporation are not competent witnesses for it; and where the charter provides that the directors "shall be owners of stock," a director is, *prima facie*, an incompetent witness. *Montgomery & Wetumpka Plank-Road Co. v. Webb*, 27 Ala. 618.

6. A suit commenced by a corporation, without first giving security for the costs, as required by section 2398 of the Code, should be dismissed on motion. *Ala. & Tenn. Rivers Railroad*

Co. v. Harris, 25 Ala. 232; *Steamboat Empire v. Ala. Coal Mining Co.*, 29 Ala. 698.

7. A proceeding by notice and motion, on the part of a railroad company, against a delinquent stockholder, is a suit within the meaning of this statute; and security for the costs must be given when the notice is placed in the hands of the sheriff to be served. *Ala. & Tenn. Rivers Railroad Co. v. Harris*, 25 Ala. 232.

8. Process of garnishment does not lie against a public municipal corporation, to subject the salary of one of its police officers. *Mayor of Mobile v. Rowland & Co.*, 26 Ala. 498.

9. Where the corporate authorities of a city or town are required by its charter to keep in repair the streets and bridges within its limits, and, in consideration thereof, are relieved from other duties, an action on the case lies against them, for the neglect of this duty, in favor of any person who is thereby injured. *Smoot v. Mayor of Wetumpka*, 24 Ala. 112.

10. But their failure to abate as a nuisance, under the powers conferred on them by their charter, a private bridge, not belonging to the corporation, which had become rotten and unsafe, does not, in the absence of malice and corrupt intention, constitute a ground of action against them. *Ib.*

11. A municipal corporation, owning lands on a water-course from three to five miles distant from the city, has no right to divert the water of the stream, to the injury of other riparian proprietors, in quantities sufficient to supply the domestic wants of its inhabitants. *Stein v. Burden*, 24 Ala. 130; *Stein v. Ashby*, 24 Ala. 521.

As to the validity, construction and proceedings for the violation of by-laws, and also proceedings for a forfeiture of charter, see same title in PART I, p. 33.

As to the answer of a corporation in chancery, amendment and surrender of charter, liability of directors, and rights of stockholders, see same title in PART III, p. 234.

COSTS.

I. RECOVERY.

1. *Against State or County.*

1. No costs can be adjudged against the State, when it fails as plaintiff in a civil action. *Collier v. Powell & Bradley*, 23 Ala. 579.

2. Where judgment for costs is rendered against a county treasurer, in a suit instituted by him against the clerk of the county court, this is not an ascertained claim against the county, in favor of any person. *Falkner v. Comm'rs' Court of Randolph Co.*, 19 Ala. 177.

3. Where the proceedings of the commissioners' court, in the establishment of a public road, are removed by *certiorari* into the circuit court, and there reversed, judgment for the costs cannot be rendered against the commissioners; but, if they appeal from the circuit to the supreme court, and give security for the costs of the appeal, they are liable on an affirmance of the judgment. *Comm'rs' Court of Russell Co. v. Tarver*, 25 Ala. 480.

2. *As Affected by Amount of Damages.*

4. In actions to recover damages for torts, the plaintiff can recover no more costs than damages, where such damages do not exceed five dollars, unless the presiding judge will certify that the jury ought to have awarded greater damages. *Galle v. Lynch*, 21 Ala. 579.

5. But this statute does not apply to an action of debt on an attachment

bond. *McAllister v. McDow*, 26 Ala. 453.

6. Nor does it apply to a statutory action of debt, to recover the value of trees cut and removed from plaintiff's premises by defendant. *Hornsby v. Crossland*, 22 Ala. 625.

7. Nor does it authorize the rendition of judgment against the plaintiff for the residue of the costs. *Ivey v. McQueen*, 17 Ala. 408.

3. *In Other Cases.*

8. On the trial of a *supersedeas* of an execution, the successful party is entitled to costs as in other civil cases. *Ijams & Carr v. Rice*, 17 Ala. 404.

9. A party who, whether ignorantly or oppressively, summons witnesses in a cause which is not at issue, or which is not for trial at the return term of the subpœna, will be taxed with the costs of their attendance, even though he acted under the advice of counsel. *Porter v. Williams*, 22 Ala. 525.

10. When a party summons witnesses to sustain his character, after having been notified by the opposite party that no attempt would be made to impeach it, and such witnesses are not examined on the trial, he will be taxed with the costs of their attendance, although he acted under the advice of counsel. *Ib.*

11. In appeal cases from a justice's court, taken up by the defendant, if the plaintiff recovers judgment for a less sum than he recovered before the justice, the costs of the appeal may, in the discretion of the court, be imposed on either party. *Hornsby v. Crossland*, 22 Ala. 625.

12. In an action against an executor or administrator, commenced after the death of the testator or intestate, if the defendant intends to raise the question of the presentation of the demand, he must present it on the record by plea or suggestion, and the issue must be tried by the jury; but, if no such plea or suggestion is made, and the plaintiff has a general verdict on the issues joined, he is entitled to full costs. *Wallace v. Nelson*, 28 Ala. 282.

13. When a tender is made after suit brought, and refused, and the costs are paid by the defendant up to the time of the tender; and, under the plea of the tender, the money is brought into court on the day of trial, and paid to the plaintiff,—this does not discharge the defendant from the costs accruing after the tender. *Raiford v. Governor*, 29 Ala. 382.

14. The attorney of the successful party, and not the party himself, is entitled to the tax-fee. *Gillis v. Holly*, 19 Ala. 663.

15. An error in the imposition of costs, being amendable in the primary court, will be amended in the supreme court at the appellant's cost. *Comm'rs' Court of Russell Co. v. Tarver*, 25 Ala. 480.

As to costs in criminal cases, see same title in PART I, p. 34.

As to costs in probate cases, see same title in PART II, p. 132.

As to costs in chancery, see same title in PART III, p. 235.

As to costs on error or appeal, see ERROR AND APPEAL.

II. SECURITY.

1. *Before the Code.*

16. Security for the costs cannot be required, upon proof of the non-residence of a nominal plaintiff, who sues for the use of another person. *Lewis v. Lewis*, 25 Ala. 315.

17. An entry on the judge's docket, and in his hand-writing, reciting that the plaintiff was ruled to give security for costs by the next term, is not sufficient to authorize the entry of an order to that effect at a subsequent term, *nunc pro tunc*, unless it shows the reason why it was made. *Ib.*

18. Judgment cannot be rendered against the sureties on an attachment bond, for the costs accruing on the trial of a claim suit respecting the attached property. *Thompson v. Gates*, 18 Ala. 32.

19. When two persons sign their names to the blank form at the bottom of a writ, thereby acknowledging themselves bound as sureties for the costs, their contract is joint only, and not joint and several. *Boswell v. Morton*, 20 Ala. 235.

20. Suit being instituted against one surety alone, he can only take advantage of the non-joinder of his co-

surety by plea in abatement; and when a motion for a summary judgment is made against one, his failure to raise any objection on account of such non-joinder is a waiver of it. *Ib.*

21. A motion for a summary judgment against the surety may be made before the costs are taxed; and it is not necessary that the amount or items of costs should be stated. *Ib.*

22. In an action of debt on a bond given to secure the costs, it is not necessary to aver in the declaration that an account or bill in writing, containing the particulars of the fees, was produced, or ready to be produced, to the defendant; nor that the clerk and sheriff kept fee-books, in which the fees sought to be recovered were entered. *Pryor v. Beck*, 21 Ala. 393.

23. In such action, a recovery may be had for the fees of witnesses who were summoned by the plaintiff in the original suit. *Ib.*

24. An execution, signed by the clerk, but not certified, is not admissible to prove the amount of the judgment for costs. *Ib.*

25. A transcript of the judgment, properly certified by the clerk, is admissible evidence, although the certifying officer is himself entitled to a portion of the costs sought to be recovered. *Ib.*

26. The supreme court cannot render a direct judgment against the surety for the costs in the primary court; but the certificate of its clerk, as to the judgment there rendered, is a sufficient predicate for a summary judgment against the surety in the primary court. *Williams v. McCurdy & Aldrick*, 22 Ala. 696.

2. *Under the Code.*

27. A proceeding by notice and motion, on the part of a railroad company, against a delinquent stockholder, is a suit within the meaning of section 2398; and security for the costs must be given when the notice is placed in the hands of the sheriff to be served. *Ala. & Tenn. Rivers Railroad Co. v. Harris*, 25 Ala. 232.

28. An action brought by the wife, under section 2136, is within the provisions of section 2396, where the husband is a non-resident. *Ex parte Cole*, 28 Ala. 50.

29. An action commenced by original attachment is also within the provisions of said section. *Ex parte Robbins*, 29 Ala. 71; *Shepherd & Gordon v. Spriggs*, 29 Ala. 673.

30. But an action instituted by a non-resident nominal plaintiff, for the use of a resident, is not within the provisions of said section, although the complaint shows that the action ought to have been brought in the name of the beneficiary. *Ex parte Bush*, 29 Ala. 50.

31. The security must be endorsed on the complaint, or lodged with the clerk, before the issue of the summons. *Ala. & Tenn. Rivers Railroad Co. v. Harris*, 25 Ala. 232; *Ex parte Cole*, 28 Ala. 50.

32. In a suit commenced by original attachment, if the plaintiff wishes to sue out the writ before any other officer than the clerk of the court to which it is returnable, he may annex his complaint to the attachment, and procure security for the costs to be endorsed on the complaint before the issue of the writ. *Ex parte Robbins* 29 Ala. 71.

33. A motion to dismiss, on account of the failure to give security for the costs, may be made at any time before a plea is filed, or judgment rendered. *Ib.*

34. If the court improperly refuses to dismiss the suit on motion, *mandamus* lies to compel its dismissal, when no final judgment has been rendered in the cause. *Ex parte Cole*, 28 Ala. 50; *Ex parte Robbins*, 29 Ala. 71.

35. After the rendition of final judgment, the error is available on appeal; and the cause will be remanded, with instructions to the primary court to dismiss it. *Steamboat Empire v. Ala. Coal Mining Co.*, 29 Ala. 698.

36. Although the statute gives a summary judgment against the surety for the costs, only in the event of the plaintiff being unsuccessful in the suit; yet he is liable for them, equally with the plaintiff, if they cannot be collected when adjudged against the defendant. *Shepherd & Gordon v. Spriggs*, 27 Ala. 673.

III. TAXATION.

37. The half commissions to which a sheriff is entitled, when the sale of property levied on is stayed, become a part of the costs in the cause, and may be so taxed by the clerk, without motion to the court, or notice to the defendant, in an execution subsequently issued. *Barron v. Tart*, 18 Ala. 668. (Overruling *Oswitchee Co. v. Hope & Co.*, 5 Ala. 629.)

38. After the cost is taxed, it becomes a part of the judgment, and cannot be collaterally impeached: the items of costs can only be re-examined, on a direct motion to retax in the court in which the judgment was rendered. *Pryor v. Beck*, 21 Ala. 393.

39. The action of the circuit court, on matters relating to the taxation of costs, is revisable on error, except in certain appeal cases in which it has a discretionary power. *Porter v. Williams*, 22 Ala. 525.

COUNTY.

1. Claims against the county must be audited and allowed, before the commissioners' court can be required to make an appropriation for their payment. *Falkner v. Comm'rs' Court of Randolph Co.*, 19 Ala. 177.

2. A judgment for costs against the county treasurer, in a suit instituted by him against the clerk of the county court, is not an established claim against the county, in favor of any one. *Ib.*

3. A claim, audited and allowed at an unauthorized term of the commissioners' court, creates no liability on the county. *Wightman v. Karsner*, 20 Ala. 446.

4. The hire of carriages procured by the sheriff of Mobile, under the direction of the circuit judge, to convey the grand jurors to the county jail for the purpose of inspecting it, is no charge against the county, although the commissioners' court has, for many years past, allowed such charges. *Van Eppes v. Comm'rs' Court of Mobile*, 25 Ala. 460.

5. As to the liability of the commissioners, appointed under an act of the legislature, to contract for and superintend the erection of county buildings in Tallapoosa, and other questions connected therewith, see *Tarver v. Comm'rs' Court of Tallapoosa Co.*, 17 Ala. 527; *S. C.*, 21 Ala. 661; *S. C.*, 29 Ala. 414.

COUNTY TREASURER.

1. It is not essential to the validity of a county treasurer's official bond, even as a statutory bond, that it should recite the fact that he is county treasurer, or was elected as such. *Wilson v. Cantrell*, 19 Ala. 642.

2. The act of 1839, (Clay's Digest, 580, § 27.) which inflicts a penalty on a county treasurer for a breach of duty, does not deprive a party injured by such breach of his right of action on the treasurer's official bond. *Ib.*

3. In an action of debt on such official bond, a recovery can only be had for injuries necessarily affecting the rights of the party for whose use the suit is brought. *Ib.*

COURT, CIRCUIT.

1. The circuit court has jurisdiction of a summary proceeding against a sheriff and his sureties, for a failure to return an execution to the supreme court, although the amount of the judgment may be less than fifty dollars. *Huggins v. Ball*, 19 Ala. 587.

2. In an action on a contract, commenced in the circuit court, if the complaint shows a cause of action for only a nominal sum, it is not sufficient to sustain the jurisdiction. *Cahuzac & Co. v. Samini*, 29 Ala. 288.

3. If the plaintiff recovers a verdict for less than fifty dollars, in an action commenced in the circuit court, he may have judgment for the amount of the verdict, with costs, on making the affidavit required by the statute. *Kirkley v. Segar*, 20 Ala. 226.

4. In such case, the overruling of a motion to nonsuit the plaintiff, on account of the insufficiency of his affidavit, is not revisable on error. *McAllister v. McDow*, 26 Ala. 453.

5. The circuit court has authority to amend a judgment, at any time within three years after its rendition, by the correction of any clerical error or mistake, where there is sufficient matter of record to amend by. *Lee v. Houston*, 20 Ala. 301. (See AMENDMENT, 26–43, p. 396.)

6. It also has power, under the act establishing courts of probate, to amend the judgments of the county court, in causes transferred under that act. *Glass v. Glass*, 24 Ala. 468.

7. It also has jurisdiction of a motion against a sheriff, for failing to pay over money collected on an execution which was issued from the county court before its abolition. *Kavanaugh v. State Bank*, 21 Ala. 564.

8. It also has power, by virtue of its general and plenary jurisdiction, to supply a lost record. *Adkinson v. Keel*, 25 Ala. 551.

9. The circuit court of Montgomery county has jurisdiction of a summary proceeding against the tax collector of another county. *Walker v. Chapman*, 22 Ala. 116.

10. In a real action, the circuit court of the county in which the land lies has jurisdiction of the subject-matter; and it is competent for the parties, after a change of revenue has been ordered, to come into court by consent, have the order rescinded, and give the court jurisdiction of their persons. *Gager v. Doe d. Gordon*, 29 Ala. 341.

11. The circuit court has no authority to set aside a final judgment, after the close of the term at which it was rendered; yet, if the parties consent that the judgment may be set aside, the court may set it aside, but is not bound to do so. *Kidd & Stainton v. McMillan*, 21 Ala. 325.

As to jurisdiction and practice in appeal cases, see JUSTICES OF THE PEACE.

See, also, same title in PART I, p. 35.

COURT, CITY (MOBILE.)

1. The city court of Mobile has jurisdiction of an action on the case to recover damages for the diversion of the water of a running stream. *Stein v. Ashby*, 24 Ala. 521.

2. The judge of said court has power to grant writs of injunction, to be operative only in Mobile county. *Ex parte Greene and Graham*, 29 Ala. 52.

3. The clerk of said court has no power to issue an original attachment. *Stevenson v. O'Hara*, 27 Ala. 362; *Matthews, Finley & Co. v. Sands & Co.*, 29 Ala. 136; *Flash, Hartwell & Co. v. Paul, Cook & Co.*, 29 Ala. 141; *Lewis v. Dubose & Co.*, 29 Ala. 219. (Changed by statute.—Session Acts 1855–6, p. 117.)

As to the constitutionality of the city court, and its jurisdiction in criminal cases, see same title in PART I, p. 35.

COURT, COMMISSIONERS'.

1. The commissioners' court being a court of limited jurisdiction, its record must affirmatively show every fact necessary to support its jurisdiction. *Comm'rs' Court of Talladega Co. v. Thompson*, 18 Ala. 694; *Long v. Comm'rs' Court of Butler Co.*, 18 Ala. 482; *Wightman v. Karsner*, 20 Ala. 446; *Lamar v. Comm'rs' Court of Marshall Co.*, 21 Ala. 772; *Molett v. Keenan*, 22 Ala. 484; *Comm'rs' Court of Russell Co. v. Turver*, 25 Ala. 480; *Keenan v. Comm'rs' Court of Dallas Co.*, 26 Ala. 568.

2. In the establishment of a public road, the record must affirmatively show that the road lies within the limits of the county. *Comm'rs' Court of Talladega Co. v. Thompson*, 18 Ala. 694; *Comm'rs' Court of Russell Co. v. Turver*, 25 Ala. 480.

3. And that the statutory notice was given. *Molett v. Keenan*, 22 Ala. 484.

4. And that the prescribed oath was administered to the jury, and the prescribed duties performed by them. *Molett v. Keenan*, 22 Ala. 484; *Keenan v. Comm'rs' Court of Dallas Co.*, 26 Ala. 568.

5. In the establishment of a private road, it is not necessary that the record should show that it does not run through any person's plantation. *Long v. Comm'rs' Court of Butler Co.*, 18 Ala. 482.

6. The court has no authority to hold special terms, except in the cases expressly authorized by law; and all

orders, made at such unauthorized term, are absolute nullities. *Wightman v. Karsner*, 20 Ala. 446.

7. It has no authority to revoke a ferry license, except on the grantee's failure to renew his bond after receiving ten days notice. *Lamar v. Comm'rs' Court of Marshall Co.*, 21 Ala. 772.

As to the practice and proceedings of this court, see ROADS, BRIDGES, AND FERRIES.

When a *certiorari* or *mandamus* lies to it, see those respective titles.

COURT, SUPREME.

1. The supreme court, after its final adjournment, ceases to have any other power over its records than that, incident to all courts of general jurisdiction, of correcting clerical errors by matters of record. *Van Dyke v. The State*, 22 Ala. 57.

2. At an adjourned term, which, though continued for the trial of causes on a particular division only, is but a continuation of the regular term, the court has power, *ex mero motu*, to vacate an erroneous judgment, rendered during the regular term, in a cause on another division, and to set down the cause for rehearing at the next regular term. *Ib.*

3. The supreme court will take original jurisdiction of an application by a member of the house of representatives, for a *mandamus* against the speaker of the house, to compel him to certify to the comptroller of public accounts the amount to which the petitioner, as a member of said house, is entitled for mileage or *per diem* compensation. *Ex parte Pickett*, 24 Ala. 91.

4. The appellate jurisdiction of the supreme court, in the revision of final judgments and decrees of the inferior courts, is derived from the constitution, and is not restricted by the statutory provisions regulating appeals, which merely prescribe the means by which each particular case is brought under the pre-existing jurisdiction of the court. (*Per* WALKER and STONE, JJ.; while RICE, C. J., held that, however full and complete might be the jurisdiction conferred by the constitution, the public policy of the State required that that jurisdiction should not be exercised in favor of a party who did not comply with the statutory requisitions. *Thompson v. Lea*, 28 Ala. 453.

5. Where a cause was regularly heard before a special statutory court, (Code, § 573,) consisting of one judge of the supreme court and two circuit judges, and was by them reversed and remanded; and, on a subsequent day of the term, before the minutes of the regular court were signed, two members of the special court, in the absence of one of the circuit judges, granted a rehearing,—*held*, (STONE, J., alone sitting,) that the order was not void for want of jurisdiction. *Goodman & Mitchell v. Walker*, 29 Ala. 444.

As to the matters of which the supreme court will take judicial notice, see EVIDENCE.

As to the practice in the supreme court, see BILL OF EXCEPTIONS; ERROR AND APPEAL; MANDAMUS; and, PROHIBITION.

COURT AND JURY.

I. PROVINCE AND DUTY OF COURT.
II. PROVINCE AND DUTY OF JURY.

I. PROVINCE AND DUTY OF COURT.

1. It is the peculiar province of the court to construe written instruments, and to declare their legal effect. *Long v. Rogers*, 19 Ala. 321; *Kidd & Co. v. Cromwell, Haight & Co.*, 17 Ala. 648; *Moore v. Leseur and Wife*, 18 Ala. 606; *Allen v. Harper*, 26 Ala. 686; *Chamberlain v. Gaillard*, 26 Ala. 505; *Magee v. Doe d. Hallett & Walker*, 22 Ala. 699.

2. And the refusal to do so, when requested, is an error for which the judgment will be reversed. *Long v. Rodgers*, 17 Ala. 540.

3. Whether the instrument sued on is under seal or not, there being no explanatory parol proof, is a question to be determined by the court from the instrument itself. *Moore v. Leseur and Wife*, 18 Ala. 606.

4. The construction of an order of

sale, made by the orphans' court, is a question for the court, to be determined from an inspection of the record alone, without the aid of extrinsic evidence as to its meaning. *Wyatt's Adm'r v. Steele*, 26 Ala. 639.

5. The sufficiency of parol evidence, tending to show that a person, not a party to the record, was the real defendant in the action, is a question for the jury, which the court cannot properly assume to decide. *Tarleton & Pollard v. Johnson*, 25 Ala. 300.

6. When the boundary lines of a grant are fixed by the grant itself, it is the duty of the court to decide what the lines are. *Magee v. Doe d. Hallett & Walker*, 22 Ala. 699.

7. The law-merchant is a matter for the court to decide, and cannot be proved by witnesses. *Jewell v. Center & Co.*, 25 Ala. 498.

8. Where the admissibility of evidence depends upon the existence of a preliminary fact, it is the duty of the court to decide whether that fact exists; but the question may, at the discretion of the court, be submitted to the jury. *Scott v. Coxe's Adm'rs*, 20 Ala. 294.

9. When there is no evidence tending to prove a particular fact, the court may so instruct the jury. *Knox v. Fair*, 17 Ala. 503; also, *Jewell v. Center & Co.*, 25 Ala. 498.

10. But, where many witnesses are examined orally, and the facts detailed by them are numerous, such a charge may be refused. *Knox v. Fair*, 17 Ala. 503.

11. When a cause is submitted upon an agreed state of facts, the court can only decide the legal questions thereon arising, and will not infer the existence of other facts from those which are admitted. *Bott v. McCoy & Johnson*, 20 Ala. 578.

12. The existence of a partnership is, after the facts are ascertained, a question of law; but nevertheless, a witness, cognizant of the fact, may state it. *McGrew & Harris v. Walker*, 17 Ala. 824.

13. Where the words relied on to take a case out of the statute of limitations, amount in law to an express promise, the court may instruct the jury as to the legal effect of the words. *Evans v. Carey*, 29 Ala. 99.

As to mixed questions of law and fact, such as agency, fraud, intention, notice, malice and probable cause, *vide infra*, 15–31.

As to the matters of which the court will take judicial notice, see EVIDENCE.

For similar decisions, arising in criminal cases, see same title in PART I, pp. 36–37.

II. PROVINCE AND DUTY OF JURY.

14. Adverse possession is a question of fact for the decision of the jury. *Benje v. Creagh's Adm'rs*, 21 Ala. 151.

15. Agency is a question of fact, which falls within the exclusive province of the jury. *McClung's Executors v. Spotswood*, 19 Ala. 165; *McDonnell v. Branch Bank at Montgomery*, 20 Ala. 313. (But see *McKenzie v. Stevens*, 19 Ala. 691, where it is said to be a mixed question of law and fact.)

16. Fraudulent intention is a question for the determination of the jury. *Thomas v. Degraffenreid*, 17 Ala. 602; *Lanier v. Branch Bank at Montgomery*, 18 Ala. 625; *Stokes v. Jones*, 21 Ala. 731.

17. But, where a deed is fraudulent on its face, it is the duty of the court so to declare it. *Johnson v. Thweatt*, 18 Ala. 741.

18. And where the bill of exceptions recites, that "it was expressly proved that the conveyance was made to hinder and delay the grantor's creditors," and that there was no conflict in the evidence, the court may give a general charge upon the effect of the evidence. *Stokes v. Jones*, 21 Ala. 731.

19. And where fraud in the execution of the plaintiff's deed is the only defense, but no evidence is offered tending to prove fraud, or to raise a presumption of fraud, the court may instruct the jury, "that the matters in proof do not make out a case of fraud." *Hopkins v. Scott*, 20 Ala. 179.

20. Where the facts are clear and undisputed, fraud *vel non* is a pure question of law for the determination of the court; but, where the facts are not clear and indisputable, or where there is any conflict in the evidence, the question should be left to the decision of the jury. *Upson v. Raiford*, 29 Ala. 188.

21. Whether a payment was voluntarily made or not, is a question of fact for the determination of the jury. *Ewing v. Peck*, 26 Ala. 413.

22. Whether a party abandoned the possession of land, or merely left it *animo revertendi*, is a question for the determination of the jury; but the court may decide whether or not the question arises. *McCall v. Doe d. Pryor*, 17 Ala. 533.

23. Whether the acceptance of partial performance is intended as a waiver of the entire fulfillment of a contract, is a question for the jury. *Wolfe v. Parham*, 18 Ala. 441.

24. In an action on a penal bond, where the defendant relies on satisfaction in lieu of performance, it is for the jury to decide whether the thing done or given in lieu of performance was intended and accepted as a satisfaction. *Johnson and Wife v. Collins*, 20 Ala. 435.

25. Notice is a question of fact for the determination of the jury. *Saltmarsh v. Bower & Co.*, 22 Ala. 221.

26. Whether the facts are sufficient to put a purchaser on his guard, and thus charge him with implied notice, is a question for the jury. *Pritchett v. Munroe*, 22 Ala. 501.

27. In an action against an endorser, it is the province of the jury to ascertain the facts, while the court determines their legal sufficiency to constitute notice. *Stanley v. Bank of Mobile*, 23 Ala. 652.

28. Whether or not there has been a delivery of a chattel, is a question for the jury. *Thomas v. Degraffenreid*, 17 Ala. 602; *Nelson v. Iverson*, 19 Ala. 95.

29. What is a reasonable time for the completion of work, under a contract which specifies no time for the performance, is, generally speaking, a question for the jury. *Drake v. Goree*, 22 Ala. 409.

30. What constitutes due diligence, on the part of a sheriff, in collecting money under an execution, is a mixed question of law and fact. *Whitsett, Garner & Co. v. Slater*, 23 Ala. 626.

31. In an action for malicious prosecution, the facts being undisputed, probable cause is a question of law for the decision of the court; but, where facts are to be ascertained from evidence which is doubtful or conflicting, it becomes a question for the jury. *Ewing v. Sanford*, 19 Ala. 605; also, *Long v. Rodgers*, 19 Ala. 321.

32. It is the peculiar province of the jury, to determine whether a contract, consummated on Sunday, was justified by the necessity of the case. *Hooper v. Edwards*, 18 Ala. 280.

33. Where the issue involves the application of the proceeds of collateral securities to the payment, *pro tanto*, of several debts, the amount of a debt being shown, the jury may ascertain from it, as a basis, the *pro-rata* share to which it is entitled. *McKenzie v. Br. Bank at Montgomery*, 28 Ala. 606.

34. It is the exclusive province of the jury to determine the credibility and sufficiency of the evidence. *Waters v. Spencer*, 22 Ala. 460; *Brooks v. Hildreth & Moseley*, 22 Ala. 469; *Knight v. Bell*, 22 Ala. 198; *Whitsett, Garner & Co. v. Slater*, 23 Ala. 626; *Woolfork's Adm'r v. Sullivan*, 23 Ala. 548; *Tarleton & Pollard v. Johnson*, 25 Ala. 300; *Freeman v. Scurlock*, 27 Ala. 407; *McKenzie v. Branch Bank at Montgomery*, 28 Ala. 606; *Foust v. Yielding*, 28 Ala. 658; *McGonegal v. Walker*, 23 Ala. 361; *Hudson & Stokes v. Weir & Tate*, 29 Ala. 294; *Cain v. Penix*, 29 Ala. 374; *Allman v. Gann*, 29 Ala. 240.

35. And to draw an inference of fact. *Knight's Adm'rs v. Vardeman*, 25 Ala. 262; *King v. Pope*, 28 Ala. 602; *Stanley v. Nelson*, 28 Ala. 514; *Crum v. Williams*, 29 Ala. 446; *Lawler v. Norris*, 28 Ala. 675.

COVENANT.

I. CONSIDERATION, AND CONSTRUCTION.
II. PERFORMANCE, AND BREACH.
III. PLEADINGS, AND EVIDENCE.

I. CONSIDERATION, AND CONSTRUCTION.

1. A covenant between heirs-at-law and devisee, by which the latter, in consideration of the former withdrawing all objections to the probate of the will, agrees that they shall be entitled to a full and equal participation in the estate, as if the testator had

died intestate, and that the estate shall be divided equally among them, not only estops the devisee from asserting his title as such, but passes to the heirs the same title they would have taken if their ancestor had died intestate. *Bean v. Welsh*, 17 Ala. 770.

2. A covenant between partners, on the dissolution of the firm, by which one agrees to take all the goods and partnership effects, and to become solely responsible for the outstanding debts, is not one of indemnity merely, but binds him to discharge his co-partner, within a reasonable time, from all liability for the outstanding debts. *Hogan's Executor v. Calvert*, 21 Ala. 194; *Peacey's Creditors v. Peacey's Adm'r*, 27 Ala. 683.

3. Where the owners of lands, through which a railroad, then in process of construction, would probably pass, joined in a sealed instrument, by which, in consideration of one dollar in hand paid, they bargained, sold and conveyed to the railroad company, by words *in præsenti*, "so much of our [their] lands as may be necessary in the construction of said railroad,"—*held*, that the instrument, although it might not operate as a conveyance in fee of the lands, was binding as a covenant that the company might appropriate so much of any part of the grantors' land as might be necessary for the construction of the contemplated railroad. *Pollard v. Maddox*, 28 Ala. 321.

4. If a lessee covenants "to repair and deliver up" the premises, he is bound to rebuild in case of loss by fire during the term; but a covenant "to deliver up" simply imposes an obligation against holding over. *Nave v. Berry*, 22 Ala. 382.

5. A covenant for a good title to land means a perfect title to the entire tract, unaffected by any gaps in the chain of title, or any defect or outstanding incumbrance. *Smith v. Robertson*, 23 Ala. 312; *Burns v. Taylor*, 23 Ala. 255.

6. Where a contract under seal contained the following provisions: "The said M. covenants and agrees to deliver to the said N., at the water's edge, at his steam-mills at Cedar Bluff, all the stocks for string timber for the Memphis Branch Railroad, agreeably to the said N.'s contract with the engineer of said road, made January 18th;" the stocks to be of a specified size and quality, and "the timber to be delivered as fast as required for sawing, (say, one hundred stocks per week, more or less.) And the said N., on his part, covenants and agrees to pay the said M., when the above contract shall have been faithfully complied with, at the following rates, to-wit, forty-five cents per stock, and that he will make his payments in the following manner, that is to say, on the 20th day of every month, during the progress of this contract, he will pay seventy-five per cent. of the relative value of such timber as may be delivered, until the whole of the timber herein contracted for shall have been delivered agreeably to contract, when the balance shall be forthwith paid." *Held*, that the weekly delivery by M., at the specified place, from the date of the contract until the next 20th day of the month, of such a number of stocks, not exceeding one hundred per week, as was necessary to afford constant employment to N.'s steam-mills, during the usual working hours of each day of the week, was a condition precedent to N.'s liability to pay, and that his failure to perform this condition vested an immediate right of action in N. *Nesbitt v. McGehee*, 26 Ala. 748.

7. An agreement under seal, whereby several creditors, at the request of their common debtor, covenant and promise to grant indulgence on their respective debts, and to forbear suit for the term of two years, and that the debtor shall be discharged from the demand of any creditor who may violate the agreement, is without consideration, and constitutes no defense to an action by one of the creditors. *Keep v. Kelly & Levin*, 29 Ala. 322.

8. A covenant which is not the foundation of the suit, but which is set up as a defense, does not import a consideration. *Ib.*

9. The legal effect of a covenant cannot be varied by a contemporaneous parol agreement. *Holley v. Younge*, 27 Ala. 204.

For analogous decisions, see BONDS, p. 448; CONTRACTS, p. 486.

II. PERFORMANCE, AND BREACH.

10. When no time is limited for the performance of a covenant, it must be performed within a reasonable time. *Allen v. Greene*, 19 Ala. 34.

11. A covenant of seizin is broken as soon as it is made, if the covenantor then had no title to the estate granted. *Anderson v. Knox*, 20 Ala. 156.

12. An unqualified covenant against incumbrances is broken by the existence, at the time of its execution, of an outstanding incumbrance; but, if the covenant merely extends to quiet enjoyment against incumbrances, then it is broken only by an entry, expulsion from the premises, or some disturbance in the possession. *Ib.*

13. An outstanding right of dower, whether perfect or inchoate, is an incumbrance upon the title, which renders it defective. *McLemore v. Mabson*, 20 Ala. 137; *Thrasher & Mitchell v. Pinckard's Heirs*, 23 Ala. 616.

14. Although the courts will not require the performance of every minute particular of a condition precedent, unless its full and exact performance is part of the essence of the contract; yet, where the execution of a trust deed is a condition precedent to the payment of money secured by a penal bond, the obligor has a right to insist on the complete execution of the trust, before he can be held liable on his bond. *Rives v. Baptiste*, 25 Ala. 382.

15. The doctrine in relation to partial performance of mutual covenants, which go to a part of the consideration on both sides, where the part unperformed can be compensated in damages, has no application to such penal bond. *Ib.*

See, also, BONDS, 20–32, p. 450; CONTRACTS, 181–200, p. 502.

III. PLEADINGS, AND EVIDENCE.

16. A stranger cannot sue upon a deed, containing covenants between the parties only, although it may contain an express covenant for his benefit. *Douglass & Easton v. Branch Bank at Mobile*, 19 Ala. 659.

17. The State Bank may sue, in its own name, on a lease of its real estate, when the rent is reserved to it, although the demise is in the name of the assistant commissioner. *Ib.*

18. In an action on a lease for years, to recover rent, it is not necessary to aver that the defendant entered upon, or took possession of the premises. *Ib.*

19. In an action on a covenant of seizin, the breach may be as general as the covenant. *Anderson v. Knox*, 20 Ala. 156.

20. In an action for a breach of the implied covenant created by the words "grant, bargain and sell," (Clay's Digest, 156, § 31,) it is necessary to aver that the title has failed in consequence of some act of the grantor. *Griffin v. Reynolds*, 17 Ala. 198.

21. In an action on a covenant of warranty of title, it is necessary to aver that the plaintiff has been evicted, or has yielded up the possession, under a paramount title. *Ib.*

22. A plea, denying that the plaintiff has lost the possession of the land, and averring that he still retains it, is good in bar of such action. *Ib.*

23. When a covenant is varied by a subsequent valid covenant, a recovery cannot be had under a declaration which sets out the first covenant and its breach; and if the declaration sets up both covenants, with an appropriate breach, a plea of performance as to the original obligations, not noticing the additional obligations created by the second covenant, is demurrable. *Nesbitt v. McGehee*, 26 Ala. 748.

24. A cause of action, accruing from a breach of covenant, cannot be discharged by any act short of a release, or the acceptance of something in satisfaction. *Ib.*

25. In an action on a covenant of seizin or against incumbrances, if the plaintiff has bought in an outstanding title or incumbrance, he is entitled to recover the reasonable price fairly and necessarily paid for it. *Anderson v. Knox*, 20 Ala. 156.

26. But the amount paid by him for such outstanding title or incumbrance is not, *per se*, evidence of its value. *Ib.*

27. The fact that he offered to prove the reasonableness of the price paid by him, and was prevented by an objection on the part of the defendant, which was sustained by the court, does

not justify the jury in acting without proof, or in considering that as evidence which would be otherwise incompetent. *Ib.*

28. In an action for a breach of covenant of title, evidence of the fact that, at the time the deed was executed, the purchaser himself was in possession of the land as tenant of an adverse holder, is not admissible for the vendor, since he is not relieved from liability to make good his covenant by the fact that such adverse holding was known to both parties. *Abernathy v. Boazman*, 24 Ala. 189.

CUSTOM.

1. Proof of a custom among commission-merchants, as to the rate of commissions for accepting and advancing, is admissible, to show the implied agreement between parties contracting in reference to their business, and the reasonableness of the charge. *Brown v. Harrison & Robinson*, 17 Ala. 774.

2. When it is shown, or may fairly be presumed, that the parties to a policy of insurance contracted with reference to a custom existing in the city where they did business, and where the policy was effected, the general law must give way to the custom. *Fulton Insurance Co. v. Milner, Tinsley & Co.*, 23 Ala. 420.

3. It is not essential to the validity of a custom, regulating the assessment of damages in cases of partial loss on insured goods, that it should extend to the whole State: it is sufficient that it is generally known and acted on in the port, city or town where the policy is effected. *Ib.*

4. The custom in the city of Mobile, as to the mode of adjusting damages in cases of partial loss under valued policies, (which is, to pay the difference between the sales price of the injured article and the price stipulated in the policy,) is valid. *Ib.*

5. Every usage of trade, so well settled, or so generally known, that all persons engaged in that trade may fairly be presumed to have contracted with reference to it, is regarded as forming part of every policy designed to protect risks in that trade, unless by the express terms of the policy, or by necessary implication, such inference is repelled. *Mobile Marine Dock & Mutual Insurance Co. v. McMillan & Son*, 27 Ala. 77.

6. A custom to pay *pro rata*, under an entire contract of hiring, if the slave does not work the full term, is not valid. *Petty v. Gayle*, 25 Ala. 472.

7. Evidence of a custom, as to the right of a consignee to sell goods to meet his acceptance for the consignor, held too vague and indefinite, both as to the time and the place of its existence, to control a particular contract. *Jewell v. Center & Co.*, 25 Ala. 498.

8. When the evidence of a custom is conflicting, it should be left to the jury to determine whether the custom is proved; but, where the only evidence is the testimony of one witness, which, not restricting the custom to any particular time or place, tends to prove the law-merchant to be different from what it really is, the court may instruct the jury that there is no evidence of custom before them. *Ib.*

9. It cannot be laid down, as a positive rule, that more than one witness is required to prove the existence of a custom, before it can become an element of contracts; consequently, a charge upon the requisites of a custom, the existence of which is proved by only one witness, cannot be considered abstract. *Partridge v. Forsyth*, 29 Ala. 200.

10. Evidence of a local custom is admissible, to supply details in a contract, whether oral or written, as to which the contract itself is silent; or, to show that provincialisms, and technicalities of science and commerce, have acquired a known, fixed, and definite meaning, different from their ordinary import; or, where such technicalities, unexplained, are susceptible of two or more reasonable constructions. *Barlow v. Lambert*, 28 Ala. 704.

11. But it cannot be received, to contradict any positive requirement of the law, any principle of public policy, or an express contract, whether oral or written; nor to give plain and unambiguous words and phrases a meaning different from their natural import; consequently, it cannot be received, to show that a stipulation in a

contract of hiring, that the hirer should "lose the negro's lost time," "related to time lost by sickness or running away, and not to time lost in consequence of the negro's death." *Ib.*

12. Where a railroad company gives a receipt for freight, "to be delivered to R. R. agent" at the terminus of the road; and the agent there deposits it in a warehouse not belonging to the company, evidence of its custom to deposit freight in that warehouse is admissible for the company, when sued for the loss of the cotton. *Ala. & Tenn. Rivers Railroad Co. v. Kidd*, 29 Ala. 221.

13. In ascertaining the value of rents, in the master's office in chancery, proof of a custom to receive a part of the crop as compensation for rent, should not be received. *Brantley v. Gunn*, 29 Ala. 387.

DAMAGES.

I. IN ACTIONS FOR TORTS.

1. *Against Officers.*
2. *In Detinue.*
3. *In Trespass, for Injuries to the Person, or Personal Property.*
4. *In Trespass to Try Titles, and Quare Clausum Fregit.*
5. *In Trover.*
6. *For Malicious or Wrongful Attachment or Injunction.*
7. *For Other Injuries.*

II. IN ACTIONS ON CONTRACTS.

1. *Bills of Exchange, and Promissory Notes.*
2. *Contracts for Performance of Services.*
3. *Sale and Warranty of Personalty.*
4. *Sale of Realty.*

III. ON ERROR, OR APPEAL.

IV. LIQUIDATED DAMAGES, AND PENALTY.

I. IN ACTIONS FOR TORTS.

1. *Against Officers.*

1. In an action against a county clerk or treasurer, on his official bond, a recovery can only be had for injuries necessarily affecting the rights of the party for whose use the suit is brought. *Brooks v. Governor*, 17 Ala. 606; *Wilson v. Cantrell*, 19 Ala. 642.

2. If the county clerk fails to take sufficient security, when tendered by the plaintiff in error, and yet certifies the bond as valid to the supreme court, where the judgment is affirmed on certificate; and the judgment is afterwards perpetually enjoined in chancery, on account of the clerk's want of authority in filling up the bond,—he is liable, in an action on the case, for the amount of the original judgment, with interest thereon, and for necessary costs, expended in good faith, in the defense of the chancery suit. *Williams v. Hart*, 17 Ala. 102.

3. Whether he is liable, also, for the ten per cent. damages to which, if the bond had been valid, the plaintiff would have been entitled on the affirmance of the judgment in the supreme court, *quære? Ib.*

4. In an action on the case against a deputy clerk, for negligence and unskillfulness in the performance of his duties, whereby his principal is exposed to a suit for damages, whether the recovery should be for only nominal damages, where the suit is instituted before the consequent injury is developed, or for the probable prospective damages, *quære? Snedicor v. Davis*, 17 Ala. 472.

5. In an action against a sheriff, for failing to return or make the money on an execution, the amount of the execution is the measure of damages, notwithstanding the defendant may have continued entirely solvent. *Evans v. Governor*, 18 Ala. 659.

6. Under the act of 1848, (Session Acts 1847–8, p. 95,) the penalty is twenty per cent. on the amount of the execution. *Huggins v. Powell*, 19 Ala. 129.

7. Under the act of 1820, (Clay's Digest, p. 244,) which remains in full force as to all defaults occurring prior to the passage of the act of 1848, tax-collectors are subjected to a penalty of fifteen per cent., with interest, on the amount of their default. *Walker v. Chapman*, 22 Ala. 116.

2. *In Detinue.*

8. In detinue for a slave, the annual hire is the measure of damages; but interest cannot be allowed on the hire. *Fralick v. Presley and Wife*, 29 Ala. 457.

9. If the damages are not proved, a nominal sum only should be given; consequently, it is error to instruct the jury, that they might, in the absence of proof as to the value of the hire, give interest on the agreed value of the slave by way of damages. *Miller v. Jones' Adm'r*, 26 Ala. 247.

10. If the plaintiff, by giving the statutory bonds, causes the possession of the slaves to be taken from the defendant, and turned over to himself, the jury are authorized, (Session. Acts 1847–8, p. 82.) on finding a verdict for the defendant, to assess the damages and value of the slaves. *Rowan v. Hutchisson*, 27 Ala. 328.

11. A bailee, failing to return the property at the termination of the bailment, is liable for damages without a special demand. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

12. If the husband comes into possession, by marriage, of a slave belonging to the estate of a decedent, which the administrator had gratuitously loaned to the wife *dum sola*, he is liable both for his own detention and that of his wife before marriage; and if, on his death before suit brought, the slave comes to the possession of his executor as assets, the latter is liable, without a previous demand, both for his own detention and that of his testator. *S. C.*, 24 Ala. 184.

As to the damages in an action on a detinue bond, *vide infra*, 58, 59.

3. *In Trespass, for Injuries to the Person, or Personal Property.*

13. In a civil action for an assault and battery, it being shown that one of the defendants prevented a third person from interfering, the simultaneous declarations of such third person, tending to show that, instead of separating the combatants, he was about to participate in the fight, are admissible evidence in mitigation of damages. *Watkins v. Gaston*, 17 Ala. 662.

14. It being shown that, at the time of the assault, the plaintiff cursed the defendant, and was in the act of rising from his chair, with a stick in his hand, threats made by him against the defendant within the preceding week or ten days, and communicated to the latter, are admissible evidence, as tending to show the motive of the defendant's act. *Ib.*

15. When it becomes a material question whether the defendant inflicted more personal injury on the plaintiff than was necessary to protect his close against the latter's attempt to enter it, the plaintiff's declarations, made some time previous to the assault, but not communicated to the defendant, showing an angry state of feeling between them concerning their respective claims to the possession of the close, are admissible evidence for the defendant. *Riddle v. Brown*, 20 Ala. 412.

16. The plaintiff having been wounded on the side, breast, head and neck, he may prove that, about two years after the commission of the assault, "when in the field of his father, he lay down under a tree, and complained that his head, neck and back hurt him." (STONE, J., *dissenting.*) *Phillips v. Kelly*, 29 Ala. 628.

17. The defendant cannot be allowed to prove, in mitigation of damages, that he has been indicted, convicted, and fined for the same assault and battery. *Ib.*

18. In an action to recover damages for injuries inflicted on a slave, a witness for plaintiff testified, that defendant and one R. were chasing the slave as a runaway, with a pack of trained dogs belonging to the defendant; that he heard the report of a gun or pistol in the direction the dogs were trailing, and, when he reached a certain fence, defendant came up to him, from a swamp on the opposite side of the field, and told him, "that he came up with the negro in the field, on horseback; that the negro turned on him with a large stick; that he retreated to keep out of the way of the negro, who said he would die before he would be taken; that he went to R., got his pistol, pursued the negro to the swamp, came up near to him, and shot him just as the negro was turning on

him." *Held*, that defendant's declaration to said R., at the time of getting the pistol, and explanatory thereof, was admissible evidence for him. *Dearing v. Moore*, 26 Ala. 586.

19. An action lies for an injury to a dog, without showing that he had pecuniary value, since the law implies that some damage is sustained from every wrongful injury to property. *Parker v. Mise*, 27 Ala. 480.

20. In an action for taking and carrying off slaves, the court charged the jury, "that, if they found for the plaintiff, the measure of damages would be the highest value of the slaves at any time between the taking and the trial; that they might, in addition to this value, allow interest thereon, or might look to the value and hire as some guide in coming to a conclusion, but were not bound by them." *Held*, that the charge was not erroneous. *Ib.*

21. In an action for taking and withholding several hired slaves, plaintiff cannot be allowed to prove, that he had prepared for cultivation a larger tract of land than his other negroes could cultivate, and had procured horses to cultivate said land, provender to feed them, and a necessary supply of provisions for the negroes; and that, by reason of losing the services of the hired slaves, some of his horses were idle during the year, and he was compelled to leave a portion of the land uncultivated. Such damage is not the natural and proximate consequence of the tortious act complained of. *Burton v. Holley*, 29 Ala. 318.

22. Whenever the tortious act is accompanied with circumstances of aggravation, exemplary damages are allowable. *Dearing v. Moore*, 26 Ala. 586; *Parker v. Mise*, 27 Ala. 480; *Roberts v. Heim*, 27 Ala. 678; *Hair v. Little*, 28 Ala. 236. (*Vide infra*, 29.)

23. In an action against two, who are shown to have acted in concert, if the evidence justifies exemplary damages against one, the other is liable to the same extent. *Hair v. Little*, 28 Ala. 236.

4. *In Trespass to Try Titles, and Quare Clausum Fregit.*

24. In trespass to try titles, the plaintiff is entitled to recover damages for the rents accruing up to the time of the verdict; consequently, the judgment is conclusive of the fact that they were recovered. *Shumake v. Nelms' Adm'r*, 25 Ala. 126.

25. In such action, if no claim or suggestion for improvements is made by the pleadings, the defendant has no right to offer evidence as to the value of his improvements. *Stephens v. Westwood*, 25 Ala. 716.

26. The value of an orchard is to be estimated with reference to what it is worth to the premises in its growing state. *Mitchell v. Billingsley*, 17 Ala. 391.

27. The actual value of growing timber is not its supposed worth to the owner, but the price for which it would sell at the time in the neighborhood in which it is situated. *Ivey v. McQueen*, 17 Ala. 408.

28. In ascertaining the injury to lands from clearing, the inquiry is limited to the effect on the market value of the land at the time of the clearing: deterioration from cultivation of the soil, although it might enter as an element into the value of the use and occupation, is too remote to be considered the legal consequence of the act of felling the timber. *Brantley v. Gunn*, 29 Ala. 387.

29. Whenever the tortious act was accompanied with circumstances of aggravation, exemplary damages may be given. *Mitchell v. Billingsley*, 17 Ala. 391; *Ivey v. McQueen*, 17 Ala. 488. (*Vide supra*, 22.)

5. *In Trover.*

30. The measure of damages, in trover, is the value of the goods at the time of the conversion, or at any time intervening between the conversion and the trial, with interest thereon. *Ewing v. Blount*, 20 Ala. 694; *Jenkins v. McConico*, 26 Ala. 213; *Williams v. Crum*, 27 Ala 468.

31. But this rule only applies, where the plaintiff has not regained his property: if he has regained the possession, he is only entitled to recover damages equal in value to the use or service of the goods, with compensation for any injury done to them, and necessary and reasonable expenses

incurred in regaining the possession otherwise than by suit at law. (LIGON, J., *dissenting*, held that, when the property is regained pending the suit, and its value is then unimpaired, judgment should go against the defendant only for the interest.) *Ewing v. Blount*, 20 Ala. 694.

32. There are cases to which the general rule has no application, and in which the equity of the case is allowed to mitigate the damages. *Williams v. Crum*, 27 Ala. 468.

33. In an action brought by an administrator, against a voluntary purchaser from an executor *de son tort*, the defendant cannot show, in mitigation of damages, that the executor *de son tort*, since his purchase, has paid debts which the administrator was bound to pay in due course of administration. *Carpenter v. Going*, 20 Ala. 587.

34. Whether the executor *de son tort* himself, when sued by the rightful administrator, can show such payments in mitigation of damages, *quære ? Ib.*

35. Whether the death of one of several co-plaintiffs pending the suit, with the failure to make his personal representative a party, affects the amount of the recovery, see *Powell v. Glenn*, 21 Ala. 458.

6. *For Malicious or Wrongful Attachment or Injunction.*

36. If an attachment is sued out against a merchant, on the ground of fraud, the injury to his credit and business constitutes a legitimate ground of recovery, in an action on the case. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

37. The loss of probable profits consequent upon the seizure of his goods under the attachment, although it does not furnish the measure of damages, is a circumstance for the consideration of the jury, in arriving at a correct conclusion as to the injury sustained. *Donnell v. Jones*, 17 Ala. 689.

38. The costs of the justice's court, before whom the attachment was returnable, are recoverable as a part of the damages actually sustained; but the costs of the circuit court, to which the defendant removed the case by appeal, cannot be recovered, when it appears that, after there filing his pleas, he withdrew them for a valuable consideration paid him by the plaintiff in attachment, and suffered judgment by *nil dicit*. *Seay v. Greenwood*, 21 Ala. 491.

39. The costs of the original suit, to which the attachment was ancillary, constitute no part of the plaintiff's damages. *White v. Wyley*, 17 Ala. 167.

40. Reasonable and necessary counsel fees, expended or incurred in the defense of the attachment suit, may be proved and considered in the assessment of damages caused by the vexatious suing out of the writ. *Marshall v. Betner*, 17 Ala. 832.

41. They are equally recoverable, where the action is brought for the wrongful suing out of the writ. *Seay v. Greenwood*, 21 Ala. 491.

42. Where an attachment against one partner is levied on the goods of the partnership, and the other partner, after recovering the goods in a claim suit under the statute, brings an action on the case against the plaintiff in attachment, counsel fees paid by him in the claim suit may be taken into consideration by the jury in assessing his damages. *Roberts v. Heim*, 27 Ala. 678.

43. Evidence of the plaintiff's general credit and reputation is not, it seems, admissible for him, until it has been assailed. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142. (As to the admissibility of evidence of character in other cases, *vide infra*, 60–62.)

44. Vindictive damages are recoverable, when the action is founded on the malicious and vexatious suing out of the writ. *Marshall v. Betner*, 17 Ala. 832; *Seay v. Greenwood*, 21 Ala. 491; *Roberts v. Heim*. 27 Ala. 678.

45. Where the attachment was sued out as ancillary to an action against the plaintiff, as endorser of a promissory note, on which suit had previously been instituted against the maker, with a return of *non est inventus*, the proceedings in the suit against the maker, although not sufficient to fix the liability of the endorser, are admissible evidence in mitigation of damages. *White v. Wyley*, 17 Ala. 167.

46. Where the attachment was sued

out by the defendant as agent of another, he may show, in mitigation of damages, that he was plaintiff's surety on a stay-bond in the original suit, and that plaintiff was about to remove his property from the State. *Forrest v. Collier*, 20 Ala. 175.

47. In debt on an injunction bond, counsel fees necessarily incurred in defense of the suit, though not actually paid, are recoverable. *Garrett & Hill v. Logan*, 19 Ala. 344.

7. *For Other Injuries.*

48. A riparian proprietor is entitled to recover nominal damages, for a diversion of the water from his mill, without any proof of actual damage. *Stein v. Burden*, 24 Ala. 130; *Stein v. Ashby*, 24 Ala. 521.

49. No recovery can be had, except by a new action, for damages accruing after the commencement of the suit; but evidence is admissible to show the effect, after suit brought, of a diversion of the water, with the view of affording information to the jury as to the effect of a diversion under similar circumstances before suit brought. *Stein v. Burden*, 24 Ala. 130.

50. The act of 1841, giving the lessee of the city water-works of Mobile a writ of *ad quod damnum*, to ascertain the damage caused to riparian proprietors by his diversion of the water of Bayou Chataque, was designed not merely to give a remedy for the present injury sustained by the proprietor, but to settle and fix compensation adequate to the injury produced by the continuous diversion of the water. *Burdew v. Stein*, 25 Ala. 455.

51. The statute (Clay's Digest, 241, § 3,) which gives double damages for injuries to stock, is highly penal; to authorize a recovery under it, the declaration must be framed with reference to it. *Tankersly v. Wedgworth*, 22 Ala. 677; *Smith v. Causey*, 22 Ala. 568.

52. The defendant cannot recoup for damages done to his crop by the stock, when it is shown that his field was not enclosed with a lawful fence. *Woodward v. Purdy*, 20 Ala. 379.

53. Under a declaration alleging that the injuries complained of were done by defendant's children and servants, plaintiff cannot prove injuries done by defendant himself in person. *Smith v. Causey*, 28 Ala. 655.

54. In debt on a penal bond, executed under an order of the chancellor as a condition precedent to the issue of a *ne exeat*, and conditioned that the plaintiff shall prosecute his suit and writ to effect, or, failing therein, pay to the defendant "all such costs and damages as he may sustain from the wrongful suing out of said writ," a recovery can only be had for the damages actually sustained from the wrongful suing out of the writ, and not such damages as might have been recovered in case if the writ had been sued out maliciously. *Spivey v. McGehee*, 21 Ala. 417.

55. In an action on a penal bond, conditioned to indemnify the obligee for all costs and damages sustained by the wrongful suing out of a writ of seizure in chancery, a recovery may be had for the damage actually sustained, without proof of malice. *Zeigler & Hall v. David*, 23 Ala. 127.

56. The death of one of the slaves seized, before the trial, does not affect the defendant's liability for hire. *Ib.*

57. If the possession of the slaves is not restored to the plaintiff, he is entitled to recover their hire down to the time of the trial, although, after the dismissal of the first bill for want of prosecution, a second was filed for the same purpose, and a new bond given, conditioned for the forthcoming of the slaves to abide the final order and decree. *Ib.*

58. In an action on a detinue bond, a recovery may be had for counsel fees expended in defending the suit in the circuit court, but not for counsel fees in the supreme court, to which the case was removed by the plaintiff below. (GOLDTHWAITE, J., *dissenting*, held that counsel fees for defending in both courts should be allowed.) *Ferguson & Scott v. Baber's Adm'rs*, 24 Ala. 402.

59. In such action, a recovery may be had, under a special allegation, for the value of the hire of the property during the whole time the obligee was deprived of its use, although, on his failure to give the statutory bond, the property was delivered to the plaintiff as provided by the statute

and this value may be proved, by evidence of the "value of the use of the property per day, over and above expenses, during the time it was in the plaintiff's possession." *Hudson v. Young*, 25 Ala. 376.

60. Under the general issue in slander, the plaintiff's general bad character is admissible evidence, although the plea of justification is also interposed. *Pope v. Welsh's Adm'r*, 18 Ala. 631.

61. In case for a malicious prosecution for larceny, evidence of the plaintiff's general bad character, showing that his only occupation was that of gambling and horse-racing, is admissible for the defendant. *Martin v. Hardesty*, 27 Ala. 458.

62. When a bankrupt's certificate of discharge is impeached for fraud, evidence of his general good character is not admissible for him. *Pearsall v. McCartney*, 28 Ala. 110.

II. In Actions on Contracts.

1. *Bills of Exchange, and Promissory Notes.*

63. A surety, uniting with his principal in drawing a bill, becomes liable to the accommodation acceptor, in the absence of proof limiting his liability, not only for the amount of the bill, but for the usual commissions incident to its acceptance and payment. (Chilton, J., *dissenting.*) *Swilley & Riley v. Lyon & Baker*, 18 Ala. 552.

64. The holder of a bill, endorsed by the payee, accepted by a firm, put in circulation before maturity by one of the partners, and purchased by the holder from an agent of the firm, at a discount greater than the legal rate of interest, can only recover from the acceptors the principal sum paid, notwithstanding his purchase was made in entire ignorance of the facts. *Sprague & Winston v. Zunts*, 18 Ala. 382.

65. A note, payable in "solvent notes or accounts of other men," is not equivalent to a note payable in money, but binds the maker to pay the specified sum, at or before maturity, dollar for dollar, in such solvent notes or accounts; or, if paid after maturity, the value in money of that amount of such solvent notes and accounts at the time of the maturity of the note. *Williams v. Sims*, 22 Ala. 512.

66. A promise to pay "in Alabama bank-notes," binds the promisor to pay in the specified bills, or their worth in coin at the time the payment is to be made. *Jolley v. Walker's Adm'rs*, 26 Ala 690.

67. When a note is payable at a specified day, for a sum certain, which may be discharged by the payment of a less sum at an earlier day, the greater sum is the debt actually due, and is recoverable if the less sum is not paid as stipulated. *Carter v. Corley*, 23 Ala. 612.

68. When a note, payable on a specified day, contains a stipulation that it shall not bear interest until another specified day after maturity, an action may be maintained on its non-payment at maturity; but the judgment must be for the principal only, without interest. *Billingsley's Adm'r v. Billingsley*, 24 Ala. 518.

2. *Contracts for Performance of Services.*

69. Under a contract for personal and individual services, at a stipulated price, and for a specified period, if the party is discharged, without cause, before the expiration of the term of his engagement, he may recover the whole amount agreed to be paid for the entire term; but, if he elects to treat the contract as rescinded, it is doubtful whether the same rule as to damages would apply. *Ramey v. Holcombe*, 21 Ala. 567.

70. The measure of damages, however, for the breach of a contract for the performance of work, or the furnishing of materials, at a stipulated price, is a *pro-rata* compensation, according to its terms, for the time during which the party had performed it, and the profits which he could have made by it during the remainder of the time. *Ib.*

71. If an engineer, having contracted to serve another for one year, at a stipulated sum, payable monthly, is discharged, without any fault on his part, before the expiration of the year, and elects to sue on the contract as still subsisting, he can only recover

the wages due by its terms before the institution of the suit; but, if he elects to sue for unliquidated damages for the breach, he is entitled to recover the actual damage sustained up to the trial, the exact measure of which would not be the sum specified in the contract. *Fowler & Prout v. Armour*, 24 Ala. 194.

3. *Sale and Warranty of Personalty.*

72. In an action against a purchaser, for refusing to receive goods agreed to be purchased by him at a specified price, the measure of damages is, the difference between the agreed price and the market value of the goods at the time of the breach. *Davis v. Adams*, 18 Ala. 264.

73. On a breach of warranty as to the quality of goods sold, the purchaser is entitled to recover, at least, the difference between its actual value and what would have been its value as warranted; but, since the jury may also allow interest on that sum, the court may properly refuse to instruct them, that this difference in value is the measure of damages. *Foster v. Rodgers*, 27 Ala. 602.

74. Where cotton, bought by sample in Montgomery, in January, was shipped to New Orleans, and there resold at public auction in May, after notice to the vendor; and the value of the sampled cotton in Montgomery, at the time of the sale, and in New Orleans at the time of the re-sale, are shown; and it is further shown that the relative value of the sampled and damaged cotton is the same in both places,—the jury may look to the price brought at the re-sale, in determining the actual value in Montgomery at the time of the sale. *Ib.*

75. The fact that the vendor of a slave had offered him for sale, within the twelve months immediately preceding the sale, for a considerable sum less than the price paid by the purchaser, tends to show that the slave was unsound at the time of the sale. *Rowland v. Walker*, 18 Ala. 749.

76. The payment by the purchaser of a price which, if the animal was sound, would be inadequate, is a circumstance to which the jury may look, in connection with other evidence, in determining whether he was not informed of the latent unsoundness of the animal. *Armstrong v. Huffstutler*, 19 Ala. 51.

77. The measure of damages for a breach of warranty of the soundness of a slave, is the difference between his actual value at the time of the sale and what he would have been worth if sound. *Worthy, Brown & Co. v. Patterson*, 20 Ala. 172.

78. Together with interest on this sum from the time of the sale. *Stoudenmeier v. Williamson*, 29 Ala. 558.

79. The measure of damages for the breach of an express warranty of a slave, a boy eight years of age, in these words: "I also do warrant Joe to be sound in mind and body, with the exception of his legs, and I do hereby bind myself, if his legs should injure him from being a serviceable boy at the age of fifteen years, to make him good,"—is the difference between the boy's actual value at the age of fifteen, and what would then have been his value, if the injury to his legs had not lessened his capacity for performing the services usually rendered by slaves of that age; but the fact that the purchaser had allowed another person, during the year preceding the trial, to have the slave's services gratuitously, is not admissible evidence for him. *Gingles v. Caldwell*, 21 Ala. 444.

80. On an exchange of slaves, the parties reciprocally executed bills of sale, under seal, containing warranties of soundness; and plaintiff afterwards brought an action, to recover damages for defendant's breach of warranty. *Held*, that defendant might recoup the damages which he had sustained by plaintiff's breach of warranty. *Eckles & Brown v. Carter*, 26 Ala. 563.

81. A purchaser is entitled to recover damages for the breach of a warranty of title to a slave, on proving the recovery of a judgment against his sub-purchaser, by one having an adverse title, of another judgment by his sub-purchaser against himself, and notice to his vendor of both suits. *Harris v. Rowland's Adm'rs*, 23 Ala. 644.

82. The measure of damages which the purchaser is entitled to recover, when he has lost the slave by title

paramount, is the value of the slave at the time of his purchase, with interest thereon, and the costs necessarily incurred by him in the suit brought to test the title, (of which suit the vendor was notified,) with interest thereon from the time of its payment. *Rowland's Adm'rs v. Shelton*, 25 Ala. 217.

4. *Sale of Realty.*

83. In an action of debt on a title-bond, conditioned that the obligor should convey so soon as he could obtain the title to the land, the judgment should be for the penalty, with nominal damages and costs. *Garnett v. Yoe*, 17 Ala. 74.

84. *Semble*, that the measure of damages, in such action, is the value of the land at the time of the breach. *Whiteside v. Jennings*, 19 Ala. 784.

85. Where the purchaser is notified, by the surety of the principal obligor, that the title is not in the person named in the condition of the bond, and promises the surety that he will not pay the purchase-money until the title is arranged, but afterwards pays it although he might have retained it consistently with his contract, the surety can reduce the damages to the extent of the purchase-money. *Allen v. Greene*, 19 Ala. 34.

86. In an action on a covenant of seizin, or against incumbrances, if the plaintiff has bought in an outstanding incumbrance, he is entitled to recover the reasonable price fairly and necessarily paid for it; but the amount paid by him is not, *per se*, evidence of the value of such outstanding incumbrance. *Anderson v. Knox*, 20 Ala. 156.

87. The fact that the plaintiff offered to prove the reasonableness of the price paid by him, and was prevented by an objection on the part of the defendant, which was sustained by the court, does not authorize the jury to act without proof, or to consider that as evidence which would be otherwise incompetent. *Ib.*

88. If an infant, on arriving at full age, disaffirms a contract of sale previously made by him, and sues his purchaser for the use and occupation of the land, the latter may recoup for valuable improvements erected on the land. *Weaver v. Jones*, 24 Ala. 420.

89. If the vendor, on discovering that he has no title to a portion of the land sold, promises that, unless he makes a good title to that portion of the land within a reasonable time, the purchaser shall be discharged from the payment of the balance due on his note for the purchase-money,—this discharges the purchaser, if titles are not made, from the entire balance due on the note. *Hussey v. Roquemore*, 27 Ala. 281.

90. The measure of damages, which a purchaser is entitled to on account of his vendor's false representation that the land was not subject to overflow, and that the tract included other valuable lands which were outside of its boundaries, is the difference between the actual value of the land and what would have been its value if the representations had been true. *Gibson v. Marquis and Wife*, 29 Ala. 668.

91. Where two contiguous half-sections, which are rendered fractional subdivisions by the passage of a navigable river, are represented by the vendor to contain 640 acres, and the purchaser afterwards files a bill for an abatement of the purchase-money, it is erroneous to compute the damages resulting from the deficiency, by taking into consideration the quality of the adjacent lands; but the correct rule is, to compute the average value of the land per acre, at the price agreed to be paid, after first deducting the value of the ferry and river privileges, and to multiply this average value by the number of acres deficient. *Stow v. Bozeman's Executors*, 29 Ala. 397.

III. On Error, or Appeal.

92. On the affirmance by the supreme court of a judgment of condemnation rendered on the trial of a claim suit under the statute, ten per cent. damages cannot be awarded. *Hooks v. Branch Bank at Montgomery*, 18 Ala. 451.

IV. Liquidated Damages, and Penalty.

93. Under a parol agreement between vendor and purchaser, made on

discovering that the former had no title to a portion of the land conveyed, to the effect that, unless he made the purchaser a good title to that portion of the land within a reasonable time, the latter should be discharged from the payment of the balance due on his note for the purchase-money, the damages resulting from the vendor's failure to make title being uncertain, and the difference between the value of the land and the balance due on the note being slight, the agreement is not in the nature of a penalty, but discharges the purchaser, if titles are not made, from the entire balance due. *Hussey v. Roquemore*, 27 Ala. 281.

DEBT.

I. WHEN THE ACTION LIES.
II. PLEADINGS, AND EVIDENCE.
III. VERDICT, AND JUDGMENT.

I. WHEN THE ACTION LIES.

1. The assignee of a promissory note may maintain debt on it in his own name. *Barclay v. Moore*, 17 Ala. 634.

2. After a bond has been paid by a third person, at the request of the obligor, an action cannot be maintained on it, in the name of the obligee, for the use of such third person. *Simmons and Wife v. Walker*, 18 Ala. 664.

3. The recovery of a judgment against a county clerk, for the statutory penalty for issuing a marriage license to a female under the age of eighteen years without the consent of her parent or guardian, does not authorize an action against the sureties on his official bond. *Brooks v. Governor*, 17 Ala. 806.

4. An action on a sheriff's official bond, payable to the governor for the time being and his successors in office, cannot be maintained in the name of the governor individually. *Bagby v. Baker*, 18 Ala. 653; *Chapman v. Spence*, 22 Ala. 588.

5. Nor can an action be maintained on such bond, in the name of the obligee officially, after he has gone out of office, unless brought for the use of a third person. *Chaudron v. Fitzpatrick*, 19 Ala. 649.

6. If a sheriff retains more than his lawful fees out of money collected under execution, when the entire amount collected is not enough to satisfy the debt and lawful costs, the defendant in execution cannot, after paying the balance really due, maintain an action against him for the excess of fees retained. *Chenault's Adm'rs v. Walker*, 22 Ala. 275.

7. Where the official bond of a county treasurer is defective as a statutory bond, but good as a common-law bond, an action on it can only be maintained in the name of the obligee. *Wilson v. Cantrell*, 19 Ala. 642.

8. The administrator of the deceased obligee is the proper party to sue for a breach of a title-bond which accrued in the lifetime of the obligee; and the action lies though the purchase-money has not been paid. *Allen v. Greene*, 19 Ala. 34.

9. Where such bond shows that the title is in a third person, and the obligor never procures a conveyance either to himself or to the obligee, the heir of the obligee cannot sue in his own name for a breach, whether accruing before or after the death of his ancestor. *Ib.*

10. An action lies on an injunction bond, when the writ was sued out vexatiously, without a previous action on the case to ascertain the damages. *Garrett & Hill v. Logan*, 19 Ala. 344.

11. An action lies on a *ne-exeat* bond, after the dismissal of the suit for want of prosecution, without the chancellor's permission being first asked and obtained. *Zeigler & Hall v. Daird*, 23 Ala. 127.

12. A return of forfeiture is not necessary to the maintenance of a common-law action of debt on a claim bond. *Alexander v. Trask*, 20 Ala. 805.

13. An action lies on the bond of a deputy sheriff, in favor of his principal, without previous notice of default to the sureties. *McGehee v. Gewin*, 25 Ala. 176.

14. Where the payment of money, secured by penal bond, is made to depend on the performance of a con-

dition precedent, an action cannot be maintained on the bond until the condition has been fully performed. *Rives v. Baptiste*, 25 Ala. 382.

15. An action of debt lies on a bond, conditioned that the obligor shall indemnify the obligee against his guaranty of a third person, given at the obligor's request. *Carr's Executors v. Wyley*, 23 Ala. 821.

16. An action does not lie on the official bond of a judge of the county court, for his failure to require a guardian to give further security, or to renew his bond, on account of the insolvency or removal of the original sureties. *Hamilton v. Williams*, 26 Ala. 527.

17. An action lies on the official bond of a justice of the peace, only for a breach of his ministerial duties, and not for errors, mistakes, and omissions of a judicial character. *McGrew & Beck v. Governor*, 19 Ala. 89.

18. To sustain an action on a *ne exeat* bond, conditioned that the obligors should "prosecute their said bill and writ to effect," or, failing therein, pay the defendant all such costs and damages as he might "sustain from the wrongful filing of said bill, or the wrongful suing out of said writ,—it must be shown that the writ was wrongfully sued out, and that the plaintiff therein failed to prosecute his suit to effect. *Spivey v. McGehee*, 21 Ala. 417.

19. An order discharging the defendant from custody under the writ, upon his delivering up to the plaintiffs therein certain slaves in his possession, is not such a failure to prosecute the writ to effect, as will give a right of action on the bond. *S. C.*, 24 Ala. 476.

20. An action does not lie on the official bond of the secretary of an incorporated company, to charge the sureties with money received on deposit by the company, without authority under its charter, and fraudulently embezzled by the secretary. *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

21. No demand is necessary, in order to sustain an action on an administrator's bond. *Kyle v. Mays, use of Pond*, 22 Ala. 692.

22. An action lies on such bond, at the suit of a party injured, either in his own name, or in the name of the obligee for his use. *Amason v. Nash*, 24 Ala. 279.

23. A decree of the orphans' court, against the administrator, in favor of a distributee, is sufficient to sustain an action on such bond. *Kyle v. Mays, use of Pond*, 22 Ala. 692; *Holley v. Acre*, 23 Ala. 603.

24. But, where the decree is in favor of "the legal representative" of a distributee, and therefore void for uncertainty, the failure to pay it does not amount to a *devastavit*, so as to authorize an action on the bond, until after the judicial ascertainment of the person who is to receive it. *Kyle v. Mays, use of Hatchett*, 22 Ala. 673.

25. A decree against the administrator of an executor, under the act of 1845, will not support an action against the sureties on the executor's bond. *Gray v. Jenkins*, 24 Ala. 516.

26. Debt lies on a judgment after the expiration of a year and a day, although an execution may legally issue on it. *Kingsland & Co. v. Forrest*, 18 Ala. 519.

27. A mere memorandum of the clerk of a foreign court, stating the amount of damages assessed by the jury, and adding the words, "then judgment for" the amount, will not sustain an action of debt, although certified, in proper form, to be "a true and perfect transcript and exemplification of the record." *Hinson v. Wall*, 20 Ala. 298.

28. A decree of the orphans' court, confirming an order of the commissioners appointed to make distribution of a decedent's estate, which order required one distributee to pay a sum of money to another, will not support an action of debt for the recovery of the money, since neither the court nor the commissioners have any jurisdiction to make such an order. *Allen and Wife v. Raney and Wife*, 19 Ala. 68.

29. But, if the parties adopted and acted on the division made by the commissioners, the money may be recovered in this form of action. *Ib.*

II. PLEADINGS, AND EVIDENCE.

30. Counts in debt and detinue may be joined. *Calvert v. Marlow*, 18 Ala. 67.

31. Counts on a bond and on a promissory note may be joined. *Barclay v. Moore*, 17 Ala. 634.

32. In an action on a bond, the breaches assigned, whether in the declaration or by a replication, must show that the plaintiff has a cause of action. *Garrett & Hill v. Logan*, 19 Ala. 344.

33. But it is sufficient, generally, to assign a breach in the words of the condition, and negative its performance. *Pryor v. Beck*, 21 Ala. 393.

34. It is sufficient, on general demurrer, that the breach be assigned in words which contain the sense and substance, though not in the language of the contract. *Calvert v. Marlow*, 18 Ala. 67.

35. If several breaches, some of which are good, are assigned in one count, a demurrer will not lie to it. *Wilson v. Cantrell*, 19 Ala. 642.

36. A general demurrer will not lie to the declaration, for surplusage, argumentativeness, or duplicity, in the assignment of the breach. *Garnett v. Yoe*, 17 Ala. 74.

37. In declaring on an administrator's bond, a count on the penalty alone, not noticing the condition, is sufficient. *Holley v. Acre*, 23 Ala. 603.

38. Where the action is brought to charge the sureties with a judgment rendered against the administrator, to be levied *de bonis intestatis*, it is not necessary to allege that the judgment was rendered on a debt which was a proper charge against the estate, or against the administrator as such. *Reid v. Nash*, 23 Ala. 733.

39. A declaration in such action, alleging that a final settlement was had by the administrator with the orphans' court, "and on said final settlement the sum of $259 was, by the decree and judgment of said court, assessed and decreed as the distributive share" of the distributee for whose use the suit was brought,—held demurrable, because it showed no judgment or decree in favor of any person. *Gilbreath v. Manning*, 24 Ala. 418.

40. In an action on a sheriff's official bond, for his failure to collect and pay over militia fines, the names of the persons against whom the fines were assessed, with the amounts of the several fines, as stated in the certificate of the president of the court-martial, must be averred. *Chapman v. Weaver*, 19 Ala. 626.

41. In declaring on a bond given as security for costs, it is not necessary to allege that a written account or bill, containing the particulars of the fees, was produced, or ready to be produced, to the defendant; nor that the clerk and sheriff kept fee-books, in which were entered the fees sought to be recovered. *Pryor v. Beck*, 21 Ala. 393.

42. In declaring on a bond required by the chancellor as a pre-requisite to the issue of a writ of seizure, it is sufficient to aver that the suit was dismissed, without stating the grounds of the dismissal. *Zeigler & Hall v. David*, 23 Ala. 127.

43. It is not necessary, in such case, to aver notice of the dismissal to the obligors, since they are presumed, being parties to the record, to know the disposition made of the cause. *Ib.*

44. In declaring on an attachment bond, to recover the damages actually sustained, it is only necessary to aver that the writ was wrongfully sued out. *Dickson v. Bachelder*, 21 Ala. 699.

45. Where the declaration proceeds on a bond given for an *ancillary* attachment, while the bond set out on oyer is for an *original* attachment, the variance is immaterial. *Ib.*

46. Nor is it a material variance, that the bond set out in the declaration alleges that the attachment was sued out by Robert and Charles Cornell, in a suit brought by them as partners, while the bond set out on oyer recites that the attachment was sued out by John J. Steiner, at the suit of said Cornells. *Ib.*

47. Under the statute of this State, the plaintiff is not bound to prove the execution of the bond sued on, unless its execution is denied by sworn plea; but he is still bound to produce it on the trial, and if it be found variant from that described in the declaration, the defendant may move to reject it, or test its legal sufficiency by a demurrer to the evidence. *Moore v. Leseur and Wife*, 18 Ala. 606.

48. In an action on a bond required by the chancellor as a pre-requisite to

the issue of a writ of seizure, a transcript of the record of the chancery suit, showing the dismissal of the bill for want of prosecution, is presumptive evidence that the writ was wrongfully obtained. *Zeigler & Hall v. David*, 23 Ala. 127.

49. A judgment, on verdict, against the plaintiff in attachment, is not conclusive evidence, in a subsequent suit on the bond, that the writ was wrongfully sued out. *Sackett & Shelton v. McCord*, 23 Ala. 851.

50. In an action on a prison-bounds bond, assigning breaches, it is a good plea by the sureties, that the prisoner surrendered himself to the jailor, within sixty days from the date of the bond, without having committed an escape in the meantime. *Harlan v. Thompson*, 20 Ala. 94.

51. In an action on a bond, conditioned to make title free from all incumbrances, a plea in bar, averring that the vendor conveyed to the purchaser by deed a fee-simple title to the land, free from all incumbrances, and that he accepted the same, is good. *Johnson and Wife v. Collins*, 17 Ala. 318.

52. If the obligor insists upon satisfaction in lieu of performance, the *onus* is on him to prove that the thing done or given was intended and accepted as a satisfaction; and this is a question of fact for the jury. *S. C.*, 20 Ala. 435.

53. In an action on a bond, assigning breaches, *nil debet* and performance generally are not good pleas. *Reid v. Nash*, 23 Ala. 733.

54. In an action on an administrator's bond, seeking to charge the sureties with a judgment against their principal, to be levied *de bonis intestatis*, a plea by the sureties, averring that the judgment was not a proper charge against the intestate, nor against his administrator as such, is but the statement of a legal conclusion, and therefore demurrable. *Ib.*

55. A plea, averring that the intestate's estate has been duly declared insolvent, and is in progress of settlement as such, is demurrable. *Ib.*

56. So is a plea, containing the additional averment, that plaintiff failed to present his judgment, as a claim against the estate, within six months after the declaration of insolvency. *Ib.*

57. A plea of *plene administravit* is demurrable, unless it avers that the assets were fully administered before suit brought. *Ib.*

58. To an action on an administrator's bond, "jointly and severally defendants plead fully administered;" to which plaintiff "demurred in short by consent." *Held*, that the plea was equivalent to a joint and several plea of *plene administravit*, and was good as to the sureties. *Amason v. Nash*, 24 Ala. 279.

59. The decree against the administrator being conclusive evidence of a sufficiency of assets, the records of the appraisement and sales of property belonging to the estate would be simply redundant evidence, and their admission would furnish no ground of reversal. *Kyle v. Mays, use of Pond*, 22 Ala. 692.

60. As no demand is necessary to the maintenance of the action, the admission of evidence of a demand is not an available error. *Ib.*

61. In an action on a refunding bond by a guardian, the defendant may set off his portion of rents, received by the plaintiff, of lands lying in another State, and belonging to defendant and others as tenants in common. *Smith's Executors v. Wiley*, 22 Ala. 396.

62. The only fraud that can be set up, at law, to avoid the execution of a sealed instrument, is that which goes to its execution. *Holley v. Younge*, 27 Ala. 204; *Stokes v. Jones*, 18 Ala. 734.

63. An action against a sheriff, for money had and received, may be revived against his administrator. *Chenault's Adm'rs v. Walker*, 22 Ala. 275.

III. VERDICT, AND JUDGMENT.

64. In an action on a bond for the performance of covenants, the judgment should be for the penalty, with nominal damages and costs. *Garnett v. Yoe*, 17 Ala. 74.

65. In an action on an administrator's bond, it is erroneous to render judgment final, without the intervention of a jury, against the principal and his sureties. *Amason v. Nash*, 24 Ala. 279.

66. Where such action is founded on a decree against the administrator, interest from the time of its rendition

is recoverable. *Kyle v. Mays, use of Pond*, 22 Ala. 692.

67. In an action on a foreign judgment, it is erroneous to render judgment final by *nil dicit*, without the intervention of a jury, for the amount of the debt with eight per cent. interest. *Clarke v. Pratt*, 20 Ala. 470.

68. In an action on an attachment bond, if the plaintiff recover less than five dollars damages, he is nevertheless entitled to full costs. *McAllister v. McDow*, 26 Ala. 453.

69. In an action on a bond given to secure costs, a recovery may be had for the fees of witnesses summoned by the plaintiff in the original suit. *Pryor v. Beck*, 21 Ala. 393.

70. In an action on the official bond of a county officer, a recovery can only be had for injuries necessarily affecting the rights of the party for whose use the suit is brought. *Wilson v. Cantrell*, 19 Ala. 642; *Brooks v. Governor*, 17 Ala. 806.

DECEIT.

See ACTION ON THE CASE.

DEDICATION.

1. A dedication, or gift of land for public use, can only be made by the owner or proprietor: a mortgagor has no such power, as against the mortgagee and those claiming under him. *Hoole & Paullin v. Attorney-General*, 22 Ala. 190.

2. But, if the mortgagee assents to a dedication made by the mortgagor, he and those claiming under him will be bound by it. *Ib.*

3. The mere acquiescence of the owner, in the use and enjoyment of a way by the public, as a public road or highway, would not, until after the lapse of twenty years, create the presumption of a dedication, without some clear and unequivocal act on his part, amounting to an explicit manifestation of his intention to make a permanent gift of the road to the public. *Ib.*

4. The fact that he described an adjoining tract of land, in a conveyance, as lying east of the road, is not an act of such an unequivocal and decisive character as to amount to an implied dedication of the road to public use. *Ib.*

5. In the absence of evidence that value was paid for the grant, the dedication of a road must be regarded as voluntary and gratuitous; and the expenditure of money and labor by individuals, in opening the road, is no evidence, so far as the public is concerned, of a valuable consideration paid for the grant. *Ib.*

DEEDS.

I. GENERALLY.

1. *Execution, and Delivery.*
2. *Form, and Requisites.*
3. *Construction.*
4. *Validity.*
5. *Operation.*
6. *Proof.*
7. *Registration.*

(*a*) When Authorized, or Required.
(*b*) Sufficiency of Acknowledgment and Probate.
(*c*) Effect of Registration and Non-Registration.

II. DEEDS OF TRUST, AND ASSIGNMENTS, FOR BENEFIT OF CREDITORS.

1. *Execution, and Assent of Beneficiaries.*
2. *Consideration.*
3. *Construction.*
4. *Subject-Matter of Conveyance.*
5. *Reversionary Interest of Grantor.*
6. *Validity; and herein, of Fraud, and Stipulations for Benefit of Grantor.*
7. *Powers and Duties of Trustees.*

III. FRAUDULENT AND VOLUNTARY CONVEYANCES.

1. *Gifts.*
2. *Loans.*
3. *Sales.*

IV. OFFICIAL DEEDS.

I. GENERALLY.

1. *Execution, and Delivery.*

1. An actual delivery of a deed is not essential: mere words, or words and actions, indicating an intention that the instrument shall be considered as executed, may amount to a good delivery in law. *McClure v. Colclough*, 17 Ala. 89.

2. When a deed is found in the possession of the grantee, the presumption is that it was delivered to him. *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

3. A deed may be delivered, as an escrow, to any other person than the grantee; but it cannot be so delivered to him. *Ib.*

4. An admission of the execution of a deed, implies that it was delivered; and a delivery of the deed dispenses with the necessity for a delivery of the property conveyed. *Jenkins v. McConico*, 26 Ala. 213.

5. One seal may be adopted by any number of persons, and answer for all of them; and where the seal affixed might be regarded as the seal either of the agent or of the principal, the body of the instrument must be looked to in determining whose deed it is. *Carter v. Doe d. Chaudron*, 21 Ala. 72.

6. To make a conveyance under seal, executed by an agent, the deed of the principal, he must appear from the body of it to be the grantor, and his name and seal must be signed and affixed. *Ib.*

7. A deed, purporting to be made by both principal and agent as parties of the first part, reciting the authority of the agent, whereby the principal, in consideration of a certain sum paid to him by the grantee, grants, bargains, &c.; purporting to be signed and sealed by the parties, and signed "S. H. G. [seal], attorney in fact for J. K.," —held well executed as the deed of the principal. *Ib.*

8. Where S. A. bound a slave, by articles of indenture, to J. for the term of five years, to be taught the trade of a brick-layer and plasterer, and, at the same time, executed an unconditional deed to E. A. for the slave, which he delivered to J., with instructions to deliver the deed and the slave to the grantee at the expiration of the apprenticeship,—*held*, that the deed took effect *in præsenti*, and invested the grantee with the absolute title and property in the slave, subject only to J.'s special property under the indenture. *Tucker and Wife v. Magee*, 18 Ala. 99,

(As to proof of execution and delivery, *vide infra*, 72–76.)

2. *Form, and Requisites.*

9. An instrument, founded on valuable consideration, in form a deed executed by both parties, capable of full effect as a deed, and manifestly intended to convey a beneficial interest to the grantee, to take effect and be enjoyed in the grantor's lifetime, —held a deed, and not a will. *Thompson v. Johnson*, 19 Ala. 59.

10. An instrument, in form a deed, containing a clause of warranty, attested by two witnesses, and conveying real and personal property by the words, "at my death I do hereby give and grant unto my son,"—held a deed, and not a will; the evidence showing that it was delivered to the grantee, who was a cripple, on the day of its date, and that it was intended as a present provision for him, to induce him to continue to live with the grantor, who was his mother. *Golding v. Golding's Adm'r*, 24 Ala. 122.

11. A writing under seal, in form a deed, conveying to the grantor's daughter and her children, by present words of gift, several slaves and other property, and containing this clause, "The condition of the above named gift is to take place at my death—until then the property is to remain as my own,"—held a deed, and not a will. *Elmore v. Mustin*, 28 Ala. 309.

12. An instrument, purporting to be a deed, acknowledged as such before a justice of the peace on the day of its date, and conveying by present words of gift, in consideration of natural love and affection, to each of the grantor's children, several slaves, together with all the money, notes, and household and kitchen furniture on hand at the time of his death, but reserving to him the right of ownership over the slaves until his death, "at which time," it is said, "this deed

shall take effect,"—held a will, and not a deed. *Walker v. Jones*, 23 Ala. 448.

3. *Construction.*

13. In the construction of deeds, the cardinal rule is, to effectuate, if possible, the intention of the grantor. *Saunders v. Saunders' Adm'r*, 20 Ala. 710; *Hamner v. Smith*, 22 Ala. 433.

14. In ascertaining this intention, regard must be had to the situation and relative position of the parties, and the objects which they had in view. *Strong v. Gregory*, 19 Ala. 146; *Mitchell v. Gates*, 23 Ala. 438; *Pollard v. Maddox*, 28 Ala. 321.

15. The intention is to be gathered from the entire instrument, even if particular clauses are thereby sacrificed. *Saunders v. Saunders' Adm'r*, 20 Ala. 710; *McWilliams v. Ramsay*, 23 Ala. 813.

16. If the instrument shows on its face that it was written by an illiterate person, a greater latitude of construction is indulged. *Saunders v. Saunders' Adm'r*, 20 Ala. 710; *Hamner v. Smith*, 22 Ala. 433.

17. If two clauses are entirely inconsistent and irreconcilable with each other, the latter must give way to the former. *Petty v. Boothe*, 19 Ala. 633; *McWilliams v. Ramsay*, 23 Ala. 813; *Webb v. Webb's Heirs*, 28 Ala. 588.

18. But, if the words of the latter clause are of doubtful import, they will not be so construed as to contradict the certain words of a preceding clause. *Petty v. Boothe*, 19 Ala. 633.

19. The strictness of the ancient rule, as to repugnancy, is now much relaxed. *McWillaims v. Ramsay*, 23 Ala. 813.

20. An introductory recital, as to the interest intended to be conveyed, will be controlled by the granting clause. *Webb v. Webb's Heirs*, 28 Ala. 588.

21. Another instrument, executed contemporaneously with a deed, and expressly referring to it, whether written on the same or a separate sheet of paper, may be looked to in construing the deed. *Cuthbert v. Wolfe*, 19 Ala. 373; *Strong's Executors v. Brewer*, 17 Ala. 706; *Prater's Adm'r v. Darby*, 24 Ala. 496; *Rives v. Toulmin*, 19 Ala. 288; *Trippe v. Trippe*, 29 Ala. 637. (*Vide* CONTRACTS, 162–68, p. 500.)

22. The words "be the same more or less," when used in stating the quantity of land conveyed, mean that the parties shall respectively run the risk of gain or loss. *Frederick v. Youngblood*, 19 Ala. 680.

As to the construction of deeds, respecting the estate or interest conveyed, *vide infra*, 38–69.

4. *Validity.*

23. The deed of an infant is voidable only, and not absolutely void. *Slaughter v. Cunningham*, 24 Ala. 260; *Weaver v. Jones*, 24 Ala. 420; *Manning v. Johnson*, 26 Ala. 446.

24. The deed of a married woman, unless acknowledged according to the requisitions of the statute, is absolutely void. *George v. Goldsby*, 23 Ala. 326; *Beene's Heirs v. Randall's Heirs*, 23 Ala. 514; *Doe d. Hughes v. Wilkinson*, 21 Ala. 296; *Boykin v. Rain*, 28 Ala. 332; *McBryde's Heirs v. Wilkinson*, 29 Ala. 662.

25. But she has the same power over her separate estate as if she were sole, and may by deed convey such interest as she has. *McCroan v. Pope*, 17 Ala. 612.

26. And where personal property is conveyed directly to her, to her sole and separate use, she and her husband may, by their joint deed, vest the legal title in trustees, for their joint use, and the use of the survivor for life. *Jenkins v. McConico*, 26 Ala. 213.

27. A conveyance of land, which is at the time in the adverse possession of a third person, is void, as against third persons. *Coleman v. Hair*, 22 Ala. 596; *Harvey v. Doe d. Carlisle*, 23 Ala. 635; *Abernathy v. Boazman*, 24 Ala. 189.

28. But it is nevertheless valid and binding between the parties themselves. *Harvey v. Doe d. Carlisle*, 23 Ala. 635; *Abernathy v. Boazman*, 24 Ala. 189.

29. So is a deed which is void for fraud as against the grantor's creditors. *Walton v. Bonham*, 24 Ala. 513; *Wiley, Banks & Co. v. Knight*, 27 Ala. 336.

30. A deed of gift is valid and binding between the parties, although not

proved and recorded as the statute prescribes. *Perry v. Graham*, 18 Ala. 822; *Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27.

31. So is an unrecorded mortgage. *Center v. P. & M. Bank*, 22 Ala. 743; *Smith's Heirs v. Branch Bank at Mobile*, 21 Ala. 125.

32. It is equally valid as against subsequent creditors and purchasers with notice. *Smith's Heirs v. Branch Bank at Mobile*, 21 Ala. 125; *DeVendal v. Malone's Executors*, 25 Ala. 272; *Boyd v. Beck*, 29 Ala. 703.

33. When a corporation is a party to a deed, a mistake in stating its name does not affect the validity of the deed, when it is apparent that the corporation is the party intended. *Douglass & Easton v. Branch Bank at Mobile*, 19 Ala. 659.

34. A conveyance to a partnership, by its firm name, is not void for uncertainty, but may be aided by parol proof. *Lindsay v. Hoke & Abernathy*, 21 Ala. 542. (As to uncertainty in deeds, see *Pollard v. Maddox*, 28 Ala. 321; *infra*, 48.)

35. A contingent remainder in slaves may be created by deed without the intervention of a trustee. *Williamson and Wife v. Mason*, 23 Ala. 488; *Price v. Price's Adm'r*, 23 Ala. 609.

36. So may a reversionary interest, as upon a gift for life with contingent remainder. *McWilliams v. Ramsay*, 23 Ala. 813.

37. At common law, a remainder could not be limited upon a contingency which would abridge or defeat the particular estate, nor could a fee be mounted on a fee; but, under the statute of uses, which constitutes a part of the common law of Alabama except so far as repealed or modified by the statute of 1812, a conditional limitation may be created by deed, and a fee may be limited on a fee determinable on condition. *Horton v. Sledge*, 29 Ala. 478.

5. *Operation.*

38. A deed, conveying property to L., "in trust and for the use" of another, and containing covenants of warranty to both the trustee and the *cestui que trust*, vests the legal title in L. *Norton and Wife v. Linton*, 18 Ala. 690.

39. A covenant between heirs-at law and devisee, by which the latter, in consideration of the former withdrawing all objections to the probate of the testator's will, agrees that they shall be entitled to as full and equal participation in the estate as if the testator had died intestate, and that the estate shall be divided precisely as if he had so died,—not only estops the devisee from asserting his title as such, but passes to the heirs the same title they would have taken if the testator had died intestate. *Bean v. Welsh*, 17 Ala. 770.

40. Where a father conveyed by deed certain slaves to his son, with the understanding that, on his death, the son should divide them equally with his daughter, then a married woman; and the son having claimed the slaves absolutely until his death, the husband of the daughter afterwards conveyed by deed to the distributees of his estate, for valuable consideration, all the "right, title, claim, interest and demand," which he then "had, or might thereafter recover, in and to the goods and chattels, rights and credits, lands and tenements," of the deceased father and son,—*held*, that the husband's deed embraced his wife's claim to the slaves, and estopped him from joining with her in a bill for their recovery. *Hamilton and Wife v. Clements' Adm'r*, 17 Ala. 201.

41. Where a father conveyed all his property to his son, who, at the same time, executed to his father a bond, conditioned that he would let the father retain the possession of the property during the lifetime of himself and wife, or until he should think proper to divide it among his children,—*held*, construing the bond and deed as parts of one and the same transaction, that a life estate in the property was reserved to the grantor, with power to defeat the title of the grantee at any time by making a division of the property among his children. *Strong's Executors v. Brewer*, 17 Ala. 706.

42. A deed of gift of a slave, on condition that the donee shall emancipate him, vests the absolute title in the donee, discharged from the condition. *Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27.

43. A deed by commissioners appointed to sell a decedent's real estate, without a final decree of the court confirming their sale, does not divest the title of the heirs-at-law. *Wallace v. Hall's Heirs*, 19 Ala. 367.

44. The deed of a widow, before dower assigned to her, conveying her interest in the lands of her deceased husband, conveys no title as against the heirs-at-law. *Ib.*

45. If the widow of a mortgagor, while in possession of the mortgaged premises, before her dower has been assigned to her, conveys by deed to the mortgagee, her deed, if effective for any purpose as against the heir, certainly does not pass more than the right to retain one third of the rents and profits of the premises. *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

46. A mortgage, or deed of trust, on the real estate of a firm, executed by the surviving partner to secure the payment of an individual liability, creates a lien only to the extent of his interest in the property. *Lang's Heirs v. Waring*, 17 Ala. 145.

47. Although the deed of a surviving partner, for the real estate of the firm, does not convey the legal title to the purchaser; yet it conveys an equity, through which he may compel the heir to convey the legal title. *Andrews' Heirs v. Brown's Adm'r*, 21 Ala. 437. (But see *Lang's Heirs v. Waring*, 25 Ala. 625, as to the circumstances under which equity will not decree a conveyance.)

48. Where the owners of lands, through which a railroad, then in process of construction, would probably pass, joined in a sealed instrument, by which, in consideration of one dollar in hand paid, they bargained, sold and conveyed to the railroad company, by present words, "so much of any part of our [their] lands as may be necessary in the construction of said railroad,"—*held*, that the instrument, though it might not operate as a conveyance in fee of the land necessary for the construction of the road, was not void for uncertainty, but was binding as a covenant that the company might appropriate so much of any part of the grantors' lands as might be necessary for the construction of the projected road. *Pollard v. Maddox*, 28 Ala. 321.

49. A deed contained these clauses: "For and in consideration of the sum and covenants hereinafter mentioned, reserved and contained, on the part of the said D. D. to be paid, done and performed, the said J. K. hath granted and sold, and, by these presents, doth grant, sell and convey, unto the said D. D., the following lots," &c., "for the sum of $50 each, making altogether the just sum of $300, to be paid by the said D. D., his heirs, executors and administrators, to said J. K., his heirs or assigns, so soon as the United States Government shall have confirmed to the said J. K., or his heirs, the title to the said lots; to have and to hold the said lots, together with all the privileges and appurtenances thereunto belonging, unto the said D. D., his heirs and assigns, forever. *Provided*, nevertheless, and it is the true intent and meaning of these presents, and of the parties thereunto, that the said D. D., his heirs, executors and administrators, shall pay, or cause to be paid, unto the said J. K., his heirs or assigns, the yearly interest of eight per cent. on the said sum of $300, until the covenants before mentioned are complied with; the interest to commence from the 1st day of this present month." *Held*, that it conveyed but a conditional fee, dependent upon the yearly payment of interest as therein provided; that the grantor and his privies were estopped from saying that the legal title did not pass; and that, upon the confirmation of the grantor's title by the United States, the whole legal title vested in the grantee. *Carter v. Doe d. Chaudron*, 21 Ala. 72.

50. Growing fruit trees, and fences enclosing a field, pass with the freehold. *Mitchell v. Billingsley*, 17 Ala. 391.

51. As between vendor and purchaser, the stationary machinery for impelling turning-lathes or other portable machines, which are of equal value everywhere, if erected by the vendor for his own use, for the purposes either of trade or agriculture, and fixed in or to the ground, or to some substance which has already become a part of the freehold, pass under a

deed for the land. *Harkness v. Walker*, 26 Ala. 493.

52. The doctrine, that a grant of land by the Government, to an alien and his heirs, necessarily confers the power to enjoy and transmit it, however true when applied to legislative grants, does not hold good as to patents, issued by ministerial officers, upon ordinary purchases of public land by an alien. *Etheridge v. Doe d. Malempre*, 18 Ala. 565.

53. Where a patent calls for a sub-division of a fractional section, described as lying north of a certain creek and containing a specified number of acres, it embraces all the land in the sub-division north of the creek, although the actual number of acres exceeds the number specified in the patent. *Stein v. Ashby*, 24 Ala. 521.

54. When a deed is made to two jointly, the law presumes, in the absence of proof as to their respective interests, that they are equally interested ; and a transfer by one of them, by present words, of all his right, title and interest in the land, conveys a moiety. *Long v. McDougald's Adm'r*, 23 Ala. 413.

55. The absolute deed of a riparian proprietor conveys the right to the undiminished flow of the stream ; and no reservation of a right to divert can be implied, especially when the claim is set up by a stranger, from the fact that, at the time of the execution of the conveyance, he diverted the water for the purpose of supplying a mill on another tract of land. *Burden v. Stein*, 27 Ala. 204.

56. A conveyance of lands held adversely to the grantor is good, as between the parties, on the principle of estoppel, which can only operate on the parties and their privies. *Harvey v. Doe d. Carlisle*, 23 Ala. 635.

57. A mortgagee is not entitled to the rents and profits accruing before the law-day, unless his deed contains a stipulation to that effect. *Davis v. Lassiter*, 20 Ala. 561 ; *Hutchinson v. Dearing*, 20 Ala. 798. (*Vide* MORTGAGES, 30–35, p. 302.)

58. A mortgage on the wife's land, executed by the husband during coverture, and after issue born, conveys all his interest as husband and tenant by the curtesy initiate. *Boykin v. Rain*, 28 Ala. 332.

59. At common law, a freehold could be released in five ways, to-wit : 1st, to the tenant of the freehold, in fact or in law, without any privity; 2d, to the remainder-man ; 3d, to the reversioner, without privity ; 4th, to one having a right only by privity ; or, 5th, to one having a privity only, without right. But, in this country, the technical rules relating to releases are not generally adopted, and a quit-claim deed is considered as passing the title of the grantor, as against himself and those claiming under him, either by descent or subsequent conveyance, without any warranty as to outstanding titles or incumbrances. *Smith's Heirs v. Branch Bank at Mobile*, 21 Ala. 125.

60. A. sold and conveyed to B., and took from him a mortgage to secure the payment of the purchase-money, but failed to record it within sixty days. B. afterwards sold and conveyed to C., and took from him a mortgage to secure the payment of the purchase-money ; and having foreclosed his mortgage, and become himself the purchaser at the master's sale, he afterwards conveyed by quit-claim deed to D., who had no actual notice of A.'s unrecorded mortgage. *Held*, that the deed, as against A., only passed B.'s equity of redemption. *Ib.*

61. A deed of gift was in these words : "Know all men, by these presents, that I, A. G., for the love and affection I have for my daughter Mary, have given to her a certain negro girl named Eliza, about ten years old, with all her issue ; which said negroes I warrant and defend to the said Mary during her life, and to her heirs afterwards, (especially those who, in the course of Providence, may live the longest with her,) against the lawful claims of any person or persons whatever." *Held*, that the daughter took an absolute estate in the slaves, and not a life estate merely. *Hamner v. Smith*, 22 Ala. 433.

62. The rule in Shelley's case enlarges the estate of the first taker, only when the objects of the limitation are his heirs general, or the heirs of his body, and when they take by descent from him, and not as purcha-

sers under the deed; consequently, it has no application, where the deed is to the husband, for the lives of himself and his wife, with contingent remainder to the heirs of the body of the wife who may survive him. *Williamson and Wife v. Mason*, 23 Ala. 488.

63. Where a marriage-contract stipulated, that the husband should "receive and enjoy, during the lifetimes" of himself and wife, "all the rights and profits" of the wife, "and, at their decease, to descend to the heirs of the body" of the wife "which may survive at that time"; and that the wife should "have no part or portion of the property now owned by" the husband "after his death,"—*held*, that the husband, on reducing the wife's property to possession, became entitled to it as absolute owner, until the death of himself and wife, subject to the contingent limitation to the heirs of the body of the wife who might then be living. *Ib.*

64. Where a deed, executed by the husband, conveying certain slaves in trust "for the use, benefit and behoof" of his wife "forever," contained the following clause: "*Provided*, however, that the title or property in said slaves shall be and remain in the said R. [trustee] for the use and behoof of the" wife, "her heirs, executors and assigns, during her natural life only, with remainder to the heirs of her body by the" grantor "who might be living at her death; and, in default of such issue living at that time, the title and property in said slaves to revert to the" grantor, "if living; but, if dead, to descend to his heirs-at-law,"—*held*, that the wife took only a life estate in the property; that the contingent remainder to the heirs of the body of the wife was not too remote, and that a reversionary interest remained in the grantor. *McWilliams v. Ramsay*, 23 Ala. 813.

65. Under a deed of gift of a slave, "to my daughter L. during her natural life, and at her death to her child or children; but, in case of the death of my said daughter, without lawful issue of her body, then the said negro and her issue, or increase, to return and belong to my other heirs,"—*held*, that the term "heirs" was a word of limitation, and not of purchase; and that, upon the death of L. without issue, living the grantor, his other surviving children, born before the execution of the deed, took nothing under it. *Couch v. Anderson*, 26 Ala. 676.

66. Under a deed of gift, in these words: "I give, grant and confirm unto my daughter Eliza a negro girl, named Perse, to have, hold and enjoy said property and her increase, during the natural life of my said daughter; which property, at her death, shall descend to the natural heirs of her body. *Provided* always, and upon this condition, and it is the true intent and meaning of these presents, that in case my said daughter die, leaving no natural heirs of her body, then, and in that case, said property shall revert back, and from part of my estate,"—*held*, that Eliza took only an estate for life, and not the absolute interest; that the words "die leaving" limited the words "heirs of her body" to issue living at the death of the first taker; and that on her death, leaving no living issue, the grantor's personal representative might recover the property. *McVay's Adm'r v. Ijams*, 27 Ala. 238.

67. Where a father conveyed certain personal property, by deed of gift, to his "daughter Sarah, and to her children, the natural heirs of her body, at her death," "to have and to hold unto the said Sarah, her executors and administrators, forever, as her and her children's property;" and the deed reserved to the donor, during his life, the use and possession of the property,—*held*, that Sarah took a life estate in the property, with contingent remainder to such of her children as might be living at her death. *Elmore v. Mustin*, 28 Ala. 309.

68. A deed, purporting to have been made in consideration of the grantor's natural love and affection for the grantees, his great grand-children, and of $5 in hand paid; and using the words "give, grant, bargain, sell, alien, enfeoff and convey,"—if it cannot be otherwise upheld, will be held a conveyance under the statute of uses; if, on account of its consideration, it cannot operate as a deed of bargain and sale, it will be deemed some other one of the conveyances under the statute; and it may be

maintained as a covenant to stand seized. *Horton v. Sledge*, 29 Ala. 478.

69. A deed, conveying a tract of land to George and Thomas, to be equally divided between them, contained this clause: "It is, moreover, expressly understood, and this conveyance is upon this condition, that if the said Thomas should die before the age of twenty-one years, leaving no brother or sister, then the whole of said tract of land shall belong exclusively to the said George; but, if the said Thomas should die before attaining the age of twenty-one years, leaving brothers and sisters, then the half of said tract of land hereby conveyed to him shall go to his said brothers and sisters." Thomas having died before attaining the age of twenty-one years, leaving an only sister and no brothers,—*held*, that the sister took one half of the land. *Ib.*

70. The legal effect of a deed cannot be varied by parol. *Davis v. Lassiter*, 20 Ala. 561; *Melton v. Watkins*, 24 Ala. 433.

71. But this rule does not apply, where a party comes into equity to have a deed, absolute on its face, declared a trust or mortgage. *Bryan & McPhail v. Cowart*, 21 Ala. 92; *Locke's Executor v. Palmer*, 26 Ala. 312; *Brantley v. West*, 27 Ala. 542; *West and Wife v. Hendrix*, 28 Ala. 226; *Parish v. Gates*, 29 Ala. 254. (*Vide* MORTGAGES, 5–16, p. 300.)

6. *Proof.*

72. A party's mark may be proved, like his handwriting, by a witness who is sufficiently acquainted with it to be able to testify that he believes it to be his. *Strong's Executors v. Brewer*, 17 Ala. 706.

73. If the subscribing witnesses have left the State, or are incompetent from interest, proof of the handwriting of the grantor alone is sufficient to admit it in evidence. *Cox v. Davis*, 17 Ala. 714.

74. If the subscribing witness resides beyond the limits of the State, it is admissible in evidence on proof of his signature. *Foote and Wife v. Cobb*, 18 Ala. 585.

75. The contents of a deed cannot be proved by parol, until the proper predicate has been laid for its introduction. *Allen v. Smith*, 22 Ala. 416; *Hussey v. Roquemore*, 27 Ala. 281.

76. Where a witness testified, that the grantor or his wife, both being present, handed him a paper, saying, "There is a deed I intended for my daughter P.;" that he read it, and then returned it to the grantor; and that he could only recollect the words, "I give to my daughter P. my negro woman Penny, and to the heirs of her body,"—*held*, that the evidence, both as to the execution and the contents of the deed, was sufficient to go to the jury; especially, as it was shown that the deed could not be found, and the party in whose possession it was presumed to be had failed, after notice, to produce it. *Mims' Executors v. Sturtevant*, 18 Ala. 359.

77. Secondary evidence of a deed is not admissible, upon proof that the grantee's executor had searched for it, and had not been able to find it; that after the grantee's death, his son had carried off, to a place in the country where he had been living, a small trunk containing his papers, which the executor had not searched; and that the executor had made verbal application to the son, both for the trunk and for the deed. *Tannis v. Doe d. St. Cyre*, 21 Ala. 449.

78. In a suit to which the grantee is a party, the non-residence of his grantor does not, *per se*, authorize the introduction of secondary evidence of its contents: the grantee, or person in whose possession it is presumed to be, must be first notified to produce it, or its loss or destruction must be proved. *Hussey v. Roquemore*, 27 Ala. 281.

79. Where the deed under which plaintiff claimed the slave in controversy was more than twenty years old, and was proved to have gone into the possession of defendant's testator, who declared his intention to keep the slave for the grantee until her marriage, but died before that time; and the defendant, who was one of his executors, failed to produce the deed on notice,—*held*, that this was a sufficient predicate for the introduction of secondary evidence. *Fralick v. Presley and Wife*, 29 Ala. 457.

80. The contents of a lost deed

may be proved, after a sufficient predicate has been laid for the introduction of secondary evidence, by a party's verbal admissions. *Ib.*

81. After a party has adduced parol evidence of the contents of a deed, without objection from his adversary, and the witness has been cross-examined touching the matter, it is discretionary with the court to exclude the evidence. *Allen v. Smith*, 22 Ala. 416.

82. If a party reads in evidence to the jury, without any attempt to limit its effect as proof, a certified copy of a deed purporting to have been executed by husband and wife, he thereby concedes its genuineness, and cannot be heard, in the appellate court, to say that it was not proved; although it appears, from the clerk's memorandum endorsed on it, to have been admitted to record on the acknowledgment of the husband alone, and is admitted to have been "executed, proved, acknowledged and recorded. as endorsed and certified on said copy." *Jenkins v. McConico*, 26 Ala. 213.

83. A record copy of a lost deed, or a transcript from the record, is only *prima-facie* evidence of the contents of the deed; and parol evidence is admissible, to show that it was not correctly recorded. *Harvey and Wife v. Thorpe*, 28 Ala. 250.

84. Where defendant shows a letter from plaintiff's ancestor, directing his agent to close a bargain for the sale of the land; a deed thereupon executed by the agent, in his own name, to defendant's vendor, and an uninterrupted possession of twenty-eight years,—the court may instruct the jury, that they may presume a conveyance from plaintiff's ancestor, either to the agent, or to the purchaser. *Ib.*

85. A deed more than thirty years old, having nothing suspicious about it, is presumed to be genuine, without express proof; and, when found in the proper custody, and corroborated by enjoyment under it, or by other equivalent explanatory proof, it is allowed to prove itself. *Carter v. Doe d. Chaudron*, 21 Ala. 72.

7. *Registration.*

(*a*) When Authorized, or Required.

86. A deed of gift of slaves, executed in another State, is not required to be recorded here, in order to protect a remainder. *Lyde v. Taylor*, 17 Ala. 270; *Turner v. Fenner*, 19 Ala. 355; *Fralick v. Presley and Wife*, 29 Ala. 457. (But see *McCoy v. Odom*, 20 Ala. 502.)

87. And this, although the tenant for life and the remainder-man both both resided in this State at the time of the execution of the deed, and continue to reside here. *Turner v. Fenner*, 19 Ala. 355.

88. Nor does the statute apply to a deed of gift, executed in another State, by which slaves are given to a married woman, "during her natural life, to her separate, sole and exclusive use and behoof," and at her death to her children. *Michan and Wife v. Wyatt*, 21 Ala. 813.

89. But a loan of slaves in another State, must be recorded here, when the property is brought into this State, in order to protect the rights of the owner as against the creditors of the party in possession. *McCoy v. Odom*, 20 Ala. 502.

90. A deed, purporting to have been made in consideration of natural love and affection, "and for divers other good considerations," which are shown by parol to have been valuable, is not within the statute relative to conveyances "upon consideration not deemed valuable in law." *Johnson v. Boyles*, 26 Ala. 576.

91. An absolute bill of sale of a slave is not required to be recorded, although there is a contemporaneous agreement for the delivery of the slave at a future day. *Millard's Adm'rs v. Hall*, 24 Ala. 209.

92. A mortgage or transfer of a vessel for the navigation of the ocean is not within the statute requiring the registration of mortgages on personal property. *Fontaine & Dent v. Beers & Smith*, 19 Ala. 722.

93. The Mississippi statute, relative to the registration of mortgages and deeds of trust, does not apply to a written instrument, by which a planter assigns his crop of cotton to a commission merchant, to secure the repayment of advances made on it, with a stipulation that the cotton shall not be sold before a specified day unless directed by the assignor. *Bryan v. Smith*, 22 Ala. 534.

94. The official deed of a sheriff or marshal is required to be recorded, like other deeds, within six months after its execution. *Pollard v. Cocke*, 19 Ala. 188.

95. A deed of trust, conveying accounts to be created in future by the grantor's labor, is not required to be recorded, nor is its registration authorized. *Stewart v. Kirkland*, 19 Ala. 162.

(*b*) Sufficiency of Acknowledgment and Probate.

96. A mortgage may be admitted to record, on proof by the subscribing witness that he saw it signed, sealed and delivered on the fourth day after its date; there being no evidence that any fraud or injury was thereby committed or attempted. *Harbinson v. Harrell*, 19 Ala. 753.

97. It is not essential to the probate of a deed that it should be proved to have been executed on the day of its date, if the deed is recorded within the time required by law. *Parsons v. Boyd*, 20 Ala. 112.

98. If the certificate of probate recites that the grantor acknowledged the instrument "to be his free act and deed," this is tantamount to saying that he "signed, and sealed and delivered" it. *Ib.*

99. If the endorsements on the deed, purporting to have been made by the proper officer, show at what time it was left with him for registration, and the book and page in which it is recorded, this is a substantial compliance with the statute. *Ib.*

100. An acknowledgment of a deed by the grantor, on the day of its date, is a sufficient compliance with the statute, although the certificate of acknowledgment does not state the date of the execution. *Carter v. Doe d. Chaudron*, 21 Ala. 72.

101. Where the clerk's certificate misdescribes the grantor, as by substituting the name of *McKinnie* for *McKewin*, this is not a compliance with the registration acts; nor can the opinion of the clerk be received to identify the deed, and thus render a copy admissible evidence. *Jones v. Parks*, 22 Ala. 446.

102. The deed of husband and wife, acknowledged by them before a justice of the peace, may be admitted to record without proof of execution by a subscribing witness. *Harvey v. Doe d. Carlisle*, 23 Ala. 635.

103. It is the duty of the purchaser, not of the vendor, to have the deed probated. *Carter v. Corley*, 23 Ala. 612.

104. The statute of 1839, authorizing relinquishments of dower by deed of husband and wife attested by two witnesses, embraces non-resident as well as resident femes covert. *Ib.*

105. If one of the subscribing witnesses subsequently acquires an interest in the note given for the purchase-money, this does not affect the validity of his attestation. *Ib.*

106. To pass the wife's interest in her lands, the deed must be acknowledged by her, on private examination apart from her husband, and must be so certified, in proper form, by the officer before whom the acknowledgment is made. *Doe d. Hughes v. Wilkinson*, 21 Ala. 296; *George v. Goldsby*, 23 Ala. 326; *Beene's Heirs v. Randall's Heirs*, 23 Ala. 514; *McBryde's Heirs v. Wilkinson*, 29 Ala. 662; *Boykin v. Rain*, 28 Ala. 332.

107. Husband and wife conveyed her lands, by deed dated May 16, 1839, and certified in proper form to have been acknowledged by them as "their free act and deed." The wife also executed a relinquishment of dower in said lands, dated May 17, and written on the back of said deed; and at the foot of the relinquishment was written the certificate of a justice of the peace, that the wife, on said 17th May, on private examination, "acknowledged that she signed, sealed and delivered *the foregoing instrument*, as her voluntary act and deed." *Held*, that the last certificate applied only to the relinquishment of dower. *Doe d. Hughes v. Wilkinson*, 21 Ala. 296.

108. In such case, a court of equity cannot, on the ground of mistake, apply the certificate to the deed. *McBryde's Heirs v. Wilkinson*, 29 Ala. 662.

109. Whether parol evidence is admissible to show that the words "foregoing instrument," as used in the justice's certificate, were intended to apply to the deed, and not to the relinquishment of dower, *quære?* If

admissible, it may be received at law. *Ib.*

110. A certificate, stating that the wife acknowledged, on private examination, "that she signed, sealed and delivered the above instrument, on her own free will and accord, and without any force, persuasion, or threats from her said husband, and for the express purpose therein stated," is not a substantial compliance with the provisions of the statute. *Boykin v. Rain*, 28 Ala. 332.

(*c*) Effect of Registration, and Non-Registration.

111. If a deed is not registered within the time required by the statute, nor until after the rendition of a judgment against the vendor in favor of a creditor who had no notice of it, its subsequent registration cannot relate back, so as to defeat or postpone the lien of the judgment. *Pollard v. Cocke*, 19 Ala. 188.

112. The registration of a deed of trust, conveying (*inter alia*) accounts to be contracted in future, does not operate as constructive notice of the assignment of the accounts. *Stewart v. Kirkland*, 19 Ala. 162.

113. The registration of a deed of trust is constructive notice of the lien in all contests respecting the property, but does not run with mercantile paper secured by the deed, so as to charge a *bona-fide* holder before maturity with knowledge of its recitals. *Minell & Co. v. Reed*, 26 Ala. 730.

114. The registration of a mortgage, in compliance with the requisitions of the statute, operates as actual notice to subsequent purchasers. *Steele v. Adams*, 21 Ala. 534.

115. An unrecorded mortgage is void, as against a subsequent mortgagee without notice, although his deed also is unrecorded. *Coster's Executors v. Bank of Georgia*, 24 Ala. 37.

116. But it is valid and binding between the parties themselves. *Smith's Heirs v. Branch Bank at Mobile*, 21 Ala. 125; *Center v. P. & M. Bank*, 22 Ala. 743.

117. It is also valid as against subsequent creditors and purchasers with notice. *Smith's Heirs v. Branch Bank at Mobile*, 21 Ala. 125; *DeVendal v. Malone's Executors*, 25 Ala. 272; *Boyd v. Beck*, 29 Ala. 703.

118. If a lien attaches in favor of a judgment creditor before notice of an unrecorded deed, the purchaser at execution sale is also protected, although he may have had notice at the time of his purchase. *DeVendell v. Doe d. Hamilton*, 27 Ala. 156.

119. A deed of trust which, for want of due registration, is void as against a judgment creditor, cannot operate to place the title beyond the lien of his judgment. *Ib.*

120. A deed of gift, though unrecorded, is valid and binding between the parties themselves. *Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27; *Perry v. Graham*, 18 Ala. 822.

II. DEEDS OF TRUST, AND ASSIGNMENTS, FOR THE BENEFIT OF CREDITORS.

1. *Execution, and Assent of Beneficiaries.*

121. Where the provisions of a deed of trust or assignment are clearly beneficial to the preferred creditors, their assent will be presumed. *Governor v. Campbell*, 17 Ala. 566; *Brown v. Lyon & O'Neal*, 17 Ala. 659; *Evans & Evans v. Lamar*, 21 Ala. 333; *Rankin, Duryee & Co. v. Lodor*, 21 Ala. 380; *Benning v. Nelson*, 23 Ala. 801; *Shearer v. Loftin*, 26 Ala. 703; *Ashley's Adm'r v. Robinson*, 29 Ala. 112; *Lanier v. Driver*, 24 Ala. 149.

122. *Secus*, where its provisions are not clearly beneficial to them. *Evans & Evans v. Lamar*, 21 Ala. 333; *Rankin, Duryee & Co. v. Lodor*, 21 Ala. 380; *Benning v. Nelson*, 23 Ala. 801; *Shearer v. Loftin*, 26 Ala. 703.

123. Or where it was made with intent to defraud the other creditors of the grantor. *Townsend & Brothers v. Harwell*, 18 Ala. 301; *Benning v. Nelson*, 23 Ala. 801; *Ashley's Adm'r v. Robinson*, 29 Ala. 112.

124. And this, notwithstanding the deed devotes the property, absolutely and unconditionally, to the payment of the secured debts, and the trustee did not participate in the fraudulent intent. *Townsend & Brothers v. Harwell*, 18 Ala. 301.

125. An assignment which devotes the property conveyed, uncondition-

ally, to the payment of the preferred creditors, is complete and executed, as to them, immediately upon its delivery, although it requires the grantor's other creditors, as a condition to their participation in the residue, to execute it within six months. *Brown v. Lyon & O'Neal*, 17 Ala. 659.

126. Generally, where a debtor seeks to postpone the payment of his debts, by conveying property in trust to secure or pay them, all the creditors must assent to the deed, to give it any validity. *Rankin, Duryee & Co. v. Lodor*, 21 Ala. 380.

127. But this principle does not apply to a deed, executed by a firm and one of the partners individually, who were in failing circumstances, containing the following provisions: The trustee was authorized to receive, collect, sell and dispose of the property conveyed, with all convenient speed, on such terms as he might deem expedient, and, out of the proceeds, after first discharging the costs and expenses of the trust, to pay the debts of the creditors who were made parties of the third part to the deed, according to their priority in signing it, as follows: 1st, those who assented within ninety days were to be paid equally in full; 2dly, those who assented within one hundred days, in like manner, out of the residue; and, 3dly, those who assented within one hundred and twenty days; and it was expressly stipulated, that the assenting creditors thereby released all their claims and demands against the debtors. On the contrary, the assent of any one of the creditors makes such deed complete in law, and vests the whole legal title in the trustee; and the subsequent levy of attachments and executions by other creditors gives them no priority over those beneficiaries who afterwards, but within the prescribed time, assented to it. *Ib.*

128. A deed which conveys property absolutely for the benefit of specified creditors, although it purports on its face to be tripartite, does not require to be signed by either the trustee or the beneficiaries; but, if the trustee is only authorized to sell the property "at the request of the beneficiaries or a majority of them," and the deed reserves to the grantor the right of redeeming the property by a special day, beyond the maturity of the greater part of the secured debts, the assent of the beneficiaries cannot be presumed, and nothing less than the express assent of a majority in interest can render the deed available. *Shearer v. Loftin*, 26 Ala. 703.

