REPORTS

OF

CASES AT LAW AND IN EQUITY,

ARGUED AND DETERMINED

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SUPREME COURT OF ARKANSAS:

EMBRACING THE CASES DECIDED AT THE JULY TERM, A. D. 1851,
AND MOST OF THOSE DECIDED AT THE
JANUARY TERM, A. D. 1852.

BY E. H. ENGLISH, COUNSELLOR AT LAW.

VOLUME VII.

LITTLE ROCK, ARK.
PUBLISHED BY JOHN M. BUTLER,
1853.

OFFCERS OF THE SUPREME COURT
DURING THE TIME OF THESE DECISIONS.

Hon. THOMAS JOHNSON, Chief Justice, (*a*)

Hon. CHRISTOPHER C. SCOTT, } Associate Justices.
Hon. DAVID WALKER, }

JOHN J. CLENDENIN, Attorney General.
LUKE E. BARBER, Esq., Clerk.

JUDGES OF THE CIRCUIT COURTS.

1st Circuit, Hon. THOMAS B. HANLY, (*b*)
2d " Hon. J. C. MURRAY,
3d " Hon. BEAUFORT H. NEELY,
4th " Hon. ALFRED B. GREENWOOD,
5th " Hon. WM. H. FEILD,
6th " Hon. SHELTON WATSON.

(*a*) Succeeded by Hon. GEO. C. WATKINS, Nov. 15th, 1852.
(*b*) " " Hon. CHARLES W. ADAMS, " 2d, 1852.

ATTORNEYS

Upon the Roll of the Supreme Court of Arkansas, and their places of residence.

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Pike & Cummins,
Samuel H. Hempstead,
F. W. & P. Trapnall,
John J. Clendenin,
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SEARCY.

J. W. McConaughey.

Orville Jennings, (unknown.)
S. C. Walker "

IN THE SUPREME COURT,
JANUARY TERM, 1853.

The Hon. John J. Clendenin, Attorney General, after an appropriate address, presented to the court the following proceedings of the Bar convened upon the death of Hon. William Conway B., and the Hon. Sam C. Roane, and moved that they be spread upon the record and printed in the next volume of the decisions of this court:

At a meeting of members of the Bar, in attendance upon the Supreme Court, on the 4th of January, 1853, the following proceedings were had:

On motion, Charles P. Bertrand, Esq., was appointed Chairman, and Luke E. Barber, Secretary.

The object of the meeting was explained by E. H. English, Esq., who represented that since the last adjournment of the Supreme Court, the Hon. WILLIAM CONWAY B, formerly one of the Judges of the Supreme Court of this State, and the Hon. SAM C. ROANE, one of the oldest citizens of the State, and the oldest lawyer in the State, and who had filled many offices under our Territorial and State governments, with distinguished ability, had departed this life, and moved that a committee of three be appointed, to draft resolutions expressive of regard for the loss we have sustained.

Whereupon, the chairman appointed E. H. English, S. H. Hempstead and John J. Clendenin, Esqrs., who reported the following, which were unanimously adopted:

WHEREAS, Since the last adjournment of the supreme court, it has pleased the Great Ruler of all things, to remove from among us WILLIAM CONWAY B., who was for some years an Associate Justice of said court, and for many years one of the circuit judges of this State, and who, in all the relations of life was truly eminent for his many amiable qualities as a man and his unswerving integrity as a Judge, and whose association with us a Judge and brother lawyer was always characterized by kindness and courtesy.

And whereas, also, since the last adjournment of said supreme court, SAM C. ROANE has departed this life; and whereas, the deceased was the oldest lawyer in the State, as he was among the oldest resident citizens, and had filled with distinguished ability many high offices, among others that of District Attorney for the United States, member of the senate of this State; President of said senate, ex-officio Governor and special Judge of the supreme court of this State, and who, as one of the codifiers of our laws, has left the impress of his ability as a lawyer upon our statute book, and who, in all his relations with our profession and society, maintained, to the close of a useful life, the uprightness and integrity which so eminently distinguished him among his professional brethren and fellow-citizens: Therefore, it is

Resolved, That, in the death of the Hon. William Conway B., and the Hon. Sam C. Roane, our profession has sustained a great loss, society two of its most worthy members, and the State most useful citizens.

Resolved, That as a testimony of our respect for the memory of our deceased brothers, we will wear the usual badge of mourning for thirty days.

Resolved, That the proceedings of this meeting, and the above preamble and resolutions, be presented to the supreme court by the Attorney General, with a request that they be spread on the records of said court, and published in the next volume of its decisions. C. P. BERTRAND, *Ch'n.*

L. E. BARBER, *Secretary.*

The Court, by the Chief Justice, responded:

SIR: The court cannot but feel concerned at the announcement of the decease of any one who has ever been honored with a seat on this bench. Cordially concurring in the sentiments expressed in the resolutions of the Bar, which you have just presented, the court will order that they be entered of record.

Test: L. E. BARBER, *Clerk.*

NOTE—Since the publication of the last volume, Lemuel R. Lincoln, of Little Rock, Wm. H. Ringo, of Helena, and John Brown, of Princeton, worthy members of the Supreme Court Bar, have also departed this life. REPORTER.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS,

DURING THE JULY TERM, A. D. 1851.

LYTLE ET. AL. V. THE STATE OF ARKANSAS ET. AL.

The pre-emption act of May 29, 1830, conferred certain rights upon settlers upon the public lands, upon proof of settlement or improvement being made to the satisfaction of the Register and Receiver, agreeably to the rules prescribed by the Commissioner of the General Land Office.

The Commissioner directed the proof to be taken before the Register and Receiver, and afterwards directed them to file the proof where it should establish to their entire satisfaction the rights of the parties.

Where the proof was taken in the presence of the Register only, but both officers decided in favor of the claim, and the money paid by the claimant was received by the Commissioner, this was sufficient. The commissioner had power to make the regulation, and power also to dispense with it.

The proof being filed, there was no necessity of re-opening the case when the public surveys were returned.

The circumstance that the Register would not afterwards permit the claimant to enter the section, did not invalidate the claim.

The pre-emptioner had no right to go beyond the fractional section upon which his improvements were, in order to make up the one hundred and sixty acres to which settlers generally were entitled.

No selection of lands under a subsequent act of Congress could impair the right of a pre-emptioner, thus acquired.

This was a bill originally filed in the Pulaski Circuit Court, by

Robinson Lytle and wife, Elias Hooper and wife and Nathan H. Cloyes, by Clayton, his guardian, heirs at law of Nathan Cloyes, deceased, against the State of Arkansas, the Real Estate Bank, the Trustees of said Bank, Richard C. Byrd, James Pitcher, and others.

A demurrer was sustained to the Bill, Complainants appealed to this court, and the dicision of the court below was affirmed. The case was then taken to the Supreme Court of the United States, by writ of Error, reversed and remanded. The case was heard in this court before the Hon. Thos. Johnson, Chief Justice, Hon. W. S. Oldham, Associate, and Hon. R. C. S. Brown, Special Judge, and was argued by FOWLER, for the appellants, and RINGO & TRAPNALL and WATKINS & CURRAN, contra. The State Reporter has thought proper to postpone the publication of the case in our Reports until the decision of the Supreme Court of the United States should be sent down. The facts will appear from the statement made by the Reporter of the Supreme Court of the United States, and the opinions of the courts. The State Reporter would be pleased to publish the able arguments of counsel in both courts, but it would require more space than can conveniently be given to the case in the volume.

The opinion of this Court was delivered by OLDHAM, J., as follows:

This was a bill filed by the Appellants, as heirs at law of Nathan Cloyes, deceased, against the Appellees in the Pulaski Circuit Court. The bill charges that Nathan Cloyes, in his lifetime, by virtue of an act of the Congress of the United States of America, entitled "an act to grant pre-emption to settlers on the public lands," approved May 29th, 1830, as a settler and occupant of the public land, to-wit: on and of the north-west fractional quarter of section numbered two, in township numbered one, north of range numbered twelve west, in said county of Pulaski, prior to the passage of that act, being then in the possession thereof, and having cultivated some part thereof in the year one thousand eight hundred and twenty-nine, was and became thereby authorized and entitled to enter with the Register

of the Land Office, for the district in which said fractional quarter of said section of land lay, by legal subdivisions, any number of acres not more than one hundred and sixty, or a quarter section, to include his improvement, upon paying to the United States the then minimum price of said land, provided such land should not have been reserved for the use of the United States, or either of the several States in which any of the public lands might be situated, or reserved from sale by act of Congress, or by order of the President, or appropriated for any purpose whatever; that being so authorized and entitled by said act of Congress, the said Nathan Cloyes, in his life-time, on the 23d day of April, 1831, and whilst the said act was in full force, at the Land Office at Batesville, in said State of Arkansas, which was then the Land Office in and for the district in which said fractional quarter section of land was then situated, by his own affidavit and by the affidavit and evidence of John Saylor, Nathan Maynor and Elliott Bussey, made proof of his settlement and improvement on and of the said fractional quarter section of land, and of his right to a pre-emption thereof according to the provisions of said act to the satisfaction of the Register and Receiver of said Land District, agreeably to the rules prescribed by the Commissioner of the General Land Office, for that purpose; and on the 28th day of May, A. D. 1831, the said act of Congress being then still in full force, Hartwell Boswell, the Register, and John Redman, the Receiver of said land district, granted to the said Nathan Cloyes, then still living, the privilege of entering the said land upon which he had so established his right. The bill exhibits copies of the proofs of pre-emption with the endorsement of approval thereon by the Land Officers.

The bill then charges that having made said proof and been granted, and allowed the privilege of entering said quarter section of land, said Nathan Cloyes, on the 28th day of May, A. D. 1831, made application to the Register of said Land Office at Batesville, to enter the said north-west fractional quarter of section two, in township one, north of range twelve west, containing thirty acres and eighty-eight hundredths of an acre, and also the

north-east fractional quarter of the same section, containing forty-two acres and thirty-two hundredths of an acre, and also the north-west and north-east fractional quarters of sections numbered one, in the same township and range, containing thirty-five acres and forty one-hundreths of an acre; the said fractional quarter sections containing together, one hundred and eight acres and sixty one-hundreths of an acre, and in legal subdivisions, and then and there offered to pay the said United States, and tendered to the said Receiver, the minimum price for said land, to-wit: the sum of one hundred and thirty-five dollars and seventy-six and one-fourth cents, which said fractional quarter sections of land were not reserved at that time, or previously, for the use of the United States, or either of the several States in which any of the public lands were situated, nor were said lands reserved from sale by act of Congress, or by order of the President, or appropriated for any purpose whatever, but said Register refused to permit the said Nathan to enter said lands, and the Receiver refused to receive the payment so tendered therefor, because they alleged the said Nathan could only enter the fractional quarter section aforesaid, upon which he had settled and made his improvement, and because the public surveys of said four fractional quarter sections of land, which were all contiguous, had not been returned, according to law, and that said surveys had not then been made, perfected, and returned. That by virtue of an act of of Congress, entitled "an act establishing land districts in the Territory of Arkansas," approved June 25th, 1832, the said fractional quarter sections of land were transferred to, and made part of the Arkansas land district: the Land Office for which was located at Little Rock; and afterwards in pursuance of law, the papers and evidence relating to said pre-emption right, filed in the Land Office at Batesville, were transferred to, and filed in the said Land Office at Little Rock; that afterwards, by virtue of an act of Congress, entitled "an act granting to the Territory of Arkansas one thousand acres of land, for the erection of a Court-House and Jail at Little Rock," approved, June 15th, 1832, and of an act entitled "an act to authorize the Governor of the Ter-

ritory of Arkansas to sell the land granted to said Territory by an act of Congress, approved the 15th day of June, 1832, and for other purposes, approved March 2d, 1833, John Pope, then Governor of said Territory, selected illegally and by mistake for the benefit of said Territory, among other lands, the said north-west fractional quarter of section numbered two as aforesaid, containing thirty acres and eighty-eight hundreths of an acre, and for which, as complainants are informed, a patent was afterwards issued to the said Governor of said Territory of Arkansas, and his successors in office, for the purpose of erecting a Court-House and Jail at Little Rock: that said John Pope, as Governor, afterwards, and by virtue of or under pretence of an act of Congress entitled "an act granting a quantity of land to the Territory of Arkansas, for the erection of a public building at the seat of Government of said Territory," approved March 2d, 1831, and "an act to authorize the Governor of the Territory of Arkansas to select ten sections of land granted to said Territory for the purpose of building a Legislative House for said Territory, and for other purposes," approved July 4th, 1832, selected the said south-east fractional quarter of section two, and the said north-west fractional quarter and north-east fractional quarter of section one, as unappropriated lands, for the purpose of raising a fund for the erection of a public building at Little Rock, and having assigned the same to one William Russell, a patent was issued therefor on or about the 21st May, A. D. 1844: that both of said patents were issued in mistake and in violation of law, and in fraud of the legal and vested rights of said Nathan Cloyes: that after the application of said Nathan Cloyes to enter said lands, and after his tender of payment therefor had been refused as aforesaid, an act of Congress entitled "an act supplemental to the act granting the right of pre-emption to settlers on the public lands, approved the twenty-ninth May, A. D. 1830," was approved on the 14th July, 1832, authorizing settlers upon th public lands entitled to a pre-emption on public lands under the act of 29th May, 1830, to enter the same under the provisions of said supplemental act: that said last mentioned act was approved

and in force before the said Governor Pope selected said lands, and that the public surveys of said lands were made and perfected on or about the 1st December, 1833, and returned to the Land Office, in the beginning of the year 1834: that by virtue of said last mentioned act, said Nathan Cloyes, having in the meantime departed this life, the said complainants, as his heirs, applied to enter said four fractional quarter sections of land on the 5th day of March, 1834, at the Receiver's office, at Little Rock, by the hands of Ben Desha, they paid to the Receiver the sum of $135, 76¼ for the same, who granted a receipt and certificate therefor, and endorsed on said receipt that a part of the land for which said receipt was given, to-wit: the north-west fractional quarter of section two was a part of the location made by Governor Pope in selecting the 1000 acres aforesaid; and that said endorsement was made by direction of the Commissioner of the General Land Office. The bill contains other allegations necessary for the introduction of parties, and prays relief, &c.

Process having issued, a portion of the defendants appeared and answered the bill; and others appeared and filed demurrers. The demurrers being sustained, the complainants have appealed to this court. It is first urged, in support of the demurrer, that the bill is multifarious, and demurrable for a misjoinder of parties. This objection, we conceive, cannot be sustained. The claim asserted by the complainants is entire, accruing to them by the same right, and cannot be well separated or made the subject of different and distinct actions. Although the interests of the various defendants are separate and distinct, yet they all derive title from the same source, under two patents, which, as the complainants contend, were issued in violation of their rights. The complainants could not obtain complete relief to the extent of their claim, without asserting the whole of it in their bill, and consequently making every person a party holding under the adverse title which they seek to set aside. The relief of the complainants would be incomplete unless both patents should be set aside. This would effect the interests of all the defendants, and would not be binding upon them unless they were made parties

with the privilege of defending their title. Besides, it is one great object with Courts of Equity to prevent a multiplicity of suits. Were a different rule to be observed, the complainants might be driven to a separate suit against each defendant, for the purpose of establishing their one entire title to the lands in controversy.

2: The next point to be considered, is, whether Cloyes was entitled to a pre-emption on any other lands, than the north-west quarter of section two, inasmuch as his entire improvement was confined to that tract. Upon this point we adopt the construction given to the act of Congress by the Commissioner of the General Land Office, as being well founded and proper. The Commissioner in his circular instructions, dated June 10th, 1830, and found in the land laws, (*Instructions, &c., Vol.* 2, 539, *No.* 479,) says, "when the whole of the improvement is embraced in the limits of a quarter section, the occupant must be confined to the entry of that particular quarter section."

Again, the Commissioner in his letter to the Register and Receiver at St. Stephens, Alabama, dated May 31st, 1831, in the same *Vol.* 554, *No.* 497, says, "if therefore all the improvements and cultivation of the settler are included in a fractional section or a legal subdivision containing less than one hundred and sixty acres, he can have no claim to enter any tract to make up the maximum allowance of the law."

This construction of the Commissioner, as before stated, we conceive to be the proper construction, and we give it our entire concurrence; and consequently Cloyes could not, by virtue of the occupancy and cultivation contained in the bill, claim a right of pre-emption beyond the fractional quarter section upon which such occupancy and cultivation were confined.

It has been held that the "decisions of the Register and Receiver are conclusive as to all matters within their jurisdiction, in the absence of fraud; for the act of Congress, for many purposes, makes them judical officers, and gives them exclusive cognizance of a particular class of cases." *Wilcox v. Jackson*, 13 *Pet.* 490. *Nicks' hrs. v. Rector*, 4 *Ark. R.* 250.

Allowing Cloyes to have been entitled by the act of Congress to a right of pre-emption, to the full extent of his claim, it is not within the province of a State Court of Equity to correct the Errors of the land officers, who are clothed with exclusive jurisdiction.

The Register and Receiver decided, that he was not entitled to a pre-emption beyond the fractional quarter section, which included his settlement and cultivation, and it is not the province of this Court to say that their decision was erroneous and that he was entitled to no more.

3: At the time, or shortly after, filing his proof to a right of pre-emption, Cloyes tendered payment for the whole of the land claimed by him, at the minimum price. The land at that time was not subject to sale by pre-emption, as the surveys had not been completed and the plats returned to the Land Office. After the establishment of the "Arkansas Land District," and a transfer of the books, papers, &c., to the land officer at Little Rock, and before the expiration of twelve months after the plats had been returned to the Land Office, the complainants, by Ben Desha, paid to the Receiver at Little Rock, the minimum price for the whole of the land claimed, and took his receipt therefor, upon which he made an endorsement under the direction of the Commissioner of the General Land Office: "That the north-west fractional quarter of section two forms a part of the location made by Governor Pope, in selecting 1000 acres of land adjoining the town of Little Rock, granted by Congress, to raise a fund for building a Court House and Jail for the Territory of Arkansas."

The Receiver has no legal authority to receive payment for any of the public lands, until a sale is made by the Register. In this case, the Register declared the lands not subject to entry by the complainants, and accordingly refused to permit them to enter the same.

The receipt given by the Receiver therefore conferred no title whatever upon the complainants, and can be regarded only as having the operation and effect of a tender. If at the time of

making such payment to the Receiver, the complainants were entitled to a pre-emption to any portion of the lands claimed; although the amount paid was greater than the price of the land, to which they were so entitled, yet it was good for the amount to which they were entitled. It was a mere precautionary measure and was intended for the whole land claimed, if entitled to the whole; and if not, then for as much as they might be entitled to. So are such tenders or payments regarded by the Commissioner of the General Land Office. See *Instructions, &c., Public lands, Vol.* 2, 132, *No.* 84. Whether such a tender would be good at common law, it is not necessary to enquire. Such a tender is regarded as sufficient by the General Land Office, which is charged by law for the protection of the General Government, and will be held good by this court against the government, and, consequently those claiming under her.

4: Having disposed of these preliminary questions, we will proceed to inquire whether, by the bill, Cloyes is shown to have been entitled to a pre-emption to the particular fractional quarter including his improvement. The act of Congress of the 29th May, 1830, section 3, *Provides:* "That prior to any entries being made under the privilege of this act, proof of settlement or improvement shall be made to the satisfaction of the Register and Receiver of the land district, in which such lands may lie, agreeably to the rules to be prescribed by the Commissioner of the General Land Office, for that purpose." The Commissioner, in his circular instructions to the Registers and Receivers, dated June 10th, 1830, already referred to, says, "the evidence must be taken before a justice of the peace in the presence of the Register and Receiver, and be in answer to such interrogatories propounded by them, as may be best calculated to elicit the truth." The regulations so prescribed by the Commissioner are as binding and obligatory upon the Register and Receiver as the law itself. The manner in which they are to receive satisfactory proof of a right of pre-emption, is not left to their discretion, but is fixed by definite rules, from which no one but the Commissioner himself can authorize a departure, and the Register and

Receiver must conform to them. It devolves upon the Commissioner to prescribe the mode and nature of the proof; but after it is received, it is exclusively within the province and jurisdiction of the Register and Receiver to determine whether it is sufficient and satisfactory. They can acquire *jurisdiction* of the evidence and of the subject matter so as to adjudicate upon it, only in the manner pointed out by the rules made under, and in conformity with, the act of Congress. An allowance of a right of pre-emption upon the personal knowledge of the Land Officers, in the absence of proof, would be void against the United States, and consequently a claim to a right of pre-emption so granted would not affect or impair the adverse claims of persons holding under the United States; and such, we conceive, would be the case were a pre-emption granted upon proof not taken in the presence of the Register and Receiver, as prescribed by the Commissioner in conformity with the law.

This point, however, is only made in argument, as the bill alleges, "that the proof was made to the satisfaction of the Register and Receiver, agreeably to the rule prescribed by the Commissioner of the General Land Office, for that purpose." The exhibit shows that "the proof was taken in the presence of the Register." The allegation contained in the bill is admitted by the demurrer. If it should be denied by answer, the exhibit becomes an instrument of proof under the issue so formed. The act of Congress, under which Cloyes made his proof, was approved the 29th May, 1830, and expired one year from its passage, by limitation. During the existence of the law, he was unable to avail himself of the benefits and privileges which it conferred, because the surveys had not been completed and the plats returned to the Land Office. With the expiration of the act, his right to a pre-emption ceased, and he had no right to claim the benefits of the law after it ceased to exist. The act did not confer a vested legal or equitable interest, which could be enforced against the Government, but a mere gratuity or bounty, for the obtaining and protection of which, against those who would defeat the intention of the donor, courts will interfere and grant

relief. Although the right of pre-emption granted by act of Congress to settlers upon the public lands, is a mere gratuity, yet it is one of sound policy on the part of the General Government, as a means of settling our extensive public domain with a hardy and enterprising population; and of actual benefit to the settler upon the public lands as a protection to him in the enjoyment of the labor which he may have bestowed upon such land. The subject, however, is completely within the control of Congress. The gratuity may be granted or withheld at pleasure, and if granted may be revoked, if done before the acceptance of, and compliance with, the terms upon which it is offered.

The 4th section of the act of 29th May, 1830, provides that, "the right of pre-emption contemplated by this act, shall not extend to any land which is reserved from sale by act of Congress, or by order of the President, or which may have been appropriated for any purpose whatsoever." The act, having expired by limitation, was revived by the supplemental act of July 14th, 1832. This latter act provides, "that all the occupants and settlers upon the public lands of the United States, who are entitled to a pre-emption according to the provisions of the act of Congress, approved twenty-ninth day of May, eighteen hundred and thirty, and who have not been, or shall not be enabled to make proof and enter the same, within the time limited in said act in consequence of the public surveys not having been made and returned, or where the land was not attached to any land district, or where the same has been reserved from sale on account of a disputed boundary between any State and Territory, the said occupants shall be permitted to enter the said lands on the same conditions in every respect as are prescribed in said act, within one year after the surveys are made, or the land attached to a land district, or the boundary line established," &c. Although this act is general, and confers upon occupants coming within its perview all the benefits and privileges of the act of 1829, yet it does not confer a right of pre-emption to lands disposed of, or otherwise appropriated by act of Congress between the dates of its expiration and that of its revival, by the supple-

mental act. If the land, to which Cloyes claimed his right of pre-emption, remained undisposed of in any manner, at the time of the passage of the supplemental act, then he comes within the provisions of the act, and is entitled to the benefits which it confers; otherwise he is not.

On the 15th June, 1832, an act was passed "granting to the Territory of Arkansas, one thousand acres of land, contiguous to, and adjoining the Town of Little Rock, for the erection of a Court House and Jail in said town; to be selected by the Governor," &c. This act was passed one month before the supplemental act of 14th July, 1832, reviving the pre-emption act of 1830, and consequently at the time of its passage there was no law in existence conferring upon Cloyes a right of pre-emption. The Governor was authorized by the act to select any land belonging to the United States, unappropriated at the date of the act, "contiguous to and adjoining the Town of Little Rock." We will not enquire whether the supplemental act, passed on the 14th July, 1832, conferred a right of pre-emption on Cloyes which the Governor was bound to notice in selecting the one thousand acres. If there was not more than one thousand acres of unappropriated public lands, "contiguous to, and adjoining the Town of Little Rock," exclusive of the fractional quarter section claimed by Cloyes, then that quarter section had at the time of the passage of the supplemental act been already appropriated by an act of Congress, for the building of a Court House and Jail in the Town of Little Rock, and he was not entitled to any pre-emption upon it. This fact the bill does not show, and this court will not presume that there was a sufficiency of land which the Governor could select exclusive of the quarter section occupied by Cloyes. For this reason, we think the demurrer to the bill was properly sustained by the court below, and we accordingly affirm the decree.

STATEMENT BY THE REPORTER OF THE SUPREME COURT OF THE UNITED STATES.

This case was brought up from the Supreme Court of the State of Arkansas, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

It involved the validity of an entry of four fractional quarter sections of land, one of which only, namely, the north-west fractional quarter section, number two in township one of north range twelve west, was passed upon by this Court.

The history of the claim is this:

The act of Congress passed on the 29th of May, 1830, (4 *Stat. at Large* 420,) gave to every occupant of the public lands prior to the date of the act, and who had cultivated any part thereof in the year 1829, a right to enter at the minimum price by legal subdivisions, any number of acres not exceeding one hundred and sixty or a quarter section, to include his improvements: *Provided*, The land shall not have been reserved for the use of the United States or either of the several States.

In the third section of the act, it is provided, that, before any entries being made under the act, proof of settlement or improvement shall be made to the satisfaction of the Register and Receiver of the land district in which the lands may lie, agreeably to the rules prescribed by the Commissioner of the General Land Office for that purpose.

On the 10th of June, 1830, the Commissioner issued his instructions to the Receivers and Registers, under the above act, in which he said, that the fact of cultivation and possession required, "must be established by the affidavit of the occupant, supported by such corroborative testimony as may be entirely satisfactory to both; the evidence must be taken by a justice of the peace, in the presence of the Register and Receiver." And the Commissioner directed, that, where the improvement was wholly on a quarter section, the occupant was limited to such quarter; but where the improvement is situated in different quarter sections

adjacent, he may enter a half-quarter in each to embrace his entire improvement.

Another circular, dated 7th February, 1831, was issued instructing the land officers, where persons claiming pre-emption rights had not been prevented, under the above circular, from making an entry, "by reason of the township plats not having been furnished by the Surveyor General to the Register of the Land Office, the parties entitled to the benefit of said act may be permitted to file the proof thereof under the instructions heretofore given, identifying the tract of land as well as circumstances will admit, any time prior to the 30th of May, next." And they were requested to "keep a proper abstract or list of such cases wherein the proof shall be of a character sufficient to establish, to their entire satisfaction, the right of the parties, respectively, to a pre-emption," &c. No payments, however, were to be received on account of pre-emption rights duly established, in cases where the townships were known to be serveyed, but the plats whereof were not in their office, until they shall receive further instructions."

It may be here remarked, that the public surveys of the land in question were not completed until the 1st of December, 1833, nor returned to the Land Office until the beginning of the year 1834.

On the 2d of March, 1831, Congress passed an act (4 *Stat. at Large* 473,) "granting a quantity of land to the Territory of Arkansas, for the erection of a public building at the seat of government of said Territory;" but this act did not designate what specific tract of land should be granted for that purpose.

On the 23d of April, 1831, Cloyes filed the following affidavit in the office of the Register, in support of his claim to a pre-emption right:

PRE-EMPTION CLAIM, MAY 29, 1830.

"Nathan Cloyes's testimony, taken on the 23d of April, 1831, before James Boswell, a justice of the peace for the county of Independence, in the Register's office, in the presence of the Register.

"*Question by the Register.*—What tract of the public lands did you occupy in the year 1829, that you claimed a right of pre-emption upon?

"*Answer.*—On the north-west fractional quarter of section two, in township one north of range twelve west, adjoining the Quapaw line, being the first fraction that lies on the Arkansas river, immediately below the town of Little Rock, and contains about twenty-eight or twenty-nine acres, as I have been informed by the county surveyor of Pulaski county; and I claim under the law the privilege to enter the adjoining fraction or fractions so as not [to] exceed one hundred and sixty-acres, all being on the river below the before named fraction.

Question as before.—Did you inhabit and cultivate said fraction of land in the year 1829; and if so, what improvement had you in that year in cultivation?

Answer.—I did live on said tract of land in the year 1829, and had done so since the year 1826; and in the year 1829, aforesaid, I had in cultivation a garden, perhaps to the extent of an acre; raised vegetables of different kinds, and corn for roasting-years (ears), and I lived in a comfortable dwelling, east of the Quapaw line, and on the before named fraction.

Question as before.—Did you continue to reside and cultivate your garden aforesaid on the before named fraction until the 29th of May, 1830?

Answer.—I did, and have continued to do so until this time.

Question as before.—Were you, at the passage of the act of Congress under which you claim a right of pre-emption, a farmer; or, in other words, what was your occupation?

Answer.—I was a tin-plate worker, and cultivated a small portion of the fraction before named for the comfort of my family, and carried on my business in a shop adjoining my house.

Question as before.—Do you know of any interfering claim under the law, that you claim a pre-emption right upon the fraction whereon you live?

Answer.—I know of none. And further this deponent saith not.

NATHAN CLOYES.

Sworn and subscribed to, before me, the date aforesaid.

J. BOSWELL, *J. P.*"

On the same day, Cloyes filed also the corroborative testimnoy of John Saylor, Nathan W. Maynor, and Elliott Bussey.

On the 28th May, 1831, the Register and Receiver made the following entry, and gave Cloyes the following certificate:

PRE-EMPTION CLAIM, 29 MAY, 1830.

Nathan Cloyes, No. 24, N. W. fractional ¼ 2, 1 N. 11 W., granted for the above fractional ¼, and reject the privilege of entering the adjoining fractions. May 28, 1831.

H. BOSWELL, *Register.*

JOHN REDMAN, *Receiver.*"

On the 15th of June, 1832, Congress passed an act, (4 *Stat. at Large*, 531,) granting one thousand acres of land to the Territory of Arkansas, "contiguous to, and adjoining the town of Little Rock," for the erection of a Court House and Jail at Little Rock.

On the 4th of July, 1832, Congress passed another act, (4 *Stat. at Large* 563,) authorizing the Governor of the Territory to select ten sections of land to build a Legislative house for the Territory.

On the 4th of July, 1832, Congress passed an act, (4 *Stat. at Large* 603,) giving to the persons entitled to pre-emption under the act of 1830, (but who had not been able to enter the same within the time limited, because the township plats had not been made and returned) one year from the time when such township plats should be returned, to enter said lands upon the same terms and conditions as prescribed in the act of 1830.

On the 2d of March, 1833, Congress passed an act, (4 *Stat. at Large* 661,) authorizing the Governor of the Territory to sell the lands granted by the act of 15th June, 1832.

Under these acts of Congress, Governor Pope made a part of his location upon the fractional quarter sections in question, upon the 30th of January, 1833.

It has been already mentioned, that on the 1st of December 1833, the public surveys were completed, and returned to the Land Office in the beginning of the year 1834.

On the 5th of March, 1834, the heirs of Cloyes (he being dead) paid for the four fractional quarter sections, and took the following receipt:

"*Receiver's Office, at Little Rock, March 5th*, 1834.

Received by the hands of Ben Desha, from Lydia Louisa Cloyes, Mary Easther Cloyes, Nathan Henry Cloyes, and William Thomas Cloyes, (heirs of Nathan Cloyes, deceased, late of Pulaski county, A. T.,) the sum of one hundred and thirty-five dollars and seventy-six and ¼ cents, being in payment for the north-west and north-east fractional quarters of section two, and the north-west and north-east fractional quarters of section one, in fractional township one, north of the base line, and range twelve, west of the fifth principal meredian, containing in all one hundred and eight 61-100 acres, at $1,25 per acre.

$135 76¼. P. T. CRUTCHFIELD, *Receiver*.

A part of the land for which the within receipt is given, to-wit: "The north-west fractional quarter of section two forms a part of the location made by Governor Pope, in selecting 1,000 acres adjoining the town of Little Rock, granted by Congress to raise a fund for building a Court House and Jail for the Territory of Arkansas; and this endorsement is made by direction of the Commissioner of the General Land Office.

P. T. CRUTCHFIELD, *Receiver*.

Receiver's Office, at Little Rock, March 5th, 1843."

In 1843, the heirs of Cloyes filed a bill against the persons mentioned in the title of this statement, who had purchased various interests in these fractional quarter sections, and claimed title under Governor Pope. The bill was filed in the Pulaski Circuit Court of the State, setting forth the above facts, and praying that the defendants might be ordered to surrender their patents and other muniments of title to the complainants.

The parties who were interested in the north-west fractional quarter of section number two, answered the bill. The other parties demurred.

The answers admitted that proof of a pre-emption right to the north-west fractional quarter of section two was made by Cloyes

at the time and in the manner set forth in the bill; but deny that he had a valid pre-emption to it. They admit, also, that Governor Pope selected said quarter in pursuance of the two acts of Congress of 15th June, 1832, and 2d March, 1833, but deny that he did so illegally or by mistake.

In July, 1844, the Pulaski Circuit Court sustained the demurrer of the parties who had demurred, and dismissed the bill as to those who had answered.

In July, 1847, the Supreme Court of Arkansas, to which the cause had been carried, affirmed the judgment of the Court below, and a writ of error brought the case up to this court.

It was argued by *Mr. Lawrence* and *Mr. Badger*, for the plaintiffs in error, and *Mr. Sebastian*, for the defendants in error.

Mr. Justice McLEAN delivered the opinion of the Court.

This writ of error brings before us a decree of the Supreme Court of the State of Arkansas.

The complainants filed their bill in the Pulaski Circuit Court, of that State, charging that Nathan Cloyes, their ancestor, during his life, claimed a right of pre-emption under the act of Congress of the 29th of May, 1830, to the north-west fractional quarter of section numbered two, in township one, north of range twelve west. That he was in possession of the land claimed when the above act was passed and had occupied it in 1829. That he was entitled to enter, by legal subdivisions, any number of acres, not more than one hundred and sixty, or a quarter section, to include his improvement, upon paying the minimum price for said land. That Cloyes, in his life-time, by his own affidavit, and the affidavits of others, made proof of his settlement on, and improvement of, the above fractional quarter, according to the provisions of the above act, to the satisfaction of the Register and Receiver of said land district, agreeably to the rules prescribed by the Commissioner of the General Land Office; and on the 20th of May, 1831, Hartwell Boswell, the Register, and John Redman, the Receiver, decided that the said Cloyes was entitled to the pre-emption right claimed.

That on the same day he applied to the Register to enter the north-west fractional quarter of section two, containing thirty acres and eighty-eight hundredths of an acre; also the north-east fractional quarter of the same section, containing forty-two acres and thirty-two hundredths of an acre; and also the north-west and north-east fractional quarters of section numbered one in the same township and range, containing thirty-five acres and forty one-hundredths of an acre, the said fractional quarter sections containing one hundred and eight acres and sixty one-hundreths of an acre: and offered to pay the United States, and tendered to the Receiver, the sum of one hundred and thirty-five dollars, seventy-six and a fourth cents, the government price for the land. But the Register refused to permit the said Cloyes to enter the land, and the Receiver refused to receive payment for the same, on the ground that he could only enter the quarter section on which his improvement was made. That the other quarter sections were contiguous to the one he occupied.

That, under the act of the 29th of June, 1832, entitled, "an act establishing land districts in the Territory of Arkansas," the above fractional sections of land were transfered to the Arkansas land district, and the land office was located at Little Rock, to which the papers in relation to this claim of pre-emption were transmitted.

The bill further states, that, under an act of Congress of the 15th of June, 1832, granting to the Territory of Arkansas one thousand acres of land for the erection of a Court-House and Jail at Little Rock, and under "an act to authorize the Governor of the Territory to sell the land granted for a Court-House and Jail and for other purposes," dated 2d March, 1833, John Pope, then Governor of said Territory, among other lands, selected illegally and by mistake, for the benefit of the Territory, the said north-west fractional quarter of section numbered two, for which a patent was issed to the Governor of the Territory and his successors in office, for the purposes stated.

That the said John Pope, as Governor, under an act granting a quantity of land to the Territory of Arkansas, for the erection

of a public building at the seat of Government of said Territory dated 2d March, 1831, an act to authorize the Governor of the Territory to select ten sections to build a Legislative House for the Territory, approved 4th July, 1832, selected the north-east fractional quarter of section two, and the north-west fractional quarter, and the north-east fractional quarter of section one, as unappropriated lands, and having assigned the same to William Russell, a patent to him was issued, therefor, on or about the 21st of May, 1834, both of which, the complainants allege, were issued in mistake and in violation of law, and in fraud of the legal and vested right of their ancestor, Cloyes.