129. The bankruptcy of the grantor, before an express assent on the part of the beneficiaries, is a revocation of a fraudulent assignment. *Ashley's Adm'r v. Robinson*, 29 Ala. 112.

2. *Consideration.*

130. If a surety assumes, in good faith, the payment of a debt on which he is liable, this is a valid consideration for a deed of trust executed to him by his principal. *Pennington v. Woodall*, 17 Ala. 685.

131. In an action by the grantee against a third person, to recover the property conveyed, it is not necessary to prove the consideration of the deed, until the defendant has shown that he claims as purchaser from, or creditor of the grantor. *Ib.*

132. As a general rule, the recitals in a deed which is impeached for fraud, in a controversy between those claiming under it and a pre-existing creditor of the grantor, are not evidence of a consideration. *Pool v. Cummings & Co.*, 20 Ala. 563.

3. *Construction.*

133. Where a deed of trust, conveying certain real and personal property, together with the grantor's growing cotton crop, provided that, if the proceeds of the property other than the crop should prove insufficient to satisfy certain debts due to C., "then, whatever may remain due thereon shall be paid by the trustee out of the crop, and, out of the same crop, he shall pay to M. & Co. a bill for $2,000," described as having been "accepted by them on the faith of the crop," and also pay to said M. & Co. the amount due by the grantor on his account current; and further provided, after the discharge of "the debts already directed to be paid out of the sales of the crop," for the payment of other

creditors in the order in which they were named,—*held*, that the deed created no preference between C. and M. & Co., as to the proceeds of the cotton crop. *Maulden, Mantague & Co. v. Armistead*, 18 Ala. 500.

134. Where a deed of trust contained the following provisions: "The said trustees shall pay and satisfy the following debts of the party of the first part, in the following order, to-wit: first class," &c. specifying them, and describing them thus, "The above demands compose the first class of preferred creditors, being principally endorsers, sureties, and those who have advanced money to the said party of the first part, and all are to be first satisfied and discharged in full." "The second class comprises the following claims," &c., "which shall be paid ratably and proportionably, after the entire discharge of the debts enumerated in the first class." *Held*, that the deed created no preference among the debts specified in the first class. *Colgin v. Redman*, 20 Ala. 650.

4. *Subject-Matter of Conveyance.*

135. Whether accounts, to be created in future by the labor of the grantor, may be conveyed by deed of trust, *quære? Stewart v. Kirkland*, 19 Ala. 162.

136. "The hire" of slaves, "or the use of them during the present year, and whatever negroes the grantor may hire next year to make a crop with, and the entire crop he may make this year and next," may be conveyed by mortgage. *Floyd v. Morrow*, 26 Ala. 353.

5. *Reversionary Interest of Grantor.*

137. If the grantor retains possession of the property conveyed, consistently with the terms of the deed, and by the permission of the trustee, in whom is reposed a reasonable discretion as to the time and manner of selling, his interest is not subject to levy and sale under execution at law. *Hopkins v. Scott*, 20 Ala. 179.

138. If the grantor retains the possession of personal property, after default made in a portion of the secured debts, when the deed authorizes the trustee to sell so much of the property as may be necessary to pay the debts then due, he has not such an interest therein as may be subjected by attachment at law; and this, notwithstanding the value of the property conveyed greatly exceeds the aggregate amount of the debts then due. *Thompson v. Thornton*, 21 Ala. 808.

As to the effect of reservations for the benefit of the grantor, *vide infra*, 152–164.

6. *Validity; and herein, of Fraud, and Stipulations for Benefit of Grantor.*

139. The fraudulent intention of the grantor alone does not vitiate an assignment. *Governor v. Campbell*, 17 Ala. 566.

140. Nor can its validity be impaired by the subsequent unauthorized acts or admissions of either the grantor or the trustee, when the latter has no beneficial interest in the property. *Ib.*

141. The omission to specify the property assigned, is merely a circumstance for the consideration of the jury in determining the question of fraudulent intent, but does not render the deed fraudulent on its face. *Brown v. Lyon & O'Neal*, 17 Ala. 659.

142. Under a general assignment for the equal benefit of all the grantor's creditors, the failure to annex a schedule of the debts, or to provide the mode of giving notice to the creditors, does not render it fraudulent on its face. *Doe d. Shackelford v. P. & M. Bank*, 22 Ala. 238.

143. A provision in such deed, conferring upon the trustees "a just and reasonable discretion as to selling at private or public sale, for cash or upon time with ample security," does not render the deed fraudulent on its face. *Evans & Evans v. Lamar*, 21 Ala. 333; *Doe d. Shackelford v. P. & M. Bank*, 22 Ala. 238.

144. Nor is a deed rendered fraudulent, by a provision authorizing the trustee to carry on the mercantile business of the grantor until the assent or dissent of the preferred creditors should be expressed, or until after the expiration of a reasonable time for ascertaining such assent, and to employ clerks and agents to assist him

in the execution of the trust; and further providing that he should only be liable for his own acts and defaults, and for the money which might actually come to his hands. *Rankin, Duryee & Co. v. Lodor*, 21 Ala. 380.

145. The fact that one of the items of a secured debt consists of usurious interest, which the creditor had been compelled, in good faith, to pay to a third person for the purpose of replacing money borrowed from him by the grantor, does not vitiate a deed. *Pennington v. Woodall*, 17 Ala. 685.

146. A miscalculation, mistake, or unintentional error in stating the amount of a secured debt, does not invalidate a deed; *secus*, if a larger amount than is justly due is intentionally inserted. *Ib.*

147. If a debtor, in failing circumstances, executes a deed of trust for the security of some of his creditors, and, with the intent to thereby save a portion of the property to himself, fails to disclose the indebtedness of one of the beneficiaries to him, arising out of another transaction, this would be a fraud upon his creditors, as against any one who, by assenting to the intent, participated in the fraud. *Ala. Life Insurance & Trust Co. v. Pettway*, 24 Ala. 544.

148. If a creditor, knowing the insolvency of his debtor, takes from him a deed to secure the entire amount of his debt, without disclosing the fact that he is indebted to the grantor on another independent transaction, this would be a strong circumstance against him, and, if the indemnity provided was fully adequate to the secured debts, probably conclusive; but, if the property conveyed was insufficient to pay the secured debts, by an amount exceeding the creditor's indebtedness to the grantor; or, if there were other liabilities, not provided for in the deed, and exceeding the creditor's said indebtedness,—this would be sufficient to rebut every inference of fraud. *Ib.*

149. Where one of the secured debts was described as a balance paid by the beneficiary on a note on which he was surety for the grantor, while the evidence showed that the debt was paid, in part, with notes of a third person borrowed by the grantor, in payment of which he gave his own bond, with the beneficiary as surety; that the grantor was insolvent; that the loan was made on the credit of the beneficiary; and that the latter had paid a portion of the note, and given his individual acceptance for the balance,—*held*, that there was nothing in these facts to affect the validity of the deed. *Ib.*

150. A recital in a deed, that some of the grantor's creditors were urging the collection of their debts at a time when there was a great pressure in the money market, and that his property, if sold at a more favorable period, would be more than enough to pay off all his debts, is but a statement of the reasons which induced the execution of the deed, and does not render it fraudulent on its face. *Doe d. Shackelford v. P. & M. Bank*, 22 Ala. 238.

151. The relationship of all the parties to a deed, executed by an insolvent debtor, is a circumstance for the consideration of the jury in determining the question of fraudulent intent, but raises no legal presumption of fraud. *Montgomery's Executors v. Kirksey*, 26 Ala. 172.

152. A reservation in favor of the grantor, with intent to hinder and delay his creditors, renders a deed void. *Stokes v. Jones*, 18 Ala. 734.

153. An assignment, executed by an insolvent debtor, providing that the preferred creditors are not to enjoy its benefits unless they accept it in full satisfaction of their debts, and that the *pro-rata* share of those who refuse to accept shall be paid to another specified creditor; and making no provision as to the disposition of the surplus which, if all the preferred creditors should refuse to accept, would remain after paying the debt of the residuary creditor,—is fraudulent and void on its face. *West, Oliver & Co. v. Snodgrass*, 17 Ala. 549.

154. But an assignment, appropriating the property unconditionally to the payment of certain preferred creditors, and the residue, if any, to be distributed, *pari passu*, among all others who shall execute the deed within six months, is not vitiated by the implied reservation, in the event of the failure or refusal of the latter class of creditors to accept the deed,

of such residue to the grantor. *Brown v. Lyon & O'Neal*, 17 Ala. 659.

155. A deed of trust, executed by a debtor in failing circumstances, who had taken to the supreme court judgments obtained against him for delay, was intended to secure the payment of a debt of $150 to C., and to indemnify C. and another against certain debts on which they were bound as sureties for the grantor, some of which were due, and others running to maturity; conveyed property, consisting of land, slaves, cattle, cotton, lumber, household and kitchen furniture, a stock of goods, and outstanding notes and accounts, amounting to above $7,000, and exceeding the aggregate amount of the secured debts; and provided that the grantor should retain the possession of all the property, and take the profits thereof to his own use, until default made in the payment of the debt due to C., or until C. and his co-surety should be compelled by law to pay any of the debts for which they were bound; in either of which contingencies, the trustee was authorized, after giving twelve months notice of the sale, to sell so much of the property as might be sufficient for the purpose, and, out of the proceeds, after defraying the expenses of the trust, to pay the debt due to C., or the amounts paid by him and his co-surety on the other debts; the surplus, if any, to be paid to the grantor,—*held*, that the deed was fraudulent on its face, as against the grantor's creditors. *Johnson v. Thweatt*, 18 Ala. 741.

156. A deed of trust, executed by a defaulting guardian, for the indemnity of the sureties on his bond; reciting that he is indebted to his ward, in an amount equal to, or greater than the value of the property conveyed; and authorizing the trustee to sell whenever he may think a sale most conducive to the advancement of the purposes of the trust, and to permit the grantor to retain the possession of all the property until a sale shall take place, is not fraudulent on its face. *Hopkins v. Scott*, 20 Ala. 179.

157. A debtor, in failing circumstances, may make an assignment, preferring one or more creditors to others: and if the deed conveys his entire property, and contains no reservation for his benefit, he may provide for the payment of one class of creditors absolutely, and for another on condition of their releasing all further claim on him. *Rankin, Duryee & Co. v. Lodor*, 21 Ala. 380.

158. A provision in a general assignment, reserving to the grantor the right to retain possession of the dwelling-house and slaves (nine in number) conveyed, until the trustees, in the exercise of the discretion confided to them, shall think proper to sell, does not render it fraudulent on its face. (GOLDTHWAITE, J., *dissenting*.) *Doe d. Shackelford v. P. & M. Bank*, 22 Ala. 238.

159. A deed of trust, made without the knowledge of the beneficiary, and reserving to the grantor the use of the property until the beneficiary ordered a sale, held not fraudulent on its face. *Lanier v. Driver*, 24 Ala. 149.

160. A deed of trust, executed by an insolvent debtor; conveying all his property to secure the payment of a portion of his debts then past due, and leaving other creditors wholly unprovided for; and stipulating that the grantor should retain the possession of all the property, until the law-day of the deed, and for such longer period as the sale might be postponed by the secured creditors, and that the surplus remaining after paying the secured debts and expenses should be refunded to him,—is fraudulent and void as against the usecured creditors. *Montgomery's Executors v. Kirksey*, 26 Ala. 172.

161. The fact that the grantor's father purchased all the property at the trustee's sale, and suffered it to go back immediately to the grantor's possession, "with permission to get a subsistence for himself and family, but to turn over all beyond this to the father, and that the property was to be under the general supervision and control of his brother as agent of the father," is a circumstance for the consideration of the jury, but does not, if the deed and purchase were both honestly made, justify any legal presumption of fraud. *Ib.*

162. A creditor, whose debt was past due, and who was chargeable with implied notice of the insolvency of his debtors, took from them, as the

best terms he could obtain for his security, a mortgage on all their property, to-wit, all their partnership effects, books, notes and accounts, and all their individual property, consisting of lands and negroes, all the stock and provisions then on hand, or which might afterwards be on hand at any time, all the cotton and corn which might be produced up to the law-day of the mortgage, all farming utensils, and household and kitchen furniture. The law-day of the mortgage was postponed nearly six years, the possession meanwhile remaining with the mortgagors; and it was shown that the property conveyed greatly exceeded in value the amount of the mortgage debt. *Held*, that the mortgage was fraudulent and void as to the other creditors. *Wiley, Banks & Co. v. Knight*, 27 Ala. 336.

163. Circumstances held sufficient to charge a creditor, through his agent and attorney, with implied notice of his debtor's insolvency. *Ib.*

164. A mortgage, executed by a man and his wife, who were engaged in the mercantile business as partners, to secure certain debts on which the mortgagees were bound as sureties and endorsers for them, and also a balance due one of the mortgagees on their original purchase of a stock of goods from him; conveying, by general words of description, the debtors' entire stock of goods, with the outstanding notes and accounts; neither fixing a law-day, nor authorizing the mortgagees to sell or take possession of the goods on default being made in the payment of the secured debts; and providing that the mortgagors should continue to carry on their business as before, and to sell to responsible men in the usual way, (the mortgagees to have the entire control of the proceeds of sale, for the purpose of paying the secured debts,) and that all other goods which, through the assistance of the mortgagees, might be afterwards purchased, for replenishing the stock and keeping up the business, should be held liable to all the provisions of the mortgage,—is not fraudulent on its face, but becomes fraudulent and void, as against other creditors, on proof that the husband, at the time it was executed, was wholly insolvent; that it conveyed all the separate property of the wife, except the interest therein which had been conveyed by previous mortgage to secure the balance due on the purchase of the original stock of goods; that the mortgagees, at the time they agreed to become bound on the debts made in replenishing the stock of goods, knew that the mortgagors were somewhat embarrassed, and unable to buy goods on their own credit; that they became bound for these debts, on the agreement of the mortgagors to secure them against all loss on account of their suretyship, and also to secure the balance due to one of them on the purchase of the original stock of goods, although it was not shown that the first mortgage was an inadequate security; that there were other creditors at the time it was executed, one of whom had reduced his debt to judgment; and that the mortgagors, within a few months after the execution of the mortgage, although it was stipulated that the business should be carried on at the same place, packed up the goods, with the consent of the mortgagees, and attempted to remove them beyond the limts of the State. *Constantine v. Twelves*, 29 Ala. 607.

165. A deed, fraudulent and void as against creditors whose debts are hindered or delayed, is nevertheless valid and binding between the parties themselves, and neither can set up the fraud in avoidance of it. *Walton v. Bonham*, 24 Ala. 513; *Wiley, Banks & Co. v. Knight*, 27 Ala. 336.

166. A mortgage, void for constructive fraud as against creditors, cannot stand as a valid security to reimburse the mortgagees for their payment of a prior incumbrance on a portion of the property, which constituted a part of its consideration. *Wiley, Banks & Co. v. Knight*, 27 Ala. 336.

167. An assignment, fraudulent on its face as against creditors, may be confirmed by them; and after they have assented to it, and have been paid out of the proceeds of the property, the transaction will not be disturbed. *White v. Banks*, 21 Ala. 705.

168. If a creditor receives his *pro-rata* share of the proceeds of the property conveyed, he is not thereby estopped from attacking the deed for

fraud. *Crutchfield's Heirs v. Hudson*, 23 Ala. 393.

169. Where a debtor executes two deeds of trust at different times, the beneficiaries in the second deed cannot complain of the negligence of the others after the law-day of their own deed, since they can then enforce the execution of the trust. *Lanier v. Driver*, 24 Ala. 149.

7. *Powers and Duties of Trustees.*

170. When a trustee is sued at law by one of the beneficiaries, he may, with the assent of the grantor, defeat a recovery, by showing that the deed was obtained by fraud, or that the debt has been paid. *Drake v. Moore*, 18 Ala. 597.

171. Where personal property is conveyed to two trustees, with power to sell and pay the secured debts, the survivor of them has the entire legal title to the property, and may maintain detinue for its recovery. *Parsons v. Boyd*, 20 Ala. 112.

172. Where the trustee has a discretion as to the time and manner of selling the property conveyed, and refuses to act promptly or within a reasonable time, the secured creditors may compel him to do so, or have him displaced and another appointed. *Evans & Evans v. Lamar*, 21 Ala. 333.

173. If the trustee, after accepting the trust, voluntarily permits his co-trustee to take the entire management, control and possession of the property, he is liable equally with his co-trustee to account; and, on a bill being filed by the grantor for an account and settlement of the trust, he is an incompetent witness for his co-defendant, to prove the insolvency of the debtors. *Royall's Adm'r v. McKenzie*, 25 Ala. 363.

174. Where the assignment consists principally of notes and accounts under twenty dollars, against debtors who reside in the same district with the trustee, he should be allowed, in the absence of all special cause, twelve months from his acceptance of the trust for the collection of the debts, and should be charged with interest on the available assets from the expiration of that time. *Ib.*

175. If the grantor agrees with the trustee, after the lapse of a sufficient time for closing the assignment, that, on the latter confessing judgments in favor of certain preferred creditors, the balance shall stand open for future adjustment, the trustee should nevertheless be charged with interest on that balance from that time. *Ib.*

176. The trustee's own note, when included in the assignment, should be charged as cash in his hands from its maturity. *Ib.*

177. The trustee is not estopped from showing that the actual amount of any assigned debt is less than that specified in the deed, and is accountable only for the actual amount of it. *Ib.*

178. It is his duty to use all necessary means, by suit or otherwise, to realize the debts; and if a debt is lost by his neglect of this duty, when the debtor had property sufficient to pay, he is personally responsible for the loss, although he may have acted without any improper motive. *Ib.*

179. If he receives lands in settlement and satisfaction of the assigned debts, without the sanction of the beneficiaries, equity will hold him responsible for whatever loss may ensue, and, if the beneficiaries so elect, will treat the land as his own individual property. *Ib.*

180. He cannot compromise the debts, without the consent of the beneficiaries, unless the deed gives him that power. *Ib.*

181. If he buys up the secured debts, at less than their nominal value, he is only entitled to a credit for the amount actually paid by him. *Ib.*

182. He is chargeable with the amount of an assigned debt, although the evidence is conflicting as to the debtor's solvency, upon proof of a settlement had between them, and the payment by him in cash of the balance found in the debtor's favor. *Ib.*

183. Also, with rents accruing under a lease included in the assignment, upon his own admission of the lease, and proof of the debtor's solvency. *Ib.*

184. Also, with the value of articles of personal property embraced in the assignment, to which he is shown to have asserted title, although he denies that they ever came to his possession. *Ib.*

III. FRAUDULENT AND VOLUNTARY CONVEYANCES.

1. *Gifts.*

185. A gift, or other voluntary conveyance, is void as against existing creditors, although no actual fraud was intended. *Thomas v. Degraffenreid*, 17 Ala. 602; *Stokes v. Jones*, 18 Ala. 734; *Gannard v. Eslava*, 20 Ala. 732; *Stiles & Co. v. Lightfoot*, 26 Ala. 443; *Foote and Wife v. Cobb*, 18 Ala. 585.

186. But, to enable subsequent creditors to avoid it, it must be shown to have been made with a fraudulent intent. *Thomas v. Degraffenreid*, 17 Ala. 602; *Stiles & Co. v. Lightfoot*, 26 Ala. 443.

187. This is also the law of Georgia, under the construction of the English statutes there adopted. *Foote and Wife v. Cobb*, 18 Ala. 585.

188. A contingent liability under a contract, express or implied, constitutes the party to whom the liability is incurred a creditor within the meaning of the statute. *Ib.*

189. A purchaser, with general covenants of warranty, is a creditor from the time of the execution of his deed, when there is at the time an outstanding paramount title under which he may be or is afterwards evicted. *Gannard v. Eslava*, 20 Ala. 732.

190. The marriage of the grantee, subsequent to the execution of the deed, but before its avoidance by creditors, does not give it any validity. *Stokes v. Jones*, 18 Ala. 734.

191. A voluntary deed is also void as against subsequent *bona-fide* creditors for valuable consideration. *S. C.*, 21 Ala. 731.

192. And this, although the grantor, at the time of its execution, did not have such title to the lands conveyed as could have been subjected by his creditors, either at law or in equity, provided he afterwards acquired title. *Ib.*

193. Where such deed contains a condition, that the grantor shall, during his life, be supported by the grantee, who is an infant of tender years; and the grantee does not in any manner accept or bind himself to the performance of the condition, until after a sale by the grantor to a *bona-fide* purchaser for valuable consideration, his subsequent acceptance, and part performance of the condition, cannot relate back so as to defeat the title of such purchaser. *Ib.*

194. The purchaser may avoid such voluntary deed in a court of law. *Ib.*

195. And the fact that it contains full covenants of warranty, does not operate as an estoppel on him. *S. C.*, 18 Ala. 734.

196. The payment of $65 for a slave constitutes a valuable consideration. *Dent v. Portwood*, 21 Ala. 589.

197. A claimant deriving title partly by gift, and partly by purchase, consummated before the lien of an execution attached, must be regarded, in a court of law, as a purchaser for valuable consideration, when no fraud is shown. *Taylor v. Branch Bank at Huntsville*, 21 Ala. 581.

198. If a subsequent creditor takes a mortgage to secure his debt, but does not pay anything for it, nor waive any right or lien to obtain it, nor incur any new responsibility, he is not a purchaser for valuable consideration. *Stiles & Co. v. Lightfoot*, 26 Ala. 443.

199. The simple fact of marriage does not, *per se*, constitute the husband a purchaser of property in the possession of the wife. *Perry v. Graham*, 18 Ala. 822.

200. A deed, purporting to have been made in consideration of natural love and affection, "and for divers other good considerations," which are shown by parol to have been valuable, is not within the statute respecting conveyances of personalty "upon consideration not deemed valuable in law." *Johnson v. Boyles*, 26 Ala. 576.

201. The declarations of the grantor, subsequent to the execution of his deed, are not admissible to prove it fraudulent. *Price v. Branch Bank at Decatur*, 17 Ala. 374; *Strong's Executors v. Brewer*, 17 Ala. 707.

202. Nor are his subsequent acts, other than a sale to a *bona-fide* purchaser for valuable consideration, admissible for that purpose. *Foote and Wife v. Cobb*, 18 Ala. 585.

2. *Loans.*

203. A loan of personal property, made in another State, must be recorded here when the property is brought into this State; otherwise, the retention of possession by the bailee, for three years, will subject the property to his debts. *McCoy v. Odom*, 20 Ala. 502.

204. The possession of the husband, under a loan to his wife and children, is within the statute. *McCoy v. Odom*, 20 Ala. 502; *Knight v. Bell*, 22 Ala. 198.

205. But, where the husband's possession commenced under a loan to his wife and children, and the property is afterwards given to his minor children, who reside with him, his subsequent possession will be referred to their title, although there was no actual change of possession. *McCoy v. Odom*, 20 Ala. 502.

206. If the property is sold under execution against the husband, and afterwards bought by him from the purchaser at the sale, he again becomes, as against the lender, a mere bailee as before, and cannot set up the title of the purchaser at the sheriff's sale. *Knight v. Bell*, 22 Ala. 198.

207. The statute does not apply, where the father of a debtor purchases his property at trustee's sale under deed of trust, and immediately suffers it to go back to the debtor's possession, "with permission to get a subsistence for himself and family, but to turn over all beyond this to the father; the property to be under the general supervision and control of an agent for the father." *Montgomery's Executors v. Kirksey*, 26 Ala. 172.

208. If the lender resumes the possession of the property before a creditor has acquired a lien on it, though after the expiration of three years, it cannot be afterwards subjected to the borrower's debts. *McCoy v. Odom*, 20 Ala. 502; *Pharis v. Leachman*, 20 Ala. 662.

209. If the lender resumes the possession before the expiration of the three years, though with the view of thereby avoiding the effect of the statute, and retains it for one or two days, this cuts off the statute at that point, and the borrower's subsequent possession will date from the time the property is restored to him. *Montgomery's Executors v. Kirksey*, 26 Ala. 172.

210. Although a creditor may subject slaves which have been in his debtor's possession, under a loan, more than three years, this gives him no right to subject crops partly grown by them, or other products of their labor, which have not been in the debtor's possession three years. *Ib.*

3. *Sales.*

211. A conveyance, executed by an insolvent debtor to one of his creditors, absolute on its face, but accompanied with a parol agreement that it should operate only for the grantee's indemnity, is fraudulent and void as to the grantor's other creditors. *Bryant v. Young & Hall*, 21 Ala. 264.

212. A sale of goods by an insolvent debtor, on a credit, with a reservation to the purchaser of the right to rescind the contract on a specified day, is subject to be defeated by the levy of an attachment on the goods, at the suit of a creditor of the vendor, at any time before the purchaser has paid the agreed price and made his election. *West, Oliver & Co. v. Snodgrass*, 17 Ala. 549.

213. As to the validity of the contract, if no levy had been made before the day on which the purchaser was to make his election, and he should then elect to affirm it, *quære?* *Ib.*

214. The rule which makes the retention of possession, by the vendor of a chattel, presumptive evidence of fraud, does not apply to public sales on notice. *Montgomery's Executors v. Kirksey*, 26 Ala. 172.

215. The retention of possession by the vendor of a chattel, unexplained, is only *prima-facie* evidence of fraud as against creditors, and may be explained. *Millard's Adm'rs v. Hall*, 24 Ala. 189; *Upson v. Raiford*, 29 Ala. 188.

216. The fact that the possession was retained under a *bona-fide* contract of hiring, the consideration of which was the board and clothing of the slaves, may be a sufficient explanation; and the fact that the keeping of the slaves was expensive to the hirer,

would not, of itself, authorize the court to assume that the hiring was simulated. *Upson v. Raiford*, 29 Ala. 188.

217. The retention of possession by the vendor of a family of slaves, after an absolute sale, under a *bona-fide* contract of hiring, in consideration of their board and clothing only, would be a possession upon valuable consideration, if the chief value of the property was its prospective growth and improvement, and the board and clothing of the slaves was a fair equivalent for such services as they could render. *Ib.*

218. Circumstances of unusual particularity, attending a sale by a debtor to his son-in-law, may be considered by the jury, as tending, if unexplained, to show fraud. *Jones v. Stewart*, 19 Ala. 701.

219. To show fraud in the execution of a bill of sale, a deed for land, executed by the vendor to the purchaser on the same day, is admissible evidence. *Dent v. Portwood*, 21 Ala. 588.

220. Where a deed is attacked for fraud, the creditor may show that the grantee was the minor son of the grantor; that the grantor, who was in embarrassed circumstances, executed another deed to the same grantee on the same day; and that the two deeds conveyed all the grantor's property within the State. *Benning v. Nelson*, 23 Ala. 801.

221. It being shown that the slaves in controversy remained in the possession of the claimant, who derived title under a sale from the debtor, for about four years after the alleged sale, the creditor may show that the debtor obtained his certificate of discharge in bankruptcy at the expiration of that time, and that the slaves were found in his possession a few months afterwards. *Snodgrass v. Branch Bank at Decatur*, 25 Ala. 161.

222. The possession of slaves, by a fraudulent purchaser, gives him no title under the statute of limitations, as against a creditor of the vendor who could not, by reasonable diligence, have discovered the fraud within six years before the levy of his execution. *Ib.*

V. OFFICIAL DEEDS.

223. The deed of a sheriff or marshal must be recorded, like other deeds, within six months after its execution. *Pollard v. Cocke*, 19 Ala. 188.

224. Such a deed cannot be collaterally impeached, on account of any irregularity in the proceedings, or in the process under which the land was sold. *Ib.*

225. But a deed for lands situated in the middle district of the State, and sold in the southern district by the United States marshal of the southern district, may be collaterally impeached, because the sale is absolutely void. *Ib.*

226. Under the revenue law of 1848, the omission to observe all the requisitions of the statute concerning the sale of land for taxes is fatal to the purchaser's title, although his deed may contain all the recitals enumerated in the 67th section of the act. *Elliott v. Doe d. Eddins*, 24 Ala. 508.

DEPOSITIONS.

(Statutory Provisions: Code, §§ 2318–2329; Clay's Digest, 164–8, §§ 1–19; Session Acts 1849–50, p. 73.)

As to depositions in chancery, see same title on page 249.

I. WHEN A DEPOSITION MAY BE TAKEN.

1. The deposition of a witness may be taken, on the ground of sickness and great bodily infirmity, rendering him unable to attend court. *Reese v. Beck*, 24 Ala. 651.

2. When such deposition is taken twelve days before the trial, it may be read in evidence, on proof that the witness, about the time it was taken,

was infirm and generally unable to leave home; there being no evidence on the contrary, showing his ability to attend. *Worthy, Brown & Co. v. Patterson*, 20 Ala. 172.

3. Under the Code, the deposition of a witness may be taken, when the claim or defense, or a material part thereof, depends exclusively on his testimony; and it may be read on the trial, although he resides within one hundred miles of the court. *May's Heirs v. May's Adm'r*, 28 Ala. 141.

II. AFFIDAVIT, AND NOTICE.

4. The affidavit for a deposition may be made by the attorney of the party wishing it. *Reese v. Beck*, 24 Ala. 651.

5. It may be made before the clerk of the court in which the cause is pending. *Wolfe v. Parham*, 18 Ala. 441.

6. The fact that the christian name of the witness is not stated in the affidavit, is not a sufficient ground for suppressing the deposition, when the commission and notice so describe and identify the witness, as to preclude the idea that the omission injured or misled the opposite party. *Parsons v. Boyd*. 20 Ala. 112.

7. A motion to suppress, on account of the insufficiency of the notice of the time and place of executing the commission, is addressed to the sound discretion of the primary court, when the deposition appears on its face to have been regularly taken, and nothing appears to the contrary in either the commission or the notice. *Ib.*

8. That no notice was given, is an objection which cannot be first raised on error. *Dill v. Camp*, 22 Ala. 249.

9. Where the notice is addressed to the attorneys of record of the opposite party, by their firm name, without stating that they are attorneys-at-law; and is served by the sheriff on a person bearing the same name with one of the partners of the firm,—this is, *prima facie*, sufficient. *Reese v. Beck*, 24 Ala. 651.

III. COMMISSION; ITS EXECUTION, AND RETURN.

10. If the commission, bearing a specific date, directs the deposition to be taken on "to-morrow," this is no objection to the deposition. *Wolfe v. Parham*, 18 Ala. 441.

11. Nor is it a valid objection, when the deposition is taken on interrogatories, that the commission describes the plaintiff as suing individually, instead of as executor: the commission, in such case, may be amended by the interrogatories. *Reese v. Beck*, 24 Ala. 561.

12. There is no statute requiring the commissioner himself to be sworn. *Wolfe v. Parham*, 18 Ala. 441.

13. The commission may be executed after the commencement of the term to which it is returnable, at any time before the cause is called for trial. *Dill v. Camp*, 22 Ala. 249; also, *Jordan v. Jordan*, 17 Ala. 466.

14. Where the caption of a deposition was in these words: "Pursuant to the annexed commission, to me directed, I have caused the said witness to come before me, a justice of the peace," &c.; and, in the final certificate, the answers were stated to have been sworn to "before me, a justice of the peace," &c.—*held*, that it sufficiently appeared that the commissioner acted under the commission. *Griffin v. Isbell*, 17 Ala. 184.

15. The failure of the commissioner to attach his seal to his certificate, is an objection which comes too late at the trial. *Reese v. Beck*, 24 Ala. 651.

16. His failure to date his certificate is not a valid objection to the deposition. *Dill v. Camp*, 22 Ala. 249.

17. A deposition, taken *de bene esse*, at the time and place specified in the commission, cannot be suppressed, because the commissioner returns with it a list of interrogatories, not signed by counsel, nor filed in the clerk's office, nor served on the opposite party. *Ib.*

18. If the deposition is returned to the clerk by the hands of a private person, it is not incumbent on the party offering it to prove that he was disinterested. *Ib.*

19. Under the provisions of the Code, an objection to an entire deposition, on account of defects in the commissioner's certificate, must be made before the trial commences; otherwise, though made as soon as

the deposition is opened by the court, it comes too late. *May's Heirs v. May's Adm'r*, 28 Ala. 141.

20. The failure of the commissioner to show in his final certificate that the witness was sworn, when it is stated in the caption that he was "first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth," is not a valid objection to a deposition. *Broadnax v. Sullivan*, 29 Ala. 320.

21. Nor is it a valid objection to a deposition, not governed by the provisions of the Code, that the commissioner does not certify that the witness is known to him. *Ib.*

22. The provisions of the Code, regulating depositions, do not apply to causes which were pending when it went into operation. *Ib.*

IV. OBJECTIONS, AND MOTIONS TO SUPPRESS.

23. The fact that a deposition was taken before the filing of an amended declaration, is not a sufficient reason for its suppression, when it is not shown that the issue was substantially varied by the amendment. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

24. A general objection to an entire deposition, containing some legal evidence, may be overruled. *Love v. Dargan*, 21 Ala. 583; *Hudson v. Crow*, 26 Ala. 515.

25. The same rule applies to an objection to a single answer. *Newton v. Jackson*, 23 Ala. 335.

26. But such a general objection may also be sustained, if any portion of the evidence is illegal. *Gibson v. Hatchett & Brother*, 24 Ala. 201.

27. Where two depositions are offered in evidence, and are objected to "on the ground that no interrogatories, cross-interrogatories or commissions issued to take the testimony of said witnesses or either of them," the entire objection may be overruled if either deposition is unobjectionable. *Thomas v. DeGraffenreid*, 27 Ala. 651.

28. An agreement, of record, that a deposition "shall be considered as regularly taken," does not prevent an objection to any portion of it containing illegal evidence. *Millard's Adm'rs v. Hall*, 24 Ala. 209.

29. An objection to a deposition, on account of the incompetency of the witness from interest, must be distictly made at the first opportunity. *Gray's Executors v. Brown*, 22 Ala. 262; *Hudson v. Crow*, 26 Ala. 515.

30. The question of the competency of the witness is not raised by a general objection at the time his deposition is taken. *Gray's Executors v. Brown*, 22 Ala. 262.

31. If, in accepting service of interrogatories, a party stipulates that he thereby "waives no objection to their legality, pertinency, relevancy or competency," this does not enable him afterwards to raise the question of the incompetency of the witness. *Hudson v. Crow*, 26 Ala. 515.

32. As a general rule, if a party is present at the taking of a deposition, and allows secondary evidence to be received, he cannot afterwards raise an objection to it; but, where the deposition is taken on interrogatories, which do not call for secondary evidence, an objection to the admissibility of such evidence may be raised on the trial, although the deposition was in the possession of the party's counsel for twenty-four hours before that time. *Boykin, McRae & Foster v. Collins*, 20 Ala. 230.

33. If a party fails to object to an interrogatory calling for a legal conclusion, he cannot object to the answer, if responsive. *Townsend v. Jeffries' Adm'r*, 24 Ala. 329.

34. In an answer to an interrogatory, whether plaintiff's warehouse could have been saved from fire, by the use of ordinary diligence, if it had been as good as his own, a witness answered, "Had it been as good as mine, eight such men could have saved it, but Major Dick was one." *Held*, that the latter clause of the answer was not responsive. *Gibson v. Hatchett & Brother*, 24 Ala. 201.

35. Where a witness, testifying to a parol gift of a slave, was asked, on cross-examination, whether control and possession passed to the grantee at the time of the gift, or whether the grantor still retained possession; and answered, "I considered that the control and possession of the slave did pass to the grantee at the time, and the slave was known as his property

from that time,"—*held*, that the answer was properly suppressed, because it was not responsive, and because it stated mere opinion and legal conclusion instead of facts. *Thomas v. De-Graffenreid*, 27 Ala. 651.

36. The objection that an answer is not responsive to the interrogatory, comes too late at the trial. *Nelson v. Iverson*, 24 Ala. 9.

37. Under the Code, an objection to a deposition, regularly taken and returned, on the ground that any portion of it is not responsive to the interrogatories, or that it states either more or less than was called for by the interrogatories, cannot be raised on the trial, unless accompanied by proof that it could not have been made at an earlier opportunity. *McCreary v. Turk*, 29 Ala. 244.

38. When a deposition shows on its face that the commissioner by whom it was taken was not very expert in such matters, the court will look to this circumstance, on motion to suppress, in gathering the meaning of the witness from the inapt expressions used. *Nelson v. Iverson*, 24 Ala. 9.

39. When a paper is appended to an answer, and the interrogatory itself is not set out in the record, the appellate court will presume, against the party excepting, that the answer was responsive to the interrogatory. *Furlow's Adm'r v. Merrell*, 23 Ala. 705.

40. *Mandamus* does not lie, to vacate an order suppressing a deposition. *Ex parte Elston*, 25 Ala. 72.

As to objections predicated on defects in the affidavit or notice, *vide supra*, 6–9; and on irregularities in the execution and return of the commission, 10–21.

V. ADMISSIBILITY AS EVIDENCE.

41. When a letter or account current is attached to a deposition in answer to a cross-interrogatory, and the party calling for it declines to read it, his adversary may read it in evidence. *Edgar v. McArn*, 22 Ala. 796.

42. When a party reads in evidence to the jury a deposition taken by his adversary, which the latter declined to offer, he thereby makes it his testimony, and cannot be heard to say that any portion of it is illegal or incompetent. *Jewell v. Center & Co.*, 25 Ala. 498.

43. The deposition of a witness, who has since removed from the State, is admissible evidence in a subsequent suit between the same parties or their privies, touching the same subject-matter, although the issues are not identical. *Long v. Davis*, 18 Ala. 801.

VI. RE-TAKING.

44. When a deposition is re-taken, by the same party, without an order of court, it is discretionary with the primary court to admit or reject it. *Broadnax v. Sullivan*, 29 Ala. 320.

DETINUE.

I. WHEN THE ACTION LIES.
II. PLEADINGS, AND EVIDENCE.
III. DAMAGES, VERDICT, AND JUDGMENT.
IV. STATUTORY BONDS.

I. WHEN THE ACTION LIES.

1. To maintain detinue, the plaintiff must have the entire legal title to the chattel. *Parsons v. Boyd*, 20 Ala. 112; *Frierson v. Frierson*, 21 Ala. 549; *Price v. Talley's Adm'rs*, 18 Ala. 21.

2. He must have, when the action is commenced, either a general or a special property in the chattel, and the right to its immediate possession; and, if he has never had the actual possession, he must a legal title. *Reese v. Harris*, 27 Ala. 301.

3. If he has color of title, and has had peaceable possession, he may recover against a mere wrong-doer who, by force or indirection, obtained and holds the possession. *Shomo v. Caldwell*, 21 Ala. 448.

4. He may recover upon possession alone, against one who has not so good a right as himself. *Miller v. Jones' Adm'r*, 26 Ala. 247.

5. If he has possession and the right of possession, accompanied by a lien for money advanced, he may recover against an officer who levies an attach-

ment on the property against the person from whom he derived his title. *Bryan v. Smith*, 22 Ala. 534.

6. The action lies in favor of an administratrix, individually, to recover slaves belonging to the estate, of which she has been wrongfully dispossessed. *Walker v. Lauderdale*, 17 Ala. 359.

7. It lies in favor of the survivor of two trustees, under a deed of trust for the benefit of creditors, conferring upon them power to sell and pay the secured debts. *Parsons v. Boyd*, 20 Ala. 112.

8. It lies in favor of husband and wife, for the recovery of a chattel belonging to the wife, where the unlawful taking and detainer occurred before the marriage; and if the record shows only the wife's title, but is silent as to the time of the wrongful taking and detainer, the appellate court will presume, in favor of the correctness of the judgment, that such taking and detainer was proved to have occurred before the marriage. *Mitchell v. Cowsert and Wife*, 20 Ala. 186.

9. It lies in favor of the assignee of a mortgage, claiming under the mortgagee's assignment of "all right, title and interest in and to the within mortgage," endorsed upon the deed; but not in favor of the mortgagee, for the use of such assignee. *Graham & Rogers v. Newman*, 21 Ala. 497.

10. It does not lie, either at common law, or under the statutes of Virginia as shown in evidence in this case, in favor of a distributee, who has never had possession, before administration granted or distribution made. *Reese v. Harris*, 27 Ala. 301.

11. A separate action lies for the detention of each chattel. *Wittick v. Traun*, 27 Ala. 562.

12. It lies against an executor, in his representative capacity, to recover a slave of which his testator was possessed, and which came to his possession as executor, although the cause of action did not accrue until after the death of the testator. *Strong's Executors v. Brewer*, 17 Ala. 706.

13. It lies against an infant. *Oliver v. McClellan*, 21 Ala. 607.

14. It does not lie against a bailee, who, asserting no title in himself, restored the property to his bailor, in good faith, in accordance with the terms of the bailment, before he was notified that the true owner would look to him for it. *Nelson v. Iverson*, 17 Ala. 216.

15. It lies for the recovery of a slave, who, at the commencement of the suit, was in the possession of a third person, under a contract of hiring, which is not shown to have been of such a nature as would prevent the defendant from resuming the possession at pleasure. *Gaines v. Harvin*, 19 Ala. 491.

16. It does not lie against a tenant *pur autre vie*, who, before the commencement of the suit, had hired out the property for the usual term, which term had not expired when the life estate determined. *Walker v. Fenner*, 20 Ala. 192.

17. Nor against one who, though he had possession at the time such life estate determined, whereby plaintiff's vested remainder accrued, afterwards parted with it, without fault, under a contract of hiring, before suit brought or demand made, and was out of possession at the date of the writ. *Fenner v. Kirkman*, 26 Ala. 650.

18. Nor against a purchaser at sheriff's sale, who, without notice that plaintiff intended to assert any right to the property, parted with the possession, under a contract of hiring, before the commencement of the suit. *Harris v. Hillman*, 26 Ala. 380.

19. Nor does it lie against a bailee who holds over after the expiration of his term, so long as his possession is permissive. *Benje v. Creagh's Adm'r*, 21 Ala. 151.

20. But it lies for the recovery of slaves, which the owner allowed to go into the possession of an intended purchaser, under an executory contract of sale which did not pass the legal title, and to which such purchaser asserted an adverse claim. *Love v. Crook*, 27 Ala. 624.

II. PLEADINGS, AND EVIDENCE.

21. The non-joinder of proper parties plaintiff is fatal to the action. *Price v. Talley's Adm'rs*, 18 Ala. 21; *Parsons v. Boyd*, 20 Ala. 112; *Frierson v. Frierson*, 21 Ala. 549.

22. So is a misjoinder of plaintiffs. *Walker v. Fenner*, 28 Ala. 367.

23. Counts in detinue and debt may be joined. *Calvert v. Marlow*, 18 Ala. 67.

24. Under the Code, which preserves the distinctions between this action and trover, an amendment of the complaint, which would convert the action into trover, cannot be allowed. *Harris v. Hillman*, 26 Ala. 380.

25. In suing for the recovery of slaves belonging to his intestate's estate, an administrator may declare in the form prescribed by the Code, (p. 552,) with the additional averment that he claims "as administrator," &c. *Crimm's Adm'rs v. Crawford*, 29 Ala. 623.

26. In an action by husband and wife, to recover the separate property of the wife, a complaint in the prescribed form is sufficiently certain and definite on demurrer, although it does not allege whether the separate estate of the wife was created by contract or by statute, nor whether the husband has ever had possession of the property during coverture; but no recovery can be had, under such a complaint, upon a cause of action which does not authorize husband and wife to join as plaintiffs. *Pickens and Wife v. Oliver*, 29 Ala. 528.

27. If the cause of action accrued in this State, adverse possession here for six years, by some one against whom suit might at any time be brought, is necessary to bar the action. *Bohannon v. Chapman*, 17 Ala. 696.

28. A replication to a plea of the statute of limitations of another State, alleging that the property was converted in this State, and carried into another, where it was purchased by defendant, and brought back again by him, and that it has not been in this State more than four years since the conversion, is demurrable. *Thomason v. Odum*, 23 Ala. 480.

29. Adverse possession, for the length of time prescribed as a bar by the statute, may be given in evidence under the general issue. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

30. A plea *puis darrein continuance*, alleging the slave's death, is bad on demurrer. *Ib.*

31. The defendant cannot show that plaintiff's possession was acquired by fraud, unless he connects such fraud with his own title. *McGuire v. Shelby*, 20 Ala. 456.

32. A release from a stranger, or a transfer of all interest in the property, is admissible evidence for the defendant, as tending to show title in himself. *Slaughter v. Cunningham*, 24 Ala. 260.

33. Where plaintiff claims as trustee, under a deed of gift executed by a minor in trust for his children, the defendant may show that the grantor, after becoming of age, disavowed the act, and made another disposition of the property. *Ib.*

34. When the plaintiff's right of action is founded on possession merely, the defendant cannot set up an outstanding title in a third person, without connecting himself with it; *secus*, where plaintiff's right of recovery is based on his title. *Miller v. Jones' Adm'r*, 26 Ala. 247; *S. C.*, 29 Ala. 174.

35. If defendant claims, under a purchase at sheriff's sale, from one who was estopped from denying the right of possession to be in plaintiff's intestate, he cannot set up an outstanding title in a third person, without connecting himself with it. *Ib.*

36. A plea, which only shows title in the defendant on a day certain before the commencement of the suit, is demurrable. *Wittick v. Traun*, 25 Ala. 317; *Patton v. Hamner*, 28 Ala. 618.

37. A plea of a former judgment for defendant is nothing more. *Wittick v. Traun*, 25 Ala. 317.

38. A plea in bar to the further maintenance of the suit, setting up a recovery in a subsequent action of assumpsit for the hire of the slave, is demurrable, unless it shows that the question of ownership entered into the issue on that trial: an averment that the declaration alleged that the plaintiff therein was the owner of the slave, is not sufficient. *Chamberlain v. Gaillard*, 26 Ala. 504.

39. An additional averment that the ownership of the slave formed a material part of the issue on the former trial, does not render the plea sufficient: to make it a good plea, it must show that the jury, on the former trial, necessarily determined that the plaintiff therein was the owner of the

slave down to the commencement of the detinue suit. *Ib.*

40. If issue is joined on such defective plea, and the defendant does not show a state of facts which negatives his right to have recovered on any other ground than that of his ownership, the court may instruct the jury that his plea is not sustained. *Ib.*

41. A plea which professes to be an answer to the action as to five of the slaves sued for, while it constitutes a good defense only as to one of them, is demurrable. *Wittick v. Traun*, 27 Ala. 562.

III. DAMAGES, VERDICT, AND JUDGMENT.

42. In detinue for a slave, the annual hire is the measure of the damages; but interest cannot be allowed on the hire. *Fralick v. Presley and Wife*, 29 Ala. 457.

43. If the damages are not proved, a nominal sum only should be given; consequently, it is erroneous to instruct the jury, that they might, in the absence of proof as to the value of the hire, give interest on the agreed value of the slave as damages. *Miller v. Jones' Adm'r*, 26 Ala. 247.

44. A bailee, failing to return the property at the termination of the bailment, is liable for damages without a special demand. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

45. If the husband comes into possession, by marriage, of a slave belonging to the estate of a decedent, which the administrator had gratuitously loaned to the wife *dum sola*, he is liable both for his own detention and that of his wife before marriage; and if, on his death before suit brought, the slave comes to the possession of his executor as assets, the latter is liable, without a previous demand, both for his own detention and that of his testator. *S. C.*, 24 Ala. 184.

46 If the plaintiff, by giving the statutory bonds, causes the possession of the property to be taken from the defendant, and turned over to himself, the jury are authorized by the act of 1848, (Session Acts 1847–8, p. 82,) on finding a verdict for the defendant, to assess the damages and value of the slaves. *Rowan v. Hutchisson*, 27 Ala. 328.

47. Issues being joined on the pleas of *non detinet* and justification under legal process, a verdict, finding the defendant not guilty, and assessing the damages and separate value of the slaves, is sufficient, under this statute, to support a judgment in his favor. *Ib.*

48. In an action for several slaves, a judgment in favor of the plaintiff, for all of them except one, as to whom the judgment entry is entirely silent, is a judgment in favor of the defendant for that one. *Wittick v. Traun*, 25 Ala. 317.

49. In such action, a trial being had on the plea of the general issue, the jury returned a verdict, "that they find for the plaintiff, and assess the value of the slaves sued for as follows," &c., (specifying by name, and assessing the separate value of, all the slaves except one, as to whom the verdict was entirely silent,) "and they also find the hire of said slaves to be $200." *Held*, that the verdict was not sufficient to authorize the rendition of judgment. (RICE, J., *dissenting*, and holding that it was a good finding for the plaintiff, as to the slaves specified, with their hire as damages for their detention, and against him as to the slave omitted.) *S. C.*, 27 Ala. 562.

50. If the jury "find for the plaintiff, and assess the damages at" a specified sum; and thereupon judgment is rendered in his favor, for the damages and costs only,—there is nothing in the judgment of which the defendant can complain. *Miller v. Jones' Adm'r*, 29 Ala. 174.

51. A judgment in detinue is conclusive, as to the title then adjudicated, upon a person who, though no party to the record, is shown by parol to have been the real defendant in the action; but, as to a title subsequently acquired, from one who was neither a party nor privy to the action, it is not conclusive. *Tarleton & Pollard v. Johnson*, 25 Ala. 300.

52. An endorsement on the writ by the sheriff, that he had taken the property under it, and, after the lapse of five days, (the defendant failing and refusing to put in bond, and the plaintiff having put in bond within five days,) had delivered it to the plaintiff, will not support a judgment by default. *Fowler v. Banks*, 21 Ala. 679.

IV. STATUTORY BONDS.

53. In an action on a detinue bond, a recovery may be had for counsel fees expended in defending the suit in the circuit court, but not for counsel fees in the supreme court, to which the case was removed by the plaintiff below. (GOLDTHWAITE, J., *dissenting*, held that counsel fees for defending in both courts should be allowed.) *Ferguson & Scott v. Baber's Adm'rs*, 24 Ala. 402.

54. A recovery may be had, in such action, under a special allegation, for the value of the hire of the property during the whole time the defendant was deprived of its use, although, on his failure to give the statutory bond, the property was delivered to the plaintiff, as provided by the statute; and this value may be proved, by evidence of the "value of the use of the property per day, over and above expenses, during the time it was in the plaintiff's possession." *Hudson v. Young*, 25 Ala. 376.

DISCONTINUANCE.

1. A motion to set aside a nonsuit, notice of which is merely entered on the motion docket, but which is neither acted on, nor called to the attention of the court, is not continued in court by a general order of continuance as to "all causes, motions, or other proceedings, now pending and not otherwise disposed of." *Gunnels v. State Bank*, 18 Ala. 676.

2. If a judgment is rendered in favor of a sole plaintiff, after his death pending the suit, the failure of his personal representative, for more than two years, to have the judgment set aside and the suit revived, is not a discontinuance of the action. *Moore v. Easley*, 18 Ala. 619.

3. When a cause is withdrawn from the docket, and leave is at the same time given to reinstate it, the failure to take any steps in regard to it, for more than two years, amounts to a discontinuance. *Griffin v. Osbourne & Co.*, 20 Ala. 594; *Drinkard v. The State*, 20 Ala. 9.

4. A judgment against one of the joint makers of a note, all of whom are sued and served with process, is a discontinuance of the action; yet, where the action is commenced in a justice's court, and the proceedings are removed by appeal to the circuit court, the cause must be tried *de novo*, without regard to this irregularity. *Goss v. Davis*, 21 Ala. 479.

5. Where a cause was taken from the supreme court of this State to the supreme court of the United States, where the judgment was reversed and the cause remanded; but the certificate of reversal did not reach the former court until after the lapse of more than nine years,—*held*, that this did not operate a discontinuance of the cause. *Doe d. Brown and Wife v. Clements & Hunt*, 24 Ala. 354.

6. In an action against several joint administrators, a discontinuance as to one not served with process is not a discontinuance of the action. (PARSONS, J., *dissenting*.) *Moore & Jones v. Davidson*, 18 Ala. 209.

7. In *sci. fa.* against several executors, one of whom is not served with process, there is no discontinuance in proceeding without him, when the record does not show that he ever qualified; and if it appears that he died several terms before the trial was had, and that the cause was afterwards treated by all the parties as regularly in court, the irregularity (if any) is not available on error. *Sherrod's Executors v. Hampton*, 25 Ala. 652.

8. If a writ is sued out against two administrators, and the action discontinued, on the ground of non-residence, as to one on whom process was not served, the irregularity (if any) is not available on error to the other, who appeared and defended without objection. *Shorter v. Urquhart*, 28 Ala. 360.

9. In *sci. fa.* to revive a judgment against several joint defendants, if one of them pleads separately, and issue is taken on his pleas; while the plaintiff demurs to the pleas of the other defendants, and, on account of the rulings of the court on his demurrer, is compelled to take a nonsuit,—a writ of error under the act of 1846, against all the defendants, is not a discontinuance as to the defendant upon whose pleas issue was taken. *Duncan v. Hargrove*, 22 Ala. 150.

10. Where a motion for a summary judgment is discontinued as to those defendants upon whom the notice has not been served, and continued as to the others, the subsequent appearance of the former cures the discontinuance, and judgment may then go against all. *Walker v. Chapman*, 22 Ala. 116.

See, also, same title in PART I, p. 38.

DOCKETS.

1. The motion docket is no part of the records proper of the court; and if the clerk, in making out a transcript, copies into it entries on the motion docket, which have not been made a part of the record, either by motion to enroll or by bill of exceptions, they will be stricken out on motion. *Waring & Co. v. Gilbert & Bro.*, 25 Ala. 295.

2. But entries on the motion docket are sufficient to authorize the amendment or rendition of a judgment at a subsequent term, *nunc pro tunc*. *Yonge v. Broxson*, 23 Ala. 684.

3. So are entries on the judge's docket. *Dickens v. Bush*, 23 Ala. 849.

4. But an entry on the judge's docket, reciting that the plaintiff was ruled to give security for the costs by the next term, is not sufficient to authorize the entry of an order to that effect at a subsequent term, unless it shows the reason why the order was made. *Lewis v. Lewis*, 25 Ala. 315.

5. Entries on said docket were also held insufficient in the following probate cases: *Metcalf v. Metcalf*, 19 Ala. 319; *Perkins v. Perkins*, 27 Ala. 479. (*Vide* AMENDMENTS, 5, 9, pp. 125–6.)

DOMICILE.

1. A domicile, once acquired, is presumed to continue until a new one has been gained *facto et animo*. *Glover v. Glover*, 18 Ala. 367.

2. A temporary absence from the county of one's fixed domicile, on business or pleasure, with the intention of returning, and an actual return in accordance with such intention, do not work a change of domicile. *Boyd v. Beck*, 29 Ala. 703.

3. The domicile of the husband determines that of the wife. *Harrison & Saunders v. Harrison*, 20 Ala. 629.

4. But an exception to this general rule is, that the wife must be allowed, for the purpose of obtaining a divorce, to acquire a domicile in the State in which she is actually living at the time she is deserted by her husband; even where the desertion consists in his refusal to allow her to return, after having left his abode in another State. *Hanberry v. Hanberry*, 29 Ala. 719.

5. The husband has a right to emigrate, and thereby acquire a new domicile, although his wife remains at his former domicile. *Thompson v. The State*, 28 Ala. 12.

EJECTMENT.

I. WHEN THE ACTION LIES, AND WHAT TITLE WILL SUPPORT IT.
II. PLADINGS, PRACTICE, AND EVIDENCE.
III. VERDICT, AND JUDGMENT.

I. WHEN THE ACTION LIES, AND WHAT TITLE WILL SUPPORT IT.

1. A purchaser, holding only his vendor's bond for title, cannot recover in ejectment against one who has subsequently acquired the legal title. *Trammell v. Simmons*, 17 Ala. 411.

2. One claiming under a purchase at sheriff's sale, under judgment against a vendor who, before the rendition of the judgment, had sold the land to another, and executed his bond for titles, is entitled to recover against the holder of such title bond, although the latter acquired a deed from his vendor prior to the sheriff's sale. *Sellers & Cook v. Hayes*, 17 Ala. 749.

3. A prior possession, accompanied with acts of ownership, by one from whom plaintiff deduces title, will authorize a recovery against a person who is afterwards found in possession without any claim or title. *McCall v. Doe d. Pryor*, 17 Ala. 533; *Cox v. Davis*. 17 Ala. 714.

4. When a party enters into the possession of land under an executory contract of purchase, and fails to comply with the terms of the contract as to the payment of the money, the vendor or his grantee may maintain ejectment to recover the possession. *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207.

5. The grantor of lands which, at the time of the execution of his deed, are in the adverse possession of a third person, may maintain ejectment against such adverse holder. *Harvey v. Doe d. Carlisle*, 23 Ala. 635.

6. A purchaser at a sheriff's sale, under execution at law against the widow, before her dower has been assigned to her, does not acquire such a title as will support an ejectment. *Doe d. Cook & Hardy v. Webb*, 18 Ala. 810.

7. The heir-at-law may recover against the grantee of the widow before dower assigned. *Wallace v. Hall's Heirs*, 19 Ala. 367.

8. The administrator of a solvent estate may maintain ejectment for the lands of his intestate. *Golding v. Golding's Adm'r*, 24 Ala. 122.

9. But the administrator of an estate which has been declared insolvent cannot. *Long v. McDougald's Adm'r*, 23 Ala. 413.

10. A purchaser from a Creek Indian, of his reservation under the treaty of March 24, 1832, after his deed has been approved by the president of the United States, has such a title as will support an ejectment. *Ib.*

11. A claimant of lands situated within the territory of Louisiana, whose original claim, founded on an incomplete Spanish grant, was presented to the United States commissioner, reported by him for confirmation, confirmed by act of congress of 1822, located and surveyed under the warrant of the register and receiver, and consummated by patent from the United States, is entitled to recover against one deriving title from a claimant of an alleged Spanish grant, the written evidence of which has been lost by time or accident, and which has never been confirmed by act of congress. *Hall v. Doe d. Root*, 19 Ala. 378.

12. Where such claimant derives title from a Spanish grant, of which no written evidence was produced to the commissioner, but which was reported by him for confirmation, and confirmed by the third section of said act of congress, he shows a sufficient legal title to maintain the action, without proof of the location and survey authorized by the act. *Doe d. Chastang v. Dill*, 19 Ala. 421; *Chastang's Heirs v. Armstrong*, 20 Ala. 609.

13. Where the application to the commissioner was made by an executor, "on behalf of himself and the other legatees" of his testator, the title vests, on its confirmation, in the devisees under the will, and they may sue. *Chastang's Heirs v. Armstrong*, 20 Ala. 609.

14. A claimant under the act of congress of February 11, 1847, conferring bounty-lands on soldiers, whose warrant was located on land in the actual settlement and cultivation of another, may recover against such settler. *Cruise v. Riddle*, 21 Ala. 791.

II. PLEADINGS, PRACTICE, AND EVIDENCE.

15. The usual notice and declaration are sufficient to bring the defendant into court. *Cruise v. Riddle*, 21 Ala. 791.

16. The plea of not guilty, in an action brought under the Code, (§ 2213,) is equivalent to the consent rule, and is an admission of the defendant's possession at the commencement of the suit. *King v. Kent's Heirs*, 29 Ala. 542.

17. Section 2211 of the Code, which gives the defendant in a real action a right to demand an abstract of the plaintiff's title, does not apply to suits which were pending when the Code went into operation. *Doe d. Kennedy's Heirs v. Reynolds*, 27 Ala. 364.

18. A plea *puis darrein continuance*, setting up a recovery of the premises by a stranger, is demurrable. *Doe d. Kennedy v. Holman & Howard*, 19 Ala. 734.

19. A purchaser at a sheriff's sale is not required, in an action against the grantee of the defendant in execution, to prove the demand on which the judgment under which he claims was founded, but may recover on proof of the judgment, execution, and

sheriff's deed. *De Vendell v. Doe d. Hamilton*, 27 Ala. 156.

20. When the action is brought against the defendant in execution himself, he may show that he never had such title to the premises as was subject to sale under execution at law. *Doe d. Cook & Hardy v. Webb*, 18 Ala. 810.

21. When the defendant in execution brings suit against the purchaser at sheriff's sale, whom he induced to purchase, and to whom he surrendered the possession, he is not estopped from showing that the sale was void because made after the return day of the execution. *Smith v. Mundy*, 18 Ala. 182.

22. Where both parties claim through mesne conveyances from the same person, the plaintiff is not bound to prove the nature or extent of that person's title: it is sufficient if he can establish it in himself. *Pollard v. Cocke*, 19 Ala. 188; *Gantt v. Doe d. Cowan*, 27 Ala. 582.

23. In such case, the defendant cannot defeat a recovery by setting up an outstanding title in a third person. *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207; *Gantt v. Doe d. Cowan*, 27 Ala. 582.

24. And the fact that the plaintiff claims under a quit-claim deed, while the defendant claims under a subsequent purchase at sheriff's sale, does not affect the principle, unless the defendant can show that, after the execution of the plaintiff's quit-claim deed, the defendant in execution acquired a superior title. *Gantt v. Doe d. Cowan*, 27 Ala. 582.

25. Nor can a party who entered under an executory contract of purchase, the terms of which he failed to comply with in the payment of the purchase-money, defeat a recovery by his vendor, or one claiming under his vendor, by setting up an outstanding title. *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207.

26. But, where the defendant is not estopped by some act done by him, or by some relation existing between him and plaintiff, he may defeat a recovery by setting up an outstanding title. *King v. Stevens*, 18 Ala. 475; *S. C.*, 21 Ala. 429.

27. He may protect himself against a purchaser at sheriff's sale, when he was in possession before the rendition of the judgment, by showing an unrecorded deed from the defendant in execution, executed prior to the rendition of the judgment, although he does not connect himself with it. *Strickland v. Nance*, 19 Ala. 233.

28. Where the defendant, by claiming under plaintiff's lessor, is estopped from setting up an outstanding title, the plaintiff may recover on proof of his lessor's title, although he himself shows a superior oustanding title in another. *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207.

29. In such case, a deed from defendant, conveying the premises to one of the plaintiffs, in trust for the payment of a debt to a third person, does not operate as an estoppel against plaintiff's recovery. *Ib.*

30. The admission of irrelevant evidence on the part of the plaintiff, to rebut an outstanding title, is not an error for which the judgment will be reversed, when the defendant was estopped from setting up such outstanding title. *Ib.*

31. Where the plaintiff claimed under a purchase at sheriff's sale, and proved that the land was devised to the defendant in execution by his father, who held possession under a bond for titles from one Y., and had paid the purchase-money in full; while the defendant relied upon a purchase from an Indian reservee, under an approved contract, mesne conveyances from the grantees to said Y., and from him to one H.,—*held*, that this outstanding legal title was superior to plaintiffs. *Doe d. Stevens v. King*, 21 Ala. 429.

32. A Spanish title to land situated in the territory of Louisiana, the written evidence of which was never presented to the United States commissioner for confirmation, nor recorded under any of the different acts of congress, cannot be received in evidence against a grantee of the United States; but the unrecorded evidence of such title, and the mesne conveyances connecting the defendant therewith, would be admissible, to show adverse possession under color of title, and thus protect the party in possession under the statute of limitation. *Hall v. Doe d. Root*, 19 Ala. 378.

33. Adverse possession cannot be set up against one claiming under a patent from the United States, since there can be no adverse possession against the government. *Iverson & Robinson v. Dubose*, 27 Ala. 418.

34. Adverse possession for more than thirty years, with two descents cast on the adverse claimants, bars the action. *Baker v. Chastang's Heirs*, 18 Ala. 417.

35. But a party in possession, holding in subordination to a title which has been perfected by the adverse possession of himself and those from whom he derived it, cannot prevent a recovery on this title, by purchasing the outstanding barred title, and giving vitality to it by subtracting the time of his own adverse holding. *Ib.*

36. Where separate demises are laid from several coparceners or tenants in common, if the statute of limitations has effected a bar against one of the lessors, a recovery may still be had on the demises from the others. *Rawls v. Doe d. Kennedy*, 23 Ala. 240.

37. Where plaintiff declares on a joint demise from three lessors, and, on motion of defendant, the names of two of them are struck out, the defendant cannot complain, on error, that the name of the third was allowed to stand in the declaration; nor will the appellate court revise the action of the primary court, in refusing to strike out the names of two unless the defendant would consent that the name of the third might stand as on his sole demise. *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207.

38. In an action by the vendor or one claiming under him, against a person who entered under an executory contract of purchase, the defendant cannot set up any claim for improvements erected on the lands, because his possession is not adverse. *Ib.*

39. If no claim, or suggestion for improvements, is made by the pleadings, the defendant cannot complain, on error, that the court refused to allow him to offer evidence of the value of his improvements. *Stephens v. Westwood*, 25 Ala. 716.

40. The death of one of several lessors, pending the suit, does not abate it, nor destroy the right of action of the survivors. *Baker v. Chastang's Heirs*, 18 Ala. 417.

41. If the sole lessor of the plaintiff dies, pending the suit, where damages are sought as well as the land, the action must be revived in the names of his personal representative and heirs-at-law. *Ex parte Swan*, 23 Ala. 192.

42. If the defendant dies, pending the suit, it must be revived against his personal representatives and heirs-at-law. *Crutchfield v. Hudson*, 23 Ala. 393.

III. VERDICT, AND JUDGMENT.

43. The plaintiff may recover a less interest than he declares for. *Baker v. Chastang's Heirs*, 18 Ala. 417.

44. The jury having returned a verdict for the plaintiff, assessing the value of the improvements and rents, their failure to assess also the value of the land is not available to the defendant on error, when the record shows that, before the rendition of judgment on the verdict, the plaintiff paid into court the damages assessed in favor of the defendant. *Gager v. Doe d. Gordon*, 29 Ala. 341.

45. A recovery in ejectment is conclusive between the parties and their privies, as to the title of the plaintiff's lessor, in a subsequent action for the rents and profits. *Shumake v. Nelms' Adm'r*, 25 Ala. 126.

46. But it is conclusive only as to the term laid in the demise: after the expiration of such term, plaintiff cannot have execution on his judgment; and if he enters, with or without execution, he is a trespasser. *Doe d. Kennedy's Heirs v. Reynolds*, 27 Ala. 364.

47. A recovery, without an entry under it, does not stop the statute of limitations. *Ib.*

ELECTION.

1. Those who will be entitled to the money arising from the sale of property, may elect, if capable of making an election, to take the property itself in lieu of the money. *Broome v. Curry's Adm'rs*, 19 Ala. 805.

2. A defendant in execution, having two horses and a pair of work-oxen, has a right to elect which he will retain for the use of his family; but if an execution is levied on either, and he puts the others out of the officer's reach, this amounts to an election. *Ross v. Hannah*, 18 Ala. 125.

3. Where a party contracts to pay for a certain service in specific property or in money, he has a right to elect as to the mode of payment; but, if he voluntarily disposes of the property, or loses it by title paramount, his election is thereby determined, and he becomes liable to pay in money. *Wolfe v. Parham*, 18 Ala. 441.

4. Where a party enters into possession of land under an executory contract of purchase, and fails to comply with the stipulated terms as to the payment of the purchase-money, the vendor may, at his election, either sue for use and occupation of the land, or eject him by suit as a trespasser. *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207.

5. On the death of the vendor in such case, his executors succeed to his right of election, when the will confers on them power to sell the real estate; and they may transfer the right to another. *Ib.*

6. A workman, who contracts to serve another for a specific period, and at a specified price, and who is discharged, without any fault on his part, before the expiration of the term, may either treat the contract as still subsisting, and sue for wages due according to its terms, or consider it rescinded, and sue for unliquidated damages for its breach. *Ramey v. Holcombe*, 21 Ala. 567; *Fowler & Prout v. Armour*, 24 Ala. 194.

7. A purchaser may elect, on discovering a defect of title, either to rescind the contract, or to sue for a breach of the covenant contained in his title-bond; and he does not deprive himself of this right, by bringing suit on the title-bond, in which the lands are incorrectly described through mistake, and defending a suit in equity for the correction of the mistake. *Reese v. Kirk*, 29 Ala. 406.

8. A recovery in trover, without satisfaction, is no bar to a subsequent action against one claiming under the defendant. *Spivey v. Morris*, 18 Ala. 254.

9. But a recovery and satisfaction, in an action for the conversion of a hired slave, damages being assessed for the value at the time of the conversion, is a bar to a subsequent action for the hire of the unexpired portion of the term. *Smith v. Hooks*, 19 Ala. 101.

10. If, with full knowledge of the conversion during the term, the owner elects to receive the hire for the entire term, he cannot afterwards maintain an action for the conversion. *Moseley v. Wilkinson*, 24 Ala. 411.

11. The recovery of a judgment against one of several joint trespassers, does not preclude the plaintiff from proceeding to judgment against the others. *Blann v. Crocheron*, 19 Ala. 647.

12. After the recovery of several separate judgments in such case, the plaintiff's right of election *de melioribus damnis* is not determined, until he sues out execution, or accepts satisfaction. *S. C.* 20 Ala. 320.

13. The mere recovery of a judgment in assumpsit, against the secretary of an incorporated company, for the amount of his defalcations to the company, is no bar to a subsequent action against the sureties on his official bond. *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

14. But, if the company summons by process of garnishment a transferee of the embezzled notes and bills, takes judgment against him for the amount admitted to be due on that account, and enforces satisfaction of the judgment, it is estopped from afterwards bringing trover against him. *Firemen's Insurance Co. v. Cochran & Co.*, 27 Ala. 228.

EMBLEMENTS.

1. The right to *emblements* does not obtain until the seed is sown, and does not include the cost of preparing the ground for the seed, when the life estate falls in before the seed has been actually sown. *Price v. Pickett*, 21 Ala. 741.

2. Under the "married-woman's law," of 1850, the husband is entitled, like any other tenant for life, to *emblements* in his wife's separate estate. *Weems v. Bryan and Wife*, 21 Ala. 303.

ENTRY AND DETAINER.

(Statutory Provisions: Code, §§ 2850–2871; Clay's Digest, pp. 250–54, §§ 1–24; Session Acts 1847–8, p. 90; *Ib.* 1849–50, p. 81.)

I. WHEN ACTION LIES.
II. PLEADINGS, PRACTICE, AND EVIDENCE.

I. WHEN ACTION LIES.

1. The mere refusal of the defendant to deliver up the premises, on demand, and his declaration to a third person that he intended to keep them if he could, are not sufficient evidence of force to support an action for forcible detainer. *Matlock v. Thompson*, 18 Ala. 600.

2. The bare removal of plaintiff's fence would not, if defendant entered peaceably, convert his entry or detainer into a forcible one. *McGonegal v. Walker*, 23 Ala. 361.

3. But, to sustain an action for a forcible entry and detainer, the plaintiff must show that the defendant forcibly entered upon his premises, and that he actually detains the possession, either by himself in person, or by another to whom, after obtaining it by force, he delivered it to be kept for him; and the fact that the person to whom he thus delivered the possession had been his tenant before the premises went into plaintiff's possession, would make no difference. *Ib.*

4. An action for unlawful detainer only lies against a tenant who holds over after the expiration of his term, or against one who obtains or holds possession by, from, under, or by collusion with, such tenant. *Mounger v. Burks*, 17 Ala. 48; *Russell v. Desplous*, 25 Ala. 514; *S. C.*, 29 Ala. 308.

5. Consequently, it does not lie, in favor of a purchaser at administrator's sale, against the tenant of one who entered under a contract of purchase from the intestate in his lifetime, which contract was rescinded and abandoned after the intestate's death. *Mounger v. Burks*, 17 Ala. 48.

6. Nor does it lie against one who, "within three years last past, unlawfully entered upon and took possession" of premises then in plaintiff's possession, "and has since unlawfully kept and detained the possession thereof from him." *Russell v. Desplous*, 25 Ala. 514.

7. Nor does it lie against one who, in 1850, took possession of premises which were abandoned in 1829 by the tenant to whom they had previously been leased. *S. C.*, 29 Ala. 308.

II. PLEADINGS, PRACTICE, AND EVIDENCE.

8. Going to trial, without objection to the complaint, is a waiver of all defects therein. *Matlock v. Thompson*, 18 Ala. 600.

9. An averment that defendant "forcibly and unlawfully detains and keeps possession" of the premises, "detaining and holding the same by such words, circumstances, or actings, as have a natural tendency to excite fear and apprehension of danger," is a sufficient allegation of a forcible detainer. *Ib.*

10. In an action of unlawful detainer, if the defendant shows that he is in possession as plaintiff's tenant, for a term which was unexpired when the action was instituted, this is a sufficient defense; and if the holding for the entire term was made dependent upon some act to be done by him before its commencement or during its continuance, it is incumbent on the plaintiff to show it. *Rainey v. Capps*, 22 Ala. 288.

11. Where the defendant, having purchased the premises at sheriff's sale under execution against the plaintiff, received the possession from an under-tenant of plaintiff's lessee after the expiration of the original tenancy, the sheriff's deed for the premises, and the record of the judgment under which the land was sold, are not admissible evidence for him, even "to show that his possession was lawful," since it goes to the merits of the title. *Dumas v. Hunter*, 25 Ala. 711.

12. Prior to the passage of the act of 1850, cases removed to the circuit court by *certiorari* were required to be tried on an assignment of errors on the record sent up by the justice; and if the party whose duty it was to assign errors, failed or refused to do so, the judgment must have been affirmed. *Mahan v. Lester*, 20 Ala. 162.

13. The act of 1850, requiring a trial *de novo* to be had in such cases, does not apply to a case which had been removed to the circuit court before its passage, although the bond required by the judge was in fact executed, and the writ of *certiorari* issued, after its passage. *Ib.*

ERROR AND APPEAL.

I. WHEN ERROR OR APPEAL LIES.

1. An order for a *mandamus* to the sheriff, to compel him to accept a bond for the trial of the right of property in a slave levied on under attachment, will not support a writ of error by the plaintiff in attachment. *Braley v. Peck & Clark*, 18 Ala. 436.

2. Whether the writ would lie, in such case, in favor of the sheriff himself, *quære?* *Ib.*

3. In an admiralty proceeding against a steamboat, the refusal of the court, after the vessel has been sold, and the proceeds of the sale brought into court for distribution, to order such proceeds to be paid to the claimant, will not support an appeal or writ of error. *Stewart George v. Saunders*, 19 Ala. 744.

4. A writ of error does not lie from a judgment after the grant of a new trial, even when such new trial is granted "with the understanding that the same be revised, and a bill of exceptions allowed." *Harrington v. Meriweather*, 20 Ala. 607.

5. Nor does it lie from the refusal of the primary court to quash a bond given for the trial of the right of property, on motion of the obligors. *Gayle & Riggs v. Bancroft's Adm'r*, 22 Ala. 648.

6. Prior to the passage of the act of 1846, (Session Acts 1845–6, p. 35,) a writ of error did not lie from a judgment of nonsuit voluntarily taken; while under that act, it only lies when the nonsuit was taken in consequence of an adverse ruling of the court. *Tate & Tate v. McCrary*, 21 Ala. 499.

7. Where the judgment entry recites that the plaintiffs "voluntarily suffered a nonsuit," and neither the bill of exceptions nor any other part of the record shows that the nonsuit was taken in consequence of the ruling of the court, the writ of error cannot be sustained. *Ib.*

8. But this statute embraces all cases in which a nonsuit is taken on account of the adverse rulings of the court on the pleadings, and applies to a proceeding by *sci. fa.*, commenced since its passage, to revive a judgment rendered prior to its passage. *Duncan v. Hargrove*, 22 Ala. 150.

9. Section 3016 of the Code, abolishing writs of error, and giving an appeal in lieu thereof, applies alike to judgments rendered before and since the day on which the Code went into operation. *Mazange v. Slocum & Henderson*, 23 Ala. 668.

II. PARTIES; AND HEREIN, OF ABATEMENT AND REVIVOR.

10. A writ of error should be sued out in the joint names of all the defendants to the judgment. *Griffin, Rayfield & Griffin v. Wilson*, 19 Ala. 27; *Cleaveland v. McAdams*, 21 Ala. 321; *Savage & Darrington v. Walshe & Emanuel*, 24 Ala. 293; *Duncan v. Hargrove*, 22 Ala. 150; *Moore v. McGuire*, 26 Ala. 461.

11. The same rule applies to appeals under the Code. *Savage & Dar-*

rington v. Walshe & Emanuel, 24 Ala. 293; *Moore v. McGuire*, 26 Ala. 461.

12. Where a sheriff makes application to the court for instructions as to the appropriation of money arising from the sale of property under sundry executions, and several of the plaintiffs in execution except to the rulings of the court on such application, but one writ of error is allowable, to which all must be made parties. *Branch Bank at Decatur v. McCollum*, 20 Ala. 280.

13. In *sci. fa.* to revive a judgment, if one of the defendants pleads separately, and issue is taken on his pleas; while the plaintiff demurs to the pleas of the other defendants, and, on account of the adverse ruling of the court, is compelled to take a nonsuit, a writ of error on this nonsuit, under the act of 1846, should be sued out against all the defendants. *Duncan v. Hargrove*, 22 Ala. 150.

14. If the writ is defective for want of proper parties, it may be amended in the appellate court. *Cleaveland v. McAdams*, 21 Ala. 321; *Colvin v. Owens*, 22 Ala. 782; *Knox's Distributees v. Steele*, 18 Ala. 815.

15. If any of the parties plaintiff in the writ refuse to join in the assignment of errors, there may be a summons and severance as to them, and the others may then proceed without them. *Savage & Darrington v. Walshe & Emanuel*, 24 Ala. 293; *Moore v. McGuire*, 26 Ala. 461.

16. When the appellant is an infant, the appeal should be sued out by his guardian or next friend. *Cook v. Adams*, 27 Ala. 294. See, also, *Riddle v. Hanna*, 25 Ala. 484.

17. If the plaintiff in error dies, pending a writ of error in a personal action, the suit may be revived in the name of his personal representative. *Pope v. Welsh's Adm'r*, 18 Ala. 631; *Cox's Adm'r v. Whitfield*, 18 Ala. 738.

18. So may an appeal under the Code, although a *supersedeas* bond was given. *Savage & Darrington v. Walshe & Emanuel*, 24 Ala. 293.

19. Writs of error were governed, as to the practice in making parties in case of the death of the defendant in error before the writ was sued out, by the rule laid down in *Sewall v. Bates*, 2 Stew. 462; but, under section 3069 of the Code, parties may be made, in such case, in the court below. *Wesson v. Crook*, 24 Ala. 478.

III. BOND, AND SECURITY FOR COSTS.

20. A writ-of-error bond, without security, does not operate as a *supersedeas* of the judgment. *Williams v. Hart*, 17 Ala. 102.

21. One surety to an appeal bond is sufficient. *Cooper v. Maclin's Heirs*, 25 Ala. 298.

22. When the appellees are infants, who sued by their next friend, the bond should be made payable to them, and not to their next friend. *Ib.*

23. When the names of the sureties for the costs are shown by the record, it is not necessary that they should also be mentioned in the clerk's certificate. *Hall and Wife v. Wallace*, 25 Ala. 438.

24. If neither bond nor security for the costs is given, the cause will be struck from the docket, on motion, although the clerk certifies that "no bond was given because all costs have been paid." *King & Owen v. McCann*, 25 Ala. 471.

25. An acknowledgment of liability "for the costs of an appeal by all the plaintiffs except R.," is sufficient. *Crump v. Wallace*, 27 Ala. 277.

26. But an obligation, binding the surety to pay the costs "if the judgment is affirmed," is not sufficient. *Hinson v. Preslor*, 27 Ala. 463.

27. If the bond misdescribes the judgment, the appeal will be dismissed on motion. *Dumas v. Hunter*, 28 Ala. 688; *Williams v. The State*, 26 Ala. 85. (As to what is a sufficient description of the judgment, see *Satterwhite v. The State*, 28 Ala. 65.)

28. A joinder in error is a waiver of the appeal bond or security for costs, and of all defects therein. (RICE, C. J., *dissenting*.) *Thompson v. Lea*, 28 Ala. 453.

IV. LIMITATION.

29. There is no limitation to an appeal from a judgment which was rendered less than three years before the Code was adopted and went into operation. (*Per* STONE, J., sitting alone.) *Green v. Maclin*, 29 Ala. 695.

V. PRACTICE.

1. *Filing Transcript.*

30. If the transcript is not filed at the term to which the appeal or writ of error is returnable, the latter becomes a nullity. *Tardy v. Murry & Durand*, 17 Ala. 585; *Perryman v. Camp*, 24 Ala. 438; *Cooper v. Maclin's Heirs*, 25 Ala. 298; *Owen v. Echols*, 28 Ala. 689.

31. But it may be filed at any time during the term, before motion to affirm on certificate. *Pearsall v. McCartney*. 25 Ala. 461.

32. If it is filed after the expiration of the term to which the appeal was returnable, the appeal will be dismissed on motion. *Perryman v. Camp*, 24 Ala. 438; *Owen v. Echols*, 28 Ala. 689.

2. *Affirmance on Certificate.*

33. A certificate which does not show when the writ of error was issued, and to what term it was returnable, is not sufficient to authorize an affirmance of the judgment. *Tardy v. Murry & Durand*, 17 Ala. 585.

34. Nor can a judgment be affirmed on a certificate issued on a writ of error which, because the transcript was not filed at the return term of the writ, has become a nullity, when a second writ has been sued out. *Ib.*

35. Nor can an affirmance be had at the same term at which the appeal is dismissed, because the transcript was not filed at the proper term, and on the same transcript. *Perryman v. Camp*, 24 Ala. 438.

36. A motion to affirm comes too late after the transcript has been filed, althought it was not filed within the first three days of the term. *Pearsall v. McCarthey*, 25 Ala. 461.

3. *Assignments of Error, and Joinder in Error.*

37. Assignments of error, founded on extraneous matter in the record, which does not pertain to the case between the appellant and appellee, will be stricken out. *Hagadon v. Campbell*, 24 Ala. 375.

38. The appellate court will only notice such errors as are assigned and insisted on. *Long v. Rodgers*, 19 Ala. 321; *Van Eppes v. Smith*, 21 Ala. 317; *Jones v. Graham*, 21 Ala. 654; *Prater's Adm'r v. Darby*, 24 Ala. 496; *Fulton Insurance Co. v. Milner, Tinsley & Co.*, 23 Ala. 420; *Russell v. Desplous*, 25 Ala. 514; *Murrah v. Branch Bank at Decatur*, 20 Ala. 392.

39. A joinder in error is a waiver of the appeal bond or security for costs, and of all defects therein. (RICE, C. J., *dissenting.*) *Thompson v. Lea*, 28 Ala. 453.

4. *Citation.*

40. The appellant's failure to apply for a citation does not affect the validity of an appeal: the appellee may avoid delay by appearing. *Cooper v. Maclin's Heirs*, 25 Ala. 298.

5. *Record; and herein, of Certiorari.*

41. Each case must be tried on its own record, and cannot be aided by reference to the record of another case. *Collier's Adm'r v. Slaughter's Adm'r*, 22 Ala. 671.

42. A bill of exceptions, which does not conform to the requisitions of the statute, cannot be regarded as any part of the record. *Haden v. Brown*, 22 Ala. 572; *Murrah v. Branch Bank at Decatur*, 20 Ala. 392; *Floyd v. Fountain*, 17 Ala. 700; *Godden v. LeGrand*, 28 Ala. 158; *Kitchen v. Moye*, 17 Ala. 143.

43. Letters, copied into the transcript as exhibits, but not made part of the record by appropriate reference in the bill of exceptions, cannot be considered as any part of the record. *Stodder v. Grant & Nickels*, 28 Ala. 416.

44. If one of the original papers in the cause is, by an order of the primary court, attached to the transcript, the appellate court cannot inspect or examine it for any purpose. *Butler v. The State*, 22 Ala. 43. (Changed by rule of practice adopted at June term, 1856, hitherto unpublished.)

45. Entries on the motion docket constitute no part of the record, unless so made by motion to enroll or bill of exceptions. *Waring & Co. v. Gilbert & Bro.*, 25 Ala. 295.

46. Under the Georgia statute of 1822, (Prince's Digest, 37,) the record

of a garnishment case consists only of the affidavit and summons, the return of the officer, the answer of the garnishee, and the judgment thereon rendered against him; but neither the original judgment of which execution is sought, nor the execution thereon issued, constitutes any portion of the garnishment suit, unless incorporated into the judgment against the garnishee, or made part of the record by bill of exceptions. *Gunn v. Howell*, 27 Ala. 663.

47. Where the bill of exceptions stated that the defendant "then read a transcript in the words and figures following," but the transcript itself was not set out, and the clerk certified that it was not on file in his office, a transcript which was afterwards sent up on *certiorari*, but which could not be identified by any reference in the original record, was rejected as forming no part of the bill. *Branch Bank at Decatur v. Moseley*, 19 Ala. 222.

48. A *certiorari* will not be awarded, unless by consent, to bring up an amended record, until the amendment has been made in the primary court. *Townsend v. Jeffries' Adm'r*, 24 Ala. 329.

49. But, when a judgment is amended *nunc pro tunc* during the pendency of a writ of error, and the amendment is brought up on *certiorari* previously sued out, the amended judgment is properly before the court. *Cunningham v. Fontaine*, 25 Ala. 644.

50. Evidence cannot be received in the appellate court, to contradict the record; nor will that court look to the American State Papers, as published under the authority of congress, to show a mistake in a certified copy of a public document contained in the transcript. *Kennedy's Executor v. Doe d. Rochon's Heirs*, 26 Ala. 384.

6. *Enforcing Satisfaction of Judgment.*

51. Plaintiff in detinue, having recovered only one of the slaves sued for, excepted to the rulings of the court against him, and took an appeal, but afterwards coerced satisfaction of the decree; this fact having been brought to the knowledge of the appellate court by affidavits, he was required to make restitution by the next term of the court; and now, having failed to comply with this order, his appeal was dismissed. *Earle v. Reid*, 25 Ala. 463.

52. As to the application of this rule to probate cases, see *McCreliss' Distributees v. Hinkle*, 17 Ala. 459; *Knox's Distributees v. Steele*, 18 Ala. 815. (*Vide* ERROR AND APPEAL, 38–9, p. 147.)

53. As to its application to chancery cases, see *Tarleton v. Goldthwaite's Heirs*, 23 Ala. 346; *Riddle v. Hanna*, 25 Ala. 484. (*Vide* ERROR AND APPEAL, 18–19, pp. 259–60.)

7. *What is, or not, Revisable.*

54. The action of the primary court, in allowing a party to answer interrogatories after the lapse of sixty days from the service, or to amend his answers, is not revisable. *Pool v. Harrison*, 18 Ala. 514.

55. Nor is its action in permitting a plea to be filed at any time before the trial of the cause. *Bobe v. Frowner and Wife*, 18 Ala. 89; *Newman v. Pryor*, 18 Ala. 186.

56. But the action of the court, in permitting the defendant in an appeal case to withdraw his plea to the merits, after the cause has been pending several years, and several trials have been had, and to plead in abatement to the jurisdiction of the justice, is revisable. *Vaughan v. Robinson*, 22 Ala. 519. (Correcting and limiting *Massey v. Steele's Adm'r*, 11 Ala. 340.)

57. Nor in refusing to quash branch writs, on motion, because there was no endorsement showing that they were for one and the same cause of action. *Johnson and Wife v. King*, 20 Ala. 270.

58. Nor in refusing to suppress a deposition, which appears to have been regularly taken, on account of the insufficiency of the notice. *Parsons v. Boyd*, 20 Ala. 112.

59. Nor in refusing to quash an attachment, on motion, because issued in a case not authorized by law. *Gill v. Downs*, 26 Ala. 670.

60. Nor in refusing a motion to strike out a plea. *Duncan v. Hargrove*, 22 Ala. 150.

61. Nor in permitting a witness to testify who, after the witnesses had been put under the rule, remained in

court during the examination of the others, without the knowledge of the party for whom he was summoned. *Sidgreaves v. Myatt*, 22 Ala. 617.

62. Nor in refusing a motion to exclude parol evidence of the contents of a deed, which was offered without objection, and the witness cross-examined touching it. *Allen v. Smith*, 22 Ala. 416; *Beattie v. Abercrombie*, 18 Ala. 9.

63. Nor in refusing to quash a bond for the trial of the right of property, on motion of some of the obligors. when the motion is made at the trial, after the suit has been pending for several years. *Gayle v. Bancroft's Adm'r*, 22 Ala. 316; *Gayle & Riggs v. Bancroft's Adm'r*, 22 Ala. 649.

64. Nor in refusing to strike out the name of two of the plaintiff's lessors in ejectment, on motion of defendant, unless defendant would permit the name of the only remaining lessor to stand as on his sole demise. *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207.

65. Nor in permitting additional evidence to go to the jury, after the evidence has been closed, if the justice of the case requires it. *Edgar v. McArn*, 22 Ala. 796.

66. Nor in permitting the plaintiff to be re-examined, in a suit involving less than $20, for the purpose of rebutting one of the defendant's witnesses. *Stein v. McArdle & Waters*, 24 Ala. 344.

67. Nor in overruling a motion to nonsuit the plaintiff, where the verdict in his favor is for less than $5, on account of the insufficiency of his affidavit. *McAllister v. McDow*, 26 Ala. 453.

68. Nor in permitting an amendment of the endorsement on the writ, so that a special count may be added to the declaration. *Moore v. Smith*, 19 Ala. 774.

69. Nor in permitting an amendment of the declaration, after issue joined, but before the cause is submitted to the jury. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

70. Nor in permitting such amendment, after the trial has been commenced, so as to obviate a variance. *Zeigler & Hall v. David*, 23 Ala. 127.

71. Nor in allowing an additional count to be added, even after the jury has been instructed. *Prater v. Miller*, 25 Ala. 320.

72. Nor in suggesting that the complaint may be so amended, if the plaintiff desires it, as to obviate the effect of a charge just given at the instance of the defendant. *Crimm's Adm'rs v. Crawford*, 29 Ala. 623.

73. Nor in refusing to allow counsel, after the argument has been closed and the cause submitted to the jury, to explain to them a distinction applicable to the case. *Chamberlain & Co v. Masterson*, 26 Ala. 371.

74. Nor in granting or refusing a new trial. *Walker v. Blassingame*, 17 Ala. 810; *Benje v. Creagh's Adm'r*, 21 Ala. 151; *Franklin v. The State*, 29 Ala. 14; *Brister v. The State*, 26 Ala. 107.

75. Nor in the taxation of costs in appeal cases, where the defendant appeals, and the plaintiff recovers judgment for a less sum than he recovered before the justice. *Hornsby v. Crossland*, 22 Ala. 625; *Porter v. Williams*, 22 Ala. 525.

76. But in all other cases, the action of the circuit court, on matters relating to the taxation of costs, is revisable on error. *Porter v. Williams*, 22 Ala. 525.

77. The appellate court cannot revise a decision of the primary court, upon the question whether or not a parol admission was made by counsel during the progress of the trial. *Price v. Branch Bank at Decatur*, 17 Ala. 374.

78. Nor will it revise the decision of the primary court on a question of fact, when the cause was submitted to the decision of the judge without the intervention of a jury. *Etheridge v. Doe d. Malempre*, 18 Ala. 565; *Barnes v. Mayor & Aldermen of Mobile*, 19 Ala. 707; *Bott v. McCoy & Johnson*, 20 Ala. 578; *DeVendell v. Doe d. Hamilton*, 27 Ala. 156.

79. But the decision of the court on a question of law, in such case, is revisable. *Shaw v. Beers*, 25 Ala. 449; *Mims v. Sturdevant and Wife*, 23 Ala. 664.

80. Nor in refusing to have a person brought in to testify as a witness, when he has not been subpœnaed, although he is about the court. *Woodward v. Purdy*, 20 Ala. 379.

81. The action of the court, in refusing to allow the claimant, on a trial of the right of property under the statute, to offer evidence of title in himself, on account of his failure and refusal to comply with a previous order granting him a continuance on the payment of all costs, does not come within its discretionary power, but is revisable on error. *Montgomery & Wetumpka Plank-Road Co. v. Persse, Taylor & Co.*, 25 Ala. 536.

8. *What is, or not, Available on Error.*

82. Error, without injury to the appellant, will not work a reversal in his favor. *Governor v. Campbell*, 17 Ala. 566; *Bohannon v. Chapman*, 17 Ala. 696; *Smith & Garey v. Awbrey*, 19 Ala. 63; *Herndon v. Givens*, 19 Ala. 313; *Ex parte Keenan*, 21 Ala. 558; *Spivey v. McGehee*, 21 Ala. 417; *Boykin v. Edwards*, 21 Ala. 261; *Martin v. Nall*, 22 Ala. 610; *Donley v. Camp*, 22 Ala. 659; *Stanley v. Bank of Mobile*, 23 Ala. 652; *Stewart v. Bradford*, 26 Ala. 341; *Montgomery's Executors v. Kirksey*, 26 Ala. 172; *Nelson v. Bondurant*, 26 Ala. 342; *Johnson v. Boyles*, 26 Ala. 576; *Rolston v. Langdon*, 26 Ala. 660; *Taylor v. Morrison*, 26 Ala. 728; *Mobile Marine Dock & Mutual Insurance Co. v. McMillan & Son*, 27 Ala. 77; *Goldsmith, Forcheimer, & Co. v. Picard*, 27 Ala. 142; *Reese v. Harris*, 27 Ala. 301; *Thomas v. Henderson*, 27 Ala. 523; *Winter v. Phelan*, 27 Ala. 649; *Doe d. Saltonstall and Wife v. Riley & Dawson*, 28 Ala. 164; *Jesse v. Cater*, 28 Ala. 475; *Beeson v. Wiley, Banks & Co.*, 28 Ala. 575; *King v. Pope*, 28 Ala. 601; *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147; *Miller v. Jones' Adm'r*, 29 Ala. 174; *Partridge v. Forsyth*, 29 Ala. 200; *Smith v. Ewers*, 21 Ala. 38.

83. But error raises the presumption of injury, and, unless that presumption is clearly rebutted by the record, must reverse the judgment. *Long v. Rogers*, 17 Ala. 540; *Johnson and Wife v. Collins*. 17 Ala. 318; *Ex parte Keenan*, 21 Ala. 558; *Sackett & Shelton v. McCord*, 23 Ala. 851; *Mims v. Sturdevant and Wife*, 23 Ala. 664; *Moore v. Clay*, 24 Ala. 235; *Spivey v. McGehee*, 21 Ala. 417; *Doe d. Kennedy's Heirs v. Reynolds*, 27 Ala. 364; *Thomas v. DeGraffenreid*, 27 Ala. 651; *Hines and Wife v. Trantham*, 27 Ala. 359.

84. Nor will the appellate court, for the purpose of deciding that the error did not work injury, look to grave and doubtful questions not raised by the assignment of errors. *Spivey v. McGehee*, 21 Ala. 417.

85. The admission of relevant evidence, for a wrong purpose, is error without injury. *Cook & Scott v. Parham*, 24 Ala. 21; *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

86. So is the exclusion of illegal evidence for a wrong reason. *Jordan v. Owen*, 27 Ala. 152.

87. But the admission of irrelevant evidence will reverse, unless the record clearly shows that no injury could have resulted from it. *Frierson v. Frierson*, 21 Ala. 549; *Bilberry's Adm'r v. Mobley*, 21 Ala. 277; *Thomas v. DeGraffenreid*, 27 Ala. 651.

88. Such error, however, is cured by subsequently withdrawing the evidence from the jury, or by instructing them to disregard it. *Winter v. Phelan*, 27 Ala. 649; *Thomas v. Henderson*, 27 Ala. 523; *Florey's Executors v. Florey*, 24 Ala. 241.

89. If the evidence was, when offered, *prima facie* irrelevant, the subsequent admission of the preliminary proof cures the error. *King v. Pope*, 28 Ala. 601; *Lawson & Swinney v. The State*, 20 Ala. 65; *Johnson v. The State*, 29 Ala. 62; *Ross v. Pearson*, 21 Ala. 473.

90. If the evidence, though irrelevant or illegal, was simply superfluous, (the party's case being made out without it,) its admission is error without injury. *Parsons v. Boyd*, 20 Ala. 112; *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207; *Kyle v. Mays, use of Pond*, 22 Ala. 692; *Frierson v. Frierson*, 21 Ala. 549.

91. The admission of parol evidence, to prove a fact which the court must have judicially known, is, at most, error without injury. *Doe d. Saltonstall and Wife v. Riley & Dawson*, 28 Ala. 164.

92. So is the erroneous exclusion of evidence which the charge of the court renders superfluous. *Gibson v. Hatchett & Brother*, 24 Ala. 201.

93. So is the overruling of a demurrer to several pleas, each going to the whole declaration, when one of the pleas is good. *Firemen's Insurance*

Co. v. Cochran & Co., 27 Ala. 228; *The State v. Brantley*, 27 Ala. 44; *Jesse v. Cater*, 28 Ala. 475.

94. So is the erroneous overruling of a demurrer to a defective plea, when the record shows that the court subsequently charged the jury, at the plaintiff's instance, that the evidence was not sufficient in law to sustain the plea. *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

95. So is the erroneous overruling of a demurrer to a plea in abatement, pleaded with pleas in bar, when the record shows that the plaintiff afterwards recovered judgment on the issues joined. *Holley v. Younge*, 27 Ala. 203.

96. And the wrongful sustaining of a demurrer to a special plea, when the defendant had the full benefit of all the facts under his other pleas. *Nelson v. Bondurant*, 26 Ala. 341; *Stein v. Ashby*, 24 Ala. 521; *Dunlap v. Robinson*, 28 Ala. 100; *Bohannon v. Chapman*, 17 Ala. 699.

97. And the overruling of a demurrer to a special count, when the evidence shows that the plaintiff was entitled to recover under his other counts. (CHILTON, J., *dissenting*.) *Smith & Garey v. Awbrey*, 19 Ala. 63.

98. And the refusal to strike out immaterial averments in the declaration. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

99. But the refusal of the court, in an admiralty proceeding against a steamboat, to strike from the files a declaration against the owners individually, is a reversible error. *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189.

100. An abstract charge is no ground for a reversal of the judgment, when the record clearly shows that it could not have misled the jury, to the appellant's prejudice. *Salmons v. Roundtree*, 24 Ala. 458; *Johnson v. Boyles*, 26 Ala. 576; *Rolston v. Langdon*, 26 Ala. 660; *Taylor v. Morrison*, 26 Ala. 728; *Partridge v. Forsyth*, 29 Ala. 200.

101. And this, even though it may assert an incorrect legal proposition. *Salmons v. Roundtree*, 24 Ala. 458; *Johnson v. Boyles*, 26 Ala. 576; *Rolston v. Langdon*, 26 Ala. 660.

102. An abstract charge, asserting a correct legal proposition, amounts only to error without injury, when the record shows testimony on which, if such charge were stricken out, and no instructions on the sufficiency of the evidence were requested, the jury might still have found the same verdict. *Partridge v. Forsyth*, 29 Ala. 200.

103. An erroneous charge, too favorable to the appellant, is error without injury. *Montgomery's Executors v. Kirksey*, 26 Ala. 172; *McGonegal v. Walker*, 23 Ala. 361; *Kirkley v. Segar*, 20 Ala. 226; *Salmons v. Roundtree*, 24 Ala. 458; *Martin v. Nall*, 22 Ala. 610; *Governor v. Campbell*, 17 Ala. 566.

104. A charge which, though erroneous as a general proposition, is correct when applied to the evidence, is no ground of reversal. *Miller v. Jones' Adm'r*, 29 Ala. 174.

105. An affirmative charge, asserting a correct legal proposition, although it may be objectionable on account of its generality, is no ground of reversal, since the party ought to request an explanatory charge. *Ewing v. Sanford*, 19 Ala. 605; *Hutchinson v. Dearing*, 20 Ala. 799; *Ivey's Adm'r v. Owens and Wife*, 28 Ala. 641; *Partridge v. Forsyth*, 29 Ala. 200.

106. A charge, which refers to the jury the decision of a question of law, is a reversible error. *Ewing v. Sanford*, 19 Ala. 605; *Chamberlain & Co. v. Masterson*, 26 Ala. 371; *Wright v. Bolling*, 27 Ala. 259.

107. But the party against whom the court ought to have decided the question, cannot complain of such a charge. *Stanley v. Bank of Mobile*, 23 Ala. 652; *Wyatt's Adm'r v. Steele*, 26 Ala. 639; *Millard's Adm'rs v. Hall*, 24 Ala. 209.

108. A reversal will not be granted, in favor of the plaintiff below, on account of any erroneous rulings against him, when the record clearly shows that he can never recover. *Gilmer v. Ware*, 19 Ala. 252; *Jones v. Graham*, 24 Ala. 450; *Gilmer & Taylor v. City Council of Montgomery*, 26 Ala. 665; *Reese v. Harris*, 27 Ala. 301; *Doe d. Saltonstall and Wife v. Riley & Dawson*, 28 Ala. 164; *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

109. But this rule does not apply, where the plaintiff is compelled to take a nonsuit, before concluding the

proof which he might have introduced, by the erroneous rulings of the court. *Erwin, Myers & Co. v. Crowell*, 17 Ala. 227.

110. Nor does it apply, where the bill of exceptions puts the court clearly in error, and sets out evidence which, however weak and indefinite, shows that he was entitled to recover at least a nominal sum. *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

111. Where the plaintiff was entitled to recover under a special count in his declaration, the judgment will not be reversed, in favor of the defendant, because the court held that he was entitled to recover under the common counts. *Herndon v. Givens*, 19 Ala. 313.

112. And where the evidence would have justified a general charge in favor of the plaintiff's right to recover, an erroneous charge against the defendant amounts only to error without injury. *Donley v. Camp*, 22 Ala. 659.

113. The fact that the declaration fails to show a good cause of action, and that a demurrer to it was improperly overruled, will not prevent a reversal in favor of the plaintiff, on account of erroneous rulings of the court against him. *Marshall v. Betner*, 17 Ala. 832; *Adams and Wife v. Adams*, 26 Ala. 272.

114. The refusal to give a charge in the language asked by counsel, when the charge given is a full and fair exposition of the law, is not a reversible error. *Long v. Rodgers*, 19 Ala. 321; *Ewing v. Sanford*, 21 Ala. 157.

115. An erroneous affirmative charge is good cause of reversal at the plaintiff's instance, although there may be defects in his proof on points not covered by the charge, when it does not appear from the record that these defects cannot be supplied on another trial. *Cotten v. Thompson*, 25 Ala. 671; *Hines and Wife v. Trantham*, 27 Ala. 359; *Elmore v. Mustin*, 28 Ala. 309.

116. An erroneous charge, which is corrected and withdrawn from the jury before their retirement, is no ground of reversal. *Donnell v. Jones*, 17 Ala. 689.

117. In an appeal case, which originated before a justice of the peace, the appellant cannot complain that no notice was given to the appellee. *Martin v. Higgins*, 23 Ala. 775.

118. A party cannot take advantage on error of his own mispleading in the primary court. *Jordan's Adm'r v. Habbard and Wife*, 26 Ala. 433.

119. In an action on a covenant of seizin, the fact that the plaintiff offered to prove the reasonableness of the price paid by him for an outstanding incumbrance, and was prevented by on objection on the part of the defendant, does not cure the error of a charge dispensing with the necessity of such proof. *Anderson v. Knox*, 20 Ala. 156.

120. On motion to suppress a party's answers to interrogatories, if the court "declines to sustain or overrule said motion, remarking that it would decide on the motion when the facts of the case were developed;" and the party making the motion excepts to this action of the court, and then declines to read the answers on the trial, he is entitled to a reversal of the judgment, if any portion of the answers embraced in the motion contained illegal evidence. (CHILTON, C. J., *dissenting.*) *McCargo & Cordle v. Crutcher*, 27 Ala. 171.

121. The erroneous action of the court in permitting an incompetent witness to testify, against the objection of the opposite party, is not cured by the fact that other witnesses testify to some of the same facts. *Doe d. Kennedy's Heirs v. Reynolds*, 27 Ala. 364.

122. When a witness, although shown on his *voir dire* to be incompetent, is nevertheless allowed to testify, the appellate court will not, for the purpose of holding the error cured, look to facts proved by him on his examination in chief. *Lay's Executors v. Lawson's Adm'r*, 23 Ala. 377.

123. When a pending suit is submitted to arbitration, and the award entered up as the judgment of the court, no objection to it can be raised on error which was not raised in the primary court. *Mobile Bay Road Co. v. Yeind*, 29 Ala. 325.

124. Where the judgment is by *nil dicit*, and the complaint shows a good cause of action, the objection cannot be first raised on error, that one of the notes on which the suit is founded was not due when the suit was commenced. *Blount v. McNeill*, 29 Ala. 473.

125. Nor can advantage be taken,

in such case, of any defects to which no objection was raised below, although they might have been available on demurrer. *Stewart v. Goode & Ulrick*, 29 Ala. 476.

126. An erroneous amendment of the complaint is not available on error, when the defendant, though present in the court below, raised no objection. *Bryan v. Wilson*, 27 Ala. 208; *Stewart v. Goode & Ulrick*, 29 Ala. 476.

127. The sheriff's failure to serve a copy of the complaint with the summons is not, after judgment by default, available on error. *Dew v. Cunningham*, 28 Ala. 466.

128. Nor, after judgment by *nil dicit*, is a variance between the writ and declaration available on error. *Summerlin v. Dowdle*, 24 Ala. 428.

129. But a judgment by *nil dicit* does not cure a defective declaration. *Emanuel v. Ketchum*, 21 Ala. 257.

130. An amendment of the declaration, after demurrer sustained to the original, is a waiver of the error, if any. *Stallings v. Newman*, 26 Ala. 300.

131. A defect in the writ, though good matter in abatement, is not available on error. *Yonge v. Broxson*, 23 Ala. 684.

132. An objection to a deposition, on account of the want of notice, cannot be first raised on error. *Dill v. Camp*, 22 Ala. 249.

133. The action of the court, in permitting the revivor of an action of trespass to try titles without evidence of heirship, is not revisable on error, since the heirship may be contested on the trial. *Rowland & Heifner v. Ladiga's Heirs*, 21 Ala. 9.

134. The failure to revive, in trover, in favor of the personal representative of one of several co-plaintiffs, on his death pending the suit, is not available on error, when no objection was raised in the primary court. *Powell v. Glenn*, 21 Ala. 458.

135. The erroneous overruling of a motion to dismiss a suit for want of security for costs, is available on error, after final judgment. *Steamboat Empire v. Ala. Coal Mining Co.*, 29 Ala. 698.

136. In *sci. fa.* against several executors, one of whom is not served with process, the irregularity (if any) in proceeding without him is not available on error, when the record shows that he died several terms before the trial was had, and that the cause was afterwards treated by all the parties as regularly in court. *Sherrod's Executors v. Hampton*, 25 Ala. 652.

137. If a writ is sued out against two administrators, and the action discontinued, on the ground of non-residence, as to one on whom process was not served, the irregularity (if any) is not available on error, when the other appeared and defended without objection. *Shorter v. Urquhart*, 28 Ala. 360.

138. After judgment by default against a partnership as garnishees, if the names of the partners composing the firm nowhere appear in the proceedings, the defect is fatal on error. *Reid & Co. v. McLeod*, 20 Ala. 576.

139. In an appeal case from a justice's court, if the names of the partners composing the firm which is plaintiff are not stated in either the summons or complaint, and the defendant raises no objection on that account in the primary court, but pleads to the merits, he cannot take advantage of it on error. *Ortez v. Jewett & Co.*, 23 Ala. 662.

140. A point which was waived in the primary court, cannot be raised in the appellate court. *McCall v. Doe d. Pryor*, 17 Ala. 533; *Long v. Comm'rs' Court*, 18 Ala. 482; *Murrah v. Branch Bank at Decatur*, 20 Ala. 392.

141. When a specific objection is made to evidence in the court below, the appellate court will not examine other grounds of objection. *Walker v. Blassingame*, 17 Ala. 810; *Williams v. Fitzpatrick*, 20 Ala. 791; *Garrett's Adm'rs v. Garrett & Garrett*, 27 Ala. 687; *King v. Pope*, 28 Ala. 601.

142. When the primary court excludes a witness on the ground of incompetency, the appellate court will only look to the particular grounds of objection which were raised in the primary court. *Zackowski v. Jones*, 20 Ala. 189; *Lankford v. Keith*, 21 Ala. 342.

143. When an attorney has appeared in the primary court without objection, his authority cannot be questioned in the appellate court. *Moore v. Easley*, 18 Ala. 619. (*Vide infra*, 162.)

144. The appellate court will not

examine any question which is not raised by the assignments of error, and insisted on by counsel in argument. *Long v. Rodgers*, 19 Ala. 321; *Van Eppes v. Smith*, 21 Ala. 317; *Jones v. Graham*, 21 Ala. 654; *Murrah v. Branch Bank at Decatur*, 20 Ala. 392; *Fulton Insurance Co. v. Milner Tinsley & Co.*, 23 Ala. 420; *Russell v. Desplous*, 25 Ala. 514.

9. *Presumptions.*

145. The appellate court will presume, unless the evidence is all set out in the record, that a charge given by the primary court was not abstract. *Wilson v. Calvert*, 18 Ala. 274; *Jones v. Stewart*, 19 Ala. 701; *Carter v. Doe d. Chaudron*, 21 Ala. 72; *Kirkland v. Oates*, 28 Ala. 465; *Keep v. Kelly & Levin*, 29 Ala. 322.

146. And that a charge refused was abstract. *Dent v. Portwood*, 17 Ala. 242; *Wilson v. Calvert*, 18 Ala. 274; *Leverett's Heirs v. Carlisle*, 19 Ala. 80.

147. But a presumption cannot be indulged against an express averment of the record. *Townsend v. Jeffries' Adm'r*, 17 Ala. 276; *Lawler v. Norris*, 28 Ala. 675.

148. Therefore, where the record shows that an issue was made up between the parties, and that the jury were sworn "to ascertain and assess the plaintiff's damages, it cannot be presumed that they were sworn to try the issue joined. *Townsend v. Jeffries' Adm'r*, 17 Ala. 276.

149. Where the judgment entry shows that a demurrer to the pleas was interposed and overruled, the appellate court will not presume, from the order in which the pleadings are recorded by the clerk, that the demurrer was waived. *Kirksey v. Dubose*, 19 Ala. 43.

150. If the record does not show that any action was had on the demurrer, the appellate court will presume that it was overruled before issues of fact were submitted to the jury. *Eastland v. Sparks*, 22 Ala. 607.

151. Where the transcript contains only a judgment, and the clerk certifies "that the same is all the record of said cause on file, the balance being lost or mislaid," the appellate court cannot presume the existence of a writ, declaration and plea, because the judgment entry recites that the parties appeared by attorney, and joined issue, and that the jury returned a verdict for the plaintiff. *Murray & Durand v. Tardy*, 19 Ala. 710.

152. Where no pleas appear in the record, but the judgment entry shows the appearance of the parties and a verdict on issue joined, the appellate court will presume that the general issue or other proper plea was filed. *Kirkley v. Segar*, 20 Ala. 226; *Eastland v. Sparks*, 22 Ala. 607; *Pryor v. Beck*, 21 Ala. 393; *Phillips v. Kelly*, 29 Ala. 628.

153. But it will not presume that a special plea, technical in its character, and not reaching the merits of the cause, was also filed. *Pryor v. Beck*, 21 Ala. 393.

154. When the record shows that pleas were filed and demurred to, the pleas found in the record, although not signed by counsel, nor endorsed as filed, will be presumed to be those which were filed. *Reid v. Nash*, 23 Ala. 733.

155. Where the judgment entry recites that "the plaintiff came by attorney, and the defendant having failed to file his plea within the time prescribed by law, it is considered by the court that the plaintiff have and recover of the defendant," &c., "the damages due by the two promissory notes declared on," the appellate court will presume that the complaint set out in the record, although the day on which it was filed is not endorsed on it, was filed before the rendition of the judgment. *Letondal v. Huguenin*, 26 Ala. 552.

156. When the judgment entry recites that the parties appeared by attorney, and that a trial was had on issue joined, while no complaint appears in the record, it will be presumed that the complaint was either dispensed with or lost. *Allen v. Harper*, 26 Ala. 686.

157. And if the evidence set out is sufficient to sustain an action of trover, but not sufficient to support an action *ex contractu*, it will be presumed that the action was trover. *Ib.*

158. In an action on a promissory note, where the record shows a judgment on verdict for the plaintiff,

while it appears from the bill of exceptions that the defendant pleaded the statute of limitations; that evidence of a subsequent promise was introduced; and that a charge was asked by the defendant, predicated on that evidence,—it will be presumed that a replication was filed, and that an issue was before the jury to which the evidence and the charge were applicable. *Bettis v. Saint*, 28 Ala. 214.

159. Where the record shows the issue of a *pluries fi. fa.*, it will be presumed that others preceded it, and that the judgment had not become dormant. *Sellers & Cook v. Hayes*, 17 Ala. 749.

160. In a proceeding against a garnishee, where the judgment entry recites the appearance of the parties, and the answer of the garnishee, denying any indebtedness to the defendant in attachment; and the judgment immediately follows, discharging the garnishee,—it cannot be presumed that the answer was contested, because the bill of exceptions states that the garnishee offered to read a certain deed "to the jury." *Marriott & Hardesty v. Lewis*, 25 Ala. 332.

161. On motion by a bankrupt to have his discharge entered of record, where the record does not purport to set out all the evidence, and the motion itself is wanting, the appellate court cannot presume that no execution had issued on the judgment. *Stewart & Fontaine v. Hargrove*, 23 Ala. 429.

162. Where an admission of record is made by counsel in the primary court, for the purpose of obviating the necessity of proof, his authority to make it will be presumed. *Montgomery v. Givhan*, 24 Ala. 568.

163. When an appeal is taken by the solicitor of the adult complainants, his authority will be presumed. *Riddle v. Hanna*, 25 Ala. 484.

164. Evidence which, though objected to, is not set out in the record, will be presumed to have been admissible. *Long v. Rodgers*, 19 Ala. 321.

165. When a paper is appended to the answer to an interrogatory, but the interrogatory itself is not set out in the record, it will be presumed that the answer was responsive. *Furlow's Adm'r v. Merrell*, 23 Ala. 705.

166. Where it appears that proper instructions to the jury were requested, and the record does not show that they were refused, it will be presumed that they were given. *Donnell v. Jones*, 17 Ala. 689.

167. Where the record does not show whether a notice was written or verbal, the appellate court will presume, if necessary, that it was written. *Harris v. Rowland's Adm'rs*, 23 Ala. 644.

168. In detinue by husband and wife jointly, where the record shows such title in the wife as would vest a chose in action absolutely in the husband, and is silent as to the time of the defendant's wrongful taking and detention, the appellate court will presume, against the party excepting, that the evidence showed such unlawful taking and detention to have occurred before the marriage. *Mitchell v. Cowsert and Wife*, 20 Ala 186.

169. In detinue by the husband's administrator, after the death of the wife, for a slave bequeathed to her, by her maiden name, "entirely for her and her children," the will was construed to give her a life estate only if she was unmarried at the death of the testator, but an absolute estate, jointly with her children, if she was then married and had children; and the record contained no evidence of the marriage. *Held*, that it must be presumed, against the party excepting, that she was then unmarried. *Furlow's Adm'r v. Merrell*, 23 Ala. 705.

170. On motion to amend or render a judgment *nunc pro tunc*, if the minute entry recites that it was made to appear to the court that a judgment had been duly rendered which the clerk had omitted to enter, it will be presumed, on error, that this was made to appear by sufficient legal evidence. *Glass v. Glass*, 24 Ala. 468; *Price & Simpson v. Gillespie*, 28 Ala. 279.

171. In an action on an open account for work done, defendant proved an agreement, made "in the spring of 1852," that goods to be furnished by him to plaintiff's sons, who were over twenty-one years of age, should be received in payment for the work then being done; and his accounts against the sons, "for goods furnished in 1852," were produced and proved,

but were not set out in the record. *Held*, that it must be presumed, in favor of the ruling of the primary court excluding these accounts, that some of the items were for goods furnished to the sons before the said agreement was made. *Nash & Robinson v. Shrader*, 27 Ala. 377.

172. Where the bill of exceptions stated that the slaves in controversy were given to the wife of plaintiff's intestate "in the fall of 1833," and that a witness for the defendant, who stated that the slaves were delivered "in 1833," was allowed to testify to declarations made by the donor "six or eight months afterwards,"—*held*, that the appellate court must presume that these declarations were made prior to the gift. *Gillespie's Adm'r v. Burleson*, 28 Ala. 552.

10. *Precedents, and Adjudged Cases.*

173. A decision of the supreme court, however erroneous, is the law of the case in which it is pronounced, and cannot be questioned, either in the primary court, or on a second appeal: *Price v. Price's Adm'r*, 23 Ala. 609; *Bryan and Wife v. Weems*, 25 Ala. 195; *Wyatt's Adm'r v. Steele*, 26 Ala. 639; *Jesse v. Cater*, 28 Ala. 475; *Matthews, Finley & Co. v. Sands & Co.*, 29 Ala. 136; *Miller v. Jones' Adm'r*, 29 Ala. 174; *Rugely & Harrison v. Robinson*, 19 Ala. 404; *Moore v. Barclay*, 23 Ala. 739; *Weaver's Executors v. Weaver's Creditors*, 23 Ala. 789.

174. It is equally conclusive, in a chancery case, upon new parties since brought in. *Rugely & Harrison v. Robinson*, 19 Ala. 404.

175. But it is only conclusive as to the points which were necessarily determined by the former decision. *Jesse v. Cater*, 28 Ala. 475.

176. When two conflicting opinions are delivered in the same case at different times, and it is brought up a third time on error or appeal, neither one of the previous decisions is conclusive, but the case must be considered as if presented for the first time. *Moore v. Barclay*, 23 Ala. 739.

177. A settled rule of property, though its correctness may be questionable, will be upheld by the courts. *Strickland v. Nance*, 19 Ala. 233; *Rawls v. Doe d. Kennedy*, 23 Ala. 240; *Nolen v. Palmer*, 24 Ala. 391; *Martin's Executrix v. Martin*, 25 Ala. 201; *McVay's Adm'r v. Ijams*, 27 Ala. 238; *Field's Heirs v. Goldsby*, 28 Ala. 218; *Livingston v. Arrington*, 28 Ala. 424; *Sartor v. Branch Bank at Montgomery*, 29 Ala. 353; *Matheson's Heirs v. Hearin*, 29 Ala. 210.

178. And this, not only as to the points necessarily involved and decided, but also as to the principles declared by subsequent cases to have been settled by them. *Matheson's Heirs v. Hearin*, 29 Ala. 210.

179. But this rule must be confined "to the points actually decided, and the true principles of the decision." *Rawls v. Doe d. Kennedy*, 23 Ala. 240.

VI. JUDGMENT; AND HEREIN, OF AMENDMENTS.

180. On the death of the defendant in error, pending the writ, in a personal action which does not survive, the cause will not be remanded, although the judgment is reversed. *Pope v. Welsh's Adm'r*, 18 Ala. 631.

181. Nor will the cause be remanded, on a reversal of the judgment at the instance of the defendant, on account of the erroneous overruling of a demurrer to the declaration, when there is nothing in the writ by which the declaration can be amended. *Bagby v. Baker*, 18 Ala. 653.

182. Where a demurrer is erroneously sustained to a complaint which shows a cause of action for only a nominal sum, the judgment will not be reversed, at the instance of the plaintiff, nor the cause remanded. *Cahuzac & Co. v. Samini*, 29 Ala. 288.

183. In an appeal case from a justice's court, founded on a contract, and involving less than $20, the appellate court, on reversing the judgment of the circuit court, will itself render the proper judgment, when all the evidence is set out in the bill of exceptions. *Pike v. Bright*, 29 Ala. 332.

184. In an action commenced by attachment, judgment having been erroneously rendered against the surety on the replevy bond, the error will be corrected, at the instance of the defendant, and judgment properly

rendered against him alone. *Evans v. Bell*, 20 Ala. 509.

185. On the reversal of a judgment against a partnership as garnishees, because the names of the partners nowhere appeared in the proceeding, judgment was rendered by the appellate court, quashing the whole proceeding. *Reid & Co. v. McLeod*, 20 Ala. 576.

186. Where a cause is submitted to the decision of the primary court on an agreed statement of facts, and its judgment is reversed on error, the cause will be remanded. *Rawls v. Doe d. Kennedy*, 23 Ala. 240.

187. On the reversal of a judgment, rendered on a special verdict, the proper practice is to remand the cause. *Townsend & Brothers v. Harwell*, 18 Ala. 301.

188. When a judgment by default is reversed, on the ground that the endorsement on the writ is not sufficient to show service on the defendant, the cause will be remanded, that the sheriff may have an opportunity to amend his return. *Fowler v. Banks*, 21 Ala. 679.

189. There being no writ of error in this case, the cause was stricken from the docket. *Harrington v. Meriweather*, 20 Ala. 607.

190. This cause, having been brought up by writ of error instead of appeal, was stricken from the docket. *Mazange v. Slocum & Henderson*, 23 Ala. 668.

191. Ten per cent. damages cannot be awarded on the affirmance of a judgment of condemnation on the trial of a statutory claim suit. *Hooks v. Branch Bank at Montgomery*, 18 Ala. 451.

192. In an appeal case from a justice's court, if judgment is rendered against the surety on the appeal bond, for more than the amount of the penalty, this will be regarded as a mere clerical misprision, and will be amended at the costs of the plaintiff in error. *Witherington v. Brantley*, 18 Ala. 197.