That after the refusal of the Receiver to receive payment for the land claimed, an act was approved 14th July, 1832, continuing in force the act of the 29th of May, 1830, and which specially provided, that those who had not been enabled to enter the land, the pre-emption right of which they claimed, within the time limited, in consequence of the public surveys not having been made and returned, should have the right to enter said lands on the same conditions, in every respect, as prescribed in said act, within one year after the surveys should be made and returned, and the occupants upon fractions in like manner to enter the same, so as not to exceed in quantity one quarter section. And that this act was in full force before Governor Pope selected said lands as aforesaid. That the public surveys of the above fractional quarter sections were made and perfected on or about the 1st of December, 1833, and returned to the land office the beginning of the year 1834. On the 5th of March, 1834, the complainants paid into the land office the sum of one hundred and thirty-five dollars and seventy-six and one-fourth cents, in full for the above named fractional quarter sections. That a certificate was granted for the same, on which the Receiver endorsed, that the north-west fractional quarter of section two was a part of the location made by Governor Pope in selecting one thousand acres adjoining the town of Little Rock, granted by Congress to raise a fund for building a Court-House and Jail for the Territory, and that that endorsement was made by direction of the Commissioner of the General Land Office.

That the Register of the Land Office would not permit the said fractional quarter sections to be entered.

That the patentees in both of said patents, at the time of their application to enter the lands, had both constructive and actual notice of the right of Cloyes. And that the present owners of any part of these lands had also notice of the rights of the complainants.

The answer of the Real Estate Bank and Trustees admits the proof of the pre-emption claim of Cloyes, but they say, "from beginning to end it is a tissue of fraud, falsehood and perjury, not only on the part of Cloyes, but also on the part of those persons by whose oaths the alleged pre-emption was established. And they allege, that the lots four, five and six, in block eight, in fractional quarter section two, claimed by the bank, were purchased of Ambrose H. Sevier, in the most perfect good faith, and without any notice or knowledge whatever, either constructive or otherwise, of any adverse claim thereto." That they have made improvements on the same, which have cost twenty-five thousand dollars, without ever having it intimated to them that there was any adverse claim until all of said improvements had been completed.

James S. Conway, in his answer, denies the validity of the pre-emption right set up in the bill, and alleges that it was falsely and fraudulently proved. And he says that when he purchased, "he did not know that there was any *bona fide* adverse claim or right to said lots, or any of them; and he avers, that he is an innocent purchaser for a valuable consideration, and without actual or implied notice, except as hereinafter stated." And he admits that he occasionally heard the claim of Cloyes spoken of, but always with the qualification that it was fraudulent and void, and had been rejected by the government.

Samuel A. [H.] Hempstead, in his answer, denies that, at the time of the purchase of said lots, or the recording of said deed, he had notice, either in fact or law, of the complainants' claim.

The other defendants filed special demurrers to the bill. The Circuit Court, as it appears, sustained the demurrer, and in effect

dismissed the bill. The cause was taken to the Supreme Court of Arkansas by a writ of error, [by appeal,] which affirmed the decree of the Circuit Court.

The demurrers admit the truth of the allegations of the bill, and, consequently, rest on the invalidity of the right asserted by the complainants. The answers also deny that Cloyes was entitled to a pre-emption right, and a part, if not all of them, allege that they were innocent purchasers, for a valuable consideration, without notice of the complainants' claim.

The first section of the act of 29th May, 1830, gave to every occupant of the public lands prior to the date of the act, and who had cultivated any part thereof in the year 1829, a right to enter at the minimum price, by legal subdivisions, any number of acres not exceeding one hundred and sixty or a quarter section, to include his improvement; provided, the land shall not have been reserved for the use of the United States, or either of the several States.

In the third section of the act it is provided, that, before any entries being made under the act, proof of settlement or improvement shall be made to the satisfaction of the Register and Receiver of the land district in which the lands may lie, agreeably to the rules prescribed by the Commissioner of the General Land Office for that purpose.

On the 10th of June, 1830, the Commissioner issued his instructions to the Receivers and Registers under the above act, in which he said, that the fact of cultivation and possession required "must be established by the affidavit of the occupant, supported by such corroborative testimony as may be entirely satisfactory to both; the testimony must be taken by a Justice of the Peace in the presence of the Register and Receiver." And the Commissioner directed, that, where the improvement was wholly on a quarter section, the occupant was limited to such quarter; but where the improvement is situated in different quarter sections adjacent, he may enter a half-quarter in each to embrace his entire improvement.

Another circular, dated 7th February, 1831, was issued, in-

structing the land offices, where persons claiming pre-emption rights had been presented under the above circular from making an entry, "by reason of the township plats not having been furnished by the Surveyor General to the Register of the Land Office, the parties entitled to the benefit of said act may be permitted to file the proof thereof, under the instructions heretofore given, identifying the tract of land as well as circumstances will admit, any time prior to the 30th of May next." And they were requested to "keep a proper abstract or list of such cases wherein the proof shall be of a character sufficient to establish to their entire satisfaction the right of the parties, respectively, to a pre-emption," &c. "No payments, however, were to be received on account of pre-emption rights duly established, in cases where the townships were known to be surveyed, but the plats whereof were not in their office, until they shall receive further instructions."

Under this instruction, on the 28th of May, 1831, the Register and Receiver held that Nathan Cloyes was entitled to the north-west fractional quarter, as stated in the bill, but rejected the privilege of entering the adjoining fractions.

Several objections are made to this procedure. It is contended that the land officers had no authority to act on the subject, until the surveys of the township were returned by the Surveyor General to the Register's office; and also, that in receiving the proof of the pre-emption right of Cloyes, the land officers did not follow the instructions of the Commissioner.

The first instruction of the Commissioner, dated 10th June, 1830, required the proof to be taken in presence of the Register and Receiver, and it appears that the proof was taken in the presence of the Register only.

The law did not require the presence of the land officers when the proof was taken, but in the exercise of his discretion the Commissioner required the proof to be so taken. Having the power to impose this regulation, the Commissioner had the power to dispense with it, for reasons which might be satisfactory to him. And it does appear that the presence of the Register only,

in Cloyes' case, was held sufficient. The right was sanctioned by both the land officers, and by the Commissioner also, so far as to receive the money on the land claimed, without objection as to the mode of taking the proof. And, as regards the authority for this procedure by the land officers, it appears to be covered by the above circular of the Commissioner, dated 7th February, 1831. In the absence of the surveys, the parties entitled to the benefits of the act of 1830, were "permitted to file the proof thereof," &c., identifying the tract of land, as well as circumstances will admit, any time prior to the 30th of May, 1831.

The Register and Receiver were constituted, by the act, a tribunal to determine the rights of those who claimed pre-emptions under it. From their decision no appeal was given. If therefore they acted within their powers, as sanctioned by the Commissioner, and within the law, and the decision cannot be impeached on the ground of fraud and unfairness, it must be considered final. The proof of the pre-emption right of Cloyes being "entirely satisfactory" to the land officers under the act of 1830, there was no necessity of opening the case, and receiving additional proof, under any of the subsequent laws. The act of 1830, having expired, all rights under it were saved by the subsequent acts. Under those acts, Cloyes was only required to do what was necessary to perfect his right. But those steps within the law, which had been taken, were not required to be taken again.

It is a well established principle, that where an individual, in the prosecution of a right does every thing which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him. In this case, the pre-emptive right of Cloyes having been proved, and an offer to pay the money for the land claimed by him, under the act of 1830, nothing more could be done by him, and nothing more could be required of him under that act. And, subsequently, when he paid the money to the Receiver under subsequent acts, the surveys being returned, he could do nothing more than offer to enter the fractions, which the Register would not permit him to do.

This claim of pre-emption stands before us in a light not less favorable than it would have stood if Cloyes or his representatives had been permitted by the land officers to do what, in this respect, was offered to be done.

The claim of a pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law, it has no existence as a sub-stantive right. But when covered by the law, it becomes a legal right, subject to be defeated, only by a failure to perform the conditions annexed to it. It is founded in an enlightened public policy, rendered necessary by the enterprize of our citizens. The adventurous pioneer, who is found in advance of our settlements, encounters many hardships, and not unfrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise shall be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed one hundred and sixty acres. That this is the national feeling is shown by the course of legislation for many years.

It is insisted that the pre-emption right of Cloyes extended to the fractional quarter sections named in the bill, the whole of them being less than one hundred and sixty acres. We think it is limited to the fractional quarter on which his improvement was made. This construction was given to the act by the Commissioner in his circular of the 10th of June, 1830. He says "The occupant must be confined to the entry of that particular quarter section which embraces his improvement." The act gives to the occupant whose claim to a pre-emption is established, the right to enter, at the minimum price, by legal subdivisions, any number of acres not exceeding one hundred and sixty. But less than a legal subdivision of a section or fraction cannot be taken by the occupant. It is contended, however, that several fractional quarter sections adjacent to the one on which the improvement was made, may be taken under the pre-emptive right, which shall not exceed in the whole one hundred and sixty acres. And the second section of the act of 14th July, 1832, which provides "that the occupants upon fractions shall be permitted, in like manner, to enter the same so as not to exceed in quantity one-

quarter section," it is urged, authorizes this view. But in the case of *Brown's lessee, v. Clements et. al.* 3 *How.* 666, this court say, the act of 29th May, 1830, "gave to every settler on the public lands the right of pre-emption of one hundred and sixty acres, yet, if a settler happened to be seated on a fractional section containing less than that quantity, there is no provision in the act by which he could make up the deficiency out of the adjacent lands, or any other lands."

Did the location of Governor Pope, under the act of Congress, affect the claim of Cloyes? On the 15th of June, 1832, one thousand acres of land were granted, adjoining the town of Little Rock, to the Territory of Arkansas, to be located by the Governor. This selection was not made until the 30th of January, 1833. Before the grant was made by Congress of this tract, the right of Cloyes to a pre-emption had not only accrued, under the provisions of the act of 1830, but he had proved his right to the satisfaction of the Register and Receiver of the land office. He had, in fact, done every thing that he could do to perfect his right. No fault or negligence can be charged to him. In the case above cited from 3 *Howard*, the court say—"The act of the 29th of May, 1830, appropriated the quarter section of land in controversy, on which Etheridge was then settled, to his claim, under the act, for one year, subject, however, to be defeated by his failure to comply with its provisions. During that time, this quarter section was not liable to any other claim," &c. And the supplement to this act, approved 14th July, 1832, extended its benefits. The instruction of the Commissioner, dated September 14th, 1830, was in accordance with this view. He says, "It is therefore to be expressly understood, that every purchaser of a tract of land at ordinary private sale, to which a pre-emption claim shall be proved and filed according to law, at any time prior to the 30th of May, 1831, is to be either null and void (the purchase money thereof being refundable under instructions hereafter to be given) or subject to any legislative proceedings.

By the grant to Arkansas, Congress could not have intended to impair vested rights. The grants of the thousand acres and

of the other tracts, must be so construed as not to interfere with the pre-emption of Cloyes.

The Supreme Court of the State, in sustaining the demurrers and dismissing the bill, decided against the pre-emption claimed by the representatives of Cloyes, and as we consider that a valid right, as to the fractional quarter on which his improvement was made, the judgment of the State court is reversed; and the cause is transmitted to that court for further proceedings before it, or as it shall direct, on the defence set up in the answers of the defendants, that they are *bona fide* purchasers of the whole or parts of the fractional section in controversy, without notice, and that that court give leave to amend the pleadings on both sides, if requested, that the merits of the case may be fully presented and proved as equity shall require.

Mr. Justice CATRON, Mr. Justice NELSON and Mr. Justice GRIER, dissented.

Mr. Justice CATRON:

The Complainants allege that they have the superior equity to the fractional quarter section number two, and to the other lands claimed by the bill, by virtue of an entry under a preference right; and that the respondents purchased and took their legal title with full knowledge of such existing equity in the complainants.

1. The defendants claiming section number two (or part of it,) deny that any such equity exists under the legislation of Congress. 2. That they purchased and took title without any knowledge of the claim set up; and being innocent purchasers, no equity exists as to them for this reason also, regardless of any thing alleged against them. 3. That they expended large sums on the lands purchased, and made highly valuable improvements thereon, without any objection being made by complainants, or notice of their claim being given to respondents, and therefore a court of equity cannot interfere with their existing rights.

The bill was dismissed without any particular ground having been stated in the decree why it was made for respondents; and in this condition of the record, the cause is brought here by writ

of error, under the twenty-fifth section of the judiciary act.

The case made on the face of the bill was rejected, and the inquiry on such general decree must be, whether the claim set up sought protection under an act of Congress, or an authority exercised under one, so as to draw either in question, no matter whether the claim was well founded or not; and the fact being proved that such case was made, their jurisdiction must be assumed to examine the decree, and, this being clearly true in the present instance, jurisdiction must be taken, and the equity claimed on part of complainants re-examined.

If, however, the decree had proceeded on the second or third grounds of defence, regardless of the first, and had so declared, then this court would not have jurisdiction to interfere, as no act of Congress, or authority exercised under it, would have been drawn in question.

In regard to the lands claimed, except the fractional quarter section number two, we are agreed that the bill should be dismissed. So far the controversy is ended; and as to section number two, I think the bill should be dismissed also.

The proof of occupation and cultivation was made in April, 1831, under the act of 1830, pursuant to an instruction from the Commissioner of the General Land Office having reference to that act. The act itself, the instruction given under its authority, and the proofs taken according to the instruction, expired and came to an end on the 29th of May, 1831. After that time the matter stood as if neither had ever existed; nor had Cloyes more claim to enter from May 29th, 1831, to July 14th, 1832, than any other villager in Little Rock.

July 14th, 1832, another pre-emption law was passed, providing, among other things, that when an entry could not be made under the act of 1830, because the public surveys were not returned to the office of the Register and Receiver before the expiration of that act, (29th May, 1831,) then an occupant who cultivated the land in 1829, and was in actual possession when the act of 1830 was passed, should be allowed to enter under the act of 1832, the quarter section he occupied; and also adjoining lands to which

the improvement extended in legal subdivisions, so as to increase his entry to a quantity not exceeding one hundred and sixty acres. Under the act of 1832, the entry in controversy was offered and afterwards allowed for the purpose of letting in complainants, so that a court of justice might investigate their claim, although it had been pronounced illegal at the department of public lands, the officers then acting under the advice of the Secretary of the Treasury.

The act of 1830, and the circular under it having expired, the Commissioner issued a new circular, (28th July, 1832, 2 *Land Laws and Opinions* 509,) prescribing to Registers and Receivers the terms on which entries should be allowed under the act of 1832, by which circular proof was required of cultivation in 1829, and residence on the 29th of May, 1830; and that this proof should be made after the legal surveys were returned to the office of the Register and Receiver; and the right to make the proof and to enter should continue for one year after the surveys were returned, unless the lands were sooner offered at public sale; and that then the entry should be made before the public sale took place.

The necessity of this new proceeding is manifest. By the act of April 5th, 1832, all actual settlers at this date, (5th April, 1832,) were authorized to enter, within six months thereafter, one half quarter section, including their respective improvements. Such rights stood in advance of claimants under the act of July 14th 1832. In the mutations of a new country, the fact was well known that improvements passed from hand to hand with great frequency by sale of the possessions; and one in possession (April 5th, 1832) could well enter an improvement cultivated in 1829, and held on the 29th of May, 1830, he having purchased such possession. If Cloyes, therefore, had sold out to another before the act of April 5th, was passed, then that other occupant, and not Cloyes, would have had the right to enter section number two; and therefore it was highly necessary to know who had the best right to a pre-emption at the time each entry was offered. A still greater necessity existed for new proof. Until the sur-

veys were returned, it was usually improbable for the Register and Receiver to know what subdivision had been occupied, or to what land or how much, the pre-emption right extended: and as all those who had a right of entry on lands not surveyed and legally recognized as surveyed, were provided for by the act of 14th July, 1832, and the act required them to make proof and to enter within one year after the surveys were returned, by legal subdivisions according to the surveys, it is hardly possible to conceive what other course could have been adopted at the land office than that which was pursued, as the surveys were the sole guide at the local offices where the entries were made. But it is useless to speculate why the new circular was issued; the Commissioner had positive power to do so, and the act, when done, bound every enterer. Nor could a legal entry be made under the act of 14th July, 1832, without the new proof and an adjudication by the Register and Receiver, founded on such proof, that the right of entry existed; and as no such proof was offered by the complainants, they had no right to enter even the 30 88-100 acres, and certainly not the 108 61-100 acres. That an entry could not be lawfully made, without new proof to warrant it, for the lesser quantity, is our unanimous opinion; and in this we concur with those conducting the General Land Office.

For another reason, I think their claim should be rejected. Little Rock was the seat of the Territorial Government, at which certain public buildings were necessary; and on the 15th of June, 1832, an act was passed that there be then granted to the Territory of Arkansas a quantity of land not exceeding one thousand acres "contiguous to and adjoining" the town of Little Rock, for the erection of a Court-House and Jail in said town, which lands shall be selected by the Governor of the Territory, and be disposed of as the Legislature shall direct, and the proceeds be applied towards building said Court-House and Jail.

On the 30th of January, 1833, the Governor selected the land, and filed his entry in the land office at Little Rock, which entry was received and forwarded to the General Land Office at Washington, and there ratified. The entry included the fractional

quarter section number two, now claimed by the heirs of Nathan Cloyes.

By the act of March 2d, 1833, the Governor of the Territory was required to furnish to the Secretary of the Treasury a description of the boundaries of the thousand acres, and the Secretary was required to cause to be issued a patent therefor to the Governor, in trust, &c. And the Governor was directed to lay off in town lots, as part of the town of Little Rock, so much of the grant as he might deem advisable; and said Governor was authorized to sell said lots, and to dispose of the residue of said thousand acre grant, and which sale was to be at auction, as regarded the town lots and the residue of the land. And he was also authorized to select and lay off three suitable squares, within this addition to the town, in which might be erected a state-house, a court-house and a jail—one square for each building—for the use therof forever and for no other use.

The sales were to be for cash, and the Governor was directed to make deeds to purchasers when the purchase money was paid. A patent issued to Governor John Pope for the land. In October, 1833, he proceeded to sell at auction, in lots and blocks, the fraction number two, in part, to Ambrose H. Sevier, under whom most of the defendants on number two claim. Those who have answered, deny that they had any knowledge of the claim of Cloyes when they purchased and took title, and that complainants stood by, permitted the purchase, and saw great city improvements made and large sums of money expended, without objection, or any intimation being given that they intended to bring forward any such claim as the one now set up. But, as remarked in the outset, this court has no jurisdiction of these matters, and must therefore leave them to the State courts for adjudication and final settlement.

How then did the claim of the complainants stand when the city lots were sold in 1833? Cloyes never offered to enter fraction number two alone: he offered to enter, says the bill, (28th May, 1831,) with the Register at Batesville, fractional quarter number two, for 30 88-100 acres, north-east fractional quarter

for 42 32-100 acres, and north-west and north-east fractional quarters of number one, containing 35 41-100 acres; making in all 108 61-100 acres. The proof was made that he resided on number two, for 30 88-100 acres. This entry was refused on a ground not open to controversy. By the act of 1830, only that quarter section on which the improvement was could be entered no matter what quantity it contained. In this we are unanimous now; and also that the entry allowed is void for all but the fraction number two. Here was an offer to enter in 1831, that could not be lawfully done at that time; then a refusal to receive the entry was proper. The claim to enter 108 61-100 acres was adhered to throughout by Cloyes and his heirs. The offer to enter the whole quantity of 108 61-100 acres was again made in 1834; and we agree in opinion that the entry could not be lawfully received at the latter period for this larger quantity; less than the whole was never claimed.

As already stated, the entry that was admitted in 1834, was made to enable the party to litigate his rights if any existed, as against the city title; not because the claim to enter was lawful in the estimation of the Secretary of the Treasury and the Commissioner of the General Land Office, for they had decided against its validity. The offer to enter being illegal, it is not perceived on what ground a court of equity can uphold the claim even in part, and thereby overthrow a patent of the United States, and oust purchasers who relied on such patent.

In the next place, when the act of June 15th, 1832, was passed, authorizing the Governor of Arkansas Territory to locate the thousand acres, the act of 1830 had expired, no right of entry existed in Cloyes. The land appropriated to public use was to be taken "contiguous to and adjoining the town of Little Rock;" all the land adjoining was reserved by the act, subject to a selection by the Governor as a public agent; the grant was a present grant of the thousand acres, without limitation. Cloyes had no claim to interpose at that time; and on the selection being made, it gave precision to the land granted, and the title attached from the date of the act. In the language of this court, in the case of

Rutherford v. Green's heirs, (2 *Wheat.* 206,) the grant which issued to Governor Pope in pursuance of the act of June 15th, 1832, "relates to the inception of his title." That also was a present grant of 5,000 acres to General Greene, mady by an act of the legislature of North Carolina, but unlocated by the General Assembly. It was granted in the military district generally, and ordered to be surveyed by certain commissioners. Soon afterwards, it was located by survery, and the question presented to this court was, as to what time the title had relation for the land selected; when it was held that the grant was made by the act generally, and gave date to the title, and of necessity overreached all intervening claims for the land selected.

This case is far stronger than that. Here, the act of 1830 was made part of the act of July 14th, 1832: they stood as one act and took date on the 14th of July. The act provides, "That no entry or sale should be made under the provisions of this act, of lands *which shall have been reserved* for the use of the United States, or either of the States. The land, to the quantity of one thousand acres, adjoining the then town of Little Rock, had been expressly reserved by the act of the 15th of June, and stood so reserved when the act of July 14th was passed, subject to selection in legal subdivisions. The act of June 15th, had no exception; the object was of too much importance to allow of any. If this villager could claim a pre-emption, so might any other; and the act of June would have been without value, as the whole grant might have been defeated by occupant claims, and the seat of Government transferred to private owners. This is manifest. Cloyes was a tinner, carrying on his trade in the edge of the town and next his dwelling; adjoining to his house and shop he cultivated a garden, and on this occupancy and cultivation his claim was founded. Others, no doubt, were similarly situated. The seat of government was located on the public lands, then unsurveyed; and if the act of July 14th, 1832, conferred an equity on Cloyes to take 160 acres, so did it on others in his situation all around the then town and adjoining thereto. If the occupant could take the land adjoining, how was it possible for

the governor to add lots and squares to the seat of government? The intention of Congress manifestly contemplated that the right of selection should extend to all lands adjoining the then town; and that these were reserved for public use, is, in my judgment, hardly open to controversy, in the face of the act of July 14th. But when we take into consideration the fact that General Greene's titles had been upheld on the principle that it took date with the act making the grant, and that the grant made in trust to Governor Pope depended on the same principle, and equally overreached all intervening claims, no doubt, it would seem, could well be entertained, either at the General Land office or by purchasers, that this occupant had no just claim, and could not interfere and overthrow titles derived under the act of June 15th, 1832.

And this is deemed equally true for another and similar reason. If this preference of entry for public use could be overthrown by a subsequent pre-emption law, so may every other made to secure locations for county seats and public works. The reservation was quite as definite as where salt springs and lead mines were reserved, or lands on which ship-timber existed. In such cases, the President determins that the lands shall be reserved from sale, and this is always done after the surveys are executed and returned, and certainly had such power been vested in him to reserve lands *adjoining* the set of government of Arkansas, for the use thereof, he could have lawfully made the selection; and authority to do so having been conferred by Congress on the Governor, his power was equal to that of the President in similar cases, where lands are reserved for public use by general laws.

For these reasons, I think the decree ought to be affirmed; and I have the more confidence in these views, because they correspond with accumulated intelligence and experience of those engaged in administering the Department of Public Lands, and with the practice pursued in the General Land Office, from the date of the act of July 14th, 1832, to this time.

FLOYD V. THE STATE.

On an indictment for false imprisonment, the State is only required to prove the imprisonment, and then it devolves upon the defendant to prove that he was justified in what he did, and that the imprisonment was lawful.

Every confinement of the person is an imprisonment, whether it be in a common prison, in a private house, in the stocks, or even by forcibly detaining one in the public streets.

The defendant must either prove that he did not imprison the party, or he must justify the imprisonment.

Defendant may justify, by showing that he procured the arrest to be made under and by virtue of a regular and valid warrant.

Under our statute (*Digest, chap.* 52, *sec.* 21,) the offence charged against the party arrested, should be set out in the warrant, though this was not required by the common law. Where the defendant relies upon proof of its contents, instead of producing the warrant, the State not objecting to secondary evidence, he should show that it was a legal and valid warrant—at least that it ran in the name of the State.

Though defendant may not be present when the arrest is made, yet if it be done upon his procurement, he is answerable therefor.

Where there is a conflict of evidence as to whether the party was imprisoned against his will, it is the province of the jury to determine the weight of evidence, and their verdict is conclusive.

APPEAL FROM OUACHITA CIRCUIT COURT.

The appellant, Andrew J. Floyd, was indicted, with others, in the Ouachita Circuit Court, for false imprisonment, and tried before Hon. JOSIAH GOULD, then one of the Circuit Judges, in October, 1849.

The indictment charged that Isaac Franklin, Nelson Mitchell, Henry Nelson, William H. Moffitt, *Andrew J. Floyd*, and James M. Floyd, on the 20th day of October, A. D. 1848, with force and arms, at, &c., in and upon one Charles Cook, in the peace, &c., did make an assault, and him, the said Charles Cook, did then and

there, beat, wound and ill-treat, &c., and him, the said Charles Cook, then and there unlawfully and injuriously, against the will, and without the consent of him, the said Charles Cook, and also against the laws of the State, without any legal warrant, authority or justifiable cause whatsoever, did imprison, confine and detain, for a long time, *to-wit:* for the space of three days, then next following, and other wrongs, &c., to the damage, &c., against peace," &c.

A motion to quash the indictment was made, and overruled. Defendants offered to file special pleas in justification, which the court rejected, on motion of the attorney for the State, and the defendants excepted. Defendants then standing mute, the plea of not guilty was entered for them by order of the court; Andrew J. Floyd severed, was tried by a jury, found guilty, and fined one hundred dollars. He moved for a new trial, on the grounds that the verdict of the jury was contrary to the evidence, the law, and the instructions of the court. The motion was overruled, and he took a bill of exceptions setting out the evidence, &c.,

The bill of exceptions states that, on the trial, it was proven that, on the 20th day of Oct., 1848, Charles Cook was arrested by Isaac Franklin, aided by some other persons, in Franklin township, Ouachita county, and taken before John Hanna, a justice of the peace of said township. That the arrest was made under a process of some kind from said justice, ordering Cook's body to be taken. This was stated by a witness for the State, but the original process was not produced on the trial by eiher party. One of the witnesses for the State testified, that defendant was some two or three hundred yards from the place where Cook was arrested, at the time of the arrest; and that when Cook was brought by Franklin and others to where defendant was, he said nothing to Cook, but got on his horse and rode on behind Cook, and those who had him in custody, until they all arrived at the house of the justice. A trial was there had before the justice, and Cook was committed. The process of commitment was read to the jury, and is copied in the bill of exceptions. It directs Cook to be confined in jail until he gave bond for his appearance

at the next Circut Court of the county, on a charge of removing corn from the premises of James M. and A. J. Floyd, after being forbidden to do so; and recites that he was committed on the affidavits of James M. and A. J. Floyd, and the testimony of other persons. There being no constable in the township, Isaac Franklin was specially authorized, by endorsement of the justice upon the mittimus, to execute it.

Another witness testified, that defendant had a gun, and that he said he was having Cook arrested to get his (defendant's) corn, and that his object was to get his rights. Same witness testified Cook was arrested at the instance of defendant.

One of the witnesses for defendant testified that he was summoned by Isaac Franklin to aid in the arrest of Cook, and that Cook said, at the time he was arrested, it was just what he wanted, and was willing to go, and went on. The defendant was some distance behind, and witness saw him do nothing. Franklin and witness took Cook to the house of the justice, and defendant neither did or said anything during the trial.

The witnesses both for the State and defendant, testified that defendant did not assist in the arrest or detention of Cook, neither before nor after the trial before the justice.

Another witness testified, that Cook was stacking fodder at the time of his arrest, and said he wanted them to wait until he was done, but Franklin said he could not wait; Cook said he would not resist the process, and immediately came out of the field, and went with them.

Defendant asked the court to instruct the jury, "that if Cook went willingly, it is no false imprisonment," but the court refused so to give such instruction, and defendant excepted.

But the court instructed the jury as follows: "If the jury believe Cook went willingly, and would not have been compelled to go, if he had gone willingly, it is no false imprisonment: but the manner of arrest, be what it may, if the jury believe that Cook had laid a plan to get himself arrested, in order to render the persons arresting him liable, it is no false imprisonment."

PIKE & CUMMINS, for the appellant, submitted, 1st. That, if this indictment can be sustained at all, where a party proceeded by procuring a legal warrant, yet, in this case, the facts did not warrant a conviction: and 2d. That, even if there were both malice and want of probable cause, the indictment cannot be sustained.

The law always insures to a public prosecutor all due protection, and he cannot be sued, much less indicted, unless his proceedings were actuated by malice and destitute of any probable foundation. *Pencel v. McNamara*, 1 *Camp.* 199. *S. C.*, 9 *East* 361. *Salk.* 13. *Ld. Raym.* 374. 5 *Taunt.* 187.

That the process procured by Floyd, not being *void*, but only irregular and erroneous, there was and could be no trespass, and being no trespass, there was no assault and battery or false imprisonment; that if the process was without probable cause and from malice, he may be sued in case or indicted for conspiracy, but not indicted for false imprisonment: so where the arrest was under a warrant. 1 *Ch. Cr. Law* 19. 3 *T. R.* 185. 3 *Ersp.* 166. *Boote v. Cooper*, 1 *T. R.* 535. *Arbuckle v. Taylor*, 3 *Dew.* 160. *Morris v. Cerson*, 7 *Cowen* 234. *Ulmer v. Leland*, 1 *Greenl.* 135. *Cameron v. Lightfoot*, 2 *W. Bla.* 1192. *Wood v. Kinsman*, 5 *Vern.* 588. *More v. Chapman*, 3 *Hen. & Munf.* 264. 9 *Conn.* 140. 2 *Dev.* 370. 4 *Day* 257. *Taylor v. Alexander*, 6 *Hamm.* 144. *Beaty v. Perkins*, 6 *Wend.* 382.

It devolved on the State to show malice, and the want of probable cause. She failed to prove either. It appeared that the arrest was made on a warrant from the justice, of which there was secondary evidence, without objection on the part of the State, that proof was made to the saitisfaction of the justice. And it would be doing great injury to the cause of law to punish a man under such a state of case. The appellant only did what every good citizen was bound to do.

CLENDENIN, *Att'y Genl.*, *contra.* All that the prosecution has to prove is the imprisonment. It is for the defendant to show that he was justified, and that the imprisonment was lawful.

Arch. Crim. Plead. 364. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public street. *Com. Dig., Imprisonment G.*

False imprisonment is the unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority. *Dig. Ark., Ch.* 51, *Art.* 7, *Sec.* 1.

Mr. Chief Justice JOHNSON delivered the opinion of the Court:

This is a prosecution for false imprisonment. In order to establish this offence on the part of the State, she is only required to show the imprisonment, and when that is done, it devolves upon the defendant to prove that he was justified in what he did, and that the imprisonment was lawful. Every confinement of the person is an imprisonment, whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. *Arch. Cr. L.* 471. 2 *Inst.* 589. *Cro. Car.* 210. *Com. Dig., Imprisonment.* The defendant must either prove that he did not imprison the party, or ~~we~~ the must justify the imprisonment. *Arch. Cr. L.* 471. The argument of the defendant's counsel is, that, inasmuch as trespass will not lie against a party who sues out a regular and valid process, and that as false imprisonment includes a trespass, that therefore false imprisonment cannot be maintained under like circumstances. That the doctrine contended for is correct as a general and abstract proposition, we will not at this time controvert; but the question here to be determined is, whether such a state of fact is shown to exist as to make a parallel case, and consequently to warrant the conclusion attempted to be drawn. The charge is that the defendant did the act complained of without any legal warrant, authority or justifiable cause. If he has shown, upon the trial in the court below, that he procured the arrest to be made under and by virtue of a regular and valid warrant, we think he has fully answered the charge preferred against him, and that consequently he stands justified in the eye of the law; but if, on the contrary, he has failed to show any legal warrant, authority or reasonable

or justifiable cause whatsoever for the act, it is clear that the defence of justification is not made out, and that as a matter of course the conviction is right.

It is contended that the law does not absolutely require that the charge should be set out in the warrant of arrest. This was true at the common law, but is not so since the passage of our statute. The 21st *Sec.* of *Chap.* 52 of the *Digest* enacts that, "If it shall appear, on such examination, that any criminal offence has been committed, such officer shall forthwith issue a proper warrant, reciting the acquisition and commanding the officer to whom it shall be directed to take the accused without delay and bring him before such officer to be dealt with according to law."

The principle that secondary evidence, if not objected to at the time, is competent to go to the jury and that it is too late to object for the first time in the appellate court, is a familiar one and will not be disputed. But the question here recurs whether, admitting the whole testimony to be technically competent and legal, it discloses a regular and valid warrant. The substance of the testimony bearing upon this part of the case is, that the special constable arrested Cook under a "process of some kind" which had been issued by a justice of the peace, that the process commanded the officer to take the body, that the arrest was made in ths same township in which it was issued, and that the defendant said he was having him arrested to get his rights. Do these facts show that Cook was arrested under a legal warrant? We think not. It is clear that as the defendant did not offer the warrant itself, but relied alone upon a showing of its contents, he should at least have made it appear that it ran in the name of the State. It may have been "some kind of process," and yet utterly deficient in some of the essential requisites of a valid writ. If he had attempted to justify under the warrant itself, and had offered the warrant in evidence, he most assuredly would have been held to the production of one legal and valid upon its face; and if so, it is manifest that he could not be excused from a similar showing when he rested and relied upon its contents, and that no presumption could obtain in favor of the

latter that would not equally hold in respect to the former. From this view of the testimony, we consider it clear that the arrest was made without any legal warrant, and this being the case, the conclusion drawn from a supposed different state of fact, cannot be upheld. The defendant did not attempt to justify under any other authority, nor did he pretend that such a state of case existed as would have authorized him to do the act of his own accord and without a warrant. It is true that from the testimony it appears the defendant was not actually present when the arrest was made, yet, as he first put the law in motion, and was mainly instrumental in causing the act to be done, we consider him legally liable for the consequences. We have thus disposed of all the questions made by the motion for a new trial, which relate to the law and the testimony.

The next and last relates to the finding as squaring with the instruction of the court. The instruction is, "If the jury believe Cook went willingly, and would not have been compelled to go if he had not went willingly, it is no false imprisonment; but the manner of the arrest be what it may, if the jury believe that Cook had laid a plan to get himself arrested in order to render the persons arresting him liable, it is no false imprisonment." The verdict is not believed to be at war with this instruction. It is true that there is some conflict in the evidence in respect to to the willingness of Cook to go with the officer, and that conflict the jury were perfectly competent to settle and adjust. This they have done and found, as they had the right to do, that he was carried against his will. We are, therefore, of opinion that, from the whole showing of record, the court below committed no error in refusing a new trial, and that consequently its judgment ought to be affirmed. It is, therefore, considered and adjudged that the judgment of the Circuit Court of Ouachita county, herein rendered, be, and the same is hereby, in all things, affirmed.

MITCHELL v. THE STATE.

On an indictment for false imprisonment, the person aiding an officer must show that the arrest was made under a legal and valid warrant; as to the proof of such warrant, see *Floyd v. The State, ante.*

A person acting as guard of one in custody on a criminal charge, or aiding an officer in the safe-keeping of a prisoner, is entitled to the same protection as the officer, and no more. When called upon by the officer, he aids him at his peril; he is bound to know whether the officer acts under a legal and valid warrant.

Appeal from the Ouachita Circuit Court.

Nelson Mitchell, with others, was indicted, in the Ouachita Circuit Court, for false imprisonment, and tried before Hon. JOSIAH GOULD, then one of the Circuit Judges, in October, 1849.

The indictment charged that Isaac Franklin, *Nelson Mitchell*, Henry Nelson, William H. Moffitt, Andrew J. Floyd and James, M. Floyd, on the 20th day of October, A. D. 1848, with force and arms, at, &c., in and upon one Charles Cook, in the peace, &c., did make an assault, and him, the said Charles Cook, did then and there, beat, wound and ill-treat, &c., and him, the said Charles Cook, then and there unlawfully and injuriously, against the will, and without the consent of him, the said Charles Cook, and also against the laws of the State, without any legal warrant, authority or justifiable cause whatsoever, did imprison, confine and detain, for a long time, *to-wit:* for the space of three days, then next following, and other wrongs, &c., to the damage, &c., against peace," &c.