193. In an action of trespass, the damages assessed by the jury being less than five dollars, if the court renders judgment for full costs, without the statutory certificate, the judgment will be reversed and properly rendered in the appellate court, at the costs of the defendant in error. *Galle v. Lynch*, 21 Ala. 579.

194. The rendition of a judgment final against a garnishee, for a larger sum than the judgment *nisi*, is a mere clerical misprision, which will be amended at the costs of the plaintiff in error. *Drane v. King & Devitt*, 21 Ala. 556.

195. Where the judgment entry describes the plaintiffs in attachment as "plaintiffs in execution," and declares that the property levied on was found "subject to the plaintiffs' execution," the error will be considered a mere clerical misprision, and will be held amended. *Powell v. Hadden's Executors*, 21 Ala. 745.

196. An error in the imposition of costs, being amendable in the primary court, will be amended on error at the appellant's costs. *Comm'rs' Court of Russell Co. v. Tarver*, 25 Ala. 480.

197. Where the name of a stranger is introduced into the judgment entry, as guardian of the plaintiff, who declared in his own name, the mistake will be amended on error at the appellant's costs. *Kennedy & Merritt v. Young*, 25 Ala. 563.

198. The rendition of judgment against a defendant who was not served with process, and who did not appear, is a mere clerical misprision, which will be amended on error at the appellant's costs. *Savage & Darrington v. Walshe & Emanuel*, 26 Ala. 619.

199. Where the record shows, that a petition for rehearing, under sections 2407–17 of the Code, was filed after the expiration of the term at which final judgment was rendered; that a motion to set aside and correct the entry of judgment was also made at the ensuing term; that exceptions were reserved to the rulings of the court on the motion, and that the court rendered, as on the motion, such a judgment in substance as ought to have been rendered on the petition,—the judgment will be corrected on error, at the appellant's costs, and made to conform to the proper judgment on the petition. *Pratt & McKenzie v. Keils & Sylvester*, 28 Ala. 390.

200. Where the affidavit for a garnishment on a judgment was made by the real owner of the judgment, and

judgment was rendered in his name against the garnishee; while the affidavit and garnishment correctly described the original judgment,—the judgment was corrected on error, at the costs of the appellant, and rendered in the name of the plaintiff in the original judgment. *Jackson v. Shipman*, 28 Ala. 488.

201. A judgment of the circuit court, in an appeal case, on a trial of the right of property, corrected on error, at the costs of the appellant. *Derrett v. Alexander*, 25 Ala. 265.

VII. COSTS.

202. When a cause is sticken from the docket for want of jurisdiction, no costs are recoverable. *Mazange v. Slocum & Henderson*, 23 Ala. 668.

203. But, where the certificate appended to the transcript, *prima facie*, gives the appellate court jurisdiction of the case, costs are allowable, although the case is finally stricken from the court for want of jurisdiction. *Carey v. McDougald's Adm'r*, 27 Ala. 616.

204. When an execution against the unsuccessful party is returned "no property found," and execution against the successful party, for the costs occasioned by himself, thereupon issued and returned "satisfied," an *alias* may be subsequently issued against the unsuccessful party. *Montgomery v. Montgomery*, 20 Ala. 350.

205. The act of 1840, (Clay's Digest, 311, § 31,) "to regulate the mode of collecting costs accruing in the supreme court," is not repealed by the act of 1848, (Session Acts 1847–8, p. 95,) "to amend the several laws now in force relative to the return of executions," &c. *Huggins v. Ball*, 19 Ala. 587.

206. The circuit court has jurisdiction, under the act of 1840, to render judgment against a sheriff for failing to return a *fi. fa.* to the supreme court, although the amount of the judgment may be less than $50. *Ib.*

ESTOPPEL.

See, also, the same title on pages 157 and 264.

I. BY RECORD.

1. A judgment on verdict is final and conclusive, between the parties and their privies, as to all points necessarily or actually determined. *Wittick v. Traun*, 25 Ala. 317; *Chamberlain v. Gaillard*, 26 Ala. 504.

2. It is equally conclusive upon one, who, though no party to the record, is shown by parol to have been the real party in interest. *Tarleton & Pollard v. Johnson*, 25 Ala. 300.

3. A decree in chancery is conclusive, between parties and privies, as to every fact necessary to be ascertained before the rendition of the final decree. *Hutchinson v. Dearing*, 20 Ala. 798; *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580. (*Vide* DECREES, 52–66, p. 246.)

4. The recitals of the record import absolute verity, and estop the parties from disputing their correctness. *Deslonde and James v. Darrington's Heirs*, 29 Ala. 92; *Beverly v. Stephens*, 17 Ala. 701.

5. A judgment, quashing a *supersedeas* of an execution, is not conclusive upon parties who assert rights under the defendant in the judgment, anterior in point of time to the proceedings, when it does not appear that the merits of the controversy were determined. *Hanson & Moore v. Patterson*, 17 Ala. 738.

6. A judgment for the defendant in attachment does not estop the plaintiff, when sued in case for wrongfully and maliciously suing it out, from proving that the debt on which his suit was founded was actually due. *Marshall v. Betner*, 17 Ala. 832.

7. Nor is such judgment conclusive, in a subsequent action on the bond, as to the wrongful suing out of the writ. *Sackett & Shelton v. McCord*, 23 Ala. 851.

8. But a judgment for the claimant of the attached property, on the trial of the right of property, is conclusive on the attaching creditor, in a subsequent action for damages by the claimant, that the defendant in attachment had no interest in the property. *Roberts v. Heim*, 27 Ala. 678.

9. In an action on an injunction bond, the record of the chancery suit is not conclusive as to the vexatious suing out of the writ. *Garrett & Hill v. Logan*, 19 Ala. 344.

10. In an action on a *ne-exeat* or writ-of-seizure bond, the record of the chancery suit, showing the dismissal of the bill for want of prosecution, is not conclusive as to the wrongful suing out of the writ. *Zeigler & Hall v. David*, 23 Ala. 127.

11. In case for a malicious prosecution, the judgment of the magistrate, ordering the commitment of the accused, is not conclusive on the question of probable cause. *Ewing v. Sanford*, 19 Ala. 605.

12. The adverse decision of the court on motion to have certain moneys in the hands of the sheriff appropriated to the satisfaction of a judgment, concludes the plaintiffs therein from afterwards bringing assumpsit against the sheriff. *Langdon v. Raiford*, 20 Ala. 532.

13. A judgment is conclusive as to the fact that the money is due to the plaintiff therein, and not to a third person. *Mervine v. Perkins*, 18 Ala. 241.

14. In assumpsit to recover the proceeds of a note, placed by plaintiff in defendant's hands for collection, (on which defendant brought suit for his own use, in the name of the payee, and recovered judgment, whereon a *fi. fa.* was issued, and levied on certain personal property, which was purchased at the sheriff's sale by the defendant,) the sheriff's return on the execution, showing the amount of the proceeds of sale, is not conclusive on the plaintiff. *Crow v. Hudson*, 21 Ala. 560.

15. After a claim suit has been pending several years, and a judgment has been rendered against the claimant, which judgment is reversed on error, the claimant is estopped from disclaiming. *Gayle v. Bancroft's Adm'r*, 22 Ala. 316.

16. Where a deed of trust, conveying both real and personal property, is found fraudulent and void as against creditors, in a claim suit between a judgment creditor of the grantor and a purchaser under the deed, the claimant is not concluded by that verdict and judgment, as to the *bona fides* of the deed, in a suit subsequently brought against him by a purchaser at sheriff's sale under the same judgment, to recover the lands conveyed by the deed, which the claimant bought at the trustee's sale. *Crutchfield's Heirs v. Hudson*, 23 Ala. 393.

17. When a garnishee discloses the fact that a third person claims to be the transferree of a debt due to the defendant in an attachment, and such transferree, upon being duly notified, fails to appear and assert his right to the fund, he is estopped from afterwards setting up any claim against the garnishee. *Smoot & Ketchum v. Eslava*, 23 Ala. 659.

18. But, if the transferree is not made a party to the proceedings, he is not in any manner bound by the judgment against the garnishee. *McClellan v. Young*, 17 Ala. 498.

19. Where two attachments, sued out between the same parties, are levied on the same property, and a claim interposed in each case by the same person, a judgment in one case, finding the property subject to the attachment, is conclusive that it is also subject in the other. *Derrett v. Alexander*, 25 Ala. 265.

20. In trespass to try titles, a judgment for plaintiff is conclusive that damages were recovered for the rents accruing up to the time of the verdict; and the fact that the action was brought against a tenant, whose term expired before the rendition of the judgment, makes no difference, if the landlord was brought in as a party. *Shumake v. Nelms' Adm'r*, 25 Ala. 126.

21. In a subsequent action for the rents and profits, a recovery in ejectment or trespass to try titles is conclusive between the parties and their privies, as to the title of the plaintiff's lessor. *Ib.*

22. But such recovery is only conclusive as to the term laid in the demise. *Doe d. Kennedy's Heirs v. Reynolds*, 27 Ala. 364.

23. A judgment in detinue is conclusive, as to the title then adjudicated, upon a person who, though no party to the record, is shown by parol to have been the real defendant in the action; but, as to a title subsequently acquired, from one who was neither a party nor privy to the action, it is not conclusive. *Tarleton & Pollard v. Johnson*, 25 Ala. 300.

24. A recovery in assumpsit for the hire of a slave is not necessarily conclusive as to the question of ownership, unless that question actually arose and was determined. *Chamberlain v. Gaillard*, 26 Ala. 504.

25. On motion to enter satisfaction of a judgment, or to supersede an execution, the judgment is conclusive as to all defenses existing at the time of its rendition. *Matthews v. Robinson*, 20 Ala. 130; *Mervine v. Parker*, 18 Ala. 241.

26. The recovery and satisfaction of a judgment in trover for the conversion of a hired slave, damages being assessed for the value at the time of the conversion, estops the owner from recovering hire for the unexpired portion of the term. *Smith v. Hooks*, 19 Ala. 101.

27. And the recovery of hire for the full term, with knowledge of the conversion during the term, estops the owner from afterwards suing for the conversion. *Moseley v. Wilkinson*, 24 Ala. 411.

28. In assumpsit, some of plaintiff's claims having been excluded from the jury under the charge of the court, he thereupon moved for a new trial; on which motion it was ordered, "that a new trial be granted, unless the defendants enter into an agreement of record, that upon any future settlement in chancery, or bill filed for an account between said parties, or any transaction between said defendants and H. & F., the said defendants will not plead the verdict and judgment in said cause, nor use the same in any manner to bar the claim of said plaintiffs or H. & F. for an account and settlement in relation to" said excluded claims, "all of which were included in the account produced and read to the jury by the plaintiffs on the trial." The defendants having consented to these terms, and the motion for a new trial having been thereupon overruled,—*held*, that the excluded claims were exempted from the effect of the judgment, and might be used as a set-off in a subsequent action brought by defendants against plaintiff. *Hoyt, Ford & Robinson v. Murphy*, 23 Ala. 456.

29. Where a submission to arbitration is made under an order of court, and the award entered up as the judgment of the court, a party is not thereby estopped from pleading any matter not necessarily within the scope of the award. *Jesse v. Cater*, 28 Ala 475.

30. If an incorporated company brings assumpsit against its secretary for the amount of certain bills and notes embezzled by him, summons the transferree by process of garnishment, takes judgment against him for the balance of indebtedness admitted by the answer on account of the bills and notes, and coerces satisfaction of the judgment,—this will estop the company from afterwards bringing trover against the transferree. *Firemen's Insurance Co. v. Cochran & Co.*, 27 Ala. 228.

31. A recovery against the principal, for his defalcations as secretary of an incorporated company, does not conclude the secretary on his official bond, either as to the fact of embezzlement, or as to the amount embezzled. *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

32. Where both parties to a suit derive title from a purchaser at an administrator's sale, made under an order of the probate court, the defendant is estopped from denying the validity of the proceedings connected with the sale. *Garrett v. Lyle*, 27 Ala. 586.

For analogous decisions, respecting the conclusiveness and effect of decrees in chancery, see DECREES, II, 52–66, p. 246; and, respecting the conclusiveness and effect of decrees in probate cases, see DECREES, II, pp. 134–38.

II. By Deed.

33. The acknowledgment of a deed by a minor, in open court, does not render it irrevocable, since no judicial act is thereby performed. *Slaughter v. Cunningham*, 24 Ala. 260.

34. A covenant between heirs-at-law and devisee, by which the latter, in consideration of the former withdrawing all objections to the probate of the will, agrees that they shall be entitled to as full and equal participation in the estate as if the testator had died intestate, and that the estate shall be divided equally among them, not only estops the devisee from asserting his title as such, but passes to the heirs the same title they would have taken if their ancestor had died intestate. *Bean v. Welsh*, 17 Ala. 770.

35. A deed fraudulent and void as to creditors and subsequent purchasers, although it may contain full covenants of warranty, is no estoppel against a subsequent *bona-fide* purchaser from the grantor. *Stokes v. Jones*, 18 Ala. 734.

36. And this, notwithstanding the grantor, at the time of its execution, had not such an interest in the land as could have been reached by his creditors either at law or in equity, but afterwards acquired the title. *S. C.*, 21 Ala. 731.

37. A deed, conveying land to which the grantor has not a complete title, estops him and his privies from saying that the legal title did not pass, and, on the confirmation of his title by the government, passes the entire legal title to the grantee. *Carter v. Doe d. Chaudron*, 21 Ala. 72.

38. A mortgagee is estopped from setting up against his assignee a title which dwelt in him at the time of the assignment, or one which he afterwards acquires. *Center v. P. & M. Bank*, 22 Ala. 743.

39. A deed which is void for fraud as against the grantor's creditors, or as against third persons on account of an adverse possession, is nevertheless valid and binding between the parties on the principle of estoppel. *Harvey v. Doe d. Carlisle*, 23 Ala. 635; *Abernathy v. Boazman*, 24 Ala. 189; *Walton v. Bonham*, 24 Ala. 513; *Wiley, Banks & Co. v. Knight*, 27 Ala. 336.

40. So is a deed of gift, although not proved and recorded as the statute prescribes. *Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27; *Perry v. Graham*, 18 Ala. 822.

41. So is an unrecorded mortgage. *Smith's Heirs v. Branch Bank at Mobile*, 21 Ala. 125; *Center v. P. & M. Bank*, 22 Ala. 743.

42. Where both parties in ejectment claim through mesne conveyances from the same vendor, the defendant is estopped from setting up an outstanding title to defeat a recovery. *Pollard v. Cocke*, 19 Ala. 188; *Gantt v. Doe d. Cowan*, 27 Ala. 582; *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207.

43. In such case, a deed from defendant, conveying the lands to one of the plaintiffs, in trust for the payment of a debt due to a third person, is no estoppel against plaintiffs' recovery. *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207.

44. A tenant, who has enjoyed the uninterrupted possession of the land during the period of the lease, is estopped, in any proceeding for the recovery of rent, from denying his landlord's title. *Cook v. Cook*, 28 Ala. 660; *Smith v. Mundy*, 18 Ala. 182.

45. But, after restoring the possession to the landlord at the expiration of the lease, he may afterwards assert a title paramount against him. *Smith v. Mundy*, 18 Ala. 182.

46. In an action against the trustee in a deed for the benefit of creditors, brought by one of the beneficiaries, the trustee may, with the assent of the grantor, defeat a recovery, by showing that the security was obtained by fraud, or that the debt has been paid. *Drake v. Moore*, 18 Ala. 597.

47. The lines fixed by the corrected Collins survey, accompanying the Orange-Grove grant, are conclusive on the United States and all claiming under them since the act of confirmation, and cannot be impeached or changed by any evidence tending to show that they were incorrectly located, either by fraud or mistake, on the part of the Spanish government or its officers, prior to the date of the grant. *Magee v. Doe d. Hallett & Walker*, 22 Ala. 699.

48. Where the location and survey of an incomplete Spanish grant, made under the provisions of the act of congress confirming it, recognizes and adopts one of the lines of another grant as one of its boundary lines, and the parties agree to such survey and location, the grantees and the United States are mutually estopped from disputing that line. *Ib.*

III. BY MATTER EN PAIS.

49. Admissions which have been acted on by others, whether true or false, express or implied, are conclusive between the party making and the party influenced by them. *McCravey v. Remson*, 19 Ala. 430; *Stone v. Britton*, 22 Ala. 543; *Steele v. Adams*, 21 Ala. 534.

50. But, to constitute an estoppel *en pais*, it is indispensably necessary to show that the admissions or representations were acted on by the party to whom they were made. *Pounds v. Richards*, 21 Ala. 424; *Crutchfield's Heirs v. Hudson*, 23 Ala. 393; *Ware v. Cowles*, 24 Ala. 446.

51. One claiming title from a party who is estopped, is also bound by the estoppel, unless it is fraudulent. *McCravey v. Remson*, 19 Ala. 130.

52. A party cannot go behind an estoppel, and set up a claim on which the estoppel operates. *Pool v. Harrison*, 18 Ala. 514.

53. If defendant in execution, having a legal title to land, induces another to buy it at sheriff's sale against him, he is not thereby estopped, at law, from showing that the sale was void because made after the return day of the execution. *Smith v. Mundy*, 18 Ala. 182.

54. Nor is he estopped, as against the purchaser, by the mere fact that he was in possession of the land at the time of the levy and sale, from showing that he did not have such a title as could be sold under execution at law. *Doe d. Cook & Hardy v. Webb*, 18 Ala. 810.

55. If an administrator, being entitled as such to an undivided interest in slaves, is present at a division of them, and permits the share which he should have received to be allotted and delivered to a third person, this does not estop him from afterwards asserting his title. *Hopper v. McWhorter*, 18 Ala. 229.

56. If a party surrenders the possession of personal property to an administrator, as assets of the estate, and suffers it, without objection, to be distributed as such under an order of the orphans' court, he is thereby estopped, as against the administrator, from afterwards asserting a claim to the property. *Pool v. Harrison*, 18 Ala. 514.

57. If he surrenders his own slave to the executor, on demand, to be inventoried and appraised as a part of the estate, and afterwards hires the slave from the executor, he is estopped from setting up his own title against the executor, and a purchaser from him is equally concluded. *McCravey v. Remson*, 19 Ala. 430.

58. Acts *en pais*, subsequent to the execution of a conveyance of land, cannot estop the grantee from asserting his title at law. *Stokes v. Jones*, 18 Ala. 734.

59. A promise by the master to pay money stolen by his slave, which has not come to his own hands, not being supported by any valid consideration, does not operate as an estoppel, merely because the party to whom it was made, relying on it, neglected to use proper means to recover his money. *Jelks v. McRae*, 25 Ala. 440.

60. If a factor, without authority, pledges his principal's goods for his own use, he cannot set aside the contract on account of his want of authority; and a subsequent purchaser from him, at a sale within the scope of his authority, is equally concluded. *Bott v. McCoy & Johnson*. 20 Ala. 578.

61. An administrator, who makes an unauthorized sale, loan or bailment of a slave belonging to his intestate's estate, is estopped from suing for the property. *Lawson's Adm'r v. Loy's Executor*, 24 Ala. 184; *Hopper v. Steele*, 18 Ala. 828.

62. If a person, being about to purchase a note, applies to the maker for information concerning it, and is assured by him that he has no defense against it, this does not estop the maker, when sued by such purchaser, from setting up a subsequent failure of consideration. *Maury v. Coleman*, 24 Ala. 381. (But see *Lanier v. Hill*, 25 Ala. 554; *Drake v. Foster*, 28 Ala. 649.)

63. In trover for a slave, against a purchaser at sheriff's sale, it being shown that the defendant paid part of the price at the time of the sale, and received possession of the slave; that he afterwards sent an agent to the sheriff, with money to pay the balance due; that the agent met plain-

tiff, and disclosed his business, whereupon plaintiff made no objection, but remarked that he was satisfied if the money was applied to the debt for which the slave was sold,—*held*, that plaintiff was not thereby estopped from bringing an action for the slave. *Pounds v. Richards*, 21 Ala. 424.

64. If one knowingly suffers another, in his presence, to purchase property to which he has a claim or title, and willfully conceals his claim or title, he cannot afterwards assert it against either the purchaser or his privies; but, where his title is derived from a mortgage duly recorded, which operates as constructive notice to the purchaser, the reason of the rule ceases, and there is no estoppel. *Steele v. Adams*, 21 Ala. 534.

65. A secured creditor, who receives his *pro-rata* share of the proceeds of sale under a deed of trust, is not thereby estopped from attacking the deed for fraud. *Crutchfield's Heirs v. Hudson*, 23 Ala. 393.

66. If a party consents to the erection of a partition fence by the owner of an adjoining lot, and the fence is built upon the consent thus given, he is estopped from denying his liability for one half of the expenses, on the ground that he is not the owner of the land. *Moore v. Levert*, 24 Ala. 310.

67. The recognition by the parties, as a partition fence, of a structure which is built entirely on the land of one proprietor, estops either of them from complaining of an act which, if the fence had been on the division line, would have been lawful. *Henry v. Jones*, 28 Ala. 385.

68. Where the property of the surety is, by his consent, sold under execution against the principal on a judgment to which the surety is not a party, and is bought in by the principal, through an agent, and sent back to the surety's house, the principal cannot, on afterwards paying off the debt, invoke the doctrine of estoppel to defeat the surety's title. *Pond v. Wadsworth*, 24 Ala. 531.

69. If the transaction was intended by both principal and surety, being insolvent, to hinder and delay the surety's creditors, the agent who became the purchaser would hold the property against both parties, and might dispose of it as he pleased; and if he did not participate in the fraud, but acted in good faith for the principal, the principal's title would prevail against the surety, unless the latter afterwards acquired the possession under a contract with the principal. *Ib.*

70. The acceptance of a bill of sale from the agent, by the principal's administrator, would not preclude him from deducing title through his intestate, under the previous sale consummated by delivery. *Ib.*

71. If one assumes to act in a particular capacity, he will be estopped from denying that capacity, when such a denial would operate to defeat rights attaching to the contract itself; but the doctrine of estoppel does not extend to matters affecting the remedy merely, which are entirely foreign to and disconnected from the contract, or the character in which the parties entered into it. *Duncan & Hooper v. Stewart*, 25 Ala. 408.

72. A promise made on Sunday, being void by statute, cannot operate as an estoppel. *Hussey v. Roquemore*, 27 Ala. 281.

73. A distributee of an estate, holding possession of a slave for the estate, is estopped from denying the right of possession to be in the estate; and a purchaser at execution sale against him is also estopped from setting up title in a third person, to prevent a recovery by the administrator, at least without connecting himself with it. *Miller v. Jones' Adm'r*, 26 Ala. 247; *S. C.*, 29 Ala. 174.

74. Although the law will not seek to compel a man to perform that which is impossible, yet it will not allow a workman, who, by false and fraudulent representations as to his skill, has obtained the price of stipulated services which he cannot perform, to defeat a recovery for the fraud and injury by setting up the impracticability of those services. *McGar v. Williams*, 26 Ala. 469.

75. A partial payment for the work, made after discovering that it did not correspond with the workman's representations, and without objecting on that account, does not estop the party from suing for the fraud and injury, but is, at most, only a circum-

stance for the consideration of the jury in determining the question of fraud. *Ib.*

76. If the purchaser of a slave, sold at public auction, elects to pay the price, after having been informed of the slave's unsoundness, and of facts which would constitute a fraud in the sale, he is estopped from afterwards maintaining an action on the case for the fraud. *Gilmer v. Ware*, 19 Ala. 252.

77. If the owner of a hired slave receives the stipulated hire for the entire term, with knowledge of a conversion during the term, he is estopped from afterwards bringing trover. *Moseley v. Wilkinson*, 24 Ala. 411.

78. Where a mortgage, which purported to secure an account then due, but which the mortgagee claimed to have been intended as a prospective security for the account to be contracted during the remainder of the year, was assigned by the mortgagee to a third person, in consideration of his becoming surety for the entire debt due from the mortgagor, and the mortgagor executed his note for the entire amount as being the mortgage debt,—*held*, that the mortgagor and mortgagee were estopped, as against the assignee, from saying that the mortgage did not cover the entire amount of the debt. *Wright v. Bolling*, 27 Ala. 259.

79. Conceding that a mortgagee, who, prior to the execution of his mortgage, consented to a postponement of the sale of the property under execution against the mortgagor, is thereby estopped, in a contest with the plaintiff in execution, from saying that the delay is constructively fraudulent as against his mortgage; yet this does not prevent him from taking advantage of a subsequent postponement without his consent. *Albertson, Douglass & Co. v. Goldsby*, 28 Ala. 711.

80. Where the owner of lands through which a railroad passed, having previously granted the right of way to the company, was apprised when the agents of the company entered on his lands to open the road, and know that they claimed the right under his deed, but raised no objection, and took a contract for supplying the company with a portion of the materials used in the construction of the road,—*held*, that he was estopped from afterwards bringing trespass against the members of the company, although the instrument by which he conveyed the right of way might be inoperative as a deed. *Pollard v. Maddox*, 28 Ala. 321.

81. When a bill of exchange is accepted by a firm, endorsed in the name of the payee, and put in circulation before maturity by one of the partners, the firm is estopped, when sued on the bill, from denying the genuineness of the endorsement. *Sprague & Winston v. Zunts*, 18 Ala. 382.

82. One who signs or endorses a blank bill or note, and parts with its possession with the view of its being filled up and made a negotiable security, is estopped, as against a *bona-fide* holder for valuable consideration without notice before maturity, from denying the authority of the person by whom the blank was filled. *Robertson v. Smith*, 18 Ala. 220.

83. A guaranty of a note is an affirmance of the genuineness of the note, and of the prior endorsements. *Donley v. Camp*, 22 Ala. 659.

IV. GENERAL REQUISITES.

84. Mutuality is an essential ingredient of an estoppel. *Crutchfield's Heirs v. Hudson*, 23 Ala. 393; *Bentley v. Cleaveland*, 22 Ala. 814; *Gwynn and Wife v. Hamilton's Adm'r*, 29 Ala. 233; *Ross v. Pearson*, 21 Ala. 473.

ESTRAYS.

(Statutory Provisions: Code, §§ 1062–1091; Clay's Digest, 549–52, §§ 1–18.)

1. The fourth section of the act of 1820, giving a penalty against any person who shall sell an estray before the expiration of twelve months, applies only to estrays taken up and appraised under the first section of the act. *Smith v. Ewers*, 21 Ala. 38.

2. A person who kills an estray within twelve months, and appropriates it to his own use, is liable to the penalty ($100) imposed by said act on "any person who shall take up or

use an estray contrary to the meaning of this act." *Simpson v. Talbot*, 25 Ala, 469.

3. In an action to recover this penalty, if the time of the killing is laid under a *videlicet*, although the time specified is within the twelve months, the averment is not sufficient. *Ib.*

EVIDENCE.

See, also, same title in PART I, p. 42.

I. ADMISSIONS.

1. *Against Interest.*

1. The admissions of a party in possession of personal property, in disparagement of his own title, are competent evidence against himself, or a subsequent purchaser from him, or

one claiming to hold under him. *Brewer v. Brewer & Logan*, 19 Ala. 481; *Fontaine & Dent v. Beers & Smith*, 19 Ala. 722; *Barnes & Barnes v. Mobley*, 21 Ala. 232; *Jennings v. Blocker's Adm'r*, 25 Ala. 415; *Miller v. Jones' Adm'r*, 26 Ala. 247; *S. C.*, 29 Ala. 174; *Gillespie's Adm'r v. Burleson*, 28 Ala. 551.

2. In trover for the conversion of a slave, the declaration of defendant's vendor, "that he had promised to give the slave to plaintiffs," is not competent as an admission against interest. *Barnes & Barnes v. Mobley*, 26 Ala. 718.

3. On a trial of the right of property in a slave, the declarations of the defendant in execution, while in possession of the slave, to the effect that said slave did not belong to him, but to his daughter, (the claimant,) although they may be entitled to but little weight, are admissible evidence for the claimant. *Thomas v. DeGraffenreid*, 27 Ala. 651; *S. C.*, 17 Ala. 602.

4. The admissions of the husband during coverture, to the effect that certain slaves in his possession are the separate property of his wife, are competent evidence against his administrator, in a suit brought by him against a subsequent purchaser from the wife. *Gillespie's Adm'r v. Burleson*, 28 Ala. 551.

5. Such admissions, if made after the property has vested in the husband, do not have the effect of vesting the property in the wife, so as to enable her to maintain or resist an action by or against his personal representative. *Frierson v. Frierson*, 21 Ala. 549.

6. Whatever may be the effect of such admissions, when made through ignorance or mistake as to his marital rights, in showing that he never reduced the property to possession as husband, they vest no title in the wife during coverture, and should not be received to divest the property out of his executor. *Machem v. Machem*, 28 Ala. 374; *Lockhart and Wife v. Cameron*, 29 Ala. 355.

7. The institution of a suit by the husband, in the joint names of himself and wife, for the recovery of slaves, is evidence against him, in a subsequent controversy with the distributees of his wife's estate, as an admission against interest. *Gwynn and Wife v. Hamilton's Adm'r*, 29 Ala. 233.

2. *Implied from Silence.*

8. The declaration of a third person, made in the presence and hearing of a party, and not responded to by him, is not competent evidence against him, as an implied admission of its truth, unless it was of such a character as would naturally call for a response from him, and he was in such a situation as renders it probable that, if not true, he would have replied to it. *Spencer v. The State*, 20 Ala. 24; *Lawson & Swinney v. The State*, 20 Ala. 65; *Jelks v. McRae*, 25 Ala. 440; *Abercrombie v. Allen*, 29 Ala. 281.

9. The mere fact that the declarant is a slave, does not render the statement, if of a character proper for a slave to make, incompetent evidence against a white person. *Spencer v. The State*, 20 Ala. 24.

10. A slave's confession, made in the presence of his master and another person, to the effect that he has received from another slave stolen money belonging to said third person, involves no charge against the master, and calls for no reply from him; consequently, his silence cannot be construed into an implied admission on his part of any of the facts to which the confession related. *Jelks v. McRae*, 25 Ala. 440.

11. On a trial of the right of property in a slave, evidence of the fact that the person from whom the claimant derives title asserted a claim to the slave, in the presence of the defendant in execution, some years before the rendition of plaintiff's judgment, and that said defendant did not dispute it, is competent evidence for the claimant. *Thomas v. DeGraffenreid*, 17 Ala. 602.

12. The wife's assertions of title to slaves which are in the possession of her husband and herself, if made in the presence of the husband, and acquiesced in by him, are competent evidence against his administrator, in a suit brought by the latter against a purchaser from the wife; *secus*, as to assertions of title by her not made in his presence, nor communicated to him, unless admissible on the principle of *res gestæ*. *Gillespie's Adm'r v. Burleson*, 28 Ala. 551.

13. In an action on a contract to re-

cover wages due to plaintiff as overseer of defendant's plantation and negroes, plaintiff cannot be allowed to prove that, during an altercation which took place between himself and defendant on the trial of another suit before a justice of the peace, "he said, in the presence and hearing of defendant, that he took good care of everything as defendant's overseer, and that defendant did not deny the same." *Abercrombie v. Allen*, 29 Ala. 281.

3. *Judicial.*

14. Justification in slander, when pleaded alone, is a judicial admission of the speaking of the words charged; *secus*, when pleaded with the general issue. *Wright v. Lindsay*, 20 Ala. 428.

15. A demurrer to a plea admits it to be properly filed. *Bobe v. Frowner and Wife*, 18 Ala. 89.

16. A demurrer to evidence, when issue is joined thereon, is an admission of every fact which the testimony tends to establish, or which the jury might properly infer from that testimony. *Holman v. Whiting*, 19 Ala. 703; *Shaw v. White*, 28 Ala. 637; *Williams v. McConico*, 27 Ala. 572; *Armstrong's Executors v. Armstrong's Heirs*, 29 Ala. 538; *Bryan v. The State*, 26 Ala. 65.

17. Where the bill of exceptions, after setting out all the evidence in the cause, with the several exceptions reserved by the defendant to the admissibility of certain portions of it, proceeded thus: "This being all the evidence, and the parties having agreed upon the value of the slave and the damages for her detention, and the jury having been discharged by their consent; and it being further agreed, that if, in the opinion of the court, the law upon the foregoing facts was with the plaintiff, a judgment should go in his favor, as on jury and verdict; and that, if the law was with the defendant, judgment should go in her favor,"—*held*, that the agreement was equivalent to a demurrer to evidence, and was a waiver of all exceptions previously reserved to the admissibility of evidence. *Gibson v. Land*, 27 Ala. 117.

18. In a real action under the Code, (§ 2213,) in the nature of an action of ejectment, the plea of not guilty is equivalent to the consent rule, and is an admission of the defendant's possession at the commencement of the suit. *King v. Kent's Heirs*, 29 Ala. 542.

19. When an application is made for a continuance, on account of the absence of a material witness; and the adverse party admits, that the witness, if present in court, would swear to the facts stated in the affidavit, this is neither an admission that the facts stated are true, nor that the witness is competent to testify. *Montgomery & Wetumpka Plank-Road Co. v. Webb*, 27 Ala. 618; also, on first point, *Starr v. The State*, 25 Ala. 49.

20. A *remittitur* of the damages recovered in assumpsit having been entered by mistake, the judgment was set aside at the next term of the court, on motion of plaintiff, who then dismissed his suit; and at a subsequent term, the latter judgment was amended *nunc pro tunc*, so as to show that defendant had appeared and consented to the vacating of the first judgment. *Held*, that this appearance and consent amounted to a judicial admission of the facts necessary to authorize the court to set aside the judgment. *Lee v. Houston*, 20 Ala. 301.

21. An admission of record, made by counsel in the primary court, for the purpose of obviating the necessity of proof, must be presumed to have been made by authority of his client, and cannot be withdrawn in the appellate court. *Montgomery v. Givhan*, 24 Ala. 568.

22. Conceding that attorneys have power to bind their clients by written admissions as to the facts of the case; yet, when such admissions are made improvidently, or through mistake, the court may relieve against them, and may set them aside upon such terms as will meet the justice of the case. *Harvey and Wife v. Thorpe*, 28 Ala. 250.

23. Where the defendant's attorney admitted, for the purpose of the trial, that the slaves sued for were given to the wife of the plaintiff's intestate during coverture, and went into possession of husband and wife under the gift; but with the reservation, that

"this admission is not intended to preclude the defendant from showing, by legal proof, that the wife took an estate in said slaves, by the terms of said gift, to her sole and separate use, to the exclusion of the marital rights of her said husband, or that said intestate did not have any title to said slaves,"—*held*, that the admission did not preclude the defendant from proving, by the declarations of the donor, of the intestate, and of the wife, that no title vested in the intestate by the gift. *Gillespie's Adm'r v. Burleson*, 28 Ala. 551.

24. When a bill in chancery is offered in evidence in another suit, the plaintiff therein cannot use his amended bill as rebutting evidence against the original. *Pearsall v. McCartney*, 28 Ala. 110.

As to the admissibility and effect as evidence of an answer in chancery, see ANSWER, 25–54, pp. 220–22.

4. *What may be proved by Admissions.*

25. The contents of a judgment, rendered by a justice of the peace, and the proceedings therewith connected, cannot be proved by a party's parol admissions, until a sufficient predicate has been laid for the introduction of secondary evidence. *Ware v. Roberson*, 18 Ala. 105.

26. The grant of administration, which is a judicial fact, cannot be proved by a party's admissions on oath in another case. *Shorter v. Urquhart*, 28 Ala. 360.

27. The contents of a lost deed may be proved, after a sufficient predicate has been laid for the introduction of secondary evidence, by a party's parol admissions, which are competent evidence of any fact that may be proved by parol. *Fralick v. Presley and Wife*, 29 Ala. 457.

5. *Who are bound by Admissions; and herein, of their Conclusiveness and Effect.*

28. The admissions of an agent, made within the scope of his authority, and at the time of transacting the business of his agency, are competent evidence for or against his principal. *Cunningham's Executor v. Cochran & Estill*, 18 Ala. 479; *McKenzie v. Stevens*, 19 Ala. 691; *Williams v. Fitzpatrick*, 20 Ala. 791.

29. But, if not made under these circumstances, they are not admissible against the principal. *Brown v. Harrison & Robinson*, 17 Ala. 774; *Cunningham's Executor v. Cochran & Estill*, 18 Ala. 479; *Lundie v. Cosper*, 20 Ala. 123.

30. The president of a bank occupies, in this respect, the position of any other agent. *Cunningham's Executor v. Cochran & Estill*, 18 Ala. 479.

31. The admissions of a nominal plaintiff, after suit brought, are not competent evidence against the beneficial plaintiff. *Sykes v. Lewis*, 17 Ala. 261; *Smith v. Wooding*, 20 Ala. 324.

32. The declarations of the wife, in reference to the title to a slave over which she is merely exercising control as a family servant, are not admissible against the husband. *Perry v. Graham*, 18 Ala. 822.

33. In an action by husband and wife jointly, for services rendered by the wife during coverture, her admissions of payment are not competent evidence. *Jordan's Adm'r v. Hubbard and Wife*, 26 Ala. 433.

34. A promise by the husband, to pay a debt contracted by the wife *dum sola*, will not remove the bar of the statute of limitations as against her. *Moore v. Leseur and Wife*, 18 Ala. 606.

35. In assumpsit against three joint makers of a promissory note, the admissions of one of the defendants are competent evidence against the others; at least, until the inference arising from the face of the note is rebutted, and it is shown that he is not jointly interested with the others. *Camp v. Dill*, 27 Ala. 553.

36. The unauthorized admissions of a trustee, having no beneficial interest in the property, cannot be received to invalidate a deed of trust for the benefit of creditors. *Governor v. Campbell*, 17 Ala. 566.

37. The admissions of a grantor, subsequent to the execution of a deed of gift, are not admissible to prove it fraudulent. *Price v. Branch Bank at Decatur*, 17 Ala. 374; *Strong's Executors v. Brewer*, 17 Ala. 706; *Foote and Wife v. Cobb*, 18 Ala. 585.

38. Nor are they admissible for the

purpose of affecting the gift, or explaining his words or conduct at the time of the gift. *Gillespie's Adm'r v. Burleson*, 28 Ala. 551 ; *Rumbly v. Stainton and Wife*, 24 Ala. 712.

39. The admissions of a debtor are not competent evidence, in a contest between a purchaser from him and one of his existing creditors, to prove the consideration of the purchase. *Hooper v. Edwards*, 18 Ala. 280.

40. Nor can the admissions of a guardian or bailee be received to defeat the title of his ward. *Nelson v. Iverson*, 19 Ala. 95 ; *S. C.*, 24 Ala. 9.

41. Nor are the admissions of an officer competent evidence against his sureties, unless made in the performance of some official act or duty connected with the transaction out of which the breach of the condition of his bond arose. *Dennis & Strickland v. Chapman*, 19 Ala. 29.

42. Nor are the admissions of a vendor, subsequent to the consummation of his sale, admissible to prove it fraudulent, unless made under such circumstances as would render it competent on some other principle. *Mobley v. Bilberry*, 17 Ala. 428 ; *S. C.*, 21 Ala. 277.

43. But the admissions of a party in possession are competent evidence against one claiming title by subsequent gift or purchase from him. *Brewer v. Brewer & Logan*, 19 Ala. 481 ; *Barnes & Barnes v. Mobley*, 21 Ala. 232 ; *Jennings v. Blocker's Adm'r*, 25 Ala. 415 ; *Miller v. Jones' Adm'r*, 26 Ala. 247 ; *S. C.*, 29 Ala. 174 ; *Gillespie's Adm'r v. Burleson*, 28 Ala. 551.

44. In an action against an administrator *de bonis non*, on a note purporting to have been executed by his intestate, the admissions of the administrator in chief, as to the genuineness of the signature, whether express or implied, are not competent evidence. *Rogers v. Grannis & Co.*, 20 Ala. 247.

45. In a suit against an administrator, his admissions of the presentation of the demand, though made after the lapse of eighteen months from the grant of administration, are sufficient to avoid the statute of non-claim ; and where the intestate's wife and children are also parties to the suit, which seeks to subject certain trust property to the payment of debts, such admissions are competent evidence against them. *Pharis v. Leachman*, 20 Ala. 662.

46. The admissions of a sole executor are sufficient to remove the bar of the statute of limitations, and bind the estate after his death. *Townes & Nooe v. Ferguson*, 20 Ala. 147.

47. *Secus*, as to the admissions of a sole acting executor, who has possession and control of the entire estate, when his co-executors have qualified and given bond. *Pitts v. Wooten's Executors*, 20 Ala. 474.

48. The admissions of an executor, when he is also the proponent of the will and the principal legatee, cannot be received to invalidate the will, even when offered in connection with proof that it would be for the interest of all the other legatees to set it aside. *Bunyard and Wife v. McElroy*, 21 Ala. 312.

49. Where the proponent is the husband of one of the legatees, his admissions are equally incompetent. *Walker v. Jones*, 23 Ala. 448.

50. If a party offers in evidence his adversary's letters, they become evidence as well for as against the writer; and if received to charge him, they should also be heard to discharge him. *Zimmerman v. Huber*, 29 Ala. 379.

51. When a party's admissions have been offered in evidence against him, he cannot be allowed to adduce proof of counter declarations made at another time, unless the latter are admissible as a part of the *res gestæ*. *Roberts v. Trawick*, 22 Ala. 490 ; *Pearsall v. McCartney*, 28 Ala. 110.

52. Admissions are not conclusive on the party making them, except when, having been acted on by the opposite party, they amount to an estoppel *en pais*. *Garrett's Adm'rs v. Garrett & Garrett*, 27 Ala. 651 ; *Gwynn and Wife v. Hamilton's Adm'r*, 29 Ala. 232.

As to estoppels *en pais*, see ESTOPPEL, III, p. 579.

As to the conclusiveness and effect of judicial admissions, *vide supra*, 14–24.

II. BURDEN OF PROOF.

53. In an action by a trustee for the benefit of creditors, against a third person, to recover a slave conveyed

by the deed, it is not necessary to prove the consideration of the deed, until the defendant has shown that he claims as a creditor or purchaser from the grantor; but, when the defendant has made this proof, the *onus* of showing a consideration is on the plaintiff. *Pennington v. Woodall*, 17 Ala. 685.

54. In an action against a sheriff, for levying an attachment against plaintiff's vendor on goods in plaintiff's possession, proof of the existence of the attachment debt before the transfer of the goods, casts on the plaintiff the burden of showing that his purchase was founded on valuable consideration. *Sparks v. Rawls*, 17 Ala. 211.

55. In an action against the hirer of a slave, who failed to re-deliver the slave at the expiration of the term, the *onus* is on him to show an excuse for his failure; but, when it has been shown that the slave died before the expiration of the term, it devolves on the owner to show that the death resulted from a violation of duty on the part of the hirer. *Wilkinson v. Moseley*, 18 Ala. 288.

56. In an action on a title-bond, conditioned that the vendor should make title so soon as he could obtain it, it being shown that he has neglected for more than two years to procure the title, the *onus* devolves on him to show that he could not, with reasonable diligence, have obtained the title within that time. *Garnett v. Yoe*, 17 Ala. 74.

57. In an action against the drawer or endorser of a bill of exchange, the burden of showing due diligence in giving notice is on the plaintiff, and is a pre-requisite to his right of recovery. *Rives v. Parmley*, 18 Ala. 256.

58. In a statutory proceeding before the orphans' court, to compel the administrator of a deceased vendor to make title to land, the fact that the intestate assumed to sell the land, and executed his bond for titles, is sufficient to cast on the defendant the burden of showing an outstanding title. *Prince v. Bates*, 19 Ala. 105.

59. In an action on a penal bond, if the obligors insist upon satisfaction in lieu of performance, the *onus* is on them to show that the thing done or given, in lieu of performance, was intended and accepted as a satisfaction. *Johnson and Wife v. Collins*, 20 Ala. 435.

60. In an action against a purchaser at sheriff's sale, by one claiming under a prior mortgage from the defendant in execution, it being shown that the plaintiff was present at the sheriff's sale, and did not disclose his claim, it devolves on the defendant to show that his silence was willful. *Steele v. Adams*, 21 Ala. 534.

61. In an action against the holder of a note, who, having bound himself by written contract to account for it to the owner, afterwards recovered judgment on it in his own name, and, by private agreement with the sheriff, after sale under execution, took the property at the purchaser's bid, the *onus* is on him to show the expenses, court costs, &c., for which he claims a deduction from the amount of the bid. *Hudson v. Crow*, 26 Ala. 515.

62. Where the payee of a written order, requesting the person on whom it is drawn to pay it out of the proceeds of a certain judgment, brings suit after acceptance, for defendant's negligence in collecting, the burden is on the plaintiff to prove negligence, and not on the defendant to prove diligence. *Gliddon v. McKinstry*, 28 Ala. 408.

63. Where plaintiff and defendant in trespass both claim under purchases from the same person, by conveyances valid on their face, the party alleging fraud in the purchase of the other, is bound to prove it; but, when one of the conveyances is impeached for fraud, the burden of proof is changed, and the evidence of fraud must be overcome by counter evidence of *bona fides*. *Hair v. Little*, 28 Ala. 236.

64. On the trial of an issue to test the validity of a will, the *onus* is on the proponent to show the testator's capacity, and the due execution of the will; and when these facts are established, it devolves on the contestants to show fraud or undue influence. *Dunlap v. Robinson*, 28 Ala. 100.

65. The party who alleges insanity or lunacy, in avoidance of a contract, is bound to prove it; but, when the existence of lunacy is once established, it devolves on the opposite party to prove, by testimony equally convin-

cing, that the contract was made during a lucid interval. *Rawdon v. Rawdon*, 28 Ala. 565.

66. In an action to recover back money paid under a decree which has been reversed, the *onus* of showing an equitable right to retain it is on the defendant. *Crocker and Wife v. Clements' Adm'r*, 23 Ala. 296.

67. In a chancery suit for the specific performance of a contract, if the bill alleges that possession of the land was taken under the contract, while the answer admits the possession, but alleges that it was acquired and held under a contract of rent, and denies the alleged contract of sale, the *onus* is on the complainant to show the character of the possession. *Danforth v. Laney*, 28 Ala. 274.

68. If the bill alleges a negative, (*e. g.*, the want of notice, the want of consent, or the want of indebtedness,) which the answer denies, and alleges the reverse affirmative to be true, the burden of proof is on the defendant. *Grier v. Campbell*, 21 Ala. 327; *Walker v. Palmer*, 24 Ala. 358; *Carroll v. Malone*, 28 Ala. 521.

III. DEMURRER.

69. The object of a demurrer to evidence is, not to substitute the judge for the jury as the trier of the facts, but to ascertain the law upon an admitted state of facts; and its effect, on issue being joined, is to admit every fact which the testimony tends to establish, or which the jury might properly infer from the testimony. *Holman v. Whiting*, 19 Ala. 703; *Williams v. McConico*, 27 Ala. 572; *Shaw v. White*, 28 Ala. 637; *Armstrong's Executor v. Armstrong's Heirs*, 29 Ala. 538; *Bryan v. The State*, 29 Ala. 65.

70. Under the Code, when a demurrer to the plaintiff's evidence is interposed, and no evidence at all has been offered by the defendant, the court may compel a joinder in demurrer. *Willams v. McConico*, 27 Ala. 572; *Shaw v. White*, 28 Ala. 637.

71. When the entire evidence consists of the testimony of a single witness, a general charge against the plaintiff's right to recover, is equivalent to a demurrer to his evidence. *Hollingsworth v. Martin*, 23 Ala. 591.

72. So is an agreement of record, discharging the jury, and submitting the case to the decision of the court. *Gibson v. Land*, 27 Ala. 117.

IV. DISCOVERY.

73. Interrogatories under the statute, in aid of a discovery in common-law suits, are governed by the same rules that apply to bills of discovery in chancery, so far as relates to the nature of the discovery sought, and the effect of the answers as evidence when made. *Saltmarsh v. Bower & Co.* 22 Ala. 221; *Pritchett v. Munroe*, 22 Ala. 501; *Wilson v. Maria*, 21 Ala. 359.

74. But the rules of practice, as to the mode in which objections to testimony are to be made, are those which apply to the testimony of witnesses taken by interrogatories in courts of law. *Pritchett v. Munroe*, 22 Ala. 501.

75. If the interrogatories call for an admission, the party answering has a right to state all that was said at the time, in relation to the same subject; if they seek a discovery as to an act, he may legitimately state in his answer whatever would be part of the *res gestæ*. *Ib.*

76. The party propounding the interrogatories has the legal right to move the suppression of the answers, or any part of them, before the commencement of the trial; and if he wishes to review, on error, the action of the court on his motion, the proper practice, *it seems*, is to decline to read the answers on the trial. *McCargo & Cordle v. Crutcher*, 27 Ala. 171.

77. If the court, at the time such motion is made, "declines to sustain or overrule said motion, remarking that it would decide on the motion when the facts of the case were developed"; and the party making the motion excepts to the action of the court, and then declines to read the answers on the trial, he is entitled to a reversal of the judgment, if any portion of the answers embraced in the motion contained illegal evidence. (CHILTON, C. J., *dissenting*.) *Ib.*

78. A general motion to exclude the answers, "on the ground that they are evasive, irresponsive, and contain improper matter," should be overruled,

when some of the answers are full and correctly made. *Swinney & Palmer v. Dorman*, 25 Ala. 433.

79. If the exceptions to the answers are sustained by the court, and the respondent thereupon answers over, without reserving an exception to the ruling of the court, he cannot revise its action on error. *Saltmarsh v. Bower & Co.*, 22 Ala. 221.

80. It is discretionary with the primary court to extend the time for answering, or to allow an amendment of the answers. *Pool v. Harrison*, 18 Ala. 514.

81. If the party by whom the interrogatories were propounded declines to read the answers, they cannot be considered by the court as evidence for any purpose in favor of the respondent. *Wells v. Bransford*, 28 Ala. 100.

82. If he reads them in evidence, he thereby admits that the respondent is worthy of credit, and cannot be heard to impeach him; but, he is not thereby precluded from proving the truth of any particular fact in direct contradiction of one of the answers, even when such evidence may have the collateral effect of showing that the respondent is generally unworthy of belief. *Wilson v. Maria*, 21 Ala. 359.

83. If he offers a portion of the answers in evidence, and the respondent thereupon offers another portion, to which, though a part of it is illegal and irresponsive, no objection or exception was taken by the party propounding the interrogatories, the court may exclude the entire portion thus offered. *Pritchett v. Munroe*, 22 Ala. 501.

For analogous decisions, respecting discovery in chancery, see DISCOVERY, p. 250.

V. GOVERNED BY WHAT LAW.

84. In all civil actions commenced since the adoption of the Code, although founded on contracts whose validity must be determined by the old law, the rules of evidence prescribed by the Code must govern. *Mays v. Williams*, 27 Ala. 267.

85. But, by force of section 12, causes pending on the 17th January, 1853, the day on which it went into operation, are excepted from the operation of those rules. *Hiscox v. Hendree*, 27 Ala. 216; *Doe d. Kennedy's Heirs v. Reynolds*, 27 Ala. 364; *Broadnax v. Sullivan*, 29 Ala. 320.

VI. HEARSAY.

1. *Generally.*

86. The absence of a party from the State cannot be proved by general reputation. *State Bank v. Seawell*, 18 Ala. 616.

87. Nor is such evidence admissible to prove the fact of insolvency. *Walker v. Forbes*, 25 Ala. 139.

88. A motive for an act, when founded on rumor, is not admissible evidence. *Governor v. Campbell*, 17 Ala. 566.

89. In a summary proceeding against a sheriff, for failing to make the money on an execution, general neighborhood rumor, to the effect that certain slaves, in the possession of the defendant in execution, were the separate property of his wife, is not admissible evidence for the sheriff, as tending to show an excuse for not levying the execution. *Whitsett, Garner & Co. v. Slater*, 23 Ala. 626.

90. A witness, who saw two persons engaged in writing, cannot testify to the character of the writing, from what one of the parties afterwards told him concerning it: such evidence, relating to a past transaction, of which the conversation formed no part, is mere hearsay. *Martin v. Hardesty*, 27 Ala. 458.

91. Where the character of a party's possession is in issue, it cannot be proved by general reputation. *McCoy v. Odom*, 20 Ala. 502; *Benje v. Creagh's Adm'r*, 21 Ala. 151.

92. In an action against the owners of a steamboat, to recover damages for the loss of a hired slave, who was killed by a collision between their boat and another, while one of the part-owners was acting as captain, evidence of his general reputation as a steamboat captain is admissible for plaintiff, as tending to prove notice of his incompetency to the defendants. *Cook & Scott v. Parham*, 24 Ala. 21.

2. *Books, Maps, and Plats.*

93. Standard medical books may be read in evidence to the jury, in connection with proper explanations of the technical terms used. *Stoudenmeier v. Williamson*, 29 Ala. 558.

94. A map, not made under the authority of this State, or of the United States, is not admissible evidence, although "generally received as a correct representation of what purports to be shown or described therein." *Stein v. Ashby*, 24 Ala. 521.

95. Although an *ex-parte* survey, made by a county surveyor without an order of court, may not, of itself, be competent evidence; yet the surveyor may be examined personally to prove the boundaries of the land, and may illustrate his evidence by his own survey; and when the accuracy of the survey has thus been proved, it may go to the jury as evidence tending to prove the locality of the land and its boundaries. *Nolin v. Parmer*, 21 Ala. 66.

3. *Evidence of Deceased or Absent Witness.*

96. In a statutory suit for freedom, the evidence of a deceased witness on the trial of a former proceeding, to which only a portion of the petitioners were parties, is not admissible. *Fields v. Walker*, 23 Ala. 155.

97. But, if the second trial, in reference to the same subject-matter, is between persons who are privies in blood or estate to the former parties, the evidence is admissible. *Clealand v. Huey*, 18 Ala. 343.

98. To enable a witness to testify to the evidence of a deceased witness, it is not necessary that he should be able to repeat the precise language used. *Ib.*

99. But he must testify to the substance of the whole testimony, and cannot determine upon the relevancy of the portions which he omits to prove. *Magee v. Doe d. Hallett & Walker*, 22 Ala. 699.

100. A deposition taken in a former suit is admissible evidence, after the removal of the witness from the State, in another suit between the same parties or their privies, touching the same subject-matter, although the issues involved in the two suits may not be identical. *Long v. Davis*, 18 Ala. 801.

4. *Pedigree, and Marriage.*

101. In questions of pedigree, the declarations of deceased members of the family have always been received in evidence, to establish the parentage or descent of the particular individual whose relationship is in controversy. *Rowland & Heifner v. Ladiga's Heirs*, 21 Ala. 9.

102. Filiation may be established, at common law, by proof of the fact that the individual has always born the name of the person whom he claims as father; that the father has always treated him as his child, and, in that character, has provided for his education, maintenance and establishment; that he has uniformly been received as such in society, and has been acknowledged as such by the family. *Weatherford v. Weatherford*, 20 Ala. 548.

103. Marriage may be proved by reputation and cohabitation. *Ib.*

5. *Res Gestæ.*

104. The declarations of a person in possession of personal property, explanatory of his possession, are admissible evidence on the principle of *res gestæ*. *Thomas v. DeGraffenreid*, 17 Ala. 602; *S. C.*, 27 Ala. 651; *Thompson v. Mawhinney & Smith*, 17 Ala. 362; *Walker v. Blassingame*, 17 Ala. 810; *Nelson v. Iverson*, 17 Ala. 216; *S. C.*, 19 Ala. 95; *S. C.*, 24 Ala. 9; *Darling v. Bryant & Walker*, 17 Ala. 10; *Tomkies v. Reynolds*, 17 Ala. 109; *Hadden's Executors v. Powell*, 17 Ala. 314; *Mobley v. Bilberry*, 17 Ala. 428; *Brazier & Co. v. Burt*, 18 Ala. 201; *Clealand v. Huey*, 18 Ala. 343; *Perry v. Graham*, 18 Ala. 822; *Fontaine & Dent v. Beers & Smith*, 19 Ala. 722; *Barnes & Barnes v. Mobley*, 21 Ala. 232; *Gayle v. Bancroft's Adm'rs*, 22 Ala. 316; *Mims v. Sturdevant and Wife*, 23 Ala. 664; *Derrett v. Alexander*, 25 Ala. 265; *Johnson v. Boyles*, 25 Ala. 576; *Martin v. Hardesty*, 27 Ala. 458; *Thomas v. Henderson*, 27 Ala. 523; *Hair v. Little*, 28 Ala. 236; *Gillespie's Adm'r v. Burleson*, 28 Ala.

551; *Miller v. Jones' Adm'r*, 26 Ala. 247; *S. C.*, 29 Ala. 174; *Upson v. Raiford*, 29 Ala. 188.

105. His declarations, to the effect that he claims the property as his own, or as bailee for another, are explanatory of possession. *Nelson v. Iverson*, 17 Ala. 216; *S. C.*, 19 Ala. 95; *S. C.*, 24 Ala. 9; *Hadden's Executors v. Powell*, 17 Ala. 314; *Mobley v. Bilberry*, 17 Ala. 428; *Brazier & Co. v. Burt*, 18 Ala. 201; *Clealand v. Huey*, 18 Ala. 343; *Barnes & Barnes v. Mobley*, 21 Ala. 232; *Johnson v. Boyles*, 26 Ala. 576; *Thomas v. DeGraffenreid*, 27 Ala. 651; *Thomas v. Henderson*, 27 Ala. 523; *Hair v. Little*, 28 Ala. 236; *Upson v. Raiford*, 29 Ala. 188; *Miller v. Jones' Adm'r*, 26 Ala. 247; *S. C.*, 29 Ala. 174; *Fontaine & Dent v. Beers & Smith*, 19 Ala. 722.

106. So are his declarations, that another is a joint owner with him. *Darling v. Bryant & Walker*, 17 Ala. 10.

107. But his declarations, as to the contract by which he acquired the possession, are not admissible. *Thompson v. Mawhinney & Smith*, 17 Ala. 362; *Perry v. Graham*, 18 Ala. 822; *Mims v. Sturdevant and Wife*, 23 Ala. 664; *Martin v. Hardesty*, 27 Ala. 458.

108. Nor are his declarations admissible, to show that he had not given the property to another person, or that what he said about such gift was in jest, or that he had only loaned it. *Nelson v. Iverson*, 17 Ala. 216.

109. Nor are they admissible, to show that he had previously sold the property to another. *Hadden's Executors v. Powell*, 17 Ala. 314.

110. Nor to show that he had not given, and did not intend to give, the property to another. *Walker v. Blassingame*, 17 Ala. 810.

111. Nor, "that he had promised to give" the property to another. *Mobley v. Barnes*, 26 Ala. 718.

112. Nor to impeach the *bona fides* of a deed previously executed by him. *Price v. Branch Bank at Decatur*, 17 Ala. 374; *Strong's Executors v. Brewer*, 17 Ala. 706; *Walker v. Blassingame*, 17 Ala. 810; *Foote and Wife v. Cobb*, 18 Ala. 585.

113. But the declaration of a vendor, who retains possession after the sale, to the effect that he is the owner of the property, is explanatory of possession. *Mobley v. Bilberry*, 17 Ala. 428.

114. On a trial of the right of property under the statute, the declaration of the person in whose possession the property was found, made at the time of the levy, that it was brought to his house by the defendant in attachment, is equivalent to saying that he held the property for said defendant, and is therefore competent evidence. *Derrett v. Alexander*, 25 Ala. 265.

115. The declarations of the donor, made at the time of the delivery of the property, and in explanation thereof, constitute a part of the *res gestæ*. *Gillespie's Adm'r v. Burleson*, 28 Ala. 551; *Rumbly v. Stainton and Wife*, 24 Ala. 712.

116. To render such declarations admissible on the principle of *res gestæ*, the fact of the party's possession must first be established to the satisfaction of the court. *Thomas v. DeGraffenreid*, 17 Ala. 602; *S. C.*, 27 Ala. 651; *Nelson v. Iverson*, 24 Ala. 9; *Rowan v. Hutchisson*, 27 Ala. 328.

117. The declarations of an old female slave, who lived at the same house with her grandchildren, respecting her possession of them, are not competent evidence, because (aside from other reasons) she cannot have such possession as will authorize their admission. *Rowan v. Hutchisson*, 27 Ala. 328.

118. To make a party's own declarations competent evidence in his favor as a part of the *res gestæ*, they must be connected with the material fact or inquiry involved in the issue. *Tomkies v. Reynolds*, 17 Ala. 109.

119. The original inventory and appraisement, returned by an administrator to the orphans' court, is competent evidence, if it has not been recorded, to show the character in which he held possession of a slave. *Calvert v. Marlow*, 18 Ala. 67.

120. If a party, upon the receipt of cotton from C., marks the bales with the initials of another person's name, this is admissible evidence that he held it as the property of that person. *Brazier & Co. v. Burt*, 18 Ala. 201.

121. The declarations of an agent, made within the scope of his authority, and at the time of transacting the business of his agency, are admissible for or against his principal, as a part of the *res gestæ*. *Cunningham's Executor*

v. Cochran & Estill, 18 Ala. 479; *McKenzie v. Stevens*, 19 Ala. 691; *Lundie v. Cosper*, 20 Ala. 123; *Williams v. Fitzpatrick*, 20 Ala. 791.

122. Upon this principle, a receipt for county taxes, given by the county treasurer to the tax-collector, is competent evidence for the latter, upon proof of the signature, and of the fact that the maker was county treasurer at the time of its execution. *Williams v. Fitzpetrick*, 20 Ala. 791.

123. In an action on a contract, whereby plaintiff undertook for hire to haul certain goods for defendant, but was informed by the receiving and forwarding agent, at the town where the goods were represented to be, that defendant's goods had been sent off ten days previously, and that he then had no goods at that point.—*held*, that the latter declaration of the agent was admissible, but that the former was not. *Lundie v. Cosper*, 20 Ala. 123.

124. In assumpsit by the owner of a slave, to recover money which the slave had paid to defendant, on being detected in stealing money from his store, the slave's confession, made at the time of the payment, to the effect that he had stolen other goods from the defendant equal in value to the money paid, is competent evidence for the defendant, to show the character of the payment, and the circumstances under which it was made. *Jones v. Nirdlinger*, 20 Ala. 488.

125. Declarations, inseparably connected with material acts, which they serve to elucidate and explain, are competent evidence; but declarations after suit brought, not connected with any fact or act whatever, are not admissible for the party making them. *Hooper v. Edwards*, 20 Ala. 528.

126. In an action to recover for the board of an orphan child, who had no guardian, and whom defendant had carried to plaintiff's house, plaintiff having shown such a state of facts as tended to prove that defendant had placed himself *in loco parentis*,—*held*, that the child's declarations, at the time she came to defendant's house, were admissible evidence for him, to show the manner in which he had received her, and his motive in receiving and afterwards taking her to plaintiff's house. *Edy v. McCoy*, 20 Ala. 403.

127. Where a party is shown to have published an advertisement as surviving partner, by advice of his attorney, his statement to the attorney, though not evidence of the facts stated, is admissible evidence, in connection with the advice given, as showing the grounds on which the advice was given, and explanatory of the advertisement. *Edgar v. McArn*, 22 Ala. 796.

128. The declarations of the parties to a contract, at the time it is made, as to its terms, or at the time slaves are delivered under a contract of hiring previously made, constitute a part of the *res gestæ*. *Hooper v. Edwards*, 25 Ala. 528.

129. An agreement for the rent of land, made on Sunday, although void as a contract, may be looked to as a part of the *res gestæ*, to explain the defendant's possession, and the subsequent conduct of both parties relative to the land. *Rainey v. Capps*, 22 Ala. 288.

130. Declarations, made by one in possession of slaves, two days before their removal from the State, as to his intention in removing them, are too remote to form part of the *res gestæ*. *Newcombe v. Leavitt*, 22 Ala. 631.

131. In an action against the surviving partner of a firm, for fraud and deceit in the purchase of a slave, the declarations of his deceased copartner, by whom the sale was made, before and after the purchase, as to his object in purchasing, are not competent evidence for the defendant, to show that the purchase was not made on account of the firm. *Dixon v. Barclay*, 22 Ala. 370.

132. A recital in a will, made by the donor at the time of a gift to his daughter, though of no efficiency as a muniment of title, held admissible as a part of the *res gestæ* connected with the gift. *Jennings v. Blocker's Adm'r*, 25 Ala. 415.

133. In an action on a guaranty, the statement of the person to whom the goods were furnished, made during the negotiation for them, to the effect "that he had been unfortunate, and was without means," is competent evidence against the guarantor, as tending to show that the credit was given to him. *Walker v. Forbes*, 25 Ala. 139.

134. It being shown that the creditor had instituted a suit, by the advice of his attorney, against the persons (minors) to whom the goods were furnished, the information on which the attorney's advice was given, "that the children were willing that he might sue and recover judgments against them, or resort to any other means which might be deemed advisable for the collection of his debt," is admissible as a part of the *res gestæ*. *Sanford v. Howard*, 29 Ala. 684.

135. In an action to recover the proceeds of a note, placed by plaintiff in defendant's hands for collection, it being shown that defendant recovered a judgment on it, in the name of the payee for his use, and, by private agreement with the sheriff, after the sale of property under execution, took the property at the purchaser's bid,—evidence showing that the sheriff, by his direction, demanded specie of the purchaser, and that the latter offered to pay in current bank-notes, with the difference between them and specie added, is admissible as part of the *res gestæ*. *Hudson v. Crow*, 26 Ala. 515.

136. In slander for words spoken, defendant may prove the facts and circumstances connected with the speaking of the words charged, for the purpose of showing that he did not thereby intend to impute to plaintiff the crime which the words, standing alone, would import. *Williams v. Cawley*, 18 Ala. 206.

137. The words declared on, charging plaintiff with having murdered defendant's son, being shown to have been spoken while defendant and witness were alone together, going to a neighbor's house to get him to read a letter which defendant had received relative to his son's death,—*held*, that defendant's declarations to witness, in the same conversation, "that his wife was much distressed on account of her son's death," were admissible evidence for him, as tending to show that the words spoken were prompted by grief rather than malice. *Stallings v. Newman*, 26 Ala. 300.

138. In case for a malicious prosecution, on a charge of unlawfully taking away and detaining defendant's daughter without her consent, the declarations of the daughter, made about the time of the alleged abduction, and conducing to show her willingness to go, constitute a part of the *res gestæ*. *Long v. Rodgers*, 17 Ala. 540.

139. The declarations of a slave, made while sick, either to a physician or to any other person, relative to the nature and symptoms of his disease, are competent evidence on the principle of *res gestæ*, as well as the necessity of the case. *Rowland v. Walker*, 18 Ala. 749; *Eckles & Brown v. Bates*, 26 Ala. 655. See, also, *Johnson v. The State*, 17 Ala. 618.

140. His declarations, also, as to his symptoms and condition during previous similar attacks, upon which the physician in part relies in forming his opinion as to the duration and character of the disease, are competent evidence on the same principle. *Eckles & Brown v. Bates*, 26 Ala. 655.

141. But his declarations to persons not skilled in medicine, as to his previous attacks, the medicines which he then took, and his opinion as to the similarity between those attacks and the present, are not competent evidence. *Ib.*

142. In a civil action for an assault and battery, it being shown that the plaintiff was wounded on the side, breast, head and neck, he may prove that, about two years after the commission of the assault, "when in the field of his father, he lay down under a tree, and complained that his head, neck and back hurt him." (STONE, J., *dissenting*.) *Phillips v. Kelly*, 29 Ala. 628.

143. It being shown that one of the defendants prevented a third person from interfering, the simultaneous declarations of such third person, tending to show that, instead of separating the combatants, he was about to participate in the fight, are competent evidence as a part of the *res gestæ*. *Watkins v. Gaston*, 17 Ala. 662.

144. In an action to recover damages for injuries inflicted on a slave, a witness for plaintiff testified, that defendant and one R. were chasing the slave as a runaway, with a pack of trained dogs belonging to defendant; that he heard the report of a gun or pistol in the direction the dogs were trailing, and, when he reached a certain fence, defendant came up to him,

from a swamp on the opposite side of the field, and told him, "that he came up with the negro in the field, on horseback; that the negro turned on him, with a large stick; that he retreated, to keep out of the way of the negro, who said he would die before he would be taken; that he went to R., got his pistol, pursued the negro to the swamp, came up near to him, and shot him just as the negro was turning on him." *Held*, that defendant's declaration to said R., at the time of getting the pistol, and explanatory thereof, was admissible evidence for him. *Dearing v. Moore*, 26 Ala. 586.

145. On the trial of a contest respecting the validity of a will, the declarations of the testator, made two or three weeks before the execution of the will, are admissible to prove fraud or undue influence. *Roberts v. Trawick*, 17 Ala. 55.

146. But declarations made by him six or seven years before the execution of the will, to the effect that the executor and his wife "were constantly ding-donging at him to make a will, but that he would not do it, and never meant to do it,—that the law of Alabama would make a good enough will for him," are not admissible evidence against the will. *Bunyard and Wife v. McElroy*, 21 Ala. 312.

147. The testator's acts and declarations before the publication of his nuncupative will, and his expressions at the time of its execution, tending to show a paternal feeling and affection towards a child for whom the will makes no provision, are competent evidence against the will. *Gilbert v. Gilbert*, 22 Ala. 529.

VII. MATTERS JUDICIALLY KNOWN.

148. The supreme court will take judicial notice of the regular terms of the circuit, county, and probate courts. *Lindsay v. Williams*, 17 Ala. 229; *Moore v. McGuire*, 26 Ala. 461.

149. And of the charter of a public municipal corporation. *Smoot v. Mayor of Wetumpka*, 24 Ala. 112.

150. But not of a private act incorporating a turnpike company. *Moore v. The State*, 26 Ala. 86.

151. Nor of the rate of interest in a foreign State, from the table required by law to be appended by the secretary of state to the published acts of the legislature. *Clarke v. Pratt*, 20 Ala. 470; *Harrison & Saunders v. Harrison*, 20 Ala. 629.

152. The several acts providing for the settlement of the affairs of the Planters' and Merchants' Bank of Mobile, are public statutes, which will be judicially noticed. *Jemison v. P. & M. Bank*, 17 Ala. 754.

153. So are the several acts providing for the settlement of the affairs of the State Bank and its branches, and placing its assets in the hands of commissioners, who were authorized to sell or lease its real estate, and to appoint assistant commissioners to aid them. *Douglass & Easton v. Branch Bank at Mobile*, 19 Ala. 659.

154. The fact that Cahaba, and the lands within the district subject to sale at that place, are within this State, is matter of judicial knowledge. *King v. Kent's Heirs*, 29 Ala. 542.

155. Conceding that judicial notice will be taken of the public government surveys, yet, where a proposed road is described only by the numbers of the section, township and range through which it runs, the court cannot judicially know in what county it lies. *Comm'rs' Court of Russell Co. v. Tarver*, 25 Ala. 480.

156. Nor can the court judicially know when a particular tract of land in another State may be entered. *Garnett v. Yoe*, 17 Ala. 74.

157. Judicial notice will be taken of the names of all the counties in the State. *Reeves v. The State*, 20 Ala. 33.

158. And of the meaning of words used in a statute. *Mayor & Aldermen of Wetumpka v. Winter*, 29 Ala. 651; *Sterne v. The State*, 20 Ala. 43; *Ward v. The State*, 22 Ala. 16.

159. And of the names of the sheriffs of the several counties. *Ingram v. The State*, 27 Ala. 17.

160. And of the time when the sheriff's term of office expires, whether by limitation or death, where he is the executive officer of the court. *Doe d. Saltonstall and Wife v. Riley & Dawson*, 28 Ala. 164.

161. And of the general course of the transactions of human life. *Salomon & Boullemet v. The State*, 28 Ala. 83.

VIII. OBJECTIONS; WHEN AND HOW MADE.

162. A specific objection to evidence, on the ground of irrelevancy or any other particular ground, is a waiver of all other objections to it; and the appellate court will only examine the grounds specified. *Walker v. Blassingame*, 17 Ala. 810; *Garrett's Adm'rs v. Garrett & Garrett*, 27 Ala. 687; *King v. Pope*, 28 Ala. 601.

163. A general objection is sufficient, when the evidence is illegal on its face, and is clearly pointed out. *Cunningham's Executor v. Cochran & Estill*, 18 Ala. 479; *Davis v. The State*, 17 Ala. 415.

164. Under a general objection to a party's declarations, which are not illegal on their face, the objection that they were made after the commencement of the suit, cannot be raised on error. *Phillips v. Kelly*, 29 Ala. 628.

165. A general objection to relevant evidence does not raise the question of the competency of the witness to testify to the fact in issue. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

166. Irrelevant evidence may be excluded, on motion, at any stage of the cause, although no objection was raised to it at the first opportunity. *Bush & Co. v. Jackson*, 24 Ala. 273; *Pearsall v. McCartney*, 28 Ala. 110; *McCreary v. Turk*, 29 Ala. 244.

167. If a question calls for irrelevant evidence, an objection to it is sufficient to exclude the evidence, without a separate objection to the answer. *Gilmer & Taylor v. City Council of Montgomery*, 26 Ala. 665.

168. If a question calls for a legal conclusion, and no objection is raised to it on that account, the objection cannot be raised to the answer. *Townsend v. Jeffries' Adm'r*, 24 Ala. 329.

169. A general objection to evidence, of which a portion is legal, may be overruled entirely. *Price v. Branch Bank at Decatur*, 17 Ala. 374; *Fontaine & Dent v. Beers & Smith*, 19 Ala. 722; *Rowland & Heifner v. Ladiga's Heirs*, 21 Ala. 9; *Lindsay v. Hoke & Abernathy*, 21 Ala. 542; *Allen v. Smith*, 22 Ala. 416; *Murrah v. Branch Bank at Decatur*, 20 Ala. 392; *Riddle v. Brown*, 20 Ala. 412; *Loughridge v. Thompson*, 20 Ala. 828; *Newton v. Jackson*, 23 Ala. 335; *Smoot & Ketchum v. Eslava*, 23 Ala. 659; *Wyatt's Adm'r v. Steele*, 26 Ala. 639; *Martin v. Hardesty*, 27 Ala. 458; *Thomas v. Henderson*, 27 Ala. 523; *Thomas v. DeGraffenreid*, 27 Ala. 651; *Garrett's Adm'rs v. Garrett & Garrett*, 27 Ala. 687; *Doe d. Saltonstall and Wife v. Riley & Dawson*, 28 Ala. 164; *Smith v. Causey*, 28 Ala. 655; *Upson v. Raiford*, 29 Ala. 188; *Ala. & Tenn. Rivers Railroad Co. v. Kidd*, 29 Ala. 221; *Chamberlain & Co. v. Masterson*, 29 Ala. 299; *Bigelow v. Ward*, 29 Ala. 471.

170. It may also be sustained, and the entire evidence excluded, when any portion is illegal. *West & West v. Kelly's Executors*, 19 Ala. 353; *Smith v. Wooding*, 20 Ala. 324; *Pritchett v. Munroe*, 22 Ala. 501; *Gibson v. Hatchett & Brother*, 24 Ala. 201; *Hiscox v. Hendree*, 27 Ala. 216; *Barlow v. Lambert*, 28 Ala. 704.

171. A party cannot object to evidence which he has himself called for. *Edgar v. McArn*, 22 Ala. 796; *Furlow's Adm'r v. Merrell*, 23 Ala. 705.

172. A motion to exclude testimony should be clear and specific: if it is so general and indefinite that the mind is at a loss readily to understand the ground which it is intended to cover, it should be overruled. *Newton v. Jackson*, 23 Ala. 335.

173. It is the duty of the court to decide the question of the admissibility of evidence at the time it is offered, if objection is then made to it. *Bilberry's Adm'r v. Mobley*, 21 Ala. 277.

174. If the evidence, when offered, was *prima facie* irrelevant, the subsequent admission of the preliminary proof cures the error of its admission. *Ross v. Pearson*, 21 Ala. 473; *King v. Pope*, 28 Ala. 601; *Lawson & Swinney v. The State*, 20 Ala. 65; *Johnson v. The State*, 29 Ala. 62.

175. The admission of illegal evidence is cured, by subsequently withdrawing it from the jury, or by instructing them to disregard it. *Florey's Executor v. Florey*, 24 Ala. 241; *Winter v. Phelan*, 27 Ala. 649; *Thomas v. Henderson*, 27 Ala. 523.

176. But not by instructing them, that, unless there is other evidence to connect with it, they must disregard it. *Bilberry's Adm'r v. Mobley*, 27 Ala. 277.

177. Relevant evidence, however

weak and insufficient, cannot be excluded when offered, but an appropriate charge should be asked on its sufficiency. *Brazier & Co. v. Burt*, 18 Ala. 201; *McCreary v. Turk*, 29 Ala. 244; *Adams and Wife v. Adams*, 29 Ala. 433; *Jones v. Sterns*, 28 Ala. 677.

178. If competent evidence is admitted by the court for a wrong purpose, the opposite party should ask an appropriate charge limiting its effect. *Cook & Scott v. Parham*, 24 Ala. 21.

179. If a party reads in evidence to the jury, without any attempt to limit its effect as proof, a certified copy of a deed purporting to have been executed by husband and wife, he thereby concedes its genuineness, and cannot be heard to say, in the appellate court, that it was not proved. *Jenkins v. McConico*, 26 Ala. 213.

As to demurrers to evidence, *vide supra*, 69–72; as to objections to the answers to interrogatories under the statute in aid of discovery at law, *vide supra*, 73–83; and as to objections to depositions, see that title, p. 549.

IX. Opinion; and herein, of Experts, and Questions of Fact and of Law.

180. In an action of *crim. con.*, a witness who testifies that he saw defendant at plaintiff's house, in company with plaintiff's wife, cannot state his opinion as to the purpose for which he was there. *Cox's Adm'r v. Whitfield*, 18 Ala. 738.

181. In a statutory proceeding for the assessment of damages occasioned by the passage of a railroad through a person's lands, a witness cannot state his opinion as to the amount of damage sustained. *Montgomery & West Point Railroad Co. v. Varner*, 19 Ala. 185.

182. A witness cannot be allowed to state that, "judging from the circumstances, he would say that the slave was in the possession" of a particular person. *Perry v. Graham*, 18 Ala. 822.

183. Nor that he "considered that the control and possession of the slave passed to the donee at the time of the parol gift." *Thomas v. DeGraffenreid*, 27 Ala. 651.

184. Where the character of a party's possession of property is in issue, it cannot be proved by the opinion of witnesses. *Benje v. Creagh's Adm'r*, 21 Ala. 151.

185. A witness cannot be allowed to state, "that the habits of business and intimacy between himself and defendant were such that, if defendant had received notice of the protest of said bill, he had no doubt it would at once have been communicated to him." *Coster, Robinson & Co. v. Thomason*, 19 Ala. 717.

186. The opinion of a clerk, by whom a deed was recorded, cannot be received, to show that the name of the grantor, as stated in his certificate of probate, was intended for that of the real grantor in the deed. *Jones v. Parks*, 22 Ala. 446.

187. In an action against the owners of a steamboat, to recover damages for the loss of a stage, which was caused by a collision between the steamboat and a ferry-boat on which the stage was crossing the river, an eye-witness of the collision cannot be allowed to state, "that he thought the stage could have been saved, if the steamboat had returned to the assistance of the flat when the call for assistance was made." *Otis & Jayne v. Thom*, 23 Ala. 469.

188. A person acquainted with the navigation of the river, and an eye-witness of the collision, may give his opinion, as an expert, whether the particular act which caused the collision was an act of prudence and discretion on the part of the officers of the steamboat. *Cook & Scott v. Parham*, 24 Ala. 21.

189. A witness cannot be allowed to testify, that a certain house, which was consumed by fire, might have been saved if a particular aperture had been closed. *Gibson v. Hatchett & Brother*, 24 Ala. 201.

190. In an action to recover damages for killing a dog, a witness cannot be asked, "whether, from his knowledge of the dog, he did or did not consider him a nuisance." *Parker v. Mise*, 27 Ala. 480.

191. A negro-trader may testify, as an expert, to the value of a slave at a particular time three years before he ever saw her. *Dixon v. Barclay*, 22 Ala. 370.

192. Upon questions of insanity, a

witness, whose acquaintance with the party has been such as to enable him to form a correct opinion of his mental condition, may not only depose to facts conducing to establish unsoundness of mind, but also, in connection with those facts, give his own opinion upon the question of sanity or insanity. *Florey's Executors v. Florey*, 24 Ala. 241.

193. A practical surveyor, who is familiar with the peculiar marks used by the government surveyors in their public surveys, may give his opinion, as an expert, whether a paticular line was marked by them. *Brantly v. Swift*, 24 Ala. 390.

194. In an action to recover damages for a diversion of water from a mill, a witness, well acquainted with the mill business, cannot give his opinion as to the damage sustained from the diversion, when he is not informed of the size of the stream, its supply of water, or the quantity diverted. *Stein v. Burden*, 24 Ala. 130.

195. Upon the question whether the officers and crew of a steamboat, at a particular time, were sufficient to run her on a particular river, the opinion of a witness who had an opportunity of personal observation, and who testifies to the facts derived from that observation, is competent evidence. *McCreary v. Turk*, 29 Ala. 244.

196. A physician may give his opinion, as an expert, as to the actual condition of a patient whom he has visited. *Bush & Co. v. Jackson*, 24 Ala. 273; *Bennett v. Fail & Patterson*, 26 Ala. 605.

197. Although his opinion, predicated on present symptoms, as to the length of time a disease has existed, is not equal to positive proof of the fact of its existence; yet, where he testifies to the existence of a disease from personal examination, upon which he founds his opinion as to the length of time it has existed,—it is error to instruct the jury, "that the testimony of physicians is mere matter of opinion." *Bennett v. Fail & Patterson*, 26 Ala. 605.

198. A physician may also detail to the jury the facts on which he predicates his opinion, but cannot state the history of other isolated cases which he has treated for similar diseases, unless his opinion is founded on them. *Bush & Co. v. Jackson*, 24 Ala. 273.

199. He may also state the declarations of the patient, though a slave, as to his symptoms and condition during previous similar attacks, when they form the predicate, either in whole or in part, of his opinion as to the duration and character of the disease. *Eckles & Brown v. Bates*, 26 Ala. 655.

200. Standard medical books may be read in evidence to the jury, in connection with proper explanations of the technical terms used. *Stoudenmeier v. Williamson*, 29 Ala. 558.

201. When a witness speaks of an "understanding" between himself and others that they were to do a particular thing, the term used is to be taken as a synonym for agreement, and the expression is not objectionable. *Griffin v. Isbell*, 17 Ala. 184.

202. A witness may testify that a partnership existed between two persons. *McGrew & Harris v. Walker*, 17 Ala. 824.

203. And that he "regards" certain persons as insolvent, when his testimony shows that his conclusion is based on his knowledge of their circumstances. *Royall's Adm'r v. McKenzie*, 25 Ala. 363.

204. And that a party never had title or color of title to a slave. *Norton and Wife v. Linton*, 18 Ala. 690.

205. And that a party "was in the habit of exercising control over a slave." *Nelson v. Iverson*, 19 Ala. 95.

206. Ownership is a fact to which a witness may testify. *S. C.*, 24 Ala. 9.

207. A witness, testifying to the character of an impeached witness, may state that it is "very unfavorable." *Martin's Executrix v. Martin*, 25 Ala. 201.

208. In testifying as to the soundness of a slave, he may state that "she appeared to be healthy." *Bennett v. Fail & Patterson*, 26 Ala. 605.

209. And may state that an aperture in a wall "was visible," from a particular point. *Gibson v. Hatchett & Brother*, 24 Ala. 201.

210. A merchant's clerk and bookkeeper, who testifies that he made all the entries on the books, and that he charged nothing as sold which was not sold, may further testify "that he is satisfied and believes that all the items charged in the account were sold, although he cannot recollect them." *Wright v. Bolling*, 27 Ala. 259.

X. PAROL AND WRITTEN.

1. *General Rule, Excluding Parol.*

210. The rule is inflexible, that parol evidence cannot be received, to add another term to a written instrument perfect and complete in itself, or to change its legal effect. *West & West v. Kelly's Executors*, 19 Ala. 353; *Long v. Davis*, 18 Ala. 801; *Walker v. Clay & Clay*, 21 Ala. 797; *Grey's Heirs v. Grey's Adm'rs*, 22 Ala. 233.

211. Parol evidence cannot be received, to show that a promissory note, payable on a day certain, and given for professional services performed and to be performed by the payee as an attorney-at-law, was not to be paid, unless the maker was prosecuted in the circuit court, and there defended by the payee. *Long v. Davis*, 18 Ala. 801.

212. Nor to show that such note was not to be paid, unless the party was successful in the suit for the bringing of which it was given. *West & West v. Kelly's Executors*, 19 Ala. 353.

213. Nor, when no time is fixed for the performance of the stipulated services, to show that it was not to be paid until the contemplated services had been rendered. *Walker v. Clay & Clay*, 21 Ala. 797.

214. Nor, when a note purports to have been given "for the rent of land," to show that the payee also agreed to repair the fencing around the land. *Evans v. Bell*, 20 Ala. 509.

215. Nor to show that a note, which does not designate the place of payment, was to be paid at a place different from that which the law implies from its face. *Moore & Jones v. Davidson*, 18 Ala. 209.

216. Nor to show that Jacob A. *Toberney*, the obligee in a forthcoming bond, was intended for Jacob A. *Flournoy*, the name of the plaintiff in execution. *Flournoy v. Mims*, 17 Ala. 36.

217. Nor to show that, under a contract of lease which contains no express stipulation against the lessee's right to assign, the premises were to be used and occupied by himself in person. *Nave v. Berry*, 22 Ala. 382.

218. Nor to show that, under a written contract of hiring general in its terms, the employment of the slave was to be restricted to any particular business. *Seay v. Marks*, 23 Ala. 532.

219. Nor to show that a purchaser of land, with covenants of warranty, agreed by parol to pay an outstanding incumbrance. *Holley v. Younge*, 27 Ala. 203.

220. Nor to show that a mortgagee, who is in possession of the property before the law-day of the deed, is not to account to the mortgagor for the rents and profits, when the deed itself contains no such stipulation. *Davis v. Lassiter*, 20 Ala. 561.

221. Nor to show that, under a written contract of sale, which recited that the purchase-money was to be paid on a specified day, and that the vendor was to make titles when the purchase-money was settled with him, it was agreed that the payment of the purchase-money was to await a settlement of accounts between the parties. *Ware v. Cowles*, 24 Ala. 446.

222. Nor to show that, under an absolute conveyance in fee, there was a contemporaneous verbal agreement for the retention of possession by the vendor until he had made another crop on the land. *Melton v. Watkins*, 24 Ala. 433.

223. Nor to supply an omission in a written will. *Abercrombie's Executors v. Abercrombie's Heirs*, 27 Ala. 489.

224. Nor to show that the delivery of a bill of sale to the purchaser of a slave was conditional, and that the title was to revest in the vendor in the event of the purchaser's failure to give his note, with a specified surety, for the purchase-money. (RICE, C. J., *dissenting*.) *Morgan v. Smith, Wykoff & Nicholl*, 29 Ala. 283.

225. Nor to impeach or contradict a sheriff's return on a writ. *Martin v. Barney*, 20 Ala. 369.

226. Nor to contradict the recitals of the record, in orders and entries made during the progress of the cause. *Deslonde & James v. Darrington's Heirs*, 29 Ala. 92.

227. Nor, in the appellate court, to contradict the record sent up by the primary court. *Kennedy's Executors v. Doe d. Rochon's Heirs*, 26 Ala. 384.

228. Nor to show that, in an action of trespass to try titles, damages were not recovered for the rents accruing

up to the time of the verdict. *Shumake v. Nelms' Adm'r*, 25 Ala. 126.

229. Evidence of a custom cannot be received, to contradict or vary the express terms of a written contract. *Barlow v. Lambert*, 28 Ala. 704; *Ala. & Tenn. Rivers Railroad Co. v. Kidd*, 29 Ala. 221.

230. Nor to give to plain and unambiguous words or phrases a meaning different from their natural import. *Barlow v. Lambert*, 28 Ala. 704.

231. In the absence of fraud or mistake, the rule in equity, as to the inadmissibility of parol to contradict or vary a written instrument, is the same as at law. *Ware v. Cowles*, 24 Ala. 446; *Frederick v. Youngblood*, 19 Ala. 680.

2. *Exception as to Consideration.*

232. Parol evidence is admissible to show the consideration of a note, which does not specify its consideration, and a rescision of the contract of which the note formed a part. *Newton v. Jackson*, 23 Ala. 355.

233. And to show that the consideration has failed, either in whole or in part. *Long v. Davis*, 18 Ala. 801; *Corbin v. Sistrunk*, 19 Ala. 203.

234. Therefore, where A. executed her note to B., for services to be rendered by him as an overseer, but told him, before delivering the note, that she could not employ him unless he brought a recommendation from C.; which recommendation B. promised to procure, but failed to do so, and A. then refused to employ him,—*held*, that the procuring of C.'s recommendation formed a part of the consideration of the note, and that parol evidence was admissible, to show what was said about the procuring of said recommendation. *Corbin v. Sistrunk*, 19 Ala. 203.

235. Parol evidence is admissible, to show that the consideration of a note, purporting to have been given for the amount of the maker's indebtedness to the bank, was the extinguishment of the debt of another person, and that the proceeds were so applied. *Murrah v. Branch Bank at Decatur*, 20 Ala. 392.

236. Where a note is signed by the husband, with the addition of the words "acting trustee," parol evidence may be received, to show that its consideration and purpose, with the character of the transaction, constitute it a charge on the wife's separate estate. *Baker v. Gregory and Wife*, 28 Ala. 544.

237. The acceptor of a written order, payable out of the proceeds of a certain judgment when collected, may, when sued by the payee, prove the consideration on which his acceptance was based; and may, for this purpose, show that a portion of the judgment was not collected, and that the entire amount collected was paid to persons who had prior claims on the fund. *Gliddon v. McKinstry*, 28 Ala. 408.

238. In an action on the case for fraud and deceit in the purchase of a slave, although the consideration is stated in the bill of sale to be a certain sum of money, parol evidence is admissible, to show that the purchaser, at the time of the sale, also promised to carry the slave out of the State. *Dixon v. Barclay*, 22 Ala. 370.

239. The consideration clause in a bill of sale of a slave, though under seal, is open to parol explanation; as, where a consideration in money is expressed, it may be shown to have been another slave. *Eckles & Brown v. Carter*, 26 Ala. 563.

240. The consideration of a deed, though expressed to be a certain sum of money in hand paid, may be shown by parol to have consisted, partly of money in hand paid, and partly the payment of certain debts due from the grantor to third persons. *Hair v. Little*, 28 Ala. 236.

241. And when a deed purports to have been made, not only in consideration of natural love and affection, but also "for divers other good considerations," which are not specified, parol evidence is admissible, to show what the other considerations were. *Johnson v. Boyles*, 26 Ala. 576.

3. *Exception as to Ambiguities.*

242. Parol evidence is admissible, to explain the meaning of a term, used in a written contract complete in itself, which the court cannot construe without the aid of such evidence. *Drake v. Goree*, 22 Ala. 409.

243. *Semble*, that it is admissible, when land is conveyed by deed to a partnership, to show the names of the partners composing the firm. *Lindsay v. Hoke & Abernathy*, 21 Ala. 542.

244. It is also admissible, to fix the boundaries of lands sold under an order of the orphans' court, according to the data furnished by the commissioners' deed, so as to identify the lands therein described, and thus avoid the effect of indefiniteness and discrepancies in the description contained in the petition and order of sale. *Doe d. Saltonstall and Wife v. Riley & Dawson*, 28 Ala. 164.

245. Where the date of an attachment is illegible, on account of two figures having been apparently written and blended together, the testimony of the clerk who issued it is admissible, in connection with it, to show that a wrong date had been first written by an attorney, and that he had corrected it. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

246. Evidence of a custom is admissible, to show that provincialisms, and technicalities of science and commerce, have acquired a known, fixed, and definite meaning, different from their ordinary import; or, where such technicalities, unexplained, are susceptible of two or more reasonable constructions. *Barlow v. Lambert*, 28 Ala. 704.

247. Whether parol evidence is admissible, to apply and identify the reference of the words "foregoing instrument," as used in a justice's certificate of the wife's examination and acknowledgment, written on a sheet of paper containing both a relinquishment of dower by the wife and a deed signed by husband and wife, *quære?* If admissible, it may be received at law. *McBryde's Heirs v. Wilkinson*, 29 Ala. 662.

4. *Exception as to Fraud.*

248. If a material part of a written instrument has been inserted by fraud on the part of one of the parties, this forms an exception to the general rule, and parol evidence is admissible to establish the fact. *Waddell v. Glassell*, 18 Ala. 561.

249. In an action on the case for fraud and deceit in the purchase of a slave, although the consideration is stated in the bill of sale to be a certain sum of money, parol evidence may be received, to show that the purchaser, at the time of the sale, also promised to carry the slave out of the State. *Dixon v. Barclay*, 22 Ala. 370.

250. The general rule, which requires some matter of record, entry, or memorandum in the handwriting of the judge, to authorize an amendment of the record *nunc pro tunc*, does not apply to cases in which the entry is impeached for fraud. *Dunham v. Roberts*, 28 Ala. 286.

5. *Other Exceptions.*

251. When a written instrument, if produced, would not be competent evidence of the fact to which it relates, parol evidence of the same fact may be received. *Sparks v. Rawls*, 17 Ala. 211.

252. In assumpsit to recover the discount on depreciated bank-notes, received by plaintiff from defendant on a settlement of accounts had between them, parol evidence is admissible, to show that defendant, at the time of the settlement, promised to pay the discount, although he gave his due bill for the balance found against him estimating them at par. *Mills v. Geron*, 22 Ala. 669.

253. In an action on a promissory note, by the payee against a surety who signed as co-maker with his principal, defendant having introduced evidence, for the purpose of showing a partial failure of consideration, that the note was given for the amount of a book account due from his principal to plaintiff, which was secured by a mortgage purporting on its face to secure the amount of the debt then due; that, after the execution of the note and mortgage, the amount of this debt became a material question, in a certain suit in which plaintiff was examined as a witness; and that, on his examination as a witness in said suit, he could only prove a portion of the items embraced in the account,—*held*, that plaintiff might, as rebutting evidence, introduce parol proof of other items in the account, for articles sold after the execution of the mort-

gage, but before the date of the note. *Wright v. Bolling*, 27 Ala. 259.

254. In an action on a promissory note, bearing date on Sunday, it may be show by parol to have been executed and delivered on a different day. *Aldridge v. Branch Bank at Decatur*, 17 Ala. 45.

255. Parol evidence is also admissible, to show the intention of the parties, at the time the contract was entered into, with regard to their relations and several liabilities among themselves. *Branch Bank at Mobile v. Coleman*, 20 Ala. 140.

256. *Semble*, that it is also admissible, to show that a conditional note was signed by the maker with the distinct admission, on the part of the payee, that it did not contain the terms of their agreement, and that another instrument should be afterwards executed truly expressing their contract. *Hopper v. Eiland*, 21 Ala. 714.

257. Evidence of a custom is also admissible, to add new terms to a contract, as to which the writing itself is silent. *Ala. & Tenn. Rivers Railroad Co. v. Kidd*, 29 Ala. 221.

258. Where a written instrument is incomplete on its face, parol evidence may be received, to prove the entire contract; but the parts thus added must not be inconsistent with or repugnant to the writing. *West & West v. Kelly's Executors*, 19 Ala. 353.

259. It is also admissible, to identify a demand secured by deed of trust, in which it is described as consisting of one note, when in fact it consists of two. *Morrison v. Taylor*, 21 Ala. 779.

260. Also, to show that a bill of lading is the contract of other persons than him in whose name it is executed. *McTyer v. Steele*, 26 Ala. 487.

261. Although a promissory note, executed by a child to his father, is, of itself, no evidence of an advancement; yet, parol evidence is admissible, to show a subsequent agreement between the parties, by which the father parted with all interest in the money secured by the note, as an advancement to the child. *Grey's Heirs v. Grey's Adm'rs*, 22 Ala. 233.

262. Parol evidence is also admissible, to show that a subsequent advancement by a testator was intended as a satisfaction, either in whole or in part, of a previous provision by will; and whenever such evidence is admitted for that purpose, it may be rebutted by similar evidence. *May's Heirs v. May's Adm'r*, 28 Ala. 141.

263. In the construction of a will, it is permissible to look at the condition of the testator's faimily. *Moore's Executors v. Moore's Distributees*, 18 Ala. 242; *Travis v. Morrison and Wife*, 28 Ala. 494.

264. In the construction of deeds or other written contracts, it is permissible to look at the situation and relative position of the parties. *Strong Gregory*, 19 Ala. 146; *Mitchell v. Gates*, 23 Ala. 438; *Pollard v. Maddox*, 28 Ala. 321.

265. It is also admissible to show a mistake in the registration of a lost deed. *Harvey and Wife v. Thorpe*, 28 Ala. 250.

266. It is admissible, in equity, to show that a deed, absolute on its face, was intended as a trust or mortgage. *Bryan & McPhail v. Cowart*, 21 Ala. 92; *Locke's Executor v. Palmer*, 26 Ala. 312; *Brantley v. West*, 27 Ala. 542; *West and Wife v. Hendrix*, 28 Ala. 226; *Edmondson v. Welsh and Wife*, 27 Ala. 578; *Parish v. Gates*, 29 Ala. 254.

267. It is also admissible, to show that a particular matter, as to which a record is silent, though the issue was broad enough to cover it, actually arose and was determined. *Chamberlain v. Gaillard*, 26 Ala 504; *Strother's Adm'r v. Butler*, 17 Ala. 733.

268. And to show that a person, who was no party to the record, was the real party in interest, employed counsel to defend it, and set up his own title through his bailee, who was the nominal defendant. *Tarleton & Pollard v. Johnson*, 25 Ala. 300.

269. And to show that an indictment and civil action, both pending, are founded on the same transaction. *Blackburn v. Minter*, 22 Ala. 613.

270. And, where the validity of a sale, made under an order of the orphans' court, is collaterally impeached, to show the death of the sheriff, who, *ex officio*, was the previous administrator, as a jurisdictional fact on which the court acted in appointing his successor. *Doe d. Saltonstall and Wife v. Riley & Dawson*, 28 Ala. 164.

271. And, where the record shows that issue was joined on several pleas, and that the jury returned a general verdict for the defendant, to show on what plea the cause was decided. *Young v. Fuller*, 29 Ala. 464.

XI. PARTIES.

1. *Admissibility of Declarations.*

272. A party's own declarations are not admissible evidence for him, unless they constitute a part of the *res gestæ*. *Martin v. Williams*, 18 Ala. 190; *Tomkies v. Reynolds*, 17 Ala. 109; *Thompson v. Mawhinney & Smith*, 17 Ala. 362; *Hooper v. Edwards*, 20 Ala. 528.

273. In case for a malicious prosecution, the defendant may prove, as evidence of probable cause, what he or his wife swore on the preliminary examination before the committing magistrate. *Gardner v. Randolph*, 18 Ala. 685.

274. In a statutory proceeding against a tax-collector and his sureties, for his failure to pay over county taxes, his answer to a bill of discovery, filed by his sureties against him and the county treasurer, is not admissible evidence for the sureties. *Boring v. Williams*, 17 Ala. 510.

275. In an action for a breach of warranty of the soundness of a slave, plaintiff cannot be allowed to prove that, during the year next preceding the trial, he allowed a third person to have the slave's services gratuitously. *Gingles v. Caldwell*, 21 Ala. 444.

276. When a party's declarations or admissions are offered in evidence against him, he cannot be allowed to introduce proof of counter declarations made at another time. *Roberts v. Trawick*, 22 Ala. 490; *Pearsall v. McCartney*, 28 Ala. 110.

277. In assumpsit by husband and wife, against the executors of the wife's father, on an alleged indebtedness of the testator to the wife, plaintiffs having introduced evidence of the testator's declarations, as to his intention to give to each one of his daughters the same amount of property, and of the amount given to the others,—*held*, that a memorandum book, in the handwriting of the testator, containing entries made by him a few days before his death, and purporting to give a list of all the debts owing by him, was not admissible evidence for the defendants. *Harrison's Executors v. Cordle and Wife*, 22 Ala. 457.

278. In an action on a mercantile account, plaintiff's books are not admissible evidence for him, except by the defendant's consent. *Godbold v. Blair & Co.*, 27 Ala. 592.

279. The original entries in a physician's books are competent evidence for him, (Code, § 2298,) to prove the items of his account for medicines furnished and administered to his patients in the course of his practice; but the value of the medicines, as well as of the active services rendered, must be otherwise proved. *Richardson v. Dorman's Executrix*, 28 Ala. 679.

2. *Examination under Statutes.*

280. In an appeal case from a justice's court, the amount in controversy being less than $20, the defendant is not deprived of the right to testify by the plaintiff's failure to be present at the trial. *Wheeler v. Stockdale*, 22 Ala. 658.

281. In such case, both parties being competent witnesses for every purpose, it is discretionary with the court to permit the plaintiff to be re-examined for the purpose of rebutting the testimony of one of the defendant's witnesses. *Stein v. McArdle & Waters*, 24 Ala. 344.

282. When the plaintiff seeks to establish "the correctness of his demand" by his own oath, (Code, § 2313,) he must not only state facts which, if proved by other witnesses, would make out a *prima-facie* case of indebtedness to him on the part of the defendant, but must also swear to the fact of non-payment; and, if he fails to do this, it is not erroneous to exclude from the jury all his testimony. *Jordan v. Owen*, 27 Ala. 152.

283. In a bastardy proceeding, (Code, § 3807,) the mother and putative father of the child both being examined on the trial, their testimony must be weighed by the jury like that of other witnesses. *Satterwhite v. The State*, 28 Ala. 65.

As to interrogatories in aid of discovery, *vide supra*, 73–83.

XII. PRESUMPTIONS.

1. *Continued Existence of Fact.*

284. When a person, offered as a witness for an incorporated company, is shown to have been one of its stockholders three years before the trial, it will be presumed that he continued to be a stockholder at the time of the trial. *Montgomery & Wetumpka Plank Road Co. v. Webb*, 27 Ala. 618.

285. In an action against the father, for goods furnished to his minor son while at school, the son's authority to bind his father by such contracts being once shown to exist, the lapse of fifteen months is not sufficient to overcome the presumption of the continuance of that authority, when it appears that the son was absent from the place during all that time. *McKenzie v. Stevens*, 19 Ala. 691.

286. On the settlement of a guardian's accounts in the probate court, his receipt of money at a particular time being shown, and there being no evidence whatever of any disposition having been made of it, it is a question for the jury whether it continued in his possession until a particular subsequent time; but, when there is also evidence tending to show that he had used it prior to that subsequent time, such presumption cannot be indulged for the purpose of charging a surety with it. *Williams and Wife v. Harrison*, 19 Ala. 277.

287. Issue being joined on a replication to the statute of limitations, proof of the non-residence of the defendant at the time the contract was made, or the cause of action accrued, raises the presumption of his continued absence from the State, and throws on him the *onus* of showing when it ceased. *State Bank v. Seawell*, 18 Ala. 616.

288. A domicile, once acquired, is presumed to continue until a new one is gained. *Glover v. Glover*, 18 Ala. 367.

289. The presumption of the loss of a written instrument, being once established by proof of proper search for it, will continue until some evidence is adduced of its having been since found. *Poe v. Dorrah*, 20 Ala. 288.

290. A deposition, taken twelve days before the trial, on the ground of sickness and general infirmity, may be read in evidence, when there is no evidence that the witness has since recovered. *Worthy, Brown & Co. v. Patterson*, 20 Ala. 172.

2. *From Lapse of Time.*

291. By analogy to the principles of the common law, which presumed the satisfaction of a judgment after the expiration of twenty years, the presumption of payment arises in favor of an executor or administrator, if the parties interested in the estate allow that period to elapse, from the time when they might have called him to a settlement, without taking any steps to compel a settlement. *Rhodes v. Turner and Wife*, 21 Ala. 210.

292. When an order of sale, made by the orphans' court, does not appear on its face to have been granted on the application of the administrator, that fact will be presumed after the lapse of twenty years. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

293. Where the record shows an irregular final settlement of an estate, it will be presumed, after the lapse of twenty years, that the necessary notices were given, and that the parties interested were present. *Barnett's Executor v. Tarrence*, 23 Ala. 463.

294. The legal appointment and qualification of an executrix may be presumed, after the lapse of twenty years, from the existence and production of the will and its probate; an inventory and appraisement of the estate, purporting on its face to have been made under the authority and sanction of the court; and proof that the executrix acted as such, from the testator's death until her own, paid the debts of the estate, kept the property together under the will, and exercised ownership and control over it; that the heirs and legatees acquiesced in her acts with reference to the property for more than twenty years; and that the records of the probate court of the county, for a series of years about that time, were loosely kept. *Gantt's Adm'r v. Phillips*, 23 Ala. 275.

295. A judgment, rendered by a

justice of the peace before the adoption of the Code, upon which an execution was issued within a year, and returned "no property found," is not presumed satisfied after the lapse of more than ten years without the issue of another execution. *Shelley v. Graves*, 29 Ala. 385.

296. Where a mortgage, given to secure an accommodation endorser in bank, became forfeited in 1838, while the bank debt was extended, from time to time, until 1842, and reduced to judgment in 1843 ; the balance due on the judgment being paid by the mortgagee in January, 1845,—*held*, that the mortgage debt could not be presumed satisfied, at least until the expiration of six years from the time of this payment. *Boyd v. Beck*, 29 Ala. 703.

297. A deed, more than thirty years old, and having nothing suspicious about it, is presumed to be genuine, without express proof; and, when found in the proper custody, and corroborated by enjoyment under it, or by other equivalent explanatory evidence, is allowed to prove itself. *Carter v. Doe d. Chaudron*, 21 Ala. 72.

298. Where defendant shows a letter from plaintiff's ancestor, directing his agent to close a bargain for the sale of land ; a deed thereupon executed by the agent, in his own name, to defendant's vendor, and an uninterrupted possession of twenty-eight years,—the court may instruct the jury, that they may presume a conveyance from plaintiff's ancestor, either to the agent, or to the purchaser. *Harvey and Wife v. Thorpe*, 28 Ala. 250.

3. *Other Cases.*

299. When two persons account together, and one gives his note or due bill for the balance found against him, the legal presumption is that this balance is the true one ; but this presumption may be rebutted, by proof that the balance was struck on a partial accounting. *Mills v. Geron*, 22 Ala. 669.

300. Where a receipt for a claim on a third person states that the claim is to be placed to the credit of a certain judgment, the presumption is that the claim is received as an absolute payment of the judgment, *pro tanto ;* and this presumption is not rebutted, by proof that such third person was insolvent at the time, and that no portion of the claim could have been collected from him. *Pharis v. Leachman*, 20 Ala. 662.

301. A receipt is evidence, on proof of the signature and death of the person by whom it was given, both of the fact of payment, and of the person by whom it was made. *Upson v. Raiford*, 29 Ala. 288.

302. A receipt, signed by a duly authorized agent of the creditor, in connection with proof his signature, and of the removal of both principal and agent from the State, is presumptive evidence of the payment, on the settlement of an administrator's accounts. *McCreliss' Distributees v. Hinkle*, 17 Ala. 459.

303. But the mere production of a receipt, purporting to be signed by the creditor, without proof of the signature or the validity of a debt, is not sufficient to authorize the allowance of a credit for the payment. *Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27.

304. Where a receipt bears date five days anterior to a note, and is for a different amount, the court cannot, in the absence of evidence explaining the incongruities, infer that they were given for the same debt. *Hollingsworth v. Martin*, 23 Ala. 591.

305. On settlement of partnership accounts, the books of the firm, to which all the partners have had free access, are admissible evidence for and against each partner, and the entries therein must be presumed correct. *Desha & Sheppard v. Smith*, 20 Ala. 747.

306. A note, on which suit is brought in the name of the payee for the use of another person, imports a consideration, unless its execution is denied by a sworn plea ; and this presumption is not repelled, by showing that the payee "never was the owner of the note, and never put it in circulation, nor authorized it to be done." *Bird v. Wooley*, 23 Ala. 717.

307. An instrument under seal, which is set up as a defense, does not import a consideration. *Keep v. Kelly & Levin*, 29 Ala. 322.

308. A promissory note, executed by a child to his father, is not, of itself, evidence of an advancement. *Grey's Heirs v. Grey's Adm'rs*, 22 Ala. 233.

309. But the receipt of either money or property by a child, from its father, is presumptive evidence of an advancement, unless such presumption is repelled by the nature of the property, or by some other circumstances showing that it could not have been so intended. *Smith v. Smith's Adm'rs*, 21 Ala. 761.

310. Slaves, sent by a father to his daughter's house on her marriage, are presumed to be intended as a gift, or advancement, unless a different intention is expressed at the time. *Williams v. Maull*, 20 Ala. 721; *Burnett v. Branch Bank at Mobile*, 22 Ala. 642; *Rumbly v. Stainton and Wife*, 24 Ala. 712.

311. The same presumption arises, but is not so strong, in case of a daughter who has been long married. *Merriweather v. Eames*, 17 Ala. 330.

312. Such presumption is rebutted, by proof of an understanding between the father and his son-in-law, that the slaves were intended for the wife, and would be secured by deed of trust to her and her children. *Gunn v. Barrow*, 17 Ala. 743.

313. The husband's continuous possession, for five years, of slaves placed in his posssesion by his father-in-law, raises the presuption of a gift, unless rebutted by satisfactory evidence. *Pharis v. Leachman*, 20 Ala. 662.

314. Possession is presumptive evidence of ownership. *Sparks v. Rawls*, 17 Ala. 211; *Whitsett, Garner & Co. v. Slater*, 23 Ala. 626; *Governor v. Campbell*, 17 Ala. 566.

315. Where two persons are in the joint possession of property, the law will refer the possession to him alone who has the title. *Governor v. Campbell*, 17 Ala. 566.

316. When slaves go into the possession of the father, under a gift to his minor children, who reside with him, his possession will be referred to their title. *McCoy v. Odom*, 20 Ala. 502.

317. The possession of husband and wife, under a gift to the separate use of the wife, will be referred to her title. *Michan and Wife v. Wyatt*, 21 Ala. 813.

318. When a deed is made to two persons jointly, the presumption is that they are equally interested. *Long v. McDougald's Adm'r*, 23 Ala. 413.

319. A party found in possession of land, without any evidence of title or adverse claim, will be presumed to hold in subordination to a prior occupant, who is shown to have exercised acts of ownership. *McCall v. Doe d. Pryor*, 17 Ala. 533.

320. A defendant in trover, who fails to give any account of the manner in which he acquired the property, will be presumed to hold it from or under the person who is shown to have last had the possession. *Barnes & Barnes v. Mobley*, 21 Ala. 232.

321. The fact that the items of an account are not chaged in the order of their dates, does not raise any legal presumption against its correctness. *Ross v. Pearson*, 21 Ala. 473.

322. The fact that a note, taken by the trustees of a bank in process of liquidation, is made "negotiable and payable at said bank," does not raise a legal presumption that it was discounted, instead of being taken in settlement of a debt due. *Savage & Darrington v. Walshe & Emanuel*, 26 Ala. 619.

323. When two persons sign their names to a note, they will be presumed to be joint makers. *Johnson and Wife v. King*, 20 Ala. 270; *Camp v. Dill*, 27 Ala. 553.

324. If a married woman, having a separate personal estate, gives her written obligation for the payment of money, it will be presumed that she thereby intended to charge that estate. *Ozley v. Ikelheimer*, 26 Ala. 332.

325. If the husband conveys property to the wife, or agrees to settle it on her, it will be presumed to be intended for her separate use. *Andrews v. Andrews*, 28 Ala. 432; *McWilliams v. Ramsey*, 23 Ala. 813; *Williams v. Maull*, 20 Ala. 720.

326. Proof of filiation raises the presumption of legitimacy, except when the evidence by which filiation is established also proves illegitimacy. *Weatherford v. Weatherford*, 20 Ala. 548.

327. Proof of cohabitation raises the presumption of an actual marriage; but this presumption is rebutted, by

proof of a subsequent permanent separation between the parties, without any apparent cause, and the marriage of one of them within a short time afterwards. *Ib.*

328. In this State, the presumption of slavery arises from color indicating African descent. *Field v. Walker*, 17 Ala. 80; *Becton v. Ferguson*, 22 Ala. 599.

329. But this presumption may be rebutted otherwise than by proof of emancipation. *Becton v. Ferguson*, 22 Ala. 599.

330. In an action for a breach of warranty of the soundness of a slave, plaintiff having examined as a witness a physician who had been practicing eleven or twelve years, and who had given the slave a thorough examination, his failure to call also another physician, who had been practicing seventeen or eighteen years, and who had been attending on the slave a short while before the other was called in, but had removed to an adjoining county, does not justify any inference against him. *Patton & Burgen v. Rambo*, 20 Ala. 485.

331. If a plaintiff in equity, seeking to have an absolute deed declared a mortgage, fails to examine the subscribing witnesses to the deed, to prove what transpired at the time of its execution, the fair presumption is, that their testimony would militate against him; and such failure casts a shade of suspicion on his cause, which will induce the court to regard with greater jealousy, and examine with stricter scrutiny, the less convincing proof on which he relies. *Bryan & McPhail v. Cowart*, 21 Ala. 92.

332. The fact that a witness, whose deposition is taken on interrogatories, fails to produce a letter which he is required to attach to his answers, does not justify any inference prejudicial to the party by whom his deposition was taken. *Jewell v. Center & Co.*, 25 Ala. 498.

333. The relation of landlord and tenant may be presumed from the conduct of the parties towards each other, and with reference to the lands which are the subject of the rent. *Rainey v. Capps*, 22 Ala. 288.

334. An attorney will be presumed to have read a declaration, to which pleas are filed in the name of the firm of which he is a partner. *Parsons v. Boyd*, 20 Ala. 112.

335. When the record of the proceedings of the corporate authorities of a city, relative to the assessment of taxes and the other matters connected with a sale, does not show that a meeting of the board of assessors was held, as required by the charter, for the purpose of sanctioning and correcting the assessment, the fact that such meeting was held cannot be presumed from the mere advertisement of the mayor calling it, nor from the fact that a sale of certain taxable property, assessed to persons unknown, was ordered by the city council. *Parker v. Doe d. Burgen & Pearsall*, 20 Ala. 251.

336. The fact that a person is frequently seen purchasing groceries from the only grocer in the village, does not warrant the presumption that he purchased his entire supply from him. *Scott v. Coxe's Adm'rs*, 20 Ala. 294.

337. An undisturbed and peaceable occupancy of premises by one of two tenants in common, for nearly thirty years, under an exclusive and notorious claim of title, without any payment of rents and profits, or any acknowledgment of the rights of his co-tenant, raises the presumption of an actual ouster. *Johnson v. Toulmin*, 18 Ala. 50.

338. The mere fact that a bailee claims the property, publicly and notoriously, under an adverse title, does not raise a presumption of adverse possession against his bailor, unless brought to the knowledge of the latter. *Benje v. Creagh's Adm'r*, 21 Ala. 151; *Knight v. Bell*, 22 Ala. 198.

340. That a steamboat engineer is regularly licensed, is presumptive evidence of his competency. *Walker v. Bolling*, 22 Ala. 294.

341. In case for a malicious prosecution, the presumption of malice arises from proof of the want of probable cause. *Long v. Rodgers*, 17 Ala. 540; *S. C.*, 19 Ala. 321; *Marshall v. Betner*, 17 Ala. 832; *Ewing v. Sanford*, 21 Ala. 157.

342. The judgment of the magistrate, ordering the commitment of the accused, is presumptive evidence of probable cause. *Ewing v. Sanford*, 19 Ala. 605.

343. The dismissal of a chancery

suit, for want of prosecution, is presumptive evidence that a writ of seizure therein sued out was wrongfully obtained. *Zeigler & Hall v. David*, 23 Ala. 127.

344. And that the defendant is entitled to recover back money collected under a decree, which was reversed on error. *Crocker and Wife v. Clement's Adm'r*, 23 Ala. 296.

345. A sheriff's return on a *fi. fa.*, showing its levy on certain negroes as the property of the defendant therein, raises the presumption that they were liable to satisfy the writ; but, when ruled for failing to make the money, he may rebut this presumption, by showing that they were free, and were discharged as such under a writ of *habeas corpus*. *Union Bank of Tennessee v. Benham*, 23 Ala. 143.

346. It being shown that the husband permitted his wife to take her children to another State, and there enter into business for their support and maintenance; and that he never became a resident of that State, and never asserted any claim to rights and property which the wife there acquired by her industry,—the presumption arises that he assented to her agency: *Roland v. Logan*, 18 Ala. 307.

347. Where it was shown that the wife, after her husband had gone to California, continued to carry on his business, (a bakery,) and sold a part of the furniture and fixtures, taking notes payable to herself, which she afterwards transferred,—*held*, that these facts did not amount to presumptive evidence of her agency. *Krebs v. O'Grady*, 23 Ala. 726.

348. The husband's assent to an arrangement, entered into between his wife and her brothers and sisters, respecting the division of their father's estate, cannot be presumed, in the absence of evidence that it was beneficial to him, or that he assented to or ratified it, or that his wife was accustomed to act as his agent. *Whitworth and Wife v. Hart*, 22 Ala. 343.

349. A payment by the father, without objection, of an account contracted by his minor son while attending school at a distance from home, is presumptive evidence of the son's authority thus to bind him in future. *McKenzie v. Stevens*, 19 Ala. 691.

350. The presumption arising from the face of a title-bond, conditioned that titles shall be made so soon as a patent shall have been obtained from the United States, is, that the purchase-money has been paid. *Burns v. Taylor*, 23 Ala. 255.

351. When a deed or bond is found in the possession of the grantee or obligee, the presumption is that it was delivered to him. *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

352. It being shown that a testator, at the time of his death, was seized and possessed of a large estate, consisting of both real and personal property, which went into the hands of his executor, who administered on the estate for nearly twelve years, and, at his death, left a large portion of the assets unadministered,—*held*, that equity would presume the retainer, and consequent extinguishment, of a debt due from the testator to the executor. *Kimball v. Moody*, 27 Ala. 130.

353. The mortgagor's retention of possession, after the law-day of the mortgage has passed, is not presumptive evidence either of fraud or of payment of the mortgage debt. *Steele v. Adams*, 21 Ala. 534.

354. The retention of possession by the vendor of a chattel, unexplained, is presumptive evidence of fraud. *Millard's Adm'rs v. Hall*, 24 Ala. 189; *Upson v. Raiford*, 29 Ala. 188.

355. But this rule does not apply to public sales on notice. *Montgomery's Executors v. Kirksey*, 26 Ala. 172.

356. A husband, in resisting the probate of his wife's will, can claim no advantage from any obscurity or uncertainty in the secondary evidence adduced of the contents of an antenuptial agreement between him and his wife, when the paper produced by him, on notice, is materially different from that to which the witnesses depose, and there is evidence of his declaration that he had burned the marriage contract: the maxim, that all things are to be presumed *contra spoliatorem*, applies in such case. *Wells v. Bransford*, 28 Ala. 200.

357. Parties are presumed to be in court, from the time the original process is served, until the final judgment. *Yonge v. Broxson*, 23 Ala. 684.

358. They are also presumed to know when and where the court is to be held. *Ib.*

359. Every man is presumed to know the law. *Erwin v. Hamner*, 27 Ala. 296.

360. The common law is presumed to exist in another State, except so far as it is shown to have been repealed or modified by statute. *Hinson v. Wall*, 20 Ala. 298; *Ellis v. White*, 25 Ala. 540; *Foster v. Glazener*, 27 Ala. 391; *Reese v. Harris*, 27 Ala. 301.

As to presumptions in favor of the regularity of the proceedings of the primary court, which the appellate court will indulge, *vide* ERROR AND APPEAL, 145–172, pp. 572–3.

XIII. PRIMARY AND SECONDARY.

1. *General Rule as to Production of Best Evidence.*

361. Secondary evidence cannot be received, as to the contents of a deed or other written instrument, until the absence of the instrument itself is satisfactorily explained. *Kidd & Co. v. Cromwell, Haight & Co.*, 17 Ala. 648; *Wiswall v. Knevals, Hall & Townsend*, 18 Ala. 65; *Hooks v. Smith*, 18 Ala. 338; *Yarbrough v. Hudson*, 19 Ala. 653; *McDade v. Mead*, 18 Ala. 214; *Smelser v. Drane*, 19 Ala. 245; *Boykin, McRae & Foster v. Collins*, 20 Ala. 230; *Allen v. Smith*, 22 Ala. 416; *Millard's Adm'rs v. Hall*, 24 Ala. 209; *Hussey v. Roquemore*, 27 Ala. 281.

362. In an action for the price of goods, wares and merchandize sold and delivered, a witness cannot testify that the goods were shipped and forwarded by the defendant's written instructions, unless the writing itself is produced, or its absence satisfactorily explained. *Boykin, McRae & Foster v. Collins*, 20 Ala. 230.

363. A witness cannot testify to the foreclosure and sale of mortgaged premises, since the record itself is the best evidence. *Doe d. Kennedy's Heirs v. Reynolds*, 27 Ala. 364.

364. Nor to the existence of title by deed or patent, until the proper predicate has been laid for the introduction of secondary evidence. *Hussey v. Roquemore*, 27 Ala. 281.