Defendant (Nelson Mitchell) severed, was tried on the plea of not guilty, convicted, and fined one hundred dollars. He moved for a new trial, on the grounds that the verdict was contrary to the evidence, the law, and the instructions of the court. The court overruled the motion, and Mitchell excepted.

The bill of exceptions states, that, on the trial, it was proven that, on the 28th October, 1848, in the county of Ouachita, Chas. Cook was arrested by Isaac Franklin, aided by others, and taken before John Hanna, a justice of the peace for Franklin township. The arrest was made in said township, under a process of some kind from said Justice, ordering Cook's body to be taken. This was stated by one of the witnesses for the State, but the process itself was not produced on the trial by either party.

One of the witnesses stated that he thought defendant Mitchell was "knowing to the arrest," but did not state his reasons for thinking so. Mitchell was not present at the arrest, nor while Cook was being conveyed to the Justice. He was sent for by one of the parties on whose complaint the arrest was made, after Cook was taken before the Justice, and came there soon after Cook reached the Justice's house, riding very fast, and with his collar "flared open"; and soon after he reached there, and before any warrant of commitment was made out, took authority over Cook. Witnesses were examined, and considerable writing done by the Justice, occupying the time until late at night. During this investigation, Cook said he wanted the attendance of some particular witnesses in his favor, and the Justice was willing to wait for them; but other persons (and among them Mitchell) said he was not entitled to have them sent for, and it was not done. Mitchell talked a good deal while the investigation was going on. After the writing was over, the Justice (Hanna) made out a warrant of commitment, as follows:

"STATE OF AKKANSAS,
COUNTY OF OUACHITA.

The State of Arkansas to the Sheriff of Ouachita: GREETING:

WHEREAS, Charles Cook is committed to the jail of said county of Arkansas to remain in custody until he gives security for his appearance at the next term of the Circuit Court, held in and for the county of Ouachita. *Whereas*, I, John Hanna, an acting justice of the peace for the county of Ouachita, Franklin T., find, from the affidavit of James M. Floyd and A. J. Floyd, and the

testimony before me, Charles Cook guilty of removing the corn off the premises of A. J. Floyd and James M. Floyd, and after being forbid according to law. October the 20th day, A. D. 1848.

JOHN HANNA, *J. P.*"

There being no constable in the Township, Isaac Franklin was specially authorized to execute the above warrant.

The house of the justice was thirty-five or forty miles from Camden, the county seat of Ouachita county.

After the warrant was made out, Franklin summoned the defendant Mitchell to go with him to Camden as a guard, in place of one of the persons who aided in making the original arrest, and whose place Mitchell had taken after he arrived at the house of the Justice, and had acted as guard during the investigation in his place, previous to the making out of the warrant of commitment. Franklin, Mitchell, and two or three others set out that night for Camden, with Cook in their custody. One of the party had a gun and Mitchell had pistols. They went a short distance and stopped for the night, Cook requested to be allowed to go home and see his family, but Franklin refused to let him go, and Franklin and others of the guard stayed and guarded him with light burning until morning.

In the morning, Franklin went with him to his house and they proceeded to Camden. On the way, the defendant (Mitchell) in the words of Cook himself, in testimony, ordered and hectored him about fifty times a day as if he was a dog, and if he had been a dog, could not have treated him worse; but the witness, though urged to do so, specified but one instance, which was when he stopped at a house to get water, and was waiting for it to be brought from the spring, Mitchell called to him and said: "God damn it, Cook, come along," and told him the branch was not far off. Mitchell never touched him at all, nor touched his horse.

On reaching Camden, Cook was taken to a tavern, and there remained until the morning of Sunday, the third day after his arrest.

The sheriff refused to receive him, holding the warrant insufficient. Cook was allowed to go and consult counsel; and, on Sunday morning, demanded of Franklin and Mitchell to be released, and was told he was at liberty, and was discharged. He made no opposition to going to Camden, but went against his will and without his consent, as one in legal custody. Franklin never mistreated him at all, but treated him very kindly, but Mitchell took four times as much command as any body else.

The above, was all the evidence introduced, as set out in the bill of exceptions. The charge of the court to the jury does not appear of record.

PIKE & CUMMINS, for the appellant. After arguing that the warrant of commitment was legal, contended that a ministerial officer is protected in the execution of process, provided that on its face it appears that the court has jurisdiction of the subject matter, and nothing appears to apprise the officer that the court had not jurisdiction of the person of the party to be affected by the process. *Savacool* v *Boregnton*, 5 *Wend.* 170. *Sandford* v *Nicholas*, 13 *Mass.* 288. 1 *Ch. Cr. Law* 39. *McGuinty* v *Herrick*, 5 *Wend.* 240, 243. *Wilcox* v *Smith*, *id.* 231. *Reynolds* v *Moore*, 9 *id.* 35. 7 *id.* 89. 12 *id.* 496, 499. *Earl* v *Camp*, 16 *id.* 562. *Churchill* v *Churchill*, 12 *Verm.* 661. *Taylor* v *Alexander*, 6 *Hamm.* 144. *Beaty* v *Perkins*, 6 *Wend.* 382.

If the officer is justified by the process, so is every person who comes in aid of him. *Elder* v *Morrison*, 10 *Wend.* 158. *Oystead* v *Shed*, 12 *Mass.* 572. *Lunard* v *Stacy*, 6 *Mod.* 140.

If the process is regular on its face and apparently within the jurisdiction of the court or officer who issued it, it is a complete justification to the officer who executed it. *Fulton* v *Heaton*, 1 *Barb. Sup. C. C. R.* 555. *Abbott* v *Yost*, 2 *Denio* 86.

The officer, to whom process is delivered, is bound to examine it before he executes it: not so the person whom he calls to his aid in its execution; and the doctrine, as laid down in Elder v Morrison, that those persons are protected only when the officer is, and obey his call at their peril, offends against the loftiest rules

of public policy and natural justice. The highest duty devolving on a citizen, under the obligations which he owes to his country and the laws, is to aid in the enforcement of those laws, to risk his life, if need be, in aiding to bring offenders to justice and defending the officers and agents of the law when assailed and endangered in the discharge of their duty. * * *

And it should be settled and declared, as the law of Arkansas, that when a known public officer calls on the citizens for aid or protection, his official character shall be sufficient warrant to authorize and imperatively require that citizen to obey—and that if the officer has really no legal warrant or no warrant whatever, that shall not concern or affect the citizen, but the officer alone shall suffer the consequences of his abuse of power and want of authority.

CLENDENIN, *Att'y Gen'l.*, contra.

Mr. Ch. Justice JOHNSON delivered the opinion of the Court.

If any responsibility has attached to the appellant for his participation in the offence charged jointly against himself and others, it must have arisen from a defect of authority to authorize the original arrest. This being the case, it is, by no means, material whether the warrant of commitment was legal and valid or not. The appellant was not present when the arrest was made, but he was sent for and came in as one of the aids or guards after Cook was taken before the justice, and during the investigation, and consequently before Cook was committed.

This being the state of case, the enquiry necessarily results as to his authority to do the act complained of, anterior to the period of commitment. It is true that the testimony does not expressly show that he was ordered by the constable to act as a guard over Cook; yet, inasmuch as he had been sent for, and actually took the place of one of the original guards, it is fair to presume that he acted under the authority of the constable, and if so, of course he is entitled, at least, to the same protection. The language of the witness in respect to the character of the

authority under which the original arrest was made, is precisely the same as that used in the case of Andrew J. Floyd against the State, decided at the present term; and, consequently, the legal effect must be the same in both cases. It is there laid down that the fact of confinement having been shown by the State, it devolved upon the defendant to make out his justification, and that having attempted to justify under a warrant, he must show one valid and legal upon its face. It was there held, under a similar state of fact to the one here developed, that one who procured the pretended warrant to be issued, had not shown a legal justification since it did not even appear that the one relied upon ran in the name of the State of Arkansas. All then that was said there, in respect to the defect of authority, will apply with equal force here, unless there be a distinction between the situation of an informer, who is first instrumental in putting the law in motion and one who comes in subsequently and aids in its execution. It is contended by the counsel for the appellant, that the law will not hold a party coming in to the aid of an officer to the same strictness of authority as is required of the officer himself. In support of this position, he has submitted a most plausible and forcible argument, in which he has depicted the ruinous consequences which, under peculiar circumstances, the law would visit upon honest and innocent individuals. We are free to admit that the argument is ingenious and plausible, yet we think it will be found that the current of authority is clearly against it. In the case of *Elder* v *Morrison*, 10 *Wend.* 128 the Supreme Court of New York, by SAVAGE, Ch. J., said: "It is certainly true that if the officer be guilty of a trespass, those who act by his command or in his aid, must be trespassers also, unless they are to be excused in consequence of the provision of the Revised Statutes. If a stranger comes in aid of an officer in doing a lawful act, as executing legal process, but the officer, by reason of some subsequent improper act, becomes a trespasser *ab initio*, the stranger does not thereby become a trespasser. *Cro. Eliz.* 181. *Cro. Car.* 446. But when the original act of the officer is unlawful, any stranger who aids him

will be a trespasser, though he acts by the officer's command. *Oystead* v *Shed*, 12 *Mass. R.* 511. The case in Massachusetts just cited, was an action of trespass *de bonis asportatis* against Shed and three others. Shed and Fletcher, justified as officers, under writs of attachments, the two other defendants justified as servants of Fletcher: the plaintiff replied and the defendants demurred to the replications. The court adjudged Fletcher's plea bad, and the justification of the other two defendants failed of course; and their ignorance of the law, it was said, would not excuse their conduct or diminish, in any degree, the injury which the plaintiff sustained. The case of *Lunard* v *Stacy*, 6 *Mod.* 140, is to the same effect. That was an action of trespass for entering the plaintiff's house and taking away his goods. The defendant justified that he came in aid of an officer in execution of a writ of replevin. The plaintiff replied that he claimed property in goods, and gave notice to the defendant before their removal. The court held the defendant was a trespasser *ab initio*, for though the claim should be made to the sheriff, yet if it be notified to him who comes in aid, that claim is made, he ought to desist at his peril; thereby establishing the proposition that if the officer is a trespasser, all those who act by his command, or in his aid, are trespassers. Whenever a sheriff or constable has power to execute process in a particular manner, his authority is a justification to himself and all who come in his aid; but if his authority is not sufficient to justify him, neither can it justify those who aid him. He has no power to command others to do an unlawfnl act; they are not bound to obey, neither by the common law nor the statute; and if they do not obey, it is at their peril. They are bound to obey when his acts are lawful, otherwise not. The only hardship in the case is, that they are bound to know the law. But that obligation is universal; ignorance is no excuse for any one. The counsel for the plaintiff in error insists that there is a difference between aiding in the original taking and in overcoming resistance. It seems to me there is no such distinction. If the taking was lawful, the resistance was unlawful; but if the taking was unlawful, the resistance

was lawful. If the resistance was lawful, neither the officer, nor those he commands to assist him, can lawfully overcome that resistance. Nor does the fact of the officer being indemnified confer on him any authority which he had not without such indemnity: he may thereby become compelled to do an illegal act in selling the property of strangers to the execution, but he is a trespasser in doing so, as are all others who aid him." The case referred to was an action of assault and battery brought by Morrison against Elder in the court below. The defendant pleaded the general issue, and gave notice of special matter. On the trial, the following facts appeared: The plaintiff, on the premises of one Milburn, offered for sale, two horses at public auction, in pursuance of a previous notice. Woodward, a constable of Walkill, having in his hands a justice's execution against Milburn, was present, and forbade the sale, claiming the horses under the execution and demanding possession of them, which the plaintiff refused to yield. Woodward demanded assistance from the by-standers; no one obeying him, he called upon the defendant, by name, to assist him in obtaining possession of the horses, and threatened him with legal proceedings if he did not obey. Woodward succeeded in obtaining possession of one of the horses, and then he (the plaintiff) and defendant went into the stable where the other horse was, upon which a struggle ensued as to who should have the possession of that horse, in the course of which the defendant jerked the plainliff about, who had hold of the halter, which was upon the horse, elbowed him and threw him down, which was the assault and battery complained of. The defendant, under the notice attached to his plea, proved the rendition of a judgment against Milburn, the issuing of an execution thereon, and a delivery of the writ to Woodward, and that by virtue thereof and of another execution subsequently received, Woodward, who was indemnified by the plaintiff in the execution, sold the horses. At the time of the levy, Woodward inquired of Milburn where his horses were, who pointed out the horses in question. The plaintiff offered to prove that he was the owner of the horses at the time of the taking by Woodward,

which evidence was objected to by the defendant, but the objection was overruled and the evidence received; to which decision the defendant excepted. The jury found a verdict for plaintiff with $25 damages, on which judgment was rendered. The defendant then sued out a writ of error, and the judgment was affirmed in the Supreme Court. The principle there established is, that a party who is called to aid an officer in the execution of civil process, does so at his peril, and that in case he shall invade the rights of strangers, he will be liable as a trespasser. That is a much stronger case than the one at bar, for he is not only bound to know that his principal is acting under lawful authority, but he is also bound to see that such authority is not abused by an invasion of the rights of strangers to the process under which he acts. It is conceded that the phraseology of the statute of New York is somewhat different from that of our own, yet we believe that they are substantially the same, and that consequently they should receive the same construction. The statute of that State bearing upon the subject under consideration is, "that when a sheriff or other public officer shall find resistance, or have reason to apprehend it in the execution of any process delivered to him, he may command every male inhabitant of his county, or as many as he shall think proper, to assist him in overcoming such resistance, and in seizing and confining the resisters," and that "every person commanded by an officer to assist him, who shall refuse, without lawful cause, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment." The language of our statute is that "In all cases whereby the common law or any statute of this State, any officer is authorized to execute any process, he may call to his aid all free white male inhabitants over the age of twenty-one years, of the county in which such officer is authorized to act," and "If any person shall refuse or neglect to obey the summons of any such officer, the person so neglecting or refusing, shall be fined in any sum not less than ten nor more than one hundred dollars, to be recovered by indictment." In the one case, therefore, the party summoned is bound to obey unless he shall have lawful cause to refuse;

and, in the other, he is only required to yield obedience in such cases as the officer is authorized to act, either by the common or statute law. If he is only bound to obey in such cases as the officer is authorized to act, we think it clearly follows that the law will not protect him where the officer has no authority. It certainly would not be contended that an officer of the State with a process in his hands against one individual, would be authorized to execute it upon another, neither would he be authorized to seize in execution the property of a stranger to satisfy the debt of the plaintiff in the writ.

It is assumed by the appellant's counsel, that the party called upon by an officer is bound to obey, and that having no option whether he will do so or not, he must, of necessity, be protected against any evil consequences which may result from his acts. If the premises were true in point of fact, it might be difficult to resist the conclusion drawn from them. But such is not the case. The law, as laid down in the case just referred to, is that "He has no power to command others to do an unlawful act; they are not bound to obey, neither by the common law nor the statute, and if they do obey, it is at their peril. They are bound to obey when his commands are lawful, otherwise not. The only hardship is, "that they are bound to know the law." It will be seen, therefore, that a party is not bound, right or wrong, and whether the officer is authorized to do the act or not, to render obedience to his command. It is most clearly his right to refuse in case the officer has no legal authority to do the act, and it is equally clear that he has no such right in case the officer has such authority. He must, therefore, act or decline to act at his peril. If it be a hardship for a person, called by an officer to assist him, to decide at his peril, it is quite as hard that the rights of innocent individuals should be invaded with impunity. The law does not intend that the assistance required shall, in all cases, be rendered blindly and without reflection; for if so, it might be the means of inducing the most flagrant outrages and covering with the mantle of impunity acts of violence precon-

certed between an irresponsible officer and other malicious individuals.

If persons are only bound to aid an officer in such cases as he himself would be authorized to act, it is clear that the defendant in this case can claim no protection from the law, as nothing has been shown which could by possibility have given protection to the officer.

We are, therefore, fully satisfied, from every view which we have been able to take of this case, that the judgment of the Circuit Court is right, and consequently ought to be affirmed. It is, therefore, considered and adjudged that the judgment of the Circuit Court of Ouachita county, herein rendered, be, and the same is hereby, affirmed.

THORN VS. CLENDENIN ET AL.

Where a writ of error is sent to the clerk of a Circuit Court, commanding him to send up to this court a transcript, &c., he has no right to withhold the same until his fees for making it out are paid, but must obey the writ.

The law of costs and fees is statutory, and no provision is made for paying the clerk his fees in advance of his return in such case.

On Rule for Contempt.

In this case, Thorn presented to this Court a motion for a rule upon Gordon N. Peay, Esq., clerk of the Circuit Court of Pulaski county, to show cause why he should not be attached for contempt for failing to return a writ of error.

The mover stated that, on the 18th February, 1851, he sued out of this court a writ of error to the clerk of the Pulaski Circuit Court, returnable to the present term of this court in the

case of himself against Clendenin et al., to bring up for review the judgment therein rendered against him; which writ was in the usual form, commanding him, &c.

That, a few days before making the motion, the mover, by attorney, called on the said clerk for said transcript, and requested that it be returned and filed with the writ of error, &c. That the clerk had, in all things, obeyed the command of said writ so far as to make out the transcript, &c., and endorse a formal return upon the writ; but said clerk peremptorily refused to return and send up, or to deliver to the mover to be returned and sent up, said transcript, writ and return, until his costs therefor should be first paid; and still retained, and refused to return the same on that ground alone, he, the mover, refusing to pay said costs until the transcript, &c., should be returned. Prayer for rule as above stated.

The clerk, responding to the rule, admitted that the attorney of Thorn delivered to him such a writ of error; that he had made out such transcript, and that he had refused to deliver the same on the demand of such attorney; and for cause why he should not deliver said transcript, stated that he had, in several instances, made out lengthy transcripts, by order of attorneys, and delivered them to the attorneys, or to the clerk of this court, and the attorneys and parties had failed to have the same filed in this court: whereby respondent had lost his fees for such transcripts. For these reasons, and as he was advised that he was not required or bound by law to deliver any transcript until his legal fees in respect thereof were paid; and as said Thorn was insolvent, and a non-resident, and his said attorney refused to pay such fees, respondent did refuse, and still refused, to deliver the same—disclaiming all contempt, &c.

CUMMINS, for the motion.

Mr. Justice SCOTT delivered the opinion of the Court.

The showing of the clerk is insufficient. When the writ of error goes down, its command must be obeyed. If there be hard-

ships growing out of the facts that the clerks have to wait for the fees allowed by law for the making out and certifying of the transcripts until the determination of causes in this court, and sometimes from the failure of the party or his attorney to file the transcripts in this court after they have been made out and certified in persuance of an appeal or in obedience to a writ of error, the remedy is with the Legislature, who may provide readily against them if it should be deemed proper. Our entire law of costs and fees is, in substance, statutory. The common law did not professedly allow any, the amercement of the vanquished party being his only punishment.

The writ of attachment must issue to bring up the body of the clerk of the Pulaski Circuit Court, to be dealt with for contempt.

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The State vs. Gowen.

Where an indictment is returned into court by a grand jury, and filed, but the clerk neglects to endorse the filing, the omission may be supplied at any time, *nunc pro tunc*, by order of the court, on the proper showing.

It is erroneous to quash an indictment for such omission, where the attorney of the State moves to have it supplied, and proves that the indictment was in fact returned by the grand jury. and filed.

Appeal from White Circuit Court.

Levi Gowen was indicted, in the White Circuit Court, for exhibiting a faro bank, and the case determined before the Hon. B. H. Neely, Judge, at May term, 1851. The facts appear in the opinion of this Court.

Jordan, for the State, contended that the omission of the clerk

to mark the indictment "filed," might be amended at any time, as may all ministerial acts and clerical errors, even in criminal cases. *Sharf vs. Com.*, 2 *Binn* 514. *State vs. Seaborn*, 4 *Dev.* 319. 1 *Chit. Cr. Law* 482. 1 *Strange* 136. 1 *Eng.* 100. 1 *Baily* 65.

That it was sufficient for the record to show that the indictment was returned into court, and placed among the files—that the placing the indictment upon the files of the court constiuted the filing, and not the marking it "filed"—that this is only evidence of filing. 2 *Eng.* 524. 1 *Eng.* 208.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The defendant interposed his motion in the court below to quash the indictment upon the ground that it did not appear to have been endorsed "filed" by the clerk of the court. The State, at the same term, and whilst the motion was pending before the court, appeared, by her attorney, and asked leave to have the omission supplied by an order *nunc pro tunc*. The court refused to grant the order asked by the State, but sustained the motion to quash, and rendered final judgment against the State. The motion to quash was interposed at the May term, 1851, and the State proposed to show that, at the November term, 1850, the same indictment was returned into the court, and placed amongst the files of the office. This she proposed to establish by the testimony of the clerk and his deputy, and also by the entry of record, which recited that the grand jury came into court, and, by their foreman, in the presence of said jury, presented to the court sundry bills of indictment, which were filed, &c. The clerk and his deputy not only proved that the indictment in question was one of those returned and filed at the November term, 1850, but it further appeared to have been actually marked filed on the 27th November, A. D. 1850, and signed "Dandridge McRea, D. C." The 85*th sec. of chap.* 52, *Digest*, declares that "All indictments found and presentments made by a grand jury, shall be presented to the court by the foreman, in the presence of such jury, and shall there be filed and remain as records of the court."

It is clear, from this provision of the statute, that it is made the duty of the clerk to endorse the filing upon the indictment, and to place it in his office for safe keeping. This being the case, the omission to make the endorsement, is a mere breach of clerical duty, and must consequently be governed by the law applicable to such omissions. The act of the clerk in marking a paper filed, is merely ministerial, and, as such, is amendable at common law. See 1 *Str.* 136. *Phillips vs. Smith*, 1 *Saund. Faulkner's case, p.* 250, *c and d.* The instances in which amendments have been made of the record below, are innumerable; and wherever amendments are made by the common law, there is no distinction between criminal and civil cases. (See 1 *Saund.* 250, and the authorities there cited.) The filing of a paper in court, and the endorsement of such filing, are two seperate and distinct things. The endorsement by the clerk is the highest legal evidence of the filing, yet the filing, in contemplation of law, is as perfect before as after such endorsement, and dates from the receipt by the clerk and its lodgment in his office. The filing having become complete and perfect the moment the indictment was deposited in the office of the clerk, the only question that can arise is, whether the fact that it was so deposited, is susceptible of proof by evidence *aliunde.* In respect to this, we cannot entertain a doubt, and more especially when it is regarded as a clerical omission of a mere ministerial act. The record itself showed that sundry indictments had been returned into the court at the term immediately preceding; and it was clearly and fully proven, by the testimony of the clerk, and also by his deputy, that the one before the court was one of that number. We think the proof was fully sufficient to identify the indictment as one of those returned by the grand jury at the preceding term; and if so, it most unquestionably entitled the State to the benefit of her motion to amend. It is conceded that our statute of Amendments does not extend to criminal proceedings, yet the defect alleged here, being a mere clerical omission, was amendable at common law.

We are, therefore, satisfied that the court ought to have given

leave to make the amendment upon terms, and that consequently the judgment is erroneous, and ought to be reversed. Let the judgment be reversed, and the cause remanded, to be proceeded in according to law.

BURROW VS. THE STATE.

In an indictment for false pretences, it is not sufficient to charge false pretences in general terms; but it is necessary to set them out specifically and with strict certainty.

False pretences, within the meaning of the statute, must be of some existing fact, and not of future transactions, as held in *McKenzie vs. The State*, (6 *Eng.* 594.) Hence, an indictment, charging that defendant obtained the property of A. by falsely pretending to him that his goods and chattels were about to be attached, is bad.

A count in the indictment charged that defendant falsely pretended to A. that divers persons had conspired to seize and unjustly deprive him of a slave, by means of which false pretences defendant induced A. to convey to him said negro: HELD, That the pretences here charged were of too vague and indefinite a character to deceive a person of ordinary prudence and understanding, and therefore not within the purview of the statute.

In criminal cases, the jury should be sworn to try the issue according to law and evidence.

Writ of Error to Poinsett County.

Tindrell Burrow was indicted, for false pretences, in the Green Circuit Court, at the September term, 1847; changed the venue to Poinsett, and was tried before the Hon. JOHN T. JONES, then one of the Circuit Judges, in April, 1849.

There were four counts in the indictment. The first charged:

That Burrow, on the 15th day of April, 1847, at, &c., unlawfully did falsely pretend to one Richard S. Hodge that divers

persons had conspired and agreed to seize a certain negro boy slave named Bill, of the value of five hundred dollars, of the property of him the said Hodge, by which he, the said Hodge, would be unjustly and unlawfully deprived of the said negro boy Bill; he, the said Tindrell Burrow, well knowing, at the same time, that no such conspiracy or agreement was in existence; by means of which said false representations, he, the said Tindrell Burrow, induced him, the said Hodge, to convey to him, the said Burrow, the said negro boy Bill, for safe keeping, with the felonious intent then and there to cheat and defraud him, the said Hodge, out of the said negro boy Bill; to the great damage of said Hodge, contrary, &c., and against the peace, &c.

The second count charged:

That said Tindrell Burrow, on the 15th day of April, 1847, at, &c., unlawfully and falsely did pretend to said Hodge that he was about to be attached, by all and singular the goods and chattels, rights and credits of him the said Hodge, by means of which such attachment, unless he, the said Hodge, would put his property into the hands of him, the said Burrow, he, the said Hodge, would unjust and unlawfully be deprived of all and singular his goods and chattels, rights and credits; he, the said Burrow, well knowing, at the same time, that no such attachment was in contemplation; by means of which said false pretentions, he, the said Burrow, did then and there unlawfully obtain from him, the said Hodge, a negro boy slave named Bill, of the value of five hundred dollars, the property of the said Hodge, with intent then and there feloniously to cheat and defraud the said Hodge of the same, contrary, &c., &c.

The third count charged:

That said Tindrell Burrow, on the 15th day of April, 1847, at, &c., unlawfully and falsely did pretend to said Hodge that a criminal prosecution was being instituted against him, the said Hodge, which would take from him and cause him to lose all the goods and chattels, rights and credits which he, the said Hodge, at that time had, and thereby deprive his family of the means of sustenance; and that he, the said Hodge, would

be imprisoned in the Penitentiary of the State not less than two years; and that he, the said Hodge, had better put his said property into the hands of him, the said Burrow, for safe keeping, and for the benefit of his said family; and by means of which said false pretences the said Burrow did then and there unlawfully obtain from him, the said Hodge, a certain negro boy slave named Bill, of the value of five hundred dollars, of the property of him, the said Hodge, with intent then and there to cheat and defraud the said Hodge out of the same: whereas, in truth and in fact, the said Burrow well knew that no such criminal prosecution had been or was about to be commenced; and he also knew that the said Hodge would not be so imprisoned as aforesaid, or lose his said property in manner aforesaid; to the great damage and deception of the said Hodge, contrary, &c.

And the fourth count charged:

That said Tindrell Burrow, on the 15th day of April, 1847, at &c., by means of divers false, fraudulent and unlawful pretences, did obtain from said Hodge a certain negro boy slave named Bill, of the value, &c., with the felonious intent to defraud and cheat him, the said Hodge, out of the same, contrary, &c., &c.

The defendant pleaded not guilty. The record entry of the empanneling and swearing of the jury is as follows:

"The parties having announced their readiness for trial, and the venire being called, came; from whom were selected the following jury, to wit: Calvin Hawk, &c., &c., twelve good and lawful men, of the county of Poinsett, who were severally tried and sworn to try and a true deliverance make between the State of Arkansas and the said Tindrell Burrow."

Burrow was convicted, and sentenced to the Penitentiary for five years. The evidence was not put upon record. He brought error, on the grounds that the indictment was bad in substance, and the jury not properly sworn, &c.

E. H. ENGLISH, for plaintiff in error.

The jury were not sworn to try the case according to law or

evidence. *Patterson vs. The State*, 2 *Eng*. 59. *Smith Bell vs. The State*, 5 *Eng*. 536. *Sandford vs. The State*, 6 *Eng*. —.

The false pretences charged in the indictment, are not negatived by positive and specific averment, and therefore the indictment is bad. *R. vs. Perrall*, 2 *M. & S.* 379, 386. *Arch. Cr. Plead., marg. p.* 293. *King vs. Airey*, 2 *East* 30. 3 *Chit. Crim. Law* 762, 999. 2 *ib.* 163, 311. *The People vs. The State*, 9 *Wend.* 191. *The People vs. Haynes*, 11 *Wend.* 564.

The indictment does not set out the false pretences with sufficient certainty—no time, place, or person is stated. The indictment must charge in specific terms the false pretences. (1 *Chit. Cr. Law* 140. *Arch. Cr. Law* 289. *People vs. Gates*, 13 *Wend.* 322.) And the false pretence must be of such a character as calculated to mislead a person of ordinary prudence and caution. *The People vs. Williams*, 4 *Hill* (*N. Y.*) *R.* 9.

CLENDENIN, *Att. Gen.*, contrà, contended that though the oath administered to the jury was defective in form, it was sufficient in substance, and within the rule laid down in *Patterson vs. The State*, (2 *Eng*. 60;) and could not be taken advantage of. (*Dig*. 402, *sec.* 98.) And that the first, second, and third counts are formal and technical (*Arch. Crim. Law* 346, 347) to warrant a conviction under *sec.* 1, *art.* 8, *ch.* 51, *Dig.*

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The fourth and last count of the indictment avers that, by means of divers false, fraudulent and unlawful pretences, the accused obtained the property, &c. It is not sufficient to charge false pretences in general terms, but it is necessary to set them out specifically and with strict certainty. (See *R. v. Mason*, 2 *T. R.* 581. *Moffitt vs. The State*, 6 *Eng*. 171, 174.) That count is therefore clearly bad.

The representations contained in the second and third counts, had reference to transactions that had not then taken place, and consequently could not amount to a false pretence within the meaning of the statute. (See *McKenzie vs. The State*, decided at

January term, 1851.) The first count charges that the accused represented to Hodge that divers persons had conspired and agreed to seize a certain negro boy slave named Bill, of the value of five hundred dollars, of the property of him the said Richard S. Hodge, by which he, the said Richard S. Hodge, would unjustly and unlawfully be deprived of the said negro boy Bill, he, the said Tindrell Burrow, well knowing, at the time, that no such conspiracy or agreement was in existence, by means of which said representations he, the said Tindrell Burrow, induced him, the said Richard S. Hodge, to convey to him, the said Tindrell Burrow, the said negro boy Bill, &c. This count, it is conceded, is not liable to the objection made against the second and third, yet it is believed to be equally defective upon other and different grounds. It is admitted that it represents a conspiracy as having been actually formed for the purpose of seizing upon the property, and thereby depriving Hodge of it; but the question is, whether the representation complained of is of so definite and plausible a character as to drive from his propriety a man of ordinary capacity, and to induce him to divest himself of his property. The appeal here is not to the cupidity, but it is aimed directly at the fears of the party charged to have been defrauded. Can it be supposed that a man of ordinary prudence and capacity would credit, for one moment, so vague and indefinite a statement? We think not. He was not informed who they were that conspired against him, for what offence he was about to be prosecuted, or of any thing else sufficiently specific to operate upon the fears of any sane individual. (See 4 *Hill* 12, *The People vs. Williams*.) It was not the intention of the statute to convert every fraud which might fall within the cognizance of a court of Equity into a criminal offence, and to protect every individual from the consequences of his own credulity, imprudence or folly; but it was designed to extend no further than to embrace such representations as were accompanied with circumstances fitted to deceive a person of common sagacity and exercising ordinary caution. We feel satisfied that the representation complained of in the first count, was not such an one as ought to have influenced the conduct or excited the fears of any

man in the exercise of his reason, and that therefore it does not fall within the operation of the act. See 14 *Wend., the People vs. Haynes, at pages* 572–73, and *The State vs. McKenzie*, decided by this court at January term, 1851.

Another ground of objection to the judgment of the court below, relates to the manner of swearing the jury who sat upon the trial. They were "severally tried and sworn to try and true deliverance make between the State of Arkansas and said Tindrell Burrow." This swearing was not in accordance with the law as it has been repeatedly decided by this act. See *Patterson vs. The State*, 2 *Eng. R.* 59. *Smith Bell vs. The State*, 5 *Eng. R.* 536. *Sandford vs. The State*, 6 *Eng.*

We are clear, therefore, that the judgment of the court below is erroneous, and ought to be reversed. Let the judgment of the Poinsett Circuit Court, herein rendered, be reversed, and the cause remanded, to be proceeded in according to law.

McMEECHEN ET AL. EX PARTE.

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The rule was, at common law, that no prohibition lay to an inferior court, in a cause arising out of its jurisdiction, until that matter had been pleaded in the original court, and the plea refused; and it should appear, in the suggestion, that the plea was verified, and tendered in person during the sitting of the inferior court. *Williams Ex parte*, 4 *Ark.* 540, and *Blackburn Ex parte*, 5 *Ark.* 22.

A. obtained a judgment against B., in the Pulaski Circuit Court, and issued an execution to the sheriff of Independence; B. applied to the judge of the Circuit Court of Independence, in vacation, and obtained an injunction. A. moved this court for a writ of Prohibition to the Judge of the Independence Court—writ refused because it is not shown in the suggestion that A. first applied to the Judge of Independence Circuit Court to dissolve the injunction, and that the application was refused.

On Application for Prohibition.

"Be it remembered, that, on this day, came before the Supreme Court of the State of Arkansas, in proper person, John McMeechen, D. J. Slaughter and Thomas W. Hynes, and give to the Court here to understand and be informed that, on the 30th day of November, 1842, they, by the consideration and judgment of the Pulaski Circuit Court, recovered against a certain *William Conway B.* the sum of $324 54, for their debt, as well as interest thereon at the rate of 6 per cent. from the 25th November, 1842, until paid, and the costs of suit, which were afterwards taxed to the sum of $21 33—which said judgment still remaining in full force, and in no wise satisfied or vacated, to obtain satisfaction thereof, they, on the 20th of July, 1849, caused to be issued thereon a pluries writ of *fieri facias*, directed to the sheriff of Independence county, commanding him of the goods and chattels, lands and tenements of the said Conway B. to levy the said debt, interest and costs, and have them before said Judge of the Pulaski Circuit Court, on the 2d day of the December term thereafter, A. D. 1849, which writ was dated on the day and year aforesaid, and came to the hands of the said sheriff on the — day of August, 1849, and before the return day thereof was levied by him on lots 1, 2, 3 and 4, in block 7, in the town of Batesville, as the property of said Conway B.: which levy was endorsed on the said writ, and the same was returned without sale for want of time; and on the 26th February, 1850, they caused to be issued out of said court, on said judgment, a writ of *venditioni exponas*, bearing date the day and year aforesaid, directed to the said sheriff of Independence, commanding him to make sale of said property, so levied on as aforesaid, and have said debt, interest and costs, before the Judge of said Court, on the 2d day of the December term thereof, A. D. 1850; which writ came to the hands of said sheriff on the 18th day of March, 1850, to be executed according to law.

And the said parties further suggest, that on the 2d day of September, 1850, the said Conway B. exhibited his bill in Chancery,

in the Independence Circuit Court, addressed to the Hon. William C. Scott, judge thereof, praying that an injunction might be issued restraining the said Sheriff and them, from any further action on said judgment and execution, and that said injunction might be made perpetual; upon which bill and prayer, the said judge, on the day and year aforesaid, in vacation, granted an injunction according to the prayer of said bill; and the said bill was thereupon filed in said Circuit Court, and a writ of injunction was issued thereon according to said order, commanding the said Sheriff and them, to stay all further proceedings on said writ; as by a certified copy of bill, order, writ, &c., made part hereof, will more fully and at large appear: and the said Sheriff, in obedience to said order and writ, returned said execution, stayed thereby, as by a certified copy of said writ and return, made part hereof, will more fully and at large appear. Which said injunction so granted as aforesaid, is still in full force, and said bill in Chancery is still pending in said Independence Circuit Court, and being prosecuted against them by said Conway B., by which they are still stayed in the collection of their said debt.

And they further suggest that the Judge of said Pulaski Circuit Court was in no wise disqualified by the constitution or law of this State from acting on said bill of injunction; and no excuse is given in said bill in chancery for the failure to make application to him for said injunction.

All which acts of the judge of the said Independence Circuit Court, of the said Conway B. are contrary to, and in violation of the jurisdiction of the Pulaski Circuit Court, and of the constitution and laws of the State.

Wherefore, the said McMeechen, Slaughter and Hynes, imploring the aid of this Court, prayeth to be relieved, and that they may have the State's writ of prohibition, directed to the Judge of the said Independence Circuit Court, and the said William Conway B, to prohibit him from taking any further cognizance of said plea before him touching or concerning the premises.

And it is granted to him accordingly."

F. W. & P. TRAPNALL, *Atts.*

F. W. & P. TRAPNALL, for the Petitioners.

Mr. Justice SCOTT delivered the opinion of the Court.