365. But he may testify to the existence of notes or bills of exchange, or to the fact that a debtor made a written proposition of compromise, without either producing the writing, or accounting for its absence. *Snodgrass v. Branch Bank at Decatur*, 25 Ala. 161.

366. He may also testify to the value of certain goods conveyed by deed of assignment, although he had made out a written invoice, or schedule, six or seven weeks prior to the assignment. *O'Neal v. Brown*, 20 Ala. 510.

367. The grant of administration, which is a judicial fact, cannot be proved by a party's admissions on oath in another case. *Shorter v. Urquhart*, 28 Ala. 360.

368. The president's approval of a contract for the sale of an Indian reservation, cannot be proved by the mere certificate of the secretary of war, not under the seal of his department, endorsed on the contract. *Doe d. Tillman v. Long & Freeman*, 29 Ala. 376.

369. A written contract of sale, containing a warranty of soundness, is the highest and best evidence of that warranty. *Brown v. Jones*, 24 Ala. 463.

370. When the writing itself, if produced, would not be competent evidence of the fact to which it relates, parol evidence of the same fact may be received. *Sparks v. Rawls*, 17 Ala. 211.

371. The sheriff's return on a writ is the best and highest evidence of its execution. *Martin v. Barney*, 20 Ala. 369; *McDade v. Mead*, 18 Ala. 214.

372. Or a certified transcript of it, if it has been recorded. *McDade v. Mead*, 18 Ala. 214; *Smelser v. Drane*, 19 Ala. 245.

373. A memorandum on the margin of the execution docket, in the handwriting of the clerk, is not competent evidence of the issue and return of an execution, until its existence at one time and subsequent loss are first proved. *Hanna v. Price*, 23 Ala. 826.

374. The sheriff's return on the copy of an execution, sent from an adjoining county, is competent evidence of itself, like his return on an original execution. *Lanier v. Branch Bank at Montgomery*, 18 Ala. 625.

375. A note which is not the foundation of the suit, and is not in the possession or control of the party himself, may be shown by parol to

have been executed in the firm name of a partnership. *Dixon v. Barclay*, 22 Ala. 370.

376. Parol evidence cannot be received, to show that a meeting of the board of assessors was held, for the purpose of correcting and sanctioning the assessment of city taxes, as required by the charter, as a preliminary to the sale of land for taxes. *Parker v. Doe d. Burgen & Pearsall*, 20 Ala. 251.

377. The contents of a judgment rendered by a justice of the peace, and the proceedings therewith connected, cannot be proved by the defendant's parol admissions, until it has been shown that the better evidence cannot be produced. *Ware v. Roberson*, 18 Ala. 105.

378. Secondary evidence cannot be received, until it is shown that the primary cannot be produced; but evidence of a primary character cannot be excluded, because more conclusive evidence might have been offered. *Patton & Burgen v. Rambo*, 20 Ala. 485.

379. In an action for a breach of warranty of the soundness of a slave, plaintiff having examined as a witness a physician who had been practicing eleven or twelve years, and who had given the slave a thorough examination, his failure to call also another physician, who had been practicing seventeen or eighteen years, and who had been attending on the slave a short time before the other was called in, but had removed to an adjoining county, does not justify any inference against him, since it does not appear that the testimony of the absent physician would be better than that of the other. *Ib.*

380. A merchant's books, conceding their admissibility as evidence for him, are not higher or better evidence than the oral testimony of his clerk, who swears to the sale and delivery of the articles, although he cannot recollect their dates, and has never compared the account with the books. *Godbold v. Blair & Co.*, 27 Ala. 592.

381. If the subscribing witnesses to a deed have left the State, or are incompetent from interest, proof of the handwriting of the grantor alone is sufficient to admit it in evidence. *Cox v. Davis*, 17 Ala. 714.

382. If the subscribing witness resides beyond the limits of the State, it is admissible in evidence on proof of his signature. *Foote and Wife v. Cobb*, 18 Ala. 585.

383. A party's parol admissions are competent evidence of the contents of a lost deed, after a sufficient predicate has been laid for the introduction of secondary evidence. *Fralick v. Presley and Wife*, 29 Ala. 457.

384. A memorandum, made by a justice of the peace at the time of the trial of a prosecution before him, showing the judgment rendered by him, is competent evidence of the termination of the prosecution. *Long v. Rodgers*, 19 Ala. 321.

385. If a party permits secondary evidence to be given against him in the primary court, without objection, he cannot complain of it on error. *Beattie v. Abercrombie*, 18 Ala. 9.

386. As a general rule, if a party is present at the taking of a deposition, and allows secondary evidence to be received, he cannot afterwards raise an objection to it; but, when the deposition is taken on interrogatories, which do not call for secondary evidence, an objection to the admissibility of such evidence may be raised on the trial, although the deposition was in the possession of the party's counsel for twenty-four hours before that time. *Boykin, McRae & Foster v. Collins*, 20 Ala. 230.

387. When a party has introduced, without objection from his adversary, parol evidence of the contents of a deed, and the witness has been cross-examined touching the same matter, it is discretionary with the court to exclude the evidence. *Allen v. Smith*, 22 Ala. 416.

388. When a party elicits, on cross-examination of a witness, parol evidence of judicial proceedings, which constitutes new matter, and is directly responsive to the interrogatory; and afterwards declines, on the trial, to read the answers to the cross-interrogatories,—he cannot, when his adversary offers to read them, raise the objection, that the record was not produced, nor its absence accounted for. *Thomas v. Henderson*, 27 Ala. 523.

389. Although the registration of a title-bond is neither authorized nor required by statute, yet, on proof of

its loss, and the production of a copy taken by the clerk before whom it was acknowledged, its execution and contents may be established by the clerk. *Rowland v. Day*, 17 Ala. 681.

2. *Laying Predicate for Secondary Evidence.*

390. Secondary evidence of the contents of an execution is admissible, upon proof that it was returned to the clerk's office, and that diligent search was there made for it, both by the clerk and the party's attorney. *Poe v. Dorrah*, 20 Ala. 288.

391. Where a witness testified, that the grantor or his wife, both being present, handed him a paper, saying, "There is a deed I intend for my daughter P." ; that he read it, and then returned it to the grantor ; and that he could only recollect the words, "I give to my daughter P. my negro woman Penny, and to the heirs of her body,"—*held*, that the evidence was admissible, it being shown that the deed could not be found, and the party in whose possession it was presumed to be having failed, after notice, to produce it. *Mims' Executors v. Sturtevant*, 18 Ala. 359.

392. Secondary evidence of a deed is not admissible, upon proof that the executor of the grantee had searched for it, and had not been able to find it; that the grantee's son, after his father's death, had carried off to a place in the country, where his father had been living, a trunk containing his papers, which the executor had not searched ; and that the executor had made verbal application to the son, both for the trunk and for the deed. *Tannis v. Doe d. St. Cyre*, 21 Ala. 449.

393. In a suit to which the grantee is a party, the non-residence of the grantor does not, *per se*, authorize the introduction of secondary evidence of its contents : the grantee, or other person in whose possession the deed is presumed to be, must be first notified to produce it, or its loss or destruction must be proved. *Hussey v. Roquemore*, 27 Ala. 281.

394. Where the deed under which plaintiff claimed the slave in controversy was more than twenty years old, and was proved to have gone into the possession of defendant's testator, who declared his intention to keep the slave for the grantee until her marriage, but died before that time ; and the defendant, who was one of his executors, failed to produce the deed on notice,—*held*, that this was a sufficient predicate for the introduction of secondary evidence. *Fralick v. Presley and Wife*. 29 Ala. 457.

395. To authorize the admission of secondary evidence of the contents of an order of sale, made by the court, its existence should be first proved, and its absence accounted for, or its loss established, after the requisite searches had been made for it in the proper office. *Millard's Adm'rs v. Hall*, 24 Ala. 209.

396. The contents of an attachment may be established by secondary evidence, on proof of its loss. *Derrett v. Alexander*, 25 Ala. 265.

397. A transcript from the records of the court of ordinary in Georgia, recognizing a person as administrator, cannot be received to show a previous grant of letters to him, on proof of the destruction of the records by fire, without evidence also showing the jurisdiction of the court. *Shorter v. Urquhart*, 28 Ala. 360.

3. *Conclusiveness and Effect of Secondary Evidence.*

398. The rule established by the current of American authorities, which requires a party to produce the best secondary evidence in his power, is more reasonable than the English rule, which recognizes no degrees of secondary evidence ; but, whenever this rule is invoked against a party, he is permitted to show that what appears to be is not in fact a higher degree of secondary evidence. *Harvey and Wife v. Thorpe*, 28 Ala. 250.

399. A record copy of a lost deed, or a transcript from the record, is only presumptive evidence of the contents of the deed, on the ground that all public officers must be presumed to have discharged the duties required of them by law ; but parol evidence is admissible, to show that it was not correctly recorded. *Ib.*

400. A certified transcript of a judg-

ment is only presumptive evidence of the judgment itself, and does not preclude the party against whom it is offered from showing the true amount, either by another transcript properly certified, or by copies connected with parol proof of their correctness. *Pryor v. Beck*, 21 Ala. 393.

401. A husband, in resisting the probate of his wife's will, can claim no advantage from any obscurity in the secondary evidence adduced of an ante-nuptial agreement between him and his wife, when the paper produced by him, on notice, is materially different from that to which the witnesses depose, and there is evidence of his declaration that he had burned the marriage contract. *Wells v. Bransford*, 28 Ala. 200.

XIV. PROVINCES OF COURT AND JURY.

402. Where the admissibility of evidence depends on the existence of a preliminary fact, it is the duty of the court to decide whether that fact exists; but the question may, at the discretion of the court, be submitted to the jury. *Scott v. Coxe's Adm'rs*, 20 Ala. 294.

403. When there is no evidence tending to prove a particular fact, the court may so instruct the jury. *Knox v. Fair*, 17 Ala. 503; *Jewell v. Center & Co.*, 25 Ala. 498.

404. But, where many witnesses are examined orally, and the facts detailed by them are numerous, such a charge may be refused. *Knox v. Fair*, 17 Ala. 503.

405. The construction of an order of sale, made by the orphans' court, is a question for the court, to be determined from an inspection of the record alone, without the aid of extrinsic evidence as to its meaning. *Wyatt's Adm'r v. Steele*, 26 Ala. 639.

406. The law-merchant is matter for the court to decide, and cannot be proved by witnesses. *Jewell v. Center & Co.*, 25 Ala. 498.

407. When the boundary lines of a grant are fixed by the grant itself, it is the duty of the court to decide what the lines are. *Mogee v. Doe d. Hallett & Walker*, 22 Ala. 699.

408. Where the words relied on to take a case out of the statute of limitations, amount in law to an express promise, the court may instruct the jury as to the legal effect of the words. *Evans v. Carey*, 29 Ala. 99.

409. It is the exclusive province of the jury to determine the credibility and sufficiency of the evidence. *Waters v. Spencer*, 22 Ala. 460; *Brooks v. Hildreth & Moseley*, 22 Ala. 469; *Knight v. Bell*, 22 Ala. 198; *Whitsett, Garner & Co. v. Slater*, 23 Ala. 626; *Woolfork's Adm'r v. Sullivan*, 23 Ala. 548; *McGonegal v. Walker*, 23 Ala. 361; *Tarleton & Pollard v. Johnson*, 25 Ala. 300; *Freeman v. Scurlock*, 27 Ala. 407; *McKenzie v. Branch Bank at Montgomery*, 28 Ala. 606; *Foust v. Yielding*, 28 Ala. 658; *Hudson & Stokes v. Weir & Tate*, 29 Ala. 294; *Allman v. Gann*, 29 Ala. 240; *Cain v. Penix*, 29 Ala. 374.

410. And to draw an inference of fact. *Knight's Adm'rs v. Vardeman*, 25 Ala. 262; *King v. Pope*, 28 Ala. 601; *Stanley v. Nelson*, 28 Ala. 514; *Crum v. Williams*, 29 Ala. 446; *Lawler v. Norris*, 28 Ala. 675.

XV. RECORDS AND JUDGMENTS.

1. *Admissibility and Effect as regards Parties and Subject-Matter.*

411. A record is not evidence of any fact which can only be inferred from it by argument. *McCravey v. Remson*, 19 Ala. 430; *Miller v. Jones' Adm'r*, 29 Ala. 174.

412. Therefore, in detinue by an executor, for a slave belonging to his testator's estate, the record of a chancery suit, instituted by him for a settlement of the estate, is not admissible evidence for him, to show that the slave had been charged to him as the property of the estate. *McCravey v. Remson*, 19 Ala. 430.

413. An inventory, made pursuant to the laws of Louisiana, on a widow's petition to be allowed to renounce the community of acquits and gains between her and her late husband; including no slaves, and stating that the property specified was shown by the widow, and that no other property was shown,—is not admissible evidence for the purchaser of a slave at sheriff's sale against a distributee, when sued by the husband's administrator, "to show that the husband had

no title to the slave." *Miller v. Jones' Adm'r*, 29 Ala. 174.

414. On the trial of an issue contesting the answer of a garnishee, the record of a judgment recovered by the defendant against the garnishee, subsequent to the service of the garnishment, is admissible evidence for the plaintiff, to show the recovery of such judgment, and the time of its rendition. *Harrell v. Whitman*, 20 Ala. 519.

415. A record is admissible evidence against an attorney, to prove notice to him of the plaintiff's title as set out in the declaration, when the pleas were filed in the name of a firm of which such attorney was a partner. *Parsons v. Boyd*, 20 Ala. 112.

416. In case for a malicious prosecution for the larceny of a slave, which the plaintiff afterwards recovered from the prosecutor in an action at law, the record of that suit is admissible evidence for the plaintiff. *Ewing v. Sanford*, 21 Ala. 157.

417. On the trial of a statutory claim suit, the record of the plaintiff's judgment against the defendant in execution is irrelevant and inadmissible. *Taliaferro v. Lane*, 23 Ala. 369.

418. Where the claimant derives title under a purchase from the defendant in execution, the record of a judgment recovered against the defendant, subsequent to his sale to the claimant, is not admissible evidence, to prove an indebtedness prior to its rendition. *Snodgrass v. Branch Bank at Decatur*, 25 Ala. 161.

419. The claimant's purchase being attacked for fraud, and it being shown that the slaves remained in his possession about four years from the date of the bill of sale, and were afterwards found in the possession of the defendant,—*held*, that a transcript of a decree, discharging the defendant as a bankrupt, and rendered a few months before the slaves were found in his possession, was admissible evidence for the plaintiff, to show the fact and date of such discharge, and the period intervening between that time and the slaves' return to the defendant's possession. *Ib.*

420. The sheriff's endorsement on a *fi. fa.* is admissible evidence against the claimant, for the purpose of showing its levy on the slave in controversy. *Thomas v. Henderson*, 27 Ala. 523.

421. In an action on an injunction bond, the record of the chancery suit, showing the dismissal of the bill, is admissible, but not conclusive evidence, as to the vexatious suing out of the writ. *Garrett & Hill v. Logan*, 19 Ala. 344.

422. In an action on a *ne-exeat* or writ-of-seizure bond, the record of the chancery suit, showing the dismissal of the bill for want of prosecution, is presumptive, but not conclusive evidence, that the writ was wrongfully sued out. *Zeigler & Hall v. David*, 23 Ala. 127.

423. In case for a malicious prosecution, the judgment of the magistrate, ordering the commitment of the accused, is presumptive, but not conclusive evidence, on the question of probable cause. *Ewing v. Sanford*, 19 Ala. 605.

424. In case for wrongfully and maliciously suing out an attachment, the defendant is not estopped, by the fact that judgment was rendered against him in the other suit, from proving that the debt on which his suit was founded was actually due. *Marshall v. Betner*, 17 Ala. 832.

425. Nor is such judgment conclusive, in a subsequent action on the bond, as to the wrongful suing out of the writ, when it does not appear to have been rendered on verdict. *Sackett & Shelton v. McCord*, 23 Ala. 851.

426. But a judgment for the claimant of the attached property, on a trial of the right of property under the statute, is conclusive on the attaching creditor, in a subsequent action for damages by the claimant, that the defendant in attachment had no interest in the property. *Roberts v. Heim*, 27 Ala. 678.

427. A recovery against the principal, for his defalcations as secretary of an incorporated company, does not conclude the surety on his official bond, either as to the fact of embezzlement, or as to the amount embezzled. *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

428. An indictment against the principal for the embezzlement, drawn up by the attorney of the company, and at its instance, is admissible evidence

for the surety, in connection with proof that the company had employed counsel to prosecute the principal under it, to identiy the bills and notes therein described, as the subject-matter to which the implied admission of the company related; and an indictment against the principal, prepared and prosecuted in like manner, for the forgery of another surety's name to the bond, is admissible for a similar purpose. *Ib.*

429. A judgment is conclusive as to the fact that the money is due to the plaintiff therein, and not to a third person. *Mervine v. Perkins*, 18 Ala. 241.

430. A judgment on verdict is final and conclusive, between the parties and their privies, as to all points necessarily or actually determined. *Wittick v. Traun*, 25 Ala. 317; *Chamberlain v. Gaillard*, 26 Ala. 504.

431. It is equally conclusive upon one, who, though no party to the record, is shown by parol to have been the real defendant in interest. *Turleton & Pollard v. Johnson*, 25 Ala. 300.

432. A decree in chancery is conclusive, between the parties and privies, as to every fact necessary to be ascertained before the rendition of the final decree. *Hutchinson v. Dearing*, 20 Ala. 798; *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

433. The recitals of the record import absolute verity, and estop the parties from disputing their correctness. *Deslonde & James v. Darrington's Heirs*, 29 Ala. 92; *Beverly v. Stephens*, 17 Ala. 701.

434. Recitals in a judgment or decree are not competent evidence against a stranger to the record. *Rowland v. Day*, 17 Ala. 681.

435. A judgment, quashing a *supersedeas* of an execution, is not conclusive upon parties who assert rights under the defendant in the judgment, anterior in point of time to the proceedings, when it does not appear that the merits of the controversy were determined. *Hanson & Moore v. Patterson*, 17 Ala. 738.

436. In assumpsit to recover the proceeds of a note, placed by plaintiff in defendant's hands for collection, (on which defendant brought suit for his own use, in the name of the payee, and recovered judgment, whereon a *fi. fa.* was issued, and levied on certain personal property, which was purchased at the sheriff's sale by the defendant,) the sheriff's return on the execution, showing the amount of the proceeds of sale, is not conclusive on the plaintiff. *Crow v. Hudson*, 21 Ala. 560.

437. Where a deed of trust, conveying both real and personal property, is found fraudulent and void as against creditors, in a claim suit between a judgment creditor of the grantor and a purchaser under the deed, the claimant is not concluded by that verdict and judgment, as to the *bona fides* of the deed, in a suit subsequently brought against him by a purchaser at sheriff's sale under the same judgment, to recover the lands conveyed by the deed, which the claimant bought at the trustee's sale. *Crutchfield's Heirs v. Hudson*, 23 Ala. 393.

438. Where two attachments, sued out between the same parties, are levied on the same property, and a claim interposed in each case by the same person, a judgment in one case, finding the property subject to the attachment, is conclusive that it is also subject in the other. *Derrett v. Alexander*, 25 Ala. 265.

439. In trespass to try titles, a judgment for plaintiff is conclusive that damages were recovered for the rents accruing up to the time of the verdict; and the fact that the action was brought against a tenant, whose term expired before the rendition of the judgment, makes no difference, if the landlord was brought in as a party. *Shumake v. Nelms' Adm'r*, 25 Ala. 126.

440. In a subsequent action for the rents and profits, a recovery in ejectment or trespass to try titles is conclusive between the parties and their privies, as to the title of plaintiff's lessor. *Ib.*

441. But such recovery is only conclusive as to the term laid in the demise. *Doe d. Kennedy's Heirs v. Reynolds*, 27 Ala. 364.

442. A judgment in detinue is conclusive, as to the title then adjudicated, upon a person who, though no party to the record, is shown by parol to have been the real defendant in the

action; but, as to a title subsequently acquired, from one who was neither a party nor privy to the action, it is not conclusive. *Tarleton & Pollard v. Johnson*, 25 Ala. 300.

443. A recovery in assumpsit for the hire of a slave is not necessarily conclusive as to the question of ownership, unless that question actually arose and was determined. *Chamberlain v. Gaillard*, 26 Ala. 504.

444. On motion to enter satisfaction of a judgment, or to supersede an execution, the judgment is conclusive as to all defenses existing at the time of its rendition. *Matthews v. Robinson*, 20 Ala. 130; *Mervine v. Parker*, 18 Ala. 241.

445. The transcript of a judgment against the husband is not admissible evidence against the wife, in a suit concerning her separate estate, instituted in the name of husband and wife. *Michan and Wife v. Wyatt*, 21 Ala. 813.

446. An endorsee, who acquires a negotiable note, before its maturity, *bona fide*, and for valuable consideration, is not bound by a decree in chancery to which his endorser was a party, although he acquired the note after the rendition of the decree. *Winston v. Westfeldt*, 22 Ala. 760.

As to the conclusiveness and effect of decrees in chancery, *vide* DECREES, II, 52–69, pp. 246–7; and, respecting decrees in probate cases, DECREES, II, pp. 134–8.

2. *Admissibility of Parol.*

447. The contents of a judgment, rendered by a justice of the peace, and the proceedings therewith connected, cannot be proved by a party's parol admissions, until a sufficient predicate has been laid for the introduction of secondary evidence. *Ware v. Roberson*, 18 Ala. 105.

448. Where the date of an attachment is illegible, on account of two figures having been apparently written and blended together, the testimony of the clerk who issued it is admissible, in connection with it, to show that a wrong date had been first written by an attorney, and that he had corrected it. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

449. Parol evidence is admissible, in aid of a record, to show that a particular matter, as to which the record is silent, although the issue was broad enough to cover it, actually arose and was determined. *Strother's Adm'r v. Butler*, 17 Ala. 733; *Chamberlain v. Gaillard*, 26 Ala. 504.

450. And to show that a person, who was no party to the record, was the real party in interest, employed counsel to defend it, and set up his own title through his bailee, who was the nominal defendant. *Tarleton & Pollard v. Johnson*, 25 Ala. 300.

451. And to show that an indictment and civil action, both pending, are founded on the same transaction. *Blackburn v. Minter*, 22 Ala. 613.

452. And, where the validity of a sale, made under an order of the orphans' court, is collaterally impeached, to show the death of the sheriff, who, *ex officio*, was the previous administrator, as a jurisdictional fact on which the court acted in appointing his successor. *Doe d. Saltonstall and Wife v. Riley & Dawson*, 28 Ala. 164.

453. And, where the record shows that issue was joined on several pleas, and that the jury returned a general verdict for the defendant, to show on what plea the cause was decided. *Young v. Fuller*, 29 Ala. 464.

454. But it is not admissible, to impeach or contradict a sheriff's return on a writ. *Martin v. Barney*, 20 Ala. 369.

455. Nor to contradict the recitals of a record. *Deslonde & James v. Darrington's Heirs*, 29 Ala. 92; *Kennedy's Executors v. Doe d. Rochon's Heirs*, 26 Ala. 384.

456. Nor to show that, in an action of trespass to try titles, damages were not recovered for the rents accruing up to the time of the verdict. *Shumake v. Nelms' Adm'r*, 25 Ala. 126.

3. *Authentication.*

457. A transcript of a foreign judgment is not sufficiently authenticated to make it admissible, when it is not made to appear by the certificate of either the clerk or judge that the county in which the proceedings were had was included in the judicial circuit within which the judge presided. *Elliott v. McClelland*, 17 Ala. 206.

458. A transcript from the records of a foreign court, whether of general or special jurisdiction, is admissible evidence in the courts of this State, if properly authenticated. *Slaughter v. Cunningham*, 24 Ala. 260.

459. A certified transcript of a judgment is only presumptive evidence of the judgment itself, and does not preclude the defendant from showing its true amount. *Pryor v. Beck*, 21 Ala. 393.

460. An execution, signed by the clerk, but not certified by him, is not admissible evidence, to prove the amount of a judgment for costs. *Ib.*

461. The books of a notary public, in which he keeps the minutes of his official proceedings, are public records, and a certified copy of them is competent evidence. *Phillips v. Poindexter*, 18 Ala. 579.

462. A transcript from the books or papers on file in the general land-office, or in any one of the bureaus of the different departments, if properly certified, under the seal of the department, by the "acting commissioner," is admissible in evidence. *Stephens v. Westwood*, 25 Ala. 716.

463. A certified copy of a bond, given by the intended husband preliminary to obtaining a marriage license, where the marriage was celebrated in another State, is not admissible evidence here, unless properly authenticated under the act of congress, and shown to have been recorded by statutory requisition. *Martin's Heirs v. Martin*, 22 Ala. 86.

4. *Original Unrecorded Papers.*

464. The original papers in a cause are admissible evidence, when it does not appear that the final record has been made up. *Barron v. Tart*, 18 Ala. 668; *Calvert v. Marlow*, 18 Ala. 67; *Beeson v. Wiley, Banks & Co.*, 28 Ala. 575.

465. The sheriff's return on an execution, which has not been recorded, is admissible evidence, like any other part of a record, without proof of his handwriting. *Barron v. Tart*, 18 Ala. 668.

466. The copy of an execution, sent from another county, executed, and returned, is admissible evidence without other proof than that afforded by the return. *Lanier v. Branch Bank at Montgomery*, 18 Ala. 625.

XVI. RELEVANCY.

1. *Generally.*

467. Facts and circumstances, which are incapable of affording any reasonable inference or presumption relative to a material fact or inquiry involved in the issue, are irrelevant, and, consequently, not competent evidence. *Governor v. Campbell*, 17 Ala. 566.

468. When evidence is *prima facie* irrelevant, it is the duty of the party offering it, to connect it with other facts already proved, or to offer it in connection with facts which he expects to prove. *Bilberry's Adm'r v. Mobley*, 21 Ala. 277; *Ashley's Adm'r v. Robinson*, 29 Ala. 112.

469. The erroneous admission of such evidence is cured by the subsequent introduction of the preliminary proof. *King v. Pope*, 28 Ala. 601; *Ross v. Pearson*, 21 Ala. 473; *Lawson & Swinney v. The State*, 20 Ala. 65; *Johnson v. The State*, 29 Ala. 62.

470. Or by subsequently withdrawing it from the jury, or instructing them to disregard it. *Bilberry's Adm'r v. Mobley*, 21 Ala. 277; *Florey's Executor v. Florey*, 24 Ala. 241; *Thomas v. Henderson*, 27 Ala. 523; *Winter v. Phelan*, 27 Ala. 649.

471. But not by instructing them that, unless there is other evidence to connect it, they must disregard it. *Bilberry's Adm'r v. Mobley*, 21 Ala. 277.

472. When evidence is objected to as irrelevant, the appellate court will only examine the question of its relevancy. *Garrett's Adm'rs v. Garrett & Garrett*, 27 Ala. 687; *King v. Pope*, 28 Ala. 601.

473. Relevant evidence cannot be excluded from the jury on account of its insufficiency. *Brazier & Co. v. Burt*, 18 Ala. 201; *Jones v. Sterns*, 28 Ala. 677; *McCreary v. Turk*, 29 Ala. 244; *Adams and Wife v. Adams*, 29 Ala. 433.

474. Irrelevant evidence may be excluded from the jury, on motion, at any stage of the cause. *Bush & Co. v. Jackson*, 24 Ala. 273; *Pearsall v. Mc-*

Cartney, 28 Ala. 110; *McCreary v. Turk*, 29 Ala. 244.

475. In an action to recover the purchase-money of three slaves, issue being joined on the plea of failure of consideration, evidence of the fact that the vendor, within twelve months immediately preceding the sale, had offered them for $350 less than the price paid by the purchaser, is relevant, as tending to show unsoundness. *Rowland v. Walker*, 18 Ala. 749.

476. The payment by the purchaser of what would be an inadequate price if the animal purchased was sound, is a circumstance to which the jury may look, in connection with other evidence, in determining whether he was informed of the latent unsoundness of the animal. *Armstrong v. Huffstutler*, 19 Ala. 51.

477. In an action to recover the amount of a tavern bill, consisting mostly of items for spirituous liquors, plaintiff having introduced evidence tending to show defendant's admission of the correctness of the account, defendant cannot adduce proof of his habits of sobriety, or that he was frequently at the tavern without drinking at all. *Jones v. Cooper*, 22 Ala. 551.

478. In an action to recover money over-paid by plaintiff to defendant, the fact of over-payment being contested, defendant may show plaintiff's inability to make it; and for this purpose, an unsatisfied mortgage, previously executed by plaintiff, is admissible evidence; also, a letter written by plaintiff to defendant after the making of the alleged over-payment, showing that plaintiff was at that time pressed for money, and had had an interview with defendant the day before it was written, respecting a sum of money which defendant was liable to pay, and claiming of him that sum only; but, if the letter was written before the alleged over-payment was made, it would not be admissible. *Rutherford v. McIvor*, 21 Ala. 750.

479. In an action for the value of services rendered, the fact that the defendant's intestate inserted in a will, executed after the rendition of the alleged services, a clause giving plaintiff certain property on condition that he set up no claim against his estate after his death, is irrelevant evidence, being, at most, a mere offer to purchase peace. *Ex parte Grantland*, 29 Ala. 69.

480. Evidence of a proposition of compromise, and its refusal, is not admissible evidence against the party making it, in a suit concerning the matters in controversy. *Kelly v. Brooks*, 25 Ala. 523.

481. In an action on a contract made in compromise of an existing controversy, evidence of the fact that plaintiffs, at the time the contract was made, "were poor and in destitute circumstances," is not admissible for them. *Adams and Wife v. Adams*, 29 Ala. 433.

482. In an action for slander, evidence of the defendant's wealth is not admissible for the plaintiff. *Ware v. Cartledge*, 24 Ala. 622.

483. The fact that an Indian woman bought clothes for her grandchild, whose parents were dead, and who resided with her, is relevant evidence to show that she was "the head of a family." *Rowland & Heifner v. Ladiga's Heirs*, 21 Ala. 9.

484. In an action to recover for advances made on cotton, which was destroyed by fire while in plaintiff's warehouse, the defense was, that defendant was entitled to recoup for its loss, on the ground that plaintiff had contracted to store it in a fire-proof warehouse. *Held*, that evidence of the fact that a certain aperture in the wall, through which the fire entered, was visible to the defendant, when he had once entered and examined the warehouse after the storing of his cotton, was relevant and admissible for the plaintiff, as tending to show defendant's assent to the storing of his cotton in a warehouse which was not fire-proof. *Gibson v. Hatchett & Brother*, 24 Ala. 201.

485. In such action, defendant may show in what manner a certain other warehouse "was built, that it was not burnt, and the special efforts by which it was saved," if he first proves that it was fire-proof, and was exposed to the same danger as plaintiff's. *Ib.*

486. In case against a municipal corporation, to recover damages for its neglect and breach of duty, in suffering plaintiff's land to be overflowed by the rain-water, which pass-

ed through the sewers in the streets of the city, and accumulated in a ravine emptying into the river, defendant cannot be allowed to prove "that there were other ravines in the city which had increased in size, for the last twenty years, in as great proportion as this ravine had increased." *Gilmer & Taylor v. City Council of Montgomery*, 26 Ala. 665.

487. It being shown that plaintiff had built a wall and embankment on his land, which extended partly across the ravine, and narrowed the channel through which the water flowed into the river, a witness for the defense, who had been engaged for many years in building brick walls and houses, may be asked, "whether he did not tell plaintiff, that if he built said wall in said ravine, it would fall by reason of the flood in said ravine." *Ib.*

488. In case against the owners of a steamboat, to recover damages for the loss of a stage, which was caused by a collision between the steamboat and a ferry-boat on which the stage was crossing the river, the fact that the ferryman of the flat was expert and careful is irrelevant to the issue. *Otis & Jayne v. Thom*, 23 Ala. 469.

489. An eye-witness of the collision testified, that the steamboat, after striking the flat, stopped her engine, and, when about fifty yards from the flat, was called upon by those on board of the latter to come to their assistance; whereupon, some one on board of the steamboat was heard to say, in a loud and commanding tone, "Go ahead, and let her sink,—its nothing but a damned flat-boat any how"; and that the steamboat then went on, without rendering any assistance to the flat. *Held*, that the words stated as having been used on the boat were competent evidence for the plaintiff. *Ib.*

490. Where the question in issue is, whether a sheriff has wrongfully appropriated to his own use property seized by him under legal process, the fact that he purchased it from the defendant after the levy, and paid him a part of the purchase-money, is relevant, as tending to show the fact of such appropriation. *Griffin v. Isbell*, 17 Ala. 184.

491. On a trial of the right of property in slaves, between plaintiffs in execution and a daughter of the defendant in execution, it being shown that the father and daughter lived together, and that the slaves were employed in cultivating the land on which they resided, the contemporaneous declaration of the father, that he claimed to own the land in his own right, is not irrelevant to the issue. *Thomas v. DeGraffenreid*, 17 Ala. 602.

492. The fact that the defendant in execution provided necessaries for the family, of which the slaves constituted a part, is relevant to the question of ownership; but the fact that he did not obtain credit on the faith of the slaves, is not competent evidence to disprove his ownership. *S. C.*, 27 Ala. 651.

493. Where the claimant derives title from the defendant in execution, under a conveyance which is attacked for fraud, the fact that the defendant in execution was insolvent at the time of the execution of the conveyance, is relevant evidence for the plaintiff. *Beeson v. Wiley, Banks & Co.*, 27 Ala. 575.

494. The fact that notes are outstanding against a party, on one of which a judgment has been rendered, is relevant to prove insolvency. *Ib.*

495. The fact that a creditor is unable to collect his debt, tends to show the insolvency of his debtor, but may be explained. *Bilberry v. Mobley*, 20 Ala. 260.

496. In an action on a promissory note, issue being joined on the plea of *non est factum*, the fact that plaintiff had sued another as maker, and had recovered a judgment against him as such, is not irrelevant. *Clealand v. Huey*, 18 Ala. 343.

497. Where the situation of a witness was such that, if a certain fact had existed, he would probably have known it, his want of knowledge is evidence (though slight) that it did not exist. *Thomas v. DeGraffenreid*, 17 Ala. 602; *Nelson v. Iverson*, 24 Ala. 9.

498. When a bankrupt's certificate of discharge is attacked for fraud, and he has proved that the business in which he was engaged, for several years prior to the filing of his petition in bankruptcy, was generally disastrous to those who were engaged in it

at the same time, evidence of the amount of losses sustained by another individual, wholly disconnected from him, is not admissible for him. *Edgar v. McArn*, 22 Ala. 796.

499. The collection of a judgment by the brankrupt, before or about the time of filing his petition in bankruptcy, is relevant evidence to sustain the charge of a fraudulent omission or concealment of money, if the circumstances tend to show that, at the time of his application for the benefit of the act, he had not parted with the money; but, if the judgment was collected by him after the institution of the proceedings in bankruptcy, such evidence would be irrelevant and inadmissible. *Ashley's Adm'r v. Robinson*, 29 Ala. 112.

500. The fact that the bankrupt, before filing his petition, made a fraudulent assignment which does not come within the second section of the bankrupt act, and his omission to surrender the property thus conveyed, are relevant evidence, as affecting the questions of fraud and willful concealment. *Ib.*

501. In an action on a written guaranty, the fact that the plaintiff charged the goods on his books to the person to whom they were furnished, who afterwards settled the account, by paying a part in cash, and giving his note for the balance, is proper for the consideration of the jury, in determining to whom the credit was given. *Scott v. Myatt & Moore*, 24 Ala. 489.

502. So the fact that the creditor instituted a suit against the persons to whom the goods were furnished, is relevant evidence for the defendant, as affecting the questions whether the alleged promise was really made, and whether the goods were sold in pursuance of it. *Sanford v. Howard*, 29 Ala. 684.

503. In an action against an executor, seeking to charge him personally on a guaranty, the testator's will is irrelevant to the issues, since the executor's contract is altogether disconnected from his authority under the will. *Ib.*

504. The declarations of a person in possession of property, respecting the ownership thereof, are not competent evidence of the condition of the property more than three years prior to that time. *Bilberry v. Mobley*, 20 Ala. 260.

505. Where two witnesses testify to a payment of money, one stating that it was made before the commencement of the action, and the other not specifying any time, the testimony of the latter cannot be rejected as irrelevant, but must be regarded as corroborative of the former. *Garrett's Adm'rs v. Garrett & Garrett*, 27 Ala. 687.

506. In a contest between garnishees, who have paid a judgment rendered against them as such, and one claiming under a transfer from the defendant in attachment, the fact that they paid money to the clerk in court, who immediately paid it back to one of them as the attorney of the plaintiff in attachment, is irrelevant to the issues. *Smoot & Ketchum v. Eslava*, 23 Ala. 659.

507. In assumpsit for a sum exceeding $50, evidence tending to prove an indebtedness of less than that amount is relevant and admissible. *Kirkley v. Segar*, 20 Ala. 226.

508. Where a part of the consideration of the contract declared on was the abandonment of a contemplated suit against the defendant, as executor of his father, to set aside the probate of the will, and to obtain a distributive share of the estate, a receipt previously given by the distributee to the defendant, in full of his rights and interests in the estate, and releasing both the executor and the estate from all claims and demands, though it may be ineffectual as a release, is relevant and admissible to prove a partial want of consideration. *Adams and Wife v. Adams*, 29 Ala. 433.

509. In an action by an attorney to recover his fees, the certificate of the clerk of the supreme court, showing the reversal of the cause, is neither irrelevant, nor *res inter alios*. *King v. Pope*, 28 Ala. 601.

510. In an action on the case, to recover damages for injuries done to plaintiffs's hogs, by defendant's children and servants, while driving them out of his field, defendant's declaration, "that plaintiff's hogs were in the habit of running in his field, and that they should not do it any more," is

relevant evidence, as tending (though remotely) to show that the hogs which were injured belonged to plaintiff. *Smith v. Causey*, 28 Ala. 655.

511. Where the question at issue is the condition of a slave at a particular time, evidence of his condition both before and after that time, but not so remote as to furnish no reasonable presumption as to his condition at that time, is relevant and admissible. *Gingles v. Caldwell*, 21 Ala. 444.

512. In an action for a breach of warranty of the soundness of a slave, a physician who attended on and examined the slave cannot state, "as further testimony in favor of the plaintiff, and as having a bearing on the case at bar," the history of other cases which he had treated for similar diseases, when he does not predicate his opinion upon them. *Bush & Co. v. Jackson*, 24 Ala. 273.

513. When a will is contested on the ground of the testator's mental incapacity, and it is shown that the principal legatee, who was born in lawful wedlock two or three months after his mother's marriage with the testator, bears the peculiar, distinctive marks of the negro, while his mother and the testator were white persons of fair complexion, the testator's belief that the legatee was his son is admissible evidence, as tending to show mental delusion on that particular subject. *Florey's Executors v. Florey*, 24 Ala. 241.

514. Where a will is contested on the ground of undue influence, the fact that it makes an unnatural disposition of the property, the physical and mental condition of the testator at the time the influence is exerted, the relative position of the testator and the person exercising the influence, and the motives of the latter, as deducible from self-interest, or from affection or ill-will towards others, may all be proper circumstances for consideration. *Gilbert v. Gilbert*, 22 Ala. 529.

515. The testator's acts and declarations before the publication of his nuncupative will, and his expressions at the time of its execution, tending to show a paternal feeling and affection towards a child for whom the will makes no provision, are admissible evidence against the will. *Ib.*

516. So are acts of officious intermeddling, harassing and annoying to a dying man, or evincing a purpose to hurry him on to the act without giving him time to deliberate. *Ib.*

517. But the fact that two of the testator's relatives, who resided in the same neighborhood with him, had never heard of the will until a short time before it was offered for probate, is not relevant, as tending to show either that undue influence was exerted, or that no such will was in fact made. *Ib.*

518. The declarations of the testator, made two or three weeks before the execution of the will, are admissible on the question of fraud or undue influence. *Roberts v. Trawick*, 17 Ala. 55.

519. But declarations, made by him some six or seven years before the execution of the will, to the effect that the executor and his wife "were constantly ding-donging at him to make a will, but that he would not do it, and never meant to do it,—that the law of Alabama would make a good enough will for him," are not competent evidence against the will. *Bunyard and Wife v. McElroy*, 21 Ala. 312.

520. On a trial of the right of property in slaves, evidence of the ostensible insolvency of the defendant in execution is admissible, in connection with evidence of his ability to purchase property notwithstanding such apparent insolvency, to show a motive for taking the title to property purchased by him in the name of another person. *Knox v. Fair*, 17 Ala. 503.

521. The question in issue being whether the defendant's possession of the slaves, which he had had for more than three years, continued up to the time when the lien of the execution attached, (he having left the State before that time,) the fact that the rent of a house, which was occupied by the slaves, was paid by a third person, without authority, out of the defendant's funds, and that he afterwards ratified the payment, is admissible evidence for the plaintiff. *Ib.*

522. In detinue against a sheriff, for slaves taken under attachment as the property of plaintiff's brother, who had gone to California before the levy of the writ, leaving the slaves in the

house in which he last resided, defendant may show that said defendant in attachment, while in possession of the slaves, had mortgaged them; that, when the steamboat on which he left was about quitting the wharf, he declared his intention soon to return; and that plaintiff, after his brother's departure, had returned under oath an assessment of his own property, in which said slaves were not included. *Rowan v. Hutchisson*, 27 Ala. 328.

523. In assumpsit, where the declaration contains the common counts and a special count, it is competent for the defendant, under the plea of the general issue, to show a contract different from that declared on. *Loughridge v. Thompson*, 20 Ala. 828.

524. The fact that two persons are very intimate is relevant to the question whether a partnership existed between them. *McGrew & Harris v. Walker*, 17 Ala. 824.

525. Where the question in issue is whether or not a gift of a slave was perfected before the marriage of the donee, the fact that the donor was opposed to the marriage is wholly irrelevant. *Perry v. Graham*, 18 Ala. 822.

526. The question in issue being, whether the slaves in controversy were purchased and paid for with the funds of the defendant in execution, the fact that a note which had belonged to him was found, after the death of the vendor, in the hands of his executors, is not irrelevant. *Lanier v. Branch Bank at Montgomery*, 18 Ala. 625.

527. Where a bill of sale of a slave is impeached for fraud, a conveyance for land, executed by the vendor to the purchaser on the same day, is admissible evidence, as tending to show that the vendor was disposing of his whole estate. *Dent v. Portwood*, 21 Ala. 588.

528. As a general rule, declarations made by a witness out of court, whether verbal or written, cannot be received to corroborate his testimony on the trial. *Nichols v. Stewart*, 20 Ala. 358.

529. In detinue for a slave, which plaintiff claimed under a parol gift from his maternal uncle, and which was proved to have gone into the possession of his mother, either under a gift to him, or as a loan to her, the fact that the grantor "usually supplied her with a nurse, and, when one became too large for that purpose, would take it away and supply another," is not relevant to the issue. *Nelson v. Iverson*, 24 Ala. 9.

530. Where the issue is, whether the donor had parted with his dominion over the slave in favor of the donee, with whom he had left the slave, a letter subsequently written by him to the latter is admissible evidence, for the purpose of showing that the latter was holding as his bailee merely. *Stallings v. Finch*, 25 Ala. 518.

531. The fact that the slave was the kept mistress of the donor, and had children by him, is not relevant to the issue. *Ib.*

2. *Character.*

532. Under the general issue in slander, the plaintiff's general bad character is admissible evidence, although the plea of justification is also interposed. *Pope v. Welsh's Adm'r*, 18 Ala. 631.

533. In case for a malicious prosecution for larceny, evidence of the plaintiff's general bad character, showing that his only occupation was that of gaming and horse-racing, is admissible for the defendant. *Martin v. Hardesty*, 27 Ala. 458.

534. In case for the wrongful or vexatious suing out of an attachment, evidence of the plaintiff's general credit and reputation is not, it seems, admissible for him until it has been assailed. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

535. When a bankrupt's certificate is impeached for fraud, evidence of his general good character is not admissible for him. *Pearsall v. McCartney*, 28 Ala. 110.

536. In assumpsit on the common counts for services rendered, if both parties are examined as witnesses under the statute, and contradict each other in some particulars; and defendant then introduces a witness, who testifies to conversations of the plaintiff somewhat inconsistent with her testimony on the trial,—plaintiff cannot introduce evidence of her good character. *Owens v. White*, 28 Ala. 513.

3. *Rebutting.*

537. Irrelevant evidence may be rebutted by irrelevant evidence. *Nelson v. Iverson*, 24 Ala. 9.

538. In assumpsit by husband and wife against the executors of the wife's father, on an alleged indebtedness of the testator to his daughter, plaintiffs having introduced evidence of the testator's declarations, as to his intention to give each one of his daughters the same amount of property, and the amount given to the others,—*held*, that defendants might rebut this evidence, by showing that the testator had given money and property to plaintiffs by way of advancement, and had supplied them for several years with the means of living. *Harrison's Executors v. Cordle and Wife*, 22 Ala. 457.

539. Where part of a transaction has been elicited from a witness on his direct examination, the opposite party has a right to inquire into all the facts and circumstances connected with it, although they might not be admissible as independent testimony. *Lanier v. Branch Bank at Montgomery*, 18 Ala. 625.

540. After one party has adduced a part of a conversation as evidence, his adversary has the right to call for the whole of it. *Nelson v. Iverson*, 24 Ala. 9; *Frank v. The State*, 27 Ala. 37.

541. In an action on a warranty of the soundness of a slave, the defendant introduced as a witness the auctioneer by whom the sale was made, and who was asked, on cross-examination, if the question was not asked, during the sale, whether the slave was sound, and what his reply was; to which he answered, that the question was asked, and that he replied, "I believe she is sound—she is so far as I know." *Held*, that the question and answer were competent evidence, as showing the witness' connection with the question of the slave's soundness. *Stoudenmeier v. Williamson*, 29 Ala. 558.

542. Where the question at issue is whether or not a parol gift of a slave was made, and evidence has been adduced tending to show that the declarations of the alleged donor, by which the gift is sought to be established, were made in jest, evidence of a fact tending to show a moral consideration for the gift is not irrelevant. *Nelson v. Iverson*, 17 Ala. 216.

543. In trover for the conversion of a slave, which the evidence tended to prove had been stolen by the defendant, plaintiff having proved that defendant and his accomplice, by whom the slave was run off, "were quite intimate and friendly, and acted in concert," defendant may prove that his alleged accomplice "manifested great hostility to him." *Martin's Executrix v. Martin*, 25 Ala. 201.

544. In an action on a promissory note, issue being joined on a special plea of *non est factum*, and evidence having been introduced by the defendant tending to show his insanity "at, before and after the execution of said note," plaintiff may introduce rebutting evidence of his condition seventeen days after the execution of the note. *Walker v. Clay & Clay*, 21 Ala. 797.

545. Where the validity of a will is impeached for fraud or undue influence, the declarations of the testator, made and repeated at the distance of ten and five years before its execution, and tending to show a fixed and settled purpose to make a similar will, are admissible as rebutting evidence. *Roberts v. Trawick*, 17 Ala. 55.

546. The contestants, for the purpose of showing an adulterous intercourse between the testator and the mother of the children who were his legatees, adduced evidence of his intimacy with her and her family, his visits to her house during her husband's absence, his gifts to them, &c. *Held*, that this proof might be rebutted, by evidence showing that their intercourse was characterized by a religious sentiment; such as the fact that they frequently attended class-meetings together. *Dunlap v. Robinson*, 28 Ala. 100.

547. Where a claim is filed against an insolvent estate, for goods, wares and merchandize furnished to the intestate, and money paid for him by a firm of which the creditor is surviving partner; and the administrator, for the purpose of reducing the amount of the account, proves that the firm collected money for the intestate, upon the understanding that, when collected, it should be placed to his

credit,—the creditor may rebut this evidence, by proof of another item of indebtedness from the intestate to the said firm, to which the money collected by them might properly have been applied. *Ross v. Pearson*, 21 Ala. 473.

548. Although it is irregular to admit such rebutting evidence, before the administrator has offered the evidence which it is intended to rebut; yet, if the administrator admits that he will offer such evidence, and the record shows that it was subsequently introduced, the error is without injury. *Ib.*

549. Where a bankrupt's certificate is attacked for fraud, and the plaintiff has proved that said bankrupt, before filing his petition, received considerable sums of money, was engaged in merchandizing, purchased cotton, &c., the defendant may show that all those who were engaged in the purchase of cotton, at the same time and place with himself, had failed; and this, notwithstanding it appears that he sold his goods for cash, while the others sold on time. *Edgar v. McArn*, 22 Ala. 796.

550. Evidence of the fact that defendant was a reckless cotton-buyer, is also admissible for him. *Ib.*

551. Plaintiff, having proved that defendant, during the three years immediately preceding the trial, which was several years after obtaining his discharge in bankruptcy, purchased a large quantity of cotton, defendant cannot rebut this evidence, by showing the insolvency of nine-tenths of the persons engaged in that business during the same time. *Ib.*

552. Nor can he be allowed to prove that merchants in a neighboring city were in the habit of employing persons in the town where he lived to buy cotton for them on commission. *Ib.*

553. In an action against the hirer of a slave, to recover damages for his neglect of duty in the treatment of the slave, plaintiff having proved that he transported the slave by railroad while sick, defendant may show that he acted under the advice of a physician. *Ala. & Tenn. Rivers Railroad Co. v. Burke*, 27 Ala. 535.

554. In an action by an attorney, to recover for services rendered by him as defendant's agent in going to Louisiana, plaintiff having proved a conversation between himself and defendant, in which the latter requested him to accompany him to Louisiana as his agent, and he agreed to go; and that they both left the county of their residence at the same time,—*held*, that to rebut this evidence, and to show that they in fact went to Texas instead of Louisiana, defendant might prove that plaintiff had land and slaves in Texas, and had stated that he had gone to Texas with defendant. *Jones v. Sterns*, 28 Ala. 677.

555. On a trial of the right of property in three bales of cotton, which the claimant alleged he had taken from the defendant in execution in exchange for a horse, plaintiff having shown that, after the alleged exchange, the claimant retained the horse, and offered him for sale, it is competent for the claimant, for the purpose of rebutting this evidence, to show that the defendant had no stable, that the horse was fed with his corn, and that the offer to sell was by his authority. *Mobley v. Bilberry*, 17 Ala. 428.

XVII. Substance of Issue, and Variance.

556. A bill of exchange, drawn by "Ebenezer *Hearn*," may be given in evidence under a count on a bill alleged to have been drawn by "Ebenezer *Hearne*." *Coster, Robinson & Co. v. Thomason*, 19 Ala. 717.

557. Under a declaration on a note, payable "one day after *date*," a note payable "one day after," the word "*date*" being omitted, is admissible in evidence, and the omission will be supplied by intendment. *White v. Word*, 22 Ala. 442.

558. In slander for words spoken of a female, imputing to her a want of chastity, which are made actionable by statute, an averment in the declaration of the plaintiff's chastity and good repute, is inducement merely, and does not require to be proved, unless traversed by an appropriate plea. *Sidgreaves v. Myatt*, 22 Ala. 617.

559. In debt on an attachment bond, if the declaration proceeds on a bond given for an *ancillary* attachment, while the bond set out on oyer is for

an original attachment, the variance is immaterial *Dickson v. Bachelder*, 21 Ala. 699.

560. Nor is it a material variance, that the bond set out in the declaration alleges that the attachment was sued out by "*Robert and Charles Cornell*," in a suit brought by them as partners, while the bond set out on oyer recites that the attachment was sued out by "*John J. Steiner*, at the suit of Robert and Charles Cornell." *Ib.*

561. In an action against an administratrix, seeking to charge her in her representative capacity, a recovery cannot be had on proof of a demand against her individually. *Anderson v. Rice*, 20 Ala. 239.

562. In detinue by an administrator, individually, a recovery cannot be had on a cause of action accruing to him only in his representative character. *Agee v. Williams*, 27 Ala. 644.

563. Under an averment in a declaration relative to an execution "returnable according to the statute," an execution returnable to a term different from that to which it should have been returnable is not admissible evidence. *Forward v. Marsh*, 18 Ala. 645.

564. In case against the hirer of a slave, for negligence, the consideration and terms of the contract of hiring, if alleged, need not be proved as laid. *Moseley v. Wilkinson*, 24 Ala. 411.

565. But, under a declaration alleging a general contract of hiring, and defendant's breach of duty and contract in failing to treat the slave with proper care and attention while sick, a recovery cannot be had, whether the action be case or assumpsit, on proof of a particular contract, limiting the employment of the slave to a particular place and service, and stipulating that he should not be re-hired to another. *S. C.*, 18 Ala. 288.

566. Under a declaration on a contract, by which defendant promised to pay in consideration that plaintiff would cure a certain negro, evidence cannot be received of a contract by which he promised to pay in consideration that plaintiff would take said negro "and effect a cure free of any charge for board." *Jordan v. Roney*, 23 Ala. 758.

567. In an action for a breach of warranty of the soundness of a horse, the consideration averred being a certain sum of money, a written contract, containing the warranty, and expressing as the consideration defendant's acceptance for the sum specified, is admissible evidence. *Brown v. Jones*, 24 Ala. 463.

568. Whatever may be the effect of the provisions of the Code, in dispensing with technical accuracy and precision in the complaint; yet, where the instrument offered in evidence varies from that described in the complaint, the variance renders it inadmissible. *May & Bell v. Miller & Co.*, 27 Ala. 515.

569. In case for injuries to plaintiff's stock, alleged to have been done by defendant's children and servants, plaintiff cannot be allowed to prove injuries done by defendant himself in person. *Smith v. Causey*, 28 Ala. 655.

570. If the declaration alleges that the injuries were done with the defendant's dogs, the averment, though unnecessary, is descriptive of the cause of action, and cannot be disregarded. *Ib.*

571. In an action by a bailee, averring an embezzlement of his own money, proof of an embezzlement of money rightfully deposited with him may be received. *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

572. In case for a diversion of water from plaintiff's mill, if the complaint alleges that the defendant diverted the water, while the evidence shows that, though the water was originally diverted by him, he provided means for its return to its natural channel above plaintiff's lands, and that its return was prevented by the act of another person after it left defendant's lands, there is no material variance between the allegations and proof. (RICE, C. J., *dissenting*.) *Stein v. Burden*, 29 Ala. 127.

573. Where a bankrupt's certificate is impeached for fraud, his declaration, at the time of purchasing a horse soon after the institution of the proceedings in bankruptcy, "that he wanted him to send to North Carolina for four or five negroes he had hid out there," is not admissible evidence, under a specification of the fraudulent omission and concealment of certain

notes, accounts, claims, "two negroes Esther and Rhoda, and a large sum of money." *Ashley's Adm'r v. Robinson*, 29 Ala. 112.

574. Under a specification of the fraudulent omission of a judgment for $122.81, evidence cannot be received of a judgment for $132.81, although it corresponds in every other respect with the judgment described. *Ib.*

575. In assumpsit, a recovery cannot be had under a special count, on proof of a contract variant from that set out; but in such case, a recovery may still be had under the common counts. *Hopper v. Eiland*, 21 Ala. 714.

576. In such case, it is competent for the defendant, under the plea of the general issue, to prove a contract different from that declared on. *Longhridge v. Thompson*, 20 Ala. 828.

As to variance in chancery cases, see DECREES, 4–28, pp. 242–4.

XVIII. SUFFICIENCY AND WEIGHT.

577. In the absence of legal presumptions, it is for the jury alone to determine what amount of evidence is required to produce conviction in their minds; consequently, a charge which instructs them that, "in civil cases, all that is required is that the proof shall preponderate in favor of one party or the other, and that they must find according to the preponderance of the proof," is erroneous, because it invades the province of the jury. *Mays v. Williams*, 27 Ala. 267.

578. In actions on open accounts, positive certainty is not ordinarily attainable: if the jury are reasonably satisfied from the evidence of the existence of the facts which constitute the alleged indebtedness, it is sufficient to authorize a verdict for the plaintiff. *Godbold v. Blair & Co.*, 27 Ala. 592.

579. Where one witness swears that, in a certain conversation, he heard a party use particular language; while another, who was present at the same time, testifies that he did not hear it,—the law gives more weight to the positive than to the negative testimony. *Harris v. Bell*, 27 Ala. 520.

580. But this principle does not apply, where one witness testifies that the conversation had reference to a particular slave in controversy, while the other testifies that it related to another slave, and each swears that he heard and remembers the whole conversation. *Ib.*

581. It cannot be laid down as a positive rule, that more than one witness is required to prove the existence of a custom, before it can become an element of contracts. *Partridge v. Forsyth*, 29 Ala. 200.

582. Evidence which would be sufficient, in an action against an executor or administrator, to charge him with the payment of a demand against his testator or intestate, is sufficient, on settlement of his accounts, to support his claim to a credit for such payment. *Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27.

583. But the mere production of a receipt, purporting to be signed by the creditor, without proof of his signature or of the validity of the debt, is not sufficient to authorize the allowance of such credit. *Ib.*

584. A receipt, signed by the duly authorized agent of the creditor, accompanied with proof of the signature, and of the removal of both principal and agent from the State, is sufficient evidence of the payment, unless contradicted by other testimony. *McCreliss' Distributees v. Hinkle*, 17 Ala. 459.

585. The fact that a steamboat was running as a regular packet between Mobile and New Orleans, and was advertised as such in the newspapers, is not, *per se*, conclusive evidence of a contract, in an action between her owners and the owner of a hired slave, that she should run only on that line during the term of hiring. *Myers v. Gilbert*, 18 Ala. 467.

586. A certified transcript of a judgment is only presumptive evidence of the judgment itself, and may be shown to be incorrect. *Pryor v. Beck*, 21 Ala. 393.

587. A record copy of a lost deed, or a transcript from the record, is only presumptive evidence of the contents of the deed, and does not preclude a party from showing that it was incorrectly recorded. *Harvey and Wife v. Thorpe*, 28 Ala. 250.

As to the conclusiveness and effect of admissions, *vide supra*, 28–52; and,

as to the conclusiveness and effect of records, *vide supra*, 411–446.

XIX. OF THE EVIDENCE RELATIVE TO PARTICULAR ISSUES.

1. *Accord and Satisfaction.—See that title*, p. 361.

2. *Accounts.*

588. In an action on an account, a merchant's books are not admissible evidence for him, except by the defendant's consent; nor, conceding their admissibility, would they be higher or better evidence than the positive testimony of his clerk, who swears to the sale and delivery of the articles, but cannot recollect their dates, and has never compared the account with the books. *Godbold v. Blair & Co.*, 27 Ala. 592.

589. A merchant's clerk and bookkeeper, who testifies that he made all the entries on the books, and that he charged nothing as sold which was not sold, may further testify "that he is satisfied and believes that all the items charged in the account sued on were sold, although he cannot recollect them." *Wright v. Bolling*, 27 Ala. 259.

590. The original entries on a physician's books are evidence (Code, § 2298) for him, in an action for the recovery of his medical services, of the items of his account for medicines administered and furnished to his patients in the course of his practice; but the value of the medicines, as well as of the active services rendered, must be otherwise proved. *Richardson v. Dorman's Executrix*, 28 Ala. 679.

591. On the settlement of partnership accounts in equity, the books of the firm, to which all the partners have had free access, are evidence for and against each partner. *Desha & Sheppard v. Smith*, 20 Ala. 747.

592. The fact that the items of an account are not charged in the order of their dates, does not raise any legal presumption against the correctness of the account, but is, at most, a circumstance for the consideration of the jury. *Ross v. Pearson*, 21 Ala. 473.

593. In actions on open accounts, positive certainty is not ordinarily attainable: if the jury are reasonably satisfied from the evidence of the existence of the facts which constitute the alleged indebtedness, it is sufficient to authorize a verdict for the plaintiff. *Godbold v. Blair & Co.*, 27 Ala. 592.

3. *Adverse Possession.—See that title*, p. 386.

4. *Agency.—See that title*, p. 387.

5. *Consideration.*

594. When it becomes necessary to prove the consideration of a note, the most regular mode of proceeding is, first to introduce the note itself, and then go on to show its consideration. *Pennington v. Woodall*, 17 Ala. 687.

595. A note imports a consideration, when it is the foundation of the suit; and the fact that the payee, who sues for the use of another, "never was the owner of the note, and never put it in circulation, nor authorized it to be done," does not repel this presumption. *Bird v. Wooley*, 23 Ala. 717.

596. A bond which is not the foundation of the suit, but which is set up as a defense, does not import a consideration. *Keep v. Kelly & Levin*, 29 Ala. 322.

597. As a general rule, the recitals in a deed which is impeached for fraud, in a controversy between those claiming under it and a pre-existing creditor of the grantor, are not evidence of a consideration. *Pool v. Cummings & Co.*, 20 Ala. 563.

598. In an action by a trustee for the benefit of creditors, against a third person, to recover a slave conveyed by the deed, it is not necessary for the plaintiff to prove the consideration of the deed, until the defendant has shown that he claims as a creditor or purchaser from the grantor; but, when the defendant has made this proof, the *onus* of showing a consideration is on the plaintiff. *Pennington v. Woodall*, 17 Ala. 685.

599. In an action against a sheriff, for levying an attachment against plaintiff's vendor on goods in plaintiff's possession, proof of the existence of the attachment debt before the transfer of the goods, casts on the plaintiff the *onus* of showing that his

purchase was founded on valuable consideration. *Sparks v. Rawls*, 17 Ala. 211.

As to the admissibility of parol evidence, to affect the consideration of written instruments, *vide supra*, 232–241.

6. *Deeds.—See that title*, pp. 537–8.

7. *Fraud.*

600. Where the question of fraud is involved, great latitude in the range of the evidence is allowed, since it is scarcely ever possible to prove fraud, except by a comprehensive and comparative view of the actions of the party to whom it is imputed, and his relative position at, and a reasonable time before and after, the time at which the act is alleged to have been committed. *Snodgrass v. Branch Bank at Decatur*, 25 Ala. 161.

601. Circumstances of unusual particularity, attending a sale by a debtor to his son-in-law, may be considered by the jury, as tending, if unexplained, to show fraud. *Jones v. Stewart*, 19 Ala. 701.

602. To show fraud in the execution of a bill of sale for a slave, a deed for land, executed by the vendor to the purchaser on the same day, is admissible evidence, as tending to show that the vendor was disposing of all his property. *Dent v. Portwood*, 21 Ala. 588.

603. Where a deed is attacked for fraud, the creditor may show that the grantee is the minor son of the grantor; that the grantor, who was in embarrassed circumstances, executed another deed to the same grantee on the same day; and that the two deeds conveyed all the grantor's property within the State. *Benning v. Nelson*, 23 Ala. 801.

604. On a trial of the right of property in slaves, which the claimant holds under an alleged purchase from the defendant in execution, and which are shown to have remained in the claimant's possession for about four years after the alleged sale, the creditor may show that the defendant in execution obtained his discharge in bankruptcy about the expiration of that time, and that the slaves were found in his possession a few months afterwards. *Snodgrass v. Branch Bank at Decatur*, 25 Ala. 161.

605. The mortgagor's retention of possession, after the law-day of the mortgage has passed, is not presumptive evidence of fraud. *Steele v. Adams*, 21 Ala. 534.

606. The retention of possession by the vendor of a chattel, unexplained, is only presumptive evidence of fraud, and may be explained. *Millard's Adm'rs v. Hall*, 24 Ala. 209; *Upson v. Raiford*, 29 Ala.188.

607. The rule which makes such retention of possession presumptive evidence of fraud, does not apply to public sales on notice. *Montgomery's Executors v. Kirksey*, 26 Ala. 172.

608. The grantor's retention of possession, consistently with the terms of his deed, of property conveyed in trust to secure certain creditors, is not a badge of fraud. *Hopkins v. Scott*, 20 Ala. 179.

609. The relationship of all the parties to a deed of trust, executed by an insolvent debtor, raises no legal presumption of fraud, but is a circumstance for the consideration of the jury. *Montgomery's Executors v. Kirksey*, 26 Ala. 172.

610. The fact that the grantor's father purchased all the property at the trustee's sale, and suffered it to go back immediately to the grantor's possession, "with permission to get a subsistence for himself and family, but to turn over all beyond this to the father, and that the property was to be under the general supervision and control of his brother, as agent of his father," is a circumstance for the consideration of the jury, but does not raise any legal presumption of fraud. *Ib.*

611. The use to which the parties apply a deed is, as against them, evidence of the intent with which it was made. *Constantine v. Twelves*, 29 Ala. 607.

612. The subsequent unauthorized acts or admissions of either the grantor or the trustee, when the latter has no beneficial interest in the property, cannot be received to invalidate the deed. *Governor v. Campbell*, 17 Ala. 566.

613. The declarations of the grant-

or, subsequent to the execution of a deed of gift, are not admissible to prove it fraudulent. *Price v. Branch Bank at Decatur*, 17 Ala. 374; *Strong's Executors v. Brewer*, 17 Ala. 707.

614. Nor are his subsequent acts, other than a sale to a *bona-fide* purchaser for valuable consideration. *Foote and Wife v. Cobb*, 18 Ala. 585.

615. Fraud will never be presumed, when the facts may consist with honesty and pure intention. *Smith's Heirs v. Branch Bank at Mobile*, 21 Ala. 125; *Ala. Life Insurance & Trust Co. v. Pettway*, 24 Ala. 544.

8. *Insanity.*

616. The party who alleges insanity or lunacy, in avoidance of a contract, is bound to prove it; but, when the existence of lunacy is once established, it devolves on the opposite party to prove, by testimony equally convincing, that the contract was made during a lucid interval. *Rawdon v. Rawdon*, 28 Ala. 565.

617. On the trial of an issue to test the validity of a will, the *onus* is on the proponent to show the testator's mental capacity. *Dunlap v. Robinson*, 28 Ala. 100.

618. Where the principal legatee, who was born in lawful wedlock two or three months after his mother's marriage with the testator, bears the peculiar, distinctive marks of the negro, while his mother and the testator were white persons of fair complexion, the testator's belief that such legatee was his son is admissible evidence, for the purpose of showing mental delusion on that particular subject. *Florey's Executors v. Florey*, 24 Ala. 241.

619. A witness, whose acquaintance with the testator was such as to enable him to form a correct opinion of the mental condition of the latter, may not only depose to facts conducing to establish unsoundness of mind, but may also, in connection with those facts, give his own opinion upon the question of sanity or insanity. *Ib.*

620. No precise rule can be laid down, as to the length or character of acquaintance which would render the opinion of a person who is not a physician competent evidence on the question of insanity. In cases of general insanity, a total incapacity to distinguish right from wrong on any question, the same degree of observation is not required to discover the existence of the disease, as in cases of monomania, or partial derangement; and consequently, the same degree of intimacy is not necessary to render the opinion of the witness admissible. But in every case, the circumstances must be such as to have afforded the witness an opportunity of forming an accurate judgment as to the existence or non-existence of the disease, considered with reference to the character or degree in which it is alleged to exist. *Powell v. State*, 25 Ala. 21.

621. The opinions of medical men, founded on their own personal observation of the party, or on facts detailed by other witnesses, are admissible evidence on the question of insanity; but such opinions are to be weighed by the jury as other testimony, and are not conclusive. *McAllister v. The State*, 17 Ala. 434.

622. Where insanity is set up as a defense in a criminal case, evidence of the state of the prisoner's mind at the time of the trial is admissible for him, as tending to show his true mental condition when the act was committed. *Ib.*

623. In an action on a promissory note, issue being joined on a special plea of *non est factum*, and the defendant having introduced evidence tending to show that, "at, before, and after the execution of the note," he was insane, plaintiff may introduce rebutting evidence of his mental condition seventeen days after its execution. *Walker v. Clay & Clay*, 21 Ala. 797.

9. *Insolvency.*

624. The fact that a creditor is unable to collect his debt, tends to show that the debtor is insolvent, but may be explained by proof that the inability to collect did not result from the debtor's inability to pay. *Bilberry v. Mobley*, 20 Ala. 260.

625. The fact that notes are outstanding against a debtor, on one of which a judgment has been rendered, tends to prove that he is insolvent. *Beeson v. Wiley, Banks & Co.*, 28 Ala. 575.

626. The fact of insolvency cannot be proved by general reputation. *Walker v. Forbes*, 25 Ala. 139.

627. A witness may state that "he regards certain debtors as insolvent," if his testimony shows that his conclusion is based on his knowledge of their circumstances; but not otherwise. *Royall's Adm'r v. McKenzie*, 25 Ala. 363.

10. *Marriage.*

628. Cohabitation is presumptive evidence of an actual marriage, but may be rebutted by proof of a subsequent permanent separation between the parties, without any apparent cause, and the marriage of one of them within a short time afterwards. *Weatherford v. Weatherford*, 20 Ala. 548.

629. A bond given by the intended husband, preliminary to obtaining a marriage license, is competent evidence of the marriage; but, where the marriage was celebrated in another State, a certified copy of the bond is not admissible evidence here, unless properly authenticated under the act of congress, and shown to have been recorded by statutory requisition. *Martin's Heirs v. Martin*, 22 Ala. 86.

630. Where a widow institutes proceedings in the probate court for her dower, proof of marriage by an eye-witness is not required, nor is it indispensable that the license, with the minister's return thereon endorsed, should be produced. *Ib.*

631. In divorce cases, if the answer admits the marriage, proof of the fact that the parties had lived together, as man and wife, for more than forty years, is sufficient. *Morris v. Morris*, 20 Ala. 168.

11. *Ownership.*

632. Possession is presumptive evidence of ownership. *Sparks v. Rawls*, 17 Ala. 211; *Governor v. Campbell*, 17 Ala. 566; *Whitsett, Garner & Co. v. Slater*, 23 Ala. 626.

633. Ownership is a fact to which a witness may testify. *Nelson v. Iverson*, 24 Ala. 9.

634. The character of a party's possession cannot be proved by general reputation. *McCoy v. Odom*, 20 Ala. 502; *Benje v. Creagh's Adm'r*, 21 Ala. 151; *Whitsett, Garner & Co. v. Slater*, 23 Ala. 626.

335. Nor by the opinion of witnesses as to the actual condition of the property. *Benje v. Creagh's Adm'r*, 21 Ala. 151.

As to the admissibility of a party's declarations on the question of ownership, *vide supra*, 104–118.

12. *Negligence.*

636. In an action against the drawer or endorser of a bill of exchange, the *onus* of showing due diligence in giving notice is on the plaintiff, and is a pre-requisite to his right of recovery. *Rives v. Parmley*, 18 Ala. 256.

637. Where the payee of a written order, requesting the person on whom it is drawn to pay it out of the proceeds of a certain judgment, brings suit after acceptance, for defendant's negligence in collecting, the *onus* is on the plaintiff to prove negligence, and not on the defendant to prove diligence. *Gliddon v. McKinstry*, 28 Ala. 408.

638. In an action against the hirer of a slave, who failed to re-deliver the slave at the expiration of the term, the *onus* is on him to show an excuse for his failure; but, when it has been shown that the slave died before the expiration of the term, it then devolves on the owner to show that the death resulted from some violation of duty on the part of the hirer. *Wilkinson v. Moseley*, 18 Ala. 288.

639. After the plaintiff has proved the removal of the slave by railroad while sick, as an act tending to show negligence in the defendant's treatment, the latter has a right to prove that he acted under the advice of a physician. *Ala. & Tenn. Rivers Railroad Co. v. Burke*, 27 Ala. 535.

See, also, ACTION ON THE CASE, 151–169, pp. 381–3.

13. *Partnership.*

640. A witness, cognizant of the fact, may state that a partnership existed between two persons. *McGrew & Harris v. Walker*, 17 Ala. 824.

641. The fact that two persons are very intimate, tends to show that a partnership existed between them. *Ib.*

EXECUTION.

(Statutory Provisions: Code, §§ 2422–70. 2783–85, 2788–89. 2794–2809. 2815–16; Clay's Digest, pp. 199–216; Session Acts 1853–4, p. 22; *Ib.* p. 26.)

As to executions on summary judgments against executors, administrators, and guardians, see same title in PART II, p. 158.

I. FORM, AND VALIDITY.

1. An execution, issued on a decree of the orphans' court, should be made returnable to a regular term of the county court. *Powell v. Summers*, 17 Ala. 647.

2. An execution, issued on a judgment before the defendant's final discharge in bankruptcy, but pending his application for the benefit of the act, is voidable merely, and sufficient, until avoided, to entitle the creditor to pay off a debt secured by deed of trust, and to have the property sold for his benefit. *Roden v. Jaco*, 17 Ala. 344.

3. After the defendant has obtained his certificate of discharge in bankruptcy, an execution cannot issue on a judgment against him. *Brown v. Branch Bank at Montgomery*, 20 Ala. 420; *Stewart & Fontaine v. Hargrove*, 23 Ala. 429.

4. An execution may properly issue upon a judgment which, however irregular, is not absolutely void. *Barron v. Tart*, 18 Ala. 668.

5. No execution can properly issue on a void judgment. *Swink's Adm'r v. Snodgrass*, 17 Ala. 653.

6. An execution which, on its face, is returnable at a time anterior to the term to which it should have been made returnable, may be amended. *Forward v. Marsh*, 18 Ala. 645.

7. An execution, issued on an injunction bond which misdescribes the judgment sought to be enjoined, cannot be so amended as to make it conform to the misdescription. *Shorter's Adm'r v. Mims*, 18 Ala. 655.

8. There can be no summary execution on an injunction bond, unless a writ of injunction was issued in the case. *Ib.*

9. An *olias fi. fa.*, issued by a justice of the peace after the lapse of more than ten years from the issue of the former execution, is not sufficiently regular to authorize a sale of land. *Brown v. Higginbottom*, 19 Ala. 207.

10. Where the record shows the issue of a *alias* or *pluries* execution, it will be presumed, in the absence of evidence to the contrary, that other executions regularly preceded it. *Sellers & Cook v. Hayes*, 17 Ala. 749; *Pollard v. Cocke*, 19 Ala. 188.

11. When an execution for costs, against the unsuccessful party in the appellate court, has been returned "no property found;" and an execution against the successful party, "for the costs occasioned by himself," thereupon issued, and returned "satisfied,"—an *alias* may be subsequently issued against the unsuccessful party. *Montgomery v. Montgomery*, 20 Ala. 350.

12. If one of two joint plaintiffs dies after the rendition of judgment, and no entry of his death is made in court, an execution on the judgment should be taken out in the joint names of both the plaintiffs. *Stewart v. Cunningham & Rippetoe*, 22 Ala. 626.

13. Where a *ca. sa.*, after commanding the sheriff to take the defendant's body to satisfy the plaintiff's debt and costs, contains the further direction, "and that you have the said moneys at our next circuit court to render to the said plaintiff for his costs and damages aforesaid," the latter direction is mere surplusage, and does not vitiate the writ. *Ib.*

14. An execution, issued by a court of competent jurisdiction, in the name of "Henry W. Collier, use of officers of court," is not void, but furnishes a protection to the officer levying it; the words, "use of officers of court," may be rejected as surplusage. *McElhaney v. Flynn*, 23 Ala. 819.

15. An execution, issued after the

defendant's death, without a revival of the judgment, is void, except when issued to continue a lien acquired by a previous valid execution. *Collier's Adm'r v. Windham*, 27 Ala. 291; *Whitlock's Adm'r v. Whitlock's Creditors*, 25 Ala. 543.

16. A *fi. fa.* on a void delivery bond, against the defendants in the judgment and their surety on the bond, if it correctly describes the judgment, by its date, amount, and names of parties, is neither void nor voidable as to the defendants in the judgment, but may be amended by striking out the surety's name. *Deloach v. State Bank*, 27 Ala. 437.

17. An agreement between the plaintiff in execution and a claimant of the property seized, to the effect that a judgment of condemnation should be rendered in the claim suit for the agreed value of the property, and that the claimant should have the property on paying this value, does not, as against the sheriff, render void an execution subsequently issued. *Patton v. Hamner*, 28 Ala. 618.

II. LEVY; AND HEREIN, OF PROPERTY EXEMPT FROM LEVY.

18. Where slaves are bequeathed to a mother and her children jointly,—one third to her during widowhood, and the other two thirds to her children,—her individual interest is subject to levy and sale under execution at law. *McIntosh v. Walker*, 17 Ala. 20.

19. The interest of one tenant in common of personal property is subject to levy and sale under execution against him, notwithstanding he has previously given his co-tenant authority to sell the entire property. *Thompson v. Mawhinney & Smith*, 17 Ala. 362.

20. The interest which a widow has, before dower assigned her, in the dwelling-house and adjoining plantation of her deceased husband, is not subject to levy and sale at law. *Doe d. Cook & Hardy v. Webb*, 18 Ala. 810.

21. The assets of an estate, in the hands of the administratrix, are subject to levy and sale under execution against her in her representative capacity, notwithstanding her coverture. *Bobe v. Frowner and Wife*, 18 Ala. 89.

22. The interest of a mortgagor of personal property, while in possession before the law-day of the deed, is subject to levy and sale; and although the mortgagee, upon default being made, may claim the property, and terminate the sheriff's possession, yet the assertion of his claim cannot prevent a condemnation of the property, if the mortgagor pays off the mortgage debt before the trial of the claim suit. *Fontaine & Dent v. Beers & Smith*, 19 Ala. 722.

23. The mortgagor's entire interest, consisting of the usufruct of the property until the law-day, and the equity of redemption, may be sold under execution at law. *Harbinson v. Harrell*, 19 Ala. 753; *O'Neal v. Wilson*, 21 Ala. 288.

24. If mortgaged lands are sold under a decree of foreclosure in chancery, and afterwards redeemed by the mortgagor, and a conveyance taken in the name of a trustee for his wife, he has not such an interest in them as can be sold under execution at law. *Wilson v. Beard*, 19 Ala. 629.

25. If the grantor in a deed of trust for the benefit of creditors, retains the possession of the property conveyed, consistently with the terms of the deed, and by the permission of the trustee, in whom is reposed a reasonable discretion as to the time and manner of selling, he has not such an interest as is subject to levy and sale under execution at law. *Hopkins v. Scott*, 20 Ala. 179.

26. If he retains possession of the property after default made in a portion of the secured debts, when the deed authorizes the trustee to sell so much of the property as may be necessary to pay the debts then due, he has not such an interest therein as may be subjected by levy and sale at law, notwithstanding the value of the property conveyed greatly exceeds the aggregate amount of the debts then due. *Thompson v. Thornton*, 21 Ala. 808.

27. The interest which a husband acquires, by marriage, in lands of which his wife is seized in fee-simple, is subject to levy and sale at law. *Cheek v. Waldrum and Wife*, 25 Ala. 152.

28. Slaves bequeathed to the testator's grandchildren, to remain undi-

vided until the youngest child reached the age of twenty-one years, and then to be divided among those who were living, cannot be sold under execution at law against any of the legatees until the youngest child has attained his majority, and a division has then been made pursuant to the will. *Johnson v. Culbreath*, 19 Ala. 348.

29. Where the property of the wife was conveyed, by ante-nuptial contract executed in South Carolina, where the parties then resided, to a trustee, for her sole and separate use and benefit until the solemnization of the marriage, and afterwards "for the joint and equal benefit and behoof" of husband and wife, "for and during the term of their joint lives, without being in any manner subject to the debts, contracts and engagements" of the husband; and further, in trust that he should permit the husband and wife, "during their joint lives, to receive and take the profits &c. to and for their joint and equal use, behoof and benefit, and, from and after the death of either, then to and for the sole and individual use of the survivor during his or her natural life," with remainder over,—*held*, that the husband's interest in the property could not, during his wife's life, be seized and sold under execution at law. *Peake v. Yeldell*, 17 Ala. 636.

30. Where an ante-nuptial contract provided, that a certain portion of the wife's property, in possession and remainder, should be settled and secured, after the consummation of the marriage, upon a trustee "for her use and benefit during the term of her natural life," with a provision in the settlement that this property might be changed, sold and resold, or the whole trust be annulled, whenever the husband and wife might jointly agree to do so; and that the residue of the property should be conveyed to the trustee, for the use of the wife, until the husband directed a sale of it, the proceeds of the sale to be paid to the husband,—*held*, that the husband, during his wife's life, did not have such an interest in that portion of the property, which was to be conveyed to the trustee "for her use and benefit during the term of her natural life," as was subject to levy and sale at law. *Strong v. Gregory*, 19 Ala. 146.

31. Where husband and wife conveyed certain personal property to a trustee, in trust for themselves during their joint lives, then for the survivor during his or her life, then to L. for life, and then for his next of kin; and the husband afterwards conveyed his entire interest in the property to L., who then conveyed his interest to the trustee, "to and for the only use and benefit of the wife,"—*held*, that the husband had no such interest in the property as could be sold under execution at law. *Cuthbert v. Wolfe*, 19 Ala. 373.

32. Where a marriage was celebrated in Texas, by the laws of which State marriage confers on the husband no interest in the wife's property, the subsequent removal of the parties to this State, with their property, does not render the wife's property subject to levy and sale for the husband's debts. *Doss v. Campbell*, 19 Ala. 590.

33. Property on which an execution has been levied, and a bond given to try the right of property under the statute, cannot be taken under a junior execution until the claim has been disposed of; such second levy will be set aside, even before the return of the execution. *McLemore v. Benbow*, 19 Ala. 76.

34. A judgment creditor may have his execution levied on property under deed of trust, on paying off the debt secured by the deed. *Roden v. Jaco*, 17 Ala. 344; *O'Neal v. Wilson*, 21 Ala. 288.

35. The press and type of a practical printer, necessarily used by him and his journeymen in the publication of a weekly newspaper, are "tools, or implements of trade," within the meaning of the exemption law; but the paper and ink used by him are rather to be considered as stock in trade, and do not come within the purview of the statute. *Sallee v. Waters*, 17 Ala. 482.

36. If a debtor is possessed of two horses and a pair of work oxen, he has the right to elect which he will retain for the use of his family. *Ross v. Hannah*, 18 Ala. 125.

37. If an execution is levied on either before he has made his election, he

may, at any time before the sale, elect to retain it without tendering the other to the officer; but, if he puts the articles not levied on out of the officer's way before the sale, this amounts to an election to retain them. *Ib.*

38. A vehicle on four wheels, drawn by oxen, suited to the ordinary purposes of husbandry, and employed in the same uses to which carts are appropriated, is within the purview of the exemption law. *Favers v. Glass*, 22 Ala. 621.

39. A stallion may be exempt from levy and sale under execution, if one of the purposes for which he is kept is the performance of the ordinary services of a work-horse, although he is sometimes used for other purposes. *Allman v. Gann*, 29 Ala. 240.

40. But the use is a question of fact for the decision of the jury, which the evidence in this case did not authorize the court to assume. (RICE, C. J., *dissenting*.) *Ib.*

41. The exemption law of Mississippi is a local statute, and can only protect the exempted property so long as it remains within the limits of that State. *Boykin v. Edwards*, 21 Ala. 261.

42. The exemption law of Alabama can only be invoked by a person who resides in this State, and has a family. *Ib.*

43. The relation of parent and child, or that of husband and wife, with its consequent dependent condition, is sufficient to constitute a family, although the members of it may not live under the same roof. *Sallee v. Waters*, 17 Ala. 482.

III. LIEN, AND HOW LOST OR WAIVED.

44. An execution in the hands of the sheriff is not a lien on the defendant's ungathered crop. *Evans & Evans v. Lamar*, 21 Ala. 333.

45. An execution does not create a lien on the defendant's personal property until it comes to the hands of the sheriff. *Knox v. Fair*, 17 Ala. 503.

46. It creates a lien on the debtor's personal property within the county from the time of its receipt by the sheriff; and if executions are regularly issued from term to term, this lien is not lost, but is merely suspended, by the removal of the property from one county to another within the State. *Newcombe v. Leavitt*, 22 Ala. 631.

47. If the property is removed to another State after a lien has attached to it, and is there acquired and held by a *bona-fide* purchaser until the foreign statute of limitations has barred its recovery, and is then brought back by him to this State, his title is perfect against the execution creditor, although executions have been regularly issued from term to term. *Ib.*

48. The delivery of an execution to a bank-marshal, under the act of 1843, created a lien on the defendant's personal property co-extensive with the limits of the State. (DARGAN, C. J., *dissenting*.) *Andress v. Roberts*, 18 Ala. 387.

49. The lien of an execution continues, though its operation is suspended, pending a suit respecting the property levied on, whether by action of detinue, or by statutory claim suit. *Branch Bank at Decatur v. McCollum*, 20 Ala. 280.

50. If the property levied on is "claimed by a third person, and not sold for want of indemnity," the lien of the execution nevertheless continues, unless the sheriff returns it to the defendant in execution, or delivers it to the claimant. *Ib.*

51. If the plaintiff refuses to give a bond of indemnity when required, the lien of his execution is suspended, and must yield to the title of a *bona-fide* purchaser from the defendant. *Otey v. Moore*, 17 Ala. 280.

52. The amendment of an execution, by striking out the name of a person, not a party to the judgment, which had been improperly inserted, does not affect its lien. *Andress v. Roberts*, 18 Ala. 387.

53. An execution, which is levied on a crop of cotton after the latter has been removed from the rented premises on which it was raised, and stored by the tenant in a warehouse, is entitled to preference over an attachment at the suit of the landlord, subsequently levied; the former levy being made in ignorance of the landlord's lien, on the part of both the sheriff and the execution creditor. *Governor v. Davis*, 20 Ala. 366.

54. The discharge of a levy, on ac-

count of the plaintiff's failure to give a bond of indemnity when required, destroys the lien on the property, and thus gives effect, as against a subsequent levy, to a deed executed by the defendant in execution during the intervening period. *Cotten v. Thompson*, 25 Ala. 671.

55. The lien of an executiou, which has been levied on personal property, is lost, as against an intermediate mortgagee, by an order to the sheriff, given either by the plaintiff or by his attorney of record, to postpone the sale until after the return term of the writ, and to let the property remain in the defendant's possession without requiring bond. *Albertson, Douglass & Co. v. Goldsby*, 28 Ala. 711.

56. Conceding that a mortgagee, who, prior to the execution of his mortgage, consented to a postponement of the sale of the property under execution against the mortgagor, is thereby estopped, in a contest with the plaintiff in execution, from saying that the delay is constructively fraudulent against his mortgage; yet this does not prevent him from taking advantage of a subsequent postponement without his consent. *Ib.*

57. Under the statute regulating the practice in the common-law courts of Mobile, (Session Acts 1853–4, p. 92,) which provides that "the lien acquired by any execution issuing from either of said courts shall not be lost, if *alias* executions issue to the sheriff without interval of more than ninety days," an *alias* issued on the 14th July is sufficient to preseve the lien of a previous execution issued on the 14th April. *Lang v. Phillips*, 27 Ala. 311.

58. When an execution is levied on land, and, before the sale, another execution on an older judgment comes to the hands of the sheriff, the latter is entitled to the proceeds of sale. *Bagby v. Reeves*, 20 Ala. 427.

59. The lien of an execution, issued on a judgment rendered by a justice of the peace in an attachment case, and levied on land on which the attachment was levied, relates back to the levy of the attachment, and is entitled to preference over an execution levied during the intermediate period. *Langdon v. Raiford*, 20 Ala. 532.

60. The action of the court on an application for instructions to the sheriff, relative to the appropriation of money arising from the sale of property under sundry executions, is *res adjudicata*, and conclusive until reversed. *Ib.*

61. If several of the plaintiffs in execution except to the ruling of the court on such application, but one writ of error is allowable, to which all must be made parties. *Branch Bank at Decatur v. McCollum*, 20 Ala. 280.

IV. RETURN; AND HEREIN, OF MOTIONS TO SET ASIDE RETURNS.

62. A sheriff's return on an execution cannot be proved by parol, until the absence of the higher evidence is first satisfactorily explained. *McDade v. Mead*, 18 Ala. 214.

63. The sheriff's endorsement of a levy is admissible evidence, without proof of his handwriting. *Barron v. Tart*, 18 Ala. 668.

64. His return on a copy of an execution, sent from another county, is competent evidence like his return on an original execution. *Lanier v. Branch Bank at Montgomery*, 18 Ala. 625.

65. His return, as to the amount of the proceeds of sale, is not conclusive on a third person, who afterwards brings suit against the purchaser. *Crow v. Hudson*, 21 Ala. 560.

66. His return, showing a levy on certain negroes as the property of the defendant in execution, is presumptive evidence against himself; but, when ruled for failing to make the money, he may repel this presumption, by showing that the negroes were free, and were discharged as such. *Union Bank of Tennessee v. Benham*, 23 Ala. 143.

67. If he takes the note of a third person in settlement of the debt, and then returns the execution satisfied, the plaintiff may have the return set aside, but the sheriff can neither amend nor set it aside. *Holt v. Robinson*, 21 Ala. 106.

68. A sheriff may, by leave of the court, amend his return on an execution, pending a motion against him for failing to pay over the money collected on it. *Niolin v. Hamner*, 22 Ala. 578.

69. On motion to set aside the return on an execution, it is competent for the defendant therein to show that the money has been paid, as stated in the return, and had been tendered and refused; and, by tendering it anew, to avoid the payment of interest and any further issue of execution. *Minter & Gayle v. Branch Bank at Mobile*, 23 Ala. 762.

70. A return in these words, "The property levied on was claimed by another, and not sold for want of indemnity," does not authorize the conclusion that the officer has either delivered the property to the claimant, or has returned it to the defendant. *Branch Bank at Decatur v. McCollum*, 20 Ala. 280.

V. SALES; AND HEREIN, OF MOTIONS TO SET ASIDE SALES.

71. A sale of land under an execution, the return day of which has passed, is void, and conveys no title to the purchaser. *Smith v. Mundy*, 18 Ala. 182.

72. If the sheriff levies an execution, while in force, on personal property, he may sell after the return day of the writ. *Evans v. Governor*, 18 Ala. 659.

73. So may a constable. *Dennis & Strickland v. Chapman*, 19 Ala. 29.

74. A sale of property belonging to an estate, under an execution on a judgment rendered against the decedent after his death, is void. *Swink's Adm'r v. Snodgrass*, 17 Ala. 653.

75. An equitable title cannot be sold under execution at law. *Lang's Heirs v. Waring*, 17 Ala. 145; *Wilson v. Beard*, 19 Ala. 629.

76. A purchaser at sheriff's sale acquires only all the title and interest of the defendant in execution. *Doe d. Cook & Hardy v. Webb*, 18 Ala. 810; *DeVendell v. Doe d. Hamilton*, 27 Ala. 156; *O'Neal v. Wilson*, 21 Ala. 288; *Doe d. Stevens v. King*, 21 Ala. 429.

77. The doctrine of "*caveat emptor*" applies to sales under execution, where the sheriff attempts to sell a greater interest than the defendant has; as where he sells the entire property in slaves under deed of trust, declaring that the proceeds of sale shall be applied first to the payment of the secured debts, and the balance to the satisfaction of the execution. *O'Neal v. Wilson*, 21 Ala. 288.

78. This maxim holds in equity as well as at law. *Lang's Heirs v. Waring*, 25 Ala. 625; *McCartney v. King*, 25 Ala. 681.

79. And the fact that the plaintiff in execution, after indemnifying the sheriff, became himself the purchaser at the sale, does not affect its application. *McCartney v. King*, 25 Ala. 681.

80. When land is sold under an *alias* or *pluries*, and no objection to its regularity is raised in the primary court, the appellate court will presume that previous executions had been regularly issued. *Pollard v. Cocke*, 19 Ala. 188; *Sellers & Cook v. Hayes*, 17 Ala. 749.

81. An order of sale made by the circuit court, which recites the issue of an execution by a justice of the peace of the county in which the lands lie, and its levy by a constable of that county, and also states the numbers of the lands, sufficiently shows the location of the lands. *Weir v. Clayton*, 19 Ala. 132.

82. A sheriff's deed cannot be collaterally impeached, on account of any irregularities in his proceedings, or in the process under which he sold the land, *Pollard v. Cocke*, 19 Ala. 188; *Weir v. Clayton*, 19 Ala. 132.

83. A sale of lands situated in the middle district of the State, made in the southern district, and by the United States marshal of the southern district, is absolutely void. *Pollard v. Cocke*, 19 Ala. 188.

84. A sale of 240 acres of land, out of a single tract containing 280 acres, is void for uncertainty and indefiniteness of description, when there are no means of distinguishing the portion levied on and sold from the residue of the tract. *Deloach v. State Bank*, 27 Ala. 437.

85. The validity of the sale is not affected by the fact that the land is in the adverse possession of a third person. *Coleman v. Hair*, 22 Ala. 596; *Long v. McDougald's Adm'r*, 23 Ala. 413.

86. But the purchaser, in such case, acquires only a right of property, connected with a right of possession, which can neither be sold nor asserted by force. *Coleman v. Hair*, 22 Ala. 596.

87. If only a nominal sum is bid for the property, the sheriff should not proceed with the sale, but should return the execution, with the levy, stating that the property was not sold for want of bidders. *Henderson v. Sublett*, 21 Ala. 626; *Lankford v. Jackson*, 21 Ala. 650.

88. If he sells the property for a grossly inadequate price, (as where he sells lands worth $1200 for $6, or land worth $1800 for $5,) the sale will be set aside, on the timely application of any person who is either a party to the suit, or has a legal or equitable interest in the property. *Ib.*

89. If the deputy sheriff, by whom the sale is conducted, becomes himself the purchaser at an inadequate price, after having forbid the sale at the instance of the defendant in execution, the sale will be set aside on timely application. *Daniel v. Modawell*, 22 Ala. 365.

90. But, if the application is not made until after the lapse of more than four years from the sale, and the land has meanwhile passed into the possession of sub-purchasers for valuable consideration, who have received conveyances and made valuable improvements, the application comes too late; and the plaintiff's ignorance of the fact that the sale was forbidden by the officer himself, when he was apprised of other circumstances sufficient to put him on inquiry, does not excuse his laches. *Ib.*

91. The plaintiff in execution is not a necessary party to a motion to set aside a constable's sale on account of his want of authority. *Stainton's Adm'rs v. Simmons & Simmons*, 24 Ala. 410.

92. If the motion is made by the defendant in execution, against the purchaser and the constable as defendants, the fact that he had brought an action of trespass against the constable, for levying on the property, and had recovered a judgment against him, is no bar or defense to the motion. *S. C.*, 20 Ala. 243.

VI. SATISFACTION.

93. If a sheriff sells land under execution, and executes a deed to the purchaser, without having received the purchase-money, the execution is satisfied to the extent of the sum bid, unless the sale is set aside. *Moore v. Barclay*, 18 Ala. 672.

94. A levy and sale of property which is subject to the execution, is a satisfaction *pro tanto*; but, if the property is not in fact subject, and the proceeds of sale are claimed by the party having the better legal right to it, it is no satisfaction. *Nolin v. Hamner*, 22 Ala. 578.

95. The payment by a sheriff of an execution in his hands, is a satisfaction of it, if the parties so elect to treat it, although no endorsement or return of satisfaction is made or entered. *Mooney & Black v. Parker*, 18 Ala. 708; *Houston v. Crutchfield's Adm'r*, 22 Ala. 76; *Poe v. Dorrah*, 20 Ala. 288.

96. If the sheriff takes the note of a third person in settlement of the debt, and then returns the execution satisfied, the plaintiff may have the return set aside, but the sheriff can neither amend nor set it aside. *Holt v. Robinson*, 21 Ala. 106.

VII. SUPERSEDEAS, AND MOTIONS TO QUASH.

97. The proceeding by petition and *supersedeas* is a substitute for the ancient writ of *audita querela*. *Dunlap v. Clements*, 18 Ala. 778; *Bower v. Saltmarsh*, 19 Ala. 274; *Bruce v. Barnes*, 20 Ala. 219; *Branch Bank at Mobile v. Coleman*, 20 Ala. 140.

98. It is, therefore, the proper mode of presenting a defense to an execution on a summary judgment, which the party had no previous opportunity to present. *Dunlap v. Clements*, 18 Ala. 778.

99. If a bankrupt obtains his certificate of discharge after the rendition of a judgment by default against him, but before the execution of a writ of inquiry, he may take advantage of his discharge by motion to supersede and quash an execution on the judgment. *Ewing v. Peck & Clark*, 17 Ala. 339.

100. The petition for a *supersedeas* may be verified by the oath of an agent. *Branch Bank at Mobile v. Coleman*, 20 Ala. 140.

101. If it alleges that the judgment "is satisfied," it is sufficient on demurrer. *Rice v. Dillahunty*, 20 Ala. 399.

102. If the alleged grounds of relief

go to matters behind the judgment, the petition is demurrable. *Marshall v. Caudler*, 21 Ala. 490.

103. The petition, which stands in lieu of a declaration, may be amended after demurrer sustained to the original, provided the amendment does not make an entirely new case as to the execution sought to be superseded. *Pearsall v. McCartney*, 28 Ala. 110.

104. A *supersedeas*, to restrain the execution of a writ of *hab. fac. poss.*, cannot be granted in vacation, on the petition of a stranger to the judgment. *Grant v. Kennedy*, 19 Ala. 226.

105. When issue is joined on the facts stated in the petition, it may be submitted to a jury for decision. *Branch Bank at Mobile v. Coleman*, 20 Ala. 140.

106. In such case, neither the affidavits of the parties, nor the depositions of incompetent witnesses, are admissible. *Bower v. Saltmarsh*, 19 Ala. 274.

107. Either party has a right to demand a trial by jury, and to cross-examine all witnesses offered against him. *Bruce v. Barnes*, 20 Ala. 219.

108. The petitioner is entitled to open and conclude the argument. *Pearsall v. McCartney*, 28 Ala. 110.

109. When the record shows that the plaintiff in execution was a party to the proceedings, he cannot assign for error his want of notice. *Branch Bank at Mobile v. Coleman*, 20 Ala. 140.

110. An equitable satisfaction of the judgment may be presented by this proceeding. *Ib.*

111. If an execution is superseded while in the hands of the sheriff, it is the duty of petitioner to have the sheriff notified of the *supersedeas*, so that he will be protected in refusing to execute the writ. *Payne v. Governor*, 18 Ala. 320.

112. The plaintiff in execution is entitled to notice of a motion to quash or supersede it on the ground of satisfaction, whether the alleged satisfaction appears by the sheriff's return or otherwise. *McKissack v. Davis*, 18 Ala. 315.

113. The successful party is entitled to recover his costs. *Ijams & Carr v. Rice*, 17 Ala. 404.

114. On motion to quash or enter satisfaction, matters which go behind the judgment cannot be inquired into. *Matthews v. Robinson*, 20 Ala. 130; *Mervine v. Parker*, 18 Ala. 241; *Marshall v. Caudler*, 21 Ala. 490.

115. On motion to quash an execution, it is not allowable to prove a mistake in the judgment, as to the name of one of the defendants, so as to make it support the execution. *Shorter's Adm'r v. Mims*, 18 Ala. 655.

116. An execution, issued on a judgment against a bankrupt, after he has obtained his discharge, may be superseded, or quashed on motion. *Ewing v. Peck & Clark*, 17 Ala. 339; *Brown v. Branch Bank at Montgomery*, 20 Ala. 420; *Stewart & Fontaine v. Hargrove*, 23 Ala. 429.

117. A judgment, quashing an execution, on the ground of the defendant's bankruptcy, relates back to the original judgment, and vacates all subsequent process on it. *Ewing v. Peck*, 26 Ala. 413.

EXTINGUISHMENT.

1. In England, if a debtor makes his creditor, or the executor of his creditor, his executor, and latter accepts the trust, and receives sufficient assets of the debtor's estate, the debt is extinguished; but this doctrine, which results from the power there possessed by the executor over the personal estate of his testator, does not obtain here to the same extent, because the executor has no right to take the assets, other than money, and retain them in satisfaction of his debt; consequently, the debt cannot be considered extinguished, unless it is also shown that moneys which were sufficient for the payment of the demand, and which might have been lawfully retained in satisfaction of it, came to the executor's hands. *Kimball v. Moody*, 27 Ala. 130.

2. It being shown that the debtor, at the time of his death, was seized and possessed of a large estate, consisting of both real and personal property, which went into the hands of his executor, who administered on the estate for nearly twelve years, and, at his death, left a large portion of the assets unadministered, which afterwards came into the hands of his suc-

cessor,—*held*, that equity would presume the retainer and consequent extinguishment of the debt. *Ib.*

3. A payment by a third person, which is adopted and sanctioned by the debtor, extinguishes the debt. *Ross v. Pearson*, 21 Ala. 473; *Prater v. Stinson and Wife*, 26 Ala. 456.

4. A payment to a third person, at the request of the creditor, or with his subsequent approval and sanction, is an extinguishment of the debt. *Brooks v. Hildreth & Moseley*, 22 Ala. 469.

5. If a third person gives his own note, in payment of another's debt, and takes a receipt in the name of the debtor, this does not extinguish the debt, unless the privity or assent of the debtor is shown. *Williams v. Sims*, 22 Ala. 512.

6. A payment of moneys due the State to the comptroller of public accounts, who has no authority to receive it, does not discharge the party making it from liability to the State, unless the payment is ratified by the sovereign power. *Walker v. Chapman*, 22 Ala. 116; *VanDyke v. The State*, 24 Ala. 81.

7. The acceptance of a note, from either the defendant or a stranger, may extinguish a judgment. *Brewer v. Branch Bank at Montgomery*, 24 Ala. 439.

8. The acceptance of a debtor's negotiable note, at or after the creation of the debt, is not an extinguishment, unless there is an agreement so to receive it. *Mooring v. Mobile Marine Dock & Mutual Insurance Co.*, 27 Ala. 254.

9. A lessee's negotiable note, for the amount of the rent, is not an extinguishment of the rent reserved by the lease. *Dorrance v. Jones*, 27 Ala. 630.

10. A draft, drawn by the principal debtor on the guarantor, but not accepted by the latter, does not affect the relations of the parties on the guaranty, when it does not appear to have been received in payment. *Walker v. Forbes*, 25 Ala. 139.

11. The acceptance of a note on a third person, in payment of an account, is an extinguishment of the account, although such third person is insolvent, unless the debtor used some fraud or misrepresentation to induce the creditor to take it. *Carriere v. Ticknor*, 26 Ala. 571.

12. The acceptance of a note on an insolvent person, as collateral security, and its retention for never so long a period, do not authorize the inference of payment. *Powell's Adm'r v. Henry*, 27 Ala. 612.

FENCES.

(Statutory Provisions: Code, §§ 1099–1109; Clay's Digest, 241–2. §§ 1–5.)

1. At common law, the tenant of a close was not bound to fence against an adjoining close, unless by force of prescription. *Moore v. Levert*, 24 Ala. 310.

2. The act of 1807, relative to partition fences, does not restrict a tenant's right to let his own lands lie open; he being responsible in damages if his cattle break into grounds enclosed with a lawful fence. *Ib.*

3. In an action to recover one half of the expense of a partition fence, the actual interest which the parties have in the fence is a question which cannot arise. *Ib.*

4. The fact that some pannels of the defendant's outside fence were down, though not conclusive evidence that his lot was unenclosed, is nevertheless competent evidence for the consideration of the jury in ascertaining that fact. *Ib.*

5. Defendant would not be liable for the erection or repairs of a partition fence, if his lot was in the possession of a trespasser or adverse holder; but, if he consented as owner to the erection of the fence by the adjoining proprietor, and it was erected upon the consent thus given, he would be estopped from denying his liability. *Ib.*

6. Each party has the right to enter on the land of the other, for the purpose of repairing a partition fence. *Henry v. Jones*, 28 Ala. 385.

7. If the fence is recognized by both parties as a partition fence, though built entirely on the land of one proprietor, neither can complain of an act done by the other which, if

the fence had been on the dividing line, would have been lawful. *Ib.*

8. The right to repair a gate, recognized as part of a partition fence, does not authorize its destruction as a gate. *Ib.*

9. In an action to recover damages for injuries done to plaintiff's hogs, which had broken into defendant's enclosure, defendant cannot recoup for damages done to his crop by the hogs, when it is shown that his fence was not a "lawful fence." *Woodward v. Purdy*, 20 Ala. 379.

FERRY.

See ROADS, BRIDGES, AND FERRIES.

FINES AND FORFEITURES.

1. The power to remit fines and forfeitures is confided by the constitution to the governor alone, and cannot be exercised by the legislature; consequently, the act of 1850, "for the relief of the sureties of John Douglass, late clerk of the circuit court of Marion," is unconstitutional. *Haley v. Clark*, 26 Ala. 439.

2. When a person, convicted of a misdemeanor, is sentenced to pay a certain fine, and to be imprisoned until it is discharged, a remission by the governor of the imprisonment alone is not a release or satisfaction of the fine. *The State v. Richardson*, 18 Ala. 109.

3. After the repeal of a statute giving a penalty, no recovery can be had for a penalty incurred under it, unless the repealing statute reserves the right of action. *Broughton v. Branch Bank at Mobile*, 17 Ala. 828.

4. The statutory limitation of prosecutions for the recovery of fines and forfeitures under penal statutes, does not apply to a summary proceeding against a delinquent tax collector. *Walker v. Chapman*, 22 Ala. 116.

As to penalties imposed on delinquent sheriffs, tax-collectors, coroners, and other officers, see those respective titles.

FIXTURES.

1. Growing fruit trees, and fences enclosing a field, are fixtures. *Mitchell v. Billingsley*, 17 Ala. 391.

2. In the United States, erections for agricultural purposes enjoy the same protection which the common law in England afforded to fixtures erected for the purposes of trade. *Harkness v. Sears & Walker*, 26 Ala. 493.

3. As between vendor and purchaser, the stationary machinery for impelling turning-lathes or other portable machines, if erected by the vendor for his own use, for the purpose of either trade or agriculture, and fixed in or to the ground, or to some substance which has already become a part of the freehold, passes to the purchaser under a deed for the land. *Ib.*

FRAUD.

As to actions for fraud and deceit, see ACTION ON THE CASE, I. 7, II, 3, pp. 373–7.

As to fraud in sales, see VENDOR AND PURCHASER.

As to the evidence of fraud, see EVIDENCE, XIX, 7, p. 627.

See, also, the same title in PART III, p. 267.

FRAUDS, STATUTE OF.

(Statutory Provisions: Code, §§ 1550–56; Clay's Digest, 254–5, §§ 1–3.)

I. CONTRACTS REQUIRED TO BE IN WRITING.

1. *Promise by Executor or Administrator.*
2. *Promise to Pay Debt of Another.*
3. *Contracts Respecting Real Estate.*
4. *Sales of Personalty.*
5. *Contracts not to be Performed within one Year.*

II. FRAUDULENT GIFTS, LOANS, AND CONVEYANCES.

1. *Who are Creditors and Purchasers.*
2. *What Conveyances are Fraudulent.*
3. *Rights of Creditors and Purchasers.*

I. CONTRACTS REQUIRED TO BE IN WRITING.

1. *Promise by Executor or Administrator.*

1. A verbal promise to pay out of the assets of the estate, not founded on some new consideration, is not binding on an administrator personally. *Martin v. Black's Executors*, 20 Ala. 309.

2. *Promise to Pay Debt of Another.*

2. A promise to pay the debt of another, not reduced to writing, is void. *Beall & Co. v. Ridgeway*, 18 Ala. 117; *Blount v. Hawkins*, 19 Ala. 100; *Martin v. Black's Executors*, 20 Ala. 309; *S. C.*, 21 Ala. 721; *Hollingsworth v. Martin*, 23 Ala. 591.

3. Such promise must not only be reduced to writing, but must be founded on sufficient consideration. *Beall & Co. v. Ridgeway*, 18 Ala. 117; *Martin v. Black's Executors*, 20 Ala. 309; *S. C.*, 21 Ala. 721; *Williams v. Sims*, 22 Ala. 512; *Hollingsworth v. Martin*, 23 Ala. 591.

4. But a promise founded on a new consideration, beneficial to the promisor, is not within the statute, and may be enforced, although not reduced to writing. *Martin v. Black's Executors*, 20 Ala. 309; *S. C.*, 21 Ala. 721.

5. A verbal promise by a mother, to pay a debt against the estate of her deceased son, if the creditor's attorney would also act as her attorney, in having the administrator of the estate removed and herself appointed his successor, is not beneficial to the promisor, and is therefore void under the statute, when it is shown that the attorney charged her for his said services, and that she paid him. *S. C.*, 21 Ala. 721.

6. Forbearance to sue the debtor is a sufficient consideration, if the promise is reduced to writing; *secus*, if the creditor has not the legal right to sue at any time during the period of the promised forbearance. *S. C.*, 20 Ala. 309.

7. A written promise by a mother, to pay a debt against the estate of her deceased son, on which letters of administration were granted on the 1st October, 1847, in consideration of the creditor's forbearance to sue "until the cotton crop made on the plantation of the deceased in the year 1847 was sold, which would probably be during the ensuing spring," is not supported by a sufficient consideration. *Ib.*

8. A promise by the surety on a replevy bond, to pay the debt if the creditor will dismiss the attachment suit, is both detrimental to the creditor, and beneficial to the promisor; and is consequently valid, though not reduced to writing. *Blount v. Hawkins*, 19 Ala. 100.

9. A verbal promise by an executor, in these words, "Let the children of J. M., deceased, have any goods they wish, and charge them to the children separately, and I will pay for them at the end of the year, or as soon as the cotton crop is sold," is an original undertaking, which is not within the statute of frauds, although the executor was authorized by the will to supply the children with goods, and both he and the creditor expected payment to be made out of the estate. *Sanford v. Howard*, 29 Ala. 684.

For analogous decisions, respecting the difference between direct and collateral promises, see GUARANTY.

3. *Contracts Respecting Real Estate.*

10. A contract for the sale of a "right to dig and carry away ore" from the mine of another, is within the statute, and void unless reduced to writing; but, nevertheless, it will protect the party to whom the right is given from an action of trespass for digging the ore, and vest in him the property to the ore actually dug under it. *Riddle v. Brown*, 20 Ala. 412.

11. A contract for the sale of improvements on land, consisting of sundry houses, is not within the statute. *Scoggin v. Slater*, 22 Ala. 687.

12. Nor is a promise to pay for improvements on land held adversely to the promisor, in consideration that the tenant would attain to him, and pay him rent for the unexpired term, within the statute. *Cassell v. Collins*, 23 Ala. 676.

13. A promise by a father, upon valuable consideration, to make his daughter equal in property with his

other children, or to give her so much as would make her share equal to one fourth, one fifth, or any other given portion of his estate, is not within the statute, although his estate consists entirely of lands. *Adams and Wife v. Adams*, 26 Ala. 272.

14. Conceding that a purchase of lands at execution sale, under a parol agreement with the defendant in execution to purchase for his benefit, will enure to the benefit of the purchaser himself under the operation of the statute; yet, if such purchaser resells the lands, taking a note for the purchase-money, and places the note in the hands of a third person for the benefit of the defendant, the latter may maintain an action for money had and received, to recover its proceeds when collected, and the statute of frauds is no defense to the action. *Garrett's Admr's v. Garrett & Garrett*, 27 Ala. 687.

15. Although an action at law cannot be maintained, for the breach of a contract which, because not reduced to writing, is void under the statute; yet a recovery may be had, at law, for services performed under it. *Sims v. McEwen's Adm'r*, 27 Ala. 184.

16. The statute has no application to resulting trusts, arising by operation of law alone, which may always be established by parol, except where the rules of evidence prevent. *Caple v. McCollum*, 27 Ala. 461.

As to the part performance of parol contracts respecting real estate, which will avoid the statute in equity, see SPECIFIC PERFORMANCE, p. 337.

4. *Sales of Personal Property.*

17. A contract for the sale of promissory notes, at a price not exceeding $200, is not required to be in writing, although the notes are not delivered at the time, nor any part of the price paid. *Hudson & Stokes v. Weir & Tate*, 29 Ala. 294.

18. If the purchaser of a slave at public auction takes possession under his purchase, without any thing being said, or any understanding being had, qualifying the act, and retains possession for one, two or three days, without making any objection to the sale, the jury may well infer from these facts a consummation of the sale. *Kelly v. Brooks*, 25 Ala. 523.

19. In an action by the auctioneer against such purchaser, to recover the difference between the price bid at the sale and the amount brought at a re-sale on the purchaser's account, a written memorandum of the sale, made at the time by the auctioneer's clerk, accompanied by the parol testimony of the clerk, showing that the slave was knocked down to the purchaser, and was afterwards delivered to him, is admissible evidence for the plaintiff, as tending to prove a consummation of the sale. *Ib.*

5. *Contract not to be Performed within one Year.*

20. A promise by a father, upon valuable consideration, to make his daughter equal in property to his other children, or to give her so much as would make her share equal to one fourth, one fifth, or any other given portion of his estate, is not within the statute, if the parties contemplated its present execution on the performance of the consideration, although its execution may be postponed by circumstances beyond a year and a day. *Adams and Wife v. Adams*, 26 Ala. 272.

II. FRAUDULENT GIFTS, LOANS, AND CONVEYANCES.

1. *Who are Creditors and Purchasers.*

21. A contingent liability under a contract, express or implied, constitutes the party to whom it is incurred a creditor within the meaning of the statute. *Foote and Wife v. Cobb*, 18 Ala. 585.

22. A purchaser, with general covenants of warranty, is a creditor from the time of the execution of his deed, when there is at the time an outstanding paramount title, under which he may be or is afterwards evicted. *Gannard v. Eslava*, 20 Ala. 732.

23. The simple fact of marriage, *per se*, does not constitute the husband a purchaser of property in the possession of the wife. *Perry v. Graham*, 18 Ala. 822.

24. A claimant, deriving title partly by gift, and partly by purchase, con-

summated before the lien of an execution attached, must be regarded, at law, as a purchaser for valuable consideration, when no fraud is shown. *Taylor v. Branch Bank at Huntsville;* 21 Ala. 581.

25. The payment of $65 for a slave constitutes a valuable consideration. *Dent v. Portwood,* 21 Ala. 589.

26. Taking a mortgage to secure a debt, without paying anything for it, or waiving any right or lien to obtain it, or incurring any new responsibility, does not constitute the mortgagor a purchaser for valuable consideration. *Stiles & Co. v. Lightfoot,* 26 Ala. 443; *Boyd v. Beck,* 29 Ala. 703.

27. A dedication of land to the public, as a road or highway, must, in the absence of evidence that value was paid for the grant, be regarded as voluntary and gratuitous. *Hoole & Paullin v. Attorney-General,* 22 Ala. 190.

As to what constitutes a creditor or subsequent purchaser without notice, who may invoke the statutes of registration against a prior mortgagee whose deed is unrecorded, see MORTGAGES, 104–117, p. 308.

2. *What Conveyances are Fraudulent.*

28. A deed of gift of slaves, executed in another State, is not required to be recorded here, in order to protect a remainder. *Lyde v. Taylor,* 17 Ala. 270; *Turner v. Fenner,* 19 Ala. 355; *Fralick v. Presley and Wife,* 29 Ala. 457. (But see *McCoy v. Odom,* 20 Ala. 502.)

29. And this, although the tenant for life and the remainderman both resided here at the time of the execution of the deed, and continue to reside here. *Turner v. Fenner,* 19 Ala. 355.

30. Nor does the statute apply to a deed of gift, executed in another State, by which slaves are given to a married woman, "during her natural life, to her separate, sole and exclusive use and behoof," and at her death to her children. *Michan and Wife v. Wyatt,* 21 Ala. 813.

31. But a loan of slaves in another State must, when the property is brought into this State, be recorded here, in order to protect the rights of the owner as against the creditors of the party in possession. *McCoy v. Odom,* 20 Ala. 502.

32. The possession of the husband, under a loan to his wife and children, is within the statute. *McCoy v. Odom,* 20 Ala. 502; *Knight v. Bell,* 22 Ala. 198.

33. But, where the husband's possession commenced under such loan, and the property is afterwards given to his minor children, who reside with him, his subsequent possession will be referred to their title, although there was no actual change of possession. *McCoy v. Odom,* 20 Ala. 502.

34. The statute does not apply, where the father of a debtor purchases his property at trustee's sale under deed of trust, and immediately suffers it to go back to the debtor's possession, "with permission to get a subsistence for himself and family, but to turn over all beyond this to the father; the property to be under the general supervision and control of an agent for the father." *Montgomery's Executors v. Kirksey,* 26 Ala. 172.

35. A deed, purporting to have been made in consideration of natural love and affection, "and for divers other good considerations," which are shown by parol to have been valuable, is not within that clause of the statute concerning conveyances of personalty "upon consideration not deemed valuable in law." *Johnson v. Boyles,* 26 Ala. 576.

36. A gift, or other voluntary conveyance, is void as against existing creditors, although no actual fraud was intended. *Thomas v. DeGraffenreid,* 17 Ala. 602; *Stokes v. Jones,* 18 Ala. 734; *S. C.,* 21 Ala. 731; *Foote and Wife v. Cobb,* 18 Ala. 585; *Gannard v. Eslava,* 20 Ala. 732; *Stiles & Co. v. Lightfoot,* 26 Ala. 443.

37. But, to enable subsequent creditors to avoid it, it must be shown to have been made with a fraudulent intent. *Thomas v. DeGraffenreid,* 17 Ala. 602; *Stiles & Co. v. Lightfoot,* 26 Ala. 443.

38. This is also the law of Georgia, under the construction of the English statutes there adopted. *Foote and Wife v. Cobb,* 18 Ala. 585.

39. The marrriage of the grantee, subsequent to the execution of the deed, but before its avoidance by

creditors, does not give it any validity. *Stokes v. Jones*, 18 Ala. 734.

40. A voluntary deed is also void as against subsequent *bona-fide* purchasers for valuable consideration. *S. C.*, 21 Ala. 731.

41. And this, although the grantor, at the time of its execution, did not have such title to the lands conveyed as could have been subjected by his creditors, either at law or in equity, but afterwards acquired title. *Ib.*

42. If the husband purchases property with money belonging to the *corpus* of his wife's separate estate, taking the title in his own name; and afterwards voluntarily conveys it to the wife, though for the purpose of preventing his creditors from subjecting it to his debts, his conveyance will be sustained. *Wilson v. Sheppard*, 28 Ala. 623.

43. A conveyance, executed by an insolvent debtor to one of his creditors, absolute on its face, but accompanied with a parol agreement that it should operate only for the grantee's indemnity, is fraudulent and void as to the grantor's other creditors. *Bryant v. Young & Hall*, 21 Ala. 264.

44. A sale of goods by an insolvent debtor, on a credit, with a reservation to the purchaser of the right to rescind the contract on a specified day, is inconsistent with an honest and absolute disposition of the property, and is subject to be defeated by the levy of an attachment on the goods, at any time before the purchaser has paid the agreed price and made his election. *West, Oliver & Co. v. Snodgrass*, 17 Ala. 549.

45. As to the validity of such contract, if no levy had been made before the day on which the purchaser was to make his election, and he had then elected to affirm it, *quære? Ib.*

46. A possession of slaves under a *bona-fide* contract of hiring, for valuable consideration, is not within the statute, whether the hiring is at will, from year to year, or for a definite period. *Upson v. Raiford*, 29 Ala. 188.

47. If the vendor of a family of slaves retains the possession of them, after an absolute sale, under a *bona-fide* contract of hiring, the consideration of which is their board and clothing, this would be a possession upon valuable consideration, if the chief value of the slaves was their prospective growth and improvement, and their board and clothing constituted a fair equivalent for their services. *Ib.*

As to the validity of deeds of trust, and assignments for the benefit of creditors, see DEEDS, 139–64, pp. 542–45.

3. *Rights of Creditors and Purchasers.*

48. A voluntary conveyance may be avoided, in a court of law, by a subsequent *bona-fide* purchaser for valuable consideration; and the fact that it contains full covenants of warranty, does not operate as an estoppel on him. *Stokes v. Jones*, 18 Ala. 734; *S. C.*, 21 Ala. 731.

49. Where such deed contains a condition, that the grantor shall, during his life, be supported by the grantee, who is an infant of tender years; and the grantee does not in any manner accept or bind himself to the performance of the condition, until after a sale by the grantor to a *bona-fide* purchaser for valuable consideration, the title of the purchaser cannot be defeated by his subsequent acceptance and part performance of the condition. *S. C.*, 21 Ala. 731.

50. If the owner resumes the possession of his property, before a creditor of the borrower has acquired a lien on it, though after the expiration of three years, it cannot be afterwards subjected to the borrower's debts. *McCoy v. Odom*, 20 Ala. 502; *Pharis v. Leachman*, 20 Ala. 662.

51. If he resumes the possession before the expiration of the three years, though with the view of thereby avoiding the effect of the statute, and retains it for one or two days, this cuts off the statute at that point, and the borrower's subsequent possession will date from the time the property is restored to him. *Montgomery's Executors v. Kirksey*, 26 Ala. 172.

52. Although a creditor may subject slaves which have been in his debtor's possession, under an unrecorded loan, for more than three years, this gives him no right to subject crops partly grown by them, or other products of

their labor, which have not been in the debtor's possession for three years. *Ib.*

53. A purchaser from the borrower acquires no title, unless the three years were complete at the date of his purchase: he cannot add his own subsequent possession to that of the borrower, in order to claim the benefit of the act. *Brainard v. McDevitt*, 21 Ala. 119.

54. If the borrower himself becomes the purchaser at execution sale, or, by agreement with the purchaser, takes the property at the latter's bid, he is but remitted to his former title, and cannot defend against the lender under the title of the purchaser. *Knight v. Bell*, 22 Ala. 198.