It was laid down upon authority, by this Court, in the case of *Williams Ex parte*, (4 *Ark.* 540,) that "the rule was, at common law, that no prohibition lay to an inferior court in a cause arising out of its jurisdiction, until that matter had been pleaded in the original court and the plea refused, and that it must appear in the suggestion that the plea was verified and tendered in person during the sitting of the inferior court." And the same doctrine was reiterated in the subsequent case of *Blackburn Ex parte*, 5 *Ark. R.* 22.

This rule is decisive of the application at bar, because it is in principle directly applicable to it. It does not appear in the suggestion that there has been any effort at relief in the court below. Although the parties may have in fact had no actual notice of the time and place of applying for the injunction, and thus had an opportunity to have guarded the judge against the error into which he has fallen; nevertheless they might have afterwards gone before the Circuit Court of Independence county, and, upon there showing that the whole proceedings were directly in the face of the statute, (*Dig.*, *p.* 592, *secs.* 5, 6, 7,) have doubtless had the injunction dissolved and the bill dismissed for want of jurisdiction, and thus have obtained the relief they seek here by these proceedings. And if that court had refused such relief, then the appropriate allegation of such refusal, in addition to the allegations contained in the suggestion before us, would have made a proper case for the interposition of this court in virtue of its powers of superintending control, which have in this case been invoked. There being no such allegation in the suggestion before us, the application for the rule to show cause why the writ of Prohibition should not issue, must be refused.

FLINT EX PARTE.

F. W. & P. TRAPNALL, for the petitioner.

Mr. Justice SCOTT delivered the opinion of the Court.

This case is substantially the same as that of Jno. McMeechen and other Ex parte, just decided.

The application for the rule to show cause, &c., is refused.

ROANE ET AL., USE BISCOE ET AL. VS. WILLIAMS ET AL.

The legal title to a note, executed to the original Trustees of the Real Estate Bank, did not pass, by virtue of the provisions of the deed of assignment, to the Residuary Trustees therein provided for—the equitable interest only passed—and a suit upon such note is properly brought in the name of the original trustees, for the use of the Residuary Trustees. *Biscoe st al. vs. Sneed et al.*, 6 *Eng. R.* 106.

Appeal from the Clark Circuit Court.

This was an action of debt, in the Clark Circuit Court, on a note executed by Williams, Wilson and Clingmen, January 1st, 1844, to Sam C. Roane, Lambert Reardon, Ebenezer Walters, Henry L. Biscoe, William F. Moore, John Preston, Jr., Anthony H. Davies, Sandford C. Faulkner, Silas Craig, George Hill, Enoch J. Smith, James H. Walker, John Drennen, Lorenzo N. Clark and Robert S. Gibson, due 1st January, 1845, for $300 24. The note describes the payees as Trustees of the Real Estate

Bank of the State of Arkansas, and is payable to them and their successors and survivors. The suit was brought in the name of all the payees but the two last, whom the declaration avers to be dead, for the use of Henry L. Biscoe, Sandford C. Faulkner, George Hill, John Drennen and Ebenezer Walters, Residuary Trustees of the Bank aforesaid.

Process was executed on Williams and Clingman. Oyer prayed and granted at September term, 1849.

Plea in bar: That the note sued on was not the property of the plaintiffs when the suit was brought, (September 12, 1846,) but was the property, and whole legal interest vested in the five persons for whose use the suit was brought: that Walters and Hill have departed this life, and have been succeeded since the commencement of this suit by Luther Chase and James H. Walker; that said Trustees derived their power solely from a deed executed by a deed from the Real Estate Bank of the State Bank of the State of Arkansas(*a*); that one of the stipulations in said deed consisted of a provision that the whole interest should pass from said Trustees to said five Residuary Trustees, and that said five persons became and were said Trustees.

Demurrer to this plea was overruled, judgment thereon, and appeal.

The cause was determined before the Honorable JOSIAH GOULD, Judge.

PIKE & CUMMINS, for the appellants. The plea does not show that the plaintiffs had been divested of their interest in the note by endorsement or assignment; nor whether the deed was made before or after the note. The note sued on would not pass by delivery. (*Roane et al. vs. Lafferty*, 5 *Ark.* 465.) If the change of the Trustees could produce any effect, as held in *Pickett vs. Roane et al.*, (2 *Eng.* 250,) it would be good in abatement, not in bar.

The plea merely shows an equitable interest in the Residuary Trustees.

FLANAGIN, contra. This case is precisely parallel and in all

NOTE(*a*)—This is the language of the plea.—REPORTER.

things the same as *Roane et al. vs. Brodie et al.*, 2 *Eng. R.* 264.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

Ths case of *Biscoe et al. vs. Sneed et al.*, (6 *Eng. Rep.* 106,) is conclusive of the question here presented. The bar set up by the plea here is, that the deed of assignment had been executed and delivered before the institution of the suit, and that such deed operated *per se* to convey the legal interest in the note to the trustees, who held under the deed, and that consequently the plaintiffs, who were the original trustees, could not maintain the suit. The note upon which this suit is founded, and which was exhibited upon oyer, is payable to particular persons therein specified, and not to bearer, and consequently the legal title in it could not pass merely by delivery. This court, in the case referred to, after citing all the cases which had previously been determined involving the same question, expressly declared that the deed of assignment did not, *per se*, convey the legal interest in the note, and that consequently the Trustees could not have maintained a suit at all in their own names, the equitable interest alone having passed. The transfer of the note in suit by virtue of the deed of assignment, is the only matter set up by the plea to this action, and that is wholly insufficient for the purpose as expressly held in the case in 6th English, already referred to. There cannot exist a doubt as to the right of the original Trustees to maintain this suit for the use and benefit of the Trustees, under the deed of assignment, so far as any thing appears to the contrary upon the face of the plea. The Circuit Court, therefore, erred in overruling the demurrer to the plea, and, for this error, its judgment must be reversed, and the cause remanded, to be proceeded in according to law and not inconsistent with this opinion.

BISCOE VS. MOORE ET AL., AD., USE, &C.

B. executed his note to I., and I. bound himself, by an instrument of the same date of the note, to apply the proceeds of the note to the payment of a certain claim, which the State Bank held, upon an estate of which I. was the administrator: HELD, That the payment of the note by B. was necessarily a condition precedent to the application of the proceeds of the note to the payment of the claim of the Bank, and therefore the agreement of I. so to apply the proceeds of the note could in no way be interposed as a bar to a recovery upon the note against B. by I.

There was a stipulation that a note sued on might be discharged in Arkansas Bank paper at its value: HELD, That defendunt could only avail himself of this stipulation, as a defence, by averring a tender of Arkansas Bank paper, equal in value to the amount of the note, made in apt time.

An administrator may take a note for a debt due his intestate either in his individual or representative right. If he take it to himself, he is liable over to the estate as for a devastavit, but the contract is nevertheless valid between the parties; and the maker of the note cannot set off, against it, a claim purchased by him against the estate of the intestate.

Appeal from the Phillips Circuit Court.

This was an action of debt, determined in the Phillips Circuit Court, before the Hon. JOHN T. JONES, then one of the Circuit Judges, in February, 1850. The facts are sufficiently stated in the opinion of this court.

WATKINS & CURRAN, for appellant.

W. H. & A. RINGO, for the appellees. The 2d and 3d pleas are bad, because they set up, as a defence to the action, an agreement between Irwin and the appellant, by the very terms of which, the note in suit was to be paid before the execution of the agreement by Irwin.

The 4th and 5th pleas are all bad, because they attempt to set off a debt due to the administrator in his individual right

against a debt due from his intestate. *Barbour, on off-set* 131. *Terry* v *Evans*, 8 *Wend.* 530. *Shaw* v *Gooking*, 7 *N. Hamp.* 16.

Mr. Justice WALKER delivered the opinion of the Court.

This suit was instituted by the administrator of Miller Irwin, on the following instrument: "Sept. 6, 1845. Due Miller Irwin one hundred and seventy-one dollars and three cents, for value rec'd. (Signed) H. L. Biscoe."

In defence, Biscoe filed several pleas, in which the same ground of defence was set up under different circumstances. To each of which, demurers were sustained.

A consideration of the legal right of the defendant under the contract, set up in his pleas, will, we apprehend, dispose of them all. Each of the pleas discloses a written contract of even date with the due bill in suit, which is set forth at length together with a recital that the defendant had filed the transcript of a judgment in favor of the State Bank v. Nicholas Righter's estate for $800 debt and $107 damages, in the Probate Court of Phillips county, which had been allowed and classed in the 3d class, and after these recitals, concludes as follows: "Now, I bind myself that the proceeds of the note above described shall be applied to the payment of the allowance above referred to, either by the purchase of Arkansas money with the amount of this note $171 03 par funds, or the said Biscoe shall have the right to liquidate said note in Arkansas money, at the rate of discount on the said Arkansas funds, so as to make the amount in Arkansas equal his note as above stated: (signed) Miller Irwin."

This agreement will be found to contain but two important stipulations: first, that Miller Irwin will, with the proceeds of the note, so executed, purchase Arkansas money and apply it to the payment of the claim so allowed in favor of the Bank; or, secondly, that Biscoe shall have the privilege of paying it in Arkansas money at its value.

With regard to the first, it is evident that the payment of the note by Biscoe, was a condition precedent to the act to be done by Irwin, because the purchase of the Arkansas funds was to be

made with the proceeds of the note; or, in other words, the money paid upon the note. It is evident, then, that this breach of the agreement can furnish no defence against the collection of the note. To test the rights of the parties and their liabilities under this agreement, suppose that Biscoe had sued Irwin. In order to maintain his action for a breach of the first stipulated duty on the part of Irwin, he would necessarily have had to aver that Irwin had received the money upon the note, before he could fix upon him a liability for failing to buy Arkansas money with it. How, then, can he set this agreement up as a defence in bar to the right of recovery upon the note? The mere statement of the facts show that no such defence could be interposed.

As regards the second stipulation, it amounted to nothing more than a condition annexed to his note, by which he might discharge his debt in Arkansas Bank paper at its value. In order to have availed himself of this defence, he should have averred a tender of Arkansas Bank paper, equal in value, to $171 03 cash, made in apt time. Nothing of the kind is averred in either of the pleas.

There is an attempt made, in the three last pleas, to connect with this written agreement, by averments, matters touching the consideration upon which the note was executed, to the following effect: that Biscoe was indebted to Righter in his life-time, and that Irwin, his administrator, took the note in suit upon settlement of that indebtedness, and that although the note was executed to Irwin in his individual right, it was, in truth, a debt due the estate of Righter. Concede all this to be true, and still the legal rights of the parties are not thereby changed.. Irwin had a right to take the note either in his individual or his representative right. In the first instance, he would be liable over to the estate as for a devastavit, but the contract would not be the less valid as between the parties. (*Hemphill* v *Hamilton's adm.*, 6 *Eng*. 425.) Nor does the averment that defendant had subsequently bought the claim so allowed of the Bank, add anything to the validity of his defence at law. We deem it wholly unnecessary to comment upon the several averments in

these pleas, as under no state of case under which the facts could be presented, would they furnish a defence to the action.

The judgment of the Phillips circuit must, in all things, be affirmed.

RAPLEY VS. BROWN.

This case originated before a justice of the peace, was tried de novo, on appeal, in the circuit court, and brought up by writ of error. It was assigned, for error. that the circuit court did not acquire jurisdiction of the case, because there was no entry made upon the justice's docket that an appeal was allowed from his judgment: HELD, That, since the passage of the act of 1846, (*Dig., p.* 668, *sec.* 182,) this was no valid objection to the jurisdiction of the Circuit Court, it appearing that the party appealing had, on his part, complied with all the requirements of the law to entitle him to the appeal.

Brown sued Rapley for work and labor: Ring was offered as a witness by Brown, and his competency questioned on the grounds of interest. It appeared that Rapley and Ring agreed to cultivate a farm in partnership—Rapley was to furnish a hand on his part, and, under this agreement, hired Brown, who labored upon the partnership farm of Rapley and Brown, and then sued Rapley for his wages: HELD, That there was no liability on the part of Ring for his wages, and that he was a competent witness.

Writ of Error to Pulaski Circuit Court.

Andrew J. Brown sued Charles Rapley, before a justioe of the peace of Pulaski county, on an account for work and labor, &c. On a irial before the justice, judgment was given in favor of Rapley, and Brown appealed to the Circuit Court of Pulaski county, where the case was tried *de novo*, judgment for Brown, and writ of error by Rapley. The material facts of the case are stated in the opinion of this Court.

PIKE & CUMMINS, for the Plaintiff, contended, 1st: That the Circuit Court had no jurisdiction of the cause—no appeal having been granted by the justice, (1 *Eng.* 182. 2 *ib.* 203. *Ib.* 295. *Ib.* 386. *Ib.* 514); 2d: That the testimony of the witness should have been excluded, as he was a partner of the plaintiff in error, and therefore interested.

BERTRAND, contra, as to the question of jurisdiction, referred to *Secs.* 176 *and* 182, *Dig.*, *pps.* 667, 668, 669; and to the articles of agreement between the plaintiff in error and the witness, to show that the witness had no interest in the event of the suit.

Mr. Justice WALKER delivered the opinion of the Court.

It is assigned, as error, that the Circuit Court did not acquire jurisdiction of this case, because there was no entry made upon the justice's docket that the appeal was allowed. The record shows that an appeal was prayed on the day that the judgment was rendered; and thereafter within thirty days a valid affidavit and recognizance were made and filed in strict accordance with the statute.

Prior to the statute of 1846, this objection would have been fatal to the jurisdiction of the Circuit Court. That statute seems to have been designed to cure omissions of this kind. *Sec.* 182, *Dig.*, *p.* 668, provides that, "No appeal from a justice of the peace to the Circuit Court shall be dismissed or stricken from the docket where any specific sum shall be found by said justice: First, because the justice has not rendered a formal judgment upon his record or docket: Second, because he has not entered upon his docket that an appeal was prayed for and granted; but if the requisites, as they are required in *sec.* 176, be substantially complied with, the cause shall be deemed to be in court, and be subject to be tried anew on its merits."

In this case, we find all the requisites of *section* 176 complied with. The affidavit and recognizance were regularly taken and

filed in due time. This assignment of error, therefore, cannot be sustained.

It is next assigned, as error, that Ring, a witness offered on the part of Brown, was incompetent because of interest in the suit, and was therefore improperly permitted to testify. Being sworn on his *voir dire*, he positively disclaimed all interest in the suit or the event thereof, but admitted that the account in suit was for work done by Brown, on a farm carried on by witness and Rapley in partnership, in pursuance of certain articles of agreement, which were then read, in which, after various stipulations in regard to the cultivation of the farm and the profits arising therefrom, it was agreed, on the part of Rapley, that he, at his own proper expense, was to furnish one hand to work on said farm. It was further stipulated, in said articles of agreement, that no debts should be contracted by the firm without the written assent of both parties first had and obtained. It further appeared, from the statement of the witness, that, at the instance of Rapley, he ascertained that Brown wished to hire, and went with him to Rapley. That Rapley agreed with Brown to give $12 per month for work to be done on the partnership premises, that Brown worked on the farm about 13 months. Rapley paid him sixty dollars in part satisfaction of his wages. Witness paid nothing. That Brown was employed for Rapley, by witness as aforesaid, to work in fulfillment of his (Rapley's) agreement to furnish a hand under the articles of agreement aforesaid. Witness never hired any hands himself, and had no written authority to do so.

Under this state of case, the counsel for Rapley contends that, although the witness disclaimed all interest in the suit, yet the facts disclosed prove him to be interested, and, on that ground, his evidence should have been excluded. To show this interest, they contend that this was a debt contracted by one of the parties without a written consent from the other in violation of the terms of their articles of written agreement, and is therefore as a special contract inoperative, and that as the services were rendered by Brown in and about the partnership business, both parties are responsible in assumpsit for work and labor. We think

the counsel have misconceived the object as well as the legal effect of this stipulation. It was evidently intended to prevent either partner from binding the other for the payment of contracts touching their partnership affairs, without a written consent for that purpose. Now if this was an effort on the part of Brown to fix a joint liability upon them both as partners, then it might be objected by Ring, that as he had never given his written consent for Rapley to hire Brown, he would not be bound by the contract, for, from the facts of the case, it was clearly Rapley's contract. Rapley agreed to furnish a hand at his individual expense; told Ring that, as he was busy, to look out for one, Ring did so and brought Brown to him, Brown asked Rapley $15 per month, Rapley refused, stating that $12 was the most he had ever given. Brown finally agreed with him that he would take $12, the bargain was closed by them, and Rapley from time to time paid all that was received by Brown for work. Surely no one could seriously contend that when Rapley was stipulating with Brown to do the work, which he had agreed to have done at his own proper expense, that Ring, who was requested to look out for such a hand, ever dreamed that it was any contract of his, or that he was at all responsible; nor could Rapley have so understood it. This considered, and Rapley comes here to object that he had no right to bind himself without the written consent of Ring. An objection, the bare statement of which proves its absurdity. But, to give it the effect contended for, it is evident that this stipulation never was intended to embrace the contract for the hand agreed to be furnished by Rapley in the same articles of agreement and at his individual expense. Ring did not desire Rapley to ask his permission to do what he had bound himself to do, and Rapley was legally competent to contract without written authority or consent from Ring.

Under the circumstances of the case, there can be no doubt but that the Circuit Court correctly permitted the evidence to go to the jury.

The instructions asked and refused by the Circuit Court were

predicated upon the supposition that a partnership contract had been proven. In our opinion, there was no evidence conducing to prove the existence of such a contract: therefore the instructions were irrelevant and properly excluded.

Let the judgment of the Circuit Court be, in all things, affirmed, with costs.

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WILLIAM J. MARR EX PARTE.(a)

Where application is made by an administrator to the Probate Court for an order to sell real estate of his intestate, any person interested in the subject matter may, on proper showing to the Probate Court, make himself a party to the proceedings, put upon record, by bill of exceptions, the evidence and facts upon which the order of sale is made, and appeal therefrom to the Circuit Court. *Digest, page* 142, *ch.* 4, *sec.* 176, and *Pamph. Acts* 1849, *p.* 59.

Such order of sale is a proceeding *in rem*, by a superior court having jurisdiction of the subject matter, (*Adamson et al. vs. Cummins ad.*, 5 *Eng.* 549,) and cannot be regarded as a nullity, (*Borden et al. vs. State, use, &c.*, 6 *Eng.*,) and consequently all reasonable presumptions of law are in favor of the regularity of the proceedings.

This court, in the case of *Carnall vs. Crawford Co.*, (6 *Eng.*,) expressed its views as to the true nature and character of the powers of superintendency and control entrusted to it by the constitution over all inferior tribunals; and to the circuit courts over county courts, probate courts and justices of the peace; overruling so much of *Ex parte Anthony* (5 *Ark.* 363–4) and *Levy vs. Lychinski*, (3 *Eng.* 113,) as conflicted with these views; and approving so much of the doctrine of the dissenting opinion in *Amour Hunt Ex parte* (5 *Eng.* 288) as sustained them; and now this Court adopt the residue of the doctrines of that opinion, and especially those relating to the contingency on which this court will exercise those powers.

In doing so, the court overrule the doctrine of *Webb & Estell vs. Hanger & Winston*, (1 *Ark.* 122,) and of the cases based upon it, where it is held, in substance, that a party aggrieved by the decision of a County, Probate, or Justice's Court, may apply directly to this court without having first made application to a Circuit Court, or showing any reason for not having done so.

NOTE(a)—This case was decided at the Jan'y term, 1851, continuing until May.

A party has no right to apply to this court to supersede a judgment of the Probate Court, until he has first sought a remedy at the hands of the Circuit Court, or can show that that court is incompetent to act in the premises, either in consequence of some inherent defect in the tribunal, or of incompetency of its incumbent.

On Application for Supersedeas.

This was a petition filed on the 3d of May, 1851, in this court, praying for a certiorari to the Probate Court of Randolph county, to send up to this court, for adjudication, certain proceedings and orders, made in that court, at the January term, 1851; and for a supersedeas to stay proceedings under the orders of that court.

The petition set forth certain proceedings in the Probate Court had at the January term, 1851, by the administrators of Thomas O. Marr, for the purpose of selling the real estate of the intestate; and avers various irregularities in the proceedings and in the order of the court directing the sale. It was claimed that the parties had not pursued the law in that respect, and that no sufficient showing had been made before the Probate Court to warrant the order for sale; and that, consequently, the Court of Probate was without jurisdiction, or, at least, the proceedings were so irregular as to call for the interposition of this Court to stay the proceedings and quash the order.

The petition was verified by affidavit, and accompanied by a transcript of the proceedings of the Probate Court.

BEVENS, for the Petitioner.

Mr. Justice SCOTT delivered the opinion of the Court.

This petition presents no proper ground for the action of this court in the premises. If the petitioner had desired to submit his alleged grounds for revision by appellate power, as regulated by law, he should have shown his interest in the subject matter to the Probate Court, and upon that foundation made himself a party to the proceedings therein, wherein by bill of exceptions he might have placed upon the record all the evidence and facts

upon which the judgment and decree of the court was based; and from these proceedings he might have taken an appeal to the Circuit Court, (*Digest, page* 142, *ch.* 4, *sec.* 176, and *Pamphlet Acts* 1849, *page* 59,) and from thence the case might have been brought here. But he failed to take any such steps, and now asks to be relieved here by our powers of superintendency and control from the effects of a judgment of a superior court in a proceeding *in rem* on a subject matter clearly within its jurisdiction, (see the case of *Adamson et al. vs. Cummins ad., at p.* 549, that case in 5 *Eng.*,) which cannot be a nullity, as we have held in *Borden et al. vs. The State, use, &c.*, (6 *Eng. R.*,) and when in consequence all reasonable presumptions of law are in favor of the regularity of the proceedings.

Having, during the present term, in the case of *John Carnall vs. The County of Crawford*, (6 *Eng.*,) expressed our views as to the true nature and character of the powers of superintendency and control entrusted by the framers of the constitution to this court over all inferior tribunals; and to the Circuit Court over County Courts and Justices of the Peace (in the former of which two latter the Probate Courts are clearly included); and having overruled so much of the cases of *Ex parte Anthony* (5 *Ark., at p.* 363 *to* 364) and *Levy vs. Lychinski*, (3 *Eng.* 113,) as conflict with these views; and approved so much of the doctrine of the dissenting opinion in *Amour Hunt Ex parte* (5 *Eng.* 288) as sustains them, we have now occasion to adopt the residue of the doctrines of that opinion, and especially those relating to the contingency, on the happening of which this court will exercise those powers, sustained as these doctrines are by the Alabama decisions cited by us in the case of *Carnall vs. Crawford County.* And, in doing so, we must overrule the doctrine of *Webb & Estell vs. Hanger & Winston*, (1 *Ark.* 122,) and of the cases based upon it, where the doctrine is laid down in substance that a party aggrieved by the decision of a County, Probate, or Justice's Court may apply directly to this court without having first made application to a Circuit Court or showing any reason for not having done so.

And as the case before us presents a case for the application

of the doctrine that we have above adopted as the true constitutional doctrine, as to when our power of superintendency and control shall be exercised, we shall put our refusal of action in this case upon the ground that the petitioner has no right to such a remedy as he applies for here, until he has first sought it at the hands of the Circuit Court, or can show us that that court is incompetent to act in the premises, either in consequence of some inherent defect in the tribunal or of some incompetency of its incumbent.

Let the application be refused.

MARR EX PARTE.

Construing the provisions of the constitution together, it is manifest that it was not the intention of its framers that causes should be brought directly into this court from the County, Probate, and Justices' Courts, for supervision, except in cases where it might be absolutely necessary to prevent a failure of justice.

This court (as held in *Wm. J. Marr, ante*) will not award a writ of certiorari to bring up a judgment of the Probate Court for quashal, until the party aggrieved first applies to the Circuit Court for redress, or shows that Court to be incompetent to act in the premises, either in consequence of some inherent defect in the tribunal, or of incompetency of its incumbent.

The manner in which this court exercises its superintending control over inferior tribunals, discussed.

On Application for Certiorari, &c.

William J. Marr presented to this court, at the present term, a petition, stating that, at the July term, 1850, of the Probate Court of Randolph county, John H. Imboden and John P. Black, as administrators of Thomas O. Marr, deceased, recovered against pe-

titioner as administrator of John M. Marr, deceased, in said court, $833 27 debt, $135 damages and all costs, which was then and there ordered to be classed in the fourth class of claims, against the estate of said John M. Marr; and which judgment remained in full force, although the same, as petitioner contended, was a perfect nullity. A transcript of the proceedings and judgment referred to was exhibited.

Petitioner averred that the following errors existed with regard to and in said proceedings: 1st. That it did not appear that the petitioner rejected the claim; and, without such rejection, the Probate Court had no jurisdiction to pass on the claim in any manner whatever:

2. That it did not appear that such notice was given as the law requires to obtain jurisdiction on the person, and that the proceedings were null and void.

Petitioner, for the above and other reasons apparent in the proceedings, prayed for a writ of certorari, with supersedeas, to be addressed to the said Probate Court of *Randolph county*, commanding said court to certify up said proceedings to this court, and that said judgment and proceedings might be quashed and held for nought.

S. H. HEMPSTEAD, for Petitioner.

Mr. Justice SCOTT delivered the opinion of the Court.

A similar application was refused this party at the last term of this court (*William J. Marr Ex parte, ante,*) and this must share the same fate.

When the several provisions of the constitution are considered together, we think it manifest, it never was the intention of the framers of that instrument, that causes should be brought directly into this court from the county and probate courts, and from the courts of justice's of the peace, unless in cases where it might be absolutely necessary to prevent a failure of justice. Such an hypothesis would be utterly at war with a design to make the administration of justice cheap to the suitors, and equally

accessible to the rich and the poor, at places convenient to their homes. A design which, we think, was no less prominently contemplated by the framers of the constitution than manifestly developed in the distribution of the judicial powers among the several courts, and in fixing the limits of their territorial jurisdiction. And the various subsequent enactments of the Legislature making ample and convenient provisions for appeals from these several inferior courts to the Circuit Courts, are no less the reflex of this beneficent spirit of the constitution than a vindication of the wisdom of the purposes contemplated by its framers in this connexion.

Some of the mischiefs that must otherwise ensue, were foreseen by this court, and thus graphically alluded to in the case of *Frail Ex parte*, (3 *Ark.* 564,) decided soon after the organization of this court, when expressing the opinion "that it was never designed either by the framers of the constitution or by the Legislature, that this court should be oppressed with questions of law which might arise before every justice of the peace or corporation court, by allowing them to be brought up direct on writs of error." "The man of moderate means, the diffident suitor, and the lover of quiet will yield to the presumptuous and overbearing, and the rights of the poor will frequently be crushed by his more wealthy opponent. The spirit of litigation would be engendered, strengthened and diffused, and the usefulness of this court, in a great measure, destroyed by crowding its docket with cases, in many instances, without a shadow of law or justice to sustain them, to the annoyance of meritorious litigants and the exclusion of its legitimate business."

And in presenting the grounds of their opinion that the applicant in that case was not entitled to bring his cause directly before the Supreme Court from the corporation court of Little Rock, because, by law an appeal was provided first to the Circuit Court, from which a writ of error would lie to this court, the court further remarked: "In examining the various provisions of the constitution, and the several laws defining the powers and duties of the different tribunals, it will be found that competent

means are provided, by which all private rights may be pursued and private injuries redressed, and that the utmost harmony pervades our whole system of jurisprudence. There is no class of cases unprovided for; on the contrary, the laws are adapted to every occasion that may arise—to every circumstance that may occur, and substantial justice may be speedily administered to all. If a party feels aggrieved by one tribunal, he may, if he avails himself of the facilities offered to him, step by step, and in regular gradation in general, ascend from the most inferior to the superior court, until at last he reaches the highest point of authority and law. By this means, individual rights are secured, the errors of the one court rectified by the other, and the whole judicial system preserved entire and unbroken."

Nevertheless, both before and since the determination of the case just cited, this court has adjudicated numerous cases brought here directly from the courts inferior to the Circuit Courts. The greater number of them, however, having been entertained upon the ground that although the Circuit Courts had ample capacity to afford complete relief, yet if the party aggrieved should prefer to resort at once to this tribunal, he had a right to his writ. A doctrine that was first announced in the case *Webb & Estell vs. Hanger & Winston*, (1 *Ark.* 122); which case, with those based upon it, we overruled at the last term of this court. Its annunciation, however, seems not to have been made without some hesitancy, as we infer from the accompanying remark of the court that, "In general, we would deem it more appropriate and regular for the application to be first made to the Circuit Court." Nor is it remarkable that there should have been hesitancy in view of the observations of the court already quoted, and the further remark, made in the case of *The State vs. Ashley et al.*, (1 *Ark. R.* 309,) when speaking of the organization, jurisdiction and powers of the several courts of this State, that they were "so ordered, arranged and distributed as to avoid all conflict of authority between them, and to constitute a regular gradation of power, each having a control and revising authority over such others as are inferior

to it, to produce a harmonious action between the several branches of the whole system."

Can it be true, under such a system as this, that a party is entitled to his remedial writ in the first instance in this court for a grievance in one of these inferior courts? It is true that this court has the most ample appellate powers, subject to legislative regulations and restrictions touching its exercise; and is also entrusted with a general superintending control over all inferior and other courts of law and equity; and is thus legally competent to afford complete remedy for any such grievance. But the Circuit Court is in general equally competent for such purpose, and will, in the large number of such cases, dispense justice at less expense and with more convenience to the parties and at less delay.

These courts, besides their extensive and undoubted civil and criminal and chancery original jurisdiction, are invested by the legislature with ample intermediate appellate jurisdiction; besides being entrusted under the constitution with a specific superintending control over the county and inferior courts and over justices of the peace in each county of their respective circuits. And being also presided in by learned jurists, elected by the people themselves, are, in their constitution and nature, eminently fitted to accomplish, as to the great mass of the transactions among men, all that it could have been expected that the judiciary should achieve.

The appellate power of this court is to be exercised under such regulations and restrictions as shall be, from time to time, prescribed by law. This is the substance of the constitutional provision. The Legislature has prescribed that "an appeal" shall be had from "any final judgment or decision of any Circuit Court in any civil case," and that "writs of error upon any final judgment or decision of any Circuit Court shall issue of course in all cases out of the Supreme Court;" and have made various other regulations touching these proceedings: and, besides these, have made numerous provisions by which appeals may be taken from the several inferior to the Circuit Courts. And by these means

secured for all such cases an ultimate revision by the appellate functions of this court.

Nor are these the only means, numerous and ample as they are, by which the regular appellate power of this court may be invoked for cases arising in these inferior courts. The powers of superintending control entrusted to the Circuit Courts may draw into these courts still additional causes, which, when finally adjudged and decided, will be prepared to come under revision here. Thus almost every conceivable case that can properly arise in any of our courts of original jurisdiction, may be brought up here for regular appellate revision by means of the legislative enactments. It is true that many of such would come up indirectly through an intermediate court; but surely no one would contend that it was not competent for the legislature so to provide, or that such were any the less "restrictions or regulations" touching the exercise of the appellate powers of this court.

The "restrictions and regulations" authorized by the constitution, are not such as this court may or may not approve, but are expressly "such as may, from time to time, be prescribed by law." And it would seem to be going a great way to say, in an ordinary case, and without the most grave and cogent reasons for such a course, that, after the Legislature had, under the express provisions of the constitution, made regulations and restrictions touching the exercise of the appellate powers of this court, that this court would not be governed by them, and would persist in being governed by common law regulations.

We cannot, therefore, but feel inhibited from such a course by what we conceive to be the manifest intention of the framers of the constitution, and by the spirit of that instrument, and by our course of legislation on the subject that has been responsive to both. And we do not think that any other view of our duty can be maintained on any ground of sound construction. Nor can we perceive that the proper exercise of our powers of general supertending control rests upon any different foundation in principle.

These, as we have elsewhere remarked in substance, place this court with regard to all other courts in this State, in the same po-

sition in this respect, that the court of King's Bench, in England, occupies in relation to the courts of that Kingdom, in giving it a superintending authority and control. In giving it the power to overlook and to govern, to stimulate, or to check and restrain all other courts: that the subordinate parts may be combined, and in some sense, consolidated by a concert of co-operation and harmony of action throughout the entire system, to the end that there shall be no failure of justice, either from the non-action, or from the excentric action of any of these courts, or from any accidental incapacity of any of them to administer justice. These are, therefore, to a great extent, undefinable and ultimate judicial powers entrusted to this court for the most grave and weighty purposes.

But although this court is possessed of these powers, for the purposes indicated, the Circuit Courts are also entrusted with like powers by the express provisions of the constitution, and like their intermediate appeallate powers, created by the Legislature in regulating the appellate powers of this court, may be brought to bear upon the operation of the inferior courts, in the large number of cases that can arise, at less expense and with more convenience to the parties and with less delay of justice.

And when this court, by its superintendency and control of the Circuit Courts, as well in reference to its ordinary duties as in reference to its duties of superintending, and control over the inferior courts, drives forward the whole machinery of the judicial system, we cannot perceive that it any the less exercises its proper functions, or in any degree falls short of its high duties, than when it would achieve the same, and by direct action upon the separate and subordinate parts of the system, while at the same time it is manifest to our minds that greater concert of co-operation, harmony of action, and efficiency of administration will be effected.

It is in the light of these views, in reference to what we conceive to be the true and sound construction of the constitution, as to our duties in this connection that we feel a like inhibition resting upon us to exercise these high powers, otherwise than

upon the Circuit Court, until after application for redress shall have been first made to that court, or its legal incapacity shown.

And besides the authority incident to and included in these two great functions—the one appellate, and the other to superintend and control all other courts, and prevent a failure of justice, we have no other powers, as we have elsewhere said.

In this case, there having been no showing made that any application has been made to the Circuit Court for redress or if its incapacity to act, the motion must be denied.

STATE BANK VS. BROWN.

A suit is commenced by the filing of the declaration, and the voluntary appearance of defendant, or the issuance of the writ—filing the declaration alone is not the commencement of an action.

It is no answer to a plea of limitation that plaintiff filed his declaration before the cause of action was barred, and instructed the clerk to issue a writ immediately, but the clerk did not do so until the limitation expired, as held in *State Bank vs. Carson et al.*, 5 *Eng.* 479.

Writ of Error to White Circuit Court.

DEBT, by the Bank of the State of Arkansas, against Harrison Brown, commenced in the White Circuit Court 24th of March, 1849, on a note due July 1st, 1844.

Brown pleaded that the cause of action did not accrue within three years, &c.

Plaintiffs replied that, on the 24th June, 1847, and within three years next after the cause of action accrued, she filed her petition in debt in the Independence Circuit Court thereon, and instructed the clerk to issue a writ immediately, and that the clerk,

on the 16th day of September, 1847, issued the writ, &c. That, on the 6th March, 1849, she suffered a non-suit therein, and on the 24th day of the same month, she commenced this suit.

Demurrer sustained to the replication, and final judgment for defendant.

The cause was determined below before Hon. WM. C. SCOTT, then Judge.

BEVENS, for the plaintiff.

BYERS & PATTERSON, contra, cited *State Bank vs. Carson & Frost*, 5 *Eng*. 479.

Mr. Justice SCOTT delivered the opinion of the Court.

The only questioned presented in this cause, was determined in the case of *The State Bank vs. Carson et al.*, (5 *Eng. R.* 479.) Let the judgment be affirmed.

COSSITT ET AL. VS. BISCOE.

The allowance and classification of a claim against an estate, in favor of a creditor, by the Probate Court, is not a ministerial but a judicial act, has the force and effectof a judgment, and the court has no power to set aside such classification after the lapse of the term at which it is made, and place the claim in a different class, on the application of other creditors.

Such second classification of the claim being void for want of power over the subject matter, no appeal could lie therefrom, but it should be quashed on certiorari from the Circuit Court.

Appeal from the Phillips Circuit Court.

The facts are stated in the opinion of the court.

W. H. RINGO, for the appellant.

WATKINS & CURRAN, contra. An allowance and classification of a claim by the Probate Court, have the force and effect of a judgment, (*Dooley et al. vs. Watkins*, 5 *Ark.* 705,) and the court has no power at a subsequent term to set aside such allowance and classification.

Mr. Justice SCOTT delivered the opinion of the Court.

It appears that the claim in question was allowed and classed by the Probate Court at the October term, 1843, and upon petition filed the 1st May, 1848, of certain creditors who complained that they were injured by this classification, the Probate Court made an order declaring it null and void and of no effect, and again allowing the claim and classing it in the fourth class instead of the third as originally classed. To this last order, Henry L. Biscoe, by leave of the Court filed a bill of exceptions and appealed to the Circuit Court, which, upon hearing, set aside the orders excepted to, and dismissed the petition upon which they were founded.

It is insisted, that, inasmuch as the substance of what was done upon the petition was but to change the classification of the claim from the third to the fourth class, that this was within the competent powers of the Probate Court, although the term of that court had long before expired at which the original allowance and classification had been made, and consequently that the Circuit Court erred in its action in the premises. And to sustain this position, it is first put upon the ground of an amendment, and then a distinction is sought to be drawn between an allowance and a classification; the latter being supposed to be but a ministerial act, although the former may be judicial.

As to the first of these two latter positions, it seems clear enough that the action of the Probate Court was not by way of amending its records to make them speak the truth, because there is no pretence at all that the claim in question was originally classed in the fourth class, but by clerical misprison was entered up as of the third, and therefore the case cited from 4 *Eng. R.* (*p.* 185) has no bearing.

And the argument used to sustain the second—that the statute imposed the duty of classification upon the executor or the administrator—proves equally that an allowance is also but a ministerial act, because the statute not only directs these representatives to class, but also to allow all such claims as they may be satisfied are just. *Dig.*, *p.* 128, *secs.* 87–8.

These duties, thus imposed, are manifestly, as we think, but to produce data for the subsequent final action of the Probate Court as to allowance and classification. And that this action is judicial and not ministerial, is plain enough when it is considered that it is in effect the "determination of a matter of right dependent upon matters of fact," which is of the essence of the exercise of judicial powers: (*Smith Com. on St. & Const. Law*, *p.* 504, *sec.* 351,) and that it was so contemplated by the legislature, is inferable from the provisions of the statute declaring the legal effect of an allowance to be that of a judgment. (*Dig.*, *p.* 125, *sec.* 101.) Accordingly, this court held in *Dooly et al. vs. Watkins*, (5 *Ark.* 705,) that the allowance and classification of a claim in the Probate Court has the force and effect of a judgment, and may be pleaded as a former recovery in bar of an action upon the same cause of action in the Circuit Court.

This doctrine being established, it follows that the action of the Probate Court, in the case before us, in May, 1848, although its legal effect, if it could be efficacious at all, would be but to change the classification, was not within its competent powers, but without them. Because, although the Probate Court is a superior court, it was *quoad* the allowance and classification of the claim not in the exercise of its general powers as a Court of Probate, but in the exercise of a limited jurisdiction conferred

by statute, which it exhausted in its original action upon the claim by then rendering what was, in legal effect, a final judgment upon the subject matter regularly submitted to its adjudication.

And to sustain any subsequent assumed and excessive jurisdiction over the same subject matter by the aid of the general powers of the Probate Court, would be not unlike sustaining by the powers of a court of general jurisdiction, whose judgments as such, were alien upon all the defendant's real estate in the county, a judgment of that same court rendered when but in the exercise of a limited statutory jurisdiction *in rem*, which judgment, although in terms it might be declared to be a lien on all the real estate in the county, could not in legal effect be made to extend beyond a lien on the real estate proceeded for, because that was the extent of the special statutory jurisdiction *in rem* conferred upon and then in process of exercise by that court of general jurisdiction. (See the case of *Boswell's lessee vs. Otis et al.*, (which is based upon this distinction,) reported in 9 *Howard* (*U.S.*) *R.* 336, and is cited and commented upon in the dissenting opinion in *Borden et al. vs. The State, use, &c.*, (6 *Eng. R.* 555–7.)

And that this view is correct is sustained by the consideration that the doctrine is settled by repeated adjudications in this court, that a proceeding in the Probate Court for the allowance of a claim, is a statutory proceeding that, in its result, is precisely equivalent to a judgment in an ordinary action in the Circuit Court, in favor of the claimant on that same claim.

The court below, then, did not err in regarding the order in question as a nullity, but it, nevertheless, erred in setting it aside upon the appeal, because there was nothing to appeal from. And although an appeal will lay from the Probate to the Circuit Court on any final order of allowance and classification under the general provisions of the statute, approved the 4th Jan'y, 1849, (*Pamph. Acts of* 1849, *p* 59, *sec.* 1,) at the instance of any one interested, who will apply to the Probate Court, and be made a party to such orders, and then appeal under the provisions of

the statute, still, in this case, there was nothing to appeal from. For this error, then, the judgment of the Circuit Court must be reversed, and the cause remanded with instructions to dismiss the appeal. The remedy of any party interested would be found in an original application to the Circuit Court for a certiorari to bring up and quash the order in question.

FORD VS. CLARK.

By moving for a new trial, a party waives previous exceptions, unless made grounds of the motion, and preserved by bill of exceptions to the decision of the court overruling the motion.

Appeal from the Philips Circuit Court.

DEBT, by Clark vs. Ford, on two notes executed by Applegate & Ford, in 1837, due in that year and 1838. Suit was brought in 1846.

After demurrer overruled, six pleas were filed:

1st. *Nil debet*, on which issue was taken.

2d. Limitation of three years: Replication, continued non-residence: Rejoinder, that, in 1838, plaintiff came into Arkansas: Surejoinder denying that fact and issue.

3d. That before suit brought, Clark assigned, endorsed, and delivered the notes to Boyd, Heard & Megs, who still hold the legal interest. Replication denying the whole.

4th. Assignment, &c., *after* suit brought to ——.

5th. That when suit brought, plaintiff had not the legal interest in the notes.

6th. Assignment and delivery on the —— day —— to ——.

Demurrers to 4th, 5th and 6th pleas sustained.

A petition for discovery was filed setting out the pleadings, and averring that the Plaintiff endorsed one note in blank, thereby assigning to bearer; and endorsed the other to the persons named in the 3d plea, or to some other persons whose names have been rendered illegible by erasure, and delivered the note to them; and that these facts, and that of the return of the plaintiff into the State could only be proved by obtaining discovery from himself: and so prayed discovery as to these facts.

To this petition, the plaintiff filed an answer and demurrer. By the answer, he admitted that, long before the institution of the suit, he *passed* the note alleged to have been endorsed to Boyd, Heard & Bryan, in payment of a debt due them by him; but, after its maturity and non-payment, it was returned to him, and he paid them the amount of it: and that they had no legal interest in it when the suit was commenced. It denies that plaintiff ever was in Arkansas.

The demurrer extended to so much of the petition as enquired as to the other note; and as to the assigning, setting over and delivering, and afterwards erasing the endorsement on the note *passed* to Boyd, Heard & Bryan, on the ground that the matters so sought to be discovered were not material to the issue.

Exceptions were taken to the answer for the non-discovery of of the matters covered by the demurrer.

The court sustained the demurrer to the petition—sustained the exceptions so far as they related to the issue on the 3d plea, and overruled them as to the residue.

An amended answer was then filed denying any assignment or delivery to Boyd, Heard & *Megs;* and the defendant filed a 7th plea of assignment, &c., to Boyd, Heard & *Bryan*, which was stricken from the files.

The case was then tried by a jury: after the evidence was heard, instructions were asked by both parties—and the *record* shows that the court refused to allow the defendant to produce authorities or to argue the questions of law arising on the instructions.

But, after giving some instructions and refusing others, the court refused to allow the defendant's counsel to argue the *facts* to the jury.

Verdict for plaintiff, motion for new trial overruled, and exceptions.

PIKE, for the appellant.

F. W. & P. TRAPNALL and W. H. & A. H. RINGO, contra.

Mr. Justice WALKER delivered the opinion of the Court.

It becomes unnecessary for us to examine into the merits of the several causes of error alleged to have been committed prior to the motion for a new trial; because the appellant, by his motion for a new trial, waived his right to insist upon them, and failed to preserve them in his bill of exceptions to the opinion of the court in overruling such motion.

Under this state of case, as heretofore repeatedly decided, our investigation is limited to the inquiry as to whether the evidence sustains the verdict of the jury. Of this, there can be no doubt. The note sued on, and the answer to the petition for discovery, are fully sufficient for that purpose.

Let the judgment of Phillips Circuit Court be, in all things, affirmed.

ALLIS EX PARTE.

The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted, but does not create that cause.

The intention of the framers of the constitution is to be derived by considering the subject matter, and the language, in connection with known political truths and

established common law institutions obviously in the minds eye of these law-givers; otherwise, provisions, that in this light, might be of the most clear and exact conception, might justly present the most ample ground for discussion, and legitimate foundation for contrariety of opinion, if considered by the most enlightened minds.

Nor can any single portion of the constitution be safely considered, even in this manner, to determine its functions, otherwise than in connexion with every other part, because all these were designed to constitute but one practical harmonious whole, not only when in united, but when in separate, action. Thus, when determining upon the nature and limits of the judicial functions, those of the executive and legislative departments should be also considered, not only to guard against conflict from the extention of either beyond its proper confines; but also that the aggregate of the three shall be made to cover the entire field of the government designed to be set on foot.

And when, in the light of known political truths, it might be distinctly seen that it was designed that each of these departments should operate in different portions of the field, and in entire and perfect harmony with each other, no power which was expressly delegated to any one of them could ever be derived to another by implication, even upon any basis of supposed necessity, much less of convenience.

Although this rule may not apply so strongly to the parceling out of the whole powers of a single department among different functionaries, as it does to the parceling out of the whole powers of government among its three departments, simply because the division of power, as a known political truth, is of more importance to the citizen in the one case than in the other; yet it has a just application in ratio corresponding to this descending scale of importance.

Hence it cannot be said that this rule has no application at all to the parceling out of the powers of the judicial department, because these powers, no less than those of the executive and legislative, have relation, not only to private rights, and private security, but to civil and political liberty, and to public safety, and were designed no less to be exerted in reference to known political and legal truths. Hence, when construction is necessary, as is warranted, judicial powers should be construed in like reference to such legal truths as were in the minds eye of the framers of the constitution relative to them.

Among the general politico-legal truths manifestly in the view of the framers of the constitution, was that justice can be best administered in a system embracing numerous courts, among which the judicial powers should be so parceled out that every citizen should have convenient access to justice, and every dissatisfied suitor a reasonable opportunity for a revisal of his case by appellate power.

The citizen's right to appeal may be regulated by law, and it may be enlarged, as has been done, by provisions of law for intermediate appeals to the circuit courts, but it cannot be cut off by sending him in the first place to this court; nor can he be authorized by an act of the legislature to come here for justice in the first instance.

In determining whether or not any one court in our system can rightfully exercise a given power, reference must be had not only to all the powers of such court, but to those of all the other courts as one system, framed within a department of the

government whose entire powers have limitations, qualifications, and restrictions placed upon them by the Bill of Rights. Nor is this all: we must, at the same time, let the lights from without shine in.

It is true that, when in search of a particular power, if the meaning of the framers of the constitution is evident, and is expressed in clear and precise terms, and leads to no absurd conclusion, there is no warrant in the law to interpret what has no need of interpretation; but, even waiving all absurd conclusions, the expression that this court "shall have power to issue writs, &c., and hear and determine the same," does not, in *express* terms, grant to this court jurisdiction of the causes to which the writs may be made to apply, but leaves that grant of jurisdiction as a principal judicial power to be *implied* from the language used. [Because writs are but the emination from judicial power—its mere instrument: and to hear and determine a writ is but to exert the function of a judicial power—its faculty. Therefore, although the grant of the power to exert the function may imply a grant to the functionary of the principal power itself whose function he is to exert: it does not, in express terms, grant that power, but leaves it to be implied.

Nor is there any necessity to derive the jurisdiction in question by such an implication; nor is it the necessary result of these expressions, because two great principal powers of jurisdiction are, in express terms, granted to this court, to wit: appellate powers purely, and general powers of superintendency and control—to which all that is granted in the language of the constitution in question, is but appropriate adjuncts.

And when it is considered that the result of deriving the jurisdiction in question by implication from the language in question, is to grant this court an almost illimitable original jurisdiction co-extensive with the State—is to desecrate the right of the dissatisfied suitor to a revision of his cause—is to exclude the State from all benefit of revisal in matters of the greatest moment to the people—is to thwart essentially the dispensation of justice in localities convenient to the residence of the parties, and that, by the express provisions of the constitution, the circuit courts have ample jurisdiction to hear and determine all writs applicable to causes of that character, the derivation of the jurisdiction in question for this court, is not only cogently but absolutely inhibited.

It is, therefore, held that this court has no original jurisdiction other than such as may be necessary to exercise a general superintendency and control over all the courts of this State, and as part and parcel of those powers of control.

In the light of these views, this court refuses to grant a *mandamus* to compel the Inspectors of the Penitentiary to certify to the Auditor the quarterly compensation of the Contractor for building a wall around the Penitentiary, &c., the Circuit Court of Pulaski county being competent to hear and determine the application.

Application for Mandamus.

Horace B. Allis presented a petition to this court, at the pre-

sent term, representing that, under and by virtue of the provisions of the act of the General Assembly, entitled "An act to provide for building a safe and durable wall around the Penitentiary, work shops, keeper's house, and for the improvement of the Penitentiary system," approved January 11, 1851, the Secretary of State, Auditor, and Treasurer, who were, by said act, constituted the Board of Inspectors of said Penitentiary, in behalf of the State, made and entered into a contract with petitioner, on the 5th April, 1851, whereby petitioner undertook and obligated himself to build such wall, and do all such work as was contemplated by said act, within ten years from the date of such contract; and, in the meantime, to manage and control said Penitentiary, furnish guards for the same, and feed, clothe and take care of the convicts confined therein, during the period of ten years; for which the State agreed to pay him at the rate of $6000 per annum during such period of ten years, to be paid quarter yearly out of the Treasury, upon the warrant of the Auditor, and such warrant to be issued upon the certificate of said Board of Inspectors from time to time, and that petitioner should employ such convicts and receive the avails of their labor during such period. Which contract was entered into according to plans and specifications, &c., and petitioner had entered into bond, with approved security, conditioned, &c., according to the provisions of said act.

Petitioner then represented the ruinous condition in which he found the Penitentiary buildings when he took charge of them under his contract, and what progress he had made in the work he had undertaken, &c.

He then stated, that, at the expiration of the quarter ending on the 30th day of June, 1851, he called upon said Board of Inspectors, and requested them to certify his account to the Auditor for the amount of compensation then due under his contract, &c.; but said Inspectors refused to do so, under the pretence that he was not complying with his contract, &c., which petitioner undertook to show was unjust to him, by a detailed representation of what materials he had provided, money expended, and work

performed by him during the quarter, and prayed an alternative mandamus to the Inspectors to compel them to certify his first quarterly compensation to the Auditor.

WATKINS & CURRAN, for petitioner.

Mr. Justice SCOTT delivered the opinion of the Court.

This application is for the exercise of original jurisdiction. The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted, but does not create that cause. (*Marbury vs. Madison*, 1 *Cranch* 137.) But this is for relief here primarily, no application having been made previously to any other court of justice. And necessarily involves the question whether or not this court has jurisdiction—in other words, rightful authority and power to entertain the application and accord the relief asked for. A question which, until some two years ago, was considered settled, but which we have since considered it to be our duty to reconsider.

If this court has rightful jurisdiction in cases like this, it must be found expressed in the constitution or derived by a just and necessary implication from the expressions used in that instrument. Because it was by that instrument that the State government was instituted, its departments created and the powers to be exercised by each defined and distributed.

Many of the regulations established by this instrument are so distinctly and clearly expressed that there is no place for doubt, nor necessity, nor warrant for construction to derive the true intention of its framers, when the subject matter and the language used are considered in connexion with known political truths or established common law institutions then obviously in the minds eye of these law-givers. As that the powers of the government should be divided into three distinct departments, when considered in connexion with the known political truth that this was necessary, no less for the security of public liberty than private rights —a truth that had been so proclaimed and enforced by some of the most wise and eminent men of this and of other countries;

and was besides, then, in the full tide of successful experiment in all the sister States as well as in the federal government. So, also, of the regulation that the judicial power of the State should be vested in certain specified courts, when considered in connexion with the then existing common law institutions for the dispensation of justice.

And there are many other regulations that, by like means, are of the most clear and exact conception; and yet all of them perhaps might justly present the most ample ground for discussion and legitimate foundation for contrariety of opinion, if considered even by the most enlightened minds unconnected with each other, and with the political truths and legal ideas, which we can but know from signs natural and probable were in the minds eye of their authors when they put them forth.

But although this is the characteristic of these regulations, there are others upon which the light from without does not shine so strong and clear; and yet in no case does it entirely withhold its aid, and leave us to be guided alone by that which is emitted from within. Nor is it, in any case, safe to shut our eyes to either, when we regard any portion of the constitution, or to suffer common sense to be in any degree enveigled by the mysteries of learning. Because constitutions "are instruments of a practical nature, founded upon the common business of human life, adapted to common wants, designed for common use, and intended to be fitted to common understandings. The people make them; the people adopt them; the people must be supposed to read them with the help of common sense and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." (*Story on Const.*) Nor can any single part be safely regarded even in this manner when determining its functions, otherwise than in connection with every other part; because all these were designed to constitute but one practical and harmonious whole, not only when united, but when in separate action.

Thus, when determining upon the nature and limits of the judicial functions, those of the Executive and the Legislative Departments should be also considered; not only to guard against

conflict from the extension of either beyond its proper confines; but also that the aggregate of the three shall be made to cover the whole field of the government designed to be set on foot. And when in these lights it would be seen distinctly that it was designed that each of these departments should operate in different portions of this field and in entire and perfect harmony with each other, no power which was expressly delegated to any one of them could ever be derived to another by implication, even upon any basis of supposed necessity, much less of convenience. Because, whatever was expressly committed to the judiciary, for instance, must be considered as inhibited to the other two departments upon the most obvious principles of sound construction, although there might be no express words of inhibition, and might be, in the construction of one of the other departments, expressions used that would seem to be to the contrary.

And although this rule may not strongly apply to the parceling out of the whole powers of a single department among different functionaries, as it does to the parceling out of the whole powers of government among its three departments, simply, because the division of power in the one case is of more importance to the citizen than in the other, still it must have a just application in a ratio parallel to this descending scale of importance. Thus, although it might not apply with so much force to the parceling out of the whole legislative functions among the Senate, the House of Representatives, and the Governor, as it would to the division of the whole powers of government among the three departments, yet, in the nature of things, it cannot be without some just application. Because, although it may be a political truth, that it is of more importance to public liberty and security and to the rights of the citizen, that the powers of the government should be divided among three distinct departnents, than that the powers of any one of them should be exerted through different functionaries in concert of co-operation and mutuality of check, yet the one is no less a political truth than the other, although of different grade of importance. And they

were manifestly so regarded, and their benefits designed to be secured by the framers of the constitution.

Nor can it be said that these considerations have no just application to the parceling out of the powers of the judicial department, because these, no less than those of the Executive and Legislative, have relation not only to private rights and security, but to civil and political liberty and public safety, and were designed no less to be exerted in reference to known political and legal truths.

Then the line of demarcation marked out by the constitution in the parceling out of the powers of the judicial department no less deserve our regard than those marked out for the different parts of the legislative department. And when construction is necessary, or is warranted, these powers should be construed in like reference to the legal truths that were in the minds eye of the framers of the constitution, as should be had to a like situated political truth when construing any given legislative power.

Among the general politico-legal truths that were manifestly in the minds eye of the framers of the constitution was that justice can be best administered in a system embracing numerous courts, among which the judicial powers should be so parceled out that every citizen should have convenient access to justice and every dissatisfied suitor a reasonable opportunity for a revisal of his case by appellate power. This is shown, 1st: By the various courts established and the additional ones provided for. Had it been regarded as a matter of slight importance, the convention might have simply ordained that the judicial power shold be vested in such courts as should be from time to time established by the Legislature, and thus have left the whole subject to that department. 2d: It is shown by the provisions fixing all, except the Supreme Court and the separate Chancery Courts provided for, within the limits of the respective counties, and those of Justices of the Peace within their several townships. 3d: By the jurisdiction severally conferred upon them; and 4th: By the affirmative provision that the appellate power of the Supreme Court "shall be co-extensive with the State," and that

other provisions connected with it, which in effect incapacitates this Court from being invested by the Legislature with any original jurisdiction.

Had the convenient access of suitors to the courts of justice, and the securing the advantages of revisal to every dissatisfied party been less prominent objects with the convention, these also might have been left to the legislature. But, not only were these subjects not left to the legislative discretion, but as to that of revisal by appellate power, it was so fixed by the constitution in the provision that the "Supreme Court, except in cases otherwise directed by this constitution, shall have appellate jurisdiction only," that it is rendered impossible for the legislature to defeat a party's right of revisal by any act they might pass conferring original jurisdiction upon this Court in any case. The citizen's right to appeal may be regulated by law, and it may be enlarged, as has been done by provisions of law for intermediate appeals to the Circuit Courts, but it cannot be cut off by sending him in the first place to this Court; nor can he be authorized by the Legislature to come here for justice in the first instance.

No single object, then, of all those in view in the establishment of the several Courts and the parceling out of the judicial power among them, was of more manifest prominence than that of securing for the dissatisfied party a reasonable opportunity for a revision of his case; and none seems to have been more emphatically provided for unless it should turn out in the sequel that there are other constitutional provisions which militate against those in its favor. And whether or not there are any such, we will now proceed to examine, keeping in view the principle of interpretation we have already discussed.

The first section of the 7th article of the constitution expressly provides that the judicial power of the State shall be vested in certain courts of justice. And the succeeding sections parcel out this power among the several courts, and by the provisions for the creation of circuits, election of judges and other appropriate regulations, provided to a great extent for the harmonious and efficient exercise of those powers, leaving but little to be

done by the Legislature to make the system practically useful. And yet leaving a large margin for finishing touches by that department, not only in the multiplication of tribunals, but in entrusting additional jurisdiction to those already established, within the pale of their constitutional capacity to receive and exercise it. In determining whether or not any one of these courts can rightfully exercise a given power, reference must not only be had to all the powers of such court, but to those of all the other courts, as one system formed within a department of the government, whose entire powers have limitations, qualifications and restrictions placed upon them by the bill of rights. Nor, is this all, for we must, at the same time, as we have seen, let the lights from without shine in.

Now we have already seen, in the views that we have taken, that convenient justice and revision for the dissatisfied party are not only based upon known truths, practiced upon to a greater or less extent in every enlightened government, but that these objects were prominently contemplated by the framers of our system; but whether in subordination to extensive powers of original jurisdiction in this Court, is now to be determined. We have, in the outset, remarked that if these powers exist here, it must either be so found expressed in the constitution, or they must be derived from a just and necessary implication from the expressions used. Because, as we have seen, it is not possible for the Legislature to invest this court with such powers.

First, then, are these powers granted to this court in express terms?

It has never been pretended that they were granted as independent judicial powers, otherwise than by the provision that this court "shall have power to issue writs of error and supersedeas, certiorari and habeas corpus, Mandamus and Quo Warranto, and other remedial writs, and to hear and determine the same." Now, in the first place, we will limit our inquiry to the expressions used, without going into the reason, spirit, and design of the framers of the constitution; because, if the meaning is evident, and expressed in clear and precise terms, and leads to no

absurd conclusion, we would have no warrant in the law to interpret what has no need of interpretation. Then, do the expressions used give to this court, in express terms, any jurisdiction of the causes to which the respective writs may be made to apply? We think not. Because the power to issue a writ coupled with a power to hear and determine the same, is but the power (in the use of this means) to exercise an incidental power, coupled with the power to exercise the functions of a principal power, the grant of which as a principal power is thereby implied, but not in express terms granted. Writs are but the emanations from judicial power—its mere instrument—the incident of a principal —the effect of a cause. And to hear and determine a writ is but to exert the functions of judicial power—its faculty. Therefore, although the grant of the power to exert the functions may imply the grant to the functionary of the principal power itself whose functions he is to exert, it does not in express terms grant that principal power, but leaves it to be implied.

Then we think it clear that these powers are not granted in exprees terms, and if granted at all, the grant must be derived from a just and necessary implication from the expression used.

2d: Then are they granted by necessary implication?

And still limiting our inquiry to the expressions used, as before, we will proceed to examine this. And we at once concede that, if there is not an express grant to this Court of principal powers, to which all that is granted by the expressions we have above extracted may not be appropriately adjunct, that then, such implication would be unopposed, otherwise than by the absurd conclusion to which it would lead when considered in connection with some of the more prominent features of the judicial system which, from signs, natural and probable, we think it manifest was designed to be set on foot by the framers of the constitution.

Is there, then, in the constitution a grant in express terms to this Court of such principal powers? A reference to that instrument will determine. And we there find the following provisions in the same section from which we have made the above extract and immediately preceding it, to wit: "The Supreme Court, ex-

cept in cases otherwise directed by this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions and regulations as may, from time to time, be prescribed by law: It shall have a general superintending control over all inferior and other courts of law and equity." By these provisions, as we have elsewhere said, "This Court is invested with two great powers: the one appellate purely, and the other a general power of superintendency and control over all inferior and other jurisdictions. The one designed for the correction of errors in the proceedings and judgments of the Subordinate Courts, the other to preserve harmony and insure efficiency in the whole system by forcing each subordinate tribunal to keep within its sphere of action and to prevent a failure of justice in extreme cases from any inherent defect in the subordinate courts or incapacity of their incumbents. And for these ends this Court is necessarily invested with the residuum of judicial power not invested in the other courts by the constitution or reserved within the discretion, express or implied of the Legislature, and as to the latter entrusted with their custody until withdrawn by the exercise of this discretion. (*Amor Hunt Ex parte*, 5 *Eng.*, *p.* 291, since approved and adopted.)

And as to the nature and character of these powers of general superintendency and control, we have held in the case of *Carnall v. Crawford County*, (6 *Eng.* 605,) and elsewhere, that they embrace powers both of original and of revisory jurisdiction, and are to be exerted by means of process affecting and running to cases and parties litigant as well as to courts and officers. But, as various and as comprehensive as these powers are, that there is an implied and constitutional inhibition upon the exercise of any of them by this court, until relief has been first sought in the Circuit Court, or it be shown that all subordinate courts are incompetent to grant the relief, either from accidental causes or inherent defects, and that otherwise there would be a failure of justice. And especially that these powers shall not, except in extreme cases, be so exerted as to conflict with and in effect su-

persede the ordinary appellate jurisdiction of this court as regulated by law. (*Carnall v. Crawford county*, 6 *Eng.* 605.)

These doctrines, as to the nature and character of the powers of general superintendency and control and of their use and design, and of the constitutional inhibition upon their exercise, are well settled doctrines in the Supreme Court of Alabama. And were also recognized and adopted by the new Supreme Court of Florida, at the January term, 1851, in the case of *Ex parte Robert W. White*, (4 *Florida R.* 165,) on an application for mandamus.

It thus appears, by this reference to the constitution, that there is an express grant to this court of two principal powers, to which all that is in express terms granted relative to the specified and other remedial writs, is but an appropriate adjunct. And, therefore, the only ground is removed upon which independent original jurisdiction in this court can be derived by necessary implication from the expressions in the grant of the power to hear and determine the writs. And hence, no such jurisdiction can now be derived by any implication that can have any pretence of necessity for its basis.

Seeing, then, that the powers in question cannot be conferred by the legislature; and have not been granted by the constitution in express terms; and cannot be derived from the expressions used in that instrument in relation to them, upon any basis of necessary implication, we have next to enquire whether or not they can be derived by any implication based upon any sound and just consideration of other provisions touching the judiciary department; not only as concerning its own harmony and efficiency, but also as relating to its harmonious connection with the other two departments. Because we have seen that, when determining a question like that before us, reference must not only be had to the expressions in the constitution seeming to relate directly to the issue, but also to those which relate to the powers of all the courts as one system formed within one department of an entire government, whose whole powers have limitations fixed upon them by the bill of rights. And that, in doing so, we should permit every legitimate light to shine in from without. We are, then,

necessarily lead to a more enlarged and substantial view of the question involved, which we shall endeavor to take with great brevity.

There can be no doubt but that the people designed to set on foot a State Government, as the organ of their own sovereign powers, which they retained, whose action should accomplish the greatest amount of benefits to the greatest number of citizens, and that should manifest these benefits no less in the security of the rights of the individual citizen than in the achievement of the public safety. And there can be as little doubt but that the constitution was framed in this spirit, not only in its greatest outline, but in all its more minute provisions. Those touching the judiciary department relating to the number, location, and capacity of the courts of justice and to the security of appellate revision, and for an ultimate superintending control inhibited from action otherwise than in extreme cases, strikingly manifest this spirit. It cannot, then, be disregarded, when seeking the derivation of judicial powers by implication.

If the powers in question can be derived from any implications other than those founded upon necessity, such must still rest upon the granted power to issue and determine the writs, because there can be no pretence of any other basis. And, if so, the consequence is inevitable that there would be but little limit to this jurisdiction. The exclusive original jurisdiction of all crimes amounting to felony at common law fixed in the Circuit Courts, and the exclusive original jurisdiction relating to certain contracts fixed in justices' courts, would be carried out, but beyond this the jurisdiction in question would have but few limitations.

This view of the subject did not fail strikingly to arrest the attention of this court, when the question was mooted in the case of *The State vs. Ashley et al*, (1 *Ark.*, *at page* 310,) and elicited the following observation by the court in reference more particularly to the "other remedial writs, "It would produce a direct conflict of authority between the several judicial tribunals, and involve them in the utmost confusion. It would destroy every vestige of harmony in the whole system, and virtually repeal every other

grant of judicial power made by the constitution. It would draw to this forum original jurisdiction co-extensive with the State of every civil authority: for it must be observed that in respect to the sum or amount involved, there is no restriction whatever imposed by the constitution in any case in which this court can exercise original jurisdiction. * * * These consequences are clearly not within the object and intention of the convention, but in opposition to both."

The court, however, seeming to regard these considerations as alone applicable to the "other remedial writs" and not as bearing upon those that are specified, to avoid the difficulties they saw, assumed the position (but without going at large into the reasons for doing so, or presenting the arguments by which it is to be sustained) that the power to issue the specified writs and to hear and determine the same, were powers of independent original jurisdiction, but that the power to issue the other remedial writs and to hear and determine the same were but powers adjunct to the appellate power of this Court and to its powers of superintendency and control, both of which, they seem to say, are "expressly granted by the constitution" (*Ib. p.* 311,) but which upon more mature deliberation they subsequently held in *Anthony Ex parte* (5 *Ark.*) to be powers springing from the power to issue and hear and determine the writs. So brief are the observations of the court touching the ground upon which they rest the distinction between the specified and the other remedial writs that we are not sure that we fully comprehend their proper force and solidity. In every aspect, however, in which we have been able to view them, they seem to be abnoxious to the objection, that the difficulty that was removed by one implication was the mere creation of another that was not itself based upon necessity; like mounting one presumption of law upon another and not presuming upon facts. Because the court first implied the grant of independent original jurisdiction from language that did not necessarily import it (as we have seen,) when all the language used in that connection is considered together (like considering together all the confessions of a party, both for and against him

—or like determining the character of a parol contract by considering together all the colloquy between the parties.) And thus created the necessity for restraining the generality of that language, which was, in itself, of emphatic and clear import, to prevent its leading into flat absurdity. Nor is this all: The very basis of the ground on which the distinction between the writs is made to rest is but an implication, if not one based upon another.

Nor are the authorities entirely silent, although not precisely in point, of a distinction between the specified and the other remedial writs. Expressions not dissimilar in the constitutions of Alabama and of the State of Florida, have been passed upon by their respective courts, and the distinction disallowed. In the Alabama case, the court say "the proviso is but an entire sentence, and the writs designated are named only as example or rather to illustrate the meaning intended more clearly than could be done by the employment of general words." The "other remedial and original writs," means writs of a kindred character or to effect a kindred object." (*Ex parte, Simington*, 9 *Porter* 387.) The Florida case is to the same purport. *Ex parte Robert White*, 4 *Florida R.* 171.

But even if this almost illimitable jurisdiction were restricted to the specified writs, as it has heretofore been, the evils depicted by the court in the extract of its opinion, which we have above made, would not be removed but only diminished. And, besides this, other objections obtain that were not then alluded to, such as the desecration of the dissatisfied party's right of revisal, and of the benefits which arise from the dispensation of justice in localities convenient to the residence of the parties. Both of which, we have seen, were favorite objects with the framers of the constitution. And it is no answer to the objection that all the more important rights of the State would be finally adjudicated without the benefit of revisal, to say that the same court that would otherwise revise, would, in the first instance, pass upon these interests finally, because the advantages of revisal are otherwise manifold and obvious.

And besides these objections, there are express provisions of

the constitution by which the Circuit Courts have ample jurisdiction of all these writs; and although this of itself is no invincible inhibition upon the exercise of a concurrent jurisdiction by this Court, if such was in express terms vested here, as would be the case in reference to the three departments of the government upon a question of power; nevertheless there is somewhat of reason in giving the principle of this rule some bearing, in concurrency with other considerations, when a judicial power that has been expressly parceled out to one court by the framers of the constitution is sought to be derived for another by implication merely. Especially when the latter court is expressly inhibited from receiving such a power otherwise than by the constitution itself, at the same time that other courts in the system are left with capacity to receive various additional powers from the hands of the Legislature.

The result, then, of this last enquiry is, that, so far from finding any sound and just considerations in other provisions of the constitution touching the judicial department on which to base any implications whatsoever of the powers in question, we have found abundant ground for the contrary conclusion.

Assuming, then, as we feel fully authorized to do, that this court has no original jurisdiction other than such as may be necessary to exercise a general superintendency and control over all the courts and as part and parcel of those powers of control, the result is that every provision of the constitution touching this department is effective and in harmony, and each with the other and with all is bound together in one indissoluble bond of union and amity.

The result of these views is, that the application for the mandamus must be refused.

BARKELOO'S HEIRS VS. MAYOR AND ALDERMEN OF LITTLE ROCK.

This court refuses to supersede an order of the Mayor and Aldermen of Little Rock, directing lots to be sold to pay the expense of paving the side-walk in front of them, on the ground that there is no showing that the Circuit Court of Pulaski county was incompetent to administer justice in the premises.

On Application for Supersedeas.

The minor heirs of Barkeloo, by their guardian, applied to this court to supersede an order made by the Mayor and Aldermen of Little Rock, to sell certain lots in the city, belonging to them, to pay the expense of paving the side-walk in front of the lots, under an ordinance of the city. The court ordered a *certiorari* to bring up the proceedings, with a temporary supersedeas, to stay the sale of the lots until the application could be determined.

The petitioners asked the supersedeas on the grounds that the Mayor and Aldermen, acting in their political or legislative capacity, had condemned their property to be sold on account of an alleged failure of theirs to comply with an ordinance of the city; and that inasmuch as they could not be deprived of their property, under the Bill of Rights, except by the judgment and under the process of a court of competent jurisdiction, the order in question for the sale of the lots was null and void. This court declining to determine the case on its merits, it is not necessary to state the facts in detail.

E. H. ENGLISH, for the petitioner.

HEMPSTEAD, contra.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

This was an application for a writ of certiorari and supersedeas, which has heretofore been granted by this court, and the record and proceedings in the case returned in obedience to the mandate of the writ. The motion now presented is to quash the proceedings referred to in the petition, and to issue a perpetual supersedeas. This motion must be denied: the writ itself having been improvidently issued, and there being no showing that the Circuit Court was incompetent to administer justice in the premises. The motion is, therefore, denied, and the petition dismissed. See *Carnall vs. Crawford County*, (6 *Eng*. 617,) and *Allis vs. Commissioners of Penitentiary*, decided at the present term of this court.

STATE BANK VS. WHITING ET AL.

In Error, pleas in abatement must be filed within three days after assignment of errors, (*State Bank vs. Ruddell et al.*, 5 *Eng*. 123,) or if errors are assigned before a defendant is served with process, he must plead matter in abatement within the first three days of the term to which he is served with process.

The court below erroneously dismissed this case under a mistaken opinion that a loose paper, in the form of declaration, which had, without authority, "straggled" into the case, was the commencement of a new suit.

Writ of Error to Arkansas Circuit Court.

This was an action of debt, by the Bank of the State of Arkansas, against James M. Harris, Elijah Whiting, John Malpass, and Dudley G. W. Leavitt, determined in the Arkansas Circuit Court, at the April term, 1849, before the Hon. JOSIAH GOULD, Judge.

All the defendants were served with process except Harris, as to whom several writs were returned *non est*. The cause was finally dismissed under the circumstances stated in the opinion of this court, and the plaintiff excepted and brought error.

The writ of error was issued as against all of the defendants in the suit below, and made returnable to the July term, 1849, of this court.

On the 3d day of July, 1849, the plaintiff filed an assignment of errors. On the 19th of the same month, she filed a suggestion that Leavitt was dead, and Harris not served with process in the court below, and asked that the suit abate as to them; and that an alias *sci. fa.* issue against the other defendants, and that the case be continued. Whiting appeared at the same term, and filed a joinder in error.

At the January term, 1850, plaintiff moved to amend the writ of error by striking out the name of Harris, again suggested the death of Leavitt, and asked for a a pluris *sci. fa.* as to Malpass.