55. The possession of slaves, by a fraudulent purchaser, gives him no title under the statute of limitations, as against a creditor of the vendor who could not, by reasonable diligence, have discovered the fraud within six years before the levy of his execution. *Snodgrass v. Branch Bank at Decatur*, 25 Ala. 161.

GENERAL ASSEMBLY.

See CONSTITUTIONAL LAW, VII.

GIFTS.

I. INTER VIVOS.

1. *By Deed.*
2. *By Parol.*

II. MORTIS CAUSA.

I. INTER VIVOS.

1. *By Deed.*

1. Where a father conveyed all his property by deed of gift to his son, who at the same time executed a bond to the father, conditioned that he would let the father retain the possession of the property during the lives of himself and wife, or until he might think proper to divide it among his children,—*held*, construing the bond and deed as parts of one and the same transaction, that a life estate in the property was reserved to the grantor, with power to defeat the title of the grantee at any time by making a division of the property among his children. *Strong's Executors v. Brewer*, 17 Ala. 706.

2. A deed of gift was in these words: "Know all men, by these presents, that I, A. G., for the love and affection I have for my daughter Mary, have given to her a certain negro girl named Eliza, about ten years old, with all her issue; which said negroes I warrant and defend to the said Mary during her life, and to her heirs afterwards, (especially those who, in the course of Providence, may live the longest with her,) against the lawful claims of any person or persons whatever." *Held*, that the daughter took an absolute estate in the slaves, and not a life estate merely. *Hamner v. Smith*, 22 Ala. 433.

3. Under a deed of gift of a slave, "to my daughter L. during her natural life, and at her death to her child or children; but in case of the death of my said daughter, without lawful issue of her body, then the said negro and her increase to return and belong to my other heirs,"—*held*, that the term "heirs" was a word of limitation, and not of purchase; and that upon the death of L. without issue, living the grantor, his other surviving children, born before the execution of the deed, took nothing under it. *Couch v. Anderson*, 26 Ala. 676.

4. Under a deed of gift, in these words: "I give, grant, and confirm, unto my daughter Eliza, a negro girl named Perse, to have, hold and enjoy said property, with its increase, during the natural life of my said daughter; which property, at her death, shall descend to the natural heirs of her body; *provided* always, and upon this condition, and it is the true intent and meaning of these presents, that in case my said daughter die, leaving no natural heirs of her body, then, and in that case, said property shall revert back, and form part of my estate,"—*held*, that Eliza took only an estate for life, and not the absolute interest; that the words "die leaving" limited the words "heirs of her body" to issue

living at the death of the first taker; and that on her death, leaving no living issue, the grantor's personal representative might recover the property. *McVay's Adm'r v. Ijams*, 27 Ala. 238.

5. Where a father conveyed certain personal property, by deed of gift, to his "daughter Sarah, and to her children, the natural heirs of her body, at her death," "to have and to hold unto the said Sarah, her executors and administrators, forever, as her and her children's property;" and the deed reserved to the grantor, during his life, the use and possession of the property,—*held*, that Sarah took a life estate in the property, with contingent remainder to such of her children as might be living at her death. *Elmore v. Mustin*, 28 Ala. 309.

6. A deed of gift, conveying slaves to the grantor's daughter, then a married woman, "and her heirs after her, free from the claim or claims of any person or manner of person whatever, absolutely, as their own property-right, as fully as though they had purchased them," creates a separate estate in the wife. *Brown v. Johnson*, 17 Ala. 232.

7. So does a deed of gift, executed in Virginia in 1824, conveying slaves to the grantor's daughter, then a married woman, "and the lawful heirs of her body," and containing this clause: "I do bind myself, my heirs, &c., to make to the above-named property a clear and undoubted right, as much so as can be made by word or deed, from the claim and claims from every person or persons whatever, to my said daughter and her lawful heirs, as above mentioned." *Jenkins v. McConico*, 26 Ala. 213.

8. And a deed of gift, conveying personal property to a married woman, "for her own use and benefit alone." *Ozley v. Ikelheimer*, 26 Ala. 332.

9. But a stipulation in such gift, that the property shall not be liable to the husband's debts, does not, *per se*, create a separate estate. *Gillespie's Adm'r v. Burleson*, 28 Ala. 551.

10. A deed of gift of a slave, containing a condition that the donee shall emancipate him, vests the title absolutely in the donee, discharged of the condition. *Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27.

11. Where a father conveyed a slave by deed of gift to his married daughter, and sent the slave to her residence; but her husband, supposing that the deed created a separate estate in her, would not let the slave remain on his premises; whereupon the wife sent the slave back to her father, requesting him to do the best he could for her; and the father then took the slave, saying that he would put her to work and account to his daughter for it,—*held*, that there was nothing in these facts to affect the validity of the deed. *Mims' Executors v. Sturtevant*, 18 Ala. 359.

12. A deed of gift, executed by a minor, in trust for his children, is not void, but voidable merely; and the fact that it was acknowledged by him in open court, neither renders it irrevocable, nor requires that the revocation should be made in open court after notice. *Slaughter v. Cunningham*, 24 Ala. 260.

13. A deed of gift, though unrecorded, is valid and binding between the parties themselves. *Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27; *Perry v. Graham*, 18 Ala. 822.

14. A deed of gift of slaves, executed in another State, is not required to be recorded here, in order to protect a remainder. *Lyde v. Taylor*, 17 Ala. 270; *Turner v. Fenner*, 19 Ala. 355; *Fralick v. Presley and Wife*, 29 Ala. 457. (But see *McCoy v. Odom*,) 20 Ala. 502.

15. Nor does the statute apply to a deed of gift, executed in another State, by which slaves are conveyed to a married woman, "during her natural life, to her sole, separate and exclusive use and behoof," and at her death to her children. *Michan and Wife v. Wyatt*, 21 Ala. 813.

16. The declaration or admissions of the donor, after the execution of the deed, cannot be received to invalidate it. *Strong's Executor v. Brewer*, 17 Ala. 706; *Walker v. Blassingame*, 17 Ala. 810; *Foote and Wife v. Cobb*, 18 Ala. 585; *Lockhart and Wife v. Cameron*, 29 Ala. 355.

As to the validity of voluntary conveyances as against creditors, see FRAUDS, STATUTE OF, 36–40, p. 642.

2. *By Parol.*

17. Delivery is essential to the validity of a parol gift of personalty. *Thomas v. DeGraffenreid*, 17 Ala. 602; *Gillespie's Adm'r v. Burleson*, 28 Ala. 551; *Ivey's Adm'r v. Owens and Wife*, 28 Ala. 641.

18. But it is not indispensable that it should be contemporaneous with the words of conveyance. *Gillespie's Adm'r v. Burleson*, 28 Ala. 551.

19. Where the owner of a slave left her in plaintiff's possession, telling him that, if he never called for her, plaintiff's wife was to have her; and afterwards died without calling for her, and without making any disposition of her by will,—*held*, that these facts were not sufficient to establish a gift, since the owner never parted with his control or right of dominion. *Stallings v. Finch*, 25 Ala. 518.

20. If a father places the hand of a slave in the hand of his daughter, declaring at the same time that he gives the slave to her; and this is done with the intention thereby to create and consummate a parol gift, the dominion passes to the donee, and the gift is complete. *Ivey's Adm'r v. Owens and Wife*, 28 Ala. 641.

21. It is not necessary that the actual possession should be afterwards retained by the donee: subsequent possession by the donor is not conclusive evidence that there was no delivery, or that the dominion did not pass to the donee. *Ib.* See, also, *Mims' Executors v. Sturtevant*, 18 Ala. 359.

22. Although the donor's subsequent possession is not necessarily explained, when the donee is of lawful age, by the single fact that their home is the same; yet, where the donee is his daughter, and lives with him as a member of his family, and the slave is too young to be of active service or profitable, or to be permanently separated from a family of slaves belonging to the donor,—these fact are, *prima facie*, a sufficient explanation of the donor's subsequent possession and control of the slave, although the donee is over twenty-one years of age. *Ib.*

23. In an action to recover money due by promissory note, plaintiff proved that her grandfather, with whom she was then living, loaned the money to defendant, and took his note payable to her; that he stated, at the time, that the money was his, but that he intended it for her, at his death, if she remained with him until that time and pleased him; that she afterwards married, and left her grandfather's house; and that he subsequently went to defendant, gave him up the note, (which defendant then destroyed,) and took another note payable to himself. *Held*, on demurrer to this evidence, that it showed no right of recovery in plaintiff. *Shaw v. White*, 28 Ala. 637.

24. Slaves, sent by a father to his daughter's house on her marriage, are presumed to have been intended as a gift, or advancement, unless a different intention is expressed at the time. *Williams v. Maull*, 20 Ala. 721; *Burnett v. Branch Bank at Mobile*. 22 Ala. 642; *Rumbly v. Stainton and Wife*, 24 Ala. 712.

25. The same presumption arises, but is not so strong, in case of a daughter who has been long married. *Merriweather v. Eames*, 17 Ala. 330.

26. But such presumption may be rebutted, by proof of an understanding between the father and husband, that the slaves were intended for the wife, and would be secured by deed of trust to her children. *Gunn v. Barrow*, 17 Ala. 743.

27. The husband's continuous possession, for five years, of slaves placed with him by his father-in-law, raises the presumption of a gift, unless rebutted by satisfactory evidence. *Pharis v. Leachman*, 20 Ala. 662.

28. The receipt of either money or property by a child, from its father, is presumptive evidence of an advancement, unless such presumption is repelled by the nature of the property, or by some other circumstances showing that it could not have been so intended. *Smith v. Smith's Adm'rs*, 21 Ala. 761.

29. But a promissory note, executed by a child to its father, is not, of itself, evidence of an advancement; yet a subsequent agreement between the parties, by which the father parted with all interest in the money secured by the note, in favor of the child, may be established by parol. *Grey's Heirs v. Grey's Adm'rs*, 22 Ala. 233.

30. The declarations of the donor, at the time of the delivery of the property, and explanatory thereof, are admissible evidence as a part of the *res gestæ*. *Rumbly v. Stainton and Wife*, 24 Ala. 712; *Gillespie's Adm'r v. Burleson*, 28 Ala. 551.

31. His declarations prior to the consummation of the gift, but while it was under consideration and discussion by him, and in reference to and contemplation of it, and explanatory of his intention, are also competent evidence in a suit involving the title. *Gillespie's Adm'r v. Burleson*, 28 Ala. 551.

32. But his subsequent declarations are not admissible, as against the donee, either for the purpose of affecting the gift, or explaining his words and conduct at the time of the gift. *Rumbly v. Stainton and Wife*, 24 Ala. 712; *Stallings v. Finch*, 25 Ala. 518; *Gillespie's Adm'r v. Burleson*, 28 Ala. 551; *Crabb's Adm'r v. Thomas*, 25 Ala. 212.

33. Yet, where the issue is whether he had parted with his dominion in favor of the donee, with whom he had left the slave, a letter subsequently written by him to the latter is admissible evidence, for the purpose of showing that the latter was holding merely as his bailee. *Stallings v. Finch*, 25 Ala. 518.

34. The fact that the slave was his kept mistress, and had children by him, is irrelevant to such issue. *Ib.*

35. If the donor retains the possession after the alleged gift, his subsequent declarations, explanatory of his possession, are competent evidence on the principle of *res gestæ*. *Nelson v. Iverson*, 17 Ala. 216; *S. C.*, 19 Ala. 95; *S. C.*, 24 Ala. 9; *Barnes & Barnes v. Mobley*, 21 Ala. 232; *Johnson v. Boyles*, 26 Ala. 576; *Thomas v. DeGraffenreid*, 27 Ala. 651. (*Vide* EVIDENCE, 104–115.)

36. Where the question in issue is, whether or not a parol gift of a slave was perfected before the marriage of the donee, the fact that the donor was opposed to the marriage is wholly irrelevant. *Perry v. Graham*, 18 Ala. 822.

37. Evidence of a fact tending to show a moral consideration for a gift is not irrelevant, especially when the declarations of the donor, by which the gift is sought to be established, are alleged by the opposite party to have been made in jest. *Nelson v. Iverson*, 17 Ala. 216.

38. A recital in a will, made by the donor at the time of the gift, though of no efficiency as a muniment of title, is relevant and admissible. *Jennings v. Blocker's Adm'r*, 25 Ala. 415.

39. A valid gift of slaves, to the sole and separate use of a married woman, may be made by parol. *Lockhart and Wife v. Cameron*, 29 Ala. 355; *Crabb's Adm'r v. Thomas*, 25 Ala. 212; *Jennings v. Blocker's Adm'r*, 25 Ala. 415.

40. A parol gift of slaves in North Carolina is void. *McCullough and Wife v. Walker and Wife*, 20 Ala. 389.

As to the specific execution of parol gifts, see SPECIFIC PERFORMANCES, 22, 23, 37, p. 339.

II. MORTIS CAUSA.

41. One claiming under a gift *mortis causa*, derives title directly from the donor; and, although the property may be liable to the donor's debts after his death, it is not subject to the claims of his distributees. *Gaunt and Wife v. Tucker's Executors*, 18 Ala. 27.

GOVERNOR.

See CONSTITUTIONAL LAW, V.

GUARANTY.

I. CONSTRUCTION.

1. An endorsement of a promissory note, before maturity, in these words, "I assign and guaranty the within note to J. C. for value received," is an absolute, unconditional guaranty of the payment of the note at maturity. *Donley v. Camp*, 22 Ala. 659. See, also, *Lockett v. Howze*, 18 Ala. 613, opinion of DARGAN, C. J.

2. A written order, addressed to a mercantile firm, in these words, "Please let the bearer, Mr. O., have any little things he may stand in need of, and I shall be good for the same," is a direct, original undertaking, which continues until revoked, or until the account is closed, and embraces any articles, of no great value, which would come under the denomination of necessaries for a person in O.'s condition. *Scott v. Myatt & Moore*, 24 Ala. 489.

3. But a written order, addressed to a mercantile firm, in these words, "If you can sell Mr. C. any groceries, I am willing to guaranty the ultimate payment of any bill he may make with you, to the amount of $500," is a collateral undertaking, which binds the guarantor only in the event of the principal debtor's failure to pay after the use of all reasonable and proper means of coercing payment. *Walker v. Forbes*, 25 Ala. 139.

4. A writing, dated Dec. 31, 1846, founded on no new consideration, in these words, "At the request of Mr. S., I have concluded to stand his security for the hire of two boys, not exceeding $220, for the year 1847," is a collateral guaranty. *Fay v. Hall*, 25 Ala. 704.

5. Plaintiff having agreed with S. & P., who were mail-contractors, to keep their horses and drivers at a stipulated sum *per annum*, payable quarterly; and, on their becoming insolvent during the last quarter, having refused to continue to comply with his contract without security,—thereupon defendant, at the request of S. & P., wrote to plaintiff, saying, "I will see you paid for this quarter, as their time then expires, payable when due in Alabama bank-notes." *Held*, that the promise was an original undertaking, upon a new and sufficient consideration. *Jolley v. Walker's Adm'rs*, 26 Ala. 690.

6. A promise by defendant, in consideration that plaintiffs would, from time to time, sell and deliver to a third person, who desired to open an account with them, such goods as were necessary and proper in his line of business, and on the usual terms of credit on which such goods were sold, that he would pay for them if the debtor failed to pay, is a continuing guaranty. *Cahuzac & Co. v. Samini*, 29 Ala. 288.

7. A promise by an executor, in these words, "Let the children of J. M., deceased, have any goods they wish, and charge them to the children separately, and I will pay for them at the end of the year, or as soon as the cotton crop is sold," is a direct, original undertaking, which binds the promisor personally, although he was authorized by the will to furnish the children with goods, and although both he and the creditor expected payment to be made out of the estate. *Sanford v. Howard*, 29 Ala. 684.

8. Guarantors are liable according to the law of the place of their contract. *Walker v. Forbes*, 25 Ala. 139.

II. NOTICE.

9. Notice is not necessary to perfect a party's liability on an absolute, unconditional guaranty of the payment of a note at maturity. *Donley v. Camp*, 22 Ala. 659.

10. Nor is notice of acceptance necessary to charge a party on a direct, original undertaking to be responsible for goods to be furnished to another. *Scott v. Myatt & Moore*, 24 Ala. 489.

11. But, in case of a collateral guaranty of the "ultimate payment" of the account by the party to whom the goods are furnished, notice of acceptance within a reasonable time must be given to the guarantor, except in cases where the agreement to accept is contemporaneous with the guaranty, or constitutes the consideration and basis of it. *Walker v. Forbes*, 25 Ala. 139.

12. Notice is also necessary to perfect a party's liability under a collateral guaranty "to stand security" for the hire of two negroes by another for a year. *Fay v. Hall*, 25 Ala. 704.

13. It is necessary to render one liable on an offer to guaranty a debt to be contracted by a third person, unless the guarantor and creditor reside in the same city, and the agreement to accept is contemporaneous with the offer to guaranty. *Cahuzac & Co. v. Samini*, 29 Ala. 288.

14. Where a continuing guaranty, unlimited in amount, has been accepted, and notice of acceptance has been

given within a reasonable time, it is not incumbent on the creditor to give notice of the amount advanced on the faith of it, but it is the duty of the guarantor to see that his credit is not abused. *Ib.*

15. Where the guaranty is of a demand to be created in future, and the terms of the contract are left discretionary with the creditor and principal debtor, the guarantor is entitled to notice of the principal's default; but, if the principal is insolvent when the debt falls due, notice is unnecessary. *Walker v. Forbes*, 25 Ala. 139.

As to the averment of notice, *vide infra*, 16–18.

III. PLEADINGS, AND EVIDENCE.

16. Where notice of acceptance is necessary to charge the guarantor, notice must be averred; but the general allegation, "of all which aforesaid premises the said defendant then and there had notice," is sufficient, when the declaration states facts on which it can operate. *Fay v. Hall*, 25 Ala. 704.

17. "Which promise plaintiffs accepted, of which defendant had due notice; and plaintiffs aver that, relying on said promise," they furnished goods to the debtor,—held a sufficient averment, both of acceptance, and of notice thereof. *Caluzac & Co. v. Samini*, 29 Ala. 288.

18. In an action on a continuing guaranty, unlimited in amount, for goods sold on a credit of ninety days, the complaint alleged that sales, amounting to $750, "were made from the 26th July, 1853, up to the 23d August, 1854"; that partial payments, from time to time, were made by the debtor; and that he was in default, on the 1st December, 1854, to the amount of $350, of which notice was then given to the guarantor; but no other dates or amounts were specified. *Held*, that the alleged notice was only sufficient to fix the guarantor's liability for the amount of the purchase last made. *Ib.*

19. The declaration must also state the terms of the credit given to the principal debtor. *Walker v. Forbes*, 25 Ala. 139; *Fay v. Hall*, 25 Ala. 704.

20. In an action on an absolute, unconditional guaranty of the payment of a note at maturity, it is not necessary to aver or prove the insolvency of the maker. *Donley v. Camp*, 22 Ala. 659.

21. It is not necessary to aver or prove the institution of a suit against the principal debtor, when his failure to pay and insolvency are alleged. *Caluzac & Co. v. Samini*, 29 Ala. 288.

22. A recovery cannot be had on a collateral guaranty under the common counts in assumpsit. *Walker v. Forbes*, 25 Ala. 139.

23. An absolute guaranty of the payment of a note is an affirmance of the genuineness of the note and of the previous endorsements, and its execution can only be put in issue by an appropriate plea. *Donley v. Camp*, 22 Ala. 659.

24. The fact that the goods were charged by the creditor to the person to whom they were furnished, who afterwards settled the account, by paying a part in cash, and giving his note for the balance, is proper evidence for the consideration of the jury, in determining to whom the credit was given; but, if the goods were sold on the faith of the defendant's written order, the rights and liabilities of the parties would not be affected by the fact that the creditor treated it as a collateral, instead of a direct undertaking, or the fact that he charged the goods to the person who obtained them. *Scott v. Myatt & Moore*, 24 Ala. 489.

25. The statement of the person to whom the goods were furnished, made during the negotiation for them, to the effect "that he had been unfortunate and was without means," is competent evidence against the guarantor, as tending to show that the credit was given to him. *Walker v. Forbes*, 25 Ala. 139.

26. A draft for the amount of the debt, drawn by the principal debtor on the guarantor, but not accepted by the latter, nor received in payment by the creditor, does not in any manner affect the relations or liabilities of the parties. *Ib.*

27. The fact that the creditor instituted a suit against the children, to whom the goods were furnished, is admissible evidence for the defendant

as affecting the question whether the alleged promise was really made, and whether the goods were sold in pursuance of it. *Sanford v. Howard*, 29 Ala. 684.

28. It being shown that the creditor instituted a suit against the children to whom the goods were furnished, by the advice of an attorney, the information on which the attorney's advice was predicated, "that the children said they were willing he might sue and recover judgments against them, or resort to any other means which might be deemed advisable for the collection of his debt," is admissible evidence as a part of the *res gestæ*, if on no other ground. *Ib.*

29. The fact that the children procured the goods through their servants, does not affect the rights or liabilities of the parties, since the defendant's contract does not turn on the agency of the children. *Ib.*

30. In an action against an executor, seeking to charge him personally on a guaranty, his testator's will is entirely irrelevant, since his contract is altogether disconnected from his authority under the will. *Ib.*

31. The person to whom the goods were furnished, a minor, is a competent witness for the creditor, to prove the amount and value of the goods, and the character of the defendant's promise. *Ib.*

HIRING.

See BAILMENT, V.

HUSBAND AND WIFE.

I. ACTIONS BY AND AGAINST.

1. *Parties.*
2. *Pleadings, and Evidence.*
3. *Judgment.*

II. CONVEYANCES.

III. LIABILITIES OF HUSBAND.

1. *For Debts and Torts of Wife before Coverture.*
2. *For Acts of Wife during Coverture.*
3. *For Necessaries Furnished to Wife.*

IV. LIABILITIES AND DISABILITIES OF WIFE.

V. RIGHTS AND INTEREST OF HUSBAND IN WIFE'S PROPERTY.

1. *Personal Property, and Choses in Action; and herein, of Reduction to Possession.*
2. *Real Property.*
3. *Separate Estate.*

VI. RIGHTS AND INTEREST OF WIFE IN HUSBAND'S PROPERTY.

As to contracts between husband and wife, the wife's equity to a settlement, her separate estate, and suits by and against them in equity, see same title in PART III, p. 269.

As to the right of husband and wife, respectively, to administer on the estate of each other, see EXECUTORS AND ADMINISTRATORS, 11–13, p. 159.

I. ACTIONS BY AND AGAINST.

1. *Parties.*

1. A married woman cannot sue at law by her next friend. *Jordan v. Gray*, 19 Ala. 618.

2. The marriage of an administratrix, pending a suit against her as such, does not render it necessary to make her husband a party to the suit. *Bobe v. Frowner and Wife*, 18 Ala. 89.

3. At common law, the wife could not be joined with her husband, in an action on a promissory note executed by her during coverture. *Henry and Wife v. Hickman*, 22 Ala. 685.

4. Nor could she be joined, where the action was founded on a note executed by her and her husband jointly during coverture. *Gibson v. Marquis and Wife*, 29 Ala. 668.

5. Husband and wife must join in detinue for a slave belonging to the wife, where the unlawful taking and detention occurred before the marriage. *Mitchell v. Cowsert and Wife*, 20 Ala. 186.

6. They may join, under the Code, as at common law, to recover on a promise made to the wife for services

rendered by her during coverture. *Jordan's Adm'r v. Hubbard and Wife*, 26 Ala. 433.

7. If the husband dies before suit brought, the right of action for articles of family supply, under the "married-woman's law" of 1850, survives against the wife. *Cunningham v. Fontaine*, 25 Ala. 644.

8. If a vested remainder in a slave is bequeathed to an unmarried woman, who marries after the slave has gone into the possession of the first taker with the executor's assent, her husband may, after the termination of the life estate, maintain detinue in his own name, without joining the wife, against a purchaser from the first taker. *Gibson v. Land*, 27 Ala. 117.

9. If a vested remainder in slaves is bequeathed to a married woman and others, as tenants in common, she cannot join with her husband and the other co-tenants, in an action of detinue for the slaves, after the termination of the life estate. *Walker v. Fenner*, 28 Ala. 367.

10. Where property is given or bequeathed to a married woman, during coverture, to her sole and separate use, and no trustee is appointed for her, the husband alone has the right of action, after he has reduced the property to possession. *Gerald and Wife v. McKenzie*, 27 Ala. 166; *Friend v. Oliver*, 27 Ala. 532; *Pickens and Wife v. Oliver*, 29 Ala. 528.

11. Section 2131 of the Code, respecting suits by and against husband and wife, applies only to separate estates created by law. *Ib.*

12. Under this statute, the wife must sue and be sued alone, where the suit is for the *corpus* of her separate property, or for damages to the property itself, as distinguished from its use; and where the rents, income and profits of the property are the mere incident of a suit for the property itself, and not the foundation of the suit, she may recover them. *Pickens and Wife v. Oliver*, 29 Ala. 528.

13. Where her separate estate is created by statute, but the rents, income and profits thereof are the foundation of the suit, the husband must sue alone. *Ib.*

14. Husband and wife must be joined, either as plaintiffs or defendants, in suits not relating to her separate estate created by statute, where the marriage took place before the 1st March, 1848, and the object of the suit is to reduce to possession some chose in action of which the husband has never had possession; or where the separate estate is created by contract, which contract appoints no trustee, and the husband has never reduced the property to possession; or where it was necessary, at common law, on account of her interest, that the wife should be joined. *Ib.*

15. The wife cannot be joined with her husband, in an action on a promissory note executed by them jointly during coverture. *Gibson v. Marquis and Wife*, 29 Ala. 668.

16. If the husband sells or disposes of the wife's separate property, without her consent, express or implied, her right of action is suspended during coverture only. *Jenkins v. McConico*, 26 Ala. 213.

2. *Pleadings, and Evidence.*

17. A demurrer lies to a declaration, which shows on its face that the plaintiff is a *feme covert*. *Jordan v. Gray*, 19 Ala. 618.

18. And to a count, in an action against husband and wife, which shows a cause of action against the husband alone. *Henry and Wife v. Hickman*, 22 Ala. 685.

19. The wife may demur to a complaint under the Code, which shows on its face that she is improperly joined as a defendant. *Gibson v. Marquis and Wife*, 29 Ala. 668.

20. The misjoinder of the wife, in detinue, is fatal to the entire action. *Walker v. Fenner*, 28 Ala. 637.

21. If the wife improperly sues in her own name, the complaint cannot be amended, by striking out her name, and inserting that of her husband. *Friend v. Oliver*, 27 Ala. 532.

22. A declaration, in which "plaintiff complains of M. J. and his wife S. J., formerly S. M.;" counting on a note alleged to have been executed "by the said S. before her intermarriage with the said M.;" and averring that "the said S., and the said M. since his intermarriage, have not regarded," &c.,—sufficiently discloses the char-

acter in which the parties are sued, and that the note was executed by the wife while sole. *Johnson and Wife v. Collins*, 17 Ala. 318.

23. In an action against husband and wife, under the act of 1850, for articles of family supply, the declaration must distinctly aver that the wife has a separate estate, which is sought to be charged. *Henry and Wife v. Hickman*, 22 Ala. 685.

24. It must aver, also, that she holds her separate estate under the act of 1848 or 1850: an averment that she has a separate estate, "which came to her after the 1st March, 1848," is not sufficient. *Cunningham v. Fontaine*, 25 Ala. 644.

25. In an action by husband and wife, to recover slaves which are alleged to be the separate property of the wife, a complaint in the form given in the Code, (p. 552,) "for the recovery of chattels in specie," is sufficiently certain and definite on demurrer, although it does not aver whether the separate estate was created by contract or by statute, or whether the husband has ever had possession of the slaves during coverture; but no recovery can be had, under such a complaint, upon a cause of action which does not authorize the joinder of husband and wife as plaintiffs. *Pickens and Wife v. Oliver*, 29 Ala. 528.

26. In an action by "the wife and mother," who has been deserted by her husband, (Code, § 2136,) it must appear that the wife is also a mother, and the husband a father; and if the husband is a non-resident at the commencement of the suit, security for the costs must be given, as in other cases where the plaintiff is a non-resident. *Ex parte Cole*, 28 Ala. 50.

27. In assumpsit by husband and wife, for the use of the wife, the declaration must aver that the promise was made to the wife *dum sola*, or that she is the meritorious cause of action. *Quarles v. Waldron and Wife*, 20 Ala. 217.

28. But, if judgment by default is rendered in such case, and afterwards set aside on condition that the defendant *plead to the merits*, he cannot demur to the declaration for the want of such averment. *Ib.*

29. In an action against husband and wife, founded upon a judgment rendered against the wife as administratrix, a plea in bar, averring the intermarriage of the defendants before the rendition of the judgment, is bad on demurrer. *Bobe v. Frowner and Wife*, 18 Ala. 89.

30. In an action against husband and wife, on a debt contracted by the wife while sole, issue being joined on a replication to a plea of the statute of limitations, averring a subsequent promise by the defendants, proof of a promise by the husband alone does not entitle the plaintiff to recover. *Moore v. Leseur and Wife*, 18 Ala. 606.

31. In such action, the husband may set off one half the amount paid by him, before suit brought, on a judgment rendered against the wife *dum sola* and the plaintiff, on a note executed by them jointly; *secus*, as to a payment made after suit brought. *Johnson and Wife v. King*, 20 Ala. 270.

32. In an action against the husband, for a malicious prosecution, he may prove, as evidence of probable cause, what his wife swore on the preliminary examination before the magistrate. *Gardner v. Randolph*, 18 Ala. 685.

33. The transcript of a judgment against the husband is not admissible evidence against the wife, in a suit concerning her separate estate, instituted in the name of husband and wife. *Michan and Wife v. Wyatt*, 21 Ala. 813.

34. In an action by husband and wife jointly, for services rendered by the wife during coverture, her admissions of payment are not competent evidence. *Jordan's Adm'r v. Hubbard and Wife*, 26 Ala. 433.

35. The institution of a suit by the husband, in the joint names of himself and wife, for the recovery of slaves, is evidence against him, in a subsequent controversy with the distributees of the wife's estate, as an admission against interest. *Gwynn and Wife v. Hamilton's Adm'r*, 29 Ala. 233.

36. The declarations of the wife, in reference to the title to a slave over which she is merely exercising control as a family servant, are not admissible evidence against the husband. *Perry v. Graham*, 18 Ala. 822.

37. The wife's assertions of title to

slaves which are in the possession of her husband and herself, if made in the presence of the husband, and acquiesced in by him, are competent evidence against him or his administrator; *secus*, as to assertions of title by her not made in his presence, nor communicated to him. *Gillespie's Adm'r v. Burleson*, 28 Ala. 551.

38. The admissions of the husband during coverture, to the effect that certain slaves in his possession are the separate property of the wife, are competent evidence against his administrator. *Ib.*

39. Such admissions, if made after the property has vested in the husband, do not enable the wife to maintain or resist an action by or against his personal representative. *Frierson v. Frierson*, 21 Ala. 549.

40. Whatever may be the effect of such admissions, when made through ignorance or mistake as to his marital rights, in showing that he never reduced the property to possession as husband, they vest no title in the wife during coverture, and should not be received to divest the property out of his executor. *Machem v. Machem*, 28 Ala. 374; *Lockhart and Wife v. Cameron*, 29 Ala. 355.

41. The rule which renders husband and wife incompetent, unless in a few excepted cases, to testify for or against each other, is founded not only in the identity of their legal rights, but in a wise public policy; and there is nothing in any of the statutes securing to married women their separate estates, which requires that an exception should be made of cases in which the husband is called upon to testify to his acts in the capacity of trustee for his wife. *Wilson v. Sheppard*, 28 Ala. 623.

3. *Judgment.*

42. In an action against husband and wife, on a note executed by them jointly during coverture, if a demurrer is interposed and sustained on account of the wife's coverture, she should be discharged from the action, but the plaintiff should be allowed to proceed against the husband. *Hall v. Cannte and Wife*, 22 Ala. 650; *Gibson v. Marquis and Wife*, 29 Ala. 668.

II. CONVEYANCES.

43. The act of 1839, authorizing relinquishments of dower by deed of husband and wife attested by two witnesses, embraces non-resident as well as resident *femes covert*. *Carter v. Corley*, 23 Ala. 612.

44. A married woman has the same power over her separate estate as if she were sole, and may by deed convey such interest as she has. *McCroan v. Pope*, 17 Ala. 612.

45. And where personal property is conveyed directly to her, to her sole and separate use, she and her husband may, by their joint deed, vest the legal title in trustees, for their joint use, and the use of the survivor for life. *Jenkins v. McConico*, 26 Ala. 213.

46. The deed of husband and wife, acknowledged by them before a justice of the peace, may be admitted to record without proof of execution by a subscribing witness. *Harvey v. Doe d. Carlisle*, 23 Ala. 635.

47. The deed of husband and wife, leasing or conveying the wife's lands, is absolutely void as to her, unless acknowledged on private examination pursuant to the statute. *Doe d. Hughes v. Wilkinson*, 21 Ala. 296; *George v. Goldsby*, 23 Ala. 326; *Beene's Heirs v. Randall's Heirs*, 23 Ala. 514; *Boykin v. Rain*, 28 Ala. 332.

48. A certificate, stating that the wife acknowledged, on private examination apart from her husband, "that she signed, sealed, and delivered the above instrument, on her own free will and accord, and without any force, persuasion, or threats from her said husband, and for the purpose therein stated," is not a substantial compliance with the provisions of the statute. *Boykin v. Rain*, 28 Ala. 332.

49. The officer's certificate, as to the examination and acknowledgment, is essential to the passing of the title, and cannot be dispensed with by the courts; nor can a defect or omission in it be aided or supplied in equity on the ground of mistake. *McBryde's Heirs v. Wilkinson*, 29 Ala. 662.

50. Husband and wife conveyed her lands, by deed dated May 16, 1839, and certified in proper form to have been acknowledged by them "as their

free act and deed." The wife also executed a relinquishment of dower in said lands, dated May 17, and written on the back of said deed; and at the foot of the relinquishment was written the certificate of a justice of the peace, that the wife, on said 17th May, on private examination, "acknowledged that she signed, sealed, and delivered *the foregoing instrument* as her voluntary act and deed." *Held*, that the last certificate applied only to the relinquishment of dower. *Doe d. Hughes v. Wilkinson*, 21 Ala. 296.

51. Whether parol evidence is admissible, in such case, to show that the words "foregoing instrument," as used in the certificate, were intended to apply to the deed, and not to the relinquishment of dower, *quære?* *McBryde's Heirs v. Wilkinson*, 29 Ala. 662.

III. LIABILITIES OF HUSBAND.

1. *For Debts and Torts of Wife before Coverture.*

52. The husband of an administratrix is liable for a *devastavit* committed by her before marriage, if his liability is fixed during coverture. *Bobe v. Frowner and Wife*, 18 Ala. 89.

53. In detinue for a slave which came to his possession as husband, he is liable both for his own detention, and that of his wife before marriage. *Lawson's Adm'r v. Lay's Executor*, 24 Ala. 184.

54. To charge the husband, under the act of 1846, with debts contracted by the wife *dum sola*, it must be shown that, before the commencement of the suit, he received property in right of his wife; and a recovery can only be had against him for the amount so received. *Curry & Groce v. Shrader and Wife*, 19 Ala. 831.

55. Where the widow purchases property at administrator's sale, giving her notes for the purchase-money; and, on her subsequent marriage, her husband takes out letters of administration *de bonis non*, he becomes chargeable with his wife's debt to the estate. *Bogle v. Bogle's Adm'r*, 23 Ala. 544.

2. *For Acts of Wife during Coverture.*

56. During the husband's absence from the State, the wife may act as his agent, and may, by her endorsement of a promissory note, confer a valid title on her transferree. *Rowland v. Logan*, 18 Ala. 307; *Krebs v. O'Grady*, 23 Ala. 726.

57. The husband's assent to her acting as his agent may be presumed, when it is shown that he permitted her to take her children to another State, and there enter into business for their support and maintenance; that he never became a resident of that State himself, and never asserted any claim to rights and property which the wife there acquired by her industry. *Roland v. Logan*, 18 Ala. 307.

58. The husband having gone to California, his wife continued to carry on his business, (a bakery,) and sold a part of the furniture and fixtures, taking notes payable to herself, which she afterwards transferred. *Held*, that these facts did not amount to presumptive evidence of her agency, but the jury must decide whether they were sufficient to establish it. *Krebs v. O'Grady*, 23 Ala. 726.

59. The husband's assent to an arrangement, entered into between his wife and her brothers and sisters, respecting the division of their father's estate, cannot be presumed, in the absence of evidence that it was beneficial to him, or that he assented to or ratified it, or that his wife was accustomed to act as his agent. *Whitworth and Wife v. Hart*, 22 Ala. 343.

60. The husband of an administratrix is liable for a *devastavit* committed by her during coverture, provided his liability is fixed during coverture. *Bobe v. Frowner and Wife*, 18 Ala. 89.

3. *For Necessaries Furnished to the Wife.*

61. If the husband turns his wife out of doors, or by his misconduct compels her to leave him, he is responsible for necessaries furnished her by another; but the labor and services of slaves, applied to her support and maintenance, cannot be regarded as necessaries, although their value was not more than sufficient for that purpose. *Zeigler & Hall v. David*, 23 Ala. 127.

62. The wife being separated from her husband without fault on her part,

he is liable for necessaries furnished her while confined in a lunatic asylum, although the credit was given to the person who, as agent of plaintiff, made the contract, and paid the expenses, which were afterwards repaid to him by his principal; but, if the person who made the contract was acting for himself individually, and not as plaintiff's agent, the latter cannot, by voluntarily paying the debt, make the husband his debtor. *Wray v. Cox*, 24 Ala. 337.

63. The husband is liable for necessary medical attendance on his wife, although the physician was called in against his objection, by his grown son, who lived with him, and who promised to assume the payment; it being shown that he was present while the physician was rendering his services, and that the latter had no notice whatever that he was not to look to the husband for payment. *Cothran v. Lee*, 24 Ala. 380.

IV. Liabilities and Disabilities of Wife.

64. The wife cannot be charged personally on any contract made by her during coverture. *Henry and Wife v. Hickman*, 22 Ala. 685; *Hall v. Cannte and Wife*, 22 Ala. 650; *Gibson v. Marquis and Wife*, 29 Ala. 668; *Baker v. Gregory and Wife*, 28 Ala. 544.

65. A private statute, authorizing a married woman to "take, receive, and hold, by gift, purchase or inheritance, any property, real or personal, free from the molestation, hinderance, or authority of her husband, and free from any liability to pay his debts or contracts, and to dispose of the same by will, gift or sale, in the same manner as if she were a *feme sole*," does not subject her to be sued at law on her contracts. *Hatton v. Weir*, 19 Ala. 127.

66. If the husband dies before suit brought, the right of action for articles of family supply, under the act of 1850, survives against the wife. *Cunningham v. Fontaine*, 25 Ala. 644.

67. The wife can make no contract with her husband, during coverture, which will be valid at law. *Frierson v. Frierson*, 21 Ala. 549; *Machem v. Machem*, 28 Ala. 374; *Lockhart and Wife v. Cameron*, 29 Ala. 355; *Williams v. Maull*, 20 Ala. 721; *Iron v. Reynolds*, 28 Ala. 305.

68. After her husband has abjured the State, the wife may act as a *feme sole*; but, to constitute such abjuration, there must be an abandonment of the wife, and a removal from the State with the intention not to return. *Krebs v. O'Grady*, 23 Ala. 726.

69. During her husband's absence from the State, she may act as his agent, under certain circumstances. *Roland v. Logan*, 18 Ala. 307; *Krebs v. O'Grady*, 23 Ala. 726. (*Vide supra*, 56–59.)

70. The wife cannot interpose a claim at law, in her own name, to try the right of property in a slave, which her husband purchased in his own name, with money arising from the sale of property in another State secured to the wife by ante-nuptial contract there executed; and this, notwithstanding he delivered the slave to her, and recognized it as hers. *Irons v. Reynolds*, 28 Ala. 305.

71. But, if he voluntarily conveys such slave to his wife, though for the purpose of preventing his creditors from subjecting it to his debts, his conveyance will be sustained. *Wilson v. Sheppard*, 28 Ala. 623.

72. The statute of limitations does not bar a married woman from recovering her separate property, sold under execution against her husband, when her title accrued during coverture. *Michan and Wife v. Wyatt*, 21 Ala. 813.

73. If the husband sells or disposes of the wife's separate personal property, without her consent, her right of action is suspended during coverture only: if she survives, she may sue his personal representative for the conversion; and if he survives, her personal representative may sue him. *Jenkins v. McConico*, 26 Ala. 213.

74. A subsequent promise by the husband, to pay a debt of the wife contracted *dum sola*, does not take the demand as against her out of the statute of limitations. *Moore v. Lesseur and Wife*, 18 Ala. 606.

As to the capacity of a married woman to make a will, see WILLS, p. 203.

How far the domicile of the wife is controlled by that of the husband, *vide* DOMICILE, 3–4, p. 557.

V. RIGHTS AND INTEREST OF HUSBAND IN WIFE'S PROPERTY.

1. *Personal Property, and Choses in Action; and herein, of Reduction to Possession.*

75. Marriage vests in the husband, *eo instanti*, all the wife's persoual property in possession. *Chambers v. Perry*, 17 Ala. 726; *Hopper v. McWhorter*, 18 Ala. 229; *Gibson v. Land*, 27 Ala. 117.

76. The possession of the wife's guardian or bailee is her possession. *Chambers v. Perry*, 17 Ala. 726; *Hopper v. McWhorter*, 18 Ala. 229; *Gwynn and Wife v. Hamilton's Adm'r*, 29 Ala. 233.

77. If personal property is given or bequeathed to the wife during coverture, by words which do not create in her a separate estate, and passes into the possession of the husband, his marital rights attach to it. *Williams v. Maull*, 20 Ala. 721; *Burnett v. Branch Bank at Mobile*, 22 Ala. 642; *Rumbly v. Stainton and Wife*, 24 Ala. 712; *Frierson v. Frierson*, 21 Ala. 549; *Mims' Executors v. Sturtevant*, 18 Ala. 359.

78. If slaves go into the possession of the husband, under a loan to his wife and children, the wife's interest vests in him. *McCoy v. Odom*, 20 Ala. 502; *Knight v. Bell*, 22 Ala. 198.

79. If a vested remainder in a slave is bequeathed to the wife, and the slave passes, with the assent of the executor, into the possession of the person having the particular estate, the husband's marital rights thereby attach. *Walker v. Fenner*, 28 Ala. 367.

80. But the husband's marital rights do not attach, so as to defeat the wife's right of survivorship, to property which is in the actual and rightful possession of another, and of which he cannot obtain possession during coverture without becoming a trespasser. *Hair v. Little*, 28 Ala. 267.

81. Nor do his marital rights attach to slaves which are given or bequeathed to her during coverture, claimed by her as her separate estate, and uniformly so treated and recognized by both parties during the coverture. *Jennings v. Blocker's Adm'r*, 25 Ala. 415; *Machem v. Machem*, 28 Ala. 374; *Gillespie's Adm'r v. Burleson*, 28 Ala. 551; *Lockhart and Wife v. Cameron*, 29 Ala. 355.

82. The fact that he acted in ignorance of his marital rights, and under the supposition that the gift or bequest created a separate estate in the wife, does not avoid the effect of his failure to reduce the property to possession as husband. *Machem v. Machem*, 28 Ala. 374; *Gillespie's Adm'r v. Burleson*, 28 Ala. 551; *Lockhart and Wife v. Cameron*, 29 Ala. 355.

83. But the admissions and declarations of the husband, to the effect that such slaves are the separate property of his wife, vest no title in her during coverture, and do not prevent him from asserting his marital rights at any time during the coverture. *Williams v. Maull*, 20 Ala. 721; *Gannard v. Eslava*, 20 Ala. 732; *Frierson v. Frierson*, 21 Ala. 549; *Jennings v. Blocker's Adm'r*, 25 Ala. 415; *Lockhart and Wife v. Cameron*, 29 Ala. 355.

84. Where a father executed a deed of gift of a slave to his married daughter, and sent the slave to the residence of her husband, who, supposing that the deed created a separate estate in his wife, would not let the slave remain on his premises; and thereupon the wife sent the slave back to her father, requesting him to do the best he could for her, and he received the slave, saying that he would put her to work and account to his daughter for it,—*held*, that there was nothing in these circumstances to prevent the husband from afterwards asserting his rights under the deed. *Mims' Executors v. Sturtevant*, 18 Ala. 359.

85. Where counsel are retained by husband and wife jointly, to sue for and recover the wife's property, and a decree therefor is rendered in their joint names; and the husband dies before the execution of the decree, by a delivery of the property to him, or to some other person as his bailee, —the wife is entitled to it, as property never reduced to possession by the husband. *Mason v. McNeill's Executors*, 23 Ala. 201.

86. If the plaintiffs' counsel, in such case, after the rendition of the decree, permits the slaves in controversy to remain with the persons to whom they were hired for the year, and

does not take possession of them until after the husband's death, although he might have taken possession immediately,—this does not amount to constructive possession in the husband. *Ib.*

87. The husband's assignee for valuable consideration is not entitled to the wife's choses in action, as against her surviving, unless he reduces them to possession during coverture. *George v. Goldsby*, 23 Ala. 326.

88. A *bona-fide* purchaser from the husband, without notice, of a slave in the husband's possession under a parol gift from his father-in-law, is not affected by the husband's assent to a deed by which the slave is subsequently settled on the wife and her children. *Hitt & Wade v. Rush*, 22 Ala. 563.

89. The "married-woman's law" of 1848 does not affect the husband's right to reduce to possession his wife's choses in action, which vested on his marriage prior to the passage of the act. *Kidd v. Montague*, 19 Ala. 619; *Manning v. Manning*, 24 Ala. 386.

90. Where the husband had reduced to possession, before the passage of that act, his wife's interest in certain slaves, their subsequent sale for the purpose of distribution, under an order of the chancery court, would not divest his rights and turn the money into a chose in action. *Manning v. Manning*, 24 Ala. 386.

91. Under the act of 1846, the property possessed by the wife at the time of the marriage vested in the husband, subject to the payment of her debts contracted *dum sola;* and, on his death, passed to his personal representative, subject to distribution under the general law after payment of the liabilities which had attached to it. *Maynard v. Williams*, 17 Ala. 676.

2. *Real Property.*

92. The husband acquires, by virtue of the marriage, in lands of which the wife is seized in fee-simple, at least an estate for her life, which is a legal freehold, subject to levy and sale under execution at law. *Check v. Waldrum and Wife*, 25 Ala. 152.

93. A mortgage of the wife's lands, executed by the husband during coverture, and after issue born, conveys all his interest as husband and tenant by the curtesy initiate. *Boykin v. Rain*, 28 Ala. 332.

94. A decree of divorce *a vinculo*, in favor of the wife, defeats and determines all the rights and interests of the husband in and to her lands, and of others claiming under a mortgage executed by him, and restores her rights precisely as her husband's death would have restored then. *Ib.*

3. *Separate Estate.*

95. If the husband sells or disposes of his wife's separate personal property, without her consent express or implied, her right of action is only suspended during coverture: if she survives him, she may sue his personal representative for the conversion; and he survives her, her personal representative may sue him. *Jenkins v. McConico*, 26 Ala. 213.

96. On the death of the wife intestate, having a separate estate secured by law, the husband is entitled (Code, § 1990) to one half of the personalty absolutely, whether in possession or not. *Marshall v. Crow's Adm'r*, 29 Ala. 278.

97. The provisions of the Code, regulating the distribution of the separate estate of a married woman, dying intestate, do not apply to separate estates created by deed prior to the 1st March, 1848, although the marriage took place after that day; and the husband, in such case, takes nothing under the statute. *Willis v. Cadenhead*, 28 Ala. 472.

98. Under the provisions of the "married-woman's law" of 1850, the husband is entitled, on the death of his wife intestate, to one half of the separate estate secured to her under that act or the act of 1848; but he takes nothing, under this statute, in property which vested in the wife, by bequest, before the passage of the act of 1848, although the period of its distribution did not arrive until 1854. *Hardy v. Boaz*, 29 Ala. 168.

99. If the wife dies intestate as to a portion of her estate only, her husband is entitled, under the acts of 1848 and 1850, to one half of the personalty undisposed of. *Bryan and Wife v. Weems*, 25 Ala. 195.

100. Under an ante-nuptial agreement, stipulating that the wife, "during her natural life, shall have the sole management and control" of the slaves owned by her before marriage, "with the exclusive right to dispose of the same at her death,"—on her death without disposing of the slaves, prior to the passage of the act of 1848, the slaves passed to her administrator and next-of-kin, and not to her surviving husband. *Randall v. Shrader*, 20 Ala. 338.

VI. RIGHTS AND INTEREST OF WIFE IN HUSBAND'S PROPERTY.

101. On the death of the husband intestate, his personal chattels remaining in the possession of the wife, her right of possession is perfect against every one except the lawful administrator; and she may maintain trover against any one who deprives her of that possession, before administration granted on her husband's estate. *Brown v. Beason*, 24 Ala. 466; *Williams v. Crum*, 27 Ala. 468; *S. C.*, 29 Ala. 446.

102. Until her dower is assigned, the widow is entitled to retain, free of rent, the possession of the dwelling-house in which her husband resided at the time of his death, with the adjoining plantation. *Pharis v. Leachman*, 20 Ala. 662; *Doe d. Cook & Hardy v. Webb*, 18 Ala. 810; *Wallace v. Hall's Heirs*, 19 Ala. 367; *McLaughlin v. Godwin*, 23 Ala. 846.

103. But she has not such a legal interest therein as can be sold under execution at law against her, or conveyed by deed to another. *Doe d. Cook & Hardy v. Webb*, 18 Ala. 810; *Wallace v. Hall's Heirs*, 19 Ala. 367. See, also, *Hunt & Frowner v. Acre & Johnson*, 28 Ala. 580.

104. When no provision is made for the wife by her husband's will, she may claim her distributive share of his estate without dissenting from the will. *Martin's Heirs v. Martin*, 22 Ala. 86; *Turner v. Cole*, 24 Ala. 364.

105. Adultery on the part of the wife does not bar her claim to a distributive share of her husband's estate. *Turner v. Cole*, 24 Ala. 364.

As to the widow's right of dower, see that title, on page 142.

INDIAN RESERVATIONS.

See LAND LAWS, II.

INFANTS.

I. ACTIONS.
II. CONTRACTS.
III. TORTS.

See, also, the same title in PART III, p. 280.

I. ACTIONS.

1. An infant may sue by his next friend, even when he has a regularly appointed guardian. *Hooks v. Smith*, 18 Ala. 338.

2. Section 2132 of the Code, which provides that infants must sue by their next friend, and be defended by a guardian to be appointed by the court, applies only to suits in the common-law courts of original jurisdiction, leaving appeals to be governed by the rules of the common law. *Cook v. Adams*, 27 Ala. 294.

3. An appeal by an infant must be sued out by his guardian or next friend, and cannot be sued out in his own name, nor by attorney. *Riddle v. Hanna*, 25 Ala. 484; *Cook v. Adams*, 27 Ala. 294.

As to the manner of making infants parties to proceedings before the probate court, *vide* DECREES, 81–84, p. 140.

II. CONTRACTS.

4. An infant is *in esse*, for the purpose of taking an estate for its benefit, from the time of conception; provided it is born alive, and after such a period of fœtal existence that its continuance in life may be reasonably expected. *Nelson v. Iverson*, 24 Ala. 9.

5. A release, given by the mother of a bastard whilst under age, and afterwards repudiated by her, is no bar to her statutory rights. *Wilson v. Judge of Pike County Court*, 18 Ala. 757.

6. An infant cannot appoint an

agent, nor make any binding contract, if he thinks proper to disavow and annul it on coming of full age. *Ware v. Cartledge*, 24 Ala. 622.

7. The deed or bond of an infant is voidable only, and not absolutely void. *Weaver v. Jones*, 24 Ala. 420; *Slaughter v. Cunningham*, 24 Ala. 260; *Manning v. Johnson*, 26 Ala. 446.

8. The fact that he acknowledged the deed in open court, does not render it irrevocable, nor require that the revocation should be made in open court after notice: if he retains the possession of personal property voluntarily conveyed in trust for his children, any act on his part, after attaining his majority, which shows to the world that he does not intend to be bound by his deed, is sufficient to revoke it. *Slaughter v. Cunningham*, 24 Ala. 260.

9. He will not be required, at law, as a pre-requisite to the avoidance of his deed by suit for the land, to refund the purchase-money, when it is not shown to have been in his possession, actual or constructive, after he attained his majority. *Manning v. Johnson*, 26 Ala. 446.

10. *It seems*, however, that if, after arriving at full age, he is possessed of the money, property, or chose in action, which constituted the consideration paid him, and either retains it for an unreasonable length of time, or disposes of it so that he cannot restore it, this amounts to an affirmance of his contract. *Ib.*

11. After the infant has recovered the land by suit, the purchaser may maintain an action against him for the money, especially where he was induced to enter into the contract by the infant's false representations as to his age. *Ib.*

12. If the infant disaffirms his contract, and sues his purchaser for the use and occupation of the land, the latter may recoup for valuable improvements erected. *Weaver v. Jones*, 24 Ala. 420.

13. If a stranger expends his own funds, without obligation, in maintaining and educating an orphan child, who meanwhile becomes entitled to a large estate, out of which no allowance for maintenance or education is asked or made, this is a sufficient consideration to support an express promise on her part, after coming of full age, to repay the amount so expended. *Baker v. Gregory and Wife*, 28 Ala. 544.

14. And if such expenditure was made at the request of her brother-in-law, who thereby became liable for the amount so expended, this liability on his part is sufficient to support an express promise by her, after coming of age, to indemnify him against any loss he might thereby sustain. *Ib.*

III. TORTS.

15. An infant may be sued for his torts, irrespective of the form of action which the law prescribes for the redress of the wrong. *Oliver v. McClellan*, 21 Ala. 675.

16. The fact that a minor is "in the habit of trading on his own account, and working about in the neighborhood, controlling the proceeds of his own labor," does not subject him to any greater liability than otherwise attaches to him. *Ib.*

INN-KEEPERS.

See BAILMENT, VI, p. 430.

INSANITY.

See DIVORCE, 17–18, 47, p. 253.
EVIDENCE, XIX, 8, p. 628.
LUNATICS.

INSOLVENT DEBTORS.

See BAIL, p. 425.

INSOLVENCY.

See EVIDENCE, XIX, 9, p. 628.

INSURANCE.

1. Policies of insurance are governed by the same rules of construction which apply to all other instruments;

yet they are to be construed liberally for the benefit of the assured, and if any doubt should arise upon the meaning of the whole instrument, greater effect should be allowed to the written than to the printed words. *Mobile Marine Dock & Mutual Insurance Co. v. McMillan & Son*, 27 Ala. 77.

2. The contract of the insurer is not necessarily co-extensive with that of the carrier by whom the goods are transported. *Ib.*

3. Where a marine policy was effected on a lot of cotton, shipped from Mobile to New Orleans, on board of a steamboat which always discharged her cargo at the wharf on Lake Pontchartrain; and the stipulation of the policy was, that the risk should continue "until the said goods shall be safely landed at the port of New Orleans,"—*held*, that the risk terminated with the safe landing of the goods at the lake wharf. *Ib.*

4. A policy of insurance on 198 bales of cotton, valued at $9,900, at a premium of three-sixteenths, is so far a severable contract, that the underwriters are discharged from liability for whatever portion is safely landed at the port of destination. *Ib.*

5. Every usage of trade, which is so well settled, or so generally known, that all persons engaged in that trade may fairly be considered as contracting with reference to it, forms part of every policy designed to protect risks in that trade, unless such presumption is expressly or by necessary implication repelled. *Ib.* See, also, *Fulton Insurance Co. v. Milner, Tinsley & Co.*, 23 Ala. 420.

6. A provision in a policy, that "property *held in trust*, or on commission, must be insured as such, otherwise the policy will not cover it," includes everything in which the insured has only a qualified interest, with the possession, while the ownership is in another. *Turner v. Stetts, Allen & Gill*, 28 Ala. 420.

7. The custom in the city of Mobile, as to the mode of adjusting damages in cases of partial loss under valued policies, (which is, to pay the difference between the sales price of the injured article and the price stipulated in the policy,) is valid. *Fulton Insurance Co. v. Milner, Tinsley & Co.*, 23 Ala. 420.

8. When a policy of insurance is assigned after a loss has accrued, although it contains the usual stipulation against assignment, the assignee may maintain an action on it in his own name, either under the act of 1828, (Clay's Digest, 383, § 12,) or under the Code, (§ 2129.) *Perry v. Merchants' Insurance Co.*, 25 Ala. 355.

9. A stipulation for the renewal of the policy, which had expired without renewal before the assignment, does not affect the assignee's right to sue, when the right of renewal was gone with the partial destruction of the property. *Ib.*

10. An assignment of "all the loss or damage which had accrued under the policy prior to" a specified day, before which the loss had accrued and the policy expired, passes to the assignee the whole interest in the policy. *Ib.*

INTEREST.

1. The law attaches interest as an incident to a debt from the moment it falls due, unless there is some agreement between the parties to the contrary. *Whitworth and Wife v. Hart*, 22 Ala. 343; *Cheek v. Waldrum and Wife*, 25 Ala. 152.

2. Interest that accrues on a judgment subsequent to its rendition, may be collected under execution issued thereon. *Ijams & Carr v. Rice*, 17 Ala. 404.

3. In debt on an administrator's bond, founded on a decree of the orphans' court against the administrator, interest is recoverable from the time of the rendition of the decree. *Kyle v. Mays, use of Pond*, 22 Ala. 692.

4. A debt payable on demand does not bear interest until demand made or suit brought. *Maxcy v. Knight*, 18 Ala. 309.

5. No interest is recoverable on a usurious contract. *Saltmarsh v. P. & M. Bank*, 17 Ala. 761. (*Vide* USURY.)

6. A note or bond, executed and delivered here, and not payable elsewhere, bears Alabama interest, unless there is an express stipulation to the contrary. *Moore & Jones v. Davidson*, 18 Ala. 209.

7. A judgment on a note, payable on a specified day, bears interest from the time of its rendition, although the note contains a stipulation that it shall not bear interest until another specified day after maturity, and the judgment is rendered before the arrival of that day. *Billingsley's Adm'r v. Billingsley*, 24 Ala. 518.

8. The courts of this State cannot take judicial notice of the rate of interest in a sister State, from the table required by law to be appended by the secretary of state to the published acts of the legislature. *Clarke v. Pratt*, 20 Ala. 470; *Harrison & Saunders v. Harrison*, 20 Ala. 629.

As to interest in chancery, see same title in PART III, p. 285.

As to interest against executors, administrators, and guardians, on settlement of their accounts before the probate court, see EXECUTORS AND ADMINISTRATORS, 119–23, p. 167; GUARDIAN AND WARD, 24–26, p. 174.

As to interest on legacies, see LEGACY AND DEVISE, 72, p. 197.

INTERNATIONAL LAW.

1. In construing a treaty or compact between nations, the terms of which are vague and indefinite, regard should be had to the nature of the thing to which they relate, and such construction should be placed upon them as will accord with reason, and, without injury to either, subserve the convenience of both the contracting parties. *Howard v. Ingersoll*, 17 Ala. 780.

2. Thus construing the articles of cession, entered into on the 24th April, 1802, between Georgia and the United States, the boundary line between Georgia and Alabama is low water-mark on the west bank of the Chattahoochee river, from the point at which said river enters the State of Florida, to the "great bend" next above the Uchee creek. *Ib.* (Note, that this case was carried, by writ of error, to the supreme court of the United States; where it was held, that the boundary line runs along the top of the high western bank of said river.—13 Howard's U. S. Reports, 381.)

See, also, CONFLICT OF LAWS, p. 475; LAND LAWS.

JOINT TENANTS, AND TENANTS IN COMMON.

I. HOW CREATED.
II. RIGHTS AND INTEREST.
III. SUITS.

As to partition between tenants in common, see PARTITION, p. 321.

I. How Created.

1. A contract, by which the owner of land lets it to another for cultivation, and agrees to receive a specific portion of the products as rent or compensation, creates a tenancy in common in the products. *Thompson v. Mawhinney & Smith*, 17 Ala. 362; *Smyth v. Tankersley*, 20 Ala. 212.

2. So does a contract between an overseer and his employer, by which the former agrees to receive as compensation a specific portion of the products of the plantation. *Strother's Adm'r v. Butler*, 17 Ala. 733; *Allen v. Harper*, 26 Ala. 686.

3. On the marriage of a woman who is a tenant in common with others, her husband becomes a tenant in common in her stead. *Hopper v. McWhorter*, 18 Ala. 229; *Walker v. Fenner*, 28 Ala. 367.

4. Where a testator devises and bequeaths to his children a certain portion of his estate, "to be distributed when required, at mature age or majority, in equal parts," the devisees take as tenants in common. *Chighizola v. LeBaron*, 21 Ala. 406.

II. Rights and Interest.

5. A sale of the entire property in a chattel, by one tenant in common, is a conversion, for which his co-tenant may maintain trover. *Perminter v. Kelly*, 18 Ala. 716; *Smyth v. Tankersley*, 20 Ala. 212.

6. A sale of the entire property by an officer, under legal process against one tenant, renders him liable as a trespasser *ab initio*. *Smyth v. Tankersley*, 20 Ala. 212.

7. If one tenant in common gives his co-tenant authority to sell the entire property, this does not divest him

of his right of possession, nor exempt his interest from levy and sale under execution against him. *Thompson v. Mawhinney & Smith*, 17 Ala. 362.

8. The perception of the entire profits by one tenant in common is not, of itself, sufficient to divest the possession of his co-tenant, nor are acts of ownership by one necessarily to be construed into acts of disseizin; but an undisturbed and peaceable occupancy of the premises by one, for nearly thirty years, under an exclusive and notorious claim of title, without any payment of rents and profits, or any acknowledgment of the rights of the other, is sufficient to raise the presumption of an actual ouster. *Johnson v. Toulmin*, 18 Ala. 50.

9. Where two tenants in common of an equitable title abandoned the possession of the land, and removed from the State; and one afterwards returned, made a new contract of purchase with their vendor, received a deed to himself individually, and had it duly recorded,—the presumption of an adverse possession, arising from a long-continued, notorious, and peaceable occupancy, under his new purchase, is not rebutted by the mere fact, that he caused the original unexecuted contract, under which he and his co-tenant previously held, to be recorded about the same time. *Ib.*

10. Where a part-owner of a slave claims only an undivided half interest, and acknowledges the title of the other part-owner to the other half, his possession is not adverse, although he "refused to deliver the possession to any one until his portion should be allotted to him." *Cotten v. Thompson*, 25 Ala. 671.

11. A joint owner or tenant in common, who takes and disposes of the whole property to his own use, is not guilty of larceny, unless he takes it out of the hands of a bailee with whom it was left for safe-keeping, and the effect of such taking would be to charge the bailee. *Kirksey v. Fike*, 29 Ala. 206.

12. The act of 1818, (Clay's Digest, 169, § 6,) abolishing the right of survivorship between joint tenants, applies only to those who hold the absolute property in their own right, and not to those who hold as trustees merely, or in *autre droit*. *Parsons v. Boyd*, 20 Ala. 112.

13. If the surviving tenant joins in a bill with the administrator of his deceased co-tenant, for the recovery of the joint property, he thereby waives his right of survivorship, and it does not lie with the defendant to say there is a misjoinder of plaintiffs. *Hair v. Avery*, 28 Ala. 267.

III. SUITS.

14. One tenant in common may maintain assumpsit against his co-tenant, to recover contribution for services rendered in and about their common business, in pursuance of a contract between them. *Strother's Adm'r v. Butler*, 17 Ala. 733.

15. Where there has been a conversion of the entire property, and the wrong-doer has received the proceeds of sale in money, each may waive the tort, and sue separately for his portion of the money. *Smyth v. Tankersley*, 20 Ala. 212; *Smith's Executors v. Wiley*, 22 Ala. 396.

16. Or they may join. *Tankersley v. Childers*, 23 Ala. 781; *Price v. Pickett*, 21 Ala. 741.

17. A surviving tenant in common may join with the executor of his deceased co-tenant in trespass *qu. cl. fr. Patton v. Crow*, 26 Ala. 426.

18. Tenants in common may maintain separate actions of trespass to try titles, for their respective interests in the land. *Hines and Wife v. Trantham*, 27 Ala. 359.

19. Joint tenants and tenants in common must join in detinue. *Parsons v. Boyd*, 20 Ala. 112.

JUDGMENTS.

I. BY DEFAULT, NIL DICIT, OR CONFESSION.

1. *By Default, and herein, of Office Judgments.*
2. *By Nil Dicit.*
3. *By Confession.*

II. CERTAINTY, AND OTHER REQUISITES.
III. CONCLUSIVENESS AND EFFECT.

As to the amendment of Judgments, see AMENDMENT, III, p. 396.

As to decrees in chancery, see DECREES, p. 241.

As to decrees in probate cases, see DECREES, p. 133.

I. BY DEFAULT, NIL DICIT, OR CONFESSION.

1. *By Default; and herein, of Office Judgments.*

1. It is erroneous to render judgment by default before a declaration has been filed. *Amason v. Nash*, 19 Ala. 104.

2. In a cause transferred from the county to the circuit court, under the act of 1850, after the appearance term of the former court, judgment by default may be entered at the first ensuing term. *Falk & Rosenthal v. Reese*, 19 Ala. 240.

3. It is erroneous to render judgment by default, at the return term of an *alias*, against three defendants, on one of whom the original writ was not served. *Griffin, Rayfield & Griffin, v. Wilson*, 19 Ala. 27.

4. It is erroneous to render judgment by default against a party who was not served with process. *Faver & Mount v. Briggs*, 18 Ala. 478; *Kennedy v. Millsap*, 25 Ala. 560; *Dew v. Cunningham*, 28 Ala. 466; *Fowler v. Banks*, 21 Ala. 679.

5. Service on one partner, after a dissolution of the firm, does not authorize the rendition of a judgment by default against his co-partner. *Faver & Mount v. Briggs*, 18 Ala. 478.

6. A judgment by default cannot be entered against a garnishee, until the fourth day of the term to which he is summoned; but this rule does not apply, where the garnishee himself brings the case to the circuit court, by appeal or *certiorari* from a justice's court. *Case & Pate v. Moore*, 21 Ala. 758.

7. Nor can a final judgment by default be rendered against him, until a *sci. fa.* on the judgment *nisi* has been duly executed and returned by the sheriff of the county in which he resides, or in which he was summoned. *Morris v. Russell*, 20 Ala. 357; *Wood v. Russell*, 22 Ala. 645.

8. Under the Code, (§ 2570,) judgment by default cannot be taken against the defendant in attachment on the first day of the term to which the attachment is returnable; but, under the act of 1854, (Session Acts 1853–4, p. 91,) regulating the practice in the circuit and city courts of Mobile, if the suit is brought in either of those courts, and the attachment is levied more than twenty days before its return, judgment by default may be entered on the first day of the term. *Letondal v. Huguenin*, 26 Ala. 552.

9. A complaint, in the form prescribed by the Code, (p. 551.) "on promissory note, by payee, against maker," is sufficient to support a judgment by default. *Ib.*

10. In assumpsit against the endorser of a note not payable in bank, it is erroneous to render judgment by default, without the intervention of a jury, either under the common counts, or under a special count which contains no averment of suit against the maker, and no allegation dispensing with the necessity of such averment. *Langdon v. Williams*, 22 Ala. 681.

11. In an action under the Code, on a promissory note and an open account for work and labor, it is erroneous to render judgment by default, for the aggregate amount of the sums claimed, without the intervention of a jury, or the execution of a writ of inquiry. *Beville v. Reese*, 25 Ala. 451.

12. Unpaid calls for railroad stock are not "instruments of writing ascertaining the plaintiff's demand," within the meaning of section 2366 of the Code, authorizing the rendition of a final judgment by default without the intervention of a jury. *Connoly v. Ala. & Tenn. Rivers Railroad Co.*, 29 Ala. 373.

13. If the defendant fails to plead within the prescribed time, the plaintiff may have the default entered on the docket in vacation, at any time before pleas are filed, and claim the benefit thereof at the ensuing term of the court; but the defendant may plead at any time before the default is entered against him. *Woosley v. Memphis & Charleston Railroad Co.*, 28 Ala. 536.

14. An entry on the docket, in vacation, after the time for pleading has expired, in these words, "Plaintiff claims judgment against defendant for want of a plea," signed by the plaintiff's attorneys, with the date attached, and attested by the clerk, is not a sufficient entry of the default; nor is it sufficient to sustain a judgment by default at the ensuing term, after pleas are filed, although proof is made to the court that no pleas were filed when it was entered. *Ib.*

15. On the execution of a writ of inquiry, after judgment by default, the defendant has no right to plead to the merits of the action, even though his defense has arisen since the rendition of the judgment. *Ewing v. Peck & Clark*, 17 Ala. 339.

16. After judgment by default, a defective service of process is not available on error. *Moore v. Fiquett*, 19 Ala. 236; *Dew v. Cunningham*, 28 Ala. 466.

2. *By Nil Dicit.*

17. *Nil dicit* is the proper judgment, when the defendant appears by attorney and fails to plead. *Kennedy & Merritt v. Young*, 25 Ala. 563; *Stewart v. Goode & Ulrick*, 29 Ala. 476.

18. When the action is founded on a promissory note, the court may render judgment for the amount of the note, with interest, without regard to the amount of damages laid in the declaration. *Kennedy & Merritt v. Young*, 25 Ala. 563.

19. A judgment by *nil dicit* admits that the party has been properly brought into court, but does not cure a defective declaration. *Emanuel v. Ketchum*, 21 Ala. 257.

20. Under the Code, (§ 2405,) if the complaint shows a substantial cause of action, mere formal defects, which might have been remedied by an amendment, are not available on error, after judgment by *nil dicit*. *Blount v. McNeill*, 29 Ala. 473; *Stewart v. Goode & Ulrick*, 29 Ala. 476.

21. In debt on a foreign judgment, it is erroneous to render judgment final by *nil dicit*, without the intervention of a jury, for the amount of the judgment with eight per cent interest. *Clarke v. Pratt*, 20 Ala. 470.

22. In debt on an administrator's bond, it is erroneous to render judgment final by *nil dicit*, without the intervention of a jury, against the principal and his sureties. *Amason v. Nash*, 24 Ala. 279.

3. *By Confession.*

23. When the defendant contests only a portion of the plaintiff's demand, the court may require him, on application for a continuance, to confess judgment for the sum admitted to be due, and grant a continuance as to the residue. *Gowen & Co. v. Jones*, 20 Ala. 128.

24. A judgment by confession, taken by a probate judge, in vaction, from a party charged with the paternity of a bastard, is void. *Moore v. McGuire*, 26 Ala. 461.

II. CERTAINTY, AND OTHER REQUISITES.

25. A judgment of the supreme court, awarding ten per cent. damages on the affirmance of a judgment of condemnation rendered on a trial of the right of property, is, as to the damages, void for uncertainty. *Hooks v. Branch Bank at Montgomery*, 18 Ala. 451.

26. A judgment, rendered by a justice of the peace, "for $37.30, on a note due 25th December, 1840, bearing interest from that date, and cost of suit," is, in legal effect, a judgment for $37.30, and is not void for uncertainty. *Lightsey v. Harris*, 20 Ala. 409

27. A judgment *nisi*, against a defaulting garnishee, "for the sum of $63 debt, and $26.76 damages, with interest thereon from the 2d October, 1848," is sufficiently certain. *Drane v. King & Devitt*, 21 Ala. 556.

28. A mere memorandum of the clerk of a foreign court, stating the amount of damages assessed by the jury, and adding the words, "then judgment for" the amount, does not constitute a judgment, although certified, in proper form, to be "a true and perfect transcript and exemplification of the record." *Hinson v. Wall*, 20 Ala. 298.

29. A judgment against the defendant in a bastardy proceeding, requiring him to pay into the probate court, annually, for the term of ten years, the sum of $50, for the support, maintenance and education of the child, though not in favor of any one as plaintiff, is nevertheless sufficient, since the statute points out with certainty who is plaintiff. *Seale v. McClanahan*, 21 Ala. 345.

30. A judgment in such proceeding, requiring the defendant to pay "the sum of $40 annually for ten years, to-wit, $40 now, and $40 every year for ten years afterwards," is irregular and erroneous; but the latter portion will be treated as a clerical misprision, and amended accordingly. *Wilson v. Judge of Pike County Court*, 18 Ala. 757.

31. A decree of the orphans' court, which does not designate the person in whose favor it is rendered, is void for uncertainty. *Turner v. Dupree's Adm'r*, 19 Ala. 198; *Hughes v. Mitchell*, 19 Ala. 268; *Kyle v. Mays, use of Hatchett*, 22 Ala. 673; *Gilbreath v. Manning*, 24 Ala. 418.

32. An order of the probate court, made on the application of two co-executors, for the allowance to each of a specified sum, as annual compensation for his services in the management of the estate, is void as a judgment. *Carver v. Hallett*, 26 Ala. 722.

33. A paper, purporting to be a decree rendered on the final settlement of an estate, signed by the judge of the orphans' court, and filed among the papers of the cause, with the endorsement thereon, "Decree in Est. of J. H. deceased, filed 2d Monday April, 1847," also signed by the judge, is not the judgment of the court until entered of record. *Hall v. Hudson*, 20 Ala. 284; *Hudson v. Hudson*, 20 Ala. 364.

34. A judgment against an executor or administrator, as garnishee, at the suit of a judgment creditor of a legatee or distributee, must be rendered in the name of the plaintiff of record, and not in the name of the real owner of the judgment; yet, where the affidavit for the garnishment is properly made by the real owner, and the original judgment is correctly described, the judgment against the garnishee will be amended on error. *Jackson v. Shipman*, 28 Ala. 488.

35. On application for a rehearing at law, (Code, §§ 2407–1417,) if the trial results in favor of the petitioner, the proper judgment is, that the original judgment be vacated; that the execution issued under it be quashed; that a rehearing be granted in the original action; that the petitioner be let in to make his defense to that action, and that he recover of the plaintiff in that judgment the costs which have accrued on the petition for rehearing. *Pratt & McKenzie v. Keils & Sylvester*, 28 Ala. 390.

36. In debt on bond for the performance of covenants, the judgment should be for the penalty, with nominal damages and costs. *Garnett v. Yoe*, 17 Ala. 74.

37. In detinue of several slaves, a judgment in favor of the plaintiff for all of them except one, as to whom the judgment entry is entirely silent, is a judgment in favor of the defendant for that one. *Wittick v. Traun*, 25 Ala. 317.

38. In such action, if the jury "find for the plaintiff, and assess the damages at" a specified sum; and thereupon judgment is rendered in his favor, for the damages and costs only,—there is nothing in the judgment of which the defendant can complain. *Miller v. Jones' Adm'r*, 29 Ala. 174.

III. CONCLUSIVENESS AND EFFECT.

1. *Against Parties and Privies.*

39. A judgment on verdict is final and conclusive between the parties and their privies, as to all facts necessarily or actually determined. *Wit-*

tick v. Traun, 25 Ala. 317; *Chamberlain v. Gaillard*, 26 Ala. 504.

40. It is equally conclusive upon one, who, though no party to the record, is shown by parol to have been the real defendant in interest, who employed counsel to defend it, and set up his own title through his bailee. *Tarleton & Pollard v. Johnson*, 25 Ala. 300.

41. If a particular matter, as to which the record is silent, though the issue was broad enough to cover it, actually arose and was determined, it may be shown by parol. *Strother's Adm'r v. Butler*, 17 Ala. 733; *Chamberlain v. Gaillard*, 26 Ala. 504.

42. The recitals of the record import absolute verity, and estop the parties from disputing their correctness. *Deslonde & James v. Darrington's Heirs*, 29 Ala. 92; *Beverly v. Stephens*, 17 Ala. 701.

43. A judgment is conclusive against the defendant, as to the fact that the money is due to the plaintiff therein, and not to a third person. *Mervine v. Parker*, 18 Ala. 241.

44. In case for wrongfully and maliciously suing out an attachment, the fact that judgment was rendered for the defendant in attachment does not estop the attaching creditor from proving that his debt was actually due. *Marshall v. Betner*, 17 Ala. 832.

45. Nor is such judgment conclusive, in a subsequent action on the bond, as to the wrongful suing out of the writ, when it does not appear to have been rendered on verdict. *Sackett & Shelton v. McCord*, 23 Ala. 851.

46. But a judgment on a trial of the right of property, in favor of the claimant, is conclusive on the attaching creditor, in a subsequent action by the claimant for damages, that the defendant in attachment had no interest in the property. *Roberts v. Heim*, 27 Ala. 678.

47. In an action on an injunction bond, the record of the chancery suit, showing the dismissal of the bill, is admissible, but not conclusive evidence, as to the vexatious suing out of the writ. *Garrett & Hill v. Logan*, 19 Ala. 344.

48. In an action on a *ne-exeat* or writ-of-seizure bond, the record of the chancery suit, showing the dismissal of the bill for want of prosecution, is presumptive, but not conclusive evidence, that the writ was wrongfully sued out. *Zeigler & Hall v. David*, 23 Ala. 127.

49. In case for a malicious prosecution, the judgment of the magistrate, ordering the commitment of the accused, is presumptive, but not conclusive evidence, on the question of probable cause. *Ewing v. Sanford*, 19 Ala. 605.

50. Where the prosecution was for the larceny of a slave, which the accused afterwards recovered from the prosecutor in an action at law, the record of that suit is admissible evidence for the plaintiff in case for a malicious prosecution. *S. C.*, 21 Ala. 157.

51. Where two attachments, sued out between the same parties, are levied on the same property, and a claim is interposed in each case by the same person, a judgment in one case, finding the property subject to the attachment, is conclusive that it is also subject in the other. *Derrett v. Alexander*, 25 Ala. 265.

52. Where a deed of trust, conveying both real and personal property, is found fraudulent and void as against creditors, in a claim suit between a purchaser under the deed and a judgment creditor of the grantor, the claimant is not concluded by that verdict and judgment, as to the *bona fides* of the deed, in a subsequent action of ejectment brought against him by a purchaser at sheriff's sale under the same judgment. *Crutchfield's Heirs v. Hudson*, 23 Ala. 393.

53. A recovery in assumpsit, for the hire of a slave, is not necessarily conclusive as to the question of ownership, unless that question actually arose and was determined. *Chamberlain v. Gaillard*, 26 Ala. 504.

54. A judgment in detinue is conclusive as to the title then adjudicated, upon a person who, though no party to the record, is shown by parol to have been the real defendant in the action. *Tarleton & Pollard v. Johnson*, 25 Ala. 300.

55. In trespass to try titles, a judgment for plaintiff is conclusive that damages were recovered for the rents accruing up to the time of the verdict;

and the fact that the action was brought against a tenant, whose term expired before the rendition of the judgment, makes no difference, if his landlord was brought in as a party. *Shumake v. Nelm's Adm'r*, 25 Ala. 126.

56. A recovery in ejectment or trespass to try titles is conclusive, in a subsequent action for the rents and profits, as to the title of the plaintiff's lessor. *Ib.*

57. But it is only conclusive as to the term laid in the demise. *Doe d. Kennedy's Heirs v. Reynolds*, 27 Ala. 364.

58. On motion to enter satisfaction of a judgment, or to supersede an execution on it, the judgment is conclusive as to all defenses existing at the time of its rendition. *Mervine v. Parker*, 18 Ala. 241; *Matthews v. Robinson*, 20 Ala. 130.

59. A recovery in trespass, for the taking of goods of which plaintiff was possessed as trustee, is a bar to a subsequent action for the taking of other goods, at the same time and place, of which he was possessed in his own right. *O'Neal v. Brown*, 21 Ala. 482.

60. A recovery for the hire of a horse, buggy and harness, is no bar to a subsequent action for damages on account of injuries done to the buggy and harness while in the defendant's possession. *Shaw v. Beers*, 25 Ala. 449.

61. A recovery in detinue is a bar to another action founded on the same title. *Patton v. Hamner*, 28 Ala. 618; *Wittick v. Traun*, 25 Ala. 317; *Tarleton & Pollard v. Johnson*, 25 Ala. 300.

62. A recovery in trover, without satisfaction, is no bar to a subsequent action of the same kind against one who claims under the defendant. *Spivey v. Morris*, 18 Ala. 254.

63. A recovery in trover for the conversion of a hired slave, with satisfaction thereof, is a bar to a subsequent action to recover hire for the unexpired portion of the term, when damages were assessed for the slave's value at the time of the conversion. *Smith v. Hooks*, 19 Ala. 101.

64. *Semble*, that a recovery of hire for the entire term, with knowledge of the conversion during the term, concludes the owner from afterwards bringing trover for the conversion. *Moseley v. Wilkinson*, 24 Ala. 411.

65. A mere recovery in trespass, without satisfaction, is no bar to another action against a co-trespasser. *Blann v. Crocheron*, 19 Ala. 647; *S. C.*, 20 Ala. 320.

66. The adverse decision of the court, on motion to have certain moneys in the hands of the sheriff appropriated to the satisfaction of plaintiff's judgment, is a bar to a subsequent action of assumpsit against the sheriff for the money. *Langdon v. Raiford*, 20 Ala. 532.

67. When a garnishee discloses the fact that another person claims to be the transferree of his debt to the defendant in attachment, and such transferree, upon being duly notified, fails to appear and assert his right to the fund, he is concluded from afterwards setting up any claim against the garnishee. *Smoot & Ketchum v. Eslava*, 23 Ala. 659.

68. In assumpsit, some of the plaintiff's claims having been excluded from the jury under the charge of the court, he thereupon moved for a new trial; on which motion it was ordered, "that a new trial be granted, unless the defendants enter into an agreement of record, that upon any future settlement in chancery, or bill filed for an account between said parties, or any transaction between said defendants and H. & F., the said defendants will not plead the verdict and judgment in said cause, nor use the same in any manner to bar the claim of said plaintiff or H. & F. for an account and settlement in relation to said claims, all of which were included in the account produced and read to the jury by the plaintiff on the trial." The defendants having consented to these terms, and the motion for a new trial having been thereupon overruled,—*held*, that the excluded claims were exempted from the effect of the judgment, and might be used as a set-off in a subsequent action brought by defendants against plaintiff. *Hoyt, Ford & Robinson v. Murphy*, 23 Ala. 456.

2. *Against Strangers.*

69. Recitals in a judgment or decree are not competent evidence against a stranger to the record. *Rowland v. Day*, 17 Ala. 681.

70. A judgment is competent evidence against a stranger to prove the fact and time of its rendition. *Harrell v. Whitman*, 20 Ala. 519; *Snodgrass v. Branch Bank at Decatur*, 25 Ala. 161.

71. On the trial of an issue contesting the answer of a garnishee, the record of a judgment recovered against him by the defendant, subsequent to the service of the garnishment, is admissible evidence for the plaintiff, to show the fact and time of its rendition. *Harrell v. Whitman*, 20 Ala. 519.

72. On a trial of the right of property in certain slaves, to which the claimant derived title under a purchase from the defendant in execution, and which, after remaining in his possession four years from the time of the alleged sale, were afterwards found again in the defendant's possession,—*held*, that a transcript of a decree, discharging the defendant as a bankrupt, and rendered a few months before the slaves were found in his possession, was admissible evidence for the plaintiff, to show the fact and date of the defendant's discharge, and the period intervening between that time and the slaves' return to his possession. *Snodgrass v. Branch Bank at Decatur*, 25 Ala. 161.

73. The record of a judgment recovered against the defendant in execution, subsequent to his sale to the claimant, is not competent evidence against the the latter, to prove an indebtedness prior to its rendition. *Ib.*

74. The record of the plaintiff's judgment against the defendant in execution is not admissible evidence against the plaintiff. *Taliaferro v. Lane*, 23 Ala. 369.

75. The sheriff's endorsement on the *fi. fa.* is admissible evidence against the claimant, for the purpose of showing its levy on the slave in controversy. *Thomas v. Henderson*, 27 Ala. 523.

76. A record is not evidence of any fact which can only be inferred from it by argument. *McCravey v. Remson*, 19 Ala. 430; *Miller v. Jones' Adm'r*, 29 Ala. 174.

77. A record is admissible evidence against an attorney, to prove notice to him of the plaintiff's title as set out in the declaration, when the pleas were filed in the name of a firm of which such attorney was a partner. *Parsons v. Boyd*, 20 Ala. 112.

78. A judgment, quashing a *supersedeas* of an execution, is not conclusive upon parties who assert rights under the defendant in the judgment, anterior in point of time to the proceedings, when it does not appear that the merits of the controversy were determined. *Hanson & Moore v. Patterson*, 17 Ala. 738.

79. In assumpsit, to recover the proceeds of a note, placed by plaintiff in defendant's hands for collection, (on which defendant brought suit for his own use, in the name of the payee, and recovered judgment, whereon a *fi. fa.* was issued, and levied on certain personal property, which was purchased at the sheriff's sale by the defendant,) the sheriff's return on the execution, showing the amount of the proceeds of sale, is not conclusive on the plaintiff. *Crow v. Hudson*, 21 Ala. 560.

80. A recovery against the principal, for his defalcations as secretary of an incorporated company, does not conclude the surety on his official bond, either as to the fact of embezzlement, or as to the amount embezzled. *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

81. An indictment against the principal for the embezzlement, drawn up by the attorney of the company, and at its instance, is admissible evidence for the surety, in connection with proof that the company had employed counsel to prosecute the principal under it, to indentify the bills and notes therein described, as the subject-matter to which the implied admission of the company related; and an indictment against the principal, prepared and prosecuted in like manner, for the forgery of another surety's name to the bond, is admissible for a similar purpose. *Ib.*

82. A judgment against a garnishee is not binding on one, claiming by prior transfer from the defendant, who was not made a party to the proceedings. *McClellan v. Young*, 17 Ala. 498.

83. A judgment against the husband alone is not admissible evidence against the wife, in a suit concerning her separate estate, instituted in the

name of husband and wife. *Michan and Wife v. Wyatt*, 21 Ala. 813.

IV. EVIDENCE.

84. The contents of a judgment rendered by a justice of the peace, and the proceedings therewith connected, cannot be proved by a party's parol admissions, until a sufficient predicate has been laid for the introduction of secondary evidence. *Ware v. Robertson*, 18 Ala. 105.

85. The grant of administration, which is a judicial fact, cannot be proved by a party's admissions on oath in another case. *Shorter v. Urquhart*, 28 Ala. 360.

86. A transcript of a foreign judgment, if properly authenticated, is admissible evidence here; and our courts are bound to presume that the foreign court had jurisdiction of the subject-matter, unless the contrary appears, *Slaughter v. Cunningham*, 24 Ala. 260; *Gunn v. Howell*, 27 Ala. 663.

87. Such transcript is not properly authenticated, unless it is made to appear, by the certificate of either the judge or clerk, that the county in which the proceedings were had was included in the judicial circuit within which the judge presided. *Elliott v. McClelland*, 17 Ala. 206.

88. A certified transcript of a judgment is only presumptive evidence of the judgment itself, and does not preclude the defendant from showing its true amount. *Pryor v. Beck*, 21 Ala. 393.

89. An execution, signed by the clerk, but not certified by him, is not admissible evidence to prove the amount of a judgment for costs. *Ib.*

90. The original papers in a cause are admissible evidence, when it does not appear that the final record has been made up. *Barron v. Tart*, 18 Ala. 668; *Calvert v. Marlow*, 18 Ala. 67; *Beeson v. Wiley, Banks & Co.*, 28 Ala. 575.

As to the admissibility of parol evidence, in aid of a record, *vide* EVIDENCE, 448–53, p. 615.

V. FOREIGN.

91. A transcript of a foreign judgment, whether rendered by a court of general or of limited jurisdiction, is admissible evidence here, if properly authenticated; and our courts are bound to presume, until the contrary appears, that the foreign court had jurisdiction of the subject-matter. *Slaughter v. Cunningham*, 24 Ala. 260.

92. Such transcript is not properly authenticated, when it is not made to appear, by the certificate of either the judge or clerk, that the county in which the proceedings were had was included in the judicial circuit within which the judge presided. *Elliott v. McClelland*, 17 Ala. 206.

93. Since the sentences of foreign courts do not operate, except as evidence, beyond the limits of their jurisdiction, the probate of a will in Cuba confers no authority to proceed in this State for the recovery of a legacy. *Moore v. Lewis*, 21 Ala. 580.

94. In pleading the judgment of a sister State, to which the constitution requires "full faith and credit" to be given, it is not necessary to set out affirmatively the facts upon which depended the power and authority of the court by which it was rendered. *Gunn v. Howell*, 27 Ala. 663.

95. A mere memorandum of the clerk of a foreign court, stating the amount of damages assessed by the jury, and adding the words, "then judgment for" the amount, will not sustain an action of debt, although properly certified to be "a true and perfect transcript and exemplification of the record." *Hinson v. Wall*, 20 Ala. 298.

96. Ordinarily, in debt on a foreign judgment, a plea, averring that the defendant was without the jurisdiction of the court and had no notice, must also allege that he did appear to the action, either in person, or by attorney; but this rule only applies, where the record shows that the court had jurisdiction of the person; and where this does not appear, the defendant may, under the general issue, show that the court had no jurisdiction. *Foster v. Glazener*, 27 Ala. 391.

97. In declaring on a judgment rendered by a justice of the peace in a sister State, the declaration must affirmatively show that he had jurisdiction by force of a local statute. *Ellis v. White*, 25 Ala. 540.

98. In debt on a foreign judgment, it is erroneous to render judgment final by *nil dicit*, without the intervention of a jury, for the amount of the debt with eight per cent. interest. *Clarke v. Pratt*, 20 Ala. 470.

99. A decree of divorce, rendered on publication against a non-resident defendant, is an exception to the general rule, which allows foreign judgments to be avoided, when set up in another State, if the court had no jurisdiction of the defendant's person and there was no appearance. *Thompson v. The State*, 28 Ala. 12.

VI. INTEREST.

100. Interest accruing on a judgment subsequent to its rendition, may be collected under execution issued thereon. *Ijams & Carr v. Rice*, 17 Ala. 404.

101. A judgment or decree bears interest from the time of its rendition. *Ijams & Carr v. Rice*, 17 Ala. 404; *Kyle v. Mays, use of Pond*, 22 Ala. 693; *Billingsley's Adm'r v. Billingsley*, 24 Ala. 518.

102. In debt on a judgment rendered in Mississippi, it is erroneous to render judgment final by *nil dicit*, without the intervention of a jury, for the amount of the judgment with eight per cent. interest. *Clarke v. Pratt*, 20 Ala. 470.

VII. LIEN.

103. A judgment creates a lien, from the time of its rendition, on lands of which the defendant holds the legal title; which lien must prevail, at law, over the title of a purchaser who, at the date of the judgment, held only a bond for titles, coupled with possession, but acquired a deed from the defendant before the sale by the sheriff. *Sellers & Cook v. Hayes*, 17 Ala. 749.

104. Section 2456 of the Code, which makes a judgment a lien on the defendant's lands only from the time of the delivery of an execution to the sheriff, applies to judgments rendered before its adoption. *Daily v. Burke*, 28 Ala. 328.

105. The lien of a judgment attaches to lands previously conveyed by the defendant by deed fraudulent and void against creditors, of which those claiming under the deed are chargeable with notice. *Johnson v. Thweatt*, 18 Ala. 741.

106. If a lien attaches in favor of a judgment creditor before notice of an unrecorded deed of trust, a purchaser at execution sale is also protected, although he may have had notice at the time of his purchase. *DeVendell v. Doe d. Hamilton*, 27 Ala. 156.

107. The lien of a judgment in an attachment case, where the attachment was levied on the defendant's lands, relates back to the date of the levy of the attachment, and is entitled to preference over an execution which was levied on the same land during the intermediate time. *Langdon v. Raiford*, 20 Ala. 532.

108. When an execution is levied on lands, and, before the sale, another execution on an older judgment comes to the hands of the sheriff, the latter is entitled to the proceeds of sale. *Bagby v. Reeves*, 20 Ala. 427.

109. The lien of a judgment, which has not become dormant, is not lost or impaired by laches in issuing execution. *DeVendell v. Doe d. Hamilton*, 27 Ala. 156.

110. Judgments rendered in the circuit court of the United States create a lien on the defendant's lands within the State, co-extensive with the lien of judgments rendered by the State courts. *Pollard v. Cocke*, 19 Ala. 188.

As to the lien of an execution on the defendant's personal property, *vide* EXECUTION, 44–57, p. 633.

VIII. REVERSAL.

111. The reversal of a judgment restores the parties to their original rights, as if the judgment had never existed. *Simmons v. Price*, 18 Ala. 405; *S. C.*, 21 Ala. 337; *Williams v. Simmons*, 22 Ala. 425; *Barringer v. Burke*, 21 Ala. 765; *Jones v. Dyer and Wife*, 20 Ala. 373; *Paulling v. Watson*, 26 Ala. 205.

As to the errors for which a judgment will be reversed, *vide* ERROR AND APPEAL, 82–144, pp. 568–71; *Ib.* 180–201, pp. 574–5.

IX. REVIVOR.

112. A *sci. fa.* lies to revive a judgment on which no execution has issued within ten years, although an execution was issued within a year and a day. *Shackelford v. Miller*, 18 Ala. 675.

113. A judgment, rendered by a justice of the peace before the adoption of the Code, may be revived by *sci. fa.*, upon proof that an execution was issued on it within a year, and returned "no property found," and that ten years have since elapsed without the issue of another execution. *Shelley v. Graves*, 29 Ala. 385.

114. The purchaser of a judgment, rendered in favor of the Planters' and Merchants' Bank of Mobile before the surrender of its charter, and afterwards sold by its trustees under the act of 1850, is not required to revive it by *sci. fa.* *DeVendell v. Doe d. Hamilton*, 27 Ala. 156.

115. A judgment or decree which is void for uncertainty, cannot be revived by *sci. fa.* *Turner v. Dupree*, 19 Ala. 198.

116. Whether the statute requiring a judgment to be revived by *sci. fa.*, where no execution was issued within a year and a day after its rendition, applies to decrees in chancery, *quære? The State, ex rel. Waring, v. Mayor &c. of Mobile*, 24 Ala. 701.

117. The administrator *de bonis non* is the proper party to revive a judgment rendered in favor of the administrator in chief as such. *Duncan v. Hargrove*, 18 Ala. 77.

118. The objection that branch writs of *sci. fa.* cannot issue against defendants who reside in different counties, if of any force, is not available on general demurrer. *Ib.*

119. Where the judgment sought to be revived was affirmed in the supreme court, it is not necessary to aver in the *sci. fa.* that the judgment of affirmance was certified to the primary court: an averment that the judgment of the circuit court was affirmed, "as by the record and proceedings thereon remaining in said circuit court more fully appears," is sufficient on general demurrer. *Ib.*

120. In a *sci. fa.* to revive a judgment for costs against an administrator, the damages having been paid, it is not necessary to state the amount of the costs, if the judgment is otherwise substantially described. *Barron v. Tart*, 19 Ala. 78.

121. A judgment may be rendered *nunc pro tunc*, and revived by *sci. fa.*, at the same term; and a notice of the motion to amend may be inserted in the *sci fa.* *Glass v. Glass*, 24 Ala. 468.

122. On *sci. fa.* to revive a joint judgment against two executors, if one is a non-resident, his name may be omitted out of the writ; or, if he is included in the writ, but not served with process, a discontinuance may be entered as to him, and the judgment revived against the other. *Hanson v. Jacks and Wife*, 22 Ala. 549.

123. A judgment, sought to be revived by *sci. fa.*, cannot be impeached by pleading any matter going behind it. *Duncan v. Hargrove*, 22 Ala. 150.

124. Bankruptcy is a good plea; and when pleaded "in short by consent," the appellate court will presume that it was well pleaded. *Ib.*

125. Where the *sci. fa.* seeks to revive a judgment of the circuit court which had been affirmed on error in the supreme court, the statement of the former judgment is mere matter of inducement; consequently, a plea denying its rendition is demurrable. *Ib.*

126. A plea by one of two joint defendants, averring that he was his co-defendant's surety on the note which was the foundation of the suit; that his co-defendant carried the cause, by writ of error, to the supreme court, where the judgment was affirmed; that an execution was issued on this affirmed judgment, and levied on his co-defendant's property; that a forthcoming bond was thereupon executed, to which he was no party, and which was returned forfeited,—is demurrable for vagueness and uncertainty, and substantially defective. *Ib.*

127. So is a plea by such defendant, averring that an execution on said affirmed judgment was levied on property of his co-defendant sufficient to satisfy it, which levy was unaccounted for. *Ib.*

128. And a plea averring further, that said property was sold by the sheriff, and the proceeds of sale went

into his hands while said execution was of force, and was wholly unaccounted for. *Ib.*

129. If the court rules adversely to the plaintiff on the pleadings, he may except to its decision, and take a nonsuit under the act of 1846. *Ib.*

130. On the revival of a judgment against an executor, costs may be awarded against him. *Hanson v. Jacks and Wife*, 22 Ala. 549.

X. SATISFACTION.

131. The acceptance of a note, from either the defendant or a stranger, may be a satisfaction and extinguishment of a judgment. *Brewer v. Branch Bank at Montgomery*, 24 Ala. 439.

132. The payment of an execution by the sheriff is a satisfaction of the judgment, if the parties so elect to treat it, although no endorsement or return of satisfaction is made or entered; but not otherwise. *Mooney & Black v. Parker*, 18 Ala. 708; *Poe v. Dorrah*, 20 Ala. 288; *Houston v. Crutchfield's Adm'r*, 22 Ala. 76.

133. The payment by the sheriff of a judgment recovered against himself, for failing to make the money on an execution, is not a satisfaction of the original judgment, unless the defendant adopts and so treats it. *Poe v. Dorrah*, 20 Ala. 288.

134. The payment by a stranger of a judgment rendered against the surviving partners on a firm debt, with money furnished by one of the defendants and the executor of the deceased partner, is a satisfaction of the judgment. *Hogan v. Reynolds*, 21 Ala. 56.

135. If the sheriff sells land under execution, and executes a deed to the purchaser, without having received the purchase-money, the execution is satisfied to the extent of the sum bid, unless the sale is set aside. *Moore v. Barclay*, 18 Ala. 672.

136. A levy and sale of property which is subject to the execution is, *pro tanto*, a satisfaction; but, if the property is not in fact subject, and the proceeds of sale are claimed by the party having the better legal right to it, it is no satisfaction. *Niolin v. Hamner*, 22 Ala. 578.

137. At common law, a judgment was presumed satisfied after the lapse of twenty years. *Rhodes v. Turner and Wife*, 21 Ala. 210.

138. A judgment rendered by a justice of the peace before the adoption of the Code, upon which an execution was issued within a year, and returned "no property found," is not presumed satisfied after the lapse of more than ten years without the issue of another execution. *Shelley v. Graves*, 29 Ala. 385.

139. When the defendant in a judgment is summoned by garnishment as the debtor of his judgment creditor, and pays the amount of the judgment to the attaching creditor, he may avail himself of the payment by motion to enter satisfaction of the judgment against him. *Hagadon v. Campbell*, 24 Ala. 375.

140. On motion to enter satisfaction of a judgment, whether the alleged satisfaction appears by the sheriff's return or otherwise, the plaintiff is entitled to notice. *McKissack v. Davis*, 18 Ala. 315.

141. When the record shows that the plaintiff was a party to the proceedings, he cannot assign for error his want of notice. *Branch Bank at Mobile v. Coleman*, 20 Ala. 140.

142. A motion to enter satisfaction, or proceeding by petition and *supersedeas*, is a substitute for the ancient writ of *audita querela*. *Dunlap v. Clements*, 18 Ala. 778; *Bower v. Saltmarsh*, 19 Ala. 274; *Bruce v. Barnes*, 20 Ala. 219; *Branch Bank at Mobile v. Coleman*, 20 Ala. 140; *Matthews v. Robinson*, 20 Ala. 130.

143. An equitable satisfaction of the judgment may be presented in this manner. *Branch Bank at Mobile v. Coleman*, 20 Ala. 140.

144. But matters which go behind the judgment cannot be inquired into. *Mervine v. Parker*, 18 Ala. 241; *Marshall v. Caudler*, 21 Ala. 490; *Matthews v. Robinson*, 20 Ala. 130.

145. Therefore, if the petition for a *supersedeas* sets up matters which go behind the judgment, it is demurrable. *Marshall v. Caudler*, 21 Ala. 490.

146. If it alleges that the judgment "is satisfied," it is sufficient on demurrer. *Rice v. Dillahunty*, 20 Ala. 399.

147. The petition may be verified by the oath of an agent. *Branch Bank at Mobile v. Coleman*, 20 Ala. 140.

148. It may be amended, after demurrer sustained to the original, provided the amendment does not make an entirely new case. *Pearsall v. McCartney*, 28 Ala. 110.

149. When issue is joined on the facts stated in the petition, it may be submitted to a jury for decision. *Branch Bank at Mobile v. Coleman*, 20 Ala. 140.

150. In such case, neither the affidavits of the parties, nor the depositions of incompetent witnesses, are admissible. *Bower v. Saltmarsh*, 19 Ala. 274.

151. Either party has a right to demand a trial by jury, and to cross-examine all witnesses offered against him. *Bruce v. Barnes*, 20 Ala. 219.

152. The petitioner is entitled to the opening and conclusion of the argument. *Pearsall v. McCartney*, 28 Ala. 110.

153. The successful party is entitled to recover his costs. *Ijams & Carr v. Rice*, 17 Ala. 404.

XI. TRANSFER.

154. An assignment of a judgment is not required to be under seal. *Becton v. Ferguson*, 22 Ala. 599.

155. A judgment against the surviving partners of a firm, which has been paid and satisfied by a stranger, with money furnished to him for that purpose by one of the defendants and the executor of the deceased partner, cannot be assigned to him, and thus kept alive, for the purpose of enforcing its collection from the other defendant. *Hogan v. Reynolds*, 21 Ala. 56.

156. The transfer of a judgment, upon condition that the transferree "was to pay for it if he could make anything out of it," does not constitute him "the party really interested" in it, (Code, § 2765,) nor enable him to sue on it before a justice of the peace. *Pike v. Bright*, 28 Ala. 332.

XII. VALIDITY.

1. *As Affected by Incompetency of Judge.*

157. The general rule, holding it irregular and improper for a judge to try any cause in which he has such an interest as would disqualify him as a witness, does not apply to orders purely formal in their character, and it is doubtful whether it extends to a case in which no other judge could try and determine the cause. *Heydenfeldt v. Towns*, 27 Ala. 423.

158. If the judge is deprived of authority to act by statutory inhibition, the proceedings had before him are void; otherwise, they are voidable only, and valid until avoided. *Ib.*

159. The auditing of claims against an insolvent estate, by commissioners appointed by a county-court judge who is a creditor of the estate, is voidable only, and not void. *Ib.*

160. A probate judge, who, before his appointment as such, became surety on a recognizance taken from a party charged with the paternity of a bastard, is incompetent from interest to preside on the trial of the cause: and any proceedings therein, had before him, are void. *The State, ex rel. Claunch v. Castleberry*, 23 Ala. 85.

2. *As Affected by Want of Jurisdiction.*

161. A judgment rendered against a man after his death, is a nullity. *Swink's Adm'r v. Snodgrass*, 17 Ala. 653.

162. The orders of a court acting without authority, are nullities, and may be collaterally impeached. *Wightman v. Karsner*, 20 Ala. 446; *Rood v. Eslava*, 17 Ala. 430; *Fields v. Walker*, 23 Ala. 155.

163. A judgment or decree which, on its face, shows a want of jurisdiction of either the parties or the subject-matter, is not voidable only, but absolutely void. *Lamar v. Comm'rs Court of Marshall Co.*, 21 Ala. 772.

164. A judgment by default in an attachment case, predicated on a void original attachment, is also void for want of jurisdiction. *Flash, Hartwell & Co. v. Paul, Cook & Co.*, 29 Ala. 141.

165. If the judgment against the defendant in attachment is void for want of jurisdiction, the judgment against a garnishee is also invalid. *Matthews, Finley & Co. v. Sands & Co.*, 29 Ala. 136; *Flash, Hartwell & Co. v. Paul, Cook & Co.*, 29 Ala. 141.

166. A judgment final by default against a garnishee, without a previ-

ous judgment *nisi*, though irregular and erroneous, is not void. *Gildersleeve v. Caraway*, 19 Ala. 246.

167. A judgment, rendered by a justice of the peace, cannot be collaterally impeached, by proof that the warrant was not served on one of the defendants. *Lightsey v. Harris*, 20 Ala. 409.

168. In an action on a foreign judgment, where the record does not show that the court had jurisdiction of the defendant's person, the want of jurisdiction may be shown under the general issue; but, where the record shows that the court had jurisdiction, the defendant must specially plead the want of service or notice, and his plea must allege that he did not appear to the action. *Foster v. Glazener*, 27 Ala. 391.

169. A summary judgment, rendered in Georgia, under the statute authorizing the superior court to establish copies of lost papers, held void for want of jurisdiction of the person, because the record did not show the statute authorizing the court to proceed without notice to the defendant. *Ib.*

170. When a transcript of a judgment of a sister State is properly authenticated, our courts are bound to presume that the foreign court had jurisdiction of the subject-matter, until the contrary affirmatively appears. *Slaughter v. Cunningham*, 24 Ala. 260; *Gunn v. Howell*, 27 Ala. 663.

XIII. ACTIONS ON JUDGMENTS.

171. Debt lies on a judgment after the expiration of a year and a day, although an execution may legally issue on it. *Kingsland & Co. v. Forrest*, 18 Ala. 519.

172. A mere memorandum of the clerk of a foreign court, stating the amount of damages assessed by the jury, and adding the words, "then judgment for" the amount so found, will not sustain an action of debt, although duly certified to be "a true and perfect exemplification of the record." *Hinson v. Wall*, 20 Ala. 298.

173. An order of the probate court, made on the application of two co-executors, for the allowance to each of a specified sum as annual compensation for his services, will not support an action at law in favor of either of them, or his assignee, against the other. *Carver v. Hallett*, 26 Ala. 722.

174. In an action on a judgment rendered by a justice of the peace in another State, the declaration must affirmatively show that the justice had jurisdiction by force of a local statute. *Ellis v. White*, 25 Ala. 540.

175. In pleading the judgment of a sister State, to which the constitution requires "full faith and credit" to be given, it is not necessary to set out affirmatively the facts upon which depended the power and authority of the court by which it was rendered. *Gunn v. Howell*, 17 Ala. 663.

176. Ordinarily, in debt on a foreign judgment, a plea, averring that the defendant was without the jurisdiction of the court and had no notice, must also allege that he did not appear to the action, either in person, or by attorney; but this rule only applies, where the record shows that the court had jurisdiction of the person; and where this does not appear, the defendat may, under the general issue, show that the court had no jurisdiction. *Foster v. Glazener*, 27 Ala. 391.

177. In an action on a justice's judgment, the defendant cannot be permitted to show that he was not served with process. *Lightsey v. Harris*, 20 Ala. 409.

178. In debt on a foreign judgment, it is erroneous to render judgment final by *nil dicit*, without the intervention of a jury, for the amount of the debt with eight per cent. interest. *Clarke v. Pratt*, 20 Ala. 470.

JURISDICTION.

1. To sustain the judgment of an inferior court, its record must affirmatively show every fact necessary to support its jurisdiction. *Comm'rs' Court of Talladega Co. v. Thompson*, 18 Ala. 694; *Long v. Comm'rs' Court of Butler Co.*, 18 Ala. 482; *Wilson v. Judge of Pike County Court*, 18 Ala. 757; *Wightman v. Karsner*, 20 Ala. 446; *Lamar v. Comm'rs' Court of Marshall Co.*, 21 Ala. 772; *Molett v. Keenan*, 22 Ala. 484; *Comm'rs' Court of Russell*

Co. v. Tarver, 25 Ala. 480; *Keenan v. Comm'rs' Court of Dallas Co.*, 26 Ala. 568; *Owen v. Jordan*, 27 Ala. 608; *Wyatt's Adm'r v. Rambo*, 29 Ala. 510.

2. The same rule applies to courts of general jurisdiction, in the exercise of special, statutory powers. *Foster v. Glazener*, 27 Ala. 391; *Gunn v. Howell*, 27 Ala. 663; *Wyatt's Adm'r v. Rambo*, 29 Ala. 510.

3. When a court of limited jurisdiction is charged by statute with the ascertainment of a preliminary jurisdictional fact, the record must either show the actual existence of that fact, or that the court determined its existence. *Hamner v. Mason*, 24 Ala. 480; *Gunn v. Howell*, 27 Ala. 663; *Wyatt's Adm'r v. Rambo*, 29 Ala. 510; *Williams v. The State*, 29 Ala. 9.

4. If the record shows that the existence of such jurisdictional fact was judicially ascertained, it cannot be collaterally impeached on the ground that the fact did not exist. *Ib.*

5. But the existence of that fact, or the judicial ascertainment of its existence, cannot be inferred from the mere exercise of jurisdiction. *Wyatt's Adm'r v. Rambo*, 29 Ala. 510. (Overruling *Wyatt's Adm'r v. Steele*, 26 Ala. 639.)

6. A transcript of a judgment rendered in a sister State, if properly authenticated, is presumptive evidence that the court had jurisdiction of the subject-matter. *Slaughter v. Cunningham*, 24 Ala. 260; *Gunn v. Howell*, 27 Ala. 663.

7. But, if such judgment was rendered without notice to the defendant, and there was no appearance, the statute authorizing the proceeding must be affirmatively shown, or the judgment will be held void for want of jurisdiction. *Foster v. Glazener*, 27 Ala. 391.

8. In an action on a foreign judgment, where the record does not show that the court had jurisdiction of the defendant's person, the want of jurisdiction may be shown under the general issue; otherwise, it must be specially pleaded, and the plea must also aver that there was no appearance. *Ib.*

9. In an action brought by an administrator as such, a plea in bar, averring facts which show that his letters are void for want of jurisdiction in the court by which they were issued, is good. *Miller v. Jones' Adm'r*, 26 Ala. 247.

10. A decree of divorce, rendered on publication against a non-resident defendant, is an exception to the general rule, which allows foreign judgments or decrees, when sought to be enforced or set up in another State, to be impeached for want of jurisdiction of the person. *Thompson v. The State*, 28 Ala. 12.

11. A judgment which is void for want of jurisdiction, is a mere nullity, and may be collaterally impeached. *Lamar v. Comm'rs' Court of Marshall Co.*, 21 Ala. 772; *Wightman v. Karsner*, 20 Ala. 446; *Fields v. Walker*, 23 Ala. 155; *Rood v. Eslava*, 17 Ala. 430.

12. When the court has no jurisdiction of the subject-matter, appearance and consent cannot confer jurisdiction. *Rood v. Eslava*, 17 Ala. 430; *Winn v. Freele*, 19 Ala. 171; *Benford v. Daniels*, 20 Ala. 445; *Harrison & Saunders v. Harrison*, 20 Ala. 629: *Jeffries v. Harbin*, 20 Ala. 387; *Fields v. Walker*, 23 Ala. 155.

13. *A fortiori*, mispleading cannot confer jurisdiction. *Jeffries v. Harbin*, 20 Ala. 387; *Crabtree v. Cliatt*, 22 Ala. 181; *Howard v. Ingersoll*, 23 Ala. 673; *Comm'rs' Court of Talladega Co. v. Thompson*, 18 Ala. 694.

14. But, where the court has jurisdiction of the subject-matter, the appearance of the defendant, without objection, gives it jurisdiction of his person. *Harrison & Saunders v. Harrison*, 20 Ala. 629; *Hatter v. Eastland*, 22 Ala. 688; *Walker v. Chapman*, 22 Ala. 116; *Stanley v. Bank of Mobile*, 23 Ala. 652; *Lampley v. Beavers*, 25 Ala. 534; *Gager v. Doe d. Gordon*, 29 Ala. 341.

15. The courts of this State have no jurisdiction of an action to recover damages for overflowing a mill situated in an adjoining State. *Howard v. Ingersoll*, 17 Ala. 780; *S. C.*, 23 Ala. 673.

As to the jurisdiction of the circuit court, supreme court, city court of Mobile, and commissioners' court, see those titles, respectively, on pages 510–12.

As to the jurisdiction of the probate, or orphans' court, see JURISDICTION, p. 182.

As to the jurisdiction of justices of the peace, see that title, p. 676.

As to the jurisdiction of the several courts in criminal cases, see JURISDICTION, p. 81.

JURORS AND JURY.

1. On the trial of a motion to enter satisfaction of a judgment, either party is entitled to demand a trial by jury. *Bruce v. Barnes*, 20 Ala. 219.

2. In a proceeding before the commissioners' court, for the establishment of a road, if a party wishes to challenge jurors, the challenges must be made before the jury are sworn and enter on their duties. *Molett v. Keenan*, 22 Ala. 484.

As to the constitutional right of trial by jury, see CONSTITUTIONAL LAW, XI, p. 485.

JUSTICE OF THE PEACE.

I. JURISDICTION.
II. APPEAL, AND CERTIORARI.

1. *When Appeal or Certiorari Lies.*
2. *Bond, and Notice.*
3. *Pleadings, Practice, and Evidence.*
4. *Judgment, and Costs.*

III. SURETIES.

See, also, same title in PART I. p. 86.

I. JURISDICTION.

1. At common law, a justice of the peace had no civil jurisdiction, and his court was not a court of record. *Ellis v. White*, 25 Ala. 540.

2. In this State, a justice has no jurisdiction of purely equitable demands for over twenty and less than fifty dollars. *Hall v. Cannte and Wife*, 22 Ala. 650.

3. His jurisdiction, in civil cases, is limited to fifty dollars. *Crabtree v. Cliatt*, 22 Ala. 181; *Rose v. Thompson*, 17 Ala. 629; *Henderson v. Plumb & Robbins*, 18 Ala. 74; *Vaughan v. Robinson*, 20 Ala. 229.

4. If the plaintiff's demand is over fifty dollars, he may bring it within the jurisdiction of the justice, by releasing the excess, or entering a credit for it, at or before the rendition of judgment. *Henderson v. Plumb & Robbins*, 18 Ala. 74; *Crabtree v. Cliatt*, 22 Ala. 181.

5. The jurisdiction of the justice is to be determined, in the appellate court, not by the amount of the recovery, but by the amount legally due, or actually claimed, at the time the judgment was rendered. *Crabtree v. Cliatt*, 22 Ala. 181. (Correcting *Rose v. Thompson*, 17 Ala. 629.)

6. Prior to the act of 1836, justices of the peace had no admiralty jurisdiction. *Schooner Louisiana v. Fettyplace, Goodman & Co.*, 21 Ala. 286.

7. The act of 1841, which was designed to remove all doubts as to the construction of the act of 1836, confers upon them, where the sum claimed is less than fifty dollars, the same jurisdiction that the former act gave to the circuit and county courts where the sum claimed was over that amount; which jurisdiction is limited to demands which arise from "furnishing materials, labor or stores, for the use of any steamboat or other water-craft," and does not embrace debts or demands for dockage. *Ib.*

8. A justice has no jurisdiction of an action against the commissioners of the sixteenth section fund, for a refusal on their part to pay over to a legal voter of the township his proportionate share of the fund. *Jeffries v. Harbin*, 20 Ala. 387.

9. Nor to render judgment for costs against the defendant in the preliminary proceedings had before him on a charge of felony. *Sasnett v. Weathers*, 21 Ala. 673.

10. Nor to issue an attachment against a domestic executor or administrator, whose testator or intestate was a resident of this State at the time of his death. *Taliaferro v. Lane*, 23 Ala. 369.

11. A single justice has jurisdiction to act on an application by an insolvent debtor, in custody under bail process, for a discharge from custody. *Hutchisson v. Governor*, 23 Ala. 809.

(Overruling *Morrow & Nelson v. Weaver & Frow*, 8 Ala. 295.)

12. Under the Code, a justice has authority, in cases of emergency, to appoint a special constable; and he must himself judge of the emergency. *Noles v. The State*, 24 Ala. 672.

13. A justice has no jurisdiction of a complaint under the bastardy act, unless the mother of the child is a single woman, and is pregnant, or has been delivered, in the county in which the justice acts; but, if the complaint does not state these facts, he may determine their existence from other evidence, and should then state them in his warrant, so that his jurisdiction may appear on the face of his proceedings. *Williams v. The State*, 29 Ala. 9.

As to pleas to the jurisdiction, and other modes of taking advantage of the want of jurisdiction, *vide infra*, 41–44.

II. APPEAL, AND CERTIORARI.

1. *When Appeal or Certiorari Lies.*

14. A *certiorari* from the county court does not lie, to remove proceedings had before a justice in an action for damages under the act of 1841, where the amount claimed is less than fifty dollars. *Winn v. Freele*, 19 Ala. 171.

15. The writ may be granted by a probate judge, to remove a cause to the circuit court; and when issued and signed by him, it is operative as his *fiat*, even if he has no authority to issue it. *Hatter v. Eastland*, 22 Ala. 688.

16. It does not lie after the expiration of three years from the rendition of the judgment. *Enis v. Ross*, 19 Ala. 239.

17. It should not be granted, when the petitioner does not show any reason why he did not appeal from the judgment of the justice. *Wright v. Gray*, 20 Ala. 363.

18. Three distinct judgments, in cases between different parties, cannot be removed by one writ, sued out by a party who was a defendant in each case. *Davis v. Calhoun*, 24 Ala. 437.

2. *Bond, and Notice.*

19. The cause should not be dismissed in the circuit court on account of a defective bond, unless the appellant fails or refuses, when required, to make a new one. *Davis v. Calhoun*, 24 Ala. 455; *McClellan v. Allison*, 19 Ala. 671; *Appleton v. Turrentine*, 19 Ala. 706.

20. If the appeal was taken within the proper time, it should not be dismissed for want of a bond, when the appellant is ready and willing to give bond. *Henderson v. Plumb & Robbins*, 18 Ala. 74; *Averett v. Horn*, 19 Ala. 803.

21. A motion to dismiss, on account of a defect in the bond, must be made at the first term. *Goss v. Davis*, 21 Ala. 479.

22. The statute requiring notice of an appeal to be given to the appellee, does not apply to cases removed by *certiorari*; yet, where the *certiorari* is sued out by the defendant below, a judgment of *non pros.* cannot be rendered against the plaintiff, unless he has been notified of the issue of the writ. *Crownover v. Srygley*, 19 Ala. 251.

23. Where the appeal is sued out by the defendant below, and judgment by default is rendered against him in the circuit court, he cannot complain on error of the insufficiency of the notice to the opposite party. *Martin v. Higgins*, 23 Ala. 775.

24. After the cause has been once continued in the circuit court, it is too late for a party to object on account of his want of notice; especially, when the judgment entry recites that "the parties were present" at the previous term. *Goss v. Davis*, 21 Ala. 479.

3. *Pleadings, Practice, and Evidence.*

25. The circuit court should not dismiss the cause on account of defects in the petition for the *certiorari*, but should proceed with the trial *de novo*, without noticing the defects in the petition. *Wright v. Gray*, 20 Ala. 363; *Van Eppes v. Smith*, 21 Ala. 317.

26. Nor should the cause be dismissed on account of a defect in the bond, or even the want of a bond,

unless the appellant fails or refuses, when required, to execute a good bond. *Henderson v. Plumb & Robbins*, 18 Ala. 74; *Averett v. Horn*, 19 Ala. 803; *McClellan v. Allison*, 19 Ala. 671; *Appleton v. Turrentine*, 19 Ala. 706; *Davis v. Calhoun*, 24 Ala. 455.

27. The rendition of judgment by the justice against only one of the joint makers of a note, who were all jointly sued and served with process, is a mere irregularity, which should be disregarded by the circuit court, where the trial is had *de novo*. *Goss v. Davis*, 21 Ala. 479.

28. So is the rendition of judgment against the several defendants on different days. *White v. Blount & Skelton*, 22 Ala. 697.

29. In cases of forcible entry and detainer, unlawful detainer, &c., removed to the circuit court prior to the passage of the act of 1850, (Session Acts 1849–50, p. 81,) the trial was had, not *de novo*, but on an assignment of errors on the record sent up by the justice; and if the appellant failed or refused to assign errors, the judgment of the justice was affirmed. *Mahan v. Lester*, 20 Ala. 162.

30. The act of 1850, requiring a trial *de novo* to be had in the circuit court, does not apply to a case in which the *fiat* of the judge had been obtained, and filed, with the petition, with the clerk of the circuit court, prior to the passage of the act; although the bond was executed, and the *certiorari* issued, after its passage. *Ib.*

31. In such case, a trial *de novo* being improperly had, and judgment rendered on verdict, the judgment will be reversed on error, although the plaintiff in error is the party who failed to assign errors in the circuit court. *Ib.*

32. No statement is necessary, in a summary proceeding against a constable and his sureties, for his failure to return an execution. *Henderson v. Plumb & Robbins*, 18 Ala. 74.

33. The statement must set forth a substantial cause of action; otherwise, the defendant may demur. *Jones v. Buckley*, 19 Ala. 604; *Ganaway & Kimball v. Mayor of Mobile*, 21 Ala. 577.

34. If the statement improperly joins counts in assumpsit and trover, a general demurrer lies to it. *Copeland v. Flowers*, 21 Ala. 472.