On the 1st day of February, and during the continuance of the January term, 1851, Malpass appeared and filed two pleas in abatement:

1. That before, and at the time the writ of error issued, defendant, Leavitt, was dead.

2. That at the time the judgment below was rendered, Harris was a party, and was still living, but was not joined with the other defendants in the writ of error.

On the 26th April, following, plaintiff filed a motion to strike out the pleas in abatement, and at the same time filed a motion to amend the writ of error, by stating therein that Leavitt had departed this life after judgment below, and before suing out the writ of error, and was not therefore made a party defendant.

Mr. Justice SCOTT delivered the opinion of the Court on the motion.

Both pleas in abatement were filed out of time. The assignment of errors having been filed some time previous to January term, 1851, and John Malpass having been served with process

in the month of December preceding, he could plead in abatement only within the first three days of that term. Therefore, as they were filed near a month afterward, the motion to strike them out must prevail. *The State Bank vs. Ruddel et al., on motion*, 5 *Eng*. 124.

The motion to amend the writ of error is granted.

HEMPSTEAD for the plaintiff.

TRAPNALL & TRAPNALL contra.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The defendants, at the April term 1849, filed a motion to discontinue the cause upon the ground that it had not been placed upon the docket, nor entered upon the minutes of the court, since the October term, 1847. The court sustained the motion to discontinue, not for the reason assigned in the motion, but for the fact that a declaration, which appeared to have been filed in the cause, on the 5th of February, 1848, had been withdrawn by the plaintiff on the same day that the order of discontinuance was made, and which declaration was deemed by the court the commencement of a new action. The original declaration and the one upon which the writ issued was filed on the 7th of August, 1846. It is unnecessary to say any thing as to the effect of a failure to place the cause upon the docket, and of an express order to continue it from term to term, as the state of case, as suggested by the motion did not exist in point of fact. The cause was regularly continued over by an express order from term to term from the April term, 1847, down to the final judgment. The declaration which appears to have been filed on the 5th February, 1848, was a mere loose paper that had straggled into the case and that without any authority, and so far as the record shows, without any connection whatever with the proceedings. The original declaration stood upon the files in full force without any

motion or order to withdraw it, nor is there any showing upon the record how the one which was withdrawn ever found its way into the case.

It is manifest, therefore, that there was no good ground to discontinue the cause, and as a matter of necessity the judgment must be erroneous and ought to be reversed. The judgment of the Circuit Court of Arkansas county, herein rendered, is therefore reversed, annulled and set aside with costs and the cause remanded to be proceeded in according to law and not inconsistent with this opinion.

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EDWALDS v. THE STATE.

A general pardon, by the Governor, of a person convicted of a crime, does not discharge him from the costs of prosecution.

Appeal from the Poinsett Circuit Court.

John R. Edwards was convicted of manslaughter, in the Poinsett Circuit Court, at the April term, 1850, and sentenced to imprisonment in the Penitentiary, and to pay the costs of the prosecution, which were taxed at $305 32½.

Afterwards, the following pardon was granted to him by the Governor:

The State of Arkansas—To all to whom these presents shall come—

GREETING:

Whereas, At the late term of the Circuit Court for the county of Poinsett, John R. Edwards was convicted, and sentenced to the Penitentiary for the term of two years, for the felonious killing of Parker Furnish; and whersas, it appears from the certifi-

cate of the jurors who set upon the trial of said case, that their verdict of guilty was rendered under a misconception of the law, otherwise they would have returned a verdict of not guilty, or inflicted a slight punishment:

NOW, THEREFORE, I, JOHN SELDEN ROANE, Governor of the State of Arkansas, in consideration of the premises, and being petitioned thereto by many of the good citizens of said county, and by virtue of the authority in me vested by the constitution of said State, do hereby pardon the said Edwards, and fully acquit and release him from all the pains and penalties of said conviction. The Sheriff of Poinsett county, or whosoever may have the custody of the said Edwards, is hereby commanded, without excuse or delay, forthwith to discharge him from all further confinement.

IN TESTIMONY WHEREOF, I have hereunto set my hand, and caused the seal of said State to be affixed at Little Rock, on the 13th day of May, A. D. 1850. [L. S.]

JOHN SELDEN ROANE.

By the Governor:

D. B. GREER, *Secretary of State.*"

Afterwards, on the 2d September, 1850, an execution was issued to the sheriff of Poinsett, against Edwards, for the costs of the prosecution aforesaid. He applied to the Circuit Court to quash the execution, exhibiting his pardon, and claiming that it released him from the costs, the court overruled the motion to quash, and he appealed.

ENGLISH, for the appellant, contended that the pardon released the appellant from the judgment for costs as well as imprisonment, and restored him to the same state as before conviction; and cited the case of *Amour Hunt*, 5 *Eng. Rep.*

CLENDENIN, Att. Gen'l, contra. The costs are neither a part of the pains and penalties of a conviction; nor a fine or forfeiture, but belong to private individuals and cannot be remitted by the executive.

Mr. Justice SCOTT delivered the opinion of the Court.

The only question presented is whether or not the legal effect of the pardon was to discharge the judgment for costs.

The case of *Amour Hunt, Ex Parte*, (5 *Eng*. 284,) cited by the appellant's counsel does not sustain the position contended for by him. That was a case where a pardon was construed; but this is as to the legal effect of a pardon in general terms involving no question of construction.

All that is said of the legal effect of a pardon in the case cited is that "Its legal effect is to restore the convict at once to the rights of liberty and citizenship," and *Lilly's Abr*. 270, is there cited to show that its effects are not only to discharge the punishment, but also to wipe out the guilt of the offence. To use the language of that author, "It pardons culpor so clearly that, in the eye of the law, the offender is as innocent as if he never had committed the offence." Not that its effect relates back to a moment anterior to the conviction and removes every thing that would be inconsistent with its ever having existed—as to annul the second marriage of the convicts wife, or the sale of his property made by persons appointed to administer his estate, or to divest the title of his heirs of the interest acquired in his estate in consequence of his civil death. (*Malter of Deming*, 10 *John*. 232. *S. C. Ib*. 483)—but that it creates new legal capacities for him and removes the stain of guilt, as completely as if he had never committed the offence. And by parity of reason it cannot release him from like intervening obligations. In a word, it does not continue him in a state of innocence for all purposes, but restores him to that state from the date of the delivery of his pardon.

Nor did the King's pardon in England remove every effect of a conviction. On the contrary, in every case where the disability was a part of the judgment itself, nothing short of a general pardon by act of Parliament would remove it, although it was otherwise when the disability was only consequential. (*Rex. v. Weeden, et al:* 3 *Salk*. 264.)

Costs are neither "fines" nor "forfeitures," nor are they imposed by way of punishment, or as amercement at common law, but by way of sequence to every judgment whether in a civil or criminal case, as a matter of common justice to the party complainant, witnesses and officers of court, although the judgment is in favor of the complainant alone. Costs then partaking, in no respect, of the nature, either of punishment or of guilt, are without the sphere of the legitimate legal operation of a pardon, however general in its terms. And this view is sustained in principle by a much stronger case reported in 2 *Bay. R.* 565, (*Rowe v. State*,) where it was held that a pardon from the Government did not discharge the moiety of a fine which goes to the informer.

There is no error in the record. Let the judgment of the court below be affirmed.

HEARSHY ET AL. V. HICHOX.

A person selling goods simply as agent or clerk for the owner, cannot bring an action in his own name for the price.

The general rule is that the action on a contract, whether express or implied, by parol or under seal, or of record, must be brought in the name of the party holding the legal interest in the contract.

But when an agent has any beneficial interest in the performance of the contract for commission, &c., as in the case of a factor and a broker, an auctioneer, a policy broker whose name is in the policy, or where the contract is in terms made with him, he may sustain an action in his own name; in each of which cases, however, the principal or owner might sue, unless there is an express contract under seal with the agent to pay him, when he alone can sue.

Appeal from Johnson Circuit Court.

In January, 1849, Hichox sued Hearshy before a justice of the peace of Johnson county, on an account as follows:

"MR. B. F. HEARSHY,

1846.	To W. C. Hichox, Agent,	Dr.
Jan. 26th.	To 40 bundles spun cotton, at 60c.,	$24 00."

Judgment for plaintiff before the justice, and appeal by Hearshy.

Trial *de novo* in the Circuit Court, verdict and judgment in favor of Hichox for the amount of the account. Hearshy moved for a new trial on the grounds that the verdict was contrary to law and evidence, which was overruled and he excepted, and took a bill of exceptions, setting out the evidence, which is stated in the opinion of this Court, and he, and his security in the appeal, against whom, also, judgment was rendered, appealed to this Court.

The cause was determined before the Hon. W. W. FLOYD, Judge.

F. W. & P. TRAPNALL, for the appellants, contended that the plaintiff had no right to sue, as the contract was made with him merely as the servant or agent of another. (1 *Chitt. Pl.* 5. 10 *Mass.* 362. 6 *John.* 94. 10 *Ib.* 387,) that the action could be bought only in the name of the party having the legal interest. 1 *Chitt. Pl.* 3. 1 *East* 497. 8 *T. R.* 332. 1 *Saund.* 153, *N.* 1.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The question to be determined in this case, is whether the appellee has shown such an interest in the subject matter of the suit as to entitle him to a recovery. The testimony of Alston, who was the only witness who knew any thing in relation to the matter, is that Hichox and himself were selling goods together upon the steamboat Mustang, that he (Alston) had advanced to the captain of said boat the sum of nine hundred dollars, that he had possession of and a lien on all the goods upon said boat, except that Hichox was authorized to sell and pay the money to him, that he was assisting to sell the goods at the request of Hichox, and that he being very busy requested Street to put forty bundles of cotton in Brown's wagon for Hershy, which he pre-

sumed was done, and that afterwards he (Alston) was repaid the said sum of nine hundred dollars. The account that was filed before the justice, describes Hichox as an agent, and we think that the proof, when taken in its strongest light in his favor, cannot more than establish that character. We think it clear from the evidence, that the appellee had no interest, either legal or equitable in the subject matter of the suit, and that the whole extent of his power over it, was merely that of agent or clerk to sell the goods, then upon the boat and subject to the lien of Alston. If he sold the goods which formed the consideration of the contract sued upon, simply as the agent or clerk of the owner of the boat, it is perfectly clear that he is not entitled to maintain the suit; and consequently, that the Court below should have set aside the verdict and granted a new trial. In general the action on a contract, whether express or implied, or whether by parol or under seal or of record, must be brought in the name of the party in whom the legal interest in such contract is vested. See 1 *Chitly's Plead. p.* 3, and the authorities there cited. But when an agent has any beneficial interest in the performance of the contract for commission, &c., as in the case of a factor and a broker, an auctioneer, or policy broker whose name is on the policy, or where the contract is in terms made with him, he may sustain an action in his own name; in each of which cases, however, the principal or owner might sue, unless where there is an express contract under seal, with the agent to pay him when he alone can sue. See same authorities at page 4 and 5 and the cases cited. It is very clear that the appellee has not brought himself within either of these exceptions. We are satisfied that the appellee has not shown such an interest in the thing sued for as to entitle him to maintain this action; and that, therefore, the Circuit Court should have set aside the verdict and have granted a new trial. For this reason the judgment of the Circuit Court is erroneous, and is consequently reversed.

RECTOR VS. TAYLOR, GARDINER & CO.

A bond signed "*H. M.* Rector," held to support an allegation that it was executed by *Henry M.* Rector, there being no attempt in the declaration to set out the peculiar manner in which defendant signed the instrument.

"Gardiner" and "Gardner held not materially variant in sound.

The declaration alleged that the bond sued on was made at "*The City* of Little Rock, Ark's., and the one granted on oyer was dated "Little Rock, Ark's:" *Held*, That the variance was immaterial.

Error to Pulaski Circuit Court.

Debt in the Pulaski Circuit Court. Declaration as follows:

William R. Taylor and Charles Gardiner, partners in trade, under the style and firm of Taylor, *Gardiner*, & Co., by attorney complain of Henry M. Rector of a plea of debt, and demand that he render unto them, the plaintiffs, the sum of two hundred and fifty dollars, with eight per centum per annum interest thereon, from the 31st day of April, A. D. 1848, until paid, which to them he owes, and from them unjustly detains.

For that, whereas, the said defendant heretofore, to wit: on the 21st day of April, A. D. 1848, at the *City of* Little Rock, Ark., *to wit:* in the county of Pulaski, and State of Arkansas, by his certain writing obligatory, sealed with his seal, and to the Court now here shown, the date whereof is the same day and year aforesaid, acknowledged himself to owe and be indebted to the said plaintiffs under their style of Taylor, Gardiner & Co., in the said sum of two hundred and fifty dollars, with eight per cent. per annum, interest thereon from the date thereof, to be paid at the expiration of one year after the date thereof.

Yet, the said defendant, although often requested, has not as yet paid the said sum of two hundred and fifty dollars, or any part thereof, or the interest, or any part of the interest thereon, but hitherto has wholly neglected and refused, and still does neg-

lect and refuse to pay the same to the plaintiffs; to the damage of the said plaintiffs $300, and therefore they sue.

E. CUMMINS.

Defendant craved oyer of the instrument sued on, and the following was filed:

$250 00. LITTLE ROCK, ARK'S., April 21, 1848.

One year after date, I promise to pay Messrs. Taylor, *Gardiner* & Co., order the sum of two hundred and fifty dollars, with interest thereon from date until paid, at the rate of eight per cent. per annum, for value received:

Witness my hand and seal, this 21st day of April, A. D. 1848.

H. M. RECTOR, [L.S.]

Demurrer to the declaration for variance overruled, and final judgment for plaintiffs. The grounds of demurrer are stated in the opinion of this Court.

The cause was determined below before the Hon. WILLIAM H. FEILD, Judge.

Rector brought error.

FOWDER, for the plaintiffs, relied upon the variance between the contract declared on and that given on oyer, in the description of the contract, and also as to its legal effect, and cited, as to the points made by the demurrer, *Peake's Ev.* 197. *Sebree vs. Dorr*, 5 *Cond. R.* 680. *Lemon et al. vs. Hill*, 2 *Eng.* 73. *Nicholay et al. vs. Kay*, 1 *Eng.* 68. 5 *Ark.* 236. *Wilson & Turner vs. Shannon & wife*, 1 *Eng.* 99. *Boren vs. State Bank*, — *Eng.* —. *Bank vs. Hubbard*, 4 *Ark.* 421. *Ib.* 447.

PIKE & CUMMINS, contra, upon the question of variance, referred to the cases of *State Bank vs. Clark*, 2 *Ark. Rep.* 375. *Taylor et al. vs. Auditor*, 2 *Ark. R.* 174. *Rodman vs. Forman*, 8 *J. R.* 26. *Wood vs. Bulkley*, 13 *J. R.* 486. *Field vs. Field*, 9 *Wend.* 394. *Conly vs. Anderson*, 1 *Hill* (*N.Y.*) 519. *Lewis vs. Few*, 5 *J. R.* 1. 1 *Eng.* 33. 1 *Ark.* 503. 2 *Eng.* 70. 21 *Pick.* 491. 1 *Metc.* 359. 1 *Smedes & Marsh.* 666. 5 *Blackf.* 24.

Mr. Justice WALKER delivered the opinion of the Court.

This suit was instituted by Taylor, Gardiner & Co., against the defendant, upon a writing obligatory. At the trial of the case, the defendant filed his plea of oyer, which was granted by filing the original, and thereupon he demurred for variance between the bond as given on oyer and that declared upon in the declaration, and assigned for cause of demurrer, 1: That it was averred that the bond sued upon was executed at the "City of Little Rock, Arks.," whereas that given on oyer was executed at "Little Rock, Arks;" 2: That the name of one of the plaintiffs in the declaration is "Gardiner," and that in the bond "Gardner;" 3: That the declaration is against Henry M. Rector, and the bond is executed by H. M. Rector.

The first two grounds may properly be said to rest upon the ground of variance, but the third is not strictly a variance. The pleader did not undertake to show in what terms, abbreviated or otherwise, the bond was executed, as was the case in *Boren vs. The Bank*, (3 *Eng*. 500,) where the pleader averred that the note was executed by a particular description or abbreviation by name, but declared in general terms according to the legal effect of the bond; in which case, it is only necessary to show a legal liability on the part of the defendant to pay the debt, and if on oyer the bond corresponds in the essential descriptive averments thus made, it is all that is required.

If, in order to fix upon Rector a liability to pay, it had been necessary to have shown the manner of executing the bond, and the pleader had failed to do this, then the declaration would have been demurrable without oyer, or if an obligor could only bind himself by his unabbreviated name, then there might be more force in the objection. To say the least of this ground of objection, it rests rather upon an omission to make an averment than a variance from one made; which, when oyer was granted, was as fully supplied as if the pleader had set it forth in his declaration *in hæc verba;* and, when set forth, it neither shows a substantive condition or requisite of the bond variant from that described

in the declaration. The signature, H. M. Rector, is not inconsistent with the averment that Henry M. Rector bound himself to pay. If he did not execute the bond by the abbreviated name, he should plead *non est factum* under oath; he cannot indirectly deny that it is his deed by demurrer. If, on the other hand, he did execute it by that name, then it is his deed in form and substance as set forth, and there is no variance.

We have heretofore made several decisions which cover the whole ground presented in this case. In the case of *Webb vs. Jones & Prescott*, (2 *Ark. R.* 333,) it was held that where the petition was against Abert W. Webb, and the note given on oyer was signed A. W. Webb, there was no variance. So a bond executed by "Andre J. Green," was held to support an allegation that it was executed by "Andrew J. Green." (1 *Eng.* 33.) Where the declaration stated the assignment to have been made by "William Thompson," and the bond given on oyer was signed by "Wm. Thompson, ad. of Watt Dickinson." RINGO, Ch. J., in his opinion, said: "The declaration does not purport to set forth either the writing obligatory or the assignment *in hæc verba*, or according to their legal tenor, but simply according to their legal operation and effect, and therefore the plaintiff, according to the well established principles of pleading, will not be prejudiced by any verbal misdescription of the instrument, and the pleading must be adjudged good if it states correctly the legal effect and operation of the instrument constituting the foundation of the action. Upon a careful comparison of the writing obligatory, and the assignment thereof as shown on oyer in this case, with the allegations descriptive thereof in the declaration, we do not perceive any material variance between them, and cannot conjecture in what particular a variance was supposed to exist."

So it was held in New York, that, a note executed by "Christ. Bulkley," sustains an allegation that Christopher Bulkley promised to pay. (*Wood v. Bulkley*, 13 *John. R.* 486.) So, in Alabama, a note executed by "J. C.," was held to support an averment that John C. promised, &c. A bond, signed "Philp. T." will support a declaration against "Philip T." *Taylor vs. Rogers*, *Miner R.* 197.

These exceptions fully sustain the views which we have taken of this point. Indeed it was unnecessary to have referred to authorities but for the fact that the question seemed to have been blended by counsel with a very distinct class of cases, where the objection went to variances affecting the terms of the contract itself, or where the pleader had attempted to set out the contract itself, or give a particular description of some part of the contract, which it was unnecessary to describe; but, in cases like the present, where the instrument is declared upon according to its legal effect, the main inquiry is as to whether the oyer when granted presents a new, variant or different contract in legal effect from that set forth in the declaration.

As regards the first and second grounds above referred to, neither of them is entitled to serious consideration. The venue is transitory; the place of making the contract immaterial; and, if otherwise, in this case "The city of Little Rock, Ark.," and "Little Rock, Arks." are wholly unimportant, if a variance at all. So we held a bond dated at "Little Rock," no substantial variance from an allegation that it was executed "in the county of Pulaski." *Watkins v. Weaver*, 4 *Ark.* 556.

The names "Gardiner" and "Gardner," are not variant in sound; the letter "i" in the one name makes no necessary difference in sound. So we held "Gravaier" and "Gravier" to be the same name. The decisions have already gone as far as may be allowed in support of such technicalities, which do but tend to produce delay in the due administration of the law, and should rather be modified than extended further.

There was no error in the judgment of the Circuit Court in overruling the demurrer of the defendant. Let the judgment be in all things affirmed.

EVANS VS. WHITE ET AL.

The statute of limitation is not a good plea to a *scire facias* to revive a judgment. *Brown, Robb & Co. vs. Byrd,* 5 *Eng. R.* 534.

Writ of Error to Pulaski Circuit Court.

FOWLER, for the plaintiff.

ENGLISH, contra.

Mr. Justice WALKER delivered the opinion of the Court.

In this case a *scire facias* issued to revive a judgment. The defendants plead the statute bar of limitation of five years. A motion was made to strike the plea from the files as interposing no defence to the action. The motion should have been sustained. The plea is no bar to an action of *sci. fa.* *Brown, Robb & Co. v. Byrd,* 5 *Eng.* 534.

Let the judgment be reversed with costs, and the cause remanded to be proceeded in according to law.

STATE VS. TERRY.

The legal effect of part payment is not to take the case out of the limitation act of 1839, and place it within the act of 1844. *Biscoe et al. vs. Stone et al.,* 6 *Eng.* 39, and *Durritt vs. Trammell, Ib.* 183.

Writ of Error to White Circuit Court.

On the 16th August, 1849, the Bank of the State brought an action of debt against Terry, on a promissory note, dated 8th August, 1842, and due six months after its date.

Defendant pleaded limitation of three years. Plaintiff replied that, after the note became due, and before the cause of action was barred, *to wit:* On the 26th day of May, 1845, a payment was made on the note, and that, by virtue thereof and by force of the statute, &c., the action was revived for five years, &c.

The court sustained a demurer to the replication, and the Bank rested, and brought error.

The cause was determined before the Hon. WM. C. SCOTT, Judge.

S. H. HEMPSTEAD, for plaintiff.

BYERS & PATTERSON, contra.

Mr. Justice WALKER delivered the opinion of the Court.

The Circuit Court correctly sustained the demurer to the plaintiff's replication. The legal effect of payment is not to take the case out of the limitation act of 1839, and place it within the act of 1844. *Biscoe and others v. Stone et al.*, 6 *Eng.* 39. *Durritt v. Trammell*, *id.* 183.

Let the judgment of the Circuit Court be, in all things, affirmed.

MILLER VS. BELL, USE, &C.

Plaintiff declared against *Mathew S.* Miller, as maker of the obligation sued on: the bond granted on oyer is signed "*M. S.* Miller": demurrer for variance: HELD, No variance, inasmuch as the declaration did not undertake to set out the particular manner in which defendant signed the bond, &c., as held in *Rector vs. Taylor & Gardiner, ante.*

Appeal from St. Francis Circuit Court.

Action of debt, on a writing obligatory, by Thomas G. Bell, use Wm. B. Swon, against Mathew S. Miller.

The declaration complained of *Mathew S.* Miller, of a plea, &c., and alleged that "the said defendant, on, &c., at, &c., by his certain writing obligatory, sealed, &c., bound himself to the said plaintiff in the said sum of," &c.

Defendant craved oyer, and plaintiff filed the bond sued on, which was signed, "*M. S.* Miller." Defendant demurred for variance, and the court overruled the demurrer, and defendant rested, and suffered final judgment to go on the demurrer.

The cause was determined before the Hon. JOHN T. JONES, Judge.

E. H. ENGLISH, for the appellant.

PIKE & CUMMINS, contra.

Mr. Justice WALKER delivered the opinion of the Court.

This was an action upon a writing obligatory, signed M. S. Miller. The plaintiff declared against Mathew S. Miller. The only point presented was, whether, upon oyer, there was a variance between the bond given on oyer and the declaration. The precise point was discussed and settled at the present term in the

case of *Rector vs. Taylor & Gardiner*. It is there held that this is no variance.

Let the judgment of the Circuit Court be, in all things, affirmed.

HUMPHRIES, ADR., USE, &C. VS. ANTHONY.

To a *scire facias* to revive a judgment, where defendant pleads, as a satisfaction, a subsisting, undisposed-of levy on lands, a replication that the land levied upon is not the property of the defendant, is not of sufficient value to satisfy the debt, or has been discharged by a sale of the property since the commencement of the action, is not good.

The replication should traverse the fact as to whether there was or was not a subsisting levy at the time of the commencement of the action.

Writ of Error to Pulaski Circuit Court.

John Humphries, adr. of Joel Johnson, deceased, use Ashley & Watkins, sued out a writ of *scire facias* to revive a judgment against James C. Anthony, in the Pulaski Circuit Court.

Defendant filed three pleas, 1: That execution was issued upon the original judgment, levied upon lands of defendant of sufficient value to satisfy the judgment, which remained undisposed of; 2: *Nul tiel* record; and 3: Payment.

A demurrer was sustained to the first plea; and the case brought to this court and reversed. See *Anthony vs. Humphries, use, &c.*, (4 *Eng. R.*, 176,) where the plea is copied.

After the case was remanded, the 2d and 3d pleas were withdrawn, and plaintiff filed three replications to the first plea:

1. That the lands and tenements specified in said plea were not the property of said defendant in manner and form as in said plea is alleged—concluding to the country.

2. That the lands and tenements specified in said plea were not on, &c., at, &c., of sufficient value to satisfy or pay the debt, damages, and costs, mentioned in said judgment, in manner and form as in said plea is alleged—concluding with a verification.

3. That, for having execution of said judgment, and disposing of said levy, (he) the plaintiff caused an execution to be issued, bearing date the 15th day of August, 1848, directed to the sheriff of said county of Pulaski, whereby, after reciting said judgment and levy, said sheriff was commanded to expose for sale and sell the lands and tenements specified in said plea; which said execution was made returnable on the 2d day of the October term of this court, in the year 1848, and was duly attested by the clerk, and under the seal of this court; and the same afterwards, and before the return day thereof, came to the hands of said sheriff in due form of law to be executed; and said plaintiff avers that the said sheriff, after having advertised said lands and tenements for sale, at public auction, to the highest bidder, by virtue of said writ, offered and exposed the same for sale, at the court-house door of said county, on the 15th day of October, 1848, and one Frederick W. Trapnall, then and there being the last and highest bidder therefor, became the purchaser of the whole of the real estate specified in said plea, for the sum of *five cents*, and no more, and the said lands and tenements were then and there sold by said sheriff to said Trapnall, for the sum of five cents, and no more—concluding with a verification.

Defendant demurred to each of said replications.

To the first replication, he demurred on the following grounds:

1. That, in makiug the levy, as set forth in said plea, the sheriff acted as the agent of the plaintiff in said execution, and could not lawfully levy on any property other than that of the defendant named in said execution; nor can the plaintiff in execution deny that the property so levied is legally subject to such execution, without first affirmatively showing that it was claimed by and legally adjudged to some third party.

2. That said replication admits the levy on property sufficient

to satisfy said execution, and wholly fails to show that the same has ever been legally disposed of.

3. That a party, for whose benefit a levy is made under execution, cannot, without first showing an abandonment of said levy, and a subsequent restitution of said property, deny that said property was subject to said execution.

To the 2d replication, the defendant demurred, on the grounds that the facts set up in said replication tendered an issue foreign to the cause, and was no answer or avoidance of the plea.

To the third replication, defendant demurred on the following grounds:

That said defendant admits, in said replication, the levy under said execution; that the property so levied on belonged legally to the said defendant; that said property was sufficient to satisfy said execution, and that the said levy was not disposed of until long after the issuance of the said writ of *scire facias*, &c.

The court sustained the demurrer to all of the replications, and plaintiff suffered final judgment to go, and brought error.

WATKINS & CURRAN, for Plaintiff.

F. W. & P. TRAPNALL, contra.

Mr. Justice WALKER delivered the opinion of the Court.

The replications in this case were clearly defective. The plea set forth a subsisting, undisposed-of levy on lands. A replication that the land levied upon is not the property of the defendant, is not of sufficient value to satisfy the debt, or has been discharged by a sale of the property since the commencement of the action, is not good. The replication should traverse the fact as to whether there was or was not a subsisting levy at the time of the commencement of the action. The principles upon which this case turns, will be found fully settled in the case of *Anderson vs. Fowler*, 3 *Eng*. *Anthony vs. Humphries, use, &c.*, 4 *Eng*. 176. *Whiting & Slark vs. Beebe et al.*, at the present term.

Let the judgment of the Circuit Court be, in all things, affirmed, with costs.

HARVARD LAW SCHOOL LIBRARY.

WHITE VS. YELL.

A plea in abatement of former suit pending in the same court, must, under our statute, be verified by affidavit, as the truth of the allegation that the cause of action and the parties were the same in both suits could not appear of record; though similarity in amount, date, &c., and in names might raise a strong presumption of the truth of such allegation.

Writ of Error to Jefferson Circuit Court.

This was an action of debt, brought by James Yell, against Oscar L. White, in the Jefferson Circuit Court, on a writing obligatory for $600. The defendant pleaded the pendency of a former action against him, by the plaintiff, on the same cause of action in the same court. The plea is in the usual form, but not sworn to. On motion of plaintiff, it was stricken from the record because it was not verified by affidavit, and defendant excepted, declined to plead further, and permitted final judgment to go against him.

The case was determined in the court below before the Hon. JOSIAH GOULD, Judge.

F. W. & P. TRAPNALL, for the Plaintiff.

S. H. HEMPSTEAD, contra. A plea in abatement of the pendency of another action must be verified by affidavit, because the parties and subject matter must be the same in both suits and these facts all dehors the record. (1 *Stra.* 522. 2 *Chitt. Pl.* 904, *note y.*) Mere similarity in name does not indicate that the parties are identically the same, (*State vs. Murphy*, 5 *Eng.* 77,) that being a matter of fact, and no intendment being allowed to support a plea in abatement. (1 *Saund. Pl. & Ev.* 3.) Where the matter is not

apparent on view of the record, an affidavit is indispensable. 1 *Com. Dig., Abatement J.* 11.

Mr. Justice WALKER delivered the opinion of the Court.

To this action, the defendant pleaded in abatement the pendency of another suit between the same parties for the same cause of action. The plea was in the usual form but not verified by affidavit, and for that reason was on motion stricken from the files.

The only question presented is, whether the truth of the facts set forth in the plea appears of record. If not, the statute expressly declares (unless it is a plea to the jurisdiction of the court) that it shall not be admitted. It no doubt sufficiently appears of record that another suit is pending, the nature of the action and the names of the parties. But whether it is the same identical cause of action in suit in the second action, or whether these are the same parties, although of like names, does not appear of record, and although an identity in the amount, date, &c., of the contract, or a similarity of names in the two actions, might raise a strong presumption that such might be the case, yet this does not satisfy the strictness of the rule in regard to issues in abatement. The plea itself indicates very clearly the extent to which the record is to be relied upon. After describing the action and the parties to it minutely, the plea proceeds, "As by the record and proceedings thereof remaining in the said circuit court, &c., more fully appears. And said defendant further saith that the parties in this and the former suit are the same and not other or different persons; and that the former suit so brought, &c., is still pending," &c. It is evident that these latter averments are not intended to be verified by the record; but are distinct matters requiring other proof.

But few adjudicated cases, either in England or America, are to be found directly in point. The case of *Gardner vs. Buckbee*, (3 *Cow.* 127,) has some bearing on the question. Upon an issue of former recovery, it was, in that case, held, "That the record of recovery merely proved the pleadings, and that judgment was rendered for the defendant, but without other proofs it would not make out

the defence." And this court, in the case of *The State vs. Murphy*, who was indicted for an escape after conviction, held that the record of the conviction was not evidence sufficient to establish the fact that the prisoner was the same person convicted of record; but that other proof should have been offered upon that point. (5 *Eng*. 77.) And, to this effect are the decisions of the English courts. 1 *Strange* 522.

Whilst, therefore, part of the facts constituting this defence appeared of record, other facts equally necessary did not so appear; and under the rules of strictness required in framing a defence in abatement an affidavit was necessary, at least as to those facts not evidenced by the record. Let the judgment of the Circuit Court be affirmed, with costs.

McCLELLAN VS. THE STATE BANK.

Under a general replication to a plea of limitation, plaintiff cannot avail himself of the provision of *section* 24, *ch.* 99, *Dig.*, by introducing in evidence a record to show that he had commenced a former suit within the bar, suffered a non-suit, and instituted the present suit within a year thereafter, but he must specially reply such former suit, &c., to the plea.

And when specially replied, the record offered in evidence must show a former suit between the same parties; a declaration, writ and judgment of non-suit against *Ewing* W. McClellan, is not, of itself, evidence of a suit against *Evan* W. McClellan, and whether other evidence could be introduced to explain the discrepancy, this court does not now decide.

Writ of Error to Washington Circuit Court.

This was an action of debt, by the Bank of the State, against Evan W. McClellan, determined in the Washington Circuit

Court, before the Hon. WM. W. FLOYD, Judge, in April, 1850. The facts are stated in the opinion of this court.

E. H. ENGLISH, for the appellant, contended, that, under the issue in this case on the plea of limitation, no evidence could be given of the institution of a former suit; that any exception, admitting the statute bar as to time, and avoiding it, must be replied. (*Ringgold & Hynson vs. Dunn*, 3 *Eng*. 499. *Walker vs. Bank of Miss.*, 2 *Eng*. 504. 2 *Greenleaf on Ev.*, *sec*. 440, *p*. 354; *sec*. 447, *p*. 360; *sec*. 448, *p*. 363.) But if the evidence was admissible under the pleadings, the court erred in admitting the record of a suit against *Ewing W. McClellan*, without proof that *Ewing W.* and *Evan W.* were the same person.

HEMPSTEAD, contra.

Mr. Justice WALKER delivered the opinion of the Court.

This suit was commenced on the 18th of February, 1850, on a promissory note, purporting, from the declaration, to be due on the 14th of October, 1844. The defendant pleaded *nil debet* and the statute bar of limitation of three years; to which latter plea the plaintiff replied that the cause of action did accrue to her within three years next before the commencement of her suit. To sustain this issue the plaintiff offered to read what purported to be the commencement of former suits on the same cause of action between the same parties and judgment of non-suits therein. To the introduction of this record as evidence, the defendant objected, but his objections were overruled and the record admitted to be read to the court sitting as a jury. The defendant excepted and presented the evidence in his bill of exceptions. Judgment was rendered for the plaintiff.

The only question is, was this evidence admissible? And, first, if in other respects unexceptionable, was it competent evidence under the issue formed? It was no doubt intended to bring the case within the 24*th sec. ch*. 99, *Dig*., which provides "that if after the commencement of a suit within the time prescribed by the

preceding sections of this act, the plaintiff elects to take a non-suit, he may commence anew his action within twelve months after the date of such non-suit." But under this state of facts, should not the plaintiff have replied specially, confessing the lapse of time in the plea set forth, and by setting up the intermediate proceedings brought himself within the 24th section in avoidance of the effect of such lapse of time. Instead of this, he has simply denied the truth of the plea, that is, that three years had not intervened between the time when his right of action accrued and the commencement of his then pending suit. The record, therefore, in no event, could have sustained this issue, which is alone, to be determined by the contract itself and the record evidence as to when the suit was actually commenced, and it should have been excluded from the court sitting as a jury.

But, then, even if specially replied, the record offered in evidence did not show a cause of action commenced between the same parties, but distinct and different parties. A declaration, writ and judgment of non-suit against Ewing W. McClellan, is not of itself evidence of a suit against Evan W. McClellan. These are clearly different persons, so far as the record itself gives evidence (and whether other accompanying evidence explanatory of this discrepancy, could in any case be offered under such circumstances or in what they should consist, it does not become necessary for us here to determine.)

It is a rule of practice heretofore recognized by this Court, and well sustained by authority, that where evidence, not of itself strictly applicable or legal, may or not be so dependent upon the existence of other facts, such other facts must accompany the evidence offered, or at least there must be an offer or proposition to introduce them in connexion with it. *State vs. Jennings*, 5 *Eng.* 429.

Without this additional proof, if such in this instance was admissible, the record could not have been used in evidence. The first action and non-suit then aside, the second was commenced on the 4th May, 1848, more than three years after the cause of action had accrued; and therefore did not come within the pro-

visions of the 24th section. We are, therefore, of opinion that there was error in the judgment and decision of the Circuit Court in permitting said record to be read as evidence. And for this error the judgment must be reversed and the cause remanded to be proceeded in according to law.

WARNER V. BURTON.

An attorney was employed by a woman to prosecute a bill against her husband for divorce, alimony, &c. After interlocutory decree, by default, on the application of the husband, and by consent of the wife, the decree was set aside, and the bill dismissed; but on a showing by the attorney that he had a claim for fees and expenses incurred in prosecuting the suit, the Court referred his claim to the Master, and ordered that a portion of defendant's property be placed in the hands of a receiver, to be held subject to the final order of the Court on the coming in of the report of the Master, &c: HELD, That the Court having power over the subject matter, the order so made could not be superseded by this Court, but that the final decree of the Court, in the matter, would be subject to review on appeal.