35. In an action by a mother, for the work and labor of her minor son, the statement must aver that his father is dead, or that plaintiff is entitled to his services as guardian or otherwise. *Jones v. Buckley*, 19 Ala. 604.

36. "Plaintiff claims $50 for work and materials," held a sufficient statement, after judgment by default. *Martin v. Higgins*, 23 Ala. 775.

37. In an action to recover damages for a diversion of water from plaintiff's mill, the statement must show that the mill was injured by the diversion, or that the quantity of water which continued to flow to it was insufficient. *Burden v. Mayor &c. of Mobile*, 21 Ala. 309.

38. If a demurrer to the statement is properly sustained by the court, and the plaintiff refuses to amend, the court may render judgment for the defendant, although the damages claimed are less than $20, unless the plaintiff offers to try the cause on its merits without any issue in writing. *Ib.*

39. It is not error to allow the substitution of a lost statement, without notice to the defendant, after judgment on issue joined. *Ortez v. Jewett & Co.*, 23 Ala. 662.

40. In an action by a partnership, if the christian names of the partners are not stated in either the summons or the statement, and the defendant goes to trial on a plea to the merits, without either demurring or pleading in abatement, the defect is not available on error. *Ib.*

41. If the statement shows the justice's want of jurisdiction, the defendant should demur: a plea to the merits is a waiver. *Rose v. Thompson*, 17 Ala. 629.

42. If the want of jurisdiction in the justice is apparent on the face of his proceedings, it may be pleaded in abatement, or the circuit court may, *ex mero motu*, declare the judgment void. *Crabtree v. Cliatt*, 22 Ala. 181.

43. If the defendant neither demurs, nor pleads in abatement to the jurisdiction of the justice, the objection is waived; and the circuit court, by virtue of its general jurisdiction over the amount, may render judgment for

the sum due. *Vaughan v. Robinson*, 20 Ala. 229.

44. A plea in abatement, to the jurisdiction of the justice, must be filed at the first term, as in other cases, if the statement has been filed, and the plaintiff is in no default; nor is it discretionary with the court, after the cause has been pending several years, and several trials have been had, to allow such plea in abatement to be filed. *S. C.*, 22 Ala. 519. (Correcting and limiting *Massey v. Steele's Adm'r*, 11 Ala. 340.)

45. If the warrant is in the name of a partnership, not setting out the christian names of the partners, and the amount claimed is less than $20, the plaintiffs may adduce proof of their individual names, in order that they may be set out in the judgment entry. *Stockdale v. Biddle & Co.*, 22 Ala. 678.

46. When the judgment entry shows that the parties appeared by attorney, and that a trial was had on issue joined, while no statement is found in the record, the appellate court will presume, on error, that the statement was either dispensed with or lost. *Ortez v. Jewett & Co.*, 23 Ala. 662; *Allen v. Harper*, 26 Ala. 686.

47. If the evidence set out in the record is sufficient to support an action in tort, but not sufficient to support an action *ex contractu*, it will be presumed that the action was in tort. *Allen v. Harper*, 26 Ala. 686.

48. If the action is *ex contractu*, damages cannot be recovered for torts or trespasses. *Pike v. Bright*, 29 Ala. 332.

49. Where the sum in controversy is less than $20, a trial by jury is not necessary. *Witherington v. Brantley*, 18 Ala. 197.

50. In an action on an open account for less than $20, the court cannot render judgment final until the demand has been proved. *Witherington v. Brantley*, 18 Ala. 197; *Crosby v. Brantley*, 20 Ala. 287.

51. The plaintiff's failure to be present at the trial, cannot deprive the defendant of his legal right to testify. *Wheeler v. Stockdale*, 22 Ala. 658.

52. If the original papers and judgment entry are sent up by the justice, properly certified, the appellate court will look to them, without other proof of their execution and identity than that afforded by the certificate, as evidence of what was done before the justice. *Wolfe v. Parham*, 18 Ala. 441.

53. When a judgment against a garnishee is removed by *certiorari* to the circuit court, the garnishee is entitled to the privilege of answering over; but, if he does not offer to make further answer, he will be held to have waived this privilege. *Case & Pate v. Moore*, 21 Ala. 758.

4. *Judgment, and Costs.*

54. It is erroneous to render judgment against the surety on the appeal bond, for more than the penalty; but the error will be regarded as clerical, and amended at the appellant's cost. *Witherington v. Brantley*, 18 Ala. 197.

55. The circuit court may render judgment for the amount due, without regard to the sum allowed before the magistrate. *Vaughan v. Robinson*, 20 Ala. 229; *Waring & Co. v. Gilbert & Bro.*, 25 Ala. 295.

56. In a garnishment case, brought up by the garnishee, judgment by default may be rendered against him before the fourth day of the term. *Case & Pate v. Moore*, 21 Ala. 758.

57. On the trial of a statutory claim suit, which results in a verdict of condemnation, it is erroneous to render judgment, for the assessed value of the property, against the sureties on the *certiorari* bond, or against the sureties on the replevy bond. *Derrett v. Alexander*, 25 Ala. 265.

58. The proper practice is, to certify the judgment, with a *procedendo*, to the justice, who thereupon issues execution. If the defendant fails to deliver the property, the failure being endorsed on the claim bond, the justice thereupon issues execution against the principal and surety on the bond, for the assessed value of the property, if it does not exceed the amount of the judgment and costs in the attachment suit; or, if it exceeds that amount, then for the judgment and costs. *Ib.*

59. But the circuit court should render judgment, against the claimant and his sureties on the *certiorari* bond, for the costs accruing on the trial of

the claim suit, both in that court and before the justice. *Ib.*

60. In an action of debt to recover the value of trees cut and removed from the plaintiff's premises, the cause being removed to the circuit court by the defendant below, if the plaintiff there recovers judgment for a less amount than before the justice, the court may, in its discretion, render judgment for the costs of the appeal against either party, according to the justice of the case. *Hornsby v. Crossland*, 22 Ala. 625.

61. The appellate court, on reversing the judgment of the circuit court in an appeal case, founded on a contract, and involving less than $20, will itself render the proper judgment, (Code, § 3034,) when all the evidence is set out in the bill of exceptions. *Pike v. Bright*, 29 Ala. 332.

III. SURETIES.

62. The sureties on the official bond of a justice of the peace are liable only for the faithful performance of his ministerial duties, and not for errors, mistakes and omissions of a judicial character. *McGrew & Beck v. Governor*, 19 Ala. 89.

LACHES.

1. Although a demand must be made, before an action can be maintained against an attorney, for failing to pay over money collected for his client; yet the client cannot invoke this principle, in excuse of his own laches in failing to make the demand within a reasonable time. *Kimbro v. Waller*, 21 Ala. 376.

2. An application to set aside a sale of lands under execution refused on account of the plaintiff's laches in making it, where he had neglected to avail himself of the means of information within his reach, and the lands had passed into the possession of sub-purchasers for valuable consideration, who had paid the purchase-money and received conveyances. *Daniel v. Modawell*, 22 Ala. 365.

3. The lien of a judgment, which has not become dormant, is not lost or impaired by laches in issuing execution. *DeVendell v. Doe d. Hamilton*, 27 Ala. 156.

4. A party seeking the rescission ot a contract, on the ground of fraud, must act with promptness on the discovery of it, by an offer to return the property in a reasonable time, if the parties live at a distance from each other; or, if they reside near each other, and the property is susceptible of easy transportation, by an actual re-delivery, or by a tender with a view to its re-delivery. *Dill v. Camp*, 22 Ala. 249; *S. C.*, 27 Ala. 553.

As to laches in equity, *vide* LIMITATIONS, STATUTE OF, II, p. 291.

LAND LAWS.

I. BOUNTY LANDS.
II. INDIAN RESERVATIONS.
III. LEGISLATIVE GRANTS, AND PATENTS.
IV. SPANISH TITLES.
V. TAX TITLES.

I. BOUNTY LANDS.

1. The proviso to the act of congress of 1847, conferring bounty lands on soldiers, was intended to protect not only pre-emption claimants, but also those who were in the actual settlement and cultivation of public lands without a pre-emption right. *Cruise v. Riddle*, 21 Ala. 791.

2. If this proviso is disregarded, and the bounty-land claimant obtains from the register a certificate to land which is in the actual settlement and cultivation of another, the title of the claimant must prevail over that of the settler in an action of ejectment. *Ib.*

3. The settler's remedy, *it seems*, is by application to the government, to recall the certificate, or to refuse a patent. *Ib.*

4. Land-warrants pass to the heirs-at-law, unless specifically devised. *Atwood's Heirs v. Beck*, 21 Ala. 591.

II. INDIAN RESERVATIONS.

5. Under the treaty of March 24,

1832, between the United States and the Creek Indians, every "head of a family" of that tribe, who resided on a half-section of land, and claimed it as his reservation under the treaty, thereby became entitled to it, and his right could not be divested by the refusal of the locating agent to locate him upon it. *Rowland & Heifner v. Ladiga's Heirs*, 21 Ala. 9.

6. The right of such reservee, after his location, could only be divested within five years by an abandonment of the land, or by a sale in accordance with the provisions of the treaty; but, if he neither sold nor abandoned it within that time, his title became perfect and indefeasible, and, on his death, descended to his heirs-at-law. *Ib.*

7. A female belonging to said tribe, whose husband was dead, and with whom an orphan grand-child resided as a member of her family, is "the head of a family," within the meaning of the treaty. *Ib.*

8. Where an Indian who was "the head of a family" made application to the locating agent to be located on her reservation, and, though her application was improperly refused, continued to reside on the land until expelled by intruders, and then went and resided with a relative,—this is not an abandonment of the land, although she is afterwards forcibly removed from the country by the United States. *Ib.*

9. A deed from such a reservee, approved by the president of the United States, vests in the grantee the full legal title. *Doe d. Stevens v. King*, 21 Ala. 429.

10. Such title is sufficient to sustain an ejectment. *Long v. McDougald's Adm'r*, 23 Ala. 413.

11. Where the plaintiff in ejectment claims under such a conveyance, while the defendant claims under an older patent from the United States, it is incumbent on the plaintiff to prove the location of the Indian reservee, as well as that he succeeded to the rights of such reservee. *Stephens v. Westwood*, 20 Ala. 275.

12. A patent from the United States, for the lands embraced in a reservation on which the Indian has been located, is void as against the reservee or a legal purchaser from him. *Stephens v. Westwood*, 20 Ala. 275; *S. C.*, 25 Ala. 717; *Saltmarsh v. Crommelin*, 24 Ala. 347.

13. But the fact of such location cannot be proved, as against such patentee, by the recitals in a junior patent. *Stephens v. Westwood*, 20 Ala. 275.

14. If the location is proved by the government records to have been regularly made, it cannot be collaterally impeached, even by one holding a patent from the United States. *S. C.*, 25 Ala. 716.

15. A party in possession, deriving title through an invalid conveyance from an Indian reservee, has color of title, and when sued in trespass by a patentee from the United States, may contest the validity of the plaintiff's patent. *Saltmarsh v. Crommelin*, 24 Ala. 347.

16. The president's approval of a contract, for the sale of an Indian reservation, cannot be proved by the mere certificate of the secretary of war, not under the seal of his department, endorsed on the contract. *Doe d. Tillman v. Long & Freeman*, 29 Ala. 376.

III. LEGISLATIVE GRANTS, AND PATENTS.

17. However true may be the doctrine, that a legislative grant of land to an alien and his heirs necessarily confers the power to enjoy and transmit it, it does not hold good as to patents issued by the ministerial officers of the government upon ordinary purchases of public land by an alien. *Etheridge v. Doe d. Malempre*, 18 Ala. 565.

18. Where a patent calls for a sub-division of a fractional section, described as lying north of a certain creek, and containing a specified number of acres, it embraces all the land in the sub-division north of the creek, although the actual number of acres exceeds the number specified in the patent. *Stein v. Ashby*, 24 Ala. 521.

19. Where the course of a running stream through a fractional section prevents the sub-division of the quarter-sections into eighty-acre tracts, under the act of congress of April 24, 1820, the sub-division of the quarter-

sections into two tracts, divided by the stream, is not in contravention of the act. *Ib.*

20. The boundaries, lines and corners of sections of land, as fixed and marked by the United States surveyors, cannot be altered or controlled by another survey; but the lines run to divide the sections into halves and quarters, if erroneous, may be corrected, by running the line according to law. *Nolin v. Parmer*, 21 Ala. 66.

21. The acts of congress of 1805 and 1820, "concerning the mode of surveying the public lands of the United States," do not establish, as the true corners of sub-divisions of fractional sections, the corners fixed by the United States surveyors in their official surveys; but the corners of quarter-sections are to be placed equidistant from the section corners on the same line. *S. C.*, 24 Ala. 391.

As to the validity of patents for lands appropriated as Indian reservations, *vide supra*, 11–15; and, as to patents for lands held under incomplete foreign grants, *vide infra*, 22–45.

IV. SPANISH TITLES.

22. On the death of the husband, in possession of a lot in the city of Mobile to which he was entitled under a grant from the Spanish authorities, leaving no kindred, his wife succeeded to the estate under the Spanish laws then of force in the territory; and on her application to the proper commissioner for a confirmation of her title, as one founded on a grant which had been lost or destroyed by time or accident, and his recommendation for its confirmation, its confirmation by the United States enures to her benefit, and operates as an acknowledgment by the government that the title had already vested in her by virtue of the previous grant to her husband. *Baker v. Chastang's Heirs*, 18 Ala. 417.

23. On the death of the widow after the confirmation of her claim, the subsequent survey and location of the land under the act of congress was cumulative evidence of title in favor of her heirs, and did not defeat the confirmation *Ib.*

24. A party, whose title to land, situated within the territory of Louisiana, was complete by grant from the Spanish government while that power held dominion over the country, may successfully assert his title against a claimant under the United States, unless his grant has been rendered inoperative as an instrument of evidence by his failure to have it recorded as required by act of congress. *Hall v. Doe d. Root*, 19 Ala. 378.

25. If the written evidence of such title was never presented to the United States commissioners, nor recorded, as required by the different acts of congress, it cannot be received in evidence against any grant derived from the United States; but it would be admissible, in connection with mesne conveyances to the party in possession, to perfect his title under the statute of limitations. *Ib.*

26. If an incomplete title was such as bound the conscience of the former sovereign to perfect it, and to furnish the evidence necessary to support and maintain it, the duty would devolve on the United States, on its acquisition of the territory, to carry out in good faith the obligation resting on the former government at the time of the cession. *Ib.*

27. On the confirmation of such incomplete title by the United States, whether by act of congress or by patent, the source of title is the United States, and not the former government. *Hall v. Doe d. Root*, 19 Ala. 378; *Doe d. Chastang v. Dill*, 19 Ala. 421.

28. When a party, claiming lands in the ceded territory, is obliged to apply to the political power of the new government to perfect his title, or to furnish him with the evidence of title, that government has a right to prescribe the conditions on which such confirmation will be made; provided, however, that such conditions be not inconsistent with the faithful performance of the duties and obligations imposed on it by the transfer of the ceded territory. *Ib.*; *Eslava's Heirs v. Bolling & Bolling*, 22 Ala. 721.

29. A plaintiff in ejectment, who proves that the ancestor of his lessors presented his claim for confirmation to the United States commissioners; that the commissioner reported favorably on it, and recommended it for

confirmation; that it was confirmed by act of congress of 1822, located and surveyed under the warrant of the register and receiver, and consummated by patent from the United States,—shows a sufficient title to maintain ejectment. *Hall v. Doe d. Root*, 19 Ala. 378.

30. If he shows that his title was recommended for confirmation by the commissioner, and confirmed under the third section of the act of 1822, he shows sufficient title to sustain the action, without proof of the location and survey of his claim under the fifth section of said act. *Doe d. Chastang v. Dill*, 19 Ala. 421; *Chastang's Heirs v. Armstrong*, 20 Ala. 609.

31. The confirmatory act of congress vests the title in those who are alleged to be the claimants in the application to the commissioner, and according to their interests as therein propounded; consequently, where the claimant made application, as executor of his father's will, "on behalf of himself and the other legatees" therein named, and the claim was recommended and confirmed, the title vests in all the devisees under the will. *Chastang's Heirs v. Armstrong*, 20 Ala. 609.

32. Where the commissioner reports a claim as having been "formerly inhabited and cultivated," but does not say that such inhabitation and cultivation were under Spanish government, the claim cannot be considered as recommended by him for confirmation. *Hall v. Doe d. Root*, 19 Ala. 378.

33. The act of congress of 1822 confirms only those claims "which, in the opinion of the commissioner, ought to be confirmed"; while the commissioner's report, on which the act is based, only recommends for confirmation, of all the claims embraced in register No. 11, "the claims to such lots as were inhabited and cultivated under the Spanish government, or such as were built upon by permission of the Spanish authorities." *Kennedy's Executor v. Doe d. Rochon's Heirs*, 26 Ala. 384.

34. Consequently, the claims of A. Rochon, numbered 74, 75 and 76, in the register (No. 11) of claims "founded on private conveyances, which have passed through the office of the commandant, but which are founded, as the claimant supposes, on grants lost by time or accident," (American State Papers, vol. 3, p. 32,) do not come within the provisions of the act of confirmation, when it is shown that the lot was inhabited and cultivated, by one of the claimant's ancestors, while the country was under the dominion of Great Britain; that the mansion-house, with all the improvements, was burned down during the siege of Mobile by the Spaniards in 1780; and there is no proof of any subsequent inhabitation and cultivation under Spain. *Ib.*

35. Where two conflicting claims to the same land are both confirmed by act of congress, the title of the government can only pass to one of the claimants; and if it be admitted that one has a perfect title, it results that the other can have no title at all. *Chastang's Heirs v. Armstrong*, 20 Ala. 609. (But see *Hall v. Doe d. Root*, 19 Ala. 378, 396, where it is said, that the effect of such confirmation of conflicting claims is to place the parties *in equali jure*, so far as the action of the government is concerned, and remit them to their rights under the former government.)

36. The act of congress of 1841, "for the relief of the heirs of Miguel Eslava," was intended to furnish them and their adversaries, Hunt and Gazzam, with the evidence of a legal title, so that each might, *prima facie*, have a standing in court, and thus be enabled to settle the question at issue between them by a judicial determination. *Eslava's Heirs v. Bolling & Bolling*, 22 Ala. 721.

37. The question of possession, as between these contending parties, is not concluded by the report of the register and receiver on Eslava's claim, under the provisions of the act of congress of March 2, 1829, and the confirmation thereof by the act of March 3, 1841. *Ib.*

38. A grant of lands within Louisiana territory, made by the Spanish authorities after the treaty of St. Ildefonso, but while Spain still retained the actual possession of the province, is void. *Ib.*

39. Such void grant, though accompanied by possession, and a survey of

the land contrary to the provisions of the act of congress of March 26, 1804, confers no title whatever on the claimants in a court of justice, unless their possession is sufficient to bring them within the act of March 2, 1829, and creates no obligation on the United States to recognize their claim. *Ib.*

40. The Orange-Grove grant having been confirmed by congress, by act of March 3, 1819, as a perfect title, courts of justice are bound by that action, to the extent of the recognition, and are concluded, at least in a collateral proceeding, from any inquiry which might have the effect of avoiding or impairing any rights which have accrued under the act of confirmation. *Magee v Doe d. Hallett & Walker*, 22 Ala. 699.

41. The plat of the Collins survey, as corrected by Pintado, which accompanied the Orange-Grove grant, was a part of the grant itself; and the grant is for all the lands included within the lines of this survey, extended without variation to the channel of the river, or low water-mark. *Ib.*

42. The lines fixed by this corrected Collins survey are obligatory on the United States, and all claimants under the United States since the act of confirmation, and cannot be changed or impeached by any evidence of fraud or mistake on the part of the Spanish government or its officers. *Ib.*

43. Where the location and survey of an incomplete Spanish grant, made under the provisions of the confirmatory act of congress, recognizes and adopts one of the lines of another grant as one of its lines, and the parties agree to such location and survey, the grantees and the United States are mutually bound by it, and estopped from disputing that line. *Ib.*

44. Where the Mobile river formed the eastern boundary of an incomplete Spanish grant, and the confirmatory act of congress was passed after the admission of Alabama into the Union, the lines of the grant could extend only to high-water mark at that time. *Ib.*

45. In determining the riparian rights, as to reclaimed lands in Mobile, of a proprietor claiming under a Spanish grant confirmed by act of congress as a perfect title, where the lines of the grant extended by its terms to low water-mark at its date, the lines should be drawn from the termination of the river lines, as they existed at the date of the grant, perpendicularly to the channel of the river. *Ib.*

V. TAX TITLES.

46. A party claiming land under a sale for city taxes, made by the corporate authorities of a city under the powers conferred by its charter, must show a compliance with all the requisitions of the city ordinances regulating the proceedings, from the assessment to the sale. *Parker v. Doe d. Burgen & Pearsall*, 20 Ala. 251.

47. Where such sale was made by the corporate authorities of the city of Montgomery, (City Laws, p. 30,) it must be shown that a meeting of the mayor and aldermen, or of the assessors, was held for the purpose of sanctioning and correcting the assessment; and this can only be proved by the record of the proceedings of the city council. *Ib.*

48. When the record does not show this fact, it cannot be proved by parol. *Ib.*

49. When the record does not show that such meeting was held, the fact that it was held cannot be presumed from the mere advertisement of the mayor calling it, nor from the fact that the city council ordered a sale of certain taxable property assessed to persons unknown. *Ib.*

50. Under the revenue law of 1848, the omission to observe all the requisitions of the statute, concerning the sale of lands for taxes, is fatal to the purchaser's title, although his deed contains all the recitals enumerated in the 67th section of the act. *Elliott v. Doe d. Eddins*, 24 Ala. 508.

LANDLORD AND TENANT.

I. WHEN THE RELATION EXISTS.
II. LEASE; AND HEREIN, OF THE RESPECTIVE RIGHTS AND LIABILITIES OF THE PARTIES.
III. LANDLORD'S LIEN, AND REMEDIES FOR RECOVERY OF RENT.

I. WHEN THE RELATION EXISTS.

1. When one enters into the possession of land under a contract of purchase, and afterwards agrees to pay rent for the year in consideration of the rescission of the contract, the agreement creates the relation of landlord and tenant. *Powell v. Hadden's Executors*, 21 Ala. 745.

2. Where one enters into possession under an executory contract of purchase, and fails to comply with the terms of the contract as to the payment of the purchase-money, the vendor may, at his election, treat him as a tenant. *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207.

3. The relation of landlord and tenant may be presumed from the conduct of the parties towards each other in reference to the land. *Rainey v. Capps*, 22 Ala. 288.

4. A contract, by which the owner of land lets it to another for cultivation, and agrees to receive in lieu of rent a portion of the specific products, creates between them, not the relation of landlord and tenant, but a tenancy in common in the products. *Thompson v. Mawhinney & Smith*, 17 Ala. 362; *Smyth v. Tankersley*, 20 Ala. 212.

II. LEASE; AND HEREIN, OF THE RESPECTIVE RIGHTS AND LIABILITIES OF THE PARTIES.

5. A stipulation in the lease "to repair and deliver up," binds the lessee to rebuild, in case of loss by fire during the term; but a stipulation "to deliver up" simply imposes an obligation against holding over. *Nave v. Berry*, 22 Ala. 382.

6. The law implies an obligation on the part of the lessee, when the lease is silent, to use the property in a proper and tenant-like manner, without exposing the buildings to ruin or waste by acts of omission or commission; and not to use or employ them in a manner materially different from that in which they have been usually employed. *Ib.*

7. The lessee has an implied right, in the absence of an express stipulation to the contrary, to put the premises to any use and employment, not materially different from that in which they are usually employed, to which they are adapted, and for which they were constructed. *Ib.*

8. A house which was built for a hotel, may be used by the lessee as a seminary for young ladies. *Ib.*

9. If the lease contains no express stipulation against assignment, the lessee has an implied right to transfer all his interest, rights and privileges under the contract to another. *Ib.*

10. Where the contract is in writing these implied stipulations form part and parcel of it, and cannot be contradicted by parol evidence. *Ib.*

11. If the lessee makes a general assignment of "all his property whatsoever," for the benefit of his creditors, and the trustee accepts the trust, and enters under the lease, he becomes bound as assignee of the lease. *Dorrance v. Jones*, 27 Ala. 630.

12. If the trustee enters upon, and takes possession of the leasehold premises, and uses them for the purpose of selling the goods assigned, this binds him as assignee, and he cannot afterwards recede from his election. *Ib.*

13. If the lessee covenants to erect on the premises a building worth a specified sum, and to keep the premises insured; and, after the completion of the house, the builder obtains a decree in chancery under his statutory lien, and enters into possession of the premises without a sale,—this does not make him an assignee of the lease, nor render him liable on the covenants contained therein. *Merchants' Insurance Co. v. Mazange*, 22 Ala. 168.

14. If the builder, while thus in possession, insures the premises to the extent of his interest in the lease, the policy does no enure to the benefit of the lessor, nor does it render the builder liable on the covenant of insurance contained in the lease. *Ib.*

15. A decree of sale in chancery, under the builder's lien, does not invest the complainant with either a right of entry or the legal title; nor will equity compel him to take an assignment of the lease, until a privity has been created by the purchase of the leasehold estate. *Ib.*

16. An agreement for the rent of

land, if made on Sunday, is void as a contract, and cannot be set up by either party; yet it may be looked to, in connection with other circumstances, to explain the character of the defendant's possession, and to account for the subsequent conduct of both parties relative to the land. *Rainey v. Capps*, 22 Ala. 288.

17. Attornment to a stranger, by the tenant in possession, does not, *per se*, destroy or affect the landlord's possession. *Doe d. Kennedy's Heirs v. Reynolds*, 27 Ala. 364.

18. A tenant in possession is not a competent witness for his landlord. *Ib.*

19. After the termination of the tenancy, and the restoration of possession to the landlord, the tenant may assert a paramount title against him, and the previous tenancy cannot bar his right of recovery. *Smith v. Munday*, 18 Ala. 182.

20. But, where the tenant has enjoyed the undisturbed possession of the land during the period of the lease, he is estopped from denying the landlord's title in any proceeding for the recovery of rent. *Cook v. Cook*, 28 Ala. 660.

21. The general doctrine, that the making of a lease by a tenant at will determines his tenancy, and converts him into a disseizor, must be understood with this qualification, that it has that effect only at the election of the landlord, and that the tenant cannot avail himself of it to avoid the payment of rent. *Ib.*

22. To determine a tenancy at will, by the landlord's entry on the land, and there by words declaring it at an end, it is necessary that the tenant should have notice of such words. *Ib.*

23. The right to emblements does not obtain until the seed is sown, and does not include the costs of preparing the ground for the reception of the seed, when the term is determined by the death of the tenant for life before the seed is actually sown. *Price v. Pickett*, 21 Ala. 741.

III. LANDLORD'S LIEN, AND REMEDIES FOR RECOVERY OF RENT.

24. The landlord's lien for rent extends to the entire crop raised on the rented premises, whether by the tenant himself or an under-tenant. *Givens v. Easley*, 17 Ala. 385.

25. It depends on the existence of the relation of landlord and tenant, and, consequently, cannot attach to a crop which the occupant of the land had sold before the creation of the tenancy, but which is not removed from the premises until after that event. *Hadden's Executors v. Powell*, 17 Ala. 314.

26. But wherever the relation exists, the landlord's lien on the crop attaches; consequently, where the relation is created by an agreement on the part of a purchaser, after entering into possession under a contract of purchase, to pay rent in consideration of a rescission of the contract, it is immaterial whether any rent accrues after the rescission of the contract. *S. C.*, 21 Ala. 745.

27. The lien attaches to crops grown on the land after the creation of the relation, although they were planted prior to its existence. *Ib.*

28. An execution, levied on the crop after its removal from the premises and storage in a warehouse by the tenant, is entitled to preference over an attachment subsequently levied at the suit of the landlord, when it appears that the former levy was made in ignorance of the landlord's lien both by the sheriff and the execution creditor. *Governor v. Davis*, 20 Ala. 366.

29. The State Bank may sue in its own name on a lease of its real estate, when the rent is reserved to it by the terms of the lease, although the demise is in the name of the assistant commissioner. *Douglass & Easton v. Branch Bank at Mobile*, 19 Ala. 659.

30. In an action on a lease for years, to recover the rent reserved, it is not necessary to aver that the defendant entered upon or took possession of the premises. *Ib.*

31. A count in assumpsit, on a lease not under seal, averring the performance by plaintiff of his part of the agreement, and the non-payment of the rent by defendant; and then alleging that the buildings were destroyed by fire, and, in consequence thereof, were not delivered up, but were wholly lost, is not demurrable, either for duplicity, or for misjoinder of breaches;

the non-payment of the money being the only breach alleged, and the other allegations being mere surplusage. *Nave v. Berry*, 22 Ala. 382.

32. If the rent reserved is to be paid in specific articles, and the contract does not fix their value, nor furnish a rule by which it may be ascertained by a mere calculation, assumpsit for use and occupation does not lie. *Oswald v. Godbold*, 20 Ala. 811; *Eastland v. Sparks*, 22 Ala. 607.

33. Nor does it lie against a mere naked trespasser. *Weaver v. Jones*, 24 Ala. 420.

34. But it lies against one who, after entering under a contract of purchase, fails to comply with the stipulations of the contract in the payment of the purchase-money. *Smith v. Wooding*, 20 Ala. 324; *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207.

35. It lies in favor of the heir, for rents accruing after the death of his ancestor, whose estate has been declared insolvent, if neither the administrator nor creditors interpose any obstacle. *Branch Bank at Mobile v. Fry*, 23 Ala. 770.

36. It lies, also, after a recovery in trespass to try titles, for the mesne profits accruing between the rendition of judgment and the execution of the writ of possession, against the defendant in the first action, or any one who comes into possession under him; but not against a tenant who comes into possession under an express promise to pay rent to the defendant. *Shumake v. Nelms' Adm'r*, 25 Ala. 126.

37. Rents, received by the defendant under an adverse holding, cannot be recovered in assumpsit for money had and received; *secus*, if the holding is not adverse. *Price v. Pickett*, 21 Ala. 741.

38. A landlord may maintain the action against a stranger, who has never had possession of the land, for rents received by him from the tenants under an assertion of title in himself. *Branch Bank at Mobile v. Fry*, 23 Ala. 770.

39. An heir cannot maintain the action against the administrator of his ancestor's estate, for the rent of the plantation on which the decedent resided at the time of his death, and which the administrator rented out, when it appears that the widow's dower has not been assigned. *McLaughlin v. Godwin*, 23 Ala. 846.

40. Rents, received by an administrator or guardian, from lands lying without the limits of this State, may be recovered in this form of action by the parties entitled. *Smith's Executors v. Wiley*, 22 Ala. 396.

41. Tenants in common may, at their election, join or sever in the action. *Price v. Pickett*, 21 Ala. 741; *Smith's Executors v. Wiley*, 22 Ala. 396; *Tankersley v. Childers*, 23 Ala. 781.

42. The lessee's negotiable note for the rent is not an extinguishment of the rent reserved by the lease. *Dorrance v. Jones*, 27 Ala. 630.

LEX LOCI.

See CONFLICT OF LAWS, p. 475.

LIBEL AND SLANDER.

I. WHEN ACTION LIES; AND HEREIN, OF PRIVILEGED COMMUNICATIONS.
II. PLEADINGS, PRACTICE, AND EVIDENCE.

I. WHEN ACTION LIES; AND HEREIN, OF PRIVILEGED COMMUNICATIONS.

1. A publication, made by defendant, of and concerning plaintiff, alleging, in substance, that the town commissioners had placed certain notes, amounting to $1949.94, in the hands of plaintiff as county treasurer; that defendant notified him, that the commissioners, appointed by the county judge to examine his office, were in town, and willing to proceed with the investigation, but he refused, saying that he had not time before the election; that plaintiff and his friends then circulated the report, that he had proposed to go into the examination, and that defendant had refused; that the commissioners made a slight examination of plaintiff's papers, and found among them a receipt for $626.04, other vouchers for moneys paid out amounting to $219.85, cash on

hand $35, two notes for $119.55 each, and that plaintiff accounted to them for the receipt of $276.55; that defendant "warned" plaintiff to have his books and office, and not the few papers which he had exhibited, examined by the commissioners, but he refused to do so; that "there has been collected, from the claims placed in his hands by said commissioners, the sum of $510.45", instead of $276.55 for which he accounted, the names of the persons from whom collected being annexed,—is not a libel, though charged by innuendo to have been intended to impute to plaintiff, as county treasurer, fraud, corruption, embezzlement, and other official misconduct. *Henderson v. Hale*, 19 Ala. 154.

2. At common law, and in this State prior to the passage of the act of 1841, (Clay's Digest, 421, § 31,) words spoken of an agent or bailee, charging him with the embezzlement or fraudulent conversion of his principal's goods, did not impute the crime of larceny. *Wright v. Lindsay*, 20 Ala. 428. See, also, *Spivey v. The State*, 26 Ala. 90.

3. The words, "He is mighty smart after night," "Put him in the dark, and he would get it all," falsely and maliciously spoken of and concerning another, do not impute the crime of larceny, and are not in themselves actionable; nor do they become actionable, when alleged to have been spoken in a conversation, in the presence of third persons, "with reference to a dispute and difficulty which existed between plaintiff and defendant, relative to a certain tan-yard, and the hides and leather in said tan-yard, and the division and disposition of the same." *Kirksey v. Fike*, 29 Ala. 206.

4. Words spoken of another, charging him with having beaten his wife so that he made her miscarry, amount to nothing more than a charge of having committed an assault and battery, and are not of themselves actionable. *Dudley v. Horn and Wife*, 21 Ala. 379.

5. The following words, alleged to have been spoken of and concerning plaintiff, in his trade and occupation as clerk of a firm in which the defendant was a partner, "Your man is plotting to blow me and the concern (the firm) up, and I believe you have a hand in it,—held, *per se*, actionable, without an averment of special damage, though spoken in the present time. *Ware v. Clowney*, 24 Ala. 707.

6. The following words, alleged to have been spoken in a conversation relative to the burning of defendant's house, and to have been intended to charge plaintiff with the crime of arson, "Next morning, I saw a track, going to and returning from the house. The toes turned in; and I know of but one man who owes me enmity enough to do such a thing, and you know whom I mean, D.," (plaintiff,)—are not actionable, in the absence of an averment tending to identify plaintiff as the person who made the tracks. *Robinson v. Drummond*, 24 Ala. 174.

7. Privileged communications are of four kinds: 1st, when the author of the alleged slander acted in the *bona-fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights and interests; 2d, anything said or written by a master, in good faith, in giving the character of a servant who has been employed by him; 3d, words used in the course of a legal or judicial proceeding; and, 4th, publications duly made in the ordinary course of parliamentary proceedings. Also, expressions of suspicion, based upon facts detailed, confidentially and prudently made to discreet persons, in good faith, to direct their watchfulness and enlist their aid in the detection of persons supposed to be guilty of felony, and not more extended than the circumstances of suspicion justify, give the injured party no right of action. *Stallings v. Newman*, 26 Ala. 300.

8. The act of 1830, which makes "all words spoken and published of any female person of this State, falsely and maliciously imputing to her a want of chastity," actionable in themselves, includes all resident females, whether foreigners or citizens. *Sidgreaves v. Myatt*, 22 Ala. 617.

II. PLEADINGS, PRACTICE, AND EVIDENCE.

9. It is the office of an innuendo to explain the words spoken or published, but it cannot enlarge their meaning. *Henderson v. Hale*, 19 Ala. 154; *Robinson v. Drummond*, 24 Ala. 174; *Kirksey v. Fike*, 29 Ala. 206.

10. It is not necessary to aver in the declaration the name of the person to whom, or in whose presence, the actionable words were spoken. *Ware v. Cartledge*, 24 Ala. 622.

11. In declaring on words charging plaintiff with the murder of defendant's son, it is not necessary to aver the death of the person said to have been murdered. *Stallings v. Newman*, 26 Ala. 300.

12. In an action by a female, for the false speaking of words imputing to her a want of chastity, an averment of her chastity and good repute is inducement merely, and can only be put in issue by an appropriate plea: under the general issue, the defendant can only adduce evidence of her want of chastity in mitigation of damages. *Sidgreaves v. Myatt*, 22 Ala. 617.

13. The plea of justification, when pleaded with the general issue, does not amount to an admission of record of the speaking of the words charged. *Wright v. Lindsay*, 20 Ala. 428.

14. If the defendant, in such case, fails to establish the plea of justification, it may be considered by the jury in aggravation of damages. *Robinson v. Drummond*, 24 Ala. 174.

15. Evidence of the defendant's wealth is not admissible for plaintiff. *Ware v. Cartledge*, 24 Ala. 622.

16. In an action by an unmarried female, for the speaking of words imputing to her a want of chastity, evidence of other words and acts, spoken and committed by the defendant after the speaking of the words charged, but before the commencement of the suit, implying a want of chastity on the part of plaintiff, and indicating a desire to harass, insult and degrade her, but not forming of themselves a separate cause of action,—is admissible for plaintiff, to show malice. *Ib.*

17. Under the general issue, the defendant may adduce evidence of the plaintiff's general bad character in mitigation of damages, although he has also interposed the plea of justification. *Pope v. Welsh's Adm'r*, 18 Ala. 631.

18. The defendant may prove the facts and circumstances in reference to which the words were spoken, for the purpose of showing that he did not intend thereby to impute to plaintiff the crime which, standing alone, they would naturally import. *Williams v. Cawley*, 18 Ala. 206.

19. If he proves that the words were spoken with reference to a transaction which could not amount to the imputation of a crime, such proof will protect him from all legal consequences except those resulting from special damages. *Wright v. Lindsay*, 20 Ala. 428.

20. The defendant may show, in mitigation of damages, that he was incited and provoked to the utterance of the slanderous words, by some act or declaration of plaintiff, contemporaneous or nearly concurrent with the speaking of the slander; but, to render such act or declaration on the part of the plaintiff admissible evidence for the defendant, it must be shown to have been the immediate and proximate cause or provocation of the slanderous words: it is not sufficient to show that it occurred, and was communicated to the defendant, before the speaking of the words charged. *Moore v. Clay*, 24 Ala. 235.

21. The words declared on, charging plaintiff with the murder of defendant's son, having been proved to have been spoken while defendant and witness were alone together, going to a neighbor's house, to get him to read a letter which defendant had received, relative to his son's death,—*held*, that defendant's declaration to witness, in the same conversation, "that his wife was much distressed on account of her son's death," was admissible evidence for him, as tending to show that the words spoken were prompted by grief rather than malice. *Stallings v. Newman*, 26 Ala. 300.

22. A witness may testify, that he received and understood the defendant's communication as private and confidential, in the absence of any injunction of secrecy from the defendant, or any declaration on his part that it should be so regarded; but, whether the communication was so intended by the defendant, and whether, although so intended, it was nevertheless prompted by malice, are questions for the jury. *Ib.*

23. There is no error in instructing the jury, "that confidential communi-

cations, made in the usual course of business, or of domestic or friendly intercourse," should be liberally viewed by juries." *Ib.*

LIEN.

See ATTACHMENT, 39–40, p. 416.
EXECUTION, III, p. 633.
JUDGMENT, VII, p. 670.
LANDLORD AND TENANT, III, p. 686.

LIMITATIONS, STATUTE OF.

(Statutory Provisions: Code, §§ 2474–2502; Clay's Digest, 326–8, §§ 78–93; Session Acts 1853–4, p. 71.)

I. WHEN THE STATUTE COMMENCES TO RUN.
II. WHEN THE STATUTORY BAR IS COMPLETE.

1. *Personal Actions.*
2. *Real Actions.*
3. *Summary Proceedings.*
4. *Writs of Error, and Appeals.*

III. OPERATION OF THE STATUTE, AND HOW SUSPENDED OR AVOIDED.

1. *Operation on Contracts and Titles to Property.*
2. *What will Suspend the Running of the Statute.*
3. *Admissions, and Subsequent Promises.*

IV. EXCEPTIONS AND PROVISOES.

1. *Absent Debtors, and Non-Residents.*
2. *Accounts between Merchants.*
3. *Commencement of New Action.*
4. *Coverture.*
5. *Other Exceptions.*

V. PLEADINGS AND EVIDENCE.

I. WHEN THE STATUTE COMMENCES TO RUN.

1. When a cause of action accrues against a deputy clerk, in favor of his principal, for the negligent and unskillful performance of his duty as such deputy, whereby the principal is exposed to a suit for damages, the statute begins to run in his favor, as against his principal, from the time of the default, and not when the consequent injury is developed. *Snedicor v. Davis*, 17 Ala. 472.

2. If one receives the slave of another, under a promise to account for the hire, without any agreement as to the term or amount, the hire becomes due and payable as it is earned, or, at most, within a convenient and reasonable time thereafter. *Mims' Executors v. Sturtevant*, 18 Ala. 359.

3. The statute does not begin to run in favor of a clerk, who has collected money on a judgment, until a conversion or refusal to pay on demand. *McDonnell v. Branch Bank at Montgomery*, 20 Ala. 313.

4. The same principle applies to an attorney, who has collected money for his client; but the client cannot invoke this principle, to excuse his own laches in failing to make a demand within a reasonable time. *Kimbro v. Waller*, 21 Ala. 376.

5. Where a person receives money under a decree, which is afterwards reversed on error, the statute begins to run in his favor from the reversal. *Crocker and Wife v. Clements' Adm'r*, 23 Ala. 296.

6. The statute begins to run, in favor of one claiming under a loan, gratuitous bailment, or purchase at a void sale, from an administrator in chief, only from the appointment of a succeeding administrator. *Lawson's Adm'r v. Lay's Executor*, 24 Ala. 184; *Wyatt's Adm'r v. Rambo*, 29 Ala. 510. See, also, *Hopper's Adm'r v. Steele*, 18 Ala. 828.

7. If a purchaser at administrator's sale takes possession of the property, but fails to comply with the statutory requirements in giving bond, with security, for the payment of the purchase-money, the statute begins to run in his favor from that time. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

8. If a surety for the defendant in execution, having control of the judgment under an agreement to hold and use it for the defendant's benefit on his payment of it, purchases his lands

at execution sale, and afterwards resells them, taking a note for the purchase-money, which he places in the hands of a third person, for the benefit of the defendant,—the statute begins to run in favor of such third person, as against the defendant in execution, not from the payment of the judgment by the defendant, but from the bailee's subsequent receipt of the money. *Garrett's Adm'rs v. Garrett & Garrett*, 27 Ala. 687.

9. Where a party has the right to bring either trover for the conversion of his slave, or assumpsit for the proceeds of sale, and elects to proceed in the latter action, the statute begins to run, not from the time of the sale, but from the subsequent receipt of the money. *Ivey's Adm'r v. Owens and Wife*, 28 Ala. 641.

10. The statute does not begin to run against a mortgagee out of possession, as in favor of the mortgagor or one claiming under him, even after the law-day has passed, until there has been some overt act, or open assertion of adverse title. *Boyd v. Beck*, 29 Ala. 703.

11. Where the separate property of a married woman is allowed by her trustee to remain in the possession of her husband, who, at his death, disposes of it by will; and the trustee is cognizant, before the will is admitted to probate, of facts which are sufficient to charge him with implied notice of its general provisions,—the adverse possession of the husband's executor, as against the trustee, commences to run from the probate of the will and possession under it. *Bryan v. Weems and Wife*, 29 Ala. 423.

II. WHEN THE STATUTORY BAR IS COMPLETE.

1. *Personal Actions.*

12. To bar an action of detinue, where the cause of action accrued here, there must have been six years adverse possession within this State, by some one against whom an action might at any have been brought. *Bohannon v. Chapman*, 17 Ala. 696; *Thomason v. Odum*, 23 Ala. 480.

13. In an action on a contract made in another State, the foreign statute of limitations, although a perfect bar to a suit there instituted, is not available as a defense. *Jones v. Jones*, 18 Ala 248. (Overruling *Goodman v. Monk*, 8 Porter, 94.)

14. If personal property, to which the lien of an execution has attached, is removed to another State, and there acquired and held by a *bona-fide* purchaser until the foreign statute has barred its recovery, and then brought back by him to this State, his title is perfect against the execution creditor. *Newcombe v. Leavitt*, 22 Ala. 631.

15. A fraudulent purchaser from a debtor, who holds possession for the period prescribed as a bar by the statute of limitations, thereby acquires no title, as against a creditor who could not, by the exercise of reasonable diligence, have discovered the fraud within six years before the commencement of the action. *Snodgrass v. Branch Bank at Decatur*, 25 Ala. 161.

16. Three years is the limitation to an action on an account, whether consisting of one or more items, founded on a contract some term of which is left unsettled by the parties. *Mims' Executors v. Sturtevant*, 18 Ala. 359.

17. If the owner of a slave allows another to have possession for several years, under a promise to account for the hire, without any agreement as to the price or term, he cannot treat the entire demand as one continuous item, so as to exempt it from the operation of the statute until the expiration of three years from the accrual of the last item. *Ib.*

18. Where all the items of an account are on one side, the entire account is not taken out of the statute, because one or more of the items may not be barred; but, where there are mutual accounts between the parties, consisting of items of debit and credit on each side, no part of the account is barred until the bar is complete as to all the items. *Wilson v. Calvert*, 18 Ala. 274.

2. *Real Actions.*

19. Adverse possession for more than thirty years, with two descents cast on the adverse claimants, bars not only a right of entry, but all real actions. *Baker v. Chastang's Heirs*, 18 Ala. 417.

20. To bar an action for the recovery of lands under the act of 1843, ten years must have elapsed since the passage of that act. *Cox v. Davis*, 17 Ala. 714; *Rawls v. Doe d. Kennedy*, 23 Ala. 420.

21. But possessions which commenced under the former law, are governed by the statute which first effects a bar in their favor. *Rawls v. Doe d. Kennedy*, 23 Ala. 240.

22. The act of 1843 having been approved on the 7th February, a suit commenced on the 7th February, 1853, is not barred. *Owen v. Slatter*, 26 Ala. 547.

23. The proviso to the first section of the act of 1843, applies only to that section, and does not extend to the whole act. *Cox v. Davis*, 17 Ala. 714; *Rawls v. Doe d. Kennedy*, 23 Ala. 240.

3. *Summary Proceedings.*

24. The act of 1848, requiring liens on steamboats and other water-craft to be enforced within six months from the time of their creation, repeals the act of 1836, which required their enforcement on or before the first day of July ensuing next after their creation. *Stewart George v. Skeates & Co.*, 19 Ala. 738.

25. The limitation of a summary proceeding against a steamboat, for a violation of the registration act of 1854, is one year, as prescribed by section 2481 of the Code, and not thirty days' from the accrual of the cause of action, as prescribed by the statute (Code, § 2706) relative to the enforcement of liens. *Commissioners of Pilotage v. Steamboat Cuba, &c.*, 28 Ala. 185.

26. The act of 1807, limiting prosecutions for the recovery of fines and forfeitures to one year, does not apply to summary proceedings against a tax-collector, under the act of 1820, for failing to pay over taxes. *Walker v. Chapman*, 22 Ala. 116.

27. In a summary proceeding against a bank debtor, the notice is the commencement of the action, although the motion for judgment is afterwards delayed. *Stanley v. Bank of Mobile*, 23 Ala. 652.

4. *Writs of Error, and Appeals.*

From judgments at law, see ERROR AND APPEAL, IV, p. 564.

From decrees in chancery, see ERROR AND APPEAL, IV, p. 259.

From probate decrees and orders, see ERROR AND APPEAL, IV, p. 147.

III. OPERATION OF THE STATUTE, AND HOW SUSPENDED OR AVOIDED.

1. *Operation on Contracts and Title to Property.*

28. In its operation on contracts for the payment of money, the statute simply bars the remedy, but does not affect the debt. *Jones v. Jones*, 18 Ala. 248.

29. In its operation on personal property, adversely held, it perfects the title of the possessor, *Jones v. Jones*, 18 Ala. 248; *Newcombe v. Leavitt*, 22 Ala. 631.

30. A party in possession of land, holding in subordination to a title which has been perfected by the adverse possession of himself and those from whom he derived it, cannot, by purchasing in an outstanding title which has been barred by such adverse possession, give vitality to it, and thus prevent a recovery on the title under which he held. *Baker v. Chastang's Heirs*, 18 Ala. 417.

31. When the statute has perfected a bar against the recovery of a female slave, the bar is also complete as to her children born after the commencement of the adverse possession. (RICE, C. J., *dissenting*, held that, unless the children were born after the completion of the bar as to their mother, the bar as to them was not complete until they were six years old.) *Bryan and Wife v. Weems*, 29 Ala. 423.

32. The barring of a recovery on a note, secured by an assigned mortgage, does not affect or impair the security. *Cullum v. Branch Bank at Mobile*, 23 Ala. 797.

2. *What will Suspend the Running of the Statute.*

33. The bankruptcy of the maker of a note does not suspend the operation of the statute. *Harwell v. Steel*, 17 Ala. 372.

34. A recovery in ejectment, without an entry under it, does not stop the statute. *Doe d. Kennedy's Heirs v. Reynolds*, 27 Ala. 364.

35. In an action against an administrator of an insolvent estate, founded on a claim which had been filed against the estate under an order of court, the time which elapsed while the proceedings were pending in the probate court cannot be deducted to prevent the bar of the statute. *Lee v. Leachman*, 22 Ala. 452.

3. *Admissions, and Subsequent Promises.*

36. A general admission of unsettled matters of account is not sufficient to take any particular account out of the statute. *Boxley v. Gayle*, 19 Ala. 151.

37. Where an account, already barred by the statute, is sent by mail to the debtor, at his request; and he neither responds to the letter for several years, nor makes any objection to the account,—it does not thereby become a stated account, so as to remove the bar of the statute. *Bryan v. Ware*, 20 Ala. 687.

38. Where an account was placed, with a number of others, in the hands of an attorney for collection; and it was proved that the debtor came several times to his office, examined the bundle of accounts, and made no objection to his own,—*held*, that this was sufficient to charge him with an acknowledgment of its justness. *McCulloch v. Judd, Sons & Co.*, 20 Ala 703.

39. A sole executor may, by his admissions, remove the bar of the statute, and revive a cause of action against the estate. *Townes & Nooe v. Ferguson*, 20 Ala. 147.

40. *Secus*, as to a sole acting executor, who has control and possession of the entire estate, when his co-executors have qualified and given bond. *Pitts v. Wooten's Executors*, 24 Ala. 474.

41. A promise by the husband, to pay a debt contracted by the wife *dum sola*, will not take the demand, as against the wife, out of the influence of the statute, *Moore v. Leseur and Wife*, 18 Ala. 606.

42. To remove the bar of the statute, requires either an express promise to pay, or a clear and distinct admission of a present indebtedness; but either of these is sufficient. *Townes & Nooe v. Ferguson*, 20 Ala. 147; *Ross v. Ross*, 20 Ala. 105; *Bryan v. Ware*, 20 Ala. 687; *Pool's Executor v. Relfe*, 23 Ala. 701.

43. A charge to the jury, asserting that "it requires an express promise, or something equivalent to an express promise, to revive a cause of action after the statute has effected a bar," is erroneous. *Ross v. Ross*, 20 Ala. 105.

44. So is a charge, asserting that, to remove the bar of the statute when pleaded to an open account, requires proof, not only of a subsequent promise, but that it was made "with a full knowledge of all the facts." *Rolston v. Langdon*, 26 Ala. 660.

45. An admission in these words, "The account is a good one, but I cannot pay it before January, at which time I will be receiving money for the hire of negroes,"—held sufficient to remove the bar of the statute. *Townes & Nooe v. Ferguson*, 20 Ala. 147.

46. A proposal, by way of compromise, to pay the principal if the creditor will lose the interest, is not sufficient to remove the bar. *Pool's Executor v. Relfe*, 23 Ala. 701.

47. A letter, containing an offer of compromise, held not be such a conditional promise as, on proof of the facts denied in it, would remove the bar of the statute. *Ib.*

48. In assumpsit by husband and wife, on a promise to pay for services rendered by the wife to the defendant's intestate, it appeared that the intestate once went to defendant's house, to get the latter to write his will, but did not find him at home; that, on his return, he met witness, and, after telling him the object of his visit, stated "that he was satisfied he would not live long, and never expected to see B. (defendant) again; that he wanted him to bear witness that he wished B. to pay Mrs. H. (plaintiff's wife) $500 for the services she had rendered him." *Held*, that this admission was not in the nature of a testamentary bequest, but was sufficient to remove the bar of the statute of limitations. *Jordan's Adm'r v. Hubbard and Wife*, 26 Ala. 433.

49. Section 2490 of the Code, respecting partial payments and subsequent promises, does not apply to verbal promises made before the Code went into effect. *Ib.*

50. A subsequent promise, express or implied, if made on Sunday, does not remove the bar of the statute. *Bumgardner v. Taylor*, 28 Ala. 687.

51. To revive a debt barred by the statute, there must be a promise by the debtor to pay the debt; but this promise may be either express or implied, conditional or unconditional. If implied, there must not only be a clear and distinct recognition of the debt, but it must be unaccompanied with any expressions which leave it doubtful whether the debtor was willing to waive the benefit of the statute; but, if the promise is express, though conditional or dependent, proof of the performance of the condition is all that is required. *Evans v. Carey*, 29 Ala. 99.

52. Where the words amount, in law, to an express promise, there is no necessity for referring their construction to the jury, but the court may instruct them as to the legal effect of the words. *Ib.*

53. Where the creditor met his debtor at the house of a common relative, and refused to speak to him; and, on the debtor afterwards complaining of this to his relative, the latter told him, that the creditor "considered he had treated him badly in permitting him to suffer largely as his endorser in bank;" whereupon the debtor, "seeming suprised, said that, if plaintiff had paid anything on account of such endorsement, he was able and willing to pay it to plaintiff,"—*held*, that these words amounted in law to an express promise, and, on proof of the payment by plaintiff, removed the statutory bar. *Ib.*

IV. Exceptions and Provisoes.

1. *Absent Defendants, and Non-Residents.*

54. The provision in the act of 1802, allowing the creditor to bring suit after the return of an absent debtor, applies not only to a resident debtor temporarily absent, but to a non-resident who has come into the State since the accrual of the cause of action. *State Bank v. Seawell*, 18 Ala. 616.

55. If such non-resident, after coming into this State, has appeared openly, not evading or concealing himself from his creditor, but traveling about, the statute runs in his favor, although the creditor has no actual notice of his presence. *Ib.*

56. Although, to perfect the statutory bar, the defendant must have resided within the State during the entire period prescribed as the limitation, yet it is not necessary that his residence should have been continuous. *Crocker and Wife v. Clements' Adm'r*, 23 Ala. 296.

57. The proviso to the Florida statute, in favor of persons "beyond the seas or out of the country," includes a resident citizen of another State who has never been in Florida. *Thomason v. Odum*, 23 Ala. 480.

2. *Accounts between Merchants.*

58. The term account current, in its usual mercantile sense, implies an account containing items of debit and credit between the parties, from which the balance due to one or the other is or can be ascertained. *Wilson v. Calvert*, 18 Ala. 274.

59. An account, containing several items of debit for goods bought, and a single item of credit for cash paid, is not within the proviso. *McCulloch v. Judd, Sons & Co.*, 20 Ala. 703.

60. An account for goods sold and delivered is not necessarily within the proviso, because both parties were merchants at the time it was contracted. *Ib.*

3. *Commencement of New Action.*

61. This proviso does not apply to an action instituted within twelve months after the dismissal of a bill in chancery touching the same matters. *Roland v. Logan*, 18 Ala. 307.

4. *Coverture.*

62. When a cause of action accrues to a married woman during coverture, the statute does not begin to run against her until the death of her hus-

band. *Michan and Wife v. Wyatt*, 21 Ala. 813.

5. *Other Exceptions.*

62. A suit commenced within one year from the time the Code went into operation, on a cause of action existing at the time of its adoption, is exempted from the influence of its provisions as to the limitation of actions. *Bettis v. Saint*, 28 Ala. 214.

64. The proviso to the first section of the act of 1843, applies only to that section, and does not extend to the whole act. *Rawls v. Doe d. Kennedy*, 23 Ala. 240; *Cox v. Davis*, 17 Ala. 714.

65. The statute does not pefect, as against a creditor, a possession acquired under a fraudulent purchase from the debtor, if the creditor could not, by the exercise of reasonable diligence, have discovered the fraud within six years before the levy of his execution. *Snodgrass v. Branch Bank at Decatur*, 25 Ala. 161.

As to the matters which will suspend the operation of the statute, *vide supra*, 33–35.

V. PLEADINGS, AND EVIDENCE.

66. The statute may be pleaded to a set-off. *Harwell v. Steel*, 17 Ala. 372.

67. An attorney may plead the statute, when sued by his client for failing to pay over money collected. *Kimbro v. Waller*, 21 Ala. 376.

68. An administrator is not bound to plead the statute, when he has personal assets sufficient to pay all the debts; *secus*, when a resort to the realty is necessary to raise funds for that purpose. *Pollard v. Scears' Adm'r*, 28 Ala. 484

69. If an administrator refuses to plead the statute, the distributees of the estate cannot be made parties to the cause, on motion, for the purpose of putting in that plea. *Ex parte Perryman and Wife*, 25 Ala. 79.

70. In an action against husband and wife, on a debt contracted by the wife *dum sola*, issue being joined on a replication to the statute averring a subsequent promise, proof of a promise by the husband alone does not authorize a recovery by plaintiff. *Moore v. Leseur and Wife*, 18 Ala. 606.

71. When it has been proved by plaintiff that defendant was a non-resident when the cause of action accrued, the *onus* devolves on the defendant to show when his non-residence ceased, and that he has actually been in the State a sufficient length of time to perfect the statutory bar. *State Bank v. Seawell*, 18 Ala. 616.

72. The act of 1846, allowing several replications to be filed to certain specified pleas, applies to a plea of the statute of limitations of another State. *Thomason v. Odum*, 23 Ala. 480.

73. In an action against an attorney, for failing to pay over money collected for his client, a replication to a plea of the statute, averring "that the money sued for was collected by the defendant, as an attorney-at-law, in the State of Tennessee; that no demand was made of him for said money, until a short time before the commencement of this suit, and that the statute only began to run from the demand," is demurrable. *Kimbro v. Waller*, 21 Ala. 376.

74. When the statute of three years is pleaded, "in short by consent," to a declaration containing only the common counts, the plea must aver that the plaintiff's demand is an open account. *Brooks v. McFarland*, 20 Ala. 483.

75. Adverse possession, for the length of time prescribed as a bar by the statute, may be given in evidence under the general issue in detinue. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

76. In detinue for a slave, a replication to the plea of a foreign statute, averring that the slave was converted in this State, carried into another, there purchased by the defendant, and brought back by him to this State, and that it has not been in this State more than four entire years since the conversion, is defective on demurrer. *Thomason v. Odum*, 23 Ala. 480.

77. In an action on an open account, issue being joined on a replication to the statute, averring that the account was "between merchant and merchant," proof of the fact that, at the time the account was contracted, both the parties were merchants, is not, *per se*, sufficient to support the replication. *McCulloch v. Judd, Sons & Co.*, 20 Ala. 703.

LUNATICS.

1. In an action against a lunatic, the appointment by the court of a guardian *ad litem* for him is not erroneous, when the record shows that he appeared and pleaded by "his guardian *ad litem*, and by attorney;" especially, when it appears that the appointment was made at the instance of the attorney. *Walker v. Clay & Clay*, 21 Ala. 797.

2. Judgment is properly rendered, in such case, against the lunatic himself, and not against his guardian. *Ib.*

As to the appointment of guardians for lunatics, by the probate court, see same title in PART II, p. 198.

As to the proof of insanity, see EVIDENCE, XIX, 8, p. 628.

MALICIOUS PROSECUTION.

See ACTION ON THE CASE, p. 369.

MANDAMUS.

I. WHEN THE WRIT LIES.
II. RETURN, AND PRACTICE.

I. WHEN THE WRIT LIES.

1. When directed to an inferior tribunal, *mandamus* is a writ which seeks to compel action, but does not point out to that court how it shall act in a matter over which it has a discretionary power. *Lamar v. Comm'rs' Court of Marshall Co.*, 21 Ala. 772.

2. The writ lies, whenever a party shows a clear legal right, without any other legal remedy for its enforcement; but in no other cases. *Tarver v. Comm'rs' Court of Tallapoosa Co.*, 17 Ala. 527; *Ex parte Putnam*, 20 Ala. 592; *Ex parte Lowe*, 20 Ala. 330; *Ex parte Pickett*, 24 Ala. 91; *Ex parte Small*, 25 Ala. 74; *Ex parte Elston*, 25 Ala. 72; *Ex parte Garlington*, 26 Ala. 170; *Ex parte Cole*, 28 Ala. 50; *Ex parte Robbins*, 29 Ala. 71.

3. It lies from the circuit to the commissioners' court, to compel the levy and collection of a tax, which said court improperly refuses to levy. *Tarver v. Comm'rs' Court of Tallapoosa Co.*, 17 Ala. 527.

4. But not to compel it to make an appropriation for the payment of claims against the county, before they have been audited and allowed. *Falkner v. Comm'rs' Court of Randolph Co.*, 19 Ala. 177.

5. Nor to compel said court to revoke a ferry license, on the application of a person who claims a vested right in the franchise: the party's remedy in such case, *it seems*, is by proceeding in the nature of a *quo warranto*. *Lamar v. Comm'rs' Court of Marshall Co.*, 21 Ala. 772.

6. Whether it lies to said court, on its refusal to establish a private road, on account of the supposed legal insufficiency of the petition, *quære?* *Brooks v. Kirby*, 19 Ala. 72.

7. It lies from the supreme to the circuit court, to compel the reinstating of a cause which has been improperly stricken from the docket. *Ex parte Lowe*, 20 Ala. 330.

8. But not to compel said court to strike a cause from the docket, on motion, on the ground that it has been discontinued by a submission to arbitration. *Ex parte Garlington*, 26 Ala. 170.

9. Nor to vacate an order suppressing a deposition. *Ex parte Elston*, 25 Ala. 72.

10. Nor to vacate an amendment of an original attachment. *Ex parte Putnam*, 20 Ala. 592.

11. Nor to compel it to quash an original attachment on motion. *Ib.*

12. Nor to compel it to quash a bond, taken from a non-resident who had been arrested under a *ca. sa.* *Ex parte Small*, 25 Ala. 74.

13. But it lies to compel the dismissal, on motion, of a suit brought by a non-resident, without first giving security for costs as required by the statute, if no final judgment has been rendered in the cause. *Ex parte Cole*, 28 Ala. 50; *Ex parte Robbins*, 29 Ala. 71.

14. Whether it would lie, on the refusal of said court to compel a party to answer interrogatories propounded to him under the statute, *quære?* It certainly would not, if the evidence

sought to be elicited is irrelevant. *Ex parte Grantland*, 29 Ala. 69.

15. It lies from the supreme court to the speaker of the house of representatives, to compel him to certify to the comptroller of public accounts, on the application of a member of said house, the amount to which said member is entitled for mileage or *per-diem* compensation. *Ex parte Pickett*, 24 Ala. 91.

When the writ lies in criminal cases, see same title, p. 91.

When it lies to the probate court, see same title, p. 198.

When it lies to the chancery court, see same title, p. 293.

II. RETURN, AND PRACTICE.

16. The defendant has the right to plead as many matters as he thinks necessary to his defense. *Comm'rs' Court of Tallapoosa Co. v. Tarver*, 21 Ala. 661.

17. The statute of Anne, ch. 20, allowing the return to the alternative writ to be traversed and tried by a jury, not being of force in this State, the facts stated in the return must be pleaded with such certainty as will enable the court to decide whether they are sufficient, in law, to justify the party in failing to do the required act. *Ib.*

18. Where the proceeding was instituted to compel the commissioners' court to levy a tax, under the authority conferred by a special statute, for the purpose of discharging the liability previously incurred by certain commissioners under a contract for the erection of county buildings,—an answer, averring that the court had refused to make the levy because the relator had never produced to the court any information or proof as to the extent of his liability, is a sufficient return to the alternative writ. *Ib.*

19. Where the relator in such proceeding alleged, that the last payment under the liability incurred by said commissioners was made by him out of his private funds, and that the balance was paid out of assets and effects belonging to the county arising from the sale of certain town lots,—an answer alleging "that the several sums of money set out in said application were paid by said relator out of moneys arising from the sale of said town-lots by the said commissioners, and not out of the individual and private funds of the relator," is sufficient. *S. C.*, 29 Ala. 414.

20. A writ of error does not lie, at the suit of the plaintiff in attachment, from an order for a *mandamus*, to compel the sheriff to accept a bond for the trial of the right of property in slaves seized under the attachment. Whether it lies in favor of the sheriff himself, *quære?* *Braley v. Clarke & Peck*, 18 Ala. 436.

MAXIMS.

1. *Ad quæstionem juris, non respondent juratores, sed judices. Ex parte Henry*, 24 Ala. 638.

2. *Aqua currit, et debet currere. Stein v. Burden*, 29 Ala. 127.

3. *Caveat emptor. O'Neal v. Wilson*, 21 Ala. 288; *Lang's Heirs v. Waring*, 25 Ala. 626; *McCartney v. King*, 25 Ala. 681; *Dill v. Shahan*, 25 Ala. 694; *Thompson's Adm'r v. Christian*, 28 Ala. 399.

4. *Expressio unius est exclusio alterius. Sims & Jones v. Knox*, 18 Ala. 236; *Hamilton v. Williams*, 26 Ala. 527; *Miller and Wife v. Flournoy's Heirs*, 26 Ala. 724.

5. *Id certum est, quod certum reddi potest. Drane v. King & Devitt*, 21 Ala. 556; *Jemison v. P. & M. Bank*, 23 Ala. 168.

6. *In pari delicto, potior est conditio possidentis. Pond v. Wadsworth*, 24 Ala. 531; *Brantley v. West*, 27 Ala. 542.

7. *Lex non cogit impossibilia. McGar v. Williams*, 26 Ala. 469.

8. *Nemo judex in causa propria. The State, ex rel. Claunch v. Castleberry*, 23 Ala. 85; *Heydenfeldt v. Towns*, 27 Ala. 423.

9. *Partus sequitur ventrem. Union Bank of Tennessee v. Benham*, 23 Ala. 143; *Fields v. Walker*, 23 Ala. 155; *Bryan and Wife v. Weems*, 29 Ala. 423.

10. *Utile per inutile non vitiatur. Montgomery Manufacturing Co. v. Thomas*, 20 Ala. 473; *Perry v. Marsh*, 25 Ala. 659; *Stewart v. Cunningham & Rippetoe*, 22 Ala. 626; *McElhaney v. Flynn*, 23 Ala. 819.

NEGLIGENCE.

See ACTION ON THE CASE, p. 369.

NEW TRIALS.

1. On motion for a new trial, the court may impose terms on the party in whose favor the verdict is rendered, as a condition on which the new trial is refused. *Walker v. Blassingame*, 17 Ala. 810.

2. The grant of a new trial, on condition that the costs be paid by a specified day in vacation, is a nullity. (*Per* PARSONS, J.; DARGAN, C. J., expressing no opinion, and CHILTON, J., dissenting.) *Edwards v. Lewis*, 18 Ala. 494.

3. The regularity of the grant of a new trial as to part of the demand, letting the judgment stand as to the residue, questioned; CHILTON, J., holding that the practice had been too long sanctioned to be now disturbed. *Ib.*

4. An order, setting aside a judgment, and granting a new trial, "upon the payment of all costs," does not vacate the judgment; and if the costs are not paid, a subsequent order, "that said order is therefore discharged, and the plaintiff permitted to proceed upon the previous judgment, as if no such order had been made," merely gives effect to the judgment. *Willis & Co. v. P. & M. Bank*, 19 Ala. 141.

5. The grant of a new trial to the defendant, "on the payment of all costs," is not an absolute, but a conditional grant of a new trial, the effect of which is to keep the cause in court until the next term; and the payment of the costs at any time during vacation, or before the cause is regularly called for action at the next term, is a compliance with the condition, and restores the cause to the docket for trial. *Ex parte Lowe*, 20 Ala. 330.

6. The grant of a new trial, "with the understanding that the same be revised, and a bill of exceptions allowed," sets aside the verdict and judgment; the cause then stands as if no trial had ever been had, and is not revisable on error. *Harrington v. Meriweather*, 20 Ala. 607.

7. In trover against several defendants, only one of whom is found guilty by the verdict of the jury, it is competent for the court to grant a new trial as to him, and let the judgment stand as to the others. *Pounds v. Richards*, 21 Ala. 424.

8. If the party in whose favor a new trial is conditionally granted, sues out a writ of error to reverse the judgment, without complying with the condition, he thereby waives his right to a new trial. *Edwards v. Lewis*, 18 Ala. 494.

9. The action of the primary court, on a motion for a new trial, is not revisable on error. *Martin v. Higgins*, 23 Ala. 775; *Benje v. Creagh's Adm'r*, 21 Ala. 151; *Walker v. Blassingame*, 17 Ala. 810; *Brister v. The State*, 26 Ala. 107; *Franklin v. The State*, 29 Ala. 14.

As to what is good ground for a new trial, in a criminal case, see same title, p. 92.

NONSUIT.

1. The court has no power, except in cases provided for by statute, to order a nonsuit against the plaintiff's consent. *Smith v. Wooding*, 20 Ala. 324; *Tate & Tate v. McCrary*, 21 Ala. 499.

2. When a nonsuit is set aside, on a subsequent day of the term, "on the payment of all costs," and the costs are not paid until after the adjournment of the court, the cause cannot be stricken from the docket on motion. *Parker v. Doe d. Burgen & Pearsall*, 20 Ala. 251.

3. The overruling of a motion to nonsuit the plaintiff, when the verdict in his favor is for less than $50, on the ground that his affidavit does not comply with the requisitions of the statute, is not revisable or error. *McAllister v. McDow*, 26 Ala. 453.

4. Under the act of 1846, a writ of error lies from a judgment of nonsuit, only when it was taken in consequence of an adverse ruling of the court; but, when the judgment entry recites that the plaintiffs "*voluntarily* suffered a nonsuit," and the record nowhere

shows that the nonsuit was taken in consequence of an adverse ruling of the court, the appellate court cannot presume that it was so taken, from the mere fact that a bill of exceptions was reserved by the plaintiffs. *Tate & Tate v. McCrary*, 21 Ala. 499.

5. Under this act, the plaintiff may take a nonsuit, with a bill of exceptions, when the court overrules his objections to the defendant's evidence, and charges adversely to his right to recover. *Blackburn v. Minter*, 22 Ala. 613.

6. The act applies to proceedings by *sci. fa.* commenced since its passage, to revive a judgment rendered prior to its passage. *Duncan v. Hargrove*, 22 Ala. 150.

7. Under the Code, (§ 2357,) whenever a nonsuit is taken on account of any adverse ruling of the court, the point must be reserved by bill of exceptions, even when it is otherwise disclosed by the record. *Palmer v. Bice*, 28 Ala. 430.

8. The general rule of practice in the supreme court, which refuses a reversal in favor of the plaintiff below when the record shows that he was not entitled to recover, does not apply to a case in which he was compelled, by the adverse ruling of the court, to take a nonsuit before introducing all his evidence. *Erwin, Myers & Co. v. Crowell*, 17 Ala. 227.

NOTARY PUBLIC.

See BILLS OF EXCHANGE, VI, p. 443.

NOTICE.

I. WHEN NECESSARY.
II. WHEN AND HOW GIVEN.

1. *Actual.*
2. *Constructive.*

As to notice to guarantors, see GUARANTY, II, p. 648.

As to notice of protest of negotiable paper, see BILLS OF EXCHANGE, VI, p. 443.

As to notice of appeals, see JUSTICE OF THE PEACE, p. 677.

As to notice of the taking of depositions, see DEPOSITIONS, II, p. 550.

I. WHEN NECESSARY.

1. On motion to enter satisfaction of an execution, whether the alleged satisfaction appears by the sheriff's return or otherwise, the plaintiff in execution is entitled to notice. *McKissack v. Davis*, 18 Ala. 315.

2. When an execution is superseded after it has come into the hands of the sheriff, he must be notified of its supersedeas, in such manner as will protect him in refusing to execute it, before he can be held liable for obeying its mandate. *Payne v. Governor*, 18 Ala. 320.

3. In summary proceedings, where the statute requires notice, the record must affirmatively show that all the requisitions of the statute were complied with. *Arthur v. The State*, 22 Ala. 61; *Molett v. Keenan*, 22 Ala. 484.

4. After judgment, the defendant is entitled to notice of a motion for leave to substitute papers. *Murray & Durand v. Tardy*, 19 Ala. 710.

5. In an appeal case from a justice's court, after judgment on issue joined, it is not error to allow the substitution of a lost statement, without notice to the defendant. *Ortez v. Jewett & Co.*, 23 Ala. 662.

6. From the service of process, until final judgment the parties are presumed to be in court, and need no further notice of orders taken in the cause. *Yonge v. Broxson*, 23 Ala. 684.

7. In an action on an injunction bond, after the dismissal of the bill for want of prosecution, it is not necessary to aver notice of the dismissal to the obligors. *Zeigler & Hall v. David*, 23 Ala. 127.

8. A judgment may be amended, or rendered, *nunc pro tunc*, on motion, without notice to the defendant. *Glass v. Glass*, 24 Ala. 468.

9. A party who enters into possession of land under a contract of purchase, and fails to comply with the terms of his contract in the payment of the purchase-money, is not entitled to notice, other than that afforded by the service of process on the com-

mencement of legal proceedings, whether his vendor elects to treat him as a tenant or as a trespasser. *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207.

10. A party is entitled to notice of proceedings instituted against him in the probate court as a lunatic or person *non compos mentis*. *Eslava v. Lepretre*, 21 Ala. 504.

11. Notice is not necessary in an action commenced by original attachment, which is levied on the defendant's goods, when no garnishee is summoned. *Letondal v. Huguenin*, 26 Ala. 552.

12. Notice of their principal's default is not necessary to be given to the sureties of a deputy sheriff, before they can be sued on their bond; nor can they discharge themselves from liability, by giving notice that they will be no longer bound. *McGehee v. Gewin*, 25 Ala. 176.

13. When a cause is submitted to the judge, without the intervention of a jury, and taken under advisement by him, he is not required to notify the parties or their counsel of the rendition of judgment. *Stein v. McArdle & Waters*, 25 Ala. 561.

14. The appearance of a party to a motion dispenses with the necessity of notice. *Moore v. Easley*, 18 Ala. 619; *Walker v. Chapman*, 22 Ala. 116.

II. WHEN AND HOW GIVEN.

1. *Actual.*

15. When a statute requires notice to be given, but does not specify the length of time, it will be held to intend a reasonable time. *Burden v. Stein*, 25 Ala. 455; *Arthur v. The State*, 22 Ala. 61.

16. A recital in the record of the commissioners' court, in the matter of the establishment of a public road, that "notice in all respects according to the statute was proven, by advertisement at the court-house door, and three other public places in the county," is not sufficient to show that notice was given for the required length of time, *Molett v. Keenan*, 22 Ala. 484.

17. If a debtor deposits notes on a third person with his creditor as collateral security, either unconditionally, or under a special agreement authorizing him to collect in any other manner than by suit, the statutory notice to sue on them may be given to the creditor. *Pickens v. Yarborough's Adm'r*, 26 Ala. 417.

18. *Semble*, that if the surety on a note notifies the holder of the fact of his suretyship, and requires him to bring suit against the principal, this is a substantial compliance with the requisitions of the statute, and the holder may waive a written notice; but, whether sufficient or not under the statute, it is good as a common-law notice, in connection with proof of the holder's failure to sue the principal, and of consequent damage to the surety. *Ib.*

19. Where the record does not show whether the notice was written or verbal, the appellate court will, if necessary, presume that it was written. *Harris v. Rowland's Adm'rs*, 23 Ala. 644.

2. *Constructive.*

20. *Lis pendens*, which, in a chancery suit, begins with the filing of the bill and service of subpœna, and continues until the final orders in the cause have been taken, is notice of every fact contained in the pleadings pertinent to the issue, and of the contents of exhibits to the bill produced and proved. *Center v. P. & M. Bank*, 22 Ala. 743.

21. The doctrine of *lis pendens* does not apply to negotiable paper. *Winston v. Westfeldt*, 22 Ala. 760.

22. The pendency of a foreclosure suit is constructive notice of the mortgage, although it is not properly recorded, from the time service is perfected. *Hoole & Paullin v. Attorney General*, 22 Ala. 190.

23 A compliance with the statutes of registration is equivalent to actual notice, as against subsequent purchasers from the mortgagor. *Steele v. Adams*, 21 Ala. 534.

24. A deed of trust, properly recorded, is constructice notice of the lien, in all contests respecting the property conveyed; but this constructive notice does not run with mercantile paper secured by the deed, so as to charge a *bona-fide* holder be-

fore maturity with knowledge of its recitals. *Minell & Co. v. Reed*, 26 Ala. 730.

25. The registration of a deed of trust, conveying (*inter alia*) certain accounts to be created in future, does not operate as constructive notice of their assignment. *Stewart v. Kirkland*, 19 Ala. 162.

26. A purchaser of land is chargeable with notice of every deed which constitutes a necessary link in his chain of title. *Johnson v. Thweatt*, 18 Ala. 741.

27. A purchaser at execution sale, of land which, before the rendition of the judgment, was in the possession of a third person, is chargeable with notice of an unregistered deed. *Strickland v. Nance*, 19 Ala. 232.

28. A purchaser of land which is in the possession of a third person, without inquiry into the nature and character of that possession, is chargeable with notice of all the equitable rights which are binding on his vendor. *Burns v. Taylor*, 23 Ala. 255; *Garrett v Lyle*, 27 Ala. 586; *Brewer v. Brewer & Logan*, 19 Ala. 482.

29. A bond for titles, conditioned that title shall be made on full payment of the purchase-money, is sufficient to charge a sub-purchaser with notice of an outstanding vendor's lien. *Bradford v. Harper*, 25 Ala. 337.

30. But, where the bond is conditioned that titles shall be made so soon as a patent shall have been obtained from the United States, it is not notice to such sub-purchaser of an outstanding lien. *Burns v. Taylor*, 23 Ala. 255.

31. Where a mortgage, duly recorded, recites that the premises "are the same this day conveyed by the said" mortgagee to the mortgagor, "and now reconveyed to secure the payment of the purchase-money," the recital is sufficient to charge all persons claiming under the mortgagee with notice of the existence of his deed to the mortgagor. *Center v. P. & M. Bank*, 22 Ala. 743.

32. Whatever is sufficient to put a party on inquiry, is sufficient to charge him with notice. *McGehee v. Gindrat*, 20 Ala. 95; *Center v. P. & M. Bank*, 22 Ala. 743; *Burns v. Taylor*, 23 Ala. 255; *Brewer v. Brewer & Logan*, 19 Ala. 482; *Bradford v. Harper*, 25 Ala. 337; *Garrett v. Lyle*, 27 Ala. 586.

33. Where a debtor, against whom a judgment had been rendered in the name of his original creditor, for the use of a fictitious person, applied to the attorney of record for the name of the real owner of the judgment, that he might settle it with him; and the attorney, acting under the instructions of the real owner, refused to disclose his name, but informed the debtor that the nominal plaintiff had no right to settle the debt, inasmuch as the judgment had been transferred to one of his creditors,—*held*, that the debtor was not chargeable with notice of the assignment of the judgment, but might properly settle it with the nominal plaintiff. *McGehee v. Gindrat*, 20 Ala. 95.

34. Notice, actual or implied, to an agent, is notice to his principal. *Wiley, Banks & Co. v Knight*, 27 Ala. 336.

35. A creditor, having a large claim, past due, on a mercantile firm then on the eve of insolvency, placed it, for collection or security, in the hands of an attorney who resided in the same town with the debtors, and who, although he did not positively know that the debtors were in failing circumstances, knew that a mortgage for a large debt covered their property, that there were other demands outstanding against them, (some of which were in his own hands for collection, and for which he had endeavored to obtain collateral security,) and that the balance of the notes and accounts due the firm, which had not been transferred to others, was almost worthless; and knowing these facts, he took from them, as the best security he could obtain for his clients, a mortgage on all their property, containing terms very beneficial to the debtors. *Held*, that these circumstances were sufficient to charge him with implied notice of the insolvency of the debtors. *Ib.*

36. Whether the facts are sufficient to put a purchaser on inquiry, and thus charge him with implied notice, is a question of fact for the jury. *Pritchett v. Munroe* 22 Ala. 590; *Saltmarsh v. Bower & Co.*, 22 Ala. 221.

37. A record is admissible evidence against an attorney, to prove notice to

him of the plaintiff's title as set out in the declaration, when the pleas were filed in the name of a firm of which he was a partner. *Parsons v. Boyd*, 20 Ala. 112.

OYER.

See PRACTICE.

PARENT AND CHILD.

1. A father is bound to support and protect his minor children, and is entitled to their labor and services so long as they remain members of his family. *Stovall v. Johnson*, 17 Ala. 14.

2. An agreement on his part, in consideration merely of natural love and affection, to permit a minor son, a a member of his family, to cultivate a crop and receive its proceeds, is revocable by him at any time before the son has actually gathered and disposed of the crop. *Ib.*

3. If a father pays, without objection, an account contracted by his minor son while attending school at a distance from home, the payment is equivalent to a recognition of the son's authority to bind him, and renders him liable on a similar account subsequently contracted. *McKenzie v. Stevens*, 19 Ala. 691.

4. A mother is not entitled to the labor and services of her minor son, unless the father is dead. *Jones v. Buckley*, 19 Ala. 604.

5. Filiation may be established, at common law, by a satisfactory combination of facts indicating the connection of parent and child; and the principal of these facts are, that the individual whose parentage is in controversy has always born the name of the person whom he claims as his father, and who has treated him as a child, and, in that character, has provided for his education, maintenance and establishment; that he has been acknowledged as such by the family, and has been so received in society. *Weatherford v. Weatherford*, 20 Ala. 548.

6. Proof of filiation raises the presumption of legitimacy, except when the evidence by which filiation is established also proves illegitimacy. *Ib.*

As to the liability of the father, under the statute, for the support of his illegitimate children, see BASTARDY, p. 14.

As to his equitable right to have an allowance made for the support and education of his children out of their separate property, see same title in PART III, p. 312.

PARTITION FENCES.

See FENCES, p. 638.

PARTNERSHIP.

I. HOW CONSTITUTED OR PROVED.
II. AUTHORITY AND LIABILITY OF PARTNERS.
III. ACTIONS BY AND AGAINST PARTNERS; AND HEREIN, OF THEIR COMPETENCY AS WITNESSES.

As to the rights, remedies, and liabilities of partners in equity, dissolution, and settlement of accounts, see same title in PART III, p. 321.

I. How Constituted or Proved.

1. A contract between an overseer and his employer, by which the former agrees to act as overseer for one year for the latter, to furnish a certain number of hands and horses, which were to be worked on the plantation with his employer's hands and horses, to defray his own expenses, as well as the expenses of his hands and horses, and to receive as his compensation one-fourth of the crop raised, does not make them partners *inter sese*. *Moore v. Smith*, 19 Ala. 774.

2. If the several proprietors of different portions of a public line of travel, by agreement among themselves, appoint a common agent at each end of the route to receive the fare and give through tickets, this does not, *per se*, constitute a partnership between them, so as to render each one liable to purchasers of

through tickets for losses occurring on any portion of the line. *Ellsworth v. Tartt*, 26 Ala. 733.

3. On the formation of a partnership for the purpose of speculating in Indian lands, certain rules and regulations were adopted at a meeting of the company, by which, after fixing and assigning to each partner his interest and number of shares, it was stipulated and required, that a specific sum should be paid on each share; that relinquishments should be executed to the company of all interests held or acquired by each partner in any of the lands embraced in their contract; that each partner should perform for the company, when called upon by a resolution of the company, any service in furtherance of its business; and that a failure by any partner to comply with any of the requisitions of the company, or any violation of good faith to its interests, should forfeit to the company the interest of the person so offending. *Held*, that a person to whom an interest in the company was assigned at this meeting, and who assented within a reasonable time afterwards to take it, was liable as a partner, at least as to third persons who afterwards dealt with the company, although he was not present at the meeting, did not pay the required installment on the share assigned him, did not execute the relinquishments, and did not perform any of the services required by the rules and regulations. *Grady v. Robinson*, 28 Ala. 289.

4. When a firm is conducted under the individual name of one partner, the others are mere dormant partners, although they have given public notice of their interest in the firm, and are active, managing members. *Bank of St. Mary's v. St. John, Powers & Co.*, 25 Ala. 566.

5. The fact that two persons are very intimate, tends to prove the existence of a partnership between them, and is admissible evidence for that purpose. *McGrew & Harris v. Walker*, 17 Ala. 824.

6. Whether a partnership existed between two persons, is a question of law, after the facts have been ascertained; but, nevertheless, a witness cognizant of the fact may state that a partnership existed between them. *Ib.*

II. AUTHORITY AND LIABILITY OF PARTNERS.

7. The act of one partner, in putting in circulation a bill of exchange, which has been accepted by the firm and endorsed in the name of the payee, is binding on the firm, and estops them, when sued on the bill, from denying the genuineness of the endorsement. *Sprague & Winston v. Zunts*, 18 Ala. 382.

8. An endorsement of a note by one partner, in the partnership name, but for the benefit or accommodation of a third person, imposes no liability on the firm. *Lang's Heirs v. Waring* 17 Ala. 145.

9. A surviving partner has no authority to make a note in the firm name, even in substitution of a pre-existing firm debt. *Ib.*

10. Ordinarily, during the existence of a partnership, each partner has authority, while acting within the scope of the partnership business, to sell and dispose of the entire interest in the partnership effects; but, when the firm, though not formally dissolved, has closed its business, and reduced all its assets to the shape of two notes, payable to the firm, the fraudulent transfer of these by one partner, in payment of his individual debts, passes to the purchaser only his individual interest, subject to the equity of the other partner. *Halstead v. Shepard*, 23 Ala. 558.

11. Delivery by the surviving partner, of a note belonging to the firm, which the deceased partner had endorsed in the partnership name, does not pass the legal title to the purchaser. *Glasscock v. Smith*, 25 Ala. 474.

12. If one partner borrows money, on the security of his firm's acceptance of a third person's draft, the acceptance, unless avoided, establishes the relation of debtor and creditor between the firm and the lender. *Saltmarsh v. Bower & Co.*, 22 Ala. 221.

13. Where three persons are engaged, as co-partners, in carrying on a steam saw-mill for a specified term; and, during its continuance, the note of the firm is given, with the concurrence of two of the partners, for necessary supplies, ordered by one of them, for the hands engaged in carrying on

the business, the partnership is bound by it. *Johnston & Co. v. Dutton's Adm'r*, 27 Ala. 245.

14. If a firm consists of but two partners, each having an equal voice in the direction and control of the common business, each may protect himself against liability on any future contract, by notifying the person with whom it is about to be made of his dissent; and where the partnership consists of more than two persons, one of whom gives notice of his dissent, the party contracting with the others acts at his peril, and cannot hold the dissenting parner liable, unless his liability results from the articles or nature of the partnership. *Ib.*

15. When a partnership consists of more than two persons, there is an implied understanding, in the absence of express stipulations to the contrary in the articles of partnership, that the acts of the majority, as to all matters within the scope of the common business, shall bind the firm; and if one partner, in such case, gives notice of his dissent before the creation of the contract, he is nevertheless bound by it, although he is not consulted by his co-partners about the matter. *Ib.*

16. One partner is liable for the acts of his co-partner, in a matter connected with the partnership business, which amounts to a constructive tort against a third person. *Myers v. Gilbert*, 18 Ala. 467.

17. When a bill of exchange, endorsed by a firm, is dishonored after the dissolution of the firm, notice of protest to any one of the partners is sufficient to bind all. *Coster, Robinson & Co. v. Thomason*, 19 Ala. 717.

18. Service of a writ on one partner, after a dissolution of the firm, will not support a judgment by default against the other. *Faver & Mount v. Briggs*, 18 Ala. 478.

19. A sealed instrument, executed by one partner in the firm name, under a prior verbal authority, or afterwards verbally ratified, is binding on the firm. *Grady v. Robinson*, 28 Ala. 289.

20. A release of one partner discharges his co-partner also. *Gray's Executors v. Brown*, 22 Ala. 262.

21. A parol agreement to discharge one partner does not discharge his co-partner. *Evans v. Carey*, 29 Ala. 99.

22. A relinquishment, by one ostensible partner to another, of all his interest in the partnership, does not discharge him from liability as a partner to third persons who afterwards deal with the partnership without notice of such relinquishment. *Grady v. Robinson*, 28 Ala. 289.

23. On the dissolution of a partnership, if one partner covenants, for valuable consideration, to become solely responsible for the outstanding debts, the covenant is not one of indemnity merely, but binds him to pay the debts within a reasonable time; and, on his failure to do so, and the declaration of his estate as insolvent after his death, his co-partner may file his claim against his estate, before payment of the partnership debts. *Hogan's Executor v. Calvert*, 21 Ala. 194; *Peacey's Creditors v. Peacey's Adm'r*, 27 Ala. 683.

24. In distributing the separate estate of a deceased partner, which has been declared insolvent, the partnership creditors will be postponed to the individual creditors, when there is a joint fund in the hands of the surviving partner to which they may resort, notwithstanding he also is insolvent. *Emanuel v. Bird*, 19 Ala. 596; *Smith & Co. v. Mallory's Executor*, 24 Ala. 628; *Bridge & Co. v. McCullough's Adm'rs*, 27 Ala. 661; *Van Wagner & Yeoman v. Chapman's Adm'r*, 29 Ala. 172.

25. But, if there is no joint fund in the hands of the surviving partner, and he is insolvent, the partnership creditors are entitled to share, *pari passu* with the individual creditors, in the separate estate of the deceased partner. *Emanuel v. Bird*, 19 Ala. 596.

III. ACTIONS BY AND AGAINST PARTNERS; AND HEREIN, OF THEIR COMPETENCY AS WITNESSES.

26. An action lies in favor of a surviving partner, against the administrator of his deceased co-partner, to recover the possession or proceeds of a note, payable to the firm, which the defendant claims to hold as assets of his intestate's estate. *Calvert v. Marlow*, 18 Ala. 67.

27. Service of a writ on one partner, after dissolution, does not authorize a judgment by default against his co-partner. *Faver & Mount v. Briggs*, 18 Ala. 478.

28. A creditor may sue one or all of the members of a firm, on a debt contracted in the firm name, and declare on the demand as the individual liability of the parties sued. *McCulloch v. Judd, Sons & Co.*, 20 Ala. 703.

29. On making the statutory affidavit, (Clay's Digest, 324, § 67,) he may proceed to judgment, and have execution, against the personal representative of a deceased partner; or he may proceed to judgment without making the affidavit, but cannot have execution until he has sued the surviving partners to insolvency. *Ib.*

30. When process of garnishment is sued out against a partnership, and judgments by default rendered, while the names of the individual partners nowhere appear in the record, the whole proceeding will be quashed on error. *Reid & Co. v. McLeod*, 20 Ala. 576.

31. In an action by a partnership, commenced in a justice's court, if the christian names of the partners are not stated in either the summons or complaint, and the defendant goes to trial on a plea to the merits, without either demurring or pleading in abatement, the defect is not available on error. *Ortez v. Jewett & Co.*, 23 Ala. 662.

32. If such action is founded on a demand less than $20, the plaintiffs may adduce proof of their individual names, in order that they may be set out in the judgment entry. *Stockdale v. Riddle & Co.*, 22 Ala. 678.

33. In an action against a surviving partner, for fraud and deceit in the purchase of a slave, the declarations of the deceased partner, by whom the contract was made, both before and after the purchase, as to his object in purchasing, are not admissible evidence for the defendant, to show that the purchase was not made on account of the firm. *Dixon v. Barclay*, 22 Ala. 370.

34. In an action by one partner individually, the defendant cannot set off a debt due to him from the partnership. *Hoyt, Ford & Robinson v. Murphy*, 18 Ala. 316.

35. This is also the law under the Code. *Duramus v. Harrison & Whitman*, 26 Ala. 326.

36. The individual debt of one partner cannot be set off against a partnership debt. *Ross v. Pearson*, 21 Ala. 473.

37. In an action by one partner individually, against a person who is a creditor of the firm, the defendant may set off his demand against the partnership, on proof that the firm has been dissolved, and that the plaintiff has agreed with his co-partner, for valuable consideration, to pay all the partnership debts. *Hoyt, Ford & Robinson v. Murphy*, 18 Ala. 316.

38. But the other partner, being still liable to the creditor, is not a competent witness for him, to prove either this agreement, or that the debt offered as a set-off is embraced in it. *Ib.*; *S. C.*, 23 Ala. 456.

39. In an action against one partner individually, on an account for goods sold to the firm, the other partner is not a competent witness to prove the sale and delivery of the goods, until the existence of the partnership between them has been first established by evidence *aliunde*. *Dickson v. Collins, Brother & Co.*, 17 Ala. 635.

40. In an action against one partner, to recover damages for a constructive tort, arising out of an act done by him in a matter connected with the partnership business, his co-partner is not a competent witness for him. *Myers v. Gilbert*, 18 Ala. 467.

41. In an action against one partner, on a note signed by his co-partner in the partnership name, the latter is not a competent witness for plaintiff. *Barney v. Earle*, 20 Ala. 405.

PAYMENT.

I. WHAT CONSTITUTES A PAYMENT.
II. TO WHOM MADE.
III. HOW APPROPRIATED.

I. WHAT CONSTITUTES A PAYMENT.

1. The acceptance of a debtor's negotiable note, at or after the crea-

tion of the debt, is not an extinguishment or payment of the debt, unless there is an agreement so to receive it; nor does it raise the presumption of payment, when shown to have been taken "for the purpose of closing the account on the books." *Mooring v. Mobile Marine Dock & Mutual Insurance Co.*, 27 Ala. 254.

2. A lessee's negotiable note, for the amount of the rent, is not an extinguishment of the rent reserved by the lease. *Dorrance v. Jones*, 27 Ala. 630.

3. The acceptance of a note on a third person, in payment of an account, is an extinguishment of the account, although such third person is insolvent, unless the debtor used some fraud or misrepresentation to induce the creditor to take it. *Carriere v. Ticknor*, 26 Ala. 571.

4. The acceptance of a note on an insolvent person, as collateral security, and its retention for never so long a period, do not authorize the inference of payment. *Powell's Adm'r v. Henry*, 27 Ala. 612.

5. A draft, drawn by the principal debtor on the guarantor, but not accepted by the latter, does not affect the relations of the parties on the guaranty, when it does not appear to have been received in payment. *Walker v. Forbes*, 25 Ala. 139.

6. A payment by a third person, adopted and sanctioned by the debtor, extinguishes the debt. *Ross v. Pearson*, 21 Ala. 473; *Prater v. Stinson and Wife*, 26 Ala. 456.

7. A payment to a third person, at the request of the creditor, or with his subsequent sanction and approval, is an extinguishment of the debt. *Brooks v. Hildreth & Moseley*, 22 Ala. 469.

8. If a third person gives his own note in payment of another's debt, and takes a receipt in the name of the debtor, this does not extinguish the debt, unless the privity or assent of the debtor is shown. *Williams v. Sims*, 22 Ala. 512.

9. The acceptance of a note, from either the defendant or a stranger, may amount to a payment and satisfaction of a judgment. *Brewer v. Branch Bank at Montgomery*, 24 Ala. 439.

As to the satisfaction of judgments, see that title, p. 672.

As to the extinguishment of a debt by the appointment of the creditor as executor of the debtor, see EXTINGUISHMENT, p. 637.

II. To Whom Made.

10. A payment to a third person, at the request of the debtor, or with his subsequent sanction and approval, discharges the debtor. *Brooks v. Hildreth & Moseley*, 22 Ala. 469.

11. A payment of moneys due the State to the comptroller of public accounts, who has no authority to receive it, does not discharge the party making it from liability to the State, unless the payment is ratified by the sovereign power of the State. *Walker v. Chapman*, 22 Ala. 116; *VanDyke v. The State*, 24 Ala. 81.

12. When a person places in the hands of an attorney, for collection, a note payable to a third person, and not endorsed by the payee, and takes a receipt for it in his own name, the attorney may pay the proceeds, when collected, to the payee of the note; and such payment will protect him from liability to the person who placed the note in his hands. *Peck & Clarke v. Wallace & Lewis*, 19 Ala. 219.

13. A judgment debtor, who pays the judgment to any other person than the plaintiff in whose name it is rendered, acts at his peril. *Mervine v. Parker*, 18 Ala. 241.

14. If the judgment is rendered in the name of the original creditor, for the use of a fictitious person, the debtor may settle the demand with the nominal plaintiff, unless he has notice of the real owner's name; and if he applies to the plaintiff's attorney of record for the name of the real owner, and the attorney, acting under the instructions of the owner, refuses to disclose his name, the debtor may settle the demand with the nominal plaintiff. *McGehee v. Gindrat*, 20 Ala. 95.

III. How Appropriated.

15. The debtor has a right to direct the application of a payment; if he fails to give any direction, the creditor may apply it; but, if only one

demand is proved to exist, and a payment is made without any direction, the law applies it to the payment of that demand. *McDonnell v. Branch Bank at Montgomery*, 20 Ala. 313.

16. A creditor, holding two separate demands, may apply to either a payment as to which the debtor gives no directions; but, if he does not make the appropriation until after suit brought on both demands, neither party can then direct its application, but the law then appropriates it. *Callahan v. Boazman*, 21 Ala. 246.

17. The creditor is not bound to notify the debtor of the manner in which he has appropriated a general payment: the only obligation owed by him to the debtor is to make the application in good faith. *Ib.*

18. When the creditor holds two debts of different degrees, one due by specialty, and the other by open account, he is not bound to apply a general payment to the older debt. *Ib.*

19. When a payment is made in cotton, at a price to be ascertained at a future time, with a general direction that it be applied to "all just demands which the creditor might hold," the creditor cannot make the application until the ascertainment of the price; and if he brings suit against the debtor, before that time, on both of his demands, the right of appropriation is thereby taken away from both parties. *Ib.*

20. Where there is a running account between the parties, the law will apply a general payment, where the character of the dealings or other circumstances do not show a different intention, in the order of time in which the charges accrued, without reference to the fact that one item is better secured than another. *Harrison & Robinson v. Johnston*, 27 Ala. 445.

21. This rule applies against the debtor's surety on a note given to his commission-merchant, with whom he had a running account for advances made, cotton sold, &c., on which the note was credited when received, and debited when due; an account current being rendered to the debtor, after the maturity of the note, showing a balance against him greater than the amount of the note, and subsequent payments being credited on general account. *Ib.*

22. In the absence of evidence clearly showing the intention of the parties, a general payment to a commission-merchant, with whom the debtor has a running account, will be referred by law to his existing indebtedness, and not to future advances. *Ib.*

PHYSICIANS.

(Statutory Provisions: Code, §§ 971-82, 2298; Clay's Digest, 487-91, §§ 1-43; Session Acts 1853-4, p. 48.)

1. A note or bond, given in consideration of medical services rendered by an unlicensed physician, is void by statute; yet, if he sells drugs and medicines, apart from his professional business as a physician, a recovery may be had for them. *Holland v. Adams*, 21 Ala. 680.

2. The effect of the several acts of 1823, 1826, and 1832, construed together, is to render void all notes and bonds given in consideration of medical services rendered by an unlicensed physician, whose name has not been enrolled in one of the medical boards of this State, unless he practices on the botanic system only. *Mays v. Williams*, 27 Ala. 267.

3. No recovery can be had on a note, which is proved to have been given in consideration of medical services rendered by a physician, unless it is shown that he was not within the prohibition of the statute. *Ib.*

4. In an action on such note, if the defendant wishes to require proof of the physician's license, he must give the plaintiff two days notice, before the trial, that such proof will be required on the trial. *Jordan v. Brewin & Boggan*, 19 Ala. 238.

5. In an action to recover for medical services rendered since the passage of the act of 1854, a diploma from any regular medical college is admissible evidence for the plaintiff; *secus*, if the services were rendered prior to the passage of that act. *Richardson v. Dorman's Executrix*, 28 Ala. 679.

6. The original entries on a physi-

cian's books are competent evidence for him, to prove the items of his account for medicines furnished and administered to his patients in the course of his practice; but the value of the medicines, as well as of the active services rendered, must be otherwise proved. *Ib.*

7. Under the act of Feb. 3d, 1848, (Session Acts 1847–8, p. 126,) "to provide for the appointment of physician of the penitentiary," if the lessee fails to appoint for three days after the happening of a vacancy, the inspectors alone may fill the place; but, if the lessee makes a nomination within three days, which is rejected by the inspectors, he has a reasonable time after the rejection, not exceeding three days, within which to make another nomination. *Jones v. Graham*, 24 Ala. 450.

8. Prior to the passage of the act of March 6th, 1848, (Session Acts 1847–8, p. 121,) the lessee of the penitentiary had no power to remove the physician, and could not avoid the statutory liability for the physician's salary by refusing to admit him into the hospital. *S. C.*, 21 Ala. 654.

PLEADING.

I. DECLARATION, OR COMPLAINT.

1. *Description of Parties.*
2. *Duplicity, and Repugnancy.*
3. *Joinder of Counts.*
4. *Statement of Cause of Action.*

   (*a*) As at Common Law.
   (*b*) In Summary Proceedings.
   (*c*) Under Code of 1852.

II. DEMURRER.

III. PARTIES.

1. *Who are Necessary or Proper Parties.*

   (*a*) Assignor and Assignee.
   (*b*) Executors and Administrators.
   (*c*) Husband and Wife.
   (*d*) Infants.
   (*e*) Joint Tenants, and Tenants in Common.
   (*f*) Principal and Agent.
   (*g*) Other Cases.

2. *Effect of Non-joinder and Misjoinder.*

IV. PLEAS.

1. *General Requisites.*
2. *Pleas to Jurisdiction.*
3. *Pleas in Abatement.*

   (*a*) Defect in Writ or Service.
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   (*c*) Non-joinder of Parties.
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   (*a*) General Issue.
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   (*c*) *Non Est Factum.*
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5. *Pleas Puis Darrein Continuance.*
6. *Pleading "in Short, by Consent."*
7. *Right to Plead Several Matters.*

V. REPLICATION.

VI. SURPLUSAGE.

VII. VARIANCE.

VIII. VIDELICET.

I. DECLARATION, OR COMPLAINT.

1. *Description of Parties.*

1. When a plaintiff styles himself executor or administrator, and declares on a note payable to himself in that capacity, but does not aver that the note is assets of the estate, the action is his individual suit, and the superadded words are a mere *descriptio personæ*. *Arrington v. Hair*, 19 Ala. 243; *Tate v. Shackelford's Adm'r*, 24 Ala. 510.

2. In trover for a slave, if the words "administrator," &c., follow the plaintiff's name in the commencement of the declaration, while he declares that he was possessed, "as of his own property, as such administrator as aforesaid," and adds the words "as administrator as aforesaid" to each material averment of the declaration, —these words are not mere matter of description, but indicate that he sues

in his representative character. *Wyatt's Adm'r v. Rambo*, 29 Ala. 510.

3. A writ in the name of "Reuben Chapman, governor &c.," is his individual suit; while a declaration in the name of "Reuben Chapman, governor of the State of Alabama," shows that the governor sues in his official capacity. *Chapman v. Spence*, 22 Ala. 588.

4. If a plaintiff in detinue describes himself, both in his writ and in the commencement of his declaration, as suing "as trustee for his wife," and the endorsement on the writ describes the slave sued for as the separate property of the wife, while the declaration avers that he "was possessed as of his own property," the superadded words are mere *descriptio personæ*. *Gibson v. Land*, 27 Ala. 117.

5. In an action under the Code, "for the recovery of chattels in specie," if the complaint puts in issue the plaintiff's individual title, while in the margin, or caption of the complaint, he describes himself as administrator, the superadded words are *descriptio personæ* merely. *Agee v. Williams*, 27 Ala. 644.

6. In suing for the recovery of slaves belonging to his intestate's estate, an administrator may declare in the prescribed form of complaint, with the additional averment that he claims "as administrator," &c. *Crimm's Adm'rs v. Crawford*, 29 Ala. 623.

7. A declaration in debt, in which plaintiff "complains of M. J. and his wife S. J., formerly S. M."; counting on a note alleged to have been executed "by the said S. before her intermarriage with the said M."; and averring that "the said S., and the said M. since his intermarriage, have not regarded," &c.,—sufficiently discloses the character in which the parties are sued, and that the note was executed by the wife while sole. *Johnson and Wife v. Collins*, 17 Ala. 318.

2. *Duplicity, and Repugnancy.*

8. In debt on bond, a general demurrer does not lie, for duplicity in the assignment of the breach. *Garnett v. Yoe*, 17 Ala. 74.

9. A declaration which unites in one count several distinct demands, due in different rights, is bad on general demurrer. *Kennedy v. Stallworth*, 18 Ala. 263.

10. In an action on a contract, containing several distinct stipulations, the pleader may assign in each count as many breaches as he pleases; but he cannot assign, in one count, two breaches of the same stipulation. *Nave v. Berry*, 22 Ala. 382.

11. A count in assumpsit, on a lease not under seal, averring the performance by plaintiff of his part of the contract, and the non-payment of the rent by the defendant; and then alleging that the buildings were destroyed by fire, and, in consequence thereof, were not delivered up, but were wholly lost,—is not demurrable, either for duplicity, or for misjoinder of breaches; the non-payment of the money being the only breach alleged. *Ib.*

12. In an action on the case, to recover damages for the loss of a slave, who was killed while working on the defendant's house, a count averring that the defendant fraudulently concealed the dangerous condition of the house, and fraudulently represented that it was safe, is not demurrable for duplicity, but the latter averment may be stricken out as surplusage. *Perry v. Marsh*, 25 Ala. 659.

13. In an action on a negotiable note, bought by a purchaser at the trustee's sale of the assets of the Planters' and Merchants' Bank of Mobile, an averment in the declaration, that the charter of the Bank was surrendered, but was continued by virtue of the provisions of the several acts for the settlement of the Bank's affairs, is not repugnant, when construed with reference to those acts. *Savage & Darrington v. Walshe & Emanuel*, 26 Ala. 619.

3. *Joinder of Counts.*

14. Counts in debt and detinue may be joined in one delaration. *Calvert v. Marlow*, 18 Ala. 67.

15. Counts in case and trover may also be joined. *Dixon v. Barclay*, 22 Ala. 370.

16. But counts in case and trespass cannot. *Sheppard v. Furniss*, 19 Ala. 760.

17. Nor can assumpsit and trover. *Copeland v. Flowers*, 21 Ala. 472.

18. In debt, counts on a bond and on a promissory note may be joined. *Barclay v. Moore*, 17 Ala. 634.

19. In assumpsit, counts on demands due from the defendant in different rights cannot be joined. *Kennedy v. Stallworth*, 18 Ala. 263; *Godbold v. Roberts*, 20 Ala. 354.

4. *Statement of Cause of Action.*

(*a*) As at Common Law.

20. A count in assumpsit, averring that, "in consideration that plaintiff would furnish three hands, and feed and clothe said servants for the year 1844, and pay all their expenses, and work the same on defendant's plantation in Perry county, and furnish provisions for himself, his family and said three hands, the lands, mules and horses of said defendant in the capacity of an overseer, he (the said defendant) agreed and promised to place on said plantation his hands, to-wit, the hands owned by him, and live on said farm, and his mules and horses, and furnish the said hands &c., placed by him on said plantation, with provisions, and said hands with clothing, to pay all expenses of the said hands and mules, and to let said plaintiff cultivate said farm, until said hands and mules, so furnished as aforesaid by said plaintiff and defendant, and raise a crop thereon in said year 1844; for which said defendant agreed and promised, that said defendant should have and draw a part of the crop raised on said farm by said defendant, with said hands, mules and horses, in the year 1844, in proportion to the said hands of plaintiff, so placed on said farm," &c.; and that plaintiff performed his part of said contract, and raised a crop on said plantation "of which his reasonable share was one-third thereof,"—held demurrable, for vagueness, indefiniteness, and uncertainty. *Moore v. Smith*, 19 Ala. 774.

21. In declaring on a written contract, containing several distinct stipulations to be performed by the defendant, some of which have been performed, it is not necessary that the breach assigned should negative the performance of the defendant's contract *in toto*: it is sufficient to aver non-performance in any one particular, which shows that plaintiff has a good cause of action. *Montgomery Manufacturing Co. v. Thomas*, 20 Ala. 473.

22. When the declaration assigns a sufficient breach, and shows a good cause of action, unnecessary averments, which are added by way of inducing special damage, are mere surplusage. *Ib.*

23. It is sufficient, on general demurrer, that the breach be assigned in words which contain the sense and substance, though not in the language of the contract. *Calvert v. Marlow*, 18 Ala. 67.

24. It is not necessary to allege a request of payment, except when such request is a condition precedent. *Ib.*

25. In debt on bond, the breaches assigned must show that plaintiff has a cause of action. *Garrett & Hill v. Logan*, 19 Ala. 344.

26. It is sufficient, generally, to assign a breach in the words of the condition, and negative its performance. *Pryor v. Beck*, 21 Ala. 393.

27. In an action on a bond given as security for costs, it is not necessary to allege that a written account, or bill, containing the particulars of the fees, was produced to the defendant, or ready to be produced; nor that the clerk and sheriff kept fee-books, in which were entered the fees sought to be recovered. *Ib.*

28. In an action on a lease for years, to recover the rent reserved, it is not necessary to aver that the defendant entered upon, or took possession of the premises. *Douglass & Easton v. Branch Bank at Mobile*, 19 Ala. 659.

29. In an action on a covenant of seizin, the breach may be as general as the covenant. *Anderson v. Knox*, 20 Ala. 156.

30. In an action for a breach of the implied covenant created by the words "grant, bargain and sell," it is necessary to aver that the title has failed in consequence of some act of the grantor. *Griffin v. Reynolds*, 17 Ala. 198.

31. In an action on a covenant of warranty of title, it is necessary to aver that the plaintiff has been evicted, or has yielded up the possession, under a paramount title. *Ib.*

32. In an action of debt on a sheriff's bond, for his failure to collect and pay over militia fines, the declaration must aver the names of the persons against whom the fines were assessed, with the amounts of the several fines, as stated in the certificate of the president of the court-martial. *Chapman v. Weaver*, 19 Ala. 626.

33. In an action by a mother, for the work and labor of her minor son, she must aver that the infant's father is dead, or that she is entitled to his services as guardian or otherwise. *Jones v. Buckley*, 19 Ala. 604.

34. In debt on an injunction bond, or a bond required by the chancellor as a pre-requisite to a writ of seizure, it is sufficient to aver that the suit was dismissed, without alleging the ground of the dismissal. *Zeigler & Hall v. David*, 23 Ala. 127.

35. It is unnecessary, in such case, to aver notice of the dismissal to the obligors, since they are presumed, being parties to the record, to know the disposition made of the cause. *Ib.*

36. In debt on an administrator's bond, a count on the penalty alone, not noticing the condition, is sufficient. *Holley v. Acre*, 23 Ala. 603.

37. When such action is brought to charge the sureties with a judgment rendered against their principal, to be levied *de bonis intestatis*, it is not necessary to allege that the judgment was founded on a debt which was a proper charge against the estate, or against the administrator as such. *Reid v. Nash*, 23 Ala. 733.

38. A declaration in such action, alleging that a final settlement was had by the administrator with the orphans' court, "and on said settlement the sum of $259 was, by the decree and judgment of the said court, assessed and decreed as the distributive share of" the person for whose use the suit was brought,—held demurrable, because it showed no judgment or decree in favor of any one. *Gilbreath v. Manning*, 24 Ala. 418.

39. In declaring on a collateral guaranty, the terms of the contract between the creditor and principal debtor must be averred. *Walker v. Forbes*, 25 Ala. 139; *Fay v. Hall*, 25 Ala. 704.

40. The declaration must aver, also, the failure of the principal debtor to pay, and notice to the guarantor; but the general allegation of notice, ("of all which aforesaid premises, the said defendant then and there had notice,") is sufficient, when facts are stated on which it can operate. *Fay v. Hall*, 25 Ala. 704. (*Vide infra*, 92–93.)

41. In an action on an absolute, unconditional guaranty of the payment of a note at maturity, it is not necessary to aver the insolvency of the maker. *Donley v. Camp*, 22 Ala. 659.

42. It is not necessary to aver the institution of a suit against the principal debtor, when his failure to pay and insolvency are alleged. *Cahuzac & Co. v. Samini*, 29 Ala. 288.

43. In declaring against the principal, on a bill of exchange accepted by his agent, the agent's authority to accept must be averred: it is not sufficient to allege that he was agent, and as such accepted for the principal. *May v. Kelly & Frazier*, 27 Ala. 497.

44. In declaring against an acceptor, on a bill payable at a particular counting-house, the declaration must aver that it was directed in blank, or that it was drawn upon the defendant, or that he accepted it for honor, or that he resided or did business at said counting-house. *Ib.*

45. In an action against husband and wife, under the act of 1850, for articles of family supply, the declaration must distinctly aver that the wife has a separate estate, which is sought to be charged. *Henry and Wife v. Hickman*, 22 Ala. 685.

46. It must further allege, that the wife holds her separate estate under the act of 1850, or that of 1848: an averment, that she has a separate estate, "which came to her after the first day of March, 1848," is not sufficient. *Cunningham v. Fontaine*, 25 Ala. 644.

47. In declaring against an endorser, the excuse for failing to sue the maker to the first court must be distinctly averred: an allegation that suit was brought to the first court to which it could be brought, "after plaintiff ascertained, by prompt and diligent inquiry, that he resided in said county," is not sufficient. *Lindsay v. Williams*, 17 Ala. 229.

48. In an action on a judgment,

rendered by a justice of the peace of another State, the declaration must affirmatively show that the justice had jurisdiction by force of a local statute. *Ellis v. White*, 25 Ala. 540.

49. As a general rule, where a party claims a right based upon a foreign statute, he is required to set out the statute, in order that the court may see that the right claimed is in conformity with it. *Gunn v. Howell*, 27 Ala. 663.

50. But, in pleading the judgment of a sister State, to which the constitution requires "full faith and credit" to be given, it is not necessary to set out affirmatively the facts upon which depended the power and authority of the court by which it was pronounced. *Ib.*

51. In an action by an agent against his principal, on an implied promise of indemnity against losses sustained from an act performed by him in the execution of his agency, the declaration, whether in assumpsit or in case, must allege a breach. *Moore v. Appleton*, 26 Ala. 633.

52. If the declaration is in case, it must negative the existence of any knowledge on the part of the plaintiff, at the time of the act, that he was committing a tort or trespass, although the *onus* of proving such knowledge may be on the defendant. *Ib.*

53. In case to recover damages for a diversion of water from plaintiff's mill, the declaration must show that the quantity of water which continued to flow to the mill was insufficient, or that the plaintiff or his mill was injured by the diversion. *Burden v. Mayor &c. of Mobile*, 21 Ala. 309.

54. But it is sufficient to aver injury to plaintiff's mill privileges, without alleging the existence of a mill; nor is it necessary to aver the manner or means of the diversion. *Stein v. Ashby*, 24 Ala. 521.

55. A count in case, which sets forth a contract for the sale of a slave by plaintiff to defendant, in consideration of the payment of a certain sum of money, which is alleged to be less than his real value, and for the further consideration that defendant would remove him from the State; and which then avers, that the defendant, when he made the contract, did not intend to remove said slave, "but falsely and fraudulently, and with intent to deceive and defraud plaintiff," represented that he would,—is good, and the statement of the contract is mere matter of inducement. *Dixon v. Barclay*, 22 Ala. 370.

56. In case against the hirer of a slave, for negligent treatment of the slave, it is not necessary to allege the consideration and terms of the contract. *Moseley v. Wilkinson*, 24 Ala. 411.

57. A count, which sets forth a contract for the hire of a slave, to be employed only in a particular service; and which alleges a breach of duty on the part of the hirer, in putting the slave to a different service, and a consequent loss to the owner,—is good in case. *Myers v. Gilbert*, 18 Ala. 467.

58. In case against a municipal corporation, for injuries caused by the fall of a bridge within the corporate limits of the town, it is not necessary to aver that the bridge was broken without any fault on the part of the plaintiff; nor that he could not pass the street, of which the bridge formed a part, without crossing the bridge: it is sufficient to aver that it was the duty of the corporation to keep the bridge in repair, and that the injury resulted from its unsafe and rotten condition, which rendered it incapable of sustaining the customary burdens. *Smoot v. Mayor &c. of Wetumpka*, 24 Ala. 112.

59. Declaration in case against an attorney-at-law, for negligence, held sufficient. *Walker v. Goodman & Mitchell*, 21 Ala. 647.

60. In case for a malicious prosecution, it is not necessary to describe by name the offense with which the plaintiff was charged, nor to aver the legal conclusion resulting from the prosecutor's act. *Long v. Rodgers*, 17 Ala. 540.

61. An averment of the plaintiff's examination before a justice of the peace, touching the offense with which he was charged, and his discharge therefrom by said justice, is a sufficient allegation that the prosecution is ended. *Ib.*

62. The declaration, in such action, must aver the issue of process, properly describing it, and the plaintiff's

arrest and imprisonment by virtue thereof. *Sheppard v. Furniss*, 19 Ala. 760.

63. In case for the malicious suing out of an injunction, the declaration must aver that the injunction suit is ended, or that the injunction itself is finally disposed of. *Tatum & Smith v. Morris*, 19 Ala. 302.

64. But such an averment is not necessary, where the action is brought to recover damages for the wrongful or vexatious suing out of an attachment. *Forrest v. Collier*, 20 Ala. 175; *Seay v. Greenwood*, 21 Ala. 491.

65. Nor is it necessary, in such action, to aver that the affidavit for the attachment was in writing. *Forrest v. Collier*, 20 Ala. 175.

66. An averment that the attachment was sued out "wrongfully, fraudulently, and in order to oppress and injure plaintiff," is equivalent to an averment that it was sued out maliciously. *Ib.*

67. If the attachment was sued out by defendant as agent of another, and the declaration alleges that he had no authority for so doing, it is not necessary to aver the want of probable cause for the issue of the attachment. *Ib.*

68. The declaration must specially deny the ground set forth in the affidavit for the attachment. *Tiller v. Shearer*, 20 Ala. 527.

69. If the attachment was sued out before a justice of the peace of another State, the declaration must allege that he had authority by law to issue attachments, and must connect the defendant with its levy. *Marshall v. Betner*, 17 Ala. 832.

70. If the attachment was sued out against a merchant on the ground of fraud, the declaration may aver injuries to his credit and business. *Goldsmith, Forcheimer & Co. v. Picard*, 27 Ala. 142.

71. In debt on an attachment bond, to recover the damage actually sustained, it is only necessary to aver that the writ was wrongfully sued out. *Dickson v. Bachelder*, 21 Ala. 699.

72. In an action against a sheriff, who, by his misrepresentations, caused property seized by him under legal process to be sold for less than its real value, it is not necessary to aver that the representations were maliciously made: it is sufficient to aver that they were falsely and fraudulently made. *Griffin v. Isbell*, 17 Ala. 184.

73. In an action by the defendant in execution, against the sheriff, for failing to collect the money bid by a purchaser of his land at the sheriff's sale, if the declaration sets forth the sale, the execution of a deed by the sheriff to the purchaser, and the sheriff's failure to collect the purchase-money; and then avers that the proceeds of sale remained after all executions in the sheriff's hands were satisfied, and that the plaintiff is entitled to such proceeds,—these averments are but the statement of legal conclusions, and cannot aid the substantial defects of the declaration. *Moore v. Barclay*, 18 Ala. 672.

74. In trover or trespass for the stealing or killing of a slave, the declaration must allege a prosecution for the felony. *Martin's Executrix v. Martin*, 25 Ala. 201; *Nelson v. Bondurant*, 26 Ala. 341; *Morton v. Bradley*, 27 Ala. 640.

75. In stating the prosecution, it is not necessary to aver with particularity everything that was done, what witnesses appeared, and what testimony was offered: it is sufficient to aver, that the party was duly prosecuted before the grand jury, who refused to find a true bill against him. *Nelson v. Bondurant*, 26 Ala. 341; *Morton v. Bradley*, 27 Ala. 640.

76. A count, averring that the defendant, falsely and maliciously, made an affidavit in writing, and thereby, falsely and maliciously, caused and procured plaintiff to be arrested by his body, and to be imprisoned, and to be kept and detained in prison for the space of ten days then next ensuing; at the expiration of which time, the plaintiff was forced and obliged, in order to procure his release and discharge from imprisonment, to pay defendant a large sum of money, which he then and there paid, and was thereupon discharged and released,—is good in trespass. *Sheppard v. Furniss*, 19 Ala. 760.

77. In slander for words spoken, it is not necessary to aver in the declaration the name of the person to whom, or in whose presence, the ac-

tionable words were spoken. *Ware v. Cartledge*, 24 Ala. 622.

78. In declaring on words charging plaintiff with the murder of defendant's son, it is not necessary to aver the death of the alleged murdered person. *Stallings v. Newman*, 26 Ala. 300.

79. A count in a real action, which does not allege a seizin in fee-simple, either in the demandant or in the ancestor through whom he claims, although it alleges the disseizin of his ancestor, is defective as a count in a writ of right, but good as a count in a writ of entry *sur disseizin*. *Lyon's Heirs v. Mottuse*, 19 Ala. 463.