Application for Supersedeas.

Franklin S. Warner presented a petition to this Court, at the present term, stating that on the 12th day of March, A. D. 1849, Selina, his wife, filed a bill against him in the Lafayette Circuit Court, for divorce and alimony.

That, at the return term, he permitted an interlocutory decree to go against him, which was to become absolute unless he showed cause against it on or before the third day of the following term.

That on the 3d day of the next term, (Nov. 1849,) he appeared before said Court, and filed a petition representing that said Selina was living and cohabiting with him as his wife, and that said

suit was prosecuted and proceeded in, without authority and contrary to her wish and desire—exhibiting therewith the written statement of said Selina to that effect—and praying not only that said decree might be set aside, but also that the bill might be dismissed.

That, therefore, James A. Burton, Esq., the solicitor who instituted and prosecuted said bill for divorce, without previous notice to petitioner, presented his petition to said Court, alleging that his fees and expenses in prosecuting said suit amounted to $2,500, and insisted that the fees and expenses, so due him, should be made and decreed to be a lien and charge upon the property of your petitioner. That, upon the presentation of the petition of said Burton, the said court, without hearing any testimony, or affording petitioner, Warner, an opportunity to respond, or be heard in opposition to said petition, and even before Burton's counsel had taken his seat, after presenting the petition, made a decree not only setting aside said interlocutory decree, and dismissing the said bill, but also directing and adjudging that the Master, in chancery for said county, should take and state an account of the expenses, &c., mentioned in the said petition of said Burton, and make a report at the next term of said Circuit Court—that certain slaves, *to wit:* Ben, Jim, Mary, Eliza and her child, all property held and owned by petitioner in his own right, and also the proceeds arising and accruing to petitioner from a certain suit then pending in that Court between him and one John Cockrell, should be placed in the custody and control of a receiver, and should stand and be charged with the payment of the amount so found to be due to said Burton as aforesaid—to which order upon the application of Burton, petitioner excepted, and tendered his bill of exceptions which was signed, sealed and made part of the record of the said case. That all of said facts would more fully appear by a transcript of the record of the proceedings in said case, which was exhibited.

Petitioner alleged that the order made as aforesaid on the application of Burton, was a usurpation of power, &c., and null and void. Prayer for perpetual supersedeas.

The transcript filed with the petition for supersedeas aforesaid, shows that Mrs. Warner filed her bill for divorce and alimony, and to have restored to her a number of slaves, and other property which she possessed on her marriage with Warner. That she obtained an interlocutory decree, as stated in the petition, and the Court appointed a receiver to take charge of the property, &c.

The application of Burton, states that he was employed by her to prosecute the suit, and that he filed the bill, and obtained the decree aforesaid. That after obtaining the decree, Warner ran some of the negroes off to Mississippi, and Mrs. Warner employed him to pursue Warner, and recover the slaves, which he did at great expense, loss of time, &c. He claimed as reasonable compensation for his services, expenses in prosecuting the suit, and pursuing Warner to Mississippi, and recovering the negroes, &c.,$2,500.

The order of Court was as stated in Warner's petition.

WATKINS & CURRAN, for the petition, contended that the Circuit Court possessed no power to adjudicate upon the rights of the petition without giving him an opportunity of being heard; that the adjudication as to the right of Burton was final and not interlocutory, and as the Court possessed no power to decree against Warner, the proceeding is void, and ought to be superseded:

That the law will not imply an undertaking by the husband to pay the fees, where a wife employs a lawyer to prosecute a bill for divorce. *Dorsey v. Goodenow, Wright's Ohio Rep.* 120. 7 *T. R.* 432. 1 *Saund. R.* 284. 5 *Taunt. R.* 356.

S. H. HEMPSEEAD AND E. CUMMINS, contra, argued that the action of the Court below cannot be reviewed in this manner, unless the proceedings are utterly void; that as in this case there was no usurpation of power, but, if any thing, error in exercising a power clearly conferred, a writ of supersedeas should not be granted. And as to the general power of courts to protect attorneys in the recovery of fees, costs and expenses, cited *Read v.*

Duffer, 6 *T. R.* 361. *Cole v. Bennett*, 6 *Price* 15. *Cross on Liens*, 227, 228, 9, *Law Lib.* *Gould v. Davis*, *Compton and Jervis*, 415. 1 *Dowling's Pra. Cas.* 238. 1 *Newland*, *ch.* 426, 3 *Atk.* 719. *Pinder v. Morris*, 3 *Caines* 165. *Ten Brock v. De Witt*, 10 *Wend.* 618. *Power v. Kent*, 1 *Cow.* 172. *Dennett v Cutts*, 11 *N. Hamp.* 163. *Pope v. Armstrong*, 3 *S. and M.* 214.

Mr: Chief Justice JOHNSON delivered the opinion of the Court.

This is an application for a supersedeas to the Lafayette Circuit Court. From the facts as presented by the record, we think it clear that the Court had the power to do the act complained of, and whether the power has been rightfully exercised or not, is not inquirable into in this form of proceeding. It was said by the Supreme Court of Ohio, in the case of *Dorsey v. Goodenow*, (*Wright's Rep.* 120,) that "Power is possessed by the Court to make an allowance to the wife, *pendente lite*. In a proper case made, the Court will make an allowance large enough to enable her to carry on her suit, and to subsist upon while it is pending." That case is in harmony with all the authorities which we have been able to consult upon the subject. If the Court had the power in this case to make an allowance out of the husband's estate to enable the wife to pay the fees of her attorney, and thereby to carry on her suit, we think it clearly follows that the attorney was equally entitled to protection when an attempt was made to dismiss the suit, and that, too, under circumstances strongly indicating collusion between his client and defendant to cheat and defraud him out of his fees and disbursements. The power of the Court over the subject being conceded, there is an end of this application, as we are not at liberty to enquire into any errors or irregularities which may have intervened in the exercise of such powers. The order complained of is merely interlocutory, and its merits can only be investigated when the whole case upon a final decree shall be presented. This Court in the case of *Carnall v. Crawford county*, (6 *Eng.* 618) held that before final judgment nothing short of a clear defect of power in the subordinate court, or clear breach of duty, and

irreparable mischief by delay, should make a case for interposition; otherwise, the extraordinary powers of superintending control would conflict with, and in effect, supersede the ordinary appellate jurisdiction as regulated by law. The application is therefore refused.

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LEVY VS. VERY.

A sealed executory contract cannot be released or rescinded by a parol executory contract; but after breach of a sealed contract, a right of action may be waived or released by a new parol contract in relation to the same subject matter, or by any valid parol executed contract.

To constitute a new contract, a valid accord and satisfaction of a previous one, it must be based upon some consideration—some inducement to the creditor, to accept it: for example, the shortening of the time of payment.

Where a covenant had several years to run before maturing, and the debtor, by agreement with the creditor, made a part payment in jewelry, and contracted to pay the balance of the debt in the same way within a year: HELD, That the part payment down, and the shortening of the time for the payment of the remainder of the debt, constituted such consideration as made the new contract a valid accord and satisfaction of the original covenant.

But to a bond, accord and satisfaction can be pleaded by deed only, for an obligation under seal cannot be discharged but by an instrument of as high a nature as the obligation itself.

Appeal from Pulaski Circuit Court.

On the 12th day of January, 1848, Martin Very, assignee of Darwin Lindsley, brought covenant against Jonas Levy, in Pulaski Circuit Court, on the following instrument:

"LITTLE ROCK, ARKANSAS, 3d March, 1841.

I promise to pay, to Darwin Lindsley, or order, six years after

date, four thousand dollars, with interest at the rate of seven per cent. per annum from date until paid, the interest payable quarterly in each year, being the second and last payment for lot numbered seven, in block numbered thirty-five, in that part of the city of Little Rock, called and known as the original or Old Town; and provided the said Lindsley will well and truly pay and discharge all incumbrances, if any there be, upon said property.

In testimony whereof, I have hereunto set my hand and affixed my seal. JONAS LEVY. [L.S."]

Assigned to plaintiff by Levy on the 25th March, 1841. Breach alleged—the non-payment of the $4000, and interest.

Defendant pleaded payment *ante diem:* payment *post diem*, and payment to Lindsley before the assignment to plaintiff, to which issues were made up.

He also filed six special pleas in bar, setting up the same defence in different forms, to which a demurrer was sustained. The substance of these pleas is stated in the opinion of this Court.

The cause was tried on the pleas of payment, and judgment for plaintiff for the sum, found to be due in the covenant, and unpaid; and Levy appealed.

CUMMINS, for the appellant, contended, 1st: That the part payment and new contract set up in the pleas, was an extinguishment of the covenant sued upon, though the new contract was by parol, and cited to this point, *Byrd v. Bertrand*, 2 *Eng.* 321. *Fleming v. Gilbert*, 3 *J. R.* 527. *Ratcliff v. Pemerbton*, 1 *Esp. Rep.* 35. *Longworthy & Clark v. Smith and others*, 2 *Wend.* 587. *Lattimore and others v. Horsen*, 14 *J. R.* 330. *Dearborn v. Cross*, 7 *Cow.* 46. *Keating v. Price*, 1 *J. Cas.* 22. *Coffin v. Jones*, 11 *Pick* 45. *Strudy and another ass. v. Arnand*, 3 *Durnf. & E.* 226. *Monroe v. Perkins*, 9 *Pick.* 298. *Buen v. Miller*, 4 *Taunt.* 745. *Cuff and others v. Penn*, 1 *Maule & Selw.* 21. *Bailey v. Johnson*, 9 *Cow.* 115. *Lefevre v Lefevre*, 4 *Serg. & R.* 241. *Evans v.*

Thompson, 5 *East* 108. 3 *Stark. Ev.* 1048. 3 *Phill. Ev.* (*Cowen & Hill's notes*) 1481. 1 *Greenl. Ev. sec.* 303.

2d: That it is a good defence by way of *accord and satisfaction. Case v. Barber, Sir T. Raym.* 450. *Reniger v. Fogasser, Plow.* 5, 11. *Thatcher v. Dudley and wife*, 2 *Root* 169. *Good v. Cheeseman*, 2 *Barn. & Adolph.* 328. *Cartwright v. Cook*, 3 *ib.* 701. *Coit & Woolsey v. Houston*, 3 *John. Cas.* 243. *Boyd and another v. Hitchcock*, 20 *J. R.* 76. *Watkinson v. Inglesby & Stokes*, 5 *J. R.* 386. *Strong v. Holmes*, 7 *Cow.* 224. *Brooks v. White*, 2 *Met.* 283. *McCreary v. McCreary*, 5 *Gill & John.* 147.

FOWLER, contra. An accord must be shown to have been received in full satisfaction of the thing demanded. 2 *Stark. Ev.* 15 (25.) *Russell vs. Lytle*, 6 *Wend.* 391. *Ballard et al. vs. Noakes*, 2 *Ark.* 57. *James vs. David*, 5 *Term Rep.* 142. 1 *Com. Dig., Accord. B.* 1, 4, 6. *Heathcote vs. Crookshanks*, 2 *Term Rep.* 27. 1 *Petersd. C. L.* 120, 121, 127. 2 *Greenl. Ev., secs.* 30, 31. 19 *Wend. Rep.* 410, 517. *Crary vs. Ashley*, 4 *Ark.* 207. *Pope vs. Tunstall et al.*, 2 *ib.* 223. A tender is insufficient. 1 *Com. Dig., Accord. B.* 4. 5 *Co. Rep.* 79. 2 *Stark. Ev.* 15. 2 *Term Rep.* 27.

Accord, &c., when pleaded to a bond, can only be pleaded by deed; for a sealed obligation can only be discharged by one under seal. 2 *Ark.* 223. *Preston vs. Christmas*, 2 *Wils. Rep.* 87. *Blake's case*, 3 *Co. Rep.* (*part* 16.) 1 *Petersd. C. L.* 127, 130. *Miller vs. Hemphill*, 4 *Eng. R.* 495.

A parol agreement in writing cannot be pleaded at law to defeat an agreement under seal. *Williams vs. Terril*, 7 *Humph. R.* 552. 2 *Stark. Ev.* 548. *Inman vs. Griswold*, 1 *Cow. Rep.* 202. *Hamilton vs. Cummings*, 1 *John. Ch. R.* 525. *Payne vs. Barnett*, 2 *Marsh. R. Blake's case*, 3 *Co. R.* (*pt.* 6.) *Miller vs. Hemphill*, 4 *Eng. R.* 495. *Garnett vs. Macon et al.*, 2 *Brockenb. R.* 224.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The only question presented by the record in this case, is whether the part payment and new parol contract for the payment of the residue of the covenant in suit, are of such a character as to ope-

rate a release or extinguishment of such covenant. The substance of the matter set up as a bar to this action, is that before the principal debt secured by the covenant became due, Levy paid a part in jewelry, and entered into a parol contract to pay the residue in like property, within twelve months then next following, and the pleas then aver that he was ready and willing and offered to deliver the same whenever called for within the twelve months, and that he is still ready and willing to do so, and then concludes by averring that said part payment and said new contract for the residue, were received and accepted by Very, in full satisfaction and discharge of the said covenant, and the money due, or to become due, in respect thereof, and of all damages accrued, or to accrue in respect thereof. The Supreme Court of New York, (see 13 *Wend. p.* 75) after collecting numerous cases bearing upon this question, said: "The extent, to which these cases have gone, is this, that after a breach of a sealed contract, the parties to it may discharge any liability upon it by entering into a new agreement in relation to the same subject matter, which new agreement is a valid contract founded upon sufficient consideration. In *Fleming v. Gilbert*, it is assumed that the plaintiff prevented the defendant from performing his contract; and therefore should not take advantage of his failure. Here it is not pretended that any thing was done or said by the plaintiff to prevent the defendant from a literal compliance with his contract. To bring this case within the principle of *Lattimore v. Horsen*, there should have been not only an avowed refusal to perform, but a subsequent executed substituted agreement; and so, also, as to the case of *Dearborn v. Cross & Trasher*. Had the plaintiff, in this case, not only waived the sealed contract by parol, but had accepted and taken possession of the new store in lieu of that which he was to have had by his sealed contract, the cases would have been more nearly parallel. It will be seen, then, that there has been no innovation upon established principles, and that the law remains as it has always existed, that a sealed executory contract cannot be released or rescinded by a parol executory contract; but that after breach of a sealed contract, a right of action may

be waived or released by a new parol contract in relation to the same subject matter or by any valid parol executed contract." The same doctrine was recognized by this Court in the case of *Miller v. Hemphill*, (4 *Eng. Rep.* 496.) In that case, this Court said: "For the law is understood to be well settled that a covenant under seal, not broken, cannot be discharged by a parol agreement. (1 *Taunton*, 430. 10 *Wend.* 184. 11 *ib.* 30. *Delacroi v. Bulky*, 13 *Wend.* 73.) The extent that the authorities seem to go, when clearly examined, is that after breach of a sealed contract, the parties to it may discharge any liability upon it by entering into a new agreement in relation to the same subject matter, which new agreement is a valid contract founded upon sufficient consideration, and "that the law remains as it always existed, that a sealed executory contract cannot be released or rescinded by a parol executory contract. But after breach of a sealed contract, a right of action may be waived or released by a new parol contract in relation to the same subject matter, or by any valid parol executed contract. These authorities are conclusive upon the question involved in this case, upon the supposition that the new contract set up and relied upon as a bar, is so relied upon simply as a subsequent substituted contract, and not by way of accord and satisfaction. But let us now view it as a plea of accord and satisfaction, and then see whether it can avail the appellant. The Supreme Court of New York, in the case of *Booth v. Smith*, (3 *Wend. p.* 68,) by SUTHERLAND Judge, said: "The plea is unquestionably good. It would have been good by way of accord and satisfaction, if no part of the original debt had been paid prior to the acceptance by the plaintiff of the last note. This was expressly decided in *Boyd & Suydam v. Hitchcock*; 20 *John. R.* 76.) It was there held that if a debtor gives his note endorsed by a third person as further security for a part of the debt, which is accepted by the creditor in full satisfaction, it is a valid discharge of the whole of the original debt, and it may be pleaded in bar as an accord and satisfaction. (6 *Cranch* 253.) The additional security required by the creditor for a part of his debt, is a good consideration for the relinquishment of the residue.

(*Le Page v. McCrea*, 1 *Wend.* 172. *Kearslake v. Morgan*, 5 *T. R.* 513.) This doctrine is admitted in *Hughes v. Wheeler*, (8 *Cow.* 79,) and the distinction is there adverted to between the note of a third person and that of the debtor himself given for the original debt. The latter, it is there held, cannot be pleaded in bar of the original cause of action, but the plaintiff will not be permitted to recover on the original consideration unless he produces the note upon the trial, or satisfactorily accounts for it." It is obvious, from that case, and the authorities there cited, that the new contract, although pleaded by way of accord and satisfaction, cannot avail the appellant as a defence to this action, since it is nothing more than another undertaking by the debtor himself and given for a part of the original debt. There can be no doubt of the correctness of the doctrine, as laid down in that case, when applied to the facts there disclosed, yet we consider it exceedingly doubtful whether the rule is not laid down too broadly when it is announced as a general rule that the debtor cannot himself extinguish a contract previously made by subsequently entering into another; and that, too, to secure the same debt. The criterian by which the power to effect this object is determined, seems to be the consideration which is supposed to influence the creditor in accepting the new contract, and not whether the new contract is made by the debtor himself, or by a stranger. This is the criterian as recognized in that case, and if it be the true one, we can see no good reason why there should not be exceptions to the rule there laid down. It is there said that "He (the debtor) has entered into a new contract with his creditor, who, upon an adequate consideration, (the obtaining the note of a third person as an additional security for his debt) has agreed to look to the defendant as endorser only, and to relinquish all claim upon him in any other character. He cannot be charged upon the original consideration." This Court, in the case of *Pope v. Tunstall & Waring*, (2 *Ark.* 223) said, "The defendant in error contends that in debt upon bond, it is no plea that the plaintiff accepted a new bond in satisfaction of the old one, for that is no satisfaction either actual or present, and refers to various authorities in sup-

port of his position. If he has reference only to cases where there is a simple exchange of bonds or obligations, his argument cannot, in truth, be controverted for the satisfaction, must in legal contemplation, be advantageous to the party agreeing to accept, for it would be inoperative if it could not possibly afford him some equivalent or consideration. *Bacon Abr., Accord A. Com. Dig., Accord B.* 1. There must be some change or rather difference between the former and the latter contract to show that the parties intended to alter it by substituting something more advantageous to the creditor than he before possessed, as by shortening the time, giving other security, or the like. (*Hobart* 68.) We consider it clear, from all the authorities, that the true distinction is between such subsequent contracts as offer no inducement to the creditor to accept them, and those which are based upon some equivalent or consideration. The shortening of the time of payment is one of the examples given by Hobart as constituting such a consideration as to support the latter contract and to supersede the former. If the only question be consideration or no consideration, we think that this case will fall clearly within the rule of a valid contract and of course a good defence by way of accord and satisfaction, if it be not obnoxious to another rule of law which will operate to exclude it. The original covenant sued upon was for $4,000, executed on the 3d of March, A. D. 1841, and made payable six years after date. The satisfaction set up and relied upon, consisted of a payment in jewelry of $1,898 25, on the 3d of March, 1843, and a promise in writing, executed on the same day, to pay the entire residue in like property during the year next ensuing. Here was a clear equivalent and a high consideration moving upon the creditor to accept the subsequent arrangement and to release the former. He not only hastened the payment of the residue, but he actually received a large amount of the debt at the date of the latter contract. There can be no doubt but that the advance in jewelry was good *pro tanto*, and if the new contract for the residue is admissible, it is equally clear that the satisfaction is full and complete.

But here we are met by another rule of law that is stern and inflexible, which is, that to a bond, accord and satisfaction can be pleaded by deed only, for an obligation under seal cannot be discharged but by an instrument of as high a nature as the obligation itself. (See 2 *Wils.* 86, and 2 *Ark.* 223.) The contract in suit is a bond or writing under seal, and the one attempted to be set up against it lies simply in parol, or at least must be so considered, since it is not averred to be under seal. For this reason, therefore, it is clear that the plea cannot prevail. The Circuit Court consequently decided correctly in sustaining the demurrer to the several pleas setting up the defence founded upon the new contract, and, as such, its judgment must, in all things, be affirmed.

BARBER, LIBRARIAN, &c., EX PARTE.

Mandamus refused, by this court, to compel the Secretary of State to turn over to the Supreme Court Librarian certain State Reports, appropriated to the Supreme Court Library by act of Assembly, on the grounds that the Circuit Court of Pulaski county was competent, and the proper tribunal, to grant relief in the premises.

On Application for Mandamus.

This was an application to this court, by L. E. Barber, Esq., Supreme Court Librarian, for mandamus to the Secretary of State to compel him to deliver up certain State Reports, set apart for the Supreme Court Library, by act of Assembly. An alternate writ was issued, response of the Secretary filed, and demurred to.

Mr. Justice SCOTT delivered the opinion of the Court.

The writ of Mandamus, in this case, having been improvidently issued, must be dismissed for that cause.

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The State vs. Minyard.

An indictment charging defendant with maliciously and contemptuously disturbing and disquieting a congregation assembled for religious worship, without alleging the manner of disturbance, is insufficient.

It is not necessary, however, to charge the manner of disturbance in any language more explicit than that used in the statute, (*Dig., p.* 370, *sec.* 1,) as "by profanely swearing," or "by using indecent gestures," &c., as the case may be.

Appeal from Conway Circuit Court.

This was an indictment in the Conway Circuit Court, for disturbing a religious congregation, determined in the Conway Circuit Court, at September term, 1850, before the Hon. William H. Feild, Judge.

The indictment was, in substance, as follows:

"The grand jurors, &c., &c., present that Jacob Minyard, Clark Fletcher, Francis M. Hollyfield, and George Roberts, late of, &c., on the 29th day of July, A. D. 1849, with force and arms, in the county aforesaid, maliciously and contemptuously did disturb and disquiet a certain congregation, assembled in the county aforesaid for religious worship, contrary to the form of the statute," &c., &c.

Defendant Minyard moved to quash the indictment, because, 1st: It did not describe in what manner the congregation was disturbed; 2d: It charged no offence in law; and 3d: It was uncertain and insufficient.

The court quashed the indictment, and the State appealed.

Clendenin, *Att. Gen.*, for the State. The indictment is in the words of the statute, (*sec.* 1, *art.* 6, *ch.* 51, *Dig.*;) the offence consists in disturbing the persons assembled for public worship; the aggravation of the offence consists in the manner of doing so, which is matter of proof.

WALKER & GREEN, contra, contended that the indictment should charge the manner of disturbance; that it must charge, with certainty and precision, the defendant to have committed the acts under the circumstances and with the intent mentioned in the statute, (*Arch. Cr. Pl.* 46, 47); that an indictment must show how the party committed the offence, and when and where it was done. *State vs. Ratliff*, 5 *Eng.* 532.

Mr. Justice SCOTT delivered the opinion of the Court.

The statute in question does not make every possible, malicious or contemptuous disturbance or disquietude of a congregation or private family assembled for religious worship a misdemeanor, although its provisions are very general, and embrace almost every such case that may occur. It is, therefore, necessary that the disturbance proceeded for, which we have said is the gist of the offence, (*State vs. Ratliff*, 5 *Eng.* 530,) should be described as well in order that it may be determined whether or not the statutory offence has been charged, as that the accused may know the "nature and cause of the accusation against him." It is not necessary, however, to describe it in language any more explicit than that used in the statute, (*Digest, page* 370, *sec.* 1,) as "by profanely swearing," or "by using indecent gestures," or "by threatening language" to some person so assembled, or "by committing violence" upon some said person. All greater particularity of description beyond the general description in the words of the statute, or by words of fully equal import, are properly matters of evidence to establish the distinction charged, and are not necessary matters of averment. (See, as to this principle, *Moffatt vs. The State*, 6 *Eng.* 178–9.) The indictment before us falls short of this reasonable and convenient certainty, and is therefore fatally defective in matter of substance. The Circuit Court ruled properly in granting the motion to quash, and its judgment must be affirmed.

PATTERSON VS. HARLAND.

An appeal lies from the judgment of a justice of the peace to the Circuit Court in a case of garnishment.

On the trial, in a case of judicial garnishment, the original judgment must be produced and read in evidence before any testimony can be introduced to establish the indebtedness of the garnishee. But if the garnishee permits the plaintiff to proceed with other testimony without requiring the production of the judgment, the objection is waived, and cannot be raised on motion for new trial.

The garnishee answered, that he had in his possession corn belonging to the judgment debtor, but held it by agreement with him as a security for labor which the judgment debtor was to perform for him, and had not done it: HELD, That the answer was defective in not showing that the judgment debter was under legal obligation to perform the work.

Under the provisions of *Chap.* 78, *Digest*, where a garnishee has goods and chattles in his hands belonging to the judgment debtor, he may surrender them to the plaintiff on the return day of the writ, and discharge himself thereby, but if he neglects or refuses to do so, judgment may be rendered against him for the value of the goods found in his hands, subject to the garnishment, in money.

Where property is placed in the hands of a person as a pledge for a debt, it cannot be taken by garnishment until the debt is paid.

Appeal from Phillips Circuit Court.

It appears, from the transcript in this case, that on the 10th March, 1849, Lemuel Jenkins, suing for the use of Harvey B. Harland, recovered a judgment against Robert Jackson, for $15 33, before a justice of the peace of Phillips county. The action seems to have been on a note assigned to Jenkins.

On the 12th March, 1848, Harland sued out a writ of garnishment on the judgment against John Patterson, and recovered judgment against him, in his own name, before the justice, as such garnishee for $11 77. From this judgment, Patterson appealed to thn Circuit Court of Phillips county.

In the Circuit Court an issue was made up to the answer of Patterson, a jury was sworn to try the issue, and they returned

a verdict that they "find in the possession of the garnisher, 70 bushels of corn, belonging to Robert Jackson at the time of the service of the writ of garnishment, 12th March, 1849, and find said corn to be worth 50 cents per bushel, amounting to the sum of $35, and find accordingly."

Then follows a judgment in favor of Harland against Patterson for the sum of $19 35, "being amount of the judgment rendered by the justice in favor of Harland against Jackson, with interest," &c., and for costs of both courts.

Patterson moved for a new trial, and in arrest of judgment, and both motions being overruled, he excepted, and appealed.

The bill of exceptions shows the evidence introduced on the trial, &c.: First, the interrogatories, to the garnishee, and his answer. He was asked if he had any goods, and chattles, moneys and effects of Jackson in his hands or possession, and, if any, how much, and of what value? He answered that he owed Jackson nothing. And further, that during the past season, Jackson cultivated a portion of his ground, on shares, producing he supposed about 140 bushels of corn, one half of which Jackson was to have. That before the corn was gathered, Jackson agreed that he might gather, and house the whole of it, and keep Jackson's part as security for some labor which Jackson owed him, and which he had not paid him at the time of answering: wherefore he answered that he had nothing in his hands belonging to Jackson.

Several witnesses were then introduced by the plaintiff, whose testimony corroborates the answer, except as to Patterson's lien upon the corn, and is silent on that point—they corroborate him as to gathering and housing the corn.

Patterson asked three instructions of the Court: 1st, and 2d, in substance, that plaintiff must disprove the answer of defendant, which the Court gave.

"3d: If the jury believe, from the evidence, including the answer of the garnishee, that the corn in question was given up to the garnishee as a pledge, or security, no recovery for the corn, or its value, can be had until the lien, created by the pledge, or deposit, is removed"—which the Court refused.

The new trial was asked on the grounds that the verdict was contrary to evidence, law, and the instructions of the Court, and that the Court erred in refusing the 3d instruction.

Motion in arrest on the ground that there was no appeal from the judgment of a justice in a case of garnishment.

HON. JOHN T. JONES presiding as Judge in the Court below.

E. H. ENGLISH, for the appellant. The original judgment is void for want of jurisdiction, and the garnishment suit founded on it, must fail. (*Everet v. Clements & Thompson*, 4 *Eng*. 478. *Heflin v. Owens*, 5 *ib*. 682.) Jenkins being the legal plaintiff in the original judgment, the garnishment should have been in his name, and not in that of Harland.

The verdict was contrary to evidence, because the answer, which was not disproved, admitted the possession of the corn, and alleged that it was held as a security or pledge. That an answer showing an original indebtedness may also show a discharge, see *Swisher vs. Fitch et al., use, &c.*, 1 *Sm. & Marsh*. 541. *Thompson et al. vs. Shelby*, 3 *ib*. 296. *Frost vs. Patrick*, 3 *ib*. 783.

The court certainly erred in refusing the 3d instruction asked by Patterson. If Patterson held the corn in pledge for labor due him by Jackson, he could not be deprived of his lien until the labor was performed or the debt settled. *Story on Bailments, title Pawns or Pledges, sec*. 353, *et seq*.

The judgment for money is erroneous; it should have been for the corn.

PIKE & CUMMINS, contra. The answer of a garnishee is evidence only so far as responsive to the interrogatories; and that portion of the answer setting up a lien, not being so, should have been proven. The court therefore might well have deemed the 3d instruction abstract.

The evidence clearly warranted the verdict. And that an appeal will lie, see *sec*. 174, *ch*. 95, *Dig*. 6 *Eng*. 182.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The objection that an appeal will not lie from the judgment of a justice in garnishment, we think is not well taken. The statute we consider sufficiently broad to include such judgments. It is as follows, viz: "Any person aggrieved by any judgment rendered by any justice of the peace, except a judgment of non-suit, may, in person, or by his agent, make his appeal therefrom to the Circuit Court of the same county where the judgment was rendered." (See *Dig.*, *ch.* 95, *p.* 667, *sec.* 174.) The final action of a justice of the peace, setting as a court and acting in his judicial capacity in a proceeding by garnishment, is clearly a judgment within the meaning and contemplation of this act. The construction placed upon that act by this court in the case of *Mitchell, use Rogers vs. Woods*, (6 *Eng. R.* 182,) is believed of itself to be conclusive upon this point.

The first cause assigned why the court should grant a new trial was, that the verdict was contrary to law and evidence; 2d, because the verdict was in the teeth of the instructions of the court: and 3d, because the court refused to give to the jury the third instruction asked for by the garnishee. We will now proceed to determine upon these several grounds of objection as they are presented by the motion.

If the counsel for the appellant had interposed his objection in apt time, he could most unquestionably have excluded the whole evidence offered against his client, unless his objection had been obviated by the production of the original judgment. That was the basis of the proceeding by garnishment, and, as a matter of course, was absolutely necessary to lay the foundation for the introduction of other testimony. The garnishee had a right to see it and also to have it before the jury, who were to pass upon and fix his liability, as it alone could serve as the measure of the recovery against him, and also to furnish a bar to any future action against him for the same subject matter. This, however, he did not do; but, on the contrary, waived his right in this respect, and permitted evidence without objection to be received tending

to show the amount in his hands belonging to the defendant in the supposed judgment. This court, in the case of *Johnson vs. Ashley*, (2 *Eng. R.* 473,) said: "It is the duty of a party who desires to have testimony offered by his adversary excluded from the jury, to move to that effect so soon as it is delivered, and if he fails to do so, but rests till other witnesses are examined, and then moves to exclude the whole, his motion will not be sustained in case any part of the testimony thus delivered shall be competent under the issue joined between the parties." The rule will apply with equal force where a party has permitted evidence to be introduced which could not be legally received without first laying a foundation for its reception, as the law will presume that he waived his right thus to object. The evidence, therefore, tending to show what property the defendant below had in his hands belonging to the supposed judgment debtor, and also the value of the same having been properly received, we will now proceed to enquire into its sufficiency to authorize the verdict rendered by the jury.

The garnishee admitted in his answer, that he had some seventy bushels of corn in his possession belonging to the judgment debtor, but that he had given him permission to retain it as a security for the performance of certain work and labor which he had agreed to do for him, and which he had failed and refused to perform up to the time of putting in his answer. It was proved by other witnesses, that corn, at the time referred to, was worth fifty cents per bushel. It is contended that the defendant had a right to hold the corn as a pledge for the work and labor, which Jackson, the debtor in the judgment, had agreed to perform until it was fully completed. How this matter might have stood in the event that the defendant had shown that the judgment debtor was under any legal liability to perform the work, we do not feel ourselves called upon at present to decide. He has not shown, nor attempted to show, that he was indebted to him, and that he had agreed to perform work and labor to liquidate such debt, but the inference is strong, from the evasive language of his answer, that he was not so indebted, but that on the contrary, his claim

was a mere pretext resorted to, to place the property beyond the grasp of the law. The answer, therefore, though not rebutted by other evidence, is strong in itself to fix a liability upon the defendant; at least it leaves the matter in that dubious state which would fully justify a jury in finding as they did.

But it is insisted that, even admitting that the jury had the right, under the proof, to find the corn in the hands of the defendant, yet they had no power to inquire into its value, and return a verdict for dollars. By the *3d sec. of the 78th chap. of the Digest*, the plaintiff is authorized to file allegations and interrogatories upon which he may be desirous of obtaining the answer of the garnishee, touching the goods and chattles, moneys, credits and effects, of the defendant in the judgment and the value thereof in his hands and possession at the time of the service of the writ, or at any time thereafter. The *6th sec.* provides that if the issue be found for the garnisee, he shall be discharged without further proceedings; but if the issue be found for the plaintiff, judgment shall be entered for the amount found due from the garnishee to the defendant in the original judgment, or so much thereof as will be sufficient to satisfy the plaintiff's judgment with costs; and the *7th sec.* further provides that if, on the return day of the garnishment, the garnishee shall surrender to the plaintiff all the goods and chattles, moneys, credits and effects which may be in his hands or possession belonging to the defendant, he shall be discharged with costs, and the court or justice shall enter up an order releasing and discharging such garnishee from all responsibility to the defendant, in relation to the goods and chattles, moneys, credits and effects so surrendered. The last section quoted, it will be perceived, gives the garnishee an election either to surrender or to retain the goods and effects, and in case he shall choose to make the surrender, he is thereby entitled to a release from all responsibility in relation thereto. It is very clear that he makes his election at his peril, and that in case he shall fail to avail himself of his privilege to surrender on the return day of the writ, he is liable for the value of the property found in his possession belonging to the judgment debtor, at least to the ex-

tent of the judgment in case it shall amount to so much. There is no error, therefore, in this respect.

It is also objected to the judgment that the Court refused to give in charge the third instruction asked by the defendant. This instruction is as follows, viz: "If the jury shall believe from the evidence, including the answer of the garnishee, that the corn in question was given up to the garnishee, by the judgment creditor (debtor) Jackson, as a pledge or security, no recovery for the corn or its value can be had until the lien created by the pledge or deposit is removed." We think there can be no doubt but that the defendant was entitled to the benefit of this instruction. There was some evidence contained in the answer from which the jury might have been warranted in the inference that the corn was left with the garnishee as a pledge to secure a real subsisting debt; and, if so, he was clearly entitled to retain it until his debt was paid. See *Jones on Bailments*, *p.* 86. The Court therefore erred in this particular, and for this error, the cause must be reserved and remanded, to be proceeded in according to law, and not inconsistent with this opinion.

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McGEE VS. OVERBY ET AL.

Joint trespassers may be sued separately, and recovery had against each; and judgment against one cannot be pleaded in bar of a recovery against another, unless the judgment has been satisfied, or at least an execution issued.

To constitute a good plea of former recovery, it is not necessary to show that the same action, in form, has been previously prosecuted against the party, but it is essential, in order to constitute a bar, that the recovery set up should be founded upon the identical cause of action.

This was trespass against defendants for taking and converting the mule of plain-

tiff. Defendants pleaded that they took the mule, and sold it to one J., against whom plaintiff brought replevin, in the detinet, and recovered judgment for the mule, and damages for its detention: HELD, On demurrer, that the plea was not good; that the original taking of the mule by defendants, and its detention by J., to whom defendants sold it, and who was not a joint trespasser with them, were separate and distinct causes of action.

Appeal from Johnson Circuit Court.

This was an action of trespass by Newman McGee against William Overby, Daniel J. Matthews, and Lemuel H. Matthews, determined in the Johnson Circuit Court, at the September term, 1850, before the Hon. W. W. FLOYD, Judge.

There were two counts in the declaration. The first charged that defendants, on the last day of January, 1850, at, &c., with force and arms, took the brown black mule of said plaintiff, of great value, to wit: of the value of $125, and carried the same off, and converted it to their use, &c.

The second count was the same as the first, except that it charged the trespass to have been committed on the last day of March, 1850, instead of the last day of January.