(*b.*) In Summary Proceedings.

80. In summary proceedings, by notice and motion, the notice serves the double purpose of a writ and declaration. *Jemison v. P. & M. Bank*, 17 Ala. 754; *S. C.*, 23 Ala. 168; *Stanley v. Bank of Mobile*, 23 Ala. 652; *Walker v. Chapman*, 22 Ala. 116; *Pait v. Pait*, 19 Ala. 713.

81. In a summary proceeding in the name of the Planters' and Merchants' Bank of Mobile, since the surrender of its charter, the notice must show that the suit is instituted by the direction of the trustees, or for their use. *Jemison v. P. & M. Bank*, 17 Ala. 754.

82. A notice, alleging that plaintiff was bound as surety for defendant, on a note which is particularly described; that judgment was thereon rendered against him, on which a *fi. fa.* was issued, under which he was compelled to pay a specified sum of money; and specifying the court in which the judgment was rendered, and the time of its rendition,—is sufficient to authorize a summary judgment in the same court, although it does not specify the amount of the judgment, the name of the plaintiff therein, nor the time of the payment by the surety. *Pait v. Pait*, 19 Ala. 713.

83. A motion for a summary judgment against a surety for costs need not specify the amount or items of cost. *Boswell v. Morton*, 20 Ala. 235.

84. In a notice for a summary judgment against a tax-collector, it is not necessary that the facts should be stated with the same technical precision and fullness that are necessary in a declaration. *Walker v. Chapman*, 22 Ala. 116.

85. A *sci. fa.* against a defaulting witness, when made to serve the double purpose of a writ and declaration, must set out the subpœna, either *verbatim* or substantially, aver that it was served, and show the day and term at which the witness was bound to appear, and the rendition of judgment *nisi* against him. *Emanuel v. Ketchum*, 21 Ala. 257; *Spence v. Simmons*, 21 Ala. 563.

86. In a *sci. fa.* to revive a judgment against an administrator for costs, the damages having been paid, it is not necessary to state the amount of the costs, if the judgment is otherwise substantially described. *Barron v. Tart*, 19 Ala. 78.

87. Where the judgment sought to be revived was affirmed on error by the supreme court, it is not necessary to aver in the *sci. fa.* that the judgment of affirmance was certified to the primary court: an averment, that the judgment of the circuit court was affirmed, "as by the record and proceedings therein, remaining in said circuit court, will more fully appear," is sufficient on general demurrer. *Duncan v. Hargrove*, 18 Ala. 77.

(*c*) Under the Code of 1852.

88. Where a complaint alleged the contract sued on to be "in substance as follows: That in consideration that plaintiffs would then and there buy out the storehouse and lot, situated in the town of C., then occupied by E. & Co., as a storehouse, and the stock of dry goods then and there owned by them, he (defendant) would assist them, by endorsing their paper, and advancing them money, to enable them to carry on the mercantile business advantageously;" or, as alleged in another count, "would endorse for them in Charleston, and, if necessary, advance money to them, to enable them to carry on the mercantile business,"—held, on demurrer, that the contract was too indefinite and uncertain to support an action. *Erwin & Williams v. Erwin*, 25 Ala. 236.

89. A promise by a father, upon valuable consideration, to give a mar-

ried daughter "a full share of his property, which was then and there worth $25,000," is too indefinite and uncertain to support an action. *Adams and Wife v. Adams*, 26 Ala. 272.

90. A complaint, in the form prescribed by the Code, "on promissory note, by payee against maker," is sufficient to support a judgment by default; and its legal effect is the same as if it contained an express averment that the note was payable to plaintiff. *Letondal v. Huguenin*, 26 Ala. 552.

91. In an action by husband and wife, to recover slaves which are alleged to be the separate property of the wife, a complaint, in the prescribed form, "for the recovery of chattels in specie," is sufficiently certain and definite on demurrer, although it does not allege whether the wife's separate estate was created by contract or by statute, or whether the husband has ever had possession during coverture. *Pickens and Wife v. Oliver*, 29 Ala. 528.

92. "Which promise plaintiffs accepted, of which defendant had due notice; and plaintiffs aver that, relying on said promise," they furnished goods to the debtors,—*held* a sufficient averment of the acceptance of a guaranty, and notice thereof to the guarantor. *Cahuzac & Co. v. Samini*, 29 Ala. 288.

93. In an action on a continuing guaranty, unlimited in amount, for goods sold on a credit of ninety days, the complaint alleged that sales, amounting to $750, "were made from the 26th July, 1853, up to the 23d August, 1854;" that partial payments were made by the debtor, from time to time; and that on the 1st December, 1854, he was in default, to the amount of $350, of which notice was then given to the guarantor; but no other dates or amounts were specified,—*held*, that the alleged notice was only sufficient to fix the guarantor's liability for the amount of the purchase last made. (RICE, C. J., *dissenting*.) *Ib.*

94. In an action to recover damages for killing a slave, an averment in the complaint, that a prosecution for the killing was instituted against the defendant before the grand jury of the county, and that they refused to find a true bill against him,—held sufficient, on the authority of *Nelson v. Bondurant*, 26 Ala. 341. *Morton v. Bradley*, 27 Ala. 640.

95. In declaring against the principal, on a bill of exchange accepted by his agent, the agent's authority to accept must be averred: an averment, that he was the agent, and as such accepted for the principal, is not sufficient. *May v. Kelly & Frazier*, 27 Ala. 497.

96. In declaring against the acceptor of a bill payable at a particular counting-house, the complaint must allege that it was directed in blank, or that it was drawn upon the defendant, or that he accepted it for honor, or that he resided or did business at said counting-house. *Ib.*

97. In declaring against a person for neglecting to use due diligence in the collection of a judgment, out of the proceeds of which, when collected, he had promised in writing to pay a specified amount, it is not necessary to aver in what respect he failed to use due diligence: it is sufficient to aver that "he has failed and omitted to do so from mere neglect." *Gliddon v. McKinstry*, 25 Ala. 246.

98. An averment that a municipal corporation subscribed for stock in a plank-road company to the amount of $15,000, and that the defendant, in consideration of the corporation's bonds for that amount, assumed the liability created by said subscription, is equivalent to an averment that the bonds were sold at par. *Mayor &c. of Wetumpka v. Winter*, 29 Ala. 651.

II. DEMURRER.

99. A demurrer lies to a declaration, which shows on its face that the plaintiff, who sues by her next friend, is a *feme covert*. *Jordan v. Gray*, 19 Ala. 618.

100. And to a declaration, in an action against husband and wife, which shows a cause of action against the husband alone. *Henry and Wife v. Hickman*, 22 Ala. 685.

101. In an action against husband and wife under the Code, if the complaint shows that the wife is improperly joined as a defendant, she may demur. *Gibson v. Marquis and Wife*, 29 Ala. 668.

102. A demurrer lies to a declaration, which shows on its face that the contract declared on is usurious. *Matlock v. Mallory*, 19 Ala. 694.

103. And to a declaration which unites, either in the same count or in different counts, demands due from defendant in different rights. *Kennedy v. Stallworth*, 18 Ala. 263; *Godbold v. Roberts*, 20 Ala. 354.

104. And to an entire declaration for a misjoinder of counts. *Sheppard v. Furniss*, 19 Ala. 760; *Godbold v. Roberts*, 20 Ala. 354; *Copeland v. Flowers*, 21 Ala. 472.

105. And to a statement, in an appeal case, which shows on its face the justice's want of jurisdiction. *Rose v. Thompson*, 17 Ala. 629.

106. And to a statement which is defective for want of substantive averments, or which improperly joins counts in different actions. *Jones v. Buckley*, 19 Ala. 604; *Ganaway & Kimball v. Mayor &c. of Mobile*, 21 Ala. 577; *Copeland v. Flowers*, 21 Ala. 472.

107. And to a *sci. fa.* which is defective for want of necessary averments. *Emanuel v. Ketchum*, 21 Ala. 257.

108. When several replications are filed to pleas which are not embraced in the act of 1846, the defendant may demur generally. *Duncan v. Hargrove*, 22 Ala. 150.

109. In debt on bond, surplusage, argumentativeness, or duplicity in the assignment of the breach, cannot be reached by general demurrer. *Garnett v. Yoe*, 17 Ala. 74.

110. A general demurrer does not lie to a declaration, which shows a good cause of action, on account of unnecessary averments, which may be rejected as surplusage. *Montgomery Manufacturing Co. v. Thomas*, 20 Ala. 473; *Nave v. Berry*, 22 Ala. 382.

111. The question whether the State may commence a suit by attachment, cannot be raised by demurrer to the declaration. *VanDyke v. The State*, 24 Ala. 81.

112. A demurrer to an entire count, assigning several breaches, some of which are good, should be overruled. *Wilson v. Cantrell*, 19 Ala. 642.

113. A demurrer to an entire declaration, containing several counts, one of which is good, should be overruled, when there is no misjoinder of counts. *Hooks v. Smith*, 18 Ala. 338; *Ferguson & Scott v. Baber's Adm'rs*, 24 Ala. 402.

114. A demurrer to an entire declaration, which is good as to a portion of the demand sued for, should be overruled; except in cases, if any such exist, where the entire amount must be recovered, or none at all. *Pryor v. Beck*, 21 Ala. 393.

115. A demurrer to a declaration cannot properly be called a plea to the merits, except where a judgment on demurrer for the defendant would bar a subsequent suit on the same cause of action; and this can never be the case, where the declaration is defective for want of an averment which might be remedied by amendment. *Quarles v. Waldron and Wife*, 20 Ala. 217.

116. The several counts in a declaration should be considered, on demurrer, as separate and distinct; yet, where one expressly refers to another, the latter, although abandoned, may be looked to in aid of the former. *Robinson v. Drummond*, 24 Ala. 174.

117. Pleas should be construed, on demurrer, as separate and distinct, except when connected by references to each other. *Clements v. Cribbs & Covington*, 19 Ala. 241.

118. The act of 1807, abolishing special demurrers, does not apply to pleas in abatement: in such pleas, form is substance, and defects in form are reached, as at common law, by general demurrer. *Humphrey v. Whitten*, 17 Ala. 30; *Townsend v. Jeffries' Adm'r*, 24 Ala. 329.

119. Duplicity, in a plea in abatement, is fatal on general demurrer. *Garner & Nevill v. Johnson*, 22 Ala. 494.

120. A demurrer to a plea admits it to be properly filed, and only questions its legal sufficiency. *Bobe v. Frowner and Wife*, 18 Ala. 89.

121. A demurrer to a plea should be visited on a defective declaration. *Chaudron v. Fitzpatrick*, 19 Ala. 649.

122. Where a plea is interposed to only a portion of the counts in the declaration, a demurrer to it should be visited upon the counts to which it relates. *Henderson v. Hale*, 19 Ala. 154.

123. A demurrer to a defective replication should be visited on a defect

in the plea. *Sykes v. Lewis*, 17 Ala. 261; *Patton v. Hamner*, 28 Ala. 618.

124. And this, notwithstanding a demurrer to the plea has been previously overruled. *Sykes v. Lewis*, 17 Ala. 261.

125. A demurrer to a rejoinder cannot be visited, in favor of the party demurring, upon pleas on which he has previously taken issue without objection. *Moore v. Leseur and Wife*, 18 Ala. 606.

126. Since the Code (§ 2253) requires the grounds of the demurrer to be specified, the objection that the venue is not well laid cannot be raised, where the only ground of demurrer specified is that the complaint does not show a sufficient prosecution for the felony in which the civil action is merged. *Morton v. Bradley*, 27 Ala. 640.

127. When a demurrer to a complaint is sustained, on account of the misjoinder of the wife as a party defendant, she should be discharged from the action; but the plaintiff should be allowed to proceed against the husband. *Gibson v. Marquis and Wife*, 29 Ala. 668; *Hall v. Cannte and Wife*, 22 Ala. 650.

128. When a demurrer to a plea is improperly overruled, the judgment will be reversed on error, although the complaint also is demurrable. *Marshall v. Betner*, 17 Ala. 832; *Adams and Wife v. Adams*, 26 Ala. 272.

129. The overruling of a demurrer to several pleas, each going to the whole declaration, (and the plaintiff declining to reply,) is not a reversible error, if any one of the pleas is good. *Firemen's Insurance Co. v. Cochran & Co.*, 27 Ala. 228; *Jesse v. Cater*, 28 Ala. 475.

As to demurrers to evidence, see EVIDENCE, III, p. 588.

III. PARTIES.

1. *Who are Necessary or Proper Parties.*

(a) Assignor and Assignee.

130. The assignee of a promissory note may maintain an action of debt on it in his own name. *Barclay v. Moore*, 17 Ala. 634.

131. When a written promise by one firm, to pay a specified sum on a day certain to the order of another firm, (the two firms having a common partner,) is assigned by the latter firm, the assignee may maintain an action on it in his own name against the makers. *Murdock v. Caruthers*, 21 Ala. 785.

132. The assignee of a written order, addressed to an attorney, in these words, "Please pay D. W. $293.75, and all interest on the same, the demand which I have against the estate of D. Y., deceased," cannot maintain an action on it in his own name. *West v. Foreman*, 21 Ala. 400.

133. The purchaser of a negotiable note, at a sale made by the trustees of the Planters' and Merchants' Bank of Mobile, under the act of 1850, acquires the legal title by the trustees' assignment, and may maintain an action in his own name. *Savage & Darrington v. Walshe & Emanuel*, 26 Ala. 619.

134. The holder of a bill, which has been endorsed by him to an agent for collection, may, after the bill has been restored to him, strike out his own endorsement, and sue in his own name as if such endorsement had never been made. *Phillips v. Poindexter*, 18 Ala. 579.

135. A purchaser of a chose in action, at a sale by the assignee in bankruptcy, cannot sue in his own name. *Camack v. Bisquay*, 18 Ala. 286.

136. A mere right of action against another, for money had and received, cannot be so assigned as to authorize the assignee to sue in his own name. *Chenault's Adm'rs v. Walker*, 22 Ala. 275.

137. But this rule does not apply, where a debtor delivers property to one of his creditors, to be sold, and the proceeds to be appropriated, after the payment of his own debt, to a debt due to another creditor, who may maintain an action in his own name, to recover the balance when ascertained. *Loftin v. Lyon & Baker*, 22 Ala. 540.

138. When a policy of insurance is assigned after a loss has accrued, although it contains the usual stipulation against assignment, the assignee may maintain an action on it in his own name. *Perry v. Merchants' Insurance Co.*, 25 Ala. 355.

139. The assignee of a note or bond, secured by mortgage, may use the name of the mortgagee, to enforce the mortgage at law; but, if the mortgage itself is assigned in proper form, the assignee must proceed in his own name to enforce it. *Graham & Rogers v. Newman*, 21 Ala. 497.

140. If the mortgage is of land, a deed is necessary to convey the legal title to the assignee, either on a separate paper, or endorsed on the mortgage with suitable words of conveyance; but, if of a personal chattel, the legal title will pass by the mortgagee's assignment, endorsed on the mortgage itself, of "all right, title and interest, in and to the within mortgage." *Ib.*

141. The transfer of a judgment, upon condition that the transferree "was to pay for it he could make anything out of it," does not constitute him "the party really interested in it," (Code, § 2765,) nor enable him to sue on it, in his own name, before a magistrate. *Pike v. Bright*, 29 Ala. 332.

(*b*) Executors and Administrators.

142. The administrator of a deceased obligee is the proper party to sue for the breach of a bond for titles which accrued in the lifetime of the intestate. *Allen v. Greene*, 19 Ala. 34.

143. When judgment is rendered against two joint executors, on a bond executed by their testator as surety for another, and one of them pays off this judgment, an action against the principal, for the recovery of the money so paid, can only be maintained in the joint names of the two executors in their representative capacity. *Martin v. Nall*, 22 Ala. 610.

144. An administratrix may maintain detinue, in her individual name, to recover a slave belonging to the estate, of which she has been wrongfully dispossessed. *Walker v. Lauderdale*, 17 Ala. 359.

145. In trover, an administrator may declare on his own prior possession in his representative character, although he has never had possession. *Wyatt's Adm'r v. Rambo*, 29 Ala. 510.

146. If an executor or administrator make an unauthorized loan of the money or choses in action belonging to the estate, he may sue on the contract in his own name individually, notwithstanding his resignation or removal, unless he has been discharged from the liability thus incurred. *Tomkies v. Reynolds*, 17 Ala. 109.

147. An administrator *de bonis non* may recover, at law, assets which were fraudulently and without consideration disposed of by his predecessor, if they can be identified. *Swink's Adm'r v. Snodgrass*, 17 Ala. 653.

148. The administrator of an estate which has been declared insolvent cannot maintain ejectment. *Long v. McDougald's Adm'r*, 23 Ala. 413.

149. But the administrator of a solvent estate may. *Golding v. Golding's Adm'r*, 24 Ala. 122.

150. Where a testator does not devise his real estate *to* his executors, nor *to* any other person, and does not dispose of the rents and profits accruing after his death, the executors may maintain trespass for the lands, provided they have not exercised the power of sale conferred on them by the will, and the estate is solvent. *Patton v. Crow*, 26 Ala. 426.

151. An action does not lie against an administrator *de bonis non*, in his representative character, to recover money paid by the administrator in chief, through mistake, to his successor in the administration. *Weeks v. Love*, 19 Ala. 25.

152. Nor to recover money received by him from his predecessor, arising from the sale of property belonging to the estate which was exempt from sale. *Godbold v. Roberts*, 20 Ala. 354.

153. A conversion by an administrator will not authorize a recovery against him in his representative character. *Shorter v. Urquhart*, 28 Ala. 360.

(*c*) Husband and Wife.

154. A married woman cannot sue, at law, by her next friend. *Jordan v. Gray*, 19 Ala. 618.

155. At common law, the wife could not be joined with her husband, in an action on a promissory note executed by her during coverture. *Henry and Wife v. Hickman*, 22 Ala. 685.

156. Nor could she be joined, where the action was founded on a note executed by her and her husband jointly

during coverture. *Gibson v. Marquis and Wife*, 29 Ala. 668.

157. In detinue for a slave belonging to the wife, husband and wife must join, where the unlawful taking and detention occurred before the marriage. *Mitchell v. Cowsert and Wife*, 20 Ala. 186.

158. They may join, under the Code, as at common law, to recover on a promise made to the wife for services rendered by her during coverture. *Jordan's Adm'r v. Hubbard and Wife*, 26 Ala. 433.

159. If the husband dies before suit brought, the right of action for articles of family supply, under the "married woman's law" of 1850, survives against the wife. *Cunningham v. Fontaine*, 25 Ala. 644.

160. If a vested remainder in a slave is bequeathed to an unmarried woman, who marries after the slave has gone into the possession of the first taker with the executor's consent, her husband may, after the termination of the life estate, maintain detinue in his own name, without joining the wife, against a purchaser from the first taker. *Gibson v. Land*, 27 Ala. 117.

161. If a vested remainder in slaves is bequeathed to a married woman and others, as tenants in common, she cannot join with her husband and the other co-tenants, in an action of detinue for the slaves, after the termination of the life estate. *Walker v. Fenner*, 28 Ala. 367.

162. Where property is given or bequeathed to a married woman, during coverture, to her sole and separate use, and no trustee is appointed for her, the husband alone has the right of action, after he has reduced the property to possession. *Gerald and Wife v. McKenzie*, 27 Ala. 166; *Friend v. Oliver*, 27 Ala. 532; *Pickens and Wife v. Oliver*, 29 Ala. 528.

163. Section 2131 of the Code, respecting suits by and against husband and wife, applies only to separate estates created by law. *Ib.*

164. Under this statute, the wife must sue and be sued alone, where the suit is for the *corpus* of her separate property, or for damages to the property itself, as distinguished from its use; and where the rents, income and profits of the property are the mere incident of a suit for the property itself, and not the foundation of the suit, she may recover them. *Pickens and Wife v. Oliver*, 29 Ala. 528.

165. Where her separate estate is created by statute, but the rents, income and profits thereof are the foundation of the suit, the husband must sue alone. *Ib.*

166. Husband and wife must be joined, either as plaintiffs or defendants, in suits not relating to her separate estate created by statute, where the marriage took place before the 1st March, 1848, and the object of the suit is to reduce to possession some chose in action of which the husband has never had possession; or where the separate estate is created by contract, which contract appoints no trustee, and the husband has never reduced the property to possession; or where it was necessary, at common law, on account of her interest, that the wife should be joined. *Ib.*

167. The wife cannot be joined with her husband, in an action on a promissory note executed by them jointly during coverture. *Gibson v. Marquis and Wife*, 29 Ala. 668.

168. The wife cannot interpose a claim, in her own name, to try the right of property in a slave, which was purchased by the husband in his own name, with money arising from the sale of property secured to the wife by ante-nuptial contract; and this, notwithstanding the husband delivered the slave to her, and recognized it as hers. *Irons v. Reynolds*, 28 Ala. 305.

169. But, if the husband purchases a slave with money belonging to his wife's separate estate secured by law, other than the income or profits thereof, and voluntarily conveys it to her, though for the purpose of preventing his creditors from subjecting it to his debts, the wife may interpose a claim in her own name. *Wilson v. Sheppard*, 28 Ala. 623.

(*d*) Infants.

170. An infant may sue by his next friend, even when he has a regularly appointed guardian. *Hooks v. Smith*, 18 Ala. 338.

171. A guardian cannot maintain case or trover against the hirer of

a slave belonging to his ward, although the contract of hiring was made with him: the action should be in the name of the ward. *Ib.*

(*e*) Joint Tenants, and Tenants in Common.

172. Where there has been a conversion of the entire property belonging to several tenants in common, and the wrong-doer has received the proceeds of sale in money, each may waive the tort, and sue separately for his portion of the money. *Smyth v. Tankersley*, 20 Ala. 212; *Smith's Executors v. Wiley*, 22 Ala. 396.

173. Or they may join. *Tankersley v. Childers*, 23 Ala. 781; *Price v. Pickett*, 21 Ala. 741.

174. A surviving tenant in common may join with the executor of his deceased co-tenant in trespass *qu. cl. fr. Patton v. Crow*, 26 Ala. 426.

175. Tenants in common may maintain separate actions of trespass to try titles, for their respective interests in the land. *Hines and Wife v. Trantham*, 27 Ala. 359.

176. Joint tenants and tenants in common must join in detinue. *Parsons v. Boyd*, 20 Ala. 112.

(*f*) Principal and Agent.

177. An agent, who places notes belonging to his principal in the hands of an attorney for collection, and takes a receipt to himself, may maintain an action for the proceeds, when collected, in his own name. *Moore & Jones v. Davidson*, 18 Ala. 232.

178. If an agent lends his principal's money without authority, and takes a promissory note for it, payable to himself as agent, he may maintain an action on the note in his own name, unless it is shown that he has been in some way discharged from the liability thus incurred. *Bryan v. Wilson*, 27 Ala. 208.

179. Warehouse-men may maintain assumpsit, for cotton "shipped by them as warehouse-men only," and not delivered to the consignees; provided, the contract was made with them personally. *Fry v. Carter & Howell*, 25 Ala. 479.

180. A common carrier, as he is not absolved from liability to the owner of the goods entrusted to his care by the torts of third persons, may maintain an action for the wrong. *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189.

(*g*.) Other Cases.

181. The heir of a deceased obligee cannot sue in his own name for the breach of a title-bond, whether accruing before or after the death of his ancestor, when the bond shows on its face that the title is in a third person, and the obligor never procures a conveyance either to himself or to the obligee. *Allen v. Greene*, 19 Ala. 34.

182. An action on a sheriff's official bond, payable to the governor for the time being and his successors in office, cannot be maintained in the name of the governor individually. *Bagby v. Baker*, 18 Ala. 653; *Chapman v. Spence*, 22 Ala. 588.

183. An action of debt cannot be maintained, on a bond payable to the governor for the time being and his successors, in the name of the obligee officially, after he has gone out of office, unless brought for the use of a third person. *Chaudron v. Fitzpatrick*, 19 Ala. 649.

184. Where the official bond of a county treasurer is defective as a statutory bond, but good as a common-law bond, an action on it can only be maintained in the name of the obligee. *Wilson v. Cantrell*, 19 Ala. 642.

185. Debt lies on an administration bond, at the suit of a party injured, either in his own name, or in the name of the obligee for his use. *Amason v. Nash*, 24 Ala. 279.

186. When a sheriff sells lands under execution, and, without receiving the purchase-money, executes a deed to the purchaser, he is liable to the plaintiff, but not to the defendant in execution, for failing to collect the money. *Moore v. Barclay*, 18 Ala. 672.

187. If the sheriff retains more than his lawful fees, out of money collected under execution, when the whole amount collected is not more than enough to satisfy the debt and lawful costs, he is liable to the plaintiff, but not to the defendant, for the excess. *Chenault's Adm'rs v. Walker*, 22 Ala. 275.

2. *Effect of Non-joinder and Misjoinder.*

188. A demurrer lies to a declaration, which shows on its face that the plaintiff, who sues by her next friend, is a *feme covert*. *Jordan v. Gray*, 19 Ala. 618.

189. And to a declaration which shows that the wife is improperly joined as a defendant with her husband. *Henry and Wife v. Hickman*, 22 Ala. 685; *Gibson v. Marquis and Wife*, 29 Ala. 668.

190. If a demurrer is interposed by the wife, in such case, she should be discharged from the action; but the plaintiff should be allowed to proceed against the husband. *Gibson v. Marquis and Wife*, 29 Ala. 668; *Hall v. Cannte and Wife*, 22 Ala. 650.

191. In detinue, the non-joinder of proper parties plaintiff is fatal to the action. *Price v. Talley's Adm'rs*, 18 Ala. 21; *Parsons v. Boyd*, 20 Ala. 112; *Frierson v. Frierson*, 21 Ala. 549.

192. So is a misjoinder of plaintiffs. *Walker v. Fenner*, 28 Ala. 367.

193. In an action on a contract which is joint but not several, the non-joinder of other defendants can only be taken advantage of by plea in abatement. *Henderson v. Hammond*, 19 Ala. 340; *Boswell v. Morton*, 20 Ala. 235.

194. When a motion for a summary judgment is made against a surety for costs, who is bound jointly with another, but not severally, if he does not interpose any objection in the primary court on account of the non-joinder of his co-surety, he will be held to have waived it. *Boswell v. Morton*, 20 Ala. 235.

195. In trespass *qu. cl. fr.*, a misjoinder of plaintiffs will defeat a recovery. *Patton v. Crow*, 26 Ala. 426.

196. In trover by several plaintiffs, one of whom is a feme sole, and who marries pending the suit, the failure to bring in her husband as a party is only available (if at all) on plea in abatement. *Powell v. Glenn*, 21 Ala. 458.

197. In an action to recover damages for causing an attachment against a third person to be levied on plaintiff's goods, a plea in abatement of the non-joinder of the defendant in attachment, alleging that the goods belonged to him and plaintiff jointly as partners, is demurrable. *Roberts v. Heim*, 27 Ala. 678.

198. In trespass to try titles, the death of one of several co-plaintiffs, before suit brought, defeats the entire action, and may be pleaded either in abatement or in bar. *Crump v. Wallace*, 27 Ala. 277.

IV. PLEAS.

1. *General Requisites.*

199. A plea which does not constitute a defense to the extent to which it professes to go, is demurrable. *Doe d. Kennedy v. Holman & Howard*, 19 Ala. 734; *Bryan v. Wilson*, 27 Ala. 208; *Wittick v. Traun*, 27 Ala. 562; *Gibson v. Marquis and Wife*, 29 Ala. 668; *Tomkies v. Reynolds*, 17 Ala. 109; *Nesbitt v. McGehee*, 26 Ala. 748.

200. A plea which states legal conclusions, instead of facts, is demurrable. *Stewart & Fontaine v. Hargrove*, 23 Ala. 429; *Reid v. Nash*, 23 Ala. 733; *Savage & Darrington v. Walshe & Emanuel*, 26 Ala. 619.

201. An averment, in general terms, that a bankrupt failed to file a full schedule of his notes and accounts, not specifying those which were omitted, is but the statement of a legal conclusion. *Stewart & Fontaine v. Hargrove*, 23 Ala. 429.

202. So is an averment that he made a fraudulent conveyance of his property, not stating the person to whom the conveyance was made, or the property conveyed. *Ib.*

203. So is an averment that the corporate existence of a bank was not dissolved. *Savage & Darrington v. Walshe & Emanuel*, 26 Ala. 619.

204. And an averment that certain trustees "were not invested with the legal ownership and control of said note, and did not make a legal transfer and endorsement of the same to the plaintiffs." *Ib.*

205. And an averment that a certain bank, "at the date of said note, had no power or authority to make a contract, and that said note is null and void." *Ib.*

206. And an averment that a judgment against an administrator was not a proper debt or charge against his intestate, nor against the adminis-

trator as such. *Reid v. Nash*, 23 Ala. 733.

207. And an averment, in the return to an alternative writ of *mandamus* against the commissioners' court, to compel the levy and collection of a county tax for the benefit of the relator, that said court had paid over to the relator, out of taxes levied and collected, the full amount for which the county is or ought to be responsible. *Comm'rs Court of Tallapoosa Co. v. Turver*, 21 Ala. 661.

208. And an averment, in such return, that said court had never refused to levy and collect taxes, for the benefit of the relator, upon a proper application and proof of his demand; and that he has neglected and refused to present his demand, properly and legally proved. *Ib.*

209. In the return to an alternative *mandamus*, the facts must be pleaded with such a degree of certainty as will enable the court to decide whether they are sufficient, in law, to justify the party's failure to do the act. *Ib.*

2. *Pleas to Jurisdiction.*

210. A plea to the jurisdiction, when pleaded in a court of general jurisdiction, must point out what other court has jurisdiction, and conclude with the prayer, "whether the court will or ought to take further cognizance of the plea aforesaid." *Fields v. Walker*, 23 Ala. 155.

As to pleas to the jurisdiction of the magistrate, in appeal cases, see JUSTICE OF THE PEACE, 41–44, p. 678.

3. *Pleas in Abatement.*

(*a*) Defect in Writ or Service.

211. When an attachment is issued without the statutory bond and affidavit, it can only be abated on plea. *Kirkman & Rosser v. Patton*, 19 Ala. 32.

212. A variance between the attachment and the bond and affidavit, if available at all to the defendant, must be pleaded in abatement; and the plea must crave oyer of them. *Goldsticker v. Stetson & Co.*, 21 Ala. 404.

213. A plea in abatement, for a defect in the writ, must set it out on oyer. *Garner & Nevill v. Johnson*, 22 Ala. 494.

214. When a judicial attachment is issued against a defendant, on the ground that he avoids the service of process, he cannot by plea in abatement contest the ground on which the writ was issued. *Ib.*

215. In an action against husband and wife, two writs having been issued, but only one served on each defendant in different counties, the want of an endorsement on the writs, showing that they were intended as branch writs in one case, must be pleaded in abatement. *Johnson and Wife v. King*, 20 Ala. 270.

216. A defective service of process should be pleaded in abatement, or the service should be set aside on motion. *Moore v. Fiquett*, 19 Ala. 236; *Dew v. Cunningham*, 28 Ala. 466.

(*b*) Misnomer.

217. When a party is declared against by the name of *Humphreys*, it is good matter in abatement that his true name is *Humphrey*. *Humphrey v. Whitten*, 17 Ala. 30.

218. The variance between the names *Edmundson* and *Edmindson* is too imperceptible to support a plea in abatement. *Edmundson v. The State*, 17 Ala. 179.

219. The insertion or omission of the initial letter of a middle name is not good matter in abatement, since the law knows but one christian name. *Ib.*

(*c*) Non-joinder of Parties.

220. If two persons are bound jointly, but not severally, and one alone is sued, he can only take advantage of the non-joinder of the other by plea in abatement. *Henderson v. Hammond*, 19 Ala. 340; *Boswell v. Morton*, 20 Ala. 235.

221. In an action to recover damages for the defendant's wrongful act in causing an attachment against a third person to be levied on plaintiff's goods, the non-joinder of the defendant in attachment, who is alleged to be a joint owner of the goods with plaintiff, is not good matter in abatement. *Roberts v. Heim*, 27 Ala. 678.

(*d*) Pendency of Former Action.

222. The pendency of another suit, in a court which has no jurisdiction, is not sufficient to abate an action in a court which has rightful jurisdiction. *Rood v. Eslava*, 17 Ala. 430.

223. In trespass to try titles, the pendency of another action between the parties, for the same premises, is not good matter in abatement. *Hall and Wife v. Wallace*, 25 Ala. 438.

224. In a real action under the Code, in the nature of an action of ejectment, the pendency of another action for the same land, brought by the plaintiff and others, is not good matter in abatement. *Hall v. Holcombe*, 26 Ala. 720.

225. The pendency of another action between the same parties, is good matter in abatement only, and, when pleaded with pleas in bar, should be stricken out on motion; but, if the plaintiff demurs to it, the overruling of his demurrer (even if erroneous) is not available on error, when the record shows that he afterwards recovered judgment on the issues joined. *Holley v. Younge*, 27 Ala. 204.

(*e*) Other Matters.

226. The act of 1807, abolishing special demurrers, does not apply to pleas in abatement. *Humphrey v. Whitten*, 17 Ala. 30.

227. A plea in abatement, setting up new matter, must conclude with a verification. *Ib.*

228. Duplicity, in a plea in abatement, is fatal on general demurrer. *Garner & Nevill v. Johnson*, 22 Ala. 494.

229. A plea in abatement, in trespass, defending "the *wrong* and injury," instead of "the *force* and injury," is bad on demurrer. *Townsend v. Jeffries' Adm'r*, 24 Ala. 329.

230. A plea in abatement, concluding in bar, is demurrable. *Goldsticker v. Stetson & Co.*, 21 Ala. 404.

231. Pleas in abatement are not viewed with favor, and are construed most strongly against the pleader: the rule requires that every inference, however slight, should be repelled. *Roberts v. Heim*, 27 Ala. 678.

232. A variance between the writ and declaration is only available in abatement. *Summerlin v. Dowdle*, 24 Ala. 428.

233. But, where the declaration shows a total departure from the writ, a plea in abatement is not necessary, since the declaration will be stricken from the files on motion. *Chapman v. Spence*, 22 Ala. 588; *Otis v. Thorn*, 18 Ala. 395.

234. But, to authorize the court to reject a declaration on that account, the variance must be total and radical. *Morrison v. Taylor*, 21 Ala. 779; *Smith v. Wiley*, 19 Ala. 216.

235. A plea in abatement, of matters *de hors* the record, must be verified by affidavit. *Hall and Wife v. Wallace*, 25 Ala. 438.

236. Matter amounting to *res adjudicata* is not good in abatement. *Fields v. Walker*, 23 Ala. 155.

237. When process of garnishment is sued out against a firm, but the individual names of the partners are nowhere stated, the defect is available on error, after judgment by default, without being pleaded in abatement. *Reid & Co. v. McLeod*, 20 Ala. 576.

238. In trespass to try titles, the death of one of several co-plaintiffs, before suit brought, is good matter either in abatement or in bar. *Crump v. Wallace*, 27 Ala. 277.

As to pleas in abatement in appeal cases, see JUSTICE OF THE PEACE, 41–44, p. 678.

4. *Pleas in Bar.*

(*a*) General Issue.

239. Under the general issue in assumpsit, the defendant may show a contract different from that declared on. *Loughridge v. Thompson*, 20 Ala. 828.

240. The non-joinder of other necessary parties defendant is not available under the general issue in assumpsit. *Henderson v. Hammond*, 19 Ala. 340.

241. In assumpsit by the endorsee of a promissory note, the fact that plaintiff is not the owner of the note is not a good defense under the general issue. *Agee & Agee v. Medlock*, 25 Ala. 281.

242. In debt on a foreign judgment,

when the record does not show that the court had jurisdiction of the defendant's person, he may show the want of jurisdiction under the general issue. *Foster v. Glazener*, 27 Ala. 391.

243. In detinue, adverse possession for the length of time prescribed as a bar by the statute of limitations may be given in evidence under the general issue. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

244. In slander for words spoken, imputing to a woman a want of chastity, the general issue does not traverse the allegation of the plaintiff's chastity and good repute, except so far as to allow the defendant to adduce evidence of a want of chastity in mitigation of damages. *Sidgreaves v. Myatt*, 22 Ala. 617.

245. Under the general issue in slander, the defendant may adduce evidence of the plaintiff's general bad character, although the plea of justification is also interposed. *Pope v. Welsh's Adm'r*, 18 Ala. 631.

246. In trespass *vi et armis*, for an assault and battery, the misconduct of the plaintiff, in provoking the assault, and entering willingly into the fight, when it does not amount to an assault in law, is no defense under the general issue, unless the defendant himself was wholly free from fault. *Phillips v. Kelly*, 29 Ala, 628.

247. An agreement, entered into after defendant had commenced a prosecution against plaintiff for an assault and battery, but before the return of the warrant, to the effect "that the parties would mutually drop the matter, and be friends, and never do or say anything more in relation thereto; and that defendant would abandon the prosecution, and plaintiff would pay the costs,"—is no defense in such action, under the general issue. *Ib.*

248. In an action for the recovery of lands, (Code, § 2213,) the plea of not guilty is equivalent to the consent rule in ejectment, and is an admission of the defendant's possession at the commencement of the suit. *King v. Kent's Heirs*, 29 Ala. 542.

(*b*) Former Recovery.

249. A recovery in trespass, for the taking of goods of which plaintiff was possessed as trustee, is a bar to a subsequent action for the taking of other goods, at the same time and place, of which he was possessed in his own right. *O'Neal v. Brown*, 21 Ala. 482.

250. A recovery for the hire of a horse, buggy and harness, is no bar to a subsequent action for damages on account of injuries done to the buggy and harness while in the defendant's possession. *Shaw v. Beers*, 25 Ala. 449.

251. In detinue, a plea of a former recovery is nothing more, in effect, than an averment of title in the defendant on a specified day before the commencement of the suit: it is, therefore, demurrable. *Wittick v. Traun*, 25 Ala. 317; *Patton v. Hamner*, 28 Ala. 618.

252. In detinue for a slave, a plea to the further maintenance of the suit, setting up a recovery in an action of assumpsit for the hire of the slave, is fatally defective on demurrer, unless it shows that the question of ownership, down to the commencement of the detinue suit, actually arose and was determined in favor of the plaintiff in the action of assumpsit. *Chamberlain v. Gaillard*, 26 Ala. 504.

253. A recovery in detinue is a bar to a subsequent action of trover, on the same title, by one who is shown by parol to have been the real defendant in the detinue suit; but not as to a title subsequently acquired from one who was neither a party nor privy to that action. *Tarleton & Pollard v. Johnson*, 25 Ala. 300.

254. A recovery by a common carrier, for injuries done to goods in his possession, is a bar to a subsequent action by the owner of the goods, for damages resulting from the same injury. *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189.

255. In an action by the owner of lost or damaged goods, against the owners of a steamboat which caused the loss or damage by running into a flat-boat on which the goods were, a plea of former recovery by the owner of the flat-boat, for "the same injuries in the plaintiff's declaration alleged to have been done to the goods of the said plaintiff," is demurrable, because *non constat* that the recovery

was not for damages done to the goods of some other person which were on the flat-boat at the same time. *Ib.*

256. A recovery in trover, without satisfaction, is no bar to a subsequent action of the same kind, against one who claims under the defendant. *Spivey v. Morris*, 18 Ala. 254.

257. A recovery in trover for the conversion of a hired slave, with satisfaction thereof, is a bar to a subsequent action to recover hire for the unexpired portion of the term, when damages were assessed for the slave's value at the time of the conversion. *Smith v. Hooks*, 19 Ala. 101.

258. *Semble*, that a recovery of hire for the entire term, with knowledge of the conversion during the term, is a bar to a subsequent action of trover for the conversion. *Moseley v. Wilkinson*, 24 Ala. 411.

259. A mere recovery in trespass, without satisfaction, is no bar to another action against a co-trespasser. *Blann v. Crocheron*, 19 Ala. 647; *S. C.*, 20 Ala. 320.

260. The adverse decision of the court, on motion to have certain moneys in the hands of the sheriff appropriated to the satisfaction of plaintiff's judgment, is a bar to a subsequent action of assumpsit against the sheriff for the money. *Langdon v. Raiford*, 20 Ala. 532.

261. The recovery of a judgment in trespass against a constable, for levying on and selling property under execution, is no bar to a motion to set aside the sale. *Staunton v. Simmons & Simmons*, 20 Ala. 243.

262. The recovery of a judgment in assumpsit, against the secretary of an incorporated company, for the amount of his defalcations to the company, is no bar to a subsequent action against the sureties on his official bond. *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

263. But, if the company summons, by process of garnishment, a transferree of the embezzled notes and bills, takes judgment against him for the amount admitted to be due on that account, and coerces satisfaction of the judgment, this will bar a subsequent action of trover against such transferree. *Firemen's Insurance Co. v. Cochran & Co.*, 27 Ala. 228.

264. A recovery in trespass to try titles, with satisfaction thereof, is a bar to a subsequent action for the rents which had accrued up to the time of the verdict. *Shumake v. Nelms' Adm'r*, 25 Ala. 126.

265. A decree in chancery, foreclosing a mortgage on a slave, is no bar to a subsequent action of assumpsit for the hire, against one who had possession under a contract with the mortgagor, to which the mortgagee assented, and who, though a party to the foreclosure suit, did not account for the hire in that suit. *Hutchinson v. Dearing*, 20 Ala. 798.

(*c*) *Non Est Factum.*

266. A plea in bar, denying the genuineness of an endorsement of a note, is required by statute to be verified by affidavit. *Agee & Agee v. Medlock*, 25 Ala. 281; *Savage & Darrington v. Walshe & Emanuel*, 26 Ala. 619.

267. A plea, averring that plaintiff, at the commencement of the suit, was not the legal owner of the note sued on, only puts in issue the genuineness of the endorsement, and must be verified by affidavit. *Agee & Agee v. Medlock*, 25 Ala. 281.

268. A special plea, averring facts which only amount to a denial of the execution of the sued on in such a manner as to make it binding on the defendant, must be verified by affidavit. *Bryan v. Wilson*, 27 Ala. 208.

269. A special plea of *non est factum*, averring that the instrument was delivered as an escrow, must allege to whom the delivery was made. *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

(*d*) Performance.

270. In debt on bond, assigning special breaches, performance generally is not a good plea. *Reid v. Nash*, 23 Ala. 733.

271. When a covenant or contract is materially varied by a subsequent valid covenant or contract, and the declaration sets up both contracts, alleging an appropriate breach, a plea of performance of the obligations imposed by the original contract, not noticing the additional obligations

created by the second contract, is demurrable. *Nesbitt v. McGehee*, 26 Ala. 748.

(*e*) Other Matters.

272. It is not necessary, in a plea in bar, to state facts with such a degree of certainty as to preclude a conclusion to the contrary: it is sufficient if, *prima facie*, it shows a bar to the plaintiff's action, and any fact in avoidance should be replied. *Roland v. Logan*, 18 Ala. 307.

273. The consideration of a note may be impeached without a sworn plea. *Holt v. Robinson*, 21 Ala. 106.

274. In an action on a bond, conditioned to make title free from all incumbrances, it is a good plea in bar, that the vendor conveyed by deed to the purchaser the fee-simple title to the land, free from all incumbrances, and that the purchaser accepted it. *Johnson and Wife v. Collins*, 17 Ala. 318.

275. In debt on bond, assigning special breaches, *nil debet* is not a good plea. *Reid v. Nash*, 23 Ala. 733.

276. In debt on bond, *nil debet* is not a good plea; but, if the plaintiff takes issue upon it, he cannot afterwards avail himself of the irregularity. *Moore v. Leseur and Wife*, 18 Ala. 606.

277. In an action against husband and wife, founded on a judgment rendered against the wife as administratrix, and suggesting a *devastavit*, it is not a good plea in bar, that the defendants intermarried before the rendition of the judgment. *Bobe v. Frowner and Wife*, 18 Ala. 89.

278. When a sheriff justifies under mesne process, after the time appointed for its return, he must either aver its return, or show some legal excuse for the failure to return it. *Kirksey v. Dubose*, 19 Ala. 43.

279. In assumpsit on the common counts, a plea of the statute of limitations of three years, must aver that the plaintiff's demand is an open account. *Brooks v. McFarland*, 20 Ala. 483.

280. In debt on a prison-bounds bond, assigning breaches, it is a good plea in bar by the sureties, that the prisoner surrendered himself to the jailor, within sixty days from the date of the bond, without having committed an escape in the meantime. *Harlan v. Thompson*, 20 Ala. 94.

281. A plea of tender, which shows on its face that the sum tendered was less than the amount due, is demurrable. *Smith v. Anders*, 21 Ala. 782.

282. A plea of tender after suit brought must aver that the sum tendered was the full amount due, with interest thereon, and costs of suit. *Ib.*

283. At common law, a plea of tender after suit brought was no bar to the action; but the defendant might obtain leave to bring the money into court, together with the costs accruing up to the time of bringing it in, and thus protect himself from liability for costs which might subsequently accrue; but the payment by defendant of costs accruing up to the time of the tender, aid the payment of the sum due to the plaintiff in court on the trial, do not discharge him from liability for costs accruing after the tender. *Raiford v. Governor*, 29 Ala. 382.

284. In an action on an injunction bond, where the matters in controversy in the injunction suit were submitted to arbitration, and the arbitrators awarded that certain acts should be done by the parties concurrently, a plea in bar, setting up the submission and award, must aver performance by the pleader, or a readiness and offer to perform. *Jesse v. Cater*, 25 Ala. 351.

285. Or a good and legal excuse for the omission to do either. *S. C.*, 28 Ala. 475.

286. In debt on a foreign judgment, where the record shows that the court had jurisdiction of the defendant's person, a plea in bar, averring that he was without the jurisdiction and had no notice, must also allege that he did not appear to the action, either in person or by attorney; but this rule only applies where the record shows such jurisdiction. *Foster v. Glazener*, 27 Ala. 391.

287. In an action by the payee against the makers of a promissory note, a plea in bar, averring that the plaintiff was not the party really interested in the note, was bad on demurrer, prior to the adoption of the Code, because the action was then

required to be brought in the name of the party having the legal interest; but, since the Code (§ 2129) requires the action to be brought in the name of the party really interested, such a plea is now good. *Bryan v. Wilson*, 27 Ala. 208.

288. In an action brought by an administrator in his official character, a plea in bar, alleging facts which show that his letters are void for want of jurisdiction in the court by which they were issued, is good. *Miller v. Jones' Adm'r*, 26 Ala. 247.

289. When a suit is revived, without notice to the defendant, in the name of the plaintiff's personal representative, on his death pending the suit, the defendant may plead in bar that the plaintiff has no right to maintain the action in his representative character. *Newman v. Pryor*, 18 Ala. 186.

290. On the death of the defendant, in an action commenced against him by attachment as a non-resident, his foreign personal representative may contest the plaintiff's right to revive the action against him, by pleading *ne unques executor*, &c. *Branch Bank at Mobile v. McDonald*, 22 Ala. 474.

291. In debt on an administration bond, *plene administravit* is a good plea as to the sureties. *Amason v. Nash*, 24 Ala. 279.

292. Such plea must allege that the assets were fully administered before suit brought. *Reid v. Nash*, 23 Ala. 733.

293. A plea in bar, in such action, averring that the intestate's estate has been duly declared insolvent and is in progress of settlement as such, is demurrable. *Ib.*

294. So is a plea, containing the additional averment that plaintiff failed to present his demand, as a claim against the estate, within six months after the declaration of insolvency. *Ib.*

295. Bankruptcy is a good plea to *sci. fa.* on a judgment. *Duncan v. Hargrove*, 22 Ala. 150.

296. Where the judgment sought to be revived is alleged to have been affirmed on error in the supreme court, a plea, denying the rendition of the judgment in the primary court, is demurrable as a plea of *nul tiel record*. *Ib.*

297. The court is not authorized to reject a plea containing matter good in substance, even though it be improperly pleaded. *Stewart & Fontaine v. Hargrove*, 23 Ala. 429.

5. *Pleas Puis Darrein Continuance.*

298. In detinue for a slave, a plea, alleging his death since the last continuance, is demurrable. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

299. In ejectment, a plea, setting up a recovery by a stranger since the last continuance, is no bar to a recovery of either the land or damages. *Doe d. Kennedy v. Holman & Howard*, 19 Ala. 734.

300. A plea, averring a submission and award, must set them out, either substantially, or *in hæc verba*. *Henry v. Porter*, 29 Ala. 619.

6. *Pleading "in Short by Consent."*

301. Consent to "plead in short" dispenses only with formal matters, and not with matters of substance: if a plea is thus pleaded by name, all material averments will be considered as made; but, if the plea is partly drawn out, the want of a material averment is fatal. *Reid v. Nash*, 23 Ala. 733.

302. In assumpsit on the common counts, a plea of the statute of limitations of three years, though pleaded "in short by consent," must aver that the plaintiff's demand is an open account. *Brooks v. McFarland*, 20 Ala. 483.

303. When bankruptcy is pleaded, "in short by consent," to *sci. fa.* on a judgment, the appellate court will presume that it was well pleaded. *Duncan v. Hargrove*, 22 Ala. 150.

304. In debt on an administration bond, "jointly and severally defendants plead fully administered;" to which there was a demurrer, "in short by consent." *Held*, that the plea was equivalent to a joint and several plea of *plene administravit*. *Amason v. Nash*, 24 Ala. 279.

7. *Right to Plead Several Matters.*

305. The act of 1807, (Clay's Digest, 332, § 109.) conferring on the defendant the right to plead "as many mat-

ters as he may judge necessary to his defense," applies to proceedings by *mandamus*, as well as to other causes at law. *Comm'rs' Court of Tallapoosa Co. v. Tarver*, 21 Ala. 661.

306. In view of this statutory right, when inconsistent pleas are pleaded, the defendant may adduce evidence under one which would not be admissible under the other, if pleaded alone; nor can either be regarded, as it might if standing alone, as an admission of facts denied by the other. *Pope v. Welsh's Adm'r*, 18 Ala. 631; *Wright v. Lindsay*, 20 Ala. 428; *Clements v. Cribb & Covington*, 19 Ala. 241.

V. REPLICATION.

307. When a plea in bar is *prima facie* sufficiently certain, although the facts are not stated with such a degree of certainty as to preclude a conclusion to the contrary, facts in avoidance of the bar, not apparent in the plea or declaration, should be replied. *Roland v. Logan*, 18 Ala. 307.

308. The act of 1846, allowing several replications to certain specified pleas, applies to a plea setting up a foreign statute of limitations. *Thomason v. Odum*, 23 Ala. 480.

309. When several replications are filed to pleas which are not embraced in this statute, the defendant may either demur generally, or call on the plaintiff to elect which one he will retain, and move the court to strike out the others. *Duncan v. Hargrove*, 22 Ala. 150; *Thomason v. Odum*, 23 Ala. 480.

310. When the defendant takes issue upon a defective replication, instead of demurring to it, he cannot test its legal sufficiency by a motion to exclude evidence which tends to establish it. *Coster v. Brack*, 19 Ala. 210.

311. Nor can he take advantage of the defect by a request for instructions to the jury. *Nunn v. Mills*, 28 Ala. 600.

VI. SURPLUSAGE.

312. In debt on bond, surplusage in the assignment of a breach cannot be reached by general demurrer. *Garnett v. Yoe*, 17 Ala. 74.

313. In an action for a breach of contract, if the declaration assigns a sufficient breach, and shows a good cause of action, unnecessary averments, which are added by way of inducing special damages, are mere surplusage, and furnish no ground of demurrer. *Montgomery Manufacturimg Co. v. Thomas*, 20 Ala. 473; *Nave v. Berry*, 22 Ala. 382.

314. In an action on the case, to recover damages for the loss of a slave, who was killed while working on the defendant's house, if the declaration alleges that the defendant fraudulently concealed the dangerous condition of the house, and also that he fraudulently represented it to be safe, the latter averment may be struck out as surplusage. *Perry v. Marsh*, 25 Ala. 659.

315. If the defendant's concealment of the danger amounts to such a breach of duty as will support the action, an additional averment of fraudulent intent may be treated as surplusage. *Ib.*

316. In case against the hirer of a slave, for negligence, the consideration and terms of the contract, if alleged, are mere surplusage. *Moseley v. Wilkinson*, 24 Ala. 411.

317. But unnecessary averments, when descriptive of the cause of action, cannot be disregarded. *Smith v. Causey*, 28 Ala. 655.

As to words which are mere *descriptio personæ*, *vide supra*, 1–6.

VII. VARIANCE.

318. A writ in the name of "Reuben Chapman, governor &c.," will not support a declaration in the name of "Reuben Chapman, governor of the State of Alabama"; and the fact that the suit is brought for the use of a third person, makes no difference. *Chapman v. Spence*, 22 Ala. 588.

319. In detinue, if the plaintiff describes himself as suing "as trustee for his wife," but avers in his declaration that he was "possessed as of his own property," while the endorsement on the writ describes the property as belonging to the wife's separate estate, there is no variance of which the defendant can take advantage. *Gibson v. Land*, 27 Ala. 117.

320. A variance between the writ of attachment and the bond and affi-

davit, if available at all to the defendant, must be taken by plea in abatement; and the plea must set them out on oyer. *Goldsticker v. Stetson & Co.*, 21 Ala. 404.

321. After judgment by *nil dicit*, a variance between the writ and declaration is not available on error. *Summerlin v. Dowdle*, 24 Ala. 428.

322. Where the declaration shows a total departure from the writ, it may be struck from the files on motion, without a plea in abatement. *Otis v. Thorn*, 18 Ala. 395; *Chapman v. Spence*, 22 Ala. 588; *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189.

323. To authorize the rejection of a declaration, on motion, on account of a variance between it and the endorsement on the writ, the variance must be total and radical. *Smith v. Wiley*, 19 Ala. 216; *Morrison v. Taylor*, 21 Ala. 779.

As to variance between the pleadings and proof, see EVIDENCE, XVII; pp. 623–4.

VIII. VIDELICET.

324. The object of a *videlicet* is, to inform the opposite party that the pleader does not intend to confine himself to proof of the particular time, place, or sum stated. *Howard v. Ingersoll*, 23 Ala. 673; *Simpson v. Talbot*, 25 Ala. 469; *McDade v. The State*, 20 Ala. 81.

325. Therefore, when the time of killing an estray is thus laid, although the time specified is within twelve months after the alleged straying, it is not a sufficient averment that the killing was within the twelve months. *Simpson v. Talbot*, 25 Ala. 469.

PRACTICE.

See, also, the following titles: AMENDMENT, p. 394: BILL OF EXCEPTIONS, p. 435; CERTIORARI, p. 456; CHARGE OF COURT, p. 458; CONTINUANCE, p. 485; DISCONTINUANCE, p. 556; ERROR AND APPEAL, p. 563; JUSTICE OF THE PEACE, p. 676; NEW TRIAL, p. 698; NONSUIT, p. 698.

I. AGREED CASE.

1. When a cause is submitted to the decision of the court on an agreed statement of facts, the court can only decide the questions of law thereon arising, and cannot infer the existence of other facts from those which are admitted. *Bott v. McCoy & Johnson*, 20 Ala. 578.

2. An agreement of record, discharging the jury, and submitting the case to the decision of the court, is equivalent to a demurrer to evidence, and is a waiver of all exceptions previously reserved to the rulings of the court on the evidence. *Gibson v. Land*, 27 Ala. 117.

3. The decision of the court, in such case, on a question of law, is revisable on error. *Shaw v. Beers*, 25 Ala. 449; *Mims v. Sturdevant and Wife*, 23 Ala. 664.

4. *Secus*, as to its decision on a question of fact. *Etheridge v. Doe d. Malempre*, 18 Ala. 565; *Barnes v. Mayor &c. of Mobile*, 19 Ala. 707; *Bott v. McCoy & Johnson*, 20 Ala. 578; *De Vendell v. Doe d. Hamilton*, 27 Ala. 126.

II. APPEARANCE.

5. Appearance, without objection to the service of process, is a waiver of any irregularities in the service. *Emanuel v. Ketchum*, 21 Ala. 257; *Stanley v. Bank of Mobile*, 23 Ala. 662; *Lampley v. Beavers*, 25 Ala. 534; *Kennedy & Merritt v. Young*, 25 Ala. 563; *Moore v. Easley*, 18 Ala. 619.

6. It is also a waiver of a previous discontinuance. *Walker v. Chapman*, 22 Ala. 116; *Shorter v. Urquhart*, 28 Ala. 360.

7. An appearance, merely for the purpose of moving to set aside the service of the writ, is not a waiver of any defect or irregularity in the ser-

vice; unless the defendant takes some action, disconnected from the motion, which recognizes the case as in court. *Lampley v. Beavers*, 25 Ala. 534.

8. When an attorney has appeared, without objection, in the primary court, his authority cannot be questioned in the appellate court. *Moore v. Easley*, 18 Ala. 619.

III. ARGUMENT OF COUNSEL.

9. It is the settled practice in this State, that the plaintiff is always entitled to the opening and conclusion of the argument, no matter what may be the form of the issue. *Chamberlain v. Gaillard*, 26 Ala. 504.

10. On the trial of an issue between a plaintiff in attachment and a transferree of the debt or property attached, the plaintiff in attachment is entitled to open and conclude the argument, although the issue is so framed as to throw the affirmative on the transferree. *Grady's Adm'r v. Hammond*, 21 Ala. 427.

11. On the trial of a *supersedeas* of an execution on the ground of the defendant's bankruptcy, his certificate of discharge being impeached for fraud, the defendant himself, who applied for the *supersedeas*, is entitled to the opening and conclusion, *Pearsall v. McCartney*, 28 Ala. 110.

IV. EXECUTION OF WRIT OF INQUIRY.

12. In debt on a foreign judgment, it is erroneous to render judgment final by *nil dicit*, for the amount of the judgment with eight per cent. interest. *Clarke v. Pratt*, 20 Ala. 470.

13. In debt on an administrator's bond, it is erroneous to render judgment final by *nil dicit*, against the principal and his sureties. *Amason v. Nash*, 24 Ala. 279.

14. In assumpsit against the endorser of a note not payable in bank, it is erroneous to render final judgment by default, either under the common counts, or under a special count which contains no averment of suit against the maker or excuse for the failure to sue. *Langdon v. Williams*, 22 Ala. 681.

15. In an action under the Code, on a promissory note and an open account for work and labor, it is erroneous to render final judgment by default, for the aggregate amount of the sums claimed. *Beville v. Reese*, 25 Ala. 451.

16. Such judgment is also erroneous, when the action is founded on unpaid calls for railroad stock. *Connoly v. Ala. & Tenn. Rivers Railroad Co.*, 29 Ala. 373.

17. On the execution of a writ of inquiry, the defendant has no right to plead to the merits of the action, even though his defense has arisen since the rendition of judgment. *Ewing v. Peck & Clark*, 17 Ala. 339.

V. FILING PLEADINGS.

18. The defendant has a right to plead in vacation, after the expiration of the time prescribed by the rules of practice, at any time before an office judgment has been entered against him for default. *Woosley v. Memphis & Charleston Railroad Co.*, 28 Ala. 536.

19. It is discretionary with the primary court to permit a plea in bar to be filed at any time before the trial. *Bobe v. Frowner and Wife*, 18 Ala. 89; *Newman v. Pryor*, 18 Ala. 186.

20. When the record shows that pleas were filed and demurred to, the appellate court will presume that the pleas found in the record, although not endorsed as filed, are those which were filed. *Reid v. Nash*, 23 Ala. 733.

21. Where the judgment entry recites, that "the plaintiff came by attorney, and the defendant having failed to file his plea within the time prescribed by law, it is considered by the court, that the plaintiff have and recover of the defendant," &c., "the damages due by the two promissory notes declared on,"—the appellate court will presume that the complaint set out in the record, although the day on which it was filed is not endorsed on it, was filed before the rendition of the judgment. *Letondal v. Huguenin*, 26 Ala. 552.

VI. OFFICE JUDGMENTS.

22. If the defendant fails to plead within the time prescribed by the rules of practice, the plaintiff may have the default entered on the docket

in vacation, at any time before pleas are filed, and claim the benefit thereof at the ensuing term of the court. *Woosley v. Memphis & Charleston Railroad Co.*, 28 Ala. 536.

23. An entry on the docket in vacation, after the time for pleading has expired, but before pleas have been filed, in these words, "Plaintiff claims judgment against defendant for want of a plea," signed by the plaintiff's attorneys, with the date annexed, and attested by the clerk, is not a sufficient entry of the default. *Ib.*

VII. PROFERT, AND OYER.

24. In an action by a foreign executor, if he makes profert of his letters, the effect is the same as if they were set out in the declaration, although he does not aver in what State they were granted. *Carr's Executor v. Wiley*, 23 Ala. 821.

25. Oyer can only be demanded of those instruments of which, at common law, the plaintiff would have been compelled to make profert; consequently, where a deed is stated as mere inducement, while the gravamen of the action is a breach of contract outside of the deed, the defendant is not entitled to oyer of it. *Hatton's Adm'rs v. Jordan*, 29 Ala. 266.

VIII. REHEARING.

26. On the trial of a petition for rehearing, (Code, §§ 2407–17,) it is only necessary for the defendant to prove the truth of the facts which constitute the surprise, accident, mistake, or fraud, on which the application is founded: he is not required to prove the truth or validity of his defense to the original action, when his pleas thereto are legally sufficient. *Pratt & McKenzie v. Keils & Sylvester*, 28 Ala. 390.

27. If the trial of the application results favorably to the petitioner, the proper judgment is, that the judgment in the original action be vacated, and the execution issued upon it be quashed; that a rehearing be granted in the original action; that the petitioner be let in to make his defense to that action; and that he recover of the plaintiff in that judgment the costs which have accrued on the petition for rehearing. *Ib.*

IX. SUBSTITUTION OF PAPERS.

28. On motion to supply a lost record, the proper practice is as follows: The notice of the motion must specify when the motion will be made, and contain a copy of that which the plaintiff will move the court to enrol as the substance of the lost record. The defendant must have personal service of the notice, and of the affidavits by which it will be supported; which affidavits may be controverted by counter affidavits. If, on hearing the affidavits, the court is fully satisfied of the correctness of the proposed substitute, it will order the same to stand enrolled as the original lost record. *Adkinson v. Keel*, 25 Ala. 551.

29. When part of a record is thus substituted, the substitute must be consistent with the portion remaining on file. *Bishop's Heirs v. Hampton*, 19 Ala. 792.

30. After the rendition of judgment, the defendant is entitled to notice of a motion to substitute papers. *Murray & Durand v. Tardy*, 19 Ala. 710.

31. In an appeal case from a justice's court, although notice of a motion to substitute a lost statement is proper, it is not error to allow the substitution without notice. *Ortez v. Jewett & Co.*, 23 Ala. 662.

PRESUMPTIONS.

See ERROR AND APPEAL, 145–172, p. 572.
EVIDENCE, 284–360, pp. 604–609.

PROMISSORY NOTES.

See BILLS OF EXCHANGE, &c. p. 438.

QUARTER MASTER GENERAL.

1. Under the several acts passed by the legislature of 1851–2. (Session Acts, pp. 83, 88, 529; Military Code, p. 36,) the annual salary of the quarter-

master general, during the years 1852 and 1853, is $200. *Riggs v. Pfister*, 21 Ala. 469.

QUO WARRANTO.

1. *Semble*, that a proceeding in the nature of a *quo warranto* is the proper remedy for a party who, having a vested right in a ferry, desires to procure the revocation of a ferry license to another who is in the actual enjoyment of the franchise. *Lamar v. Comm'rs' Court of Marshall Co.*, 21 Ala. 772.

2. When no object can be gained by the proceeding, in reference either to the public or to individuals, the cause will not be permitted to progress. *The State v. Centreville Bridge Co.*, 18 Ala. 678.

RAILROADS.

1. To entitle a party to a recovery against a railroad company, under the act of 1852, (Session Acts 1851–2, p. 45,) "to regulate and define the liabilities of railroad companies," it is only necessary for him prove property in the stock or cattle killed, their value, and that they were killed by the company's cars or locomotives : whether any degree of care on the part of the company will excuse it, *quære ? Nashville & Chattanooga Railroad Co. v. Peacock*, 25 Ala. 229.

2. The fact that the cattle were killed while running on lands which did not belong to their owner, is no defense to the action. *Ib.*

3. The said act of 1852 does not conflict with the act of 1850, (Session Acts 1849–50, p. 171,) granting the right of way through Jackson county to the Nashville and Chattanooga Railroad Company. *Ib.*

4. The Montgomery Railroad Company having made an assignment of its road and assets, which was held valid by this court in *Allen v. Montgomery Railroad Co.*, 11 Ala. 437, the purchasers at the trustees' sale, who were afterwards incorporated under a new name, acquired and succeeded to all the rights which the old company had under a deed conveying the right of way for the construction of the road. *Pollard v. Maddox*, 28 Ala. 321.

REAL ACTIONS.

See EJECTMENT.
TRESPASS.
WRIT OF RIGHT.

RECEIPT.

1. A receipt is evidence, on proof of the signature and death of the person by whom it was given, both of the fact of payment, and of the person by whom it was made. *Upson v. Raiford*, 29 Ala. 288.

2. Where a receipt bears date five days anterior to a note, and is for a different amount, the court cannot presume, in the absence of evidence explaining the incongruities, that they were given for one and the same debt. *Hollingsworth v. Martin*, 23 Ala. 591.

3. A bill of lading partakes of the two-fold character of a receipt and contract. *McTyer v. Steele*, 26 Ala. 487.

REHEARING.

See PRACTICE, VIII.

RELEASE.

1. Where two are jointly bound by a bond for titles, and the obligee afterwards accepts from one of them a deed executed by himself and a third person, and then releases him from all covenants contained in the deed, the release does not affect the liability of the obligors on their bond. *Johnson and Wife v. Collins*, 20 Ala. 436.

2. A release, executed by the mother of a bastard while an infant, and afterwards repudiated by her, is no bar to her statutory rights. *Wilson v. Judge of Pike County Court*, 18 Ala. 757.

3. A release of one partner dis-

charges his co-partner also. *Gray's Executors v. Brown*, 22 Ala. 262.

4. But a parol agreement to release one partner does not discharge the debt as against his co-partner. *Evans v. Carey*, 29 Ala. 99.

5. The delivery of a release to a witness by the party's attorney is sufficient, when it is shown that the party himself, after its delivery, acknowledged that he had released the witness. *Branch Bank at Mobile v. Coleman*, 20 Ala. 140.

6. It is not necessary that a release of a witness should be delivered to him personally; but it must be shown that he was apprised of its existence when his deposition was taken. *Gray's Executors v. Brown*, 22 Ala. 262.

REMAINDERS.

See DEEDS, 61–69, p. 536.
LEGACY AND DEVISE, 35–41, p. 191.

REVERSION.

See DEEDS, 64–5, p. 536.

RIPARIAN RIGHTS.

1. A riparian proprietor has a right to use the water which flows by or through his lands, for all ordinary purposes, and for the gratification of natural wants, even though the entire stream is thereby consumed; and also the right to its extraordinary, or artificial use, provided it is not thereby forced back on the lands of the proprietor above him, is not unreasonably and injuriously precipitated on the lands of the proprietor below, and is restored without material diminution, before it leaves his lands, to its accustomed channel. *Stein v. Burden*, 29 Ala. 127.

2. If a riparian proprietor diverts the water of a running stream, for artificial purposes, in quantities sufficient to affect injuriously the rights of the proprietor below him, and does not restore it to its natural channel, without material diminution, before it reaches the lands of that proprietor, he is liable in damages for the injury; and this, notwithstanding he provided means for its restoration, which were rendered inefficient for that purpose, after the water had left his land, by the act or interference of a third person. (RICE, C. J., *dissenting*.) *Ib.*

3. A municipal corporation, owning lands on a running stream from three to five miles distant from the city, has no right to divert the water, to the injury of other riparian proprietors, in quantities sufficient to supply the domestic wants of its inhabitants. *Stein v. Burden*, 24 Ala. 130; *Stein v. Ashby*, 24 Ala. 521.

4. A legislative grant to an incorporated company, conferring upon them "the exclusive right and privilege of conducting and bringing water for the supply of the city for the term of forty years," gives them no right to divert the water of a running stream, to the injury of riparian proprietors, without making compensation. *Ib.*

5. The uniform and uninterrupted diversion of water from a running stream, for a period of twenty years, gives a title by prescription. *Ib.*

6. But the use of the water for nine years confers no right. *Stein v. Ashby*, 24 Ala. 521.

7. A person's right to the enjoyment of a water-privilege, of which he is in the quiet use or possession, cannot be questioned by one who shows no adverse claim. *Howard v. Ingersoll*, 17 Ala. 780.

8. In determining the riparian rights, in reclaimed lands in Mobile, of a proprietor claiming under a Spanish grant, confirmed by act of congress as a perfect title, the lines of which extended to low water-mark at its date, the lines should be drawn from the termination of the river lines, as they existed at the date of the grant, perpendicularly to the channel of the river. *Magee v. Doe d. Hallett & Walker*, 22 Ala. 699.

9. The absolute deed of a riparian proprietor conveys a right to the undiminished flow of the stream. *Burden v. Stein*, 27 Ala. 104.

As to the remedies of a riparian proprietor, at law, see ACTION ON THE CASE, p. 369; and as to his remedies in equity, see INJUNCTION, p. 281.

ROADS, BRIDGES, AND FERRIES.

(Statutory Provisions: Code, §§ 1129–1210; Clay's Digest, 506–515.)

1. To sustain the proceedings of the commissioners' court, in the establishment of a road, its record must affirmatively show a compliance with all the requisitions of the statute. *Comm'rs' Court of Talladega Co. v. Thompson*, 18 Ala. 694; *Long v. Comm'rs' Court of Butler Co.*, 18 Ala. 482; *Molett v. Keenan*, 22 Ala. 484; *Comm'rs' Court of Russell Co. v. Tarver*, 25 Ala. 480; *Keenan v. Comm'rs' Court of Dallas Co.*, 26 Ala. 568.

2. An order establishing a private road need not show that the road does not run through any person's plantation. *Long v. Comm'rs' Court of Butler Co.*, 18 Ala. 482.

3. When it appears that the owner of land, through which such road passes, was present when the application was made, and that a jury to assess the damages was appointed at his request, and without objection from him to the jurors appointed, the appellate court will presume that the jurors were competent. *Ib.*

4. And where the record shows that the order of the court directed the jury to report on oath at a specified time, and that they reported at the time appointed, reciting in their report that they proceeded "after being duly sworn," the objection cannot be raised on error, that they were not sworn. *Ib.*

5. In the establishment of a public road, the record must affirmatively show that it lies within the limits of the county. *Comm'rs' Court of Talladega Co. v. Thompson*, 18 Ala. 694; *Comm'rs' Court of Russell Co. v. Tarver*, 25 Ala. 480.

6. A designation by the numbers of the section, township and range through which the road runs, is not sufficient to show that it is within the county. *Comm'rs' Court of Russell Co. v. Tarver*, 25 Ala. 480.

7. A recital in the record, that "notice was proven, in all respects according to the statute, by advertisement at the court-house door and three other public places in the county," does not show that notice was given for the length of time prescribed by the statute. *Molett v. Keenan*, 22 Ala. 484.

8. When the jurors appointed to view and mark out the road are also empanneled to assess the damages caused by it to persons through whose lands it passes, they must be sworn and charged with a view to the assessment of such damages; and the failure to do this will reverse the proceedings on error. *Ib.*

9. An oath, taken by the jury appointed to view and mark out the road, in these words, "We do solemnly affirm that we will impartially view and mark out said road, as named in said order to us directed, to the best of our skill and ability," is not a substantial compliance with the requisitions of the statute. *Ib.*

10. The prescribed form of oath must be fully set out, and precisely pursued: a mere recital in the return of the jury that they were "duly sworn before acting," is not sufficient. *Keenan v. Comm'rs' Court of Dallas Co.*, 26 Ala. 568.

11. The record must show that the road was viewed and marked out by the jury, "to the greatest advantage to the public, and with as little prejudice to individuals as possible, and without partiality or favor:" where the order of the court directs the jury to view and mark out the best route for the said road," and they report that, "being duly sworn before acting," they "performed the duty assigned them in the order of the court, to the best of their ability, without partiality or favor," this is not a sufficient compliance with the requisitions of the statute. *Ib.*

12. A crop, sown or planted in an enclosure after the court has ordered a road to be opened through it, is not a "growing crop" within the protection of the statute, although it may be growing at the time the road is to be cut out. *Thompson v. The State*, 20 Ala. 54.

13. When a person through whose lands a proposed road passes, wishes to challenge jurors, the challenge must be made before the jurors are sworn and enter on their duties. *Molett v. Keenan*, 22 Ala. 484.

14. To authorize any one to be made

a party, on petition, to proceedings had on the establishment of a road, in order that he may remove them by *certiorari* to an appellate court, he must have a private right as an individual proprietor, which he can vindicate by suit; and the record must show his interest. *Creswell & Monette v. Comm'rs' Court of Greene Co.*, 24 Ala. 282.

15. If the petitioner shows that the road runs through his lands, and that it was illegally established, this is *prima facie* sufficient, and the *certiorari* should be granted. *Ex parte Keenan*, 21 Ala. 558.

16. A *certiorari* does not lie, to review the action of the court in refusing to establish a private road. Whether a *mandamus* would lie, where the record shows that the action of the court was predicated on the erroneous supposition that the petition was legally insufficient, *quære?* *Brooks v. Kirby*, 19 Ala. 72.

17. Two distinct orders, one establishing a road, and the other granting a ferry license, cannot be removed by one *certiorari*, although the ferry is a part of the road. *Cresswell & Monette v. Comm'rs' Court of Greene Co.*, 24 Ala. 282.

18. A judgment of the circuit court, quashing the proceedings had in the establishment of a public road, applies only to the proceedings then before it, and has no effect on an order subsequently made on a new application. *Thompson v. The State*, 20 Ala. 54.

19. Where the proceedings of the commissioners' court, in the establishment of a public road, are removed by *certiorari* to the circuit court, and there reversed, judgment for the costs cannot be rendered against the commissioners; but, if they appeal from the circuit to the supreme court, and give security for the costs of the appeal, they are liable for costs on an affirmance of the judgment. *Comm'rs Court of Russell Co. v. Tarver*, 25 Ala. 480.

20. Under the act of 1839, any person may establish a private bridge, but it must be limited to his own use; that is, the use of himself individually, his family, his servants and agents, his stages and other property. *Harrell & Croft v. Elsworth*, 17 Ala. 576.

21. The grant of a license by the commissioners' court, for the establishment of a toll-bridge, must generally be governed by the same principles that are applicable to a franchise granted by the State; consequently, when a person is in possession of such privilege under a conditional grant, a third person cannot question his right to its enjoyment on the ground that he has failed to perform the condition. *Ib.*

22. The commissioners' court has no power to take a ferry from one who is in the enjoyment of it, and grant it to another, on the petition of the latter showing a vested right to the franchise. *Lamar v. Comm'rs Court of Marshall Co.*, 21 Ala. 772.

23. The petitioner's remedy, in such case, *it seems*, is a proceeding in the nature of a *quo warranto*. *Ib.*

As to the dedication of a public highway, see DEDICATION, p. 530.

See, also, the same title in PART III, p. 335.

SALES.

See VENDOR AND PURCHASER.

SCIRE FACIAS.

1. In *sci. fa.*, at common law, the writ may be made to subserve the double purpose of writ and declaration; but it must then contain all the averments which are necessary in a declaration. *Emanuel v. Ketchum*, 21 Ala.. 257.

2. In *sci. fa.* against a defaulting witness, where the writ is made to subserve this two-fold purpose, it must set out the subpœna, either *verbatim* or substantially, and aver its service, and the rendition of judgment *nisi*. *Emanuel v. Ketchum*, 21 Ala. 257; *Spence v. Simmons*, 21 Ala. 563.

3. On the return of the writ, the witness may excuse himself, by showing that his failure to attend was not in consequence of negligence or willful disobedience. *Maclin v. Wilson*, 21 Ala. 670.

4. When the bill of exceptions, in

such case, states that the witness "had been duly subpœnaed," it is not necessary that the subpœna should be set out in the record. *Ib.*

5. A final judgment cannot be rendered against a defaulting garnishee, until a *sci. fa.* on the judgment *nisi* has been duly executed and returned by the sheriff of the county in which he resides, or in which he was summoned. *Morris v. Russell*, 20 Ala. 357; *Wood v. Russell*, 22 Ala. 645.

As to *sci. fa.* against bail and corporations, see same title in PART I, p. 104.

As to *sci. fa.* to revive a pending action, see ACTION, I, p. 362.

As to *sci. fa.* to revive a judgment, see JUDGMENT, IX, p. 671.

SECURITY FOR COSTS.

See COSTS, II, p. 507.
ERROR AND APPEAL, III, p. 564.

SET-OFF.

(Statutory Provisions: Code, §§ 2240-44: Clay's Digest, 338, § 141.)

1. The right of set-off did not exist at common law. *White v. Governor*, 18 Ala. 767.

2. The statute does not apply to a suit instituted by the State against one of its debtors. *Ib.*

3. A garnishee cannot set off an equitable demand against his indebtedness to the defendant. *Loftin v. Shackelford*, 17 Ala. 455.

4. In an action by the payee of a promissory note, for the use of a *bona-fide* transferree from a prior beneficial holder, the maker cannot set off a demand against the latter, although the note was delivered to him at the time of execution, and he was then the real owner of it. *Sykes v. Lewis*, 17 Ala. 261.

5. In an action by the payee, for the use of his assignee, against the maker of a promissory note, the defendant cannot set off a payment made by him, as surety for the payee, on a note payable in bank, unless he shows that the payment was made before notice of the assignment. *Gildersleeve v. Caraway*, 19 Ala. 246.

6. In an action on an account, which was assigned before its creation, and sued on in the name of the assignor for the use of the assignee, the defendant may set off a demand against the assignor, acquired before actual notice of the assignment. *Stewart v. Kirkland*, 19 Ala. 162.

7. An endorsement of a promissory note, with the understanding that the endorsee is only to pay for it if he can make it available as a set-off against a demand held by a third person, otherwise to return it to the endorser, does not confer on the endorsee such a property in the note as will enable him to use it as a set-off against such third person. *McDade v. Mead*, 18 Ala. 214.

8. A set-off, acquired *bona fide* by the maker against the payee of a promissory note, before notice of its assignment, is not defeated by the subsequent discharge of the payee as a bankrupt. *Harwell v. Steel*, 17 Ala. 372.

9. The statute of limitations may be replied to a set-off. *Ib.*

10. In an action against husband and wife, on a note executed by the wife *dum sola*, the husband may set off one half of the amount paid by him, before suit brought, on a judgment rendered against the plaintiff and the wife *dum sola* jointly; *secus*, as to a payment made by him after the institution of the suit. *Johnson and Wife v. King*, 20 Ala. 270.

11. In an action against a person individually, he cannot set off a demand due to him as administrator or guardian, unless he was charged with it, on final settlement of his accounts, before commencement of the action. *White v. Word*, 22 Ala. 442.

12. In an action by an administrator, on a promissory note given to him for the hire of a slave belonging to his intestate's estate, a judgment rendered against him as administrator, on a debt contracted by his intestate, is a good set-off. *Crabtree v. Cliatt*, 22 Ala. 180.

13. In an action by a guardian, on a refunding bond, the defendant may set off his portion of rents received by the plaintiff, from lands lying without the limits of the State, belonging to defendant and others as tenants in

common. *Smith's Executors v. Wiley*, 22 Ala. 396.

14. In an action on an open account, for goods sold and delivered, it was shown that defendant gave plaintiff, in payment of the account, a note for a larger amount on a third person, agreeing to take up the difference in goods, at a cash value, as he might want them; that he received a part of the goods the next day; and that plaintiff, afterwards discovering that the maker of the note was insolvent, tendered it back to the defendant, and demanded a rescission of the contract. *Held*, that plaintiff's liability for goods under this contract, coupled with his disaffirmance of the contract, was not available as a set-off. *Carriere v. Ticknor*, 26 Ala. 571.

15. The individual debt of one partner cannot be set off against a partnership debt. *Ross v. Pearson*, 21 Ala. 473.

16. In an action by one partner individually, the defendant cannot set off a debt due to him from the partnership. *Hoyt, Ford & Robinson v. Murphy*, 18 Ala. 316; *Duramus v. Harrison & Whitman*, 26 Ala. 326; *McKinley v. Winston*, 19 Ala. 301.

17. But, in such case, the defendant may set off his demand against the partnership, on proof that the firm has been dissolved, and that the plaintiff agreed with his co-partner, for valuable consideration, to pay all the partnership debts. *Hoyt, Ford & Robinson v. Murphy*, 18 Ala. 316.

18. A demand, "not sounding in damages merely," is one which, when the facts upon which it is based are established, the law is capable of measuring accurately by a pecuniary standard. *Holley v. Younge*, 27 Ala. 203

19. Consequently, if a purchaser with covenants of warranty buys in an outstanding vendor's lien, at a price less than the amount of the purchase-money with interest, this demand, if reasonable, is a good set-off against the note given for the purchase-money. *Ib.*

20. In an action on a note given for the purchase-money of land, the defense may be set up, under the plea of set-off, that the vendor falsely represented that the lands were not subject to overflow, and that the tract included other valuable lands outside of its boundaries. *Gibson v. Marquis and Wife*, 29 Ala. 668.

21. A promissory note, of which the defendant is the real owner, although he has not the legal title, is a good set-off. *Hudson & Stokes v. Weir & Tate*, 29 Ala. 294.

As to set-off in equity, see same title in PART III, p. 336.

SHERIFFS.

As to sales under executions, see EXECUTIONS, V, p. 635.

I. AUTHORITY.

1. A sheriff has no authority to sell land under execution after the return day has passed. *Smith v. Mundy*, 18 Ala. 182.

2. If he has made a levy on personal property while an execution is in force, he may sell after the return day of the writ, or may receive the money in satisfaction of the debt without a sale. *Evans v. Governor*, 18 Ala. 659.

3. He has no more authority to levy an execution, which comes to his hands after the expiration of his term of office, than any other private person. *Andress v. Broughton*, 21 Ala. 200.

4. After the expiration of his term of office, he is sheriff *de facto* until the appointment of his successor. *Cuthbert v. Huggins*, 21 Ala. 349.

5. An order of court, directing the sheriff to "proceed to sell" certain property in his hands, taken under attachment, and to "pay the proceeds into court," is a sufficient authority to him to make the sale, without any process or copy of the order from the

clerk. *Millard's Adm'rs v. Hall*, 24 Ala. 209.

II. DEPUTIES.

6. A deputy sheriff is not liable to a plaintiff in attachment for failing to take sufficient security on a replevy bond. *Pond v. Vanderveer*, 17 Ala. 426.

7. An action lies against a deputy sheriff, in favor of his principal, without a previous demand, for his failure to pay over within a reasonable time money collected by him as such deputy. *Nelms v. Williams*, 18 Ala. 650.

8. The sheriff may maintain an action against the sureties of his deputy, without giving them previous notice of the deputy's default; consequently, in such action, evidence of the deputy's ability to pay, at the time of his leaving the State, and afterwards, is not admissible for the sureties. *McGehee v. Gewin*, 25 Ala. 176.

9. The sureties of the deputy cannot discharge themselves from liability on their bond, by giving notice to the sheriff that they will be no longer bound. *Ib.*

10. On the deputy's failure to account for moneys collected by him under an execution which the sheriff has previously paid to the plaintiff, the sureties are liable, since no one but the defendant in execution can take advantage of the payment by the sheriff. *Ib.*

11. The deputy having "proposed to pay" the money to his principal, the latter "told him that he would see the persons to whom it was going, and that he could pay it to them." *Held*, that this did not amount to a legal tender of the money to the principal, but was a direction to the deputy to pay it to the persons entitled to receive it. *Ib.*

12. The sureties of a deputy sheriff are not liable for his failure to pay over money collected under execution after the day on which it is on its face returnable, although made returnable at a day anterior to that at which it should have been made returnable. (DARGAN, C. J., *dissenting.*) *Forward v. Marsh*, 18 Ala. 645.

III. FEES.

13. The half-commissions to which a sheriff is entitled, when a sale of property levied on is stayed, become a part of the costs of the case, and may be taxed as such by the clerk, in an execution subsequently issued, without motion to the court, or notice to the defendant. *Barron v. Tart*, 18 Ala. 668. (Overruling *Oswitchee Co. v. Hope & Co.*, 5 Ala. 629.)

14. The repeal of the act of 1812 by the act of 1843, so far as relates to the sheriff's commissions where a sale is stayed by process of law, does not deprive him of the right to commissions to which he had become entitled before the repeal of the former act, although they were not collected at the time of its repeal. *Ib.*

15. Under the Code, (§§ 3042, 3047,) a sheriff cannot be entitled, in any case, to a fee "for levying *fi. fa.* and making money thereon," and to another fee, under the same execution, "for levying *fi. fa.* when sale is stayed after levy, by a restraining order." Where the restraining order stays the sale of only a portion of the property levied on, and leaves the sheriff free to sell the residue, he is not entitled to a fee of "one per cent. on the amount of the judgment"; and if, after levy, the sale of a portion of the property is prevented by injunction, he is not entitled to any fee or commission from complainant in the injunction suit. *Mastin v. Cullom & Co.*, 28 Ala. 670.

16. In a proceeding before the probate court, the sheriff is not entitled to any fee for "entering and returning notices," nor for "entering subpœnas." *Rainer v. McElroy*, 20 Ala. 347.

17. If a sheriff retains more than his lawful fees, out of money collected under execution, when the whole amount collected is not more than enough to satisfy the debt and lawful costs, he is liable to the plaintiff, but not to the defendant, for the excess; and this, notwithstanding the defendant afterwards pays the balance due on the execution, including this excess. *Chenault's Adm'rs v. Walker*, 22 Ala. 275.

IV. LIABILITIES.

1. *For Escape.*

18. In an action for an alleged es-

cape of a debtor in custody under a *ca. sa.*, an averment in the declaration that the *capias* was "marked and endorsed for bail," is sufficient to show that the process required the sheriff to hold the defendant to bail. *Hutchisson v. Governor*, 23 Ala. 809.

19. In debt on a prison-bounds bond, assigning breaches, it is a good plea in bar, that the prisoner surrendered himself to the jailor, within sixty days from the date of the bond, without having committed an escape in the meantime. *Harlan v. Thompson*, 20 Ala. 94.

2. *For Failing to Return or Make Money on Fi. Fa.*

20. An action on a sheriff's official bond, payable to the governor for the time being and his successors in office, cannot be maintained in the name of the payee individually. *Bagby v. Baker*, 18 Ala. 653.

21. The act of 1819, imposing a penalty on sheriffs for failing to return executions, is repealed by the act of 1848; consequently, since the passage of the latter act, the penalty imposed by the former, though incurred before its repeal, cannot be recovered. *Broughton v. Branch Bank at Mobile*, 17 Ala. 828; *Williams v. McCurdy & Aldrick*, 22 Ala. 696.

22. The act of 1848 repeals the act of 1845, and requires three days notice of a motion for a summary judgment. *Huggins v. Powell*, 19 Ala. 129.

23. Under the act of 1848, the penalty is twenty per cent. on the amount of the execution. *Ib.*

24. The act of 1848 does not repeal the act of 1840, "to regulate the mode of collecting costs accruing in the supreme court." *Huggins v. Ball*, 19 Ala. 587.

25. In an action against a sheriff, for failing to return or make the money on an execution, the amount of the execution is the measure of damages, although the defendant therein may continue entirely solvent. *Evans v. Governor*, 18 Ala. 659.

26. The plaintiff's failure to enforce satisfaction of his execution out of the defendant, when he might have done so, does not impair his remedy against the sheriff for a previous default. *Ib.*

27. If the sheriff levies an execution on the plaintiff's own property, and the plaintiff releases the levy, this does not discharge the sheriff from liability for not making the money out of property really belonging to the defendant. *Poe v. Dorrah*, 20 Ala. 288.

28. Nor is the sheriff necessarily discharged from liability, because the plaintiff released a levy on property to which a statutory claim was interposed by a third person. *Ib.*

29. In an attachment case, the attached property having been sold under an order of court, if the sheriff pays over the proceeds of sale to the defendant in attachment, after a final judgment in his favor, and before the suing out of an appeal or writ of error, this discharges him from liability to the plaintiff in attachment, although the latter afterwards procures a reversal of the judgment on error, and ultimately obtains a judgment in his favor. *Sherrod v. Davis*, 17 Ala. 312.

30. If a sheriff sells land under execution, and executes a deed to the purchaser before he has received the purchase-money, he is liable to the plaintiff, and not to the defendant in execution, for failing to collect it. *Moore v. Barclay*, 18 Ala. 672.

31. A sheriff cannot be held liable for failing to make the money on an execution, if the defendant had no property in his possession while the writ was in the sheriff's hands, unless it is shown that he owned property which might have been levied on, and of which the sheriff had notice; but, if the sheriff returns an execution unsatisfied, without resorting to the steps necessary to protect himself from liability, when the defendant had property in his possession, he assumes the *onus* of proving that the property was not subject to the execution. *Governor v. Campbell*, 17 Ala. 566.

32. What constitutes due diligence on the part of the sheriff, is a mixed question of law and fact, and depends materially on the circumstances of each particular case. *Whitsett, Garner & Co. v. Slater*, 23 Ala. 626.

33. Where he receives an execution against a resident citizen of his county, who is in the open possession of personal property sufficient to satisfy it, and makes no effort, for thirty

days after its reception, either to levy it, or to give the plaintiff notice of any real doubts he may entertain as to the liability of the property, he is guilty of a want of due diligence. *Ib.*

34. When a sheriff is ruled for failing to make the money on an execution, the plaintiff may show that the defendant in execution, "prior to the day on which the execution came to the sheriff's hands, was in possession of a house, as of his own property, claiming ownership thereof, and continued in possession until after the return day of the writ." *Ib.*

35. The sheriff cannot adduce evidence of "general neighborhood rumor," to the effect that certain slaves, in the possession of the defendant in execution, were the separate property of his wife. *Ib.*

36. A sheriff may, by leave of the court, amend his return on an execution, pending a motion against him for failing to pay over the money collected on it. *Niolin v. Hamner*, 22 Ala. 578.

37. If he takes the note of a third person in settlement of an execution debt, and then returns the execution satisfied, the plaintiff may have the return set aside; but the sheriff himself is bound by it, and can neither amend nor set it aside. *Holt v. Robinson*, 21 Ala. 106.

38. When a sheriff is ruled, for failing to make the money on an execution, which he had levied on certain negroes as the property of the defendant therein, he may repel the presumption arising from his return, by showing that the negroes were free, and were discharged as such under a writ of *habeas corpus*. *Union Bank of Tennessee v. Benham*, 23 Ala. 143.

39. In an action against a sheriff, for failing to collect and pay over militia fines, the declaration must set forth the names of the persons against whom the fines were assessed, with the amounts of the several fines, as stated in the certificate of the president of the court-martial. *Chapman v. Weaver*, 19 Ala. 626.

3. *For Torts.*

40. If a sheriff wrongfully releases and abandons property taken under attachment, he is guilty of a malfeasance for which an action will lie in favor of the plaintiff. *Griffin v. Isbell*, 17 Ala. 184.

41. If he levies an attachment, at the suit of a landlord, on the tenant's crop, and suffers the tenant to retain and dispose of it, this does not render him liable in trover to an under-tenant, for a subsequent seizure and sale of the crop raised by such under-tenant. *Givens v. Easley*, 17 Ala. 385.

42. If he levies an execution which comes to his hands after the expiration of his term of office, and sells property under it, he is liable in trespass or trover; and the fact that the defendant requested a postponement of the sale, and asked the sheriff not to pay over the proceeds to the plaintiff, does not amount to a waiver of the tort, when it is not shown that he was aware of the sheriff's want of authority. *Andress v. Broughton*, 21 Ala. 200.

43. If he sells the entire property in goods, owned by two jointly, under an execution against one of them, this renders him liable as a trespasser *ab initio*; and if he has received the proceeds of sale, the owner may waive the tort, and bring assumpsit for the money. *Smyth v. Tankersley*, 20 Ala. 212.

44. A sheriff, having a valid execution in his hands, must be served with a written order from competent authority, requiring him to suspend all action under it, before he can be held liable for obeying its mandate. *Payne v. Governor*, 18 Ala. 320.

45. He is bound to pursue the mandate of an execution, unless otherwise instructed by the plaintiff, his attorney, or some one having an interest admitted by the plaintiff: as against him, an agreement between plaintiff in execution and a statutory claimant, to the effect that a judgment of condemnation should be rendered for the agreed value of the property, and that the claimant should have the property on payment of this value, does not render void an *alias fi. fa.* *Patton v. Hamner*, 28 Ala. 618.

46. The act of a sheriff, in taking the defendant's property under a valid attachment, cannot be converted into a tort, as against a prior fraudulent

grantee of the defendant, by the subsequent dismissal of the attachment suit; nor is he guilty of a tortious conversion of the property, when it is taken out of his hands by his successor in office, under another attachment, issued by the plaintiff on the same debt, immediately after the dismissal of the first; consequently, both attachments, with their levies, would be competent evidence for him, when sued in trover. *Houseman v. Stewart*, 28 Ala. 684.

47. When a sheriff justifies under mesne process, after the time appointed for its return, he must either aver its return, or show some legal excuse for the failure to return it. *Kirksey v. Dubose*, 19 Ala. 43.

48. An execution, in the name of "Henry W. Collier, use of officers of court," issued by a court of competent jurisdiction, furnishes a protection to the officer levying it. *McElhaney v. Flynn*, 23 Ala. 819.

V. Sureties.

49. When a motion is made for a summary judgment against the supposed sureties of a sheriff, the parties sought to be charged may contest the fact of their suretyship, and introduce evidence to show that, at the time of the default, they were not his sureties. *Dixon v. Caskey*, 18 Ala. 97.

50. The sureties of a sheriff are not liable for his failure to return an execution, the return day of which had not elapsed when, on account of the sheriff's failure or refusal to give a new bond, the office was declared vacant by an order of the county-court judge. *Ib.*

51. Nor are they liable for money received by him on an execution which came to his hands after the expiration of his term of office, but before the appointment of his successor, notwithstanding the execution was issued on a forfeited forthcoming bond, which had been taken under a previous valid levy. *Cuthbert v. Huggins*, 21 Ala. 349.

52. Nor are they liable for his failure to pay over money, arising from the sale of attached property, when the sale was made without an order of court, by agreement between the plaintiff and defendant in attachment. *Governor v. Perrine*, 23 Ala. 807.

53. But they are liable for his failure to pay over money collected by him, without a sale, after the return day of an execution which he had levied while in force. *Evans v. Governor*, 18 Ala. 659.

SLANDER.

See LIBEL AND SLANDER, p. 687.

SLAVES, AND FREE NEGROES.

I. Capacity, and Incapacity.

1. A slave may act as the agent of his owner or hirer. *Stanley v. Nelson*, 28 Ala. 514; *Powell v. The State*, 27 Ala. 51.

2. If a slave, while permitted by his owner or hirer to go at large, contrary to the provisions of the act of 1805, and to act as a freeman, makes a contract for the hire of another slave to work with him, a note for the hire, given by a white man, is void. *Stanley v. Nelson*, 28 Ala. 514.

3. If such slave appropriates the proceeds of his labor, with the consent of his owner or hirer, to the payment of a debt, the owner or hirer cannot afterwards reclaim them; and, *a fortiori*, a third person cannot afterwards claim to have such proceeds applied in payment of a liability incurred by him for the slave. *Ib.*

4. The declarations of an old female slave, who lived at the same house with her grand children, respecting her possession of them, are not admissible evidence on the question of ownership, since (other reasons aside) she cannot have such possession as will authorize their admission. *Rowan v. Hutchisson*, 27 Ala. 328.

5. A slave's confession, made in the

presence of his master, that he has received from another slave stolen money belonging to a third person, involves no charge against the master, and calls for no reply from him; consequently, the master's silence cannot be construed into an admission on his part of the facts to which the confession relates. *Jelks v. McRae*, 25 Ala. 440.

6. In an action by the owner of a slave, to recover money which the slave, on being detected in stealing money from the defendant's store, had paid to him, the slave's confession, at the time of the payment, to the effect that he had stolen other goods from the defendant equal in value to the money paid, is competent evidence for the defendant, as a part of the *res gestæ*, to show the character of the payment and the circumstances under which it was made. *Jones v. Nirdlinger*, 20 Ala. 488.

7. A slave cannot be bound by an estoppel, nor can he claim the benefit of an estoppel against another person. *Bentley v. Cleaveland*, 22 Ala. 814.

8. Slaves cannot contract marriage, nor does their cohabitation confer any legal rights on their children. *Malinda v. Gardner*, 24 Ala. 719.

9. The property of a free negro, who dies intestate, escheats to the State, when there are no persons who can claim as his heirs-at-law; and if the State afterwards relinquishes by statute all its rights to the intestate's children, by two female slaves with whom he cohabited, neither set of children is in a condition to insist on the necessity of an inquisition to vest title in the State. *Ib.*

10. A slave, who was emancipated prior to the passage of the act of 1834, may hold lands in this State. *Tannis v. Doe d. St. Cyre*, 21 Ala. 449.

11. Prior to the passage of the act of 1832, a free negro might inherit lands in this State. Whether he can inherit, where the descent was cast upon him subsequent to the passage of that act, and he was not a resident of the State on the 1st February, 1832, *quære?* *Ib.*

12. A free negro, who was an inhabitant of Florida at the time of its cession to the United States, lost the character of an alien by the operation of the treaty of cession, and would be entitled to take lands by descent in the United States, if not incapacited by the laws of the State in which the lands were located. *Ib.*

As to the capacity of a slave to take a bequest for his benefit, see LEGACY AND DEVISE, III, 3, p. 188.

II. EMANCIPATION.

13. Aside from all statutory prohibition, the right of manumission is deducible not only from the master's absolute property in his slave as a chattel, but from analogous rules applicable to slavery as it has obtained in every civilized country. *Atwood's Heirs v. Beck*, 21 Ala. 590.

14. In this State, there is no constitutional or statutory prohibition or restriction upon the right of the owner to remove his slaves to a non-slaveholding State, by himself, his agent, or his personal representative; but the constitutional and statutory provisions, respecting emancipation, prohibit emancipation in this State in any other mode than that prescribed by the statute. *Ib.*

15. The constitutional delegation of authority to the legislature, "to pass laws to permit the owners of slaves to emancipate them," is not equivalent to a positive inhibition of the owner's right to emancipate them in any other mode than that prescribed by the legislature. *Prater's Adm'r v. Darby*, 24 Ala. 496. (Overruling *Trotter v. Blocker and Wife*, 6 Porter, 269.)

16. Where the owner of certain slaves, being about to carry them to Illinois for the purpose of emancipating them, conveyed them by absolute bill of sale to another, and took from him, at the same time, a bond conditioned that he should emancipate them when reasonable compensation had been made to him for his trouble and expenses with them,—*held*, that the bond was not void, inasmuch as there was nothing on its face requiring the emancipation of the slaves in this State. *Ib.*

17. Slaves, which have escheated to the State, may be emancipated by act of the legislature; and the validity of the act can only be questioned by one who shows a right of property in himself. *Malinda v. Gardner*, 24 Ala. 719.

18. A slave, voluntarily manumitted, is liable to his master's antecedent debts; but a child, born in a non-slaveholding State, is free, although its mother might, on her return to this State, be subject to the debts of her former owner. *Union Bank of Tennessee v. Benham*, 23 Ala. 143.

As to the emancipation of slaves by will, see LEGACY AND DEVISE, III, 3, p. 188.

III. FUGITIVES, AND RUNAWAYS.

19. Children, born in this State, of a negro woman who is a fugitive slave, are not fugitive slaves, or slaves which have escaped from service in another State, within the meaning of the Federal constitution and of the act of congress of 1793. *Fields v. Walker*, 23 Ala. 155.

20. Where the claimant of fugitive slaves institutes proceedings for their recovery, and obtains the certificate of the justices in his favor, the proceedings only affect those persons who are arrested and brought before the justices; and although the certificate declares that certain other persons, children of one of the females, are also slaves, and owe service to the claimant, the sentence is a nullity as to them. *Ib.*

21. A person who apprehends a runaway slave, and carries him before a justice of the peace, becomes thereupon entitled to the statutory reward. *Drew v. Ricks*, 17 Ala. 25.

22. In an action against the owner, to recover the statutory reward for the apprehension of a runaway slave, it is not necessary to prove a previous demand. *Ib.*

23. If a slave runs away during the term for which he is hired, and is apprehended and committed to jail as a runaway, it is the duty of the hirer to pay the necessary jail fees; and on his refusal to do so, the owner may pay them at the expiration of the term, and thereby acquire a cause of action against the hirer. *Walker and Wife v. Smith*, 28 Ala. 569.

IV. SUITS FOR FREEDOM.

24. As between master and slave, the question of freedom *nel non* can only be tried in the manner prescribed by the statute. *Field v. Walker*, 17 Ala. 80; *Union Bank of Tennessee v. Benham*, 23 Ala. 143.

25. But, when the sheriff levies an execution on negroes as the property of the defendant therein, they may try the question of their freedom, as between them and the sheriff, by petition for *habeas corpus*. *Union Bank of Tennessee v. Benham*, 23 Ala. 143.

26. The statute does not impose on the sheriff the duty of detaining the plaintiff in a suit for freedom, when out of the possession of the person claiming him as a slave, to be forthcoming to abide the sentence of the court; nor can the plaintiff's sureties, by surrendering him to the sheriff, discharge themselves from their bond. *Jones v. Covey*, 26 Ala. 464.

27. But, if the sheriff receives him, when thus surrendered by his sureties, and commits him to jail, neither he nor his deputy can recover against the sureties for board furnished to their principal. *Ib.*

V. OTHER MATTERS.

28. In this State, the presumption of slavery arises from color indicating African descent. *Field v. Walker*, 17 Ala. 80; *Becton v. Ferguson*, 22 Ala. 599.

29. But this presumption may be rebutted otherwise than by proof of emancipation. *Becton v. Ferguson*, 22 Ala. 599.

30. No person has a right to chastise a slave belonging to another, without the owner's consent, unless he acts under statutory authority. *Townsend v. Jeffries' Adm'r*, 24 Ala. 329.

As to contracts of hiring, and the respective rights, duties and liabilities arising from that contract, see BAILMENT, V, p. 428.

As to the respective rights and duties of master and slave, the importation of slaves, offenses by, against, and relative to slaves, the trial of slaves, and the rules of evidence on their trial, see same title in PART I, p. 105.

SPANISH TITLES.

See LAND LAWS, IV, p. 682.

STATUTES.

I. CONSTRUCTION.
II. PLEADING, AND PROOF.

As to the validity of statutes, see CONSTITUTIONAL LAW.

I. CONSTRUCTION.

1. General rules of construction and interpretation cited from *Heydon's case*, 3 Co. Rep. 8. *Huffman v. The State*, 29 Ala. 40.

2. The meaning and intention of a statute or ordinance must be gathered by the courts from the law itself, and not from the contemporaneous declarations of the individual law-makers. *Barnes v. Mayor of Mobile*, 19 Ala. 707.

3. The words of a statute are to be understood in their popular signification, when nothing to the contrary appears on its face. *Mayor of Wetumpka v. Winter*, 29 Ala. 651.

4. Ordinarily, when a word is used which has two significations, it should receive that meaning which is generally given to it in the community; but this rule of construction must yield when it contravenes the manifest intention of the legislature. *Favers v. Glass*, 22 Ala. 621.

5. Words which have obtained a fixed and definite meaning at common law, in reference to a particular subject, are presumed to be used in a statute, relating to the same subject, in their common-law sense. *Ex parte Vincent*, 26 Ala. 145.

6. Words are presumed to be used in their proper signification, unless the contrary in some way appears. *Thurman v. The State*, 18 Ala. 276.

7. A literal interpretation will not be adopted, when it would defeat the purposes of a statute, if any other reasonable construction can be given to the words. *Thompson v. The State*, 20 Ala. 54.

8. The words "it shall be lawful," when used in a statute, are mandatory and imperative, whenever either the public or an individual has a right in the exercise of the powers conferred. *Tarver v. Comm'rs' Court of Tallapoosa Co.*, 17 Ala. 527.

9. The provision in the act of 1839, requiring the county-court judge to hold a special term for the trial of a defaulting tax collector, is directory merely, and does not prohibit the judge from proceeding in the prescribed mode after the expiration of the twenty days. *Boring v. Williams*, 17 Ala. 510.

10. When a statute specifies the time within which a public officer is to perform an official act regarding the rights of others, it is merely directory as to the time within which the act is to be done, unless the nature of the act, or the phraseology of the statute, shows that the designation of the time was intended as a limitation on the power of the officer; and *a fortiori*, this rule applies to public interests. *Walker v. Chapman*, 22 Ala. 116.

11. The proviso to the act of 1819, relative to the alternation of the circuit judges, is merely directory. *Spradling & Thomas v. State*, 17 Ala. 440. (Changed by statute.—Session Acts 1855–6, p. 29.)

12. The word "may," when used in a statute, will be held mandatory and imperative, for the purpose of sustaining and enforcing rights, but not for the purpose of creating a right, or determining its character. *Per* WALKER, J.; RICE, C. J., holding, that a permissive word should be considered peremptory, when used to clothe a public officer with power to do an act which ought to be done for the sake of public justice, or which concerns either the public interests or the rights of third persons. *Ex parte Banks*, 28 Ala. 28.

13. The provision in the act of 1850, relative to the settlement of the affairs of the Planters' and Merchants' Bank of Mobile, which required the trustees to sell the remaining assets "within thirty days from the first Monday in November next," is merely directory, and does not invalidate a sale made by them after the expiration of that time. *Savage & Darrington v. Walshe & Emanuel*, 26 Ala. 619.

14. Where a statute affects a community, and requires, as a condition to its validity, that something should be done before it goes into operation, the act has no force or effect until the

performance of the thing required to be done; but, where a statute affects only one or more designated persons, either natural or artificial, those interested in its object may dispense with a preliminary of this character, and claim the benefit of its provisions without requiring the performance of the condition. *Ib.*

15. A clause of reference in a statute embraces only the general powers and provisions of the statute referred to, and not its special and particular clauses. *Ex parte Greene & Graham*, 29 Ala. 52.

16. Such a clause, when used in a statute creating a court, and prescribing the jurisdiction and powers of its officers, confers upon its ministerial officers only the general powers of the other officers referred to, and does not embrace such powers as are special and *quasi* judicial. *Matthews, Finley & Co. v. Sands & Co.*, 29 Ala. 136.

17. A retrospective operation will never be given to a statute, unless the intention that it should so operate clearly appears. *Barron v. Tart*, 18 Ala. 668; *Barnes v. Mayor of Mobile*, 19 Ala. 707; *Gould v. Hays*, 19 Ala. 438; *Kidd v. Montague*, 19 Ala. 619.

18. A retrospective operation will not be given to a statute, for the purpose of defeating a bequest or devise, unless such construction is unavoidable; *secus*, for the purpose of sustaining a bequest or devise. *Hoffman v. Hoffman*, 26 Ala. 535.

19. The repeal of statutes by implication is not favored by the courts; yet, where two statutes are so inconsistent that they cannot stand together, the latter repeals the former. *Stewart George v. Skeates & Co.*, 19 Ala. 738; *Rawls v. Doe d. Kennedy*, 23 Ala. 240.

20. A repealing clause in an unconstitutional statute, declaring that "all laws, contravening the provisions of this act, be, and the same are hereby, repealed," does not affect the previous laws. *Tims v. The State*, 26 Ala. 165.

21. It is competent for the legislature to repeal or modify a statute by a subsequent act at the same session. *Mobile & Ohio Railroad Co. v. The State*, 29 Ala. 573.

22. A special statute is not modified or controlled by a subsequent general act on the same subject, unless the latter clearly manifests on its face such an intention. *Ib.*

23. Questions of State policy can only be determined by the courts from constitutional and statutory provisions. *Atwood's Heirs v. Beck*, 21 Ala. 590; *Tannis v. Doe d. St. Cyre*, 21 Ala. 451.

24. Statutes in derogation of the common law are strictly construed. *Kirksey v. Dubose*, 19 Ala. 43; *Zackowski v. Jones*, 20 Ala. 189; *Nation v. Roberts*, 20 Ala. 544.

25. So are penal statutes, and yet not so strictly as to defeat the obvious intention of the legislature. *Crosby v. Hawthorn*, 25 Ala. 221; *Noles v. The State*, 24 Ala. 672; *Huffman v. The State*, 29 Ala. 40; *Mangham v. Cox & Waring*, 29 Ala. 81.

26. The several acts for the settlement of the affairs of the Planters' and Merchants' Bank of Mobile, are public statutes. *Jemison v. P. & M. Bank*, 17 Ala. 754.

27. So are the several acts for the settlement of the State Bank and branches. *Douglass & Easton v. Branch Bank at Mobile*, 19 Ala. 659.

28. And the charter of a public municipal coporation. *Smoot v. Mayor of Wetumpka*, 24 Ala. 112.

29. The re-enactment in the Code, of a previous statute, must be taken as a legislative adoption of the judicial construction which it had received. *Duramus v. Harrison & Whitman*, 26 Ala. 326; *Sartor v. Branch Bank at Montgomery*, 29 Ala. 353; *Ex parte Banks*, 28 Ala. 28; *Anthony v. The State*, 29 Ala. 27; *Huffman v. The State*, 29 Ala. 40.

II. PLEADING, AND PROOF.

30. The courts are bound to take judicial notice of public statutes. *Jemison v. P. & M. Bank*, 17 Ala. 754; *Douglass & Easton v. Branch Bank at Mobile*, 19 Ala. 659; *Smoot v. Mayor of Wetumpka*, 24 Ala. 112.

31. And of the meaning of words used in a statute. *Mayor of Wetumpka v. Winter*, 29 Ala. 651; *Sterné v. The State*, 20 Ala. 43; *Ward v. The State*, 22 Ala. 16.

32. But they cannot take judicial notice of the rate of interest in a sister State. *Clark v. Pratt*, 20 Ala. 470;

Harrison & Saunders v. Harrison, 20 Ala. 629.

33. Where a party claims a right based upon a foreign statute, he is required to prove that statute as a fact, and to set it out in pleading, in order that the court may see that the right claimed is in conformity with it. *Gunn v. Howell*, 27 Ala. 663; *Cockrell and Wife v. Gurley*, 26 Ala. 405; *Woodward v. Donnally* 27 Ala. 198.

STEAMBOATS.

I. LIABILITIES.
II. REGISTRATION.

I. LIABILITIES.

1. The acts of congress regulating the duties and liabilities of the steamboats engaged in carrying the mail, do not impose on the owners of such boats, in favor of a person who contracts with them only for the diligence of a mandatory, the responsibility of common carriers. *Haynie v. Waring & Co.*, 29 Ala. 263.

2. It is no defense to an action against the owners of a steamboat, to recover the value of a slave transported on their boat without the written authority of his owner, (Code, §§ 1010–11,) that the slave was a runaway, when he came on board the boat at Mobile; that he was not discovered, until after the boat had gone seventy-five miles up the river, on her trip to Montgomery; that he was then arrested, and chained until the arrival of the boat at Montgomery, when he was carried to the county jail, while the boat proceeded to Wetumpka; that he was then sick with pneumonia, and so continued until his death, which occurred a few days afterwards; and that the owners of the boat furnished him with proper medical attendance during his illness. *Mangham v. Cox & Waring*, 29 Ala. 81.

3. The same principles apply, where the action is brought to recover the penalty of fifty dollars. *Massey v. Cole*, 29 Ala. 364.

4. Under the act of 1844, giving an attachment against a steamboat for damages caused by a collision, the declaration should be filed against the boat itself, and the owners be allowed to intervene and make themselves parties. *Otis v. Thorn*, 18 Ala. 395; *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189.

5. Any facts which would defeat a common-law action on the case against the owners of the boat, will be a good defense to this statutory proceeding. *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189.

As to actions against the owners of steamboats, for negligence, see ACTION ON THE CASE, p. 369.

As to proceedings in admiralty, see ADMIRALTY, p. 383.

II. REGISTRATION.

6. The several statutes of this State, requiring the registration of deeds of trust and mortgages on personal property, do not apply to vessels for the navigation of the ocean, the evidence of title in which is to be looked for in their ship papers and registration under acts of congress. *Fontaine & Dent v. Beers & Smith*, 19 Ala. 722.

7. The act of 1854, (Session Acts 1853–4, p. 50,) "to provide for the registration of the names of steamboat owners," is not a regulation of commerce, within the constitutional grant of that power to congress; does not conflict with the license laws of the United States, regulating the coasting trade; and is not violative of the ordinance of 1819, by which Alabama accepted the conditions of the act of congress admitting her into the Union. *Commissioners of Pilotage v. Steamboat Cuba, &c.*, 28 Ala. 185.

8. The limitation of a suit under this statute is one year, as prescribed by section 2481 of the Code, although the proceedings are conducted according to the practice in admiralty. *Ib.*

9. A steamboat used exclusively as a lighter and tow-boat, plying between the wharves of the city of Mobile and the lower part of the bay outside the bar, and carrying cargoes to and from large vessels which could not pass the bar, is within the provisions of this statute, although she never goes outside the limits of the port of Mobile. *Ib.*

SUMMARY PROCEEDINGS.

1. In summary proceedings, by notice and motion, the record must affirmatively show every fact necessary to give the court jurisdiction. *Jemison v. P. & M. Bank*, 17 Ala. 754; *Connoly v. Ala. & Tenn. Rivers Railroad Co.*, 29 Ala. 373; *Gunn v. Howell*, 27 Ala. 663; *Arthur v. The State*, 22 Ala. 61.

2. If the statute requires a certain notice to be given, the record must show that the requisitions of the statute, both as to the manner and the length of time prescribed, were pursued; but, if the statute is silent as to notice, or does not prescribe any particular period, it is sufficient if the record shows that reasonable notice was given. *Arthur v. The State*, 22 Ala. 61.

3. If the defendant appears and pleads, and issues are tried by a jury, the proceeding is like any other case commenced in the ordinary mode, except that the jurisdiction must affirmatively appear. *Rutherford's Adm'r v. Smith*, 27 Ala. 417.

4. The notice cannot be looked to, though copied into the transcript, unless it is made part of the record by proper reference. *Connoly v. Ala. & Tenn. Rivers Railroad Co.*, 29 Ala. 373.

5. The notice may be made to subserve the double purpose of writ and declaration. *Jemison v. P. & M. Bank*, 17 Ala. 754; *Walker v. Chapman*, 22 Ala. 116; *Stanley v. Bank of Mobile*, 23 Ala. 662.

6. The issuing of the notice is the commencement of the suit, and prevents the statute of limitations from creating a bar, although the motion for judgment is afterwards delayed. *Stanley v. Bank of Mobile*, 23 Ala. 662.

7. A summary proceeding, on the part of a railroad company, against a delinquent stockholder, is a suit within the meaning of section 2398 of the Code; and the security for costs must be given when the notice is placed in the hands of the sheriff to be served. *Ala. & Tenn. Rivers Railroad Co. v. Harris*, 25 Ala. 232.

8. A motion for a summary judgment against a security for costs might be made, under the former law, before the costs were taxed, and was not required to specify the amount or items of cost. *Boswell v. Morton*, 20 Ala. 235.

9. And if the defendant interposed no objection on account of the non-joinder of a co-surety, who was bound jointly but not severally with him, he was held to have waived it. *Ib.*

10. The summary remedy in Georgia to establish a lost note, (Prince's Digest, 420, § 6,) being predicated on an *ex-parte* affidavit, and without notice to the party to be affected thereby, cannot be assimilated to a suit commenced by original attachment, or other analogous proceedings *in rem*, since the court has custody of neither the person nor the thing; such summary judgment will, therefore, be held void for want of jurisdiction, when set up in another State, unless the record shows the statute authorizing the court to proceed without notice. *Foster v. Glazener*, 27 Ala. 391.

As to summary proceedings against bank debtors, see BANKS, p. 433.

As to summary proceedings against clerks, coroners, sheriffs, and tax collectors, see those respective titles.

As to summary proceedings between sureties, or by a surety against his principal, see SURETIES, III, p. 749.

SUPERSEDEAS.

See EXECUTION, VII, p. 636.

SUPREME COURT.

See COURT, SUPREME, p. 512.

SURETIES.

I. DISCHARGE.
II. LIABILITY.
III REMEDIES.
IV. OTHER MATTERS.

As to the equitable liabilities and remedies of sureties, see same title in PART III, p. 341.

As to the sureties of executors, administrators, and guardians, see same title in PART II, p. 201.

I. DISCHARGE.

1. The refusal of the creditor, on request of the surety, to sell property conveyed to him by the principal debtor to secure the payment of the debt, does not discharge the surety. *Haden v. Brown*, 18 Ala. 641.

2. If the owner of a promissory note, executed by principal and surety jointly, gives it up to the principal, with the understanding that another note should be executed in its stead, with the same or another surety, this does not discharge the surety. *Smith & Garey v. Awbrey*, 19 Ala. 63.

3. The creditor's failure to present his claim against the estate of the deceased principal, within eighteen months after the grant of letters of administration, does not discharge the surety. *Minter & Gayle v. Branch Bank at Mobile*, 23 Ala. 762.

4. The release, by order of the creditor, of a levy on the principal's property sufficient to satisfy the execution, discharges the surety. *State Bank v. Edwards & Walke*, 20 Ala. 512.

5. A postponement of the day of payment, by agreement between the creditor and the principal debtor, founded on valuable consideration, discharges the surety, irrespective of the time of extension or the actual prejudice to the surety. *Haden v. Brown*, 18 Ala. 641.

6. If the surety assents to an extension of time to the principal, he is bound by his contract as altered; but a subsequent extension, without his assent, for valuable consideration, discharges him. *Gray's Executors v. Brown*, 22 Ala. 262.

7. If the creditor, having in his possession money or property belonging to the principal, which he might lawfully retain and appropriate to the satisfaction of his debt, suffers it to pass into the hands of the principal, the surety is, *pro tanto*, discharged. *Perrine v. Firemen's Insurance Co.*, 22 Ala. 575.

8. The act of 1841, amending the charter of the Firemen's Insurance Company of Mobile, (Session Acts 1840–41, p. 18,) makes it optional with the company to prohibit the transfer of stock by stockholders who are indebted to it; but, until that option is made, no lien is created on the stock, and, consequently, there is no right to retain it in satisfaction of debts due. If, therefore, the company does not refuse to permit the transfer, and the surety of the delinquent stockholder does not require it to refuse such transfer, the company may permit the transfer without losing any right against the surety. *Ib.*

9. A joint judgment having been rendered against the principal and surety, if the principal sues out a writ of error in their joint names, and gives bond superseding the whole judgment, this does not discharge the surety. *Duncan v. Hargrove*, 22 Ala. 150.

10. And if such judgment is affirmed on error, and an execution on the affirmed judgment afterwards levied on the principal's property; and a forthcoming bond is thereupon executed, to which the surety was no party, and afterwards returned forfeited,—this does not discharge the surety, unless the creditor did some act which he ought not to have done, or omitted to do some act which he ought to have done, in consequence of which the judgment on the forfeited forthcoming bond became fruitless. *Ib.*

11. Nor is the surety discharged, because an execution on the affirmed judgment was levied on the principal's property, sufficient to satisfy it, and the "levy wholly unaccounted for." *Ib.*

12. In debt on penal bond, conditioned for the principal's faithful performance of his duties as secretary of an incorporated company, a plea by the sureties, averring that the company had recovered a judgment in assumpsit against the principal for the amount of his defalcations, is no defense to the action. *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

13. If the surety in a bond for titles notifies the obligee that the title is not in the person named in the condition, and the obligee thereupon promises him not to pay the purchase-money until the title is arranged, but afterwards pays it, although he might have retained it consistently with his contract, the surety may reduce the damages, in an action on the bond, to the extent of the purchase-money. *Allen v. Greene*, 19 Ala. 34.

14. If the surety on a note notifies the holder of the fact of his suretyship, and requires him to bring suit against the principal, this is a substantial compliance with the requisitions of the statute, (Clay's Digest, 532, § 6,) and the holder may waive the necessity of a written notice; but, whether sufficient or not under the statute, it is sufficient at common law, in connection with proof of the holder's failure to sue the principal, and consequent damage to the surety. *Pickens v. Yarborough's Adm'r*, 26 Ala. 417.

15. If the surety on a note given for the purchase-money of a slave executes his own note to the payee, "in discharge of the balance remaining due," and takes up the original note, he cannot defeat a recovery on the new note, by setting up fraud in the sale, or a breach of the warranty of soundness. *Fluker v. Henry's Adm'r*, 27 Ala. 403.

As to the discharge of an endorser, by the failure to sue the maker to the first court, see BILLS OF EXCHANGE, &c., 52–56, p. 442.

II. LIABILITY.

16. The surety in a bond given for a trial of the right of property is liable for the costs, if the property is condemned, although the claim may not have been put in for delay. *Robertson v. Patterson*, 17 Ala. 407.

17. The sureties in an attachment bond are not liable for costs accruing on a trial of the right of property in the goods attached. *Thompson v. Gates*, 18 Ala. 32.

18. The sureties of a justice of the peace are only liable for the faithful performance of his ministerial duties, and not for errors, mistakes, and omissions of a judicial character. *McGrew & Beck v. Governor*, 19 Ala. 89.

19. The liability of the sureties of a county officer does not cease on their application to the judge to require a new bond, but continues until the new bond is given, or until the office is declared vacant on account of the failure to give it. *Armstrong v. Pugh*, 19 Ala. 209.

20. If money is received on deposit by an incorporated company, without authority under its charter, and fraudulently embezzled by its secretary, the surety on his official bond is not liable for it. *Firemen's Insurance Co. v. McMillan*, 29 Ala. 147.

21. A recovery against the principal, for his defalcations as secretary of an incorporated company, does not conclude the surety on his official bond, either as to the fact of embezzlement, or as to the amount embezzled. *Ib.*

22. Sureties are liable according to the law of the place of their contract. *Walker v. Forbes*, 25 Ala. 139.

III. REMEDIES.

23. An accommodation endorser of a bill of exchange is not entitled, under the act of 1821, to a summary judgment against his principal. *Stodder v. Cardwell*, 20 Ala. 223.

24. A surety, on paying off a joint judgment against himself, his co-surety and their principal, is not entitled to a summary judgment against his co-surety, either under the act of 1821, or under the act of 1839; which acts, being in derogation of the common law, must not be construed to embrace cases which are not within their legitimate meaning. *Nation v. Roberts*, 20 Ala. 544.

25. A notice, alleging that plaintiff was bound as surety for defendant, on a certain note, which is particularly described; that judgment was thereon rendered against plaintiff, upon which an execution was issued, and that plaintiff was compelled to pay a specified sum of money under said execution; and which specifies the court in which the judgment was rendered, and the time of its rendition,—is sufficient to authorize a summary judgment against the principal in the same court, although it does not specify the amount of the judgment, the name of the plaintiff therein, or the time of the payment by the surety. *Pait v. Pait*, 19 Ala. 713.

26. Under the Code, (§ 2645,) a surety is entitled, on paying off a judgment against himself and his two co-sureties on a guardian's bond, to a summary judgment against one of his co-sureties, for one half of the amount paid, when the other surety is insol-

vent, and the principal was dead before the rendition of the judgment. *Walker v. Campbell*, 25 Ala. 544.

27. When motion is made for such summary judgment, the defendant cannot be permitted to show that the guardian's default, for which the judgment was rendered, was not covered by their bond, but by a prior bond to which plaintiff only was a party. *Ib.*

28. Nor will he be allowed to prove that, before the payment by plaintiff, the attorney of the judgment creditor informed him that the suit was brought by mistake on the wrong bond, and that, unless the judgment was paid, another suit would be brought on the other bond. *Ib.*

29. A surety, who has been fully indemnified by his principal, cannot recover contribution from his co-surety, but must indemnify himself out of the means placed in his hands. *Morrison v. Taylor*, 21 Ala. 779.

30. If a surety receives a mortgage or other security from his principal, and afterwards surrenders or abandons it, without the consent of his co-surety, merely because the principal objected to giving up the property, he cannot recover contribution from his co-surety. *S. C.*, 26 Ala. 728.

31. The right of contribution among sureties results not from any implied contract between them, but from an acknowledged principle of natural justice, which requires that those who assume a common burden should bear it in equal proportions. *White v. Banks*, 21 Ala. 705; *Tyus v. DeJarnette*, 26 Ala. 280; *Taylor v. Morrison*, 26 Ala. 728.

32. If a surety obtains indemnity, for valuable consideration paid by him, his co-surety cannot claim the benefit of the indemnity, without paying his proportion of the consideration; and if an offer of security be made to them by their principal, upon condition that they execute a release to him, which offer is accepted by one, and refused by the other, the latter would have the right to demand that the proceeds of such security should be applied to the reduction of the common debt, but could not claim the benefit of it in any other manner; and such payment, if it amounted to his proportion of the common debt, would discharge the former from contribution. *White v. Banks*, 21 Ala. 705.

33. Plaintiffs and defendant being bound as sureties for one S., to whom defendant was indebted, S. proposed to release defendant from his liability as surety, by giving a new note with other sureties, if defendant would give him a sight draft on his commission-merchant for the amount of his indebtedness; or, if he failed to procure defendant's release, that he would then place defendant's note in the hands of a third person, to protect him alone against his suretyship. *Held*, that plaintiffs' assent to this arrangement was an express waiver of their right to participate in the indemnity. *Tyus v. DeJarnette*, 26 Ala. 280.

34. But a waiver, in such case, of plaintiffs' legal right to participate in any indemnity or security which defendant might obtain, cannot be inferred from the facts, that they objected to their principal making an assignment, for the benefit of his sureties, because it would injure his credit, and agreed that he might procure defendant's release from his suretyship, if the latter would pay the amount of his individual debt; and that defendant then said, in their hearing, that he should take measures to secure himself, if their principal failed to carry out this arrangement for his benefit. *Ib.*

IV. OTHER MATTERS.

35. A surety, or accommodation endorser, may take advantage of usury in the debt. *Gray's Executors v. Brown*, 22 Ala. 262.

36. In an action against the sureties on a promissory note, their principal is not a competent witness for them without a release. *Garrett v. Holloway & Malone*, 24 Ala. 376.

37. In an action against the principal, on a note executed by him, in this State, jointly with several sureties, a surety not sued is a competent witness for him. *Wright v. Atwood's Adm'r*, 29 Ala. 346.

38. If the surety's property is sold under execution on a judgment against the principal, to which the surety is not a party, and bought in by the principal, through an agent, and sent

back to the surety's house, the principal cannot, after paying the debt, invoke the doctrine of estoppel to defeat the surety's title. *Pond v. Wadsworth*, 24 Ala. 531.

39. If both parties were insolvent at the time, and the transaction was intended to hinder and delay the surety's creditors, the agent would hold the property against both parties, and might dispose of it as he pleased; and if he acted in good faith for the principal, the title of the latter would prevail over that of the surety, unless the surety afterwards acquired the property by contract with him. *Ib.*

SURVEYORS.

1. Although an *ex-parte* survey, made by a county surveyor without an order of court, may not, of itself, be competent evidence; yet the surveyor may be examined personally, to prove the boundaries of the land, and may illustrate his evidence by his own survey; and when the accuracy of the survey has thus been proved, it may go to the jury, as evidence tending to prove the location of the land and its boundaries. *Nolin v. Parmer*, 21 Ala. 66.

2. In such case, the parol testimony of the surveyor is admissible, although he testifies that all his knowledge respecting the boundaries of the land was derived from the survey which he had made. *Ib.*

3. A practical surveyor, who testifies that he is familiar with the marks used by the United States surveyors in their public surveys, may give his opinion, as an expert, whether a particular line was marked by them. *Brantly v. Swift*, 24 Ala. 390.

TAXES.

I. ASSESSMENT, AND ASSESSORS.
II. COLLECTION, AND COLLECTORS.

As to the validity of sales for taxes, see LAND LAWS, V, p. 684.

As to the validity of statutes relative to taxation, see CONSTITUTIONAL LAW, III, p. 480.

I. ASSESSMENT, AND ASSESSORS.

1. The only legitimate object of taxation, is the support and maintenance of the government; but this does not mean only the expenses incurred by the mere machinery necessarily employed in its conduct and adminstration: on the contrary, the power extends to the employment of all those means and appliances, which are ordinarily adapted, or which may be calculated, to develop the resources of the State, and to add to the aggregate wealth and prosperity of her citizens; such, *e. g.*, as providing outlets for commerce, opening up channels of intercommunication between different portions of the State, improving the condition of her people, social, moral, and physical, by wholesome police regulations, and by a judicious system of public instruction, as also for the protection, security, and perpetuity of her institutions and government. *Stein v. Mayor of Mobile*, 24 Ala. 591.

2. The power of taxation is essential to the existence of all governments, however limited their powers may be; and its surrender is never to be presumed, unless the intention to surrender clearly appears. *Stein v. Mayor of Mobile*, 17 Ala. 234.

3. The value of property is to be estimated, for the purposes of taxation, with reference to the advantages and profits which may be derived from it; consequently, in estimating the value of tangible property, an intangible right connected with it must be included. *Ib.*

4. Where the individual partners of a firm reside in the city in which they have their place of business, the locality of the partnership capital, for the purpose of taxation, is the same as the domicile of its owners. *St. John, Powers & Co. v. Mayor of Mobile*, 21 Ala. 224.

5. The cash capital of a commercial firm, whose business "comprehends the purchase of cotton on commission, the buying of bills of exchange, generally based upon cotton, upon domestic and foreign places, upon which said bills of exchange and cotton they draw and sell their own bills of exchange,"—is that much cash in gold

or silver, ready at hand in the strong box, to be paid out for cotton purchased on commission, or in the purchase of bills of exchange; and this capital comes under the description of personal estate. *Ib.*

6. The city water-works of Mobile are taxable as real estate by the corporate authorities of the city; and a lessee, who holds under a contract with the corporation, by which he acquired all their rights and privileges in the water-works for the term of twenty years, and in perpetuity, if not then redeemed by the city, is liable for the tax. *Stein v. Mayor of Mobile*, 24 Ala. 591.

7. The lessee of a two-storied house in Mobile, having sub-let the upper story to a club with which he had no connection whatever, is not liable, under the by-laws regulating the city water-works, for the water-rates assessed against the occupants of the upper story. *Stein v. McArdle & Waters*, 24 Ala. 344.

8. Under the act of March 6, 1848, tax assessors are entitled to commissions both on the State and county tax. *Dunklin v. Gafford*, 17 Ala. 814.

II. COLLECTION, AND COLLECTORS.

9. A tax collector is not bound to collect a tax which was assessed under an unconstitutional statute, and is not liable on his failure to do so. *Boring v. Willams*, 17 Ala. 510.

10. He cannot refuse to pay over taxes which he has collected, on the ground that the assessment was illegal or irregular; it not appearing that he has received notice from an adverse claimant not to do so. *Ib.*

11. When the same person holds the office for two successive years, and gives bonds with different sureties, the treasurer cannot, even with the concurrence of the collector, appropriate money, which he knows was collected under the assessment of the second year, to the discharge of a balance due on the first, without the assent of the sureties whose rights are to be prejudiced. *Ib.*

12. A payment by the collector to the comptroller of public accounts, who has no authority to receive it, does not discharge the collector from liability to the State, unless the payment is ratified by the sovereign power of the State. *Walker v. Chapman*, 22 Ala. 116; *Van Dyke v. The State*, 24 Ala. 81.

13. The official bond of the tax collector of Mobile county, executed prior to the act of 1846 which imposed a tax on steamboats, covers taxes collected by him under that act. *Walker v. Chapman*, 22 Ala. 116.

14. If the bond of a collector superadds a condition which the statute does not require, this does not affect its validity even as a statutory bond. *Boring v. Williams*, 17 Ala. 510; *Walker v. Chapman*, 22 Ala. 116.

15. A proceeding against a delinquent collector, under the act of 1839, is properly instituted in the name of the county treasurer. *Boring v. Williams*, 17 Ala. 510.

16. The act of 1839 gives a summary remedy against the collector and any one or more of his sureties, and does not limit the institution of the proceedings to twenty days after the default. *Ib.*

17. Summary proceedings against a delinquent collector, under the act of 1820, are not governed by the statutory limitation of prosecutions for fines and forfeitures under penal statutes. *Walker v. Chapman*, 22 Ala. 116.

18. As to all defaults occurring prior to the passage of the act of 1848, the act of 1820 remains in full force, and gives fifteen per cent. damages, besides interest. *Ib.*

19. Under the several acts of 1848, (Session Acts, pp. 8, 114, 141,) the circuit court of Montgomery has jurisdiction of a summary proceeding against the collector of another county. *Ib.*

20. It is not necessary that the notice should contain all the averments which are indispensable in a declaration, or state facts with the same degree of technical accuracy and fullness: it is sufficient that it is issued by the comptroller,—alleges that one of the defendants was the tax collector of a particular county for a certain year; that he failed to pay into the State treasury, within the time prescribed by law, a specified amount of money, which was the balance of taxes due and collected by him; that the other

defendants were the sureties on his official bond, which is particularly described, and alleged to be payable, conditioned and approved as required by law; and states that the motion will be made at the next term of the circuit court of Montgomery, by the attorney-general, in the name of the governor, for the use of the State. *Ib.*

21. Under the acts of 1848 and 1850, the collector is a necessary party to the notice; and if the notice shows that he was dead before it was issued, it is demurrable. *Collier v. Powell & Bradley*, 23 Ala. 579.

22. In a summary proceeding against the collector and his sureties, his answer to a bill of discovery, filed by his sureties against him and the county treasurer, is not admissible evidence for the sureties. *Boring v. Williams*, 17 Ala. 510.

23. Two suits were pending against a tax collector, for failing to pay over the county taxes for 1845 and 1846. On the trial of the suit for taxes of 1845, he produced the receipt of the county treasurer, for an amount greater than the entire taxes of that year, but purporting to have been given for them; and also examined the county treasurer as a witness, who testified that, though he would not deny his signature to the receipt, he was sure the collector had never paid him, at any one time, so large an amount as that specified in the receipt; that the receipt, if his, must have been given for some smaller receipts which the collector had never surrendered; and that he was treasurer during the years 1845–6–7, and had never had a final settlement with the defendant. *Held*, that the defendant, on this state of facts, might introduce as evidence the said treasurer's receipts for the year 1846, for the purpose of showing that all the receipts amounted in the aggregate to the entire taxes due for the two years. *Williams v. Fitzpatrick*, 20 Ala. 791.

TENANTS IN COMMON.

See JOINT TENANTS, &c., p. 661.

TENDER.

1. Where a deputy sheriff "proposed to pay" to his principal money collected under execution, and the latter thereupon "told him that he would see the persons to whom it was going, and that he could pay it to them,"—*held*, that this did not amount to a legal tender of the money to the principal, but was a direction to the deputy to pay it to the persons entitled to receive it. *McGehee v. Gewin*, 25 Ala. 176.

2. A plea of tender, which shows on its face that the sum tendered was less than the amount due, is demurrable. *Smith v. Anders*, 21 Ala. 782.

3. A tender after suit brought must be of the sum due, with interest, and costs of suit; and this must be averred in the plea. *Ib.*

4. At common law, a plea of tender after suit brought was no bar to the action; but the defendant might obtain leave to bring the money into court, together with the costs accruing up to the time of bringing it in, and thus protect himself from liability for costs which might subsequently accrue; but the payment by defendant of costs accruing up to the time of the tender, and the payment of the sum due to the plaintiff on the trial, do not discharge him from liability for costs accruing after the tender. *Raiford v. Governor*, 29 Ala. 382.

As to tender by a judgment debtor or creditor, who wishes to redeem land, see REDEMPTION OF REAL ESTATE, p. 329.

TIME.

1. When no time is specified for the performance of a contract, the law requires that it shall be performed within a reasonable time. *Garnett v. Yoe*, 17 Ala. 74; *Wolfe v. Parham*, 18 Ala. 441; *Allen v. Greene*, 19 Ala. 34; *Drake v. Goree*, 22 Ala. 409; *Adams and Wife v. Adams*, 26 Ala. 272; *Hussey v. Roquemore*, 27 Ala. 281. (*Vide* CONTRACTS, 185–188, p. 502.)

2. When a statute requires notice to be given, but does not specify the length of time, it will be held to mean a reasonable time. *Arthur v. The*

State, 22 Ala. 61; *Burden v. Stein*, 25 Ala. 455.

3. A statutory month means a calendar month, unless otherwise expressed. *Bartol v. Calvert*, 21 Ala. 42.

4. In the computation of time under a statute, which requires service for a fixed number of days, the general rule is, to include the day of service, and exclude the other; but, when it requires a number of entire days, both must be excluded. *Garner & Nevill v. Johnson*, 22 Ala. 494.

5. In the computation of time under a statute, the settled practice in this State is, to include one day, and exclude the other, unless the statute requires so many entire days to intervene. *Owen v. Slatter*, 26 Ala. 547.

6. In the computation of time from an act done, the day of performance is excluded, and fractions of a day are not recognized; but, in construing a statute which, as between different acts, gives a preference to that which is first done, this rule, *it seems*, does not apply. *Lang v. Phillips*, 27 Ala. 311.

7. When time is alleged under a *videlicet*, the pleader is not required to prove it as laid. *Simpson v. Talbot*, 25 Ala. 469.

As to the computation of time under the statutes of non-claim, frauds, and limitations, see those respective titles.

TREASURER.

1. In consequence of the informal ratification of the proposed amendments to the constitution submitted to the people by the legislature of 1844–5, the tenure of office of the State treasurer is one year only, as fixed by the original constitution. *Collier v. Frierson*, 24 Ala. 100.

See, also, COUNTY TREASURER, p. 510.

TRESPASS.

I. WHEN ACTION LIES.

1. *For Injuries to Person, or Personal Property.*
2. *For Injuries to Real Property.*

II. PLEADINGS, EVIDENCE, AND DAMAGES.

1. *In Personal Action.*
2. *In Real Action.*

III. VERDICT, AND JUDGMENT.

I. WHEN ACTION LIES.

1. *For Injuries to Person, or Personal Property.*

1. To maintain trespass, the plaintiff must have, at the time of the tortious taking, either actual possession, or the immediate right of possession; if he has neither, his remedy is case or trover. *Davis v. Young*, 20 Ala. 151.

2. If the original taking was not a trespass as against plaintiff, the defendant's subsequent conversion of the property will not render him a trespasser *ab initio*. *Ib.*

3. Trespass is the appropriate remedy for defendant's malicious act in causing an execution against a third person to be levied on plaintiff's property. *Tatum & Smith v. Morris*, 19 Ala. 302.

4. Case is the proper remedy for the malicious use of process regularly issued from a court of competent jurisdiction; but, when the proceeding complained of is merely irregular, the remedy is trespass. *Sheppard v. Furniss*, 19 Ala. 760.

5. Trespass does not lie for an act done under legal process, valid on its face, and regularly issued from a court of competent jurisdiction; but, if the process is void for want of jurisdiction, it furnishes no protection either to the officer or the court. *Sasnett v. Weathers*, 21 Ala. 673.

6. It lies against a sheriff, who sells the entire property in goods owned by two jointly, under execution against one of them. *Smyth v. Tankersley*, 20 Ala. 212.

7. It does not lie against the master, for injuries committed by his slaves, under the direction of the overseer, without the order or knowledge of the master. *Lindsay v. Griffin*, 22 Ala. 629.

8. It lies against a person who, without authority, chastises the slave of another, though the chastisement be

reasonable and moderate. *Townsend v. Jeffries' Adm'r*, 24 Ala. 329.

9. It lies by the owner, against the hirer of a slave, for a punishment inflicted on the slave which, when considered with a just regard to all the attendant circumstances, was either cruel or barbarous; but not for a punishment which, when so considered, was moderate and proper, or absolutely necessary to overcome the slave's resistance, even though he was tied. *Nelson v. Bondurant*, 26 Ala. 341.

10. It lies for an injury to a dog, without proof of his pecuniary value. *Parker v. Mise*, 27 Ala. 480.

11. It does not lie for an act amounting to a felony, until there has been a criminal prosecution. *Blackburn v. Minter*, 22 Ala. 613; *Nelson v. Bondurant*, 26 Ala. 341; *Morton v. Bradley*, 27 Ala. 640.

12. But the doctrine of merger does not apply to a statutory action by an administrator, (Code, § 1938,) to recover damages for the wrongful act which caused the death of his intestate. *Lankford's Adm'r v. Barrett*, 29 Ala. 700.

13. Nor does it apply to an assault with intent to kill, when committed by one white person upon another, which is not a felony. *Phillips v. Kelly*, 29 Ala. 628.

2. *For Injuries to Real Property.*

14. A prior possession, accompanied with acts of ownership, by one through whom plaintiff deduces title, will authorize a recovery against one who is afterwards found in possession without any title or claim to the land. *Cox v. Davis*, 17 Ala. 714; *McCall v. Doe d. Pryor*, 17 Ala. 533.

15. Trespass lies against one who enters into the possession of unoccupied lands, without any claim of right or title, merely for the purpose of keeping the true owner out of the possession. *McCall's Adm'r v. Capehart & Harbin*, 20 Ala. 521.

16. If no actual possession is shown, the right of recovery depends upon the title, which draws to it constructive possession. *Shipman v. Baxter*, 21 Ala. 456.

17. After a recovery and satisfaction, if the defendant retains the actual possession, plaintiff cannot maintain a second action against him for a continuation of the trespass, unless he shows a title which carries with it the constructive possession. *Segar v. Kirkley*, 23 Ala. 680.

18. After a recovery in trespass to try titles, an action lies for the mesne profits, accruing between the rendition of the judgment and the execution of a writ of possession, against the defendant in the first action, or any one coming into possession under him. *Shumake v. Nelms' Adm'r*, 25 Ala. 126.

19. Where a testator does not devise his real estate to any person, and does not dispose by will of the rents and profits accruing after his death, his executors may maintain trespass for his lands, provided the estate is solvent, and they have not exercised the power of sale conferred on them by the will. *Patton v. Crow*, 26 Ala. 426.

For analogous decisions, see EJECTMENT, 1–14, p. 558.

II. PLEADINGS, EVIDENCE, AND DAMAGES.

1. *In Personal Action.*

20. Counts in case and trespass cannot be united. *Sheppard v. Furniss*, 19 Ala. 760.

21. A count, averring that the defendant falsely and maliciously made an affidavit in writing, and thereby falsely and maliciously caused and procured plaintiff to be arrested by his body, and to be imprisoned, and to be kept and detained in prison for the space of ten days then next ensuing; at the expiration of which time, plaintiff was forced and obliged, in order to procure his release and discharge from imprisonment, to pay defendant a large sum of money, which he then and there paid, and was thereupon discharged and released,—is good. *Ib.*

22. Where the action is brought to recover damages for an act amounting to a felony, the declaration must aver a criminal prosecution for the offense; but it is not necessary, in averring such prosecution, to state with particularity everything that was done, what witnesses appeared, and what testimony was offered. *Nelson v. Bon-*

durant, 26 Ala. 341; *Morton v. Bradley*, 27 Ala. 640.

23. Where the action is brought by an executor, for injuries inflicted on a slave belonging to his testator's estate, and he is removed from his office pending the suit, it may be revived in the name of his successor in the administration. *Townsend v. Jeffries' Adm'r*, 24 Ala. 329.

24. A plea in abatement, defending "the wrong and injury," instead of "the force and injury," is demurrable. *Ib.*

25. When a sheriff justifies under mesne process, after the time appointed for its return, he must either aver its return, or show some valid excuse for the failure to return it. *Kirksey v. Dubose*, 19 Ala. 43.

26. In trespass against a constable for taking a horse, defendant pleaded justification under legal process, to which plaintiff specially replied, that the horse was exempt from levy and sale under the exemption law. *Held*, that the replication admitted the validity of the writ, and the capacity of the person by whom it was levied to execute it; and, though the evidence showed that the plaintiff in the writ himself executed it, and the court charged the jury that the levy was nevertheless valid, yet this was but error without injury. *Boykin v. Edwards*, 21 Ala. 261.

27. When justification and the general issue are pleaded, the plaintiff must prove his actual possession, or immediate right of possession. *Davis v. Young*, 20 Ala. 151.

28. Where the action is brought to recover damages for an assault and battery on a slave, a plea, averring that defendant only inflicted reasonable and moderate chastisement, is demurrable. *Townsend v. Jeffries' Adm'r*, 24 Ala. 329.

29. But in an action by the owner against the hirer of a slave, such a plea presents a complete defense. *Nelson v. Bondurant*, 26 Ala. 341.

30. A former recovery in trespass, for the taking of goods of which plaintiff was possessed as trustee, is a bar to a subsequent action for the taking of other goods, at the same time and place, of which he was possessed in his own right. *O'Neal v. Brown*, 21 Ala. 482.

31. A former recovery in trespass, without satisfaction, is no bar to another action against a co-trespasser. *Blann v. Crocheron*, 19 Ala. 647; *S. C.*, 20 Ala. 320.

32. A voluntary payment of the damages and costs in the former action, to the clerk in open court, is no bar to the second action, unless such payment was accepted by the plaintiff in satisfaction of his recovery. *S. C.*, 20 Ala. 320.

33. In an action to recover damages for injuries to the person, defendant may introduce the record of a pending prosecution for felony, and show by parol that the indictment and civil action are founded on the same transaction. *Blackburn v. Minter*, 22 Ala. 613.

34. It being shown that one of the defendants prevented a third person from interfering in the fight, the contemporaneous declarations of such third person, tending to show that, instead of separating the combatants, he was about to participate in the fight, are admissible evidence in mitigation of damages. *Watkins v. Gaston*, 17 Ala. 662.

35. It being shown that, at the time of the assault, plaintiff cursed defendant, and was in the act of rising from his chair, with a stick in his hand, threats made by him against defendant within the preceding week or ten days, and communicated to the latter, are admissible evidence, as tending to show the motive of the defendant's act. *Ib.*

36. When it becomes a material question whether defendant inflicted more personal injury on plaintiff than was necessary to protect his close against the latter's attempt to enter it, the plaintiff's declarations, made some time previous to the assault, but not communicated to defendant, showing an angry state of feeling between them concerning their respective claims to the possession of the close, are admissible evidence for the defendant. *Riddle v. Brown*, 20 Ala. 412.

37. In an action to recover damages for injuries inflicted on a slave, a witness for the plaintiff testified, that defendant and one R. were chasing the slave as a runaway, with a pack

of trained dogs belonging to defendant; that he heard the report of a gun or pistol in the direction the dogs were trailing, and, when he reached a certain fence, defendant came up to him, from a swamp on the opposite side of the field, and told him, "that he came up with the slave in the field, on horseback; that the slave turned on him with a large stick; that he retreated to keep out of the slave's way, who said he would die before he would be taken; that he went to R., got his pistol, pursued the slave to the swamp, came up near to him, and shot him just as the slave was turning on him." *Held*, that defendant's declarations to said R., at the time of getting the pistol, and explanatory thereof, were admissible evidence for him. *Dearing v. Moore*, 26 Ala. 586.

38. In an action to recover damages for an injury to a dog, a witness cannot be asked, "whether, from his knowledge of the dog, he did or did not consider him a nuisance." *Parker v. Mise*, 27 Ala. 480.

39. Plaintiff having been wounded on the side, breast, head and neck, he may prove that, about two years after the commission of the assault, "when in the field of his father, he lay down under a tree, and complained that his head, neck and back hurt him." (STONE, J., *dissenting.*) *Phillips v. Kelly*, 29 Ala. 628.

40. The defendant cannot be allowed to prove, in mitigation of damages, that he has been indicted, convicted, and fined, for the same assault and battery. *Ib.*

41. The plaintiff's own misconduct, in provoking the assault, and entering willingly into the fight, which does not amount to an assault in law, is no defense under the general issue, unless the defendant was wholly blameless. *Ib.*

42. An agreement between the parties, entered into after defendant had commenced a prosecution against plaintiff for an assault and battery, but before the return of the warrant, to the effect "that the parties would mutually drop the matter, and be friends, and never do or say anything more in relation thereto; and that defendant would abandon the prosecution, and plaintiff would pay costs"; and its performance by defendant,—though they might, if specially pleaded, bar a civil action for damages growing out of the same transaction, cannot so operate when given in evidence under the general issue. *Ib.*

43. In an action for the taking and withholding of several hired slaves, plaintiff cannot be allowed to prove, that he had prepared for cultivation a larger tract of land than his other slaves could cultivate, and had procured horses to cultivate said land, provender to feed them, and a necessary supply of provisions for the slaves; and that, by reason of losing the services of the hired slaves, some of his horses were idle during the year, and he was compelled to leave a portion of the land uncultivated. *Burton v. Holley*, 29 Ala. 318.

44. In an action for taking and carrying off slaves, the court charged the jury, "that the measure of damages, if they found for the plaintiff, would be the highest value of the slaves at any time between the taking and the trial; that they might, in addition to this value, allow interest thereon, or might look to the value and hire as some guide in coming to a conclusion, but were not bound by them." *Held*, that the charge was not erroneous. *Hair v. Little*, 28 Ala. 236.

45. Whenever the tortious act is accompanied with circumstances of aggravation, exemplary damages are allowable. *Dearing v. Moore*, 26 Ala. 586; *Parker v. Mise*, 27 Ala. 480; *Roberts v. Heim*, 27 Ala. 678; *Hair v. Little*, 28 Ala. 236. (*Vide infra*, 72.)

46. In an action against two, who are shown to have acted in concert, if the evidence justifies exemplary damages against one, the other is liable to the same extent. *Hair v. Little*, 28 Ala. 236.

47. Double damages cannot be recovered for injuries to stock, unless the declaration is framed under the statute. *Tankersly v. Wedgworth*, 22 Ala. 677.

48. If the damages do not exceed five dollars, the plaintiff can recover no more costs than damages, unless the presiding judge will certify that the jury ought to have awarded greater damages. *Galle v. Lynch*, 21 Ala. 579.

2. *In Real Action.*

49. Tenants in common may maintain separate actions of trespass to try titles, for their respective interests. *Hines and Wife v. Trantham*, 27 Ala. 359.

50. A surviving tenant in common may join with the executor of his deceased co-tenant. *Patton v. Crow*, 26 Ala. 426.

51. A misjoinder of plaintiffs, in trespass *qu. cl. fr.*, is fatal to the action. *Ib.*

52. The death of one of several plaintiffs, before suit brought, is fatal to the entire action, and may be pleaded either in abatement or in bar. *Crump v. Wallace*, 27 Ala. 277.

53. All the tenants in possession may be joined in one action, although they may severally possess distinct portions of the land; and they may protect themselves, in such case, from a joint judgment for damages, by showing the character and extent of their possession. *Rowland & Heifner v. Ladiga's Heirs*, 21 Ala. 9.

54. On the death of the plaintiff, where the action is brought to recover the freehold, it may be revived in the names of his heirs-at-law. *Ib.*

55. The court may require some evidence of heirship, before allowing the revivor; or may allow it without any proof at all, and the defendant may then contest the heirship on the trial. *Ib.*

56. In trespass to try titles, the pendency of another action between the parties, for the same premises, is not good matter in abatement. *Hall and Wife v. Wallace*, 25 Ala. 438; *Hall v. Holcombe*, 26 Ala. 720.

57. In a real action under the Code, the pendency of another action for the premises, brought by plaintiff and others, is not available in abatement. *Hall v. Holcombe*, 26 Ala. 720.

58. In such action, the plea of not guilty is equivalent to the consent rule in ejectment, and is an admission of the defendant's possession at the commencement of the suit. *King v. Kent's Heirs*, 29 Ala. 542.

59. In an action which was pending when the Code went into effect, the defendant is not entitled to an abstract of the plaintiff's title. *Doe d. Kennedy v. Reynolds*, 27 Ala. 364.

60. In an action by several co-plaintiffs, a deed conveying the land to a portion of them is admissible evidence for the grantees therein named. *Lindsay v. Hoke & Abernathy*, 21 Ala. 542.

61. A deed conveying a portion of the land to all of them is also admissible. *Doe d. Saltonstall and Wife v. Riley & Dawson*, 28 Ala. 164.

62. Where the plaintiff claims under patent from the United States, as the assignee of an Indian reservee, while the defendant claims under an older patent, the plaintiff must prove the location of the Indian, and that he succeeded to the Indian's rights. *Stephens v. Westwood*, 20 Ala. 275.

63. The defendant may protect himself against a purchaser at sheriff's sale, when he was in possession before the rendition of the judgment, by showing an unrecorded deed from the defendant in execution, executed prior to the rendition of the judgment, although he does not connect himself with it. *Strickland v. Nance*, 19 Ala. 233.

64. A verbal contract, for the purchase of a "right to dig and carry away ore" from the mine of another, though not binding under the statute of frauds, will protect the purchaser from an action of trespass for digging the ore; but it cannot be assigned to another. *Riddle v. Brown*, 20 Ala. 412.

65. If the defendant relies on the adverse possession of himself and those under whom he claims, he must show an actual possession of the land, or some part of a legal sub-division of which it forms a portion. *Shipman v. Baxter*, 21 Ala. 456.

66. Where neither party is shown to have had actual possession of the land, it is error to instruct the jury that, "if defendant entered in the *bona fide* assertion of a claim of title which he thought to be good," they must find him not guilty. *Ib.*

67. One who has actual possession, claiming under a deed purporting to convey the premises to him, especially when livery of seizin accompanied the delivery of the deed, may contest the validity of plaintiff's patent from the United States. *Saltmarsh v. Crommelin*, 24 Ala. 347.

68. If no claim or suggestion as to valuable improvements is made by the pleadings, the defendant has no right to offer evidence as to the value of his improvements. *Stephens v. Westwood*, 25 Ala. 716.

69. The value of an orchard is to be estimated with reference to what it is worth to the premises in its growing state. *Mitchell v. Billingsley*, 17 Ala. 391.

70. The actual value of growing timber is not its supposed worth to the owner, but the price for which it would sell at the time in the neighborhood in which it is situated. *Ivey v. McQueen*, 17 Ala. 408.

71. In trespass to try titles, the plaintiff is entitled to recover damages for the rents accruing up to the time of the verdict. *Shumake v. Nelms' Adm'r*, 25 Ala. 126.

72. Whenever the tortious act was accompanied with circumstances of aggravation, exemplary damages may be given. *Mitchell v. Billingsley*, 17 Ala. 391; *Ivey v. McQueen*, 17 Ala. 408. (*Vide supra*, 45.)

III. Verdict, and Judgment.

73. In trespass to try titles, a verdict, finding that "the land belongs to the plaintiff," will be held sufficient, on error, to support a judgment in his favor, for damages and costs, and the award of a writ of *hab. fac. pos.* *Stephens v. Westwood*, 25 Ala. 176.

74. A judgment in trespass to try titles is conclusive that damages were recovered for the rents accruing up to the time of the verdict; and the fact that the action was brought against a tenant, whose term expired before the rendition of the judgment, makes no difference, if his landlord was made a party. *Shumake v. Nelms' Adm'r*, 25 Ala. 126.

75. A recovery in that action is conclusive between the parties and their privies, as to the plaintiff's title, in a subsequent action for the rents and profits. *Ib.*

76. If the plaintiff recovers less than five dollars damages, he can recover no more costs than damages, unless the presiding judge will certify that the jury ought to have awarded greater damages. *Galle v. Lynch*, 21 Ala. 579.

77. But this statute does not authorize the court to render judgment against the defendant for the residue of the costs. *Ivey v. McQueen*, 17 Ala. 408.

TRIAL OF RIGHT OF PROPERTY.

(Statutory Provisions: Code, §§ 676–9, 2586–91, 2833–38; Clay's Digest, 210–14, §§ 50–68.)

I. Who may Interpose Claim.
II. Bond, and Liability of Sureties.
III. Pleadings, Practice, and Evidence.
IV. Verdict, and Judgment.

I. Who may Interpose Claim.

1. A *cestui que trust* cannot interpose a claim in his own name. *King & Co. v. Hill*, 20 Ala. 133.

2. A stranger to the original suit, who has replevied the property attached, cannot interpose a claim to the property, after the rendition of judgment against the defendant, and a demand of the property on the bond, without first surrendering it to the sheriff. *Braley v. Clark*, 22 Ala. 361; *Cooper v. Peck & Clark*, 22 Ala. 406.

3. When mortgaged property is levied on before the arrival of the law-day, and the mortgagor afterwards makes default, the mortgagee may then claim the property, and terminate the sheriff's possession. *Fontaine & Dent v. Beers & Smith*, 19 Ala. 722.

4. Under the Code, when an execution, from either a court of record or a justice's court, is levied on mortgaged property, the mortgagee or his assignee may interpose a claim, and try the right of property, before the law-day of the mortgage. *Floyd v. Morrow*, 26 Ala. 353.

5. Where the wife's separate property, created by contract which appointed no trustee, is attached or levied on, the husband may interpose a claim to it; but the wife cannot compel him to do so, nor can she interpose a claim in her own name. *Gerald and Wife v. McKenzie*, 27 Ala. 166; *Friend v. Oliver*, 27 Ala. 532.

6. If the husband purchases a slave

in his own name, with money arising from the sale of the wife's separate property secured to her by deed, and takes the bill of sale to himself, but afterwards delivers the slave to his wife, and always recognizes it as hers, she cannot interpose a claim in her own name, when the slave is taken under attachment against the husband. *Irons v. Reynolds*, 28 Ala. 305.

7. But the wife may interpose a claim in her own name, to a slave which the husband purchased with money belonging to her separate estate secured by law, other than the income and profits thereof, and afterwards voluntarily conveyed to her, though for the purpose of preventing it from being subjected to the payment of his debts. *Wilson v. Sheppard*, 28 Ala. 623.

II. BOND, AND LIABILITY OF SURETIES.

8. The statutory bond, required of the claimant, is merely intended to secure to the plaintiff the assessed value of the property, or the amount of the judgment itself if less than the value. *Hooks v. Branch Bank at Montgomery*, 18 Ala. 451.

9. The surety is liable for the costs, in the event of a judgment of condemnation, although the claim may not have been put in for delay. *Robertson v. Patterson*, 17 Ala. 407.

10. The surety is not a party to the issue on the trial; consequently, it is erroneous to render a judgment against him, unless the record affirmatively shows that be appeared and assented to it. *Gayle v. Bancroft*, 17 Ala. 351.

11. But the rendition of a judgment for costs, against the claimant and his surety jointly, even if erroneous, is not available to the claimant on error, because not prejudicial to him. *Beeson v. Wiley, Banks & Co.*, 28 Ala. 575.

12. A motion to quash the bond, at the instance of the obligors themselves, after the claim suit has been pending for several years, is addressed entirely to the discretion of the court. *Gayle v. Bancroft's Adm'r*, 22 Ala. 316; *Gayle & Riggs v. Bancroft's Adm'r*, 22 Ala. 648.

III. PLEADINGS, PRACTICE AND EVIDENCE.

13. On the death of the plaintiff in execution, pending the suit, it may be revived in the name of his personal representative. *Gayle v. Bancroft's Adm'r*, 22 Ala. 316.

14. It is discretionary with the court to allow an amendment of the title of the case, as prefixed to the issue, by adding the name of another defendant in execution, so as to make it correspond with the execution. *Ib.*

15. After the suit has been pending several years, and a judgment has been once rendered against the claimant, he is estopped by the record from disclaiming: if he has been ignorant of the proceedings carried on in his name, the court is not bound to notice his disclaimer, (conceding that to be his remedy,) unless he avers his ignorance of the previous pendency of the suit, and the want of authority on the part of the attorney who appeared in his name. *Ib.*

16. If the plaintiff's christian name is incorrectly stated in the affidavit, which was made by an agent of the claimant, when the error is apparent from the other papers in the case, the claimant cannot on this account decline to join in an issue with the plaintiff; but the court may compel him to join in an issue, or to suffer the consequences of a default. *Ib.*

17. An issue whether the property levied on was, "at the date of the levy," subject to the attachment, is immaterial. *Fontaine & Dent v. Beers & Smith*, 19 Ala. 722.

18. The claimant cannot set up an outstanding title in a third person, with whom he shows no privity. *Thomas v. DeGraffenreid*, 17 Ala. 602; *Cotten v. Thompson*, 21 Ala. 574.

19. But, where the claimant himself has an undivided interest in the property, as where it belongs to him and a third person jointly, he may interpose their claim. *Cotten v. Thompson*, 21 Ala. 574.

20. The record of the plaintiff's judgment against the defendant in execution, is irrelevant and inadmissible as evidence. *Taliaferro v. Lane*, 23 Ala. 369.

21. The execution is admissible ev-

idence for the plaintiff; and the admission of the affidavit and bond, though they are incompetent evidence, is not prejudicial to the claimant. *Gayle v. Bancroft's Adm'r*, 22 Ala. 316.

22. The sheriff's endorsement of his levy on the execution is competent evidence for the plaintiff, for the purpose of showing its levy on the slave in controversy. *Thomas v. Henderson*, 27 Ala. 523.

23. The plaintiff may prove the value of the property at the time of the trial. *Thomas v. DeGraffenreid*, 27 Ala. 651.

24. The death of the animal in controversy, pending the suit, does not affect the plaintiff's right of recovery; consequently, evidence of that fact is not admissible for the claimant. *Derrett v. Alexander*, 25 Ala. 265.

25. Where two attachments, between the same parties, are levied on the same property, and a claim is interposed in each case by the same person, a judgment of condemnation in one case is conclusive in the other that the property is subject to the attachment. *Ib.*

26. The payment by the claimant, in such case, of the assessed value of the property in the first case, does not, *per se*, sustain his claim in the second. *Ib.*

27. The declarations of the person in whose possession the property was levied on, explanatory of his possession, are competent evidence, as a part of the *res gestæ*. *Fontaine & Dent v. Beers & Smith*, 19 Ala. 722; *Derrett v. Alexander*, 25 Ala. 265. (*Vide* EVIDENCE, 104–117, p. 591.)

28. Where the claimant derives title by purchase from the defendant in execution, subsequent to the creation of the plaintiff's debt, the consideration of such purchase cannot be proved by the declarations or admissions of the defendant. *Hooper v. Edwards*, 18 Ala. 280.

29. Where the claimant's purchase from the defendant is impeached for fraud, the plaintiff may show that the claimant is a minor son of the defendant; that the latter, who was then in embarrassed circumstances, executed another deed to the claimant on the same day; and that the two deeds conveyed all his property within the State. *Benning v. Nelson*, 23 Ala. 801. (As to proof of fraud generally, *vide* EVIDENCE, 600–615, p. 627.)

30. The record of a judgment against the defendant, rendered after his sale to the claimant, is not admissible evidence for the plaintiff, to prove an indebtedness prior to its rendition. *Snodgrass v. Branch Bank at Decatur*, 25 Ala. 161.

31. The declarations of the defendant in execution, showing a fraudulent intent on his part, are not admissible evidence against the claimant, unless he or some one through whom he claims is shown to have been connected with the fraud. *Newcombe v. Leavitt*, 22 Ala. 631; *Bilberry's Adm'r v. Mobley*, 21 Ala. 277.

32. Any declaration of the claimant, which would be admissible evidence for him in a controversy between him and the defendant in execution, is also admissible evidence for him on the trial of the claim suit. *Allen v. Smith*, 22 Ala. 416.

33. Where the claimant is shown to be the daughter of the defendant in execution, and the slave in controversy is proved to have been worked on the plantation on which father and daughter resided, the contemporaneous declaration of the father, that he claimed to own the land in his own right, is admissible evidence, as tending to show that the slave was in his possession. *Thomas v. DeGraffenreid*, 17 Ala. 602.

34. The fact that the defendant furnished necessaries for the family, of which the slaves formed a part, tends to prove his ownership of them. *S. C.*, 27 Ala. 651.

35. But the fact that he did not obtain credit on the faith of the slaves in his possession, is not admissible to disprove his ownership. *Ib.*

36. That the defendant in execution resided on, and claimed as his own, the plantation on which the slaves in controversy were worked; that his son, who was acting as his overseer, and the claimant, his daughter, resided on the plantation with him at that time; and that he declared, while the slaves were thus being controlled, that his son was his overseer,—are facts tending to prove the defendant's adverse possession under claim of

ownership. *Thomas v. Henderson*, 27 Ala. 523.

37. Where claimant derives title from the defendant in execution, under a conveyance which is attacked for fraud, the plaintiff may show that, at the time of its execution, the defendant was insolvent. *Beeson v. Wiley, Banks & Co.*, 28 Ala. 575.

38. Where it is shown that the property was purchased and paid for with the joint funds of the claimant and defendant in execution, and the title taken in the name of the claimant; and that this was done for the purpose of defrauding the creditors of the defendant, who was insolvent, the property should be condemned. *Lanier v. Branch Bank at Montgomery*, 18 Ala. 625.

39. Where the claim is interposed by a mortgagee, and, before the trial of the claim suit, the mortgagor pays off the mortgage debt, the property should be condemned. *Fontaine & Dent v. Beers & Smith*, 19 Ala. 722.

40. Where the claimant derives title from the defendant in execution, partly by gift, and partly by purchase, consummated before the lien of the execution attached; and no question of fraud is raised,—the claimant is entitled to recover. *Taylor v. Branch Bank at Huntsville*, 21 Ala. 581.

IV. VERDICT, AND JUDGMENT.

41. The assessment by the jury of the aggregate value of the several slaves in controversy, is mere surplusage, and not available on error to the claimant. *Willis & Co. v. P. & M. Bank*, 19 Ala. 141; *Powell v. Hadden's Executors*, 21 Ala. 745.

42. If the judgment entry describes the plaintiffs in *attachment* as plaintiffs in *execution*, and declares that the property was found subject to their *execution*, this is a mere clerical misprision, which the appellate court will consider amended. *Powell v. Hadden's Executors*, 21 Ala. 745.

43. It is erroneous to render judgment against the surety on the claim bond, unless the record shows that he appeared and consented to it. *Gayle v. Bancroft*, 17 Ala. 351.

44. The rendition of a judgment for costs, against the claimant and his surety jointly, is not prejudicial to the claimant, and, consequently, is not available to him on error. *Beeson v. Wiley, Banks & Co.*, 28 Ala. 575.

45. In a case which was commenced in a justice's court, and removed by *certiorari* to the circuit court, where the property was found subject to the attachment, it is erroneous to render judgment against the sureties on either the replevy bond or the *certiorari* bond. The proper practice, in such case, would be to certify the judgment of condemnation, with a *procedendo*, to the justice; but to render judgment for the costs of the claim suit, on the trials before the justice and circuit court, against the claimant and his sureties on the *certiorari* bond. The justice thereupon issues execution on the certified judgment; if the claimant fails to deliver the property, the failure is endorsed on the claim bond, and execution then issues against both the principal and surety therein, for the assessed value of the property, or for the judgment and costs. *Derrett v. Alexander*, 25 Ala. 265.

46. Where two attachments, betweeu the same parties, are levied on the same property, and a claim is interposed in each case by the same person, a judgment of condemnation in one case is conclusive in the other. *Ib.*

47. A judgment on verdict for the claimant is conclusive, in a subsequent action against the plaintiff for damages, that the defendant in attachment had no interest in the property. *Roberts v. Heim*, 27 Ala. 678.

48. If a judgment of condemnation is affirmed on certificate in the supreme court, ten per cent. damages cannot be awarded; and if awarded, the judgment of affirmance is, to that extent, void for uncertainty. *Hooks v. Branch Bank at Montgomery*, 18 Ala. 451.

TROVER.

I. WHEN THE ACTION LIES.
II. PLEADINGS, AND EVIDENCE.
III. DAMAGES.
IV. JUDGMENT.

I. WHEN THE ACTION LIES.

1. To authorize a recovery in trover, the plaintiff must have either a general or a special property in himself. *Kemp v. Thompson*, 17 Ala. 10.

2. An equitable title is not sufficient to maintain the action. *Broome v. Curry's Adm'rs*, 19 Ala. 805.

3. If one to whom a slave is bound as an apprentice, renounces his trust, and suffers the slave to be converted by a third person, the owner becomes entitled to the immediate possession, and may maintain trover. *Tucker and Wife v. Magee*, 18 Ala. 99.

4. A guardian cannot maintain trover, in his own name, for the conversion of a hired slave belonging to his ward, although the contract of hiring was made with him : the action should be brought in the name of the ward. *Hooks v. Smith*, 18 Ala. 338.

5. The action lies for the conversion of a promissory note, in favor of the party who had prior possession, although he is neither the legal nor beneficial owner of it. *Lowremore v. Berry*, 19 Ala. 130.

6. Where the evidence, in such action, showed "that the note was traded by plaintiff to defendant for a wagon and oxen, with a reservation on the part of the plaintiff that he might, at any time before the note fell due, have the privilege of redeeming it, by paying defendant $55,"—*held*, that the court could not infer that the note was endorsed absolutely to the defendant, so as to vest in him the legal title ; and that the tender of the money within the specified time, with a demand of the note, gave plaintiff the immediate right of possession. *Trulove v. Brown*, 21 Ala. 544.

7. Possession and the right of possession, accompanied with a lien for money advanced, authorize a recovery against one who disturbs that possession. *Bryan v. Smith* 22 Ala. 534.

8. A contract for the sale of cotton, the greater part of which is ungathered, to be delivered to the purchaser at a specified place so soon as it can be gathered and ginned, does not vest such title in him as will maintain trover. *Screws v. Roach*, 22 Ala. 675.

9. A widow may maintain trover, for the conversion of personal property belonging to the estate of her deceased husband, of which she had possession several years after his death, when no letters of administration have been granted on the estate. *Brown v. Beason*, 24 Ala. 466.

10. No demand is necessary before suit brought, where the defendant's wrongful assumption of the property amounts to a conversion. *Ib.*

11. A several owner is entitled to recover, upon proof of a demand and refusal ; but, if his interest has never been separated, he cannot recover against a co-owner, without proving that the conversion went to the destruction of the chattel or the exclusion of his right. *Allen v. Harper*, 26 Ala. 686.

12. A sale of the entire property in a chattel, by one tenant in common, is a conversion, for which his co-tenant may maintain trover. *Perminter v. Kelly*, 18 Ala. 716 ; *Smyth v. Tankersley*, 20 Ala. 212.

13. An agent is liable in trover, for an act which, if done by his principal to the property of another, would amount to a conversion. *Perminter v. Kelly*, 18 Ala. 716.

14. If a sheriff sells the entire property in a chattel owned by two jointly, under execution against one of them, this amounts to a conversion. *Smyth v. Tankersley*, 20 Ala. 212.

15. If he levies an attachment, at the suit of a landlord, on a portion of the tenant's crop sufficient to satisfy it, and suffers the tenant to retain and dispose of it, this does not render him liable in trover to an under-tenant, for a subsequent seizure and sale of his portion of the crop. *Givens v. Easley*, 17 Ala. 385.

16. If he sells property under an execution which comes to his hands after the expiration of his term of office, he is liable in trover. *Andress v. Broughton*, 21 Ala. 200.

17. Trover does not lie for the conversion of a promissory note, which has been paid or legally discharged ; but, if the note has not been paid or discharged, an action may be maintained for its conversion, although the word *paid* was written across the face of it, by mistake, or without authority. *Lowremore v. Berry*, 19 Ala. 130.

18. If a factor or commission-mer-

chant pledges the goods of his principal for his own use, this is a conversion, for which the principal may bring trover against the factor and his pledgee, either or both of them, at his election. *Bott v. McCoy & Johnson*, 20 Ala. 578.

19. The employment of a hired slave in a business different from that for which he was specially hired, is a conversion, which renders the hirer liable in trover for his value, if the slave is lost, even though his death was the result of his own disobedience, or of inevitable accident. *Hooks v. Smith*, 18 Ala. 338; *Seay v. Marks*, 23 Ala. 532; *Moseley v. Wilkinson*, 24 Ala. 411.

20. But, if the owner receives the stipulated hire for the entire term, with knowledge of the conversion during the term, he is estopped from afterwards bringing trover. *Moseley v. Wilkinson*, 24 Ala. 411.

21. If the husband, during coverture, sells or disposes of the wife's separate property, without her consent, this is a conversion, for which, in the event of her surviving him, she may sue his personal representative; or, if he survives her, her personal representative may sue him. *Jenkins v. McConico*, 26 Ala. 213.

22. The unauthorized transfer, by the secretary of an incorporated insurance company, of promissory notes and bills of exchange belonging to the company, is a conversion. *Firemen's Insurance Co. v. Cochran & Co.*, 27 Ala. 228.

23. But, if the company, with full knowledge of the tort, brings assumpsit against the secretary, for the amount of the bills and notes, summons the transferree by process of garnishment, takes judgment against him for the amount of indebtedness admitted on account of the bills and notes, and coerces satisfaction of this judgment, —this amounts to a confirmation of the transaction, and estops the company from afterwards bringing trover against the transferree. *Ib.*

24. To constitute a conversion, it is not necessary that the party should have had the exclusive control, or actual manucaption of the goods: the term embraces any intermeddling with, or dominion over the property of another, subversive of the rights of the true owner; as where the defendants are actually present, aiding and assisting another in the unlawful attempt to remove plaintiff's slaves from the State, with the intention of wrongfully depriving him of his property, even though it be for the use of his wife,— each act, in furtherance of the common design, is the act of all, and all are guilty. *Freeman v. Scurlock*, 27 Ala. 407.

25. An action cannot be maintained for the conversion of a slave, against a party who stole him, until he has been prosecuted for the felony. *Martin's Executrix v. Martin*, 25 Ala. 201.

26. The conversion of several chattels at the same time, and by the same act, gives the injured party but a single cause of action, if he elects to proceed in trover. *Wittick v. Traun*, 27 Ala. 562; *Firemen's Insurance Co. v. Cochran & Co.*, 27 Ala. 228.

27. An absolute sale of a slave, by one who has possession under a contract of hiring, is a conversion, which gives the owner the immediate right of possession. *Hair v. Little*, 28 Ala. 236.

28. When a sheriff levies a valid attachment on the defendant's property, and, after the dismissal of the attachment suit, and the immediate commencement of another on the same cause of action, the property is taken out of his hands by his successor in office, under an attachment in the second suit, he is not guilty of a tortious conversion of the property. *Houseman v. Stewart*, 28 Ala. 684.

29. A conversion by an administrator does not authorize a recovery against him in his representative character. *Shorter v. Urquhart*, 28 Ala. 360.

30. A conversion of property by two persons gives the owner a joint cause of action against them; and if they reside in different counties, he may sue both in the county in which either resides. *Williamson & Arrington v. Howell*, 17 Ala. 830.

II. PLEADINGS, AND EVIDENCE.

31. Case and trover may be united, in different counts, in the same declaration. *Dixon v. Barclay*, 22 Ala. 370.

32. But trover cannot be united with assumpsit. *Copeland v. Flowers*, 21 Ala. 472.

33. The Code carefully preserves the distinctions between the actions of trover and detinue, and does not authorize an amendment of the complaint which would convert one action into the other. *Harris v. Hillman*, 26 Ala. 380.

34. If the action is brought in the name of an assignor, for the use of his assignee, and the evidence shows that the conversion took place after the assignment, the complaint cannot be so amended as to authorize a recovery. *Stodder v. Grant & Nickels*, 28 Ala. 416.

35. If the action is brought by several co-plaintiffs, one of whom is a *feme sole*, the failure to bring in her husband, on her marriage pending the suit, is only available (if at all) by plea in abatement. *Powell v. Glenn*, 21 Ala. 458.

36. The failure, in such case, to bring in the personal representative of one of the plaintiffs, on his death pending the suit, is only available (if at all) in reduction of damages. *Ib.*

37. A former recovery in trover, without satisfaction, is no bar to another action against one who claims under the defendant. *Spivey v. Morris*, 18 Ala. 254.

38. A former recovery in detinue, against one who is shown by parol to have been defendant's bailee, in which action defendant's title was set up and held subordinate to plaintiff's, is conclusive on the defendant, as to the title then adjudicated; but not as to a title subsequently acquired, from one who was neither a party nor privy to that action. *Tarleton & Pollard v. Johnson*, 25 Ala. 300.

39. A charge which assumes that a conversion is proved, when the evidence only establishes an intent to convert, is erroneous. *Knight's Adm'rs v. Vardeman*, 25 Ala. 262.

40. If the evidence tends to prove a conversion, it is error to instruct the jury, that, if they believe the evidence, they must find for the defendant. *Freeman v. Scurlock*, 27 Ala. 407.

41. In an action against an administrator in his representative character, proof of a conversion by him individually does not authorize a recovery. *Shorter v. Urquhart*, 28 Ala. 360.

42. In an action against a sheriff, for levying a valid attachment on the defendant's property, he may show that the property was taken out of his possession, by his successor in office, under a second attachment founded on the same debt, which was issued immediately after the dismissal of the first suit. *Houseman v. Stewart*, 28 Ala. 684.

43. In an action brought by an administrator, against a voluntary purchaser from an executor *de son tort*, the defendant cannot show, in mitigation of damages, that the executor *de son tort*, since his purchase, has paid debts which the administrator was bound to pay in due course of administration. *Carpenter v. Going*, 20 Ala. 587.

44. Whether the executor *de son tort* himself, when sued by the rightful administrator, can show such payments in mitigation of damages, *quære? Ib.*

III. DAMAGES.

45. The measure of damages, in trover, is the value of the goods at the time of the conversion, or at any time intervening between the conversion and the trial, with interest thereon. *Ewing v. Blount*, 20 Ala. 694; *Jenkins v. McConico*, 26 Ala. 213; *Williams v. Crum*, 27 Ala. 468.

46. But this rule only applies, where the plaintiff has not regained his property: if he has regained the possession, he is only entitled to recover damages equal in value to the use or service of the goods, with compensation for any injury done to them, and necessary and reasonable expenses incurred in regaining the possession otherwise than by action at law. (LIGON, J., *dissenting*, held that, when the property is regained pending the suit, and its value is then unimpaired, judgment should go against the defendant only for the interest.) *Ewing v. Blount*, 20 Ala. 694.

47. The general rule as to damages does not apply, in an action brought by an administrator, against one to whom the widow, before administration was granted on the estate, hired a slave belonging to the estate, and who returned the slave, at the expiration of the term, in as good condi-

tion as when he received it. *Williams v. Crum*, 27 Ala. 468.

As to evidence in mitigation of damages, *vide supra*, 43, 44.

IV. JUDGMENT.

48. A recovery in trover, with satisfaction thereof, vests the title to the property in the defendant from the time of the conversion, when damages are assessed for the value at the time of the conversion. *Spivey v. Morris*, 18 Ala. 254; *Smith v. Hooks*, 19 Ala. 101; *Moseley v. Wilkinson*, 24 Ala. 411.

49. A mere recovery, without satisfaction, is no bar to another action against one claiming under the defendant. *Spivey v. Morris*, 18 Ala. 254.

50. In an action against two or more, if the jury find one only guilty, the court may set aside the judgment, and grant a new trial as to him. *Pounds v. Richards*, 21 Ala. 424.

USURY.

(Statutory Provisions: Code, § 1523; Clay's Digest, 589-91, §§ 1-10.)

I. WHAT IS USURY, AND ITS EFFECT.
II. PLEADING, AND PROOF.

See, also, the same title in PART III, p. 352.

I. WHAT IS USURY, AND ITS EFFECT.

1. A charge by a commission merchant of five per cent., in addition to legal interest, for accepting and advancing money for his customers, is not usurious, if intended merely as a fair compensation for the risk, trouble, and expense incurred. *Brown v. Harrison & Robinson*, 17 Ala. 774; *Swilley & Riley v. Lyon & Baker*, 18 Ala. 552.

2. A contract by which the endorsee of a valid bill of exchange, or other chose in action, assigns it in exchange for a debt of less amount, is not usurious, unless intended as a device to evade the statute. *Saltmarsh v. P. & M. Bank*, 17 Ala. 761.

3. *Secus*, where the bill has no validity until assigned; as where it was accepted by a firm, endorsed in the name of the payee, and put in circulation, before maturity, by the acceptors. *Sprague & Winston v. Zunts*, 18 Ala. 382.

4. A contract by which, in consideration that plaintiff in execution would delay enforcing the collection of his debt until the ensuing term of the supreme court, in order that defendant might take the case up for revision, the latter agreed to pay ten per cent. on the amount of the execution in the event of an affirmance of the judgment,—is usurious. *Matlock v. Mallory*, 19 Ala. 694.

5. The question of usury is not affected by taking separate notes for the principal and interest, and renewing the latter annually. *Gray's Executors v. Brown*, 22 Ala. 262.

6. If a contract is usurious in its inception, no renewal of the note, or other change in the form of the contract, can alter its original character. *Pearson v. Bailey*, 23 Ala. 537.

7. Where an agent lends out the money of his principal, at a usurious rate of interest, the fact of agency does not affect the illegality of the contract. *Ib.*

8. The amount of a recovery on a usurious contract, at law, is the principal sum only, without interest. *Saltmarsh v. P. & M. Bank*, 17 Ala. 761; *Sprague & Winston v. Zunts*, 18 Ala. 382; *Pearson v. Bailey*, 23 Ala. 537.

II. PLEADING, AND PROOF.

9. In an action on a contract, usurious on its face, a demurrer lies to the declaration. *Matlock v. Mallory*, 19 Ala. 694.

10. Although the plea of usury is a personal privilege, yet the surety or accommodation endorser of the borrower may also take advantage of it. *Gray's Executors v. Brown*, 22 Ala. 262.

11. It is a question for the jury, whether a charge by a commission-merchant of five per cent., in addition to legal interest, for accepting and advancing money for his customers, was designed as a cover for usury, or as a fair compensation for the risk, trouble, and expense incurred. *Brown v. Harrison & Robinson*, 17 Ala. 774.

12. In such case, proof of a custom among commission-merchants, in the city where the contract was made, to charge the same commissions, is admissible. *Ib.*

13. When money is borrowed by two jointly, but for the benefit of one, and a joint note given by them, either one of them is a competent witness to prove usury. *Swinney & Palmer v. Dorman*, 25 Ala. 433.

14. When a defendant is offered as a witness to sustain his plea of usury, he is not confined in his testimony to the note on which the suit is founded, but may detail the history of the whole transaction; beginning with the original usurious contract, and showing the payments on cancelled notes, &c. *Ib.*

VARIANCE.

See EVIDENCE, XVII, p. 623.
PLEADING, VII, p. 728.

VENDOR AND PURCHASER.

I. SALES OF PERSONAL PROPERTY.

1. *Delivery; and herein, when Title Passes.*
2. *Fraud, and Misrepresentation.*
3. *Validity.*
4. *Warranty.*

II. SALES OF REAL PROPERTY.

1. *Bond for Titles.*
2. *Conveyance.*
3. *Covenants of Warranty.*
4. *Fraud, and Misrepresentation.*
5. *Other Matters.*

As to the equitable rights and remedies of the respective parties, see same title in PART III, p. 353.

As to sales under execution, see EXECUTION, V, p. 635.

As to sales of perishable property in attachment cases, see ATTACHMENT, IV, p. 415.

As to sales of property belonging to the estates of deceased persons, under orders of the orphans' and probate courts, see ESTATES OF DECEDENTS, VI, VII, pp. 155–57.

As to validity of sales under the statute of frauds, see FRAUDS, STATUTE OF, 10–19, p. 640.

I. SALES OF PERSONAL PROPERTY.

1. *Delivery; and herein, when Title Passes.*

1. If several slaves are sold on a credit, one half to be delivered at one time, and the other half at another time, the delivery of the first half, absolutely and unconditionally, vests in the purchaser the title to them, on his compliance with the terms of the contract, discharged of the vendor's lien for the purchase-money. *White v. Adkins*, 18 Ala. 636.

2. Under a contract for the sale of goods, to be paid for on delivery, if both parties are present at the time and place agreed on, and are able to perform their respective undertakings, it is incumbent on him who would put the other in default to offer to perform his part of the contract. *Davis v. Adams*, 18 Ala. 264.

3. Under a contract for the sale and delivery of fifty bales of cotton, of the vendor's first gathering and packing, a tender of the first fifty-five bales, with the privilege to the purchaser of selecting fifty out of them, is a substantial offer of performance. *Ib.*

4. If the contract does not specify the weight of the bales, or the quality of the cotton, the law implies that the bales are to be of the usual weight, and the cotton of the quality usually produced in the region of country where it is grown; and a tender of bales materially different, either in weight or in quality, would not be sufficient. *Ib.*

5. A contract for the sale of cotton, the greater part of which is ungathered, to be delivered to the purchaser at a specified place so soon as it can be gathered and ginned, does not vest the title in him until delivery. *Screws v. Roach*, 22 Ala. 675.

6. The delivery of a bill of sale for a slave to the purchaser, *per se*, passes the title to him; and the vendor can-

not avoid the effect of it, when sued by a sub-purchaser, by proof of a parol contemporaneous agreement, to the effect that the delivery was only conditional, and that the title should re-vest in the vendor, if the purchaser failed to give his note, with a specified surety, for the purchase-money. (RICE, C. J., *dissenting.*) *Morgan v. Smith, Wykoff & Nicholl*, 29 Ala. 283.

7. A sale of promissory notes, at a price not exceeding $200, may be so made by parol, without delivery of the notes, or payment of any part of the price, as to invest the purchaser with the equitable title and ownership. *Hudson & Stokes v. Weir & Tate*, 29 Ala. 294.

8. A written contract for the sale of several slaves, at a specified price for each, using present words of conveyance, and containing the additional stipulations, that two of the slaves are to remain in the vendor's possession until the first day of January next thereafter, and that he "may redeem any and all of the said slaves, at the value hereinbefore affixed to them, within twelve months,"—is a conditional sale, with a reservation of the right to re-purchase. *Murphy v. Barefield*, 27 Ala. 634.

9. Articles of agreement, bipartite, whereby the party of the first part "doth hereby agree to bargain, sell and convey" unto the party of the second part, certain slaves, in consideration that the party of the second part "hereby delivers" to the said party of the first part, "by order, all his right, title and interest, both at law and in equity, to the sum of $2,000," part of an amount just recovered from the United States by an agent of the party of the second part; and conditioned that, if the party of the second part "will, by any means, with or without suit, either in law or equity, enable" the said party of the first part "to recover said sum of $2,000, with lawful interest," from said agent, then the said party of the first part "binds himself, his heirs, executors, &c., that the above bill of sale shall be absolute, and shall convey unto him, his heirs, executors, &c., all right, title and interest in said slaves; otherwise, to be void, and of no effect,"—held a mere agreement to sell, which did not, *per se*, pass the legal title to the slaves. *Love v. Crook*, 27 Ala. 624.

10. Where a purchaser is allowed until the end of the year to determine whether a conditional sale shall become absolute, he may make his election at any time during the year, and is not confined to the last day only. *Reese v. Beck*, 24 Ala. 651.

2. *Fraud, and Misrepresentation.*

11. Although it is the duty of the vendor to disclose to the purchaser such intrinsic defects in the property as lie within his knowledge, which materially affect its nature and condition, and which the purchaser cannot discover by the exercise of proper diligence; yet the law does not require him to disclose "the fullest extent of that unsoundness," by describing particularly the different stages and symptoms of the disease, and all the circumstances affecting it. *Armstrong v. Huffstutler*, 19 Ala. 51.

12. A misrepresentation by the vendor, in regard to a material fact, which operated as an inducement to the purchase, on which the purchaser had a right to rely, and by which he was actually deceived and injured, amounts to a fraud in law. *Pritchett v. Munroe*, 22 Ala. 501; *Read v. Walker*, 18 Ala. 323; *Foster v. Gressett's Heirs*, 29 Ala. 393.

13. Generally, if the vendor discloses, at the time of the sale, all that he knows in relation to the property, the purchaser cannot be deceived or misled; but if, during the previous negotiation, he has made a misrepresentation, it is a question for the jury, whether its effect is destroyed, by his subsequent disclosure. *Pritchett v. Munroe*, 22 Ala. 501.

14. The payment by the purchaser of what would be an inadequate price, if the animal was sound, is a circumstance to which the jury may look, in connection with other evidence, in determining whether he was informed of the latent unsoundness of the animal. *Armstrong v. Huffstutler*, 19 Ala. 51.

15. If the purchaser of a slave at public auction pays the purchase-money, after being informed of facts which would constitute a fraud in the

sale, he cannot afterwards maintain an action for the deceit. *Gilmer v. Ware*, 19 Ala. 254.

16. In assumpsit for a breach of warranty of the soundness of a slave, the court having charged the jury, "that if defendant made any false and fraudulent representations to plaintiff, they would be considered by the jury, with the other evidence in the cause, for the purpose of determining whether there was a warranty, a breach of that warranty, and the amount of the plaintiff's damages for that breach, but not as a ground of recovery,"—*held*, that the charge was erroneous, because such declarations, if they amounted to a warranty, would constitute a ground of recovery. *Stevenson v. Reaves*, 24 Ala. 425.

17. Where the purchaser of a slave accepts a bill of sale without warranty, which shows on its face that he took the slave at his own risk, he cannot defend an action on the notes for the purchase-money, on the ground of "misrepresentation, without fraud." *Stewart v. Bradford*, 26 Ala. 410.

18. If the surety on a note, given for the purchase-money of a slave, executes his own note to the payee, "in discharge of the balance remaining due," and takes up the original note, he cannot defeat a recovery on the new note, by setting up fraud in the sale. *Fluker v. Henry's Adm'r*, 27 Ala. 403.

19. The maker of a promissory note, given for the purchase-money of a slave at a public sale by an administrator, may set up fraud in the sale as a defense, even where the fraud was practiced by the auctioneer at the sale, without the authority of the administrator. *Atwood's Adm'r v. Wright*, 29 Ala. 346.

20. Representations of soundness by the auctioneer, recklessly made for the purpose of inducing the purchaser to buy, may amount to fraud, although the auctioneer did not know, at the time, that they were false; and if the purchaser buys on the faith of such representations, the fact that the administrator gave public notice, before the commencement of the sale, "that no warranty of soundness would be made, and that every purchaser must judge for himself," does not avoid the defense of fraud. *Ib.*

21. The party who seeks a rescission, on the ground of fraud, must act with promptness on the discovery of it, by an offer to return the property within a reasonable time, if the parties live at a distance from each other; or, if they reside near each other, and the property is susceptible of easy transportation, by an actual re-delivery, or by a tender with a view to its re-delivery. *Dill v. Camp*, 22 Ala. 249; *S. C.*, 27 Ala. 553.

22. If the purchaser retains the possession, after an offer to rescind, he is merely the bailee of the vendor, and must not use or employ the property in any manner inconsistent with the vendor's rights. *Ib.*

23. If the vendor refuses to accept the property when the purchaser offers to return it, this will dispense with a more formal tender; but, if the purchaser retains the property, his subsequent refusal to surrender it on the reasonable demand of the vendor, even after suit brought, will destroy the effect of his previous tender. *Bennett v. Fail & Patterson*, 26 Ala. 605.

24. An offer to rescind by the vendor, which is not accepted by the purchaser, has no legal effect whatever on the contract, unless the offer is based on the fraud or bad faith of the purchaser. *Harris v. Rowland's Adm'rs*, 23 Ala. 644.

3. *Validity.*

25. A sale by a tenant for life, though purporting to convey the entire property, does not operate as a forfeiture of his estate, but vests his interest in the purchaser. *Jones' Executors v. Hoskins*, 18 Ala. 489; *Lyde v. Taylor*, 17 Ala. 270; *Price v. Price's Adm'r*, 23 Ala. 609.

26. Such sale converts the interest of the remainderman into a chose in action, the transfer of which to another, with knowledge of the fact that the purchaser has possession under a *bona-fide* claim to the entire title, is void. *Price v. Talley's Adm'rs*, 18 Ala. 21.

27. An absolute sale of a slave, by one who has possession under a contract of hiring, does not transfer to the purchaser the right to the unexpired portion of the term, but gives

the owner the immediate right of possession. *Hair v. Little*, 28 Ala. 236.

28. A fraudulent sale by an administrator, of property belonging to the estate, to one who is cognizant of the fact that he is violating his trust, is void as against those whose rights are prejudiced. *Swink's Adm'r v. Snodgrass*, 17 Ala. 653.

29. A parol sale of a ship, consummated by delivery, is sufficient to pass the title as between the parties; but a written instrument is necessary in determining its national character. *Fontaine & Dent v. Beers & Smith*, 19 Ala. 722.

30. A parol sale of notes, at a price not exceeding $200, is valid, although the notes are not delivered at the time, nor any part of the price paid. *Hudson & Stokes v. Weir & Tate*, 29 Ala. 294.

31. If the purchaser of a slave, at public auction, takes possession under his purchase, without anything being said, or any understanding being had, qualifying the act, and retains possession for one, two or three days, without making any objection to the sale, the jury may well infer from these facts such consummation of the sale as will take it out of the statute of frauds. *Kelly v. Brooks*, 25 Ala. 523.

32. A sale of goods by an insolvent debtor, on a credit, with a reservation to the purchaser of the right to rescind the contract on a specified day, is inconsistent with an honest and absolute disposition of the property, and is subject to be defeated by the levy of an attachment on the goods, at any time before the purchaser has paid the agreed price and made his election. *West, Oliver & Co. v. Snodgrass*, 17 Ala. 549.

33. As to the validity of such contract, if no levy had been made before the day on which the purchaser was to make his election, and he had then elected to affirm it, *quære*. *Ib.*

34. A purchaser without notice, from a person who has possession of a slave which does not belong to him, does not necessarily obtain a good title. *Johnson v. Boyles*, 26 Ala. 576.

As to the vendor's retention of possession, and other badges of fraud, see EVIDENCE, 600–615, p. 627.

4. *Warranty.*

35. The general rule, as to warranties implied against vendors of personal property, does not apply to sales by administrators in their fiduciary character. *Pool v. Hodnett & Hays*, 18 Ala. 752.

36. But, in selling slaves belonging to his intestate's estate, an administrator may warrant their soundness, and thus bind himself personally. *Stoudenmeier v. Williamson*, 29 Ala. 558.

37. False and fraudulent representations of soundness may amount to a warranty. *Stevenson v. Reaves*, 24 Ala. 425.

38. If the purchaser of a slave accepts a bill of sale without warranty, which shows on its face that he took the slave at his own risk, he cannot defend an action on the note for the purchase-money, on the ground of "misrepresentation, without fraud." *Stewart v. Bradford*, 26 Ala. 410.

39. A general warranty of soundness does not cover visible external defects, such as the eye can discover and apprehend; but it covers all other defects, even though the purchaser is informed of their nature, character, and extent. *Livingston v. Arrington*, 28 Ala. 424.

40. "Which said negro I do warrant and defend unto him, the said L., his heirs and assigns forever," held a warranty both of soundness and title. *Ib.*

41. A warranty in a bill of sale, for a slave eight years old, in these words, "I do also warrant Joe to be sound in mind and body, with the exception of his legs; and I do hereby bind myself, if his legs should injure him from being a serviceable boy at the age of fifteen years, to make him good,"—held to mean, not that the boy should have, at the age of fifteen years, a market value equal to that of a boy capable of doing ordinary work on a plantation, but that the injury to his legs should not lessen his capacity for active service at that age. *Gingles v. Caldwell*, 21 Ala. 444.

42. *Held*, also, that the measure of damages for the breach of such warranty, was the difference between the boy's actual value at the specified age, and what would then have been his value if the injury to his legs had not

lessened his capacity for the performance of services usually rendered by slaves of that age. *Ib.*

43. *Held*, also, in an action to recover damages for the breach of such warranty, that evidence of the boy's situation both before and after the specified age, but not so remote as to furnish no reasonable presumption as to his condition at that time, was admissible; but the fact that the purchaser had allowed another person, during the year preceding the trial, to have the boy's services gratuitously, was not admissible for him. *Ib.*

44. The measure of damages, for a breach of warranty of the soundness of a slave, is the difference between his actual value at the time of the sale, and what he would then have been worth if sound. *Worthy, Brown & Co. v. Patterson*, 20 Ala. 172.

45. Together with interest on this sum from the time of the sale. *Stoudenmeier v. Williamson*, 29 Ala. 558.

46. The measure of damages for a breach of warranty of title, when the purchaser has lost the slave by title paramount, is the value of the slave at the time of the sale, with interest thereon, and the costs necessarily incurred by him in the suit brought to test the title, with interest thereon from the time of payment. *Rowland's Adm'rs v. Shelton*, 25 Ala. 217.

47. The purchaser is entitled to recover, in such case, on proof of the recovery of a judgment against his sub-purchaser, by one having an adverse title, of another judgment by such sub-purchaser against himself, and notice to his vendor of both suits. *Harris v. Rowland's Adm'rs*, 23 Ala. 644.

48. The purchaser is not deprived of his right of action, in such case, by the fact that, on being informed that an adverse title was set up to the slave, he examined that title, and expressed himself satisfied with his own. *Ib.*

49. On a breach of warranty as to the quality of goods sold, the purchaser is entitled to recover, at least, the difference between their actual value and what would have been their value as warranted; but, since the jury may also allow interest on that sum, the court may properly refuse to instruct them that this difference in value is the measure of damages. *Foster v. Rodgers*, 27 Ala. 602.

50. On an exchange of slaves, the parties reciprocally executed bills of sale, under seal, containing warranties of soundness; and the plaintiff afterwards brought an action, to recover damages for defendant's breach of warranty. *Held*, that defendant might recoup the damages which he had sustained by the plaintiff's breach of warranty. *Eckles & Brown v. Carter*, 26 Ala. 563.

51. The fact that the vendor had offered the slave for sale, within the twelve months immediately preceding the sale, for a considerable sum less than the price paid by the purchaser, tends to show that the slave was unsound at the time of the sale. *Rowland v. Walker*, 18 Ala. 749.

52. The payment by the purchaser of a price which, if the animal was sound, would be inadequate, is a circumstance tending to show that he was informed of the latent unsoundness of the animal. *Armstrong v. Huffstutler*, 19 Ala. 51.

53. A written contract of sale, containing a warranty of soundness, is the highest and best evidence of that warranty, and, consequently, admissible evidence to prove it, although the consideration averred in the declaration is a certain sum of money, while that expressed in the writing is defendant's acceptance for that sum. *Brown v. Jones*, 24 Ala. 463.

II. SALES OF REAL PROPERTY.

1. *Bond for Titles.*

54. When a title-bond is conditioned to make title within a reasonable time, the purchaser is bound to prepare and tender a deed, although he has been evicted by the vendor under a recovery in ejectment; but the inability of the vendor to make title, according to the condition of his bond, is a sufficient excuse for the failure to prepare and tender a deed. *Johnson and Wife v. Collins*, 17 Ala. 318.

55. The refusal of the vendor to convey, in accordance with the terms of his contract, is a breach of the condition of his bond, although the purchaser has not presented him a deed

to execute. *Garnett v. Yoe*, 17 Ala. 74.

56. If the vendor neglects, for more than two years, to make an effort to procure the title, when his bond is conditioned to make title so soon as he can obtain it,—this is, *prima facie*, a breach of the condition; and it is incumbent on him to show that he could not, with reasonable diligence, have obtained the title. *Ib.*

57. Where the bond shows that the title is in a third person, and is conditioned to make title, no time being limited, the failure of the oblgor, for more than three years, to make an effort to procure the title, is, *prima facie*, a breach of the condition. *Allen v. Greene*, 19 Ala. 34.

58. Where the contract was made on the 8th December, 1849, and the condition of the bond was to make title "within a short time" thereafter, the tender of a deed "after the 13th October, 1851," and after the purchaser had abandoned the land, was held not to be a compliance with the condition. *Hussey v. Roquemore*, 27 Ala. 281.

59. If the bond is conditioned "to make a valid title" to the land, the purchaser is not bound to accept the deed of a stranger, which, though it conveyed a good title, might yet involve the trouble and expense of an inquiry to ascertain its validity. *Ib.*

60. Where several are bound by an executory contract to make titles to the obligee, all must join in the conveyance, in order to a complete performance; but, where several are bound for the performance of one duty, and the obligee accepts from one of them something in satisfaction of that duty, and in lieu of a strict performance, this shall discharge all. *Johnson and Wife v. Collins*, 20 Ala. 435.

61. Where the obligee, holding a title-bond executed by two jointly, accepts from one of them the deed of himself and a third person, it is a question for the jury to determine whether the deed was accepted in satisfaction of the bond. *Ib.*

62. If the obligors insist upon satisfaction in lieu of a strict performance, the *onus* is on them to prove that the thing done or given was intended and accepted as a satisfaction. *Ib.*

63. A bond for titles, executed by commissioners appointed by the orphans' court to sell a decedent's real estate, is binding on the obligors personally, when they exceed their authority, and thereby fail to bind the estate; and the obligee's notes for the purchase-money constitute a sufficient legal consideration for such bond. *Whiteside v. Jennings*, 19 Ala. 784.

64. A bond for titles, executed by an infant, is voidable only, and not absolutely void. *Weaver v. Jones*, 24 Ala. 420.

65. The administrator of the deceased obligee is the proper party to sue for the breach of a title-bond which accrued in the lifetime of the intestate; and the action lies though the purchase-money has not been paid. *Allen v. Greene*, 19 Ala. 34.

66. Where such bond shows that the title is in a third person, and the obligor never procures a conveyance to either himself or the obligee, the heir of the obligee cannot sue in his own name for a breach, whether accruing before or after the death of his ancestor. *Ib.*

67. In an action on a bond for titles, the measure of damages, *it seems*, is the value of the land at the time of the breach. *Whiteside v. Jennings*, 19 Ala. 784.

68. A bond for titles, conditioned that titles shall be made so soon as a patent shall have been obtained from the United States, is not constructive notice to a sub-purchaser of an outstanding vendor's lien. *Burns v. Taylor*, 23 Ala. 255.

69. *Secus*, where the condition is that titles shall be made on full payment of the purchase-money. *Bradford v. Harper*, 25 Ala. 337.

70. A bond for titles does not convey to the purchaser such a title as will enable him to recover in ejectment against one who has subsequently procured the legal title. *Trammell v. Simmons*, 17 Ala. 411.

2. *Conveyance.*

71. It is the duty of the purchaser to prepare and tender a deed for execution by the vendor; and the fact that he has been evicted by the vendor, under a recovery in ejectment,

does not dispense with the performance of this duty. *Johnson and Wife v. Collins*, 17 Ala. 318.

72. But the inability of the vendor to make a good title, according to the condition of his bond, excuses the purchaser from preparing and tendering a deed. *Ib.*

73. So does the vendor's refusal to convey. *Garnett v. Yoe*, 17 Ala. 74.

74. Where several are bound by an executory contract to make titles to a purchaser, all must join in the conveyance, unless the purchaser accepts satisfaction in lieu of strict performance. *Johnson and Wife v. Collins*, 20 Ala. 435.

75. Where the vendor has contracted "to make a valid title" to the land, the purchaser is not bound to accept the deed of a stranger, which, though it conveyed a good title, might yet involve the trouble and expense of an inquiry to ascertain its validity. *Hussey v. Roquemore*, 27 Ala. 281.

76. A tender by the vendor of a deed signed by himself and wife, and attested by two witnesses, is sufficient: it is the duty of the purchaser to have it probated, if he wishes it. *Carter v. Corley*, 23 Ala. 612.

77. The words "be the same more or less," when used in stating the quantity of land conveyed, mean that the parties shall respectively run the risk of gain or loss. *Frederick v. Youngblood*, 19 Ala. 680.

3. *Covenants of Warranty.*

78. The words "grant, bargain and sell," when used in a deed, create by statute an implied covenant against acts done by the grantor or his heirs; but they do not import a covenant of seizin, nor for quiet enjoyment, nor against incumbrances generally. *Griffin v. Reynolds*, 17 Ala. 198.

79. A covenant for quiet enjoyment is broken only by an eviction from the premises, or yielding up the possession under a paramount title. *Ib.*

80. A covenant of seizin is broken as soon as it is made, if the covenantor then had no title to the estate granted. *Anderson v. Knox*, 20 Ala. 156.

81. An unqualified covenant against incumbrances is broken by the existence, at the time of its execution, of an outstanding incumbrance; but, if the covenant merely extends to quiet enjoyment against incumbrances, then it is only broken by an entry, expulsion from the premises, or some disturbance in the possession. *Ib.*

82. A good title means a perfect title to the entire tract of land, unaffected by any gaps in the chain of title, without any defect or incumbrance. *Smith v. Robertson*, 23 Ala. 312; *Burns v. Taylor*, 23 Ala. 255; *Thrasher & Mitchell v. Pinckard's Heirs*, 23 Ala. 616.

83. An outstanding right of dower, whether perfect or inchoate, is an incumbrance on the title, which renders it defective. *McLemore v. Mabson*, 20 Ala. 137; *Thrasher & Mitchell v. Pinckard's Heirs*, 23 Ala. 616.

84. If the purchaser has bought in an outstanding incumbrance, he is entitled to recover the reasonable price fairly and necessarily paid for it; but the amount paid by him is not, *per se*, evidence of the value of such incumbrance. *Anderson v. Knox*, 20 Ala. 156.

85. Where the land was in the possession of the purchaser himself, as tenant of an adverse holder, at the time of his purchase, the fact that such adverse holding was known to both parties, does not relieve the vendor from liability to make good his covenants. *Abernathy v. Boazman*, 24 Ala. 189.

86. If a purchaser, with covenants of warranty, buys in an outstanding incumbrance, at a price less than the amount of the purchase-money and interest, this demand, if reasonable, is a good set-off, under the Code, in an action on the note for the purchase-money. *Holley v. Younge*, 27 Ala. 203.

87. The legal effect of a covenant cannot be varied by a parol agreement, on the part of the purchaser, to pay an outstanding incumbrance. *Ib.*

88. Fraudulent misrepresentations on the part of the purchaser, to the effect that he would not use the deed against his vendor, are no defense at law. *Ib.*

4. *Fraud, and Misrepresentation.*

89. A misrepresentation by the vendor, in regard to a material fact, which

operated as an inducement to the purchase, on which the purchaser had a right to rely, and by which he was actually deceived and injured, amounts to a fraud in law. *Pritchett v. Munroe*, 22 Ala. 501; *Read v. Walker*, 18 Ala. 323; *Foster v. Gressett's Heirs*, 29 Ala. 393.

90. An honest expression of opinion by the vendor, as to the location of one of the boundary lines of the land, even though erroneous, is not such a misrepresentation as constitutes a fraud. *Stow v. Bozeman's Executors*, 29 Ala. 397.

91. If the vendor discloses, at the time of the sale, all that he knows respecting the land, the purchaser cannot generally be deceived or misled; but if, during the previous negotiation, he has made a misrepresentation, it is a question for the jury, whether his subsequent disclosures destroyed the effect of such misrepresentation. *Pritchett v. Munroe*, 22 Ala. 501.

92. If the vendor, on discovering that he has no title to a portion of the land sold, promises that, unless he makes a good title to that portion of the land within a reasonable time, the purchaser shall be discharged from the payment of the balance due on his note for the purchase-money,—this discharges the purchaser, if titles are not made, from the entire balance due on the note. *Hussey v. Roquemore*, 27 Ala. 281.

93. The measure of damages, to which a purchaser is entitled on account of his vendor's false representation that the land was not subject to overflow, and that the tract included other valuable lands outside of its boundaries. is the difference between the actual value of the land, and what would have been its value if the representations had been true; and this is available as a set-off, in an action on the note for the purchase-money. *Gibson v. Marquis and Wife*, 29 Ala. 668.

5. *Other Matters.*

94. If the purchaser enters into possession, under an executory contract, and fails to comply with its stipulations as to the payment of the purchase-money, he is liable, in assumpsit, for the use and occupation of the land. *Smith v. Wooding*, 20 Ala. 324; *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207.

95. Or the vendor may, at his own election, treat such purchaser as a trespasser, and eject him by suit; and the purchaser is not entitled to notice of his vendor's election before suit. *Seabury v. Doe d. Stewart & Easton*, 22 Ala. 207.

96. In such case, the possession of the purchaser not being adverse to his vendor, the latter may convey the premises to a third person; and if such third person is compelled to sue for the premises, the tenant cannot set up an outstanding title to defeat a recovery, nor claim anything for improvements. *Ib.*

97. Where it appeared, after the vendor had executed a conveyance with covenants of warranty, that he had no title to the particular tract intended to be sold, and that his deed conveyed another tract to which he had title; and thereupon the purchaser offered to return the deed, and rescind the contract, which the vendor refused to do,—*held*, that, at law, the purchaser could not recover the purchase-money which he had paid. *Homer v. Purser*, 20 Ala. 573.

98. In an action by the purchaser to recover money paid under the contract, the court cannot assume, in the absence of evidence as to the terms of the contract, that his retention of possession was inconsistent with his right to rescind, or that an offer to return the premises was indispensable on his part. *Waters v. Spencer*, 22 Ala. 460.

99. The vendor's intention to abandon the contract, does not justify the purchaser in treating it as rescinded, so as to enable him to sue for the purchase-money. *Ib.*

As to rescission generally, see CONTRACTS, VII, p. 505.

VENNUE.

1. An order for a change of venue, which recites that, by consent of parties in open court, it is agreed that the cause shall be transferred to either

one of two specified counties at the election of the plaintiff, is incomplete, until the plaintiff has made his election between the counties named, and the court has acted on his election, by ordering a transfer of the papers to the selected county. *Ex parte Remson*, 23 Ala. 25.

2. When an order for a change of venue is, by consent of parties, rescinded by the court at a subsequent term, and the cause reinstated on the docket, a motion to strike the cause from the docket, after the lapse of several years, may be overruled. *Gager v. Doe d. Gordon*, 29 Ala. 341.

3. Where the name of the county is specified in the summons, and the complaint alleges that a certain prosecution, which it was necessary to allege, was had before the circuit court of "said county," the venue is laid with sufficient certainty. *Morton v. Bradley*, 27 Ala. 640.

See, also, same title in PART I, p. 116.

VERDICT.

1. In an action for malicious prosecution, it was consented, at the close of the trial, that the clerk might receive the verdict; and accordingly, during the recess of the court, the jury returned their verdict to the clerk, in these words, "We, the jury, find for the plaintiff, and assess his damages at $2,500," and requested him to have it put in proper form by the court; after which they were discharged for the day, and separated. The jury were in court on the next morning, and renewed their request to the court; whereupon the court directed the verdict to be entered in proper form. *Held*, that there was no error in the alteration of the verdict. *Ewing v. Sanford*, 21 Ala. 157.

2. Where issue is joined on several pleas, one of which presents an immaterial issue, and the evidence sustains that plea, the defendant is not entitled to a general verdict. *Agee & Agee v. Medlock*, 25 Ala. 281.

3. In an action on an open account, commenced in a justice's court, and removed by appeal to the circuit court, a verdict in these words, "We, the jury, agree of and assess damages of the defendant $47, and the plaintiff with the costs," does not authorize the rendition of judgment for the plaintiff. *Ramer v. Fletcher*, 29 Ala. 471.

4. In trespass to try titles, a verdict, finding that "the land belongs to the plaintiff," held sufficient, on error, to support a judgment for plaintiff, for damages and costs, and the award of a writ of *hab. fac. pos.* *Stephens v. Westwood*, 25 Ala. 716.

5. In ejectment, the jury having found a verdict for plaintiff, assessing the value of the improvements and rents, their failure also to assess the land is not available to the defendant, on error, when the record shows that, before the rendition of judgment on the verdict, the plaintiff paid into court the damages assessed in favor of the defendant. *Gager v. Doe d. Gordon*, 29 Ala. 341.

6. In detinue, issues being joined on the pleas of *non detinet* and justification under legal process, a verdict, finding the defendant not guilty, and assessing the damages and value of the slave in controversy, is sufficient (Session Acts 1847–8, p. 82) to support a judgment in his favor. *Rowan v. Hutchisson*, 27 Ala. 328.

7. In detinue for eight slaves, issue being joined on the plea of the general issue, the jury returned a verdict, "that they find for the plaintiff, and assess the value of the slaves sued for as follows," &c., (specifying by name, and assessing the separate value of, all the slaves except one, as to whom the verdict was entirely silent,) "and they also find the hire of said slaves to be $200." *Held*, that the verdict was not sufficient to authorize the rendition of judgment. (RICE, J., *dissenting*, held that it was a good finding for the plaintiff, as to the slaves specified, with their hire as damages for their detention, and against him as to the slave not mentioned.) *Wittick v. Traun*, 27 Ala. 562.

See, also, the same title in PART I, p. 117.

WARRANTY.

See VENDOR AND PURCHASER, p. 767.

WITNESS.

I. ATTENDANCE.

1. The court may, in its discretion, refuse to have a person who has not been subpœnaed, but who is about the court, brought in to testify as a witness. *Woodward v. Purdy*, 20 Ala. 379.

2. If a party summons witnesses in a cause which is not at issue, or which does not stand for trial at the term to which the subpœna is returnable, he will be taxed with the costs of their attendance, although he acted under the advice of counsel. *Porter v. Williams*, 22 Ala. 525.

3. If he summons witnesses to sustain his character, after he has been notified by the counsel of the opposite party that no attempt will be made to impeach it, and such witnesses are not examined on the trial, he will be taxed with the costs of their attendance, although he acted under the advice of counsel. *Ib.*

4. The statutory forfeiture imposed on a defaulting witness is given to the party summoning him, not by way of satisfaction for the injury which he may have sustained, but as a matter of good policy, and is imposed as a penalty on the witness for disobeying the process of the court. *Maclin v. Wilson*, 21 Ala. 670.

5. A defaulting witness may excuse himself on the return of a *sci. fa.* against him, by showing that his failure to attend was not attributable to negligence or willful disobedience; and this should be the limit of the primary court in allowing excuses. *Ib.*

6. A *sci. fa.* against a defaulting witness, when made to subserve the two-fold purpose of writ and declaration, must set out the subpœna, either *verbatim* or substantially, and aver its service, and the rendition of judgment *nisi*. *Emanuel v. Ketchum*, 21 Ala. 257; *Spence v. Simmons*, 21 Ala. 563.

II. COMPETENCY.

1. *Distributees and Legatees.*

7. In a contest respecting the validity of a will, which gives to the widow, since deceased, a larger portion of the estate than she would be entitled to receive under the statute of distribution, her heirs are competent witnesses to defeat, but not to sustain the will. *Roberts v. Trawick*, 17 Ala. 55.

8. A distributee who, after a division of the estate, has sold his portion to another, and who has been released, is a competent witness for his transferee, in an action involving the title to the property. *Dent v. Portwood*, 17 Ala. 242.

9. A legatee, whose legacy has been paid, is a competent witness for the executor. *Clealand v. Huey*, 18 Ala. 343.

10. In an action against an executor in his representative character, a witness, who is shown to have intermarried with a daughter of the testator, is not necessarily an incompetent witness; *secus*, if the action is against the administrator of an intestate. *Ib.*

11. In an action brought by an executrix individually, her son, who has continued to reside on the plantation with her since the testator's death, is a competent witness for her, although it is shown that the testator devised and bequeathed all his estate to his

executrix, who was his widow, during her life or widowhood, and directed it to be kept together during that period "for the support, maintenance and education of the family." *McClung's Executors v. Spotswood*, 19 Ala. 165.

12. A distributee, who has released his interest in the estate to the administrator, is a competent witness for the latter; but is not competent to prove the execution of his own release. *Herndon v. Givens' Adm'r*, 19 Ala. 313.

13. Where a testator bequeathed certain slaves to his grand children, to be divided among those who might be living when the youngest attained his majority; and a division having been made before the appointed time, one of the legatees afterwards filed a bill to set aside the division, alleging that he was an infant, and had not received an equal share with the rest,—*held*, that another legatee, who had transferred all his interest to one of his co-legatees before the division was made, and who disclaimed all interest in the slaves, was a competent witness for the plaintiff, to prove the minority of the latter at the time the division was made. *Johnson v. Culbreath*, 19 Ala, 348.

14. A distributee of an estate is, *prima facie*, an incompetent witness, when his testimony tends to increase the funds of the estate; and the fact that the estate has been declared insolvent does not remove the presumption of interest, when the party against whom his testimony is offered is neither the personal representative nor a creditor of the estate. *McGuire v. Shelby*, 20 Ala. 456.

15. A distributee, who has released and abandoned all his interest in the estate, which release has been entered of record, is a competent witness for the administrator, to prove an advancement to another distributee. *Grey's Heirs v. Grey's Adm'rs*, 22 Ala. 233.

16. In an action between the administrators of two estates, respecting the title to certain slaves, a woman, who is shown to be the widow of both the decedents, is not a competent witness for the administrator of the estate which has the smallest number of distributees. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

17. A distributee is a competent witness, when his testimony tends to decrease the funds in which he is interested. *Houston v. Crutchfield's Adm'r*, 22 Ala 76.

2. *Husband and Wife.*

18. The rule which renders husband and wife incompetent, unless in a few excepted cases, to testify for or against each other, has its foundation, not only in the legal identity of their rights, but in a wise public policy; and there is nothing in the several statutes of this State, securing to married women their separate estates, which requires that an exception should be made of cases in which the husband is called upon to testify to his acts in the capacity of trustee for his wife. *Wilson v. Sheppard*, 28 Ala. 623.

3. *Landlord and Tenant.*

19. In ejectment, a tenant in possession is not a competent witness for his landlord. *Doe d. Kennedy's Heirs v. Reynolds*, 27 Ala. 364.

20. In a suit in equity by a purchaser, to compel a conveyance, and to enjoin his vendor's action at law to recover possession, the tenant in possession, being directly interested in perpetuating the injunction, is not a competent witness for the plaintiff. *Bradford v. Harper*, 25 Ala. 337.

4. *Parties.*

21. The proponent of a will is an incompetent witness to sustain it, nor can he render himself competent by renouncing as executor. *Gilbert v. Gilbert*, 22 Ala. 529.

22. Where a will is propounded for probate by two joint executors, and an issue is made up to test its validity, it is too late at the trial for either of them to renounce his executorship, in order that he may become a competent witness to sustain the will; nor can he demand to be discharged, as a matter of right, on offering to deposit in court a sum of money sufficient to cover the costs. *Deslonde & James v. Darrington's Heirs*, 29 Ala. 92.

23. Where money is borrowed by

two jointly, but for the benefit of one, and a joint note given by them, on which both are sued, either one is a competent witness under the statute to prove usury. *Swinney & Palmer v. Dorman*, 25 Ala. 433.

As to the competency of parties in chancery cases, see PARTIES, IV, p. 320.

5. *Partners.*

24. In an action against one partner individually, on an account for goods sold to the firm, the other partner is not a competent witness to prove the sale and delivery of the goods, until the existence of a partnership between them has been first established by evidence *aliunde*. *Dickson v. Collins, Brother & Co.*, 17 Ala. 635.

25. In an action against one partner, to recover damages for a constructive tort arising out of an act done by him in a matter connected with the partnership business, his co-partner is not a competent witness for him. *Myers v. Gilbert*, 18 Ala. 467.

26. In an action against one partner, on a note signed by his co-partner in the partnership name, the latter is not a competent witness for the plaintiff. *Barney v. Earle*, 20 Ala. 405.

27. In an action by one partner individually, against a person who is a creditor of the firm, and who seeks to make his demand available as a set-off by proof of an agreement between the partners, on the dissolution of the firm, to the effect that the plaintiff should pay all the outstanding firm debts, the other partner is not a competent witness, to prove either the agreement, or the fact that the debt offered as a set-off is embraced in it. *Hoyt, Ford & Robinson v. Murphy*, 18 Ala. 316; *S. C.*, 23 Ala. 456.

28. In an action against a party sought to be charged as joint owner of a steamboat, the other joint owner is not a competent witness to prove the joint property. *Aston v. Jemison*, 17 Ala. 61.

29. Stockholders in a corporation, created for private emolument, are not competent witnesses for the company; and where the charter provides that the directors shall be stockholders, the fact that a witness is a director, unexplained by other evidence, is sufficient to exclude him. *Montgomery & Wetumpka Plank-Road Co. v. Webb*, 27 Ala. 618.

6. *Principal and Agent.*

30. An agent is a competent witness for his principal, to prove that he has paid over money left with him by his principal for that purpose. *Governor v. Gee*, 19 Ala. 199.

31. An attorney-at-law may be a witness for his client, on grounds of public policy, when he has no other interest in the event of the suit than such as concerns his fees, and they are not contingent. *Quarles v. Waldron and Wife*, 20 Ala. 217.

32. An agent, who sues out an attachment in the name of his principal, executes an attachment bond purporting to bind the principal only, and signs the names of himself and his principal, is not a competent witness for his principal in the attachment suit. *Lankford v. Smith & Weir*, 21 Ala. 342.

33. An agent, who receives commissions on all the cotton which he procures and ships to his principal, (a commission-merchant,) is a competent witness for the latter, in a suit involving the title to certain bales of cotton, which he had procured and shipped, and on which he had received his commissions. *Bryan v. Smith*, 22 Ala. 534.

34. In an action against the owners of a steamboat, to recover damages for the loss of a stage, which was caused by a collision between the steamboat and a ferry-boat on which the stage was crossing the river, the stage-driver, who had the care and control of the stage at the time, is not a competent witness for the plaintiff without a release. *Otis & Jayne v. Thom*, 23 Ala. 469.

35. Where such action is brought by the owner of goods which were on the flat-boat, and which were damaged by the collision, the owner of the flat-boat, who had charge of her at the time of the collision, is not a competent witness for the plaintiff, and is not rendered competent by section 2302 of the Code. *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189.

36. In trover for the conversion of

a slave, a witness, who, as agent of plaintiff, brought the slave to this State, is competent to prove his own agency; and although his testimony tends to show that the slave was sold under attachment against himself, sued out by the defendant, this does not render him incompetent, if it does not appear that he consented to the levy or sale. *Napier v. Barry*, 24 Ala. 511.

37. An agent, who, acting within the scope of his authority, executes a promissory note in the joint names of his principal and himself, is not a competent witness against his principal, when the latter is sued alone on the note. *Barney v. Earle*, 20 Ala. 405.

38. If such note was given for the purchase-money of goods bought from B., under authority to purchase from A., he is equally incompetent. *Ib.*

39. In assumpsit for the price of lumber furnished by plaintiffs to defendant, defendant's agent, by whom it was procured, is a competent witness for plaintiffs. *Ortez v. Jewett & Co.*, 23 Ala. 662.

40. As to the competency of an agent, when a co-defendant with his principal to a chancery suit, to prove the price agreed to be paid for a tract of land bought by him in the joint names of his principal and himself, see *Crawford v. Barkley*, 18 Ala. 270.

41. In detinue by the bailor, for a horse which the bailee had sold or exchanged without authority, the bailee is a competent witness for plaintiff. *Oliver v. McClellan*, 21 Ala. 675.

42. In detinue against the bailee of a slave, his bailor is not a competent witness for him without a release, although the slave was hired for his victuals and clothes only. *Nelson v. Iverson*, 24 Ala. 9.

43. In an action against the hirer of a slave, for negligence, his sub-bailee, in whose possession the slave died, is a competent witness for him, unless the complaint is so framed as to authorize a recovery for the negligence of such sub-bailee. *Ala. & Tenn. Rivers Railroad Co. v. Burke*, 27 Ala. 535.

44. In detinue against the hirer of a slave, belonging to a testator's estate, the executor, from whom he hired the slave, and who has been released both in his individual and representative capacity, is a competent witness for him, in the absence of an express warranty, fraud, or negligence, although it is shown that he, "as executor, was the real party in interest in the defense of the suit, and had employed the counsel who were defending it." *Walden v. Smith*, 29 Ala. 417.

7. *Principal and Surety.*

45. On the settlement of an administrator's accounts, a surety on his official bond is not a competent witness for him. *McCreliss' Distributees v. Hinkle*, 17 Ala. 459.

46. In an action against a sheriff, for failing to make the money on an execution, the surety on a forfeited replevin bond is a competent witness for the plaintiff. *Poe v. Dorrah*, 20 Ala. 288.

47. In an action to recover money paid by plaintiff, as surety on defendant's official bond as deputy marshal, on a compromise with the marshal, in full discharge of plaintiff's liability on the bond, the marshal is a competent witness for plaintiff. *Love v. Dargan*, 21 Ala. 583.

48. On the trial of a *supersedeas* of an execution, the principal in the note on which the judgment is founded, who has been released by his accommodation endorser, is a competent witness for the latter. *Branch Bank at Mobile v. Coleman*, 20 Ala. 140.

49. In an action against the sureties on a promissory note, their principal is not a competent witness for them without a release. *Garrett v. Holloway & Malone*, 24 Ala. 376.

50. In an action against the principal, on a promissory note executed by him, in this State, jointly with several sureties, a surety, who is not sued, is a competent witness for him. *Wright v. Atwood's Adm'r*, 29 Ala. 346.

51. In an action against an executor, seeking to hold him personally liable as guarantor for goods furnished to his testator's children, one of the children is a competent witness for the plaintiff, to prove the amount and value of the goods, and the character of the defendant's promise. *Sanford v. Howard*, 29 Ala. 684.

52. Where the surety on a note extinguishes it, by giving a new note, with a third person as principal, and himself as surety, the original principal is a competent witness for the principal in the new note, to prove that it was given for the accommodation of the surety, and under a promise by him to pay it. *Wright v. Lewis*, 18 Ala. 194.

8. *Other Cases.*

53. A witness, whose interest is precisely balanced, is competent. *Governor v. Gee*, 19 Ala. 199; *Oliver v. McClellan*, 21 Ala. 675; *Crawford v. Barkley*, 18 Ala. 270; *Tarleton & Pollard v. Johnson*, 25 Ala. 300.

54. If a witness becomes interested in the event of a pending suit, by the act of one party, without the assent of the other, this does not render him incompetent to testify for the latter, although his interest is on the same side. *Jones' Executors v. Hoskins*, 18 Ala. 489.

55. In an action by the endorsee, against the drawer of a bill of exchange, the payee is a competent witness to impeach its validity. *State Bank v. Seawell*, 18 Ala. 616.

56. The grantor in a deed is a competent witness to impeach it. *Norton and Wife v. Linton*, 18 Ala. 690.

57. In an action against an attorney, for money collected by him on a note, the maker of the note is not a competent witness, to prove that he paid it to the defendant. *Moore & Jones v. Henderson*, 18 Ala. 232.

58. In an action against a justice of the peace, for failing to pay over money collected, the constable, by whom the money was collected under execution, is not a competent witness, without a release, to prove that he paid it over to the justice. *McGrew & Beck v. Governor*, 19 Ala. 89.

59. A debtor, whose debt has been assumed by another person without his request, is a competent witness for such person, to prove the consideration of his promise. *Beall & Co. v. Ridgeway*, 18 Ala. 117.

60. A donor is a competent witness for his donee, in a suit involving the title to the property. *Jones' Executors v. Hoskins*, 18 Ala. 489.

61. A bankrupt may become a competent witness to sustain a deed of trust, executed by him before obtaining his discharge, by releasing to the assignee all interest which he may have in the suit. *Kirksey v. Dubose*, 19 Ala. 43.

62. A bankrupt is not a competent witness for his assignee, for the purpose of increasing the fund in the hands of the latter; but, when his testimony tends to diminish that fund, he is considered as swearing against his interest, and is competent. *Colgin v. Redman*, 20 Ala. 650.

63. In debt on a claim bond, to which *non est factum* is pleaded, the sheriff is not, without a release, a competent witness to prove its execution. *Alexander v. Trask*, 20 Ala. 805.

64. The act of 1845, which renders the defendant in execution an incompetent witness on a trial of the right of property, does not extend to other actions involving the title to the property. *Kirksey v. Dubose*, 19 Ala. 43; *Zackowski v. Jones*, 20 Ala. 189.

65. In trespass against a sheriff, for attaching plaintiff's goods as the property of his vendor, the latter is a competent witness to prove the fairness of the sale. *Zackowski v. Jones*, 20 Ala. 189.

66. In detinue against a sheriff, for property seized under attachment, the defendant in attachment is a competent witness for plaintiff, to prove his previous assignment of the property to the latter. *Bryan v. Smith*, 22 Ala 534.

67. In detinue for a slave, defendant introduced as a witness the father of his vendor, who testified, that he held an order on defendant, from said vendor, for the balance of the purchase-money, which was to be paid at the termination of the suit; and that this order had been given by said vendor as a present to his mother, who was the wife of the witness. *Held*, that the witness was incompetent, from interest, to testify for defendant. *Slaughter v. Cunningham*, 24 Ala. 260.

68. Where a debtor delivers property to one of his creditors, to be sold, and the proceeds to be applied to the payment of his own debt and that of another creditor; and the latter creditor brings an action against the other,

to recover his portion of the proceeds,—the debtor, on being released, is a competent witness for the plaintiff. *Loftin v. Lyon & Baker*, 22 Ala. 540.

69. Where a deed of trust is attacked for fraud, a general creditor of the grantor, whose debt is not secured by the deed, is a competent witness to prove the *bona fides* of any secured debt, although he has another security. *Ala. Life Insurance & Trust Co. v. Pettway*, 25 Ala. 544.

70. An insolvent debtor, being about to make an assignment, and refusing to make any assignment, without plaintiff's approval and consent, which did not place in the preferred class the debts on which plaintiff was bound, jointly with others, as endorser and surety; thereupon, in consideration that plaintiff would consent that the debtor might make an assignment, postponing the debts on which he was bound, and preferring the debts on which defendant was bound as endorser and surety, the latter promised to pay a specified sum, and the deed was made in pursuance of the contract,—*held*, in an action on the contract, that the debtor was a competent witness for plaintiff. *Hatton's Adm'rs v. Jordan*, 29 Ala. 266.

71. Under the Code, (§ 2290,) the transferror, or assignor of the note sued on, is not a competent witness for the plaintiff. *Hudson & Stokes v. Weir & Tate*, 29 Ala. 294.

9. *Objections to Competency.*

72. An objection to the competency of a witness, on the ground of interest, must be distinctly made at the first opportunity, or it will be considered as waived. *Gray's Executors v. Brown*, 22 Ala. 262; *Hudson v. Crow*, 26 Ala. 515; *Hair v. Little*, 28 Ala. 236; *Drake v. Foster*, 28 Ala. 649.

73. A general objection to the testimony of a witness, at the taking of his deposition, does not raise the question of incompetency from interest. *Gray's Executors v. Brown*, 22 Ala. 262.

74. If, in accepting service of interrogatories, a party stipulates that he "waives no objection to their legality, pertinency, relevancy, or competency," this will not enable him to object to the competency of the witness on the ground of interest. *Hudson v. Crow*, 26 Ala. 515.

75. In a chancery suit, if a party proceeds to examine a witness whom he knows to be interested, he cannot afterwards have the deposition excluded on account of such incompetency. *Lyde v. Taylor*, 17 Ala. 270.

76. If a party introduces and examines a witness who has an interest adverse to him, he thereby waives all objection to his incompetency on that account, and confers on his adversary the right to examine him fully touching all facts material to the issue. *Kelly v. Brooks*, 25 Ala. 523.

77. After complainant has several times examined a defendant as a witness, (once in chief, and twice on cross-interrogatories,) without raising any objection to his competency on the ground of interest, he cannot spring that objection for the first time at the hearing. *DeVendal v. Malone's Executors*, 25 Ala. 272.

78. When a witness, who is shown on the preliminary examination to be incompetent, is nevertheless allowed to testify, the appellate court will not, for the purpose of holding the error cured, look to facts proved by him on his examination in chief. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

79. The erroneous admission of an incompetent witness, against the objection of the opposite party, is not cured by the fact that other witnesses testify to some of the same facts. *Doe d. Kennedy's Heirs v. Reynolds*, 27 Ala. 364.

10. *Restoring Competency by Release.*

80. It is no objection to a release that it was delivered to the witness by the party's attorney, when it is shown that the party himself, after its delivery, acknowledged that he had released the witness. *Branch Bank at Mobile v. Coleman*, 20 Ala. 140.

81. It is not necessary that a release should be delivered to the witness personally, but it must appear that he was apprised of its existence when his deposition was taken; and the mere fact that it was attached to the deposition by the commissioner, is not sufficient to show that the witness

was apprised of its existence. *Gray's Executors v. Brown*, 22 Ala. 262.

82. Where the interest of a witness appears from his own testimony, he is competent to prove that he has been released; *secus*, where his interest is shown by evidence *aliunde*. *Dent v. Portwood*, 17 Ala. 242; *Herndon v. Givens' Adm'r*, 19 Ala. 313; *Hiscox v. Hendree*, 27 Ala. 216; *Montgomery & Wetumpka Plank-Road Co. v. Webb*, 27 Ala. 618.

III. EXAMINATION.

1. *Putting under Rule.*

83. When the witnesses are put under the rule, and one of them nevertheless remains in court during the examination of the others, without the knowledge of the party by whom he was summoned, it is discretionary with the court to permit him to be examined. *Sidgreaves v. Myatt*, 22 Ala. 617.

2. *Preliminary Examination.*

84. When a witness testifies, on his *voir dire*, that he was a partner of the firm which is shown by other evidence to have been defendant's vendor of the goods sued for, he may testify to the additional fact that said firm was also plaintiff's vendor; thus balancing his interest, and restoring his competency. *Tarleton & Pollard v. Johnson*, 25 Ala. 300.

85. When a witness is shown to be incompetent on his *voir dire*, and is nevertheless allowed to testify, the appellate court will not, for the purpose of holding the error cured, look to facts proved by him on his examination in chief. *Lay's Executor v. Lawson's Adm'r*, 23 Ala. 377.

3. *Cross Examination.*

86. On the trial of a motion to enter satisfaction of a judgment, the plaintiff has a right to cross-examine all witnesses offered against him. *Bruce v. Barnes*, 20 Ala. 219.

87. Where a part of a transaction or conversation has been elicited from a witness on his direct examination, the opposite party has the right, on cross examination, to call for the other portions of it, although they might not be admissible as independent testimony. *Lanier v. Branch Bank at Montgomery*, 18 Ala. 625; *Nelson v. Iverson*, 24 Ala. 9.

88. Although the court, in the exercise of its discretionary control over the conduct of the trial, may sometimes postpone the cross examination of a witness for the plaintiff, it cannot postpone such cross examination until after the plaintiff has made out a *prima-facie* case and closed. *Fralick v. Presley and Wife*, 29 Ala. 457.

89. Greater latitude is allowed on the cross than on the direct examination, and much must be left to the enlightened discretion of the presiding judge; nor will the appellate court revise his action, unless the record affirmatively shows that improper indulgence was granted, or that facts palpably irrelevant and immaterial were elicited. *Stoudenmeier v. Williamson*, 29 Ala. 558.

90. In an action on a warranty of the soundness of a slave, the auctioneer, by whom the sale was conducted, was introduced as a witness for the defense, and was asked, on cross examination, if the question was not asked, during the sale, whether the slave was sound, and what his reply was; to which he answered, that the question was asked, and that he replied, "I believe she is sound, she is so far as I know." *Held*, that the question and answer, though they would not have been admissible on the direct examination, were properly received in evidence, as showing the witness' connection with the question of the slave's soundness. *Ib.*

4. *What Witness may State.*

91. Where the situation of a witness was such that, if a certain fact had existed, he would probably have known it, he may testify to his want of knowledge of its existence. *Thomas v. De-Graffenreid*, 17 Ala. 602; *Nelson v. Iverson*, 24 Ala. 9.

92. But he cannot be allowed to state, "that the habits of business and intimacy between himself and defendant were such that, if defendant had received notice of the protest of said bill, he had no doubt it would at once

have been communicated to him. *Coster, Robinson & Co. v. Thomason*, 19 Ala. 717.

93. A witnesss must testify to facts, and not to legal conclusions, nor to matters of opinion. *Griffin v. Isbell*, 17 Ala. 184; *McGrew & Harris v. Walker*, 17 Ala. 824; *Norton and Wife v. Linton*, 18 Ala. 690; *Nelson v. Iverson*, 19 Ala. 95; *S. C.*, 24 Ala. 9. (*Vide* EVIDENCE, IX, p. 597.)

5. *Privileged Communications.*

94. The rule which protects professional communications, is founded in public policy, and extends to all information acquired by an attorney from his client, touching matters which come within the ordinary scope of professional employment; but, where two contracting parties employ an attorney to draw up their contract, and make their communications to him in the presence of each other, each thereby waives, as against the other, his right to treat those communications as confidential, and each is entitled, in asserting his rights under the contract, to a disclosure of its stipulations from the attorney. *Parish v. Gates*, 29 Ala. 254.

6. *Production of Papers.*

95. A witness, summoned under a subpœna *duces tecum*, may be required to produce papers, without being introduced generally. *Martin v. Williams*, 18 Ala. 190.

96. If a witness fails to produce a letter of which he speaks, and which he is required by the interrogatory to attach to his answer, this does not justify any inference prejudicial to the party by whom his deposition was taken. *Jewell v. Center & Co.*, 25 Ala. 498.

97. When a party calls for the production of a paper, he cannot object to its being read in evidence by his adversary. *Furlow's Adm'r v. Merrell*, 23 Ala. 705.

7. *Impeaching and Sustaining Witness.*

98. A party is not allowed to impeach his own witness. *Wilson v. Maria*, 21 Ala. 359; *Jewell v. Center & Co.*, 25 Ala. 498; *Upson v. Raiford*, 29 Ala. 188; *Williams v. Fitzpatrick*, 20 Ala. 791.

99. But he may, nevertheless, prove the truth of any particular fact in direct contradiction of the testimony of his own witness. *Wilson v. Maria*, 21 Ala. 359; *Williams v. Fitzpatrick*, 20 Ala. 791; *Upson v. Raiford*, 29 Ala. 188.

100. The testimony of a witness, on a point not in issue, cannot be contradicted; nor can he be questioned about an irrelevant matter, in order to lay a predicate to impeach him. *Ortez v. Jewett & Co.*, 23 Ala. 662.

101. In laying the predicate to impeach a witness, by proof of inconsistent statements, it is not necessary that the precise language formerly used by him should be stated, provided the substance is given. *Nelson v. Iverson*, 17 Ala. 216; *Armstrong v. Huffstutler*, 19 Ala. 51.

102. The attention of the witness must be directed with reasonable certainty to the time, place and person involved in the supposed contradiction; as where his attention is called to a conversation, had by him twenty years ago, "in the *spring* of the year," proof of a conversation which occurred in *February* of that year, otherwise corresponding with the predicate, is admissible. *Nelson v. Iverson*, 24 Ala. 9.

103. A person who removed into the neighborhood about the time the witness left it, is competent to testify to his general reputation in that neighborhood at that time. *Martin's Executrix v. Martin*, 25 Ala. 201.

104. A person may testify to the general character of an impeached witness, both from his own knowledge, and from what he has heard from other persons; and may state that it is very unfavorable. *Ib.*

105. When evidence is adduced to contradict the testimony of a witness on an immaterial point, the party who called him may introduce witnesses to sustain his general character, although the opposite party disclaims any intention to discredit him. *Newton v. Jackson*, 23 Ala. 335.

106. As a general rule, evidence of declarations made by the witness out of court, whether verbal or written, cannot be received to corroborate his testimony on the trial. *Nichols v. Stewart*, 20 Ala. 358.

WRIT.

I. FORM, AND STYLE.
II. SERVICE, AND RETURN.

I. FORM, AND STYLE.

1. The fact that a writ is addressed "to any lawful officer" of a specified county, instead of "any sheriff of the State of Alabama," is matter of abatement only, and not available on error. *Yonge v. Broxson*, 23 Ala. 684.

2. It is not necessary that a writ should specify the place at which the court is to be held, or the first day of the term to which it is returnable. *Ib.*

3. When the clerk's name is subscribed to a writ, to which is attached an affidavit that the name was subscribed by the affiant by the authority of the clerk, the affiant must be held the clerk's deputy, and the writ is properly issued. *Ib.*

4. A writ, issued on Wednesday, is properly returnable to a term of the court commencing on the following Monday. *Garner & Nevill v. Johnson*, 22 Ala. 494.

5. The want of an endorsement on branch writs, showing that they are parts of one and the same cause, is only available (if at all) in abatement. *Johnson and Wife v. King*, 20 Ala. 270.

6. Where a writ of *ca. sa.*, after commanding the sheriff to take the defendant's body to satisfy the plaintiff's judgment and costs, contains the additional direction, "And that you have the said moneys at our next circuit court, to render to the said plaintiff for his damages and costs aforesaid," the latter direction is mere surplusage, and does not vitiate the writ. *Stewart v. Cunningham & Rippetoe*, 22 Ala. 626.

7. Where a notice, in a statutory proceeding, is entitled, "Comptroller's office, State of Alabama," this is a sufficient compliance with the constitutional requisition as to the style of process. *Walker v. Chapman*, 22 Ala. 116.

II. SERVICE, AND RETURN.

8. A party is incompetent to execute process in his own favor; but mere identity of name will not authorize the inference, in the absence of a direct allegation in the pleadings, that the plaintiff in the writ and the officer by whom it was executed are the same person. *Boykin v. Edwards*, 21 Ala. 261.

9. The act of 1843, (Clay's Digest, 118, § 86,) authorizing bank-marshals to serve process, is not unconstitutional. *Andress v. Roberts*, 18 Ala. 387.

10. In detinue, an endorsement on the writ by the sheriff, stating that he had taken the property under the writ, and, after the expiration of five days, the defendant having failed and refused to put in bond, had delivered it to the plaintiff on his execution of the statutory bond, does not show that he had executed the writ on the defendant. *Fowler v. Banks*, 21 Ala. 679.

11. If the sheriff returns a writ executed, when in fact it was not, the party thereby injured has his remedy against the sheriff, or chancery will afford relief in a proper case; but the sheriff's return cannot be collaterally impeached, nor will he be allowed to depose to facts inconsistent with it. *Martin v. Barney*, 20 Ala. 369.

12. A defective service of process should be pleaded in abatement, or the service may be set aside on motion. *Moore v. Fiquett*, 19 Ala. 236; *Dew v. Cunningham*, 28 Ala. 466.

WRIT OF RIGHT.

1. At common law, a writ of right lay only to recover a fee-simple estate, and in favor of him who had a fee-simple title. *Lyon's Heirs v. Mottuse*, 19 Ala. 463.

2. A count in a writ of right must allege a seizin in fee simple, either in the demandant himself, or in the ancestor through whom he claims: if it only alleges a disseizin of the demandant's ancestor, it is insufficient as a count in that action, but good as a count in a writ of entry *sur disseizin*, and must be adjudged a count in the latter action. *Ib.*