The defendants filed a special plea, as follows:

"Defendants come, &c., and say *actionem non*, because they say that, heretofore, to wit: on the first day of June, A. D. 1850, at, &c., they, the said defendants, took the said mule, in the said plaintiff's declaration mentioned, out of the possession of him the said plaintiff, and afterwards, to wit: on the day and year aforesaid, at the county aforesaid, they, the said defendants, sold the said mule to one Absalom B. Joiner: and, the said defendants further aver that, afterwards, *to wit:* on the day and year aforesaid, the said plaintiff commenced his certain action of replevin in the detinet against the said Joiner for the recovery of the same mule in the said declaration mentioned in the Circuit Court of said county of Johnson; and that afterwards, *to wit:* on the 4th day of September, 1850, and at the September term of said Court in that year, such proceedings were had in the said action of replevin, that the said plaintiff, by the consideration and

judgment of our said Circuit Court, recovered judgment against the said Joiner for restitution of the said mule, and for the sum of six dollars and fifty cents for his damages, caused by the detention of said mule, together with all his costs in that behalf, laid out and expended, as by the record and proceedings thereof remaining of record in our said Court appears. And the said defendants further aver that the said plaintiff's action of trespass and the said action of replevin, wherein a recovery was had as aforesaid, were simultaneously instituted, the one for the taking and the other for the detention of the same mule, and so the said defendants aver that the said plaintiff hath, in his said action of replevin, recovered against the said Joiner, his damages by him sustained by reason of the several supposed trespasses in his said declaration set forth; and this, they are ready to verify, &c.

To this plea, plaintiffs demurred on the grounds: 1st, that the recovery set up in the plea was for the detention of the mule, whilst the present action was for the original taking: 2d, that it was not shown by the plea that Joiner was a joint trespasser with defendants in taking said mule, &c.

The court overruled the demurrer, and plaintiff rested, and permitted final judgment to go for defendants, and appealed.

E. H. ENGLISH, for the appellant. The plea is clearly bad, for even if it had shown that Joiner was a joint trespasser with the defendants, still a recovery against him would be no bar to the present action, unless satisfaction had followed the judgment, or at least an execution had been issued on it. (*Livingston v. Bishop*, 1 *John. Rep.* 290.) But the plea does not show that Joiner was sued for the same trespass: on the contrary, the action and recovery against him were for the property and damages for the detention; and the present is for damages for the original taking. A plea of former recovery must show that the matter of the second suit was directly in issue in the former suit, and that the verdict and judgment were directly upon the points sought to be litigated in the second suit, and of necessity involved their consideration

and determination. *McKnight vs. Dunlop*, 4 *Barber* (*N.Y.*) *Rep.* 36.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The legal sufficiency of the plea interposed by the appellees, is the only matter presented by the record for the consideration and decision of this court. The plea admits the taking of the property mentioned in the declaration, but, by way of a bar to this suit, sets up that they afterwards sold it to one Absalom B. Joiner, against whom the plaintiff subsequently brought his action of replevin in the detinet, and recovered a judgment for the restitution of the said property and for the sum of six dollars and fifty cents for his damages caused by its detention, together with all his costs in that behalf laid out and expended. This plea does not contain such matter as would constitute a valid bar to the present action of trespass, if it were even in proof that the defendant in the replevin suit and the defendants here were all liable as joint trespassers in the original taking. If they had all united in the original taking, they could still have been sued separately and separate recoveries had against each, and one judgment could not have been pleaded as a bar to a suit against the other defendants. Where a recovery has been had against a joint trespasser, there must, at least, be an execution thereon, and that may be deemed an election by the plaintiff *de melioribus damnis*, and sufficient to conclude him. This is the doctrine laid down by the Supreme Court of New York, in the case of *Livingston vs. Bishop and others*, (1 *John. R.* 290,) where the authorities are cited and fully discussed. It is conceded that it is not necessary to show that the same action, in form, has been previously prosecuted against the party, but it is essential, in order to constitute a bar, that the recovery set up should be founded upon the identical cause of action. What is meant by the same cause of action, is, where the same evidence will support both actions, although they happen to be grounded on different writs. See *Rise vs. King* (7 *John. R.* 19,) and *Johnson vs Smith*, (8 *John. R.* 383,) in the latter of which cases it was said, "The former suit was for

cutting and carrying away wheat, and was for the same cause of action, and though the former action was denominated by the justice an action of trespass on the case, and this was trespass, it did not alter the application of the rule, which depended not upon the identity of action, but upon the same proof in both cases." Let us test the case before us by the rule here laid down, and see whether the former recovery set up in the plea can be permitted to prevail as a bar to this suit, or, in other words, was the proof the same in both cases. The action in which the recovery relied upon was had, was replevin in the detinet, and prosecuted against the vendee of the present defendants. It is admitted that the mule, which was in controversy in both suits was one and the same, yet it cannot be properly said that each case involved precisely the same points, and that the proof was necessarily the same. If the plaintiff had instituted his action of replevin in the detinet against the present defendants, thereby waiving the tort of the original taking, and had prosecuted his suit to final judgment, there can be no doubt but that such judgment would have been a complete bar to the present action. But the state of case is wholly different when the recovery is had against a stranger, as he was not guilty of any wrong in the original taking, and consequently there was none for the plaintiff to waive. The plaintiff's cause of action against the present defendants was complete the moment the trespass was committed, and it was not destroyed, or in any wise affected, by the sale and transfer of the property to a stranger. If the property has been restored to the plaintiff, either by the voluntary act of the defendants, or by means of a suit prosecuted against their vendee, it is manifest that he cannot recover its value in this action; and that evidence of such restoration would be admissible for the purpose of mitigating damages. True it is that the plea avers that the recovery in the replevin suit covers all the trespasses complained of in this declaration, yet such averment cannot aid the plea, as the question of the tortious taking was not involved in that suit; and consequently if damages were recovered for such taking, such recovery cannot relieve these defendants from their respon-

sibility. We are satisfied, therefore, the plea interposed by the defendants in this case is wholly insufficient as a bar to the present action, and that consequently the demurrer to the same ought to have been sustained.

For this error, therefore, the judgment of the Johnson Circuit Court is reversed, annulled, and set aside, and the cause remanded, with instructions to be proceeded in according to law and not inconsistent with this opinion.

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FLETCHER ET AL. VS. THE STATE.

An indictment for disturbing a religious congregation, charging that defendant "maliciously and contemptuously did disturb and disquiet a certain congregation assembled for religious worship," without alleging the manner of disturbance, is bad in substance, (*State vs. Minyard, ante,*) and will not support a judgment on a plea of guilty.

By the plea of guilty, defendant but confesses himself guilty in manner and form as charged in the indictment, and if the indictment charges no offence against the law, none is confessed.

Writ of Error to Conway Circuit Court.

This was an indictment for disturbing a religious congregation, determined in the Conway Circuit Court, before the Hon. WM. H. FEILD, Judge, at the March term, 1850.

The indictment was, in substance, as follows:

"The grand jurors, &c., &c., present that Jacob Minyard, Clark Fletcher, Francis M. Hollyfield, and George Roberts, late of, &c., &c., on the 29th day of July, A. D. 1849, with force and arms, in the county aforesaid, maliciously and contemptuously did disturb and disquiet a certain congregation, assembled in the county

aforesaid for religious worship, contrary to the form of the statute," &c., &c.

Defendants Fletcher, Hollyfield, and Roberts severally pleaded guilty, and, on submission to the court, were fined $20 each.

Fletcher and Hollyfield brought error.

WALKER & GREEN, for Plaintiffs.

CLENDENIN, *Att. Gen.*, contra, said that, even if the indictment is defective, the plaintiffs have waived all objection to it by the plea of guilty.

Mr. Justice SCOTT delivered the opinion of the Court.

The indictment in this case is liable to the same objection which we have sustained against that in the case of *The State vs. Minyard*, in the opinion just delivered. But the Attorney General submits, that, inasmuch as the defendants below pleaded guilty in the Circuit Court, they thereby waived all objections to the indictment. The law has been long settled otherwise. No confession, however large and explicit, can have any such effect. (1 *Chitty on Cr. Law, page* 431, 662–3.) The defendants here but confess themselves guilty in manner and form as charged against them in the indictment, and, if no offence against the the law is charged, they have not confessed themselves guilty of any. But if the confession was still broader and embraced a crime, when the indictment fell short of it, and punishment followed, it would be the punishment of a crime not proceeded for by indictment.

And in civil pleading, this principle is equally well settled in the doctrines touching the distinctions between stating no title or a defective title on the one hand, and stating a good title or cause of action defectively on the other.

The judgment of the Circuit Court in this case must be reversed, because no offence is charged in the indictment, and the cause must be remanded, that a new indictment may be preferred to the Grand Jury. *Dig.*, *p.* 403, *sec.* 104.

MAGRUDER VS. SLATER.

Debt, by petition, on a *bond*, setting out the instrument, but calling it a *note*: HELD, That calling it a *note*, was no ground of demurrer, when taken in connexion with the instrument itself set forth in the petition, and appearing to be a bond.

In setting out a bond, in debt by petition, it is not necessary to copy the dollar-mark and numerals representing the amount of the bond, in the margin; they constitute no part of the contract.

No plausible ground appearing for the appeal, damages awarded to appellee under *Digest, ch.* 127, *sec.* 40.

Appeal from Independence Circuit Court.

Debt, by petition, as follows:

"*To the Circuit Court of the County of Independence, at the March term thereof, A. D.* 1850:

Your petitioner, John A. Slater, the plaintiff in this cause, states that he is the legal owner of a note against the defendants William W. Ewbank and Charles B. Magruder, to the following effect:

'For value received, we, or either of us, promise to pay J. T. Fairchild, or order, the sum of two hundred dollars, in one year from the 1st day of January next, interest to commence on the 1st day of January next, at the rate of 10 per cent. per annum: In witness whereof, we have hereunto set our hands and seals. Batesville, July 23, 1847.

W. W. EWBANK, [SEAL.]
C. B. MAGRUDER, [SEAL.]'

On which is the following endorsement in blank, 'J. T. Fairchild;' by virtue of which the plaintiff has become the owner thereof. Yet the debt remains unpaid; therefore he demands

judgment for his debt, and damages for the detention thereof, together with his costs." F. W. DESHA, *Att.*

Defendant Magruder craved oyer, and plaintiff filed the following as the instrument sued on:

"For value rec'd, we, or either of us, promise to pay J. T. Fairchild, or order, the sum of two hundred dollars, in one year from the 1st day of January next, interest to commence on the 1st day of January next, at the rate of 10 per cent. per annum: In witness whereof, we have hereunto set our hands and seals. Batesville, July 23, 1847.

W. W. EWBANK, [SEAL.]
C. B. MAGRUDER, [SEAL.]"

Endorsed—J. T. Fairchild.

Magruder then demurred to the petition on the following grounds:

"1. That plaintiff, in his said petition, calls and describes the instrument sued on as a *note*, whereas on oyer granted it appears to be not a note, but a bond or specialty.

2. Plaintiff has omitted in said petition the *dollar-mark* and numerals appearing on oyer as the preliminary part of said instrument sued on.

3. Plaintiff has also misdescribed said instrument in his said petition in this, *to wit:* 'for value received,' &c., whereas, on oyer, it appears thus: 'for value *rec'd.*'

4. Said plaintiff has not the legal interest in said instrument sued on." CONWAY B, *Att.*

Demurrer overruled, and final judgment for plaintiff, and appeal by Magruder.

CONWAY B, for the appellant.

FOWLER, for appellee, suggested that, as the appeal was taken for delay, damages should be awarded.

Mr. Justice WALKER delivered the opinion of the Court.

There is certainly no good ground for the demurrer in this case. The bond given on oyer was literally and truly copied into the petition. The fact that the petitioner in his petition called it a note, amounted to nothing when taken in connexion with the instrument itself set forth literally, by which it was shown to be a bond. The bond given on oyer brought no new or variant fact upon the record.

The omission of the dollar-mark and the figures representing the amount of the bond, superadded at the margin above the writing, was mere surplusage, constituting no part of the contract, and, whether there or not, in no respect varied, diminished, or enlarged it.

There is not a doubt of the correctness of the decision of the Circuit Court, nor can we conceive of any probable or plausible ground for the appeal on the score of wrong or grievance, unless it be such to make a clear and specific charge of indebtedness in the language of the contract, and a positive averment that it has been broken, and in the absence of any valid defence as to either to render judgment thereon.

Let the judgment be affirmed with costs; and, under the provisions of the 40*th sec.*, *ch.* 127, *p.* 828, *Dig.*, let six per cent. in damages be awarded on the amount of the judgment rendered in the Circuit Court.

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KURTZ VS. ADAMS ET AL.

It is the settled construction of the statute of Frauds, that every collateral undertaking or promise to answer for the debt, default, or miscarriage of another, is within the statute, and void if not in writing, but that original undertakings are not within the statute, and need not be in writing.

Where there is a pre-existing debt, or other liability, a promise by a third person having immediate respect to, and founded upon, the original liability, without any new consideration moving to him to pay or answer for such debt or liability, is a collateral undertaking.

But where, distinct from the original liability, there is a new and superadded consideration for the promise moving between the party promising and him to whom the promise is made, in such case it is an original undertaking.

Again, where there is no previously existing debt, or other liability, but the promise of one is the inducement to and ground of the credit given to another, by which a debt or liability is created, such a promise is a collateral undertaking. The general rule being that, wherever the party undertaken for is originally liable upon the same contract, the promise to answer for that liability is a collateral undertaking, and must be in writing.

But where the party undertaken for is under no original liability, the promise is an original undertaking, and binding upon the party promising without being in writing.

In this case, Y. having applied to plaintiff's store for credit, and, being refused, defendants said to the plaintiffs' clerk that if he would let Y. have goods, and he did not pay for them, they would do so. Thereupon, Y. obtained the goods upon the faith of the solvency of defendants, but the goods were charged to Y. in the books of plaintiffs: HELD, That this was a collateral undertaking on the part of defendants, and, not being in writing, they were not responsible for the price of the goods.

Appeal from Conway Circuit Court.

Adams & Ragsdale sued John Kurtz and Peter Kurtz, before a justice of the peace of Conway county, in December, 1849, on an account for goods, wares, and merchandize, consisting of a great many items, and amounting to $83 88. The plaintiffs recovered before the justice, and defendants appealed to the Circuit

Court of Conway, where the cause was determined before the Hon. WM. H. FEILD, Judge, at the March term, 1850.

On the trial, the plaintiffs proved, by David Broadway, that he was clerking for them in the year 1849; that the first twenty-eight items in the account sued on, amounting to $23 51, were sold and delivered to defendants; that one John M. Young had applied for credit, and was refused; that, before the 15th January, 1849, John Kurtz, and afterwards Peter Kurtz, (the defendants,) told witness to let said Young have goods, and, if he (Young) did not pay for them, that they (the defendants) would; that the balance of the articles in said account, as charged, commencing after the words, "by John Young," and amounting to the sum of $60 37, were sold and delivered to said Young at the times in said account stated, and were charged on the books of plaintiffs to said John M. Young, by Kurtz; that credit was given to Young upon the faith of the solvency of defendants. Which was all the evidence.

The court instructed the jury, "that, if the items charged to Young, was not a subsisting debt at the time of the promises of said defendants, but was for goods which were delivered to Young on the credit of defendants, and on the promises of defendants to pay for them, in case said Young should fail to do so, that defendants were liable to plaintiffs for the payment thereof," to which instruction defendants excepted.

The plaintiffs obtained a verdict and judgment for the amount of the account, and defendants appealed to this court.

BATSON and F. W. & P. TRAPNALL, for the appellants, contended that, as the credit for the goods purchased by Young, was given to him and not to the appellants, they were legally liable to pay for them. *Chit. Con.* 232. 2 *Term R.* 80. 1 *Saund.* 24, *n.* (*a*).

CLENDENIN, contra, argued that, as the assumpsit was not for the pre-existing debt of another, but for the credit to be given in future, the promise is not within the statute of Frauds.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The question to be decided here is, whether the evidence is of such a character as to charge the appellants with the debt for which the suit was instituted. It appears, from the testimony, that a certain John M. Young had previously applied to the appellees to purchase goods upon a credit, which they refused to do, and that, upon their refusal, the appellants said to the witness, Broadway, who was acting as the clerk of the appellees, that if he would let Young have goods, and he did not pay for them, they would do so. It is also in proof that the goods taken up by Young were charged in the books of the appellees to Young by Kurtz, and that credit was given to Young upon the faith of the solvency of appellants. In order to fix a legal liability upon the appellants for the debt of Young, a distinction is attempted to be taken between a debt pre-existing and one contracted subsequent to the date of the promise or guaranty. This supposed distinction is not believed to be known to the statute of Frauds. The statute declares that "No action shall be brought to charge any person upon any special promise to answer for the debt, default, or miscarriage of another, unless the agreement, promise or contract upon which such action shall be brought, or some memorandum, or note thereof, shall be made in writing and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized." The point now to be determined is, whether the court below erred or not in permitting the evidence to go the jury. The case of *Elder vs. Warfield*. (7 *Har. & John.* 394,) is directly in point. At the trial in that case, the plaintiff (the appellee) offered in evidence, by Alfred Warfield, his brother and clerk, that, in the year 1817, the plaintiff was applied to by Joseph Berritt, to furnish him with necessaries for his family on credit; that the plaintiff, having doubts of Berritt's solvency, declined to do so, and refused to let him have the goods he applied for. That at the time defendant lived on part of farm belonging to Berritt's wife, in what character, whether as manager, overseer, or trustee, he knew not

That subsequently the defendant called and requested the plaintiff, through the witness, to let Berritt have goods, &c., which he wanted, and told the plaintiff that Berritt was perfectly solvent, and did not owe more than $500, and was willing and able to pay his debts; that Berritt had recently sold property in Baltimore for a considerable sum of money, and the plaintiff should be paid out of it. The plaintiff still doubted, when the defendant told him to let Berritt have goods, and he would be responsible for the amount, and pay it out of the proceeds of the sale of Berritt's property, which he (the defendant) expected to receive. This agreement was not reduced to writing, or any memorandum made of it. The plaintiff, in the years 1817, 1818 and 1819, let Berritt have various goods, wares, and merchandize. The plaintiff further gave evidence, by the same witness, that, after conversation aforesaid between the plaintiff and defendant, Berritt, upon his orders, obtained, at different times, goods and merchandize, to the amount of $523, being the same goods and merchandize for the recovery of whose value the action was brought. He also offered other evidence, but wholly failed to show that the defendant's promise was reduced to writing. The statute of Maryland is substantially the same with our own, and, as such, the same must necessarily be the construction of both. The court of appeals of that State, when speaking in reference to their statute of Frauds, said that "A strict adherence to the letter would, it is believed, have prevented much litigation, of which the introduction of exceptions has proved a fruitful source; it may now, however, be assumed as the settled construction of that branch of the 4th section on which this case depends, that every collateral undertaking or promise to answer for the debt, default, or miscarriage of another, is within the statute and void if not in writing, but that original undertakings are not within the statute, and need not be in writing. Collateral and original have become the technical terms whereby to distinguish promises that are within and such as are not within the statute. And as they are terms not used or defined in the statute itself, it may here be proper to notice the general distinguishing characteristics of collateral and

original promises, as understood in relation to the statute of Frauds. Where there is a pre-existing debt or other liability, a promise by a third person having immediate respect to and founded upon the original liability, without any new consideration moving to him to pay or answer for such debt or liability, is a collateral undertaking, as in the case of *Fish vs. Hutchinson*, (3 *Wils.* 94,) which was an action founded on a promise of the defendant to pay a debt due from one Nickers to Fish, (for which Fish had brought suit) in consideration that Fish would stay his action against Nickers, which being a promise to pay the still subsisting debt of another was held to be clearly within the statute. And so in *Kirtham v. Martin*, (2 *Barn. & Ald.* 613,) where A. having wrongfully killed the horse of B., a promise by C. to pay B. the damages he had sustained in consideration that he would not sue A. was adjudged to be within the statute. But where distinct from the original liability, there is a new and superadded consideration for the promise moving between the party promising and him to whom the promise is made, in such case it is an original undertaking, as in *Williams vs. Leper*, (3 *Burr.* 1836,) where the defendant having got possession of goods, which were subject to distress for rent in arrear, promised the Landlord (the plaintiff) to pay the rent if he would desist from distraining. There are many cases proceeding upon this distinction between a promise founded upon the liability alone of a third person and one which is induced by a distinct and superadded consideration moving between the immediately contracting parties, as *Austey vs. Marden*, (4 *Bos. & Pull.* 130,) *Castling vs. Aubert*, (2 *East* 325,) and *Read vs. Nash*, (1 *Wals.* 305.) Again, where there is no previously existing debt or other liability, but the promise of one is the inducement to and ground of the credit given to another, by which a debt or liability is executed, such a promise is a collateral undertaking. The general rule being that wherever the party undertaken for is originally liable upon the same contract, the promise to answer for that liability is a collateral promise, and must be in writing. As if B. gives credit to C. for goods sold and delivered to him on the promise of A. to see him paid or to

pay him if C. should not, in that case it is the immediate debt of C. for which an action will lie against him, and the promise of A. is a collateral undertaking to pay that debt, he being only as security. But where the party undertaken for is under no original liability the promise is an original undertaking, and binding upon the party promising without being in writing. Thus, if B. furnishes goods to C. on the express promise of A. to pay for them, as if A. says to him let C. have goods to such an amount, and I will pay you, and the credit is given to A., in that case C. being under no liability, there is nothing to which the promise of A. can be collateral, but A. being the immediate debtor it is his original undertaking and not a promise to answer for the debt of another." That case, and the others cited by the court, are perfectly conclusive of the question involved in the case at bar. Here, it is true, there was no pre-existing debt, but, on the contrary, it was subsequently contracted, and that, too, upon the promise of the appellants, operating as the inducement to and ground of the credit given to Young.

We are satisfied, therefore, that the promise or guaranty made by the appellants to pay for the goods, in case Young should fail to do so, was a mere collateral undertaking, and not being reduced to writing, is clearly within the statute of frauds. Under this doctrine, it is obvious that the Circuit Court erred in refusing to exclude the testimony offered by the appellees, and also in giving the instructions which it did give to the jury. The judgment is therefore reversed, annulled, and set aside, with costs, and the cause remanded, to be proceeded in according to law, and not inconsistent with this opinion.

STATE BANK VS. ARNOLD ET AL.

Action of debt on a note: plea, limitation: replication, that before the bar attached, plaintiff brought suit on the same cause of action, against defendants, in the same court, afterwards suffered a non-suit, and commenced the present action within a year thereafter: rejoinder, *nul tiel* record of such former suit, issue thereto submitted to the court, and finding for the defendants; bill of exceptions setting out the record read in evidence on the trial, which is substantially as alleged in the replication: HELD, That this court could not presume in favor of the judgment of the court below, and for the purpose of sustaining it, that other evidence than the record set out in the bill of exceptions was introduced on the trial, because the bill of exceptions did expressly negative the introduction of other evidence, inasmuch as under the issue none other could be introduced.

Under such issue, the defendant could not have proven, *aliunde*, that the parties or the cause of action in the two suits were not the same—the only question raised by the issue being, was there such a record of such former suit, &c., as alleged in the replication.

Writ of Error to Independence Circuit Court.

On the 22d day of March, 1849, the Bank of the State of Arkansas commenced an action of debt, in the Independence Circuit Court, against John N. Arnold and Alfred Arnold, on a promissory note, due 1st July, 1844.

At the return term, defendants pleaded *nil debt*, payment, and the statute of limitation. Issue to the first and second of said pleas, and special replication, by the plaintiff, to the third. This replication alleges that, on the 26th day of June, 1846, and within three years next after the cause of action accrued to plaintiff, she commenced an action of debt on said note, against said defendants, in the Independence Circuit Court; and afterwards, at the May term of said court, 1848, suffered a non suit therein; and commenced the present action within a year thereafter.

To this replication, defendants rejoined *nul tiel record* of such former suit, &c., to which plaintiff took issue. The issue was

submitted to the court, plaintiff produced and read in evidence the record of the former suit, substantially as alleged in the replication, and thereupon the court found for defendants, and rendered final judgment against the plaintiff. Plaintiff excepted, and took a bill of exceptions setting out the record introduced by her upon the trial, and brought error.

HEMPSTEAD and BEVENS, for the Bank, argued this cause upon the question of the sufficiency of the proof to sustain the replication; and as to the bill of exceptions not stating that there was no other, said the case was tried on the issue of *nul tiel* record, which did not admit of other evidence than by inspection. *The Bank v. Bates*, (5 *Eng*. 636,) is decisive of this question.

BYERS & PATTERSON, contra. The bill of exceptions does not, in direct words or by implication, affirm that it sets forth all testimony upon which the court found the issue for the defendants; and in such case the court will presume in favor of the court below that there was sufficient proof to warrant the judgment. 2 *Eng*. 408. *Taylor v. Spears*, 3 *Eng*. 430.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The only question presented by the record in this case, is whether the court below decided correctly or not, upon the issue of *nul tiel* record. The defendants' counsel has not specified or pointed out any variance between the record described in the plaintiff's replication and the one brought in support of it; but he has rested his objection alone upon a supposed omission in the bill of exceptions to negative the idea that other evidence was before the court. He contends that the correctness of the judgment is not enquirable into, and that whether right or wrong it must stand upon the legal presumption which attaches in its favor. He insists that the bill of exceptions does not affirm either in direct words or by implication that it sets forth all the testimony upon which the court found the issue for the defendant, or that upon the evidence therein set forth, the issue was sub-

mitted to the court, or that no further testimony was offered, or that the bill of exceptions contained all the facts in the case.—He contends that in this state of the record the defendants may have proved that the record introduced was against different and other persons of the same name, or that the cause of action disclosed in the record was a different and other cause of action than the one sued upon, or that the defendants may have proved other facts which authorized the finding of the court. We will now proceed to test the grounds of these assumptions.

The bill of exceptions filed in the cause after detailing the record set forth and described in the replication, concludes as follows: "Whereupon all and singular the records and note above mentioned, being inspected by the court as the evidence introduced by the plaintiff under the issue of *nul tiel* record, and the same being examined by the court on the trial of said issue of *nul tiel* record, and after duly considering the same, the court found said issue in favor of the defendants, to which judgment, finding and opinion of the court upon said issue of *nul tiel* record in favor of the defendants, the plaintiff by attorney at the time excepted," &c. This entry shows very clearly that the record referred to in the replication was the only evidence introduced by the plaintiff; and whether it is silent in respect to that introduced by the defendant or not, is wholly immaterial, as under the issue he could have introduced none to authorize the finding of the court in opposition to that brought forward by the plaintiff. The identity of the parties, or of the cause of action, was not put in issue by the plea of *nul tiel* record, and consequently no presumption can arise in favor of such proof having been made. The only question presented by the issue of *nul tiel* record was, whether there was such a record as that described in the replication, and not whether the parties or the cause of action were one and the same. If the defendants had been disposed to contest either of these facts, they could have done so only after first admitting the existence of the record and then by setting up such matter by way of avoidance. It is clear, therefore, that under the issue which was before the court, they could not have introduced any matter to entitle them

to a judgment. We are satisfied from this view of the case, that the court below erred in finding for the defendants upon the issue of *nul tiel* record, and that the judgment ought to be, and is hereby reversed, and the cause is remanded to the said court to be proceeded in according to law, and not inconsistent with this opinion.

STATE BANK VS. SHERRILL.

Debt, on a note executed by defendant and two others: plea, limitation: replication, that plaintiff brought an action on the note within the bar, suffered a non-suit, and commenced the present action within a year thereafter: Replication held bad, on demurrer, because it did not allege that the former action was brought against defendant in the present suit.

Where a party pleads matter of record, if the record be set out imperfectly or partially, it is sufficient if enough appear to prove the matter in dispute; as if the plaintiff replies a former suit against defendant within the bar, non-suit, and new action within a year, to avoid the plea of limitation, and the record shows a suit against defendant and two others, joint-makers of the note sued on, the record is sufficient to support the replication under the issue of *nul tiel record.*

Under such issue, no evidence is admissible, but the record, or a transcript of it—plaintiff need not prove *aliunde* that the parties and cause of action in the two suits are the same: the issue is tried alone by the record.

Neither party has a right to complain that an issue remains indisposed of, where the same matter is determined under other issues.

Where plaintiff replies a former suit, &c., to the plea of limitation, defendant rejoins *nul tiel record;* and issue thereto is found for defendant, he is entitled to final judgment; and it is not necessary to submit to a jury other issues made up in the case; but if such issues are submitted to a jury, and found against plaintiff, it being an extrajudicial act, is no waiver of his right to a future trial of the issues, on reversal of the judgment on the issue of *nul tiel record.*

Writ of Error to Independence Circuit Court.

On the 22d day of March, 1849, the Bank of the State of Arkansas commenced an action of debt, in the Independence Circuit Court, against Alanson P. Sherrill and E. W. Jordan, on a note executed to the Bank by Sherrill, Jordan, and one C. S. McKinney, due 1st July, 1844.

At the return term, Jordan not having been served with process, the action was discontinued as to him.

Sherrill filed three pleas: *Nil debet*, payment, and limitation. Issues to the first two, and two special replications to the third.

1st Replication: That, within three years next after the cause of action accrued to plaintiff on the note herein sued upon, she commenced an action against said defendant Sherrill, on the same cause of action, by filing, in the Independence Circuit Court, on the 24th day of June, 1847, her petition in debt, and causing a writ to be issued thereon on the 26th day of the same month; that, afterwards, on the 24th day of May, 1848, she suffered a non-suit in said action, and commenced the present suit within a year thereafter.

2d Replication: That, within three years after the said note became due and payable, the plaintiff commenced an action at law thereon, [*without alleging against whom*,] in the Independence Circuit Court, afterwards suffered a non-suit therein, and commenced the present action within a year thereafter.

Defendant demurred to the 2d replication, and the court sustained the demurrer.

Defendant filed seven rejoinders to the 1st replication, all of which the court struck out but the 7th, which was simply a denial of the allegations of the replication in detail, and to which plaintiff took issue. Defendant also entered, in short upon the record, an additional rejoinder af *nul tiel record*, to which plaintiff took issue.

A jury was then empannelled, and sworn to try the issues, &c.

The issue of *nul tiel record* was submitted to the court, and determined in favor of the defendant.

The plaintiff then submitted the case to the jury upon the other issues, against the objection of defendant; the jury, after hearing the evidence, returned a verdict for the defendant, and final judgment was thereupon rendered in his favor.

Plaintiff excepted to the finding of the court on the issues of *nul tiel record*, and set out the record of the former suit introduced on the trial of the issue; from which it appears that the former suit was against all of the makers of the note, and not against Sherrill alone. In other respects, it corresponds substantially with the allegations of the replication.

Plaintiff brought error.

BEVENS, for the plaintiff. The second replication to the plea of limitations was technically good. It is not necessary to set forth the whole of the proceedings, a recuperant merely is sufficient, because the whole process must be given in evidence, and must be presumed regular until the contrary is shown. *Murry vs. Wilson*, 1 *Wils. Rep.* 317. 1 *Saund. R.* 92, *n.* 2. 2 *Wils.* 5. 2 *Esp. N. P.* 435.

There was no variance between the record pleaded in the first replication and that introduced in proof. Though the first action was brought against Sherrill, McKinney and Jordan, it was sufficient to allege that it was brought against Sherrill. 2 *Esp. N. P.* 435. 1 *T. R.* 239. *Rodman vs. Forman*, 8 *John. R.* 26. 1 *Greenl. Ev.* 370. 6 *Com. Dig., tit. Record* (*c.*) 175.

BYERS & PATTERSON, contra. The second replication did not allege against whom, or when, or where, the first suit was commenced: it does not allege that any suit had been brought against Sherrill, and was therefore no answer to the plea.

That there was a material variance between the replication alleging a former suit against Sherrill, and the record of a suit against Sherrill, McKinney, and Jordan, see 3 *Stark. Ev.* 1530.

But if the finding of the court was correct, the case was submitted to a jury on the pleas of *nil debet* and *payment*, and their verdict in favor of the defendant is conclusive. It appears, upon the whole record, that the judgment of the court in favor of the defendant is right, and that judgment ought not to be disturbed.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The demurrer to the 2d replication to the defendant's plea of the statute of limitations, was well taken. The replication is not responsive to the plea. The plea is, that more than three years had elapsed since the cause of action had accrued against the defendant Sherrill, and the replication is that the plaintiff commenced her suit upon the same cause of action within three years after the same accrued, and that she afterwards suffered a non suit, and after that commenced her suit again against the defendants (Sherrill and Jordan) upon the same cause of action within twelve months from the date of the non-suit. Every fact and circumstance contained in this replication may be literally true, and yet this may be the first time suit has been instituted against the defendant, Sherrill, upon the cause of action now in suit. The note was executed by Sherrill, McKinney and Jordan, and the first suit may have been instituted against one or both of the latter, and that, too, upon the same cause of action that is now in suit, and yet not against Sherrill, the present defendant. The replication failing in this respect to respond to and set up new matter in avoidance of the plea, it is clear that it could not prevent the operation of the statute of limitations, and that consequently the court ruled correctly in sustaining the demurrer to it.

The court erred in finding for the defendant upon the issue formed upon the defendant's rejoinder of *nul tiel* record, interposed to the plaintiff's first application to the plea of the statute of limitations. The replication avers that the plaintiff, within three years next after the cause of action accrued to her on the note herein sued upon, commenced her action against the said Alanson P. Sherrill on the same identical cause of action in the Circuit Court of the county of Independence, and that afterwards

she elected to take a non-suit, and that afterwards, and within one year from such non-suit, she recommenced her action on the same identical cause of action, &c. The replication sets out with particularity the dates of each successive step in the history of the whole proceeding, and is good and sufficient in form, under the issue, as an avoidance of the plea. The variance complained of consists in the fact that in the replication it is alleged that a suit had been brought against Alanson P. Sherrill alone, whereas it appeared from the proceeding offered in proof that it was commenced against Alanson P. Sherrill, Charles S. McKinney and E. W. Jordan. The apparent difference in the allegation and the proof, it is conceded, does exist, yet it is not such a variance as to authorize the exclusion of the latter. If the record be set out imperfectly or partially, it is sufficient if enough appear to prove the matter in dispute. As if a man pleads a recovery suffered of one acre and the record brought in is a recovery of two acres, this is good and not a failure of record; as, if two were recovered, one certainly is. So, if a man declares, on a recognizance by J. S., and the record is of a recognizance by J. S. and J. N. jointly and severally, it is good: for J. S. is liable for the whole. (See 1 *Esp. N. P.* 742.) If the defendant, Sherrill, had been sued before within three years after the cause of action accrued, and then within twelve months after non-suit sued again upon the same cause of action, it is all sufficient for the law, and it cannot be material whether he was sued alone or in connection with others, as he, in any event, would be liable for the whole.

It is also objected that there was no evidence offered to show that the first suit was founded upon the identical cause of the second action, nor that the Alanson P. Sherrill named in the first suit is the same as that named in the second. The law did not exact any such proof. When the question of identity was settled in the affirmative, the record was sufficient of itself to prove all the facts therein contained under the state of pleading. Records may be given in evidence by exemplication or by a copy, and in what cases the record itself or an exemplification, or when a copy is evidence, the distinction is this: where the record is the ground of the ac-

tion it makes part of the pleadings and appears in the allegations; in such case it is tried on the issue of *nul tiel* record, and it shall be tried by the record, as a record is evidence of itself. But where the record is only inducement, in which case it is not traversable, (for nothing is traversable that does not make an end of the matter, and it cannot make an end of matter if fact be joined with it;) in such case therefore the issue must be on the fact and be tried by a jury; a copy of the record may be given in evidence to support the fact, for whenever a record is offered to a jury a copy is evidence. (See 1 *Esp. N. P.* 741.) The record in this case is made a part of the pleadings in the cause, by being set up and relied upon in the replication, and stands upon precisely the same ground as proof as it would if declared upon as the foundation of the suit. The proof offered by the plaintiff to establish the issue on her part, arising upon the plea of *nul tiel record* is believed to have been a substantial compliance with the requisitions of the law, and that consequently the court erred in finding in favor of the defendant.

The record shows a seventh rejoinder and issue, drawing in question the truth of the plaintiff's first replication to the plea of the statute of limitations, and it no where appears that it has been tried, or any disposition whatever made of it. This is a matter, however, of which neither party has a right to complain, as every question therein presented has necessarily been passed upon under the issue of *nul tiel record*.

But it is contended that, although the Circuit Court may have erred in finding for the defendant upon the issue of *nul tiel record*, yet the plaintiff has no cause of complaint, as she afterwards had the benefit of a full and fair trial by a jury of the country upon all the issues, which were properly triable by a jury. The record shows that, after the court passed upon the issue of *nul tiel record* and found for the defendant, that the plaintiff insisted upon having the other issues tried by a jury, and that such trial was actually had, and that, too, against the objection of the defendant. The issues upon the pleas of *nil debet* and *payment* were then submitted to a jury, who found likewise in favor of the

defendant. The finding of the court upon the issue presented by the rejoinder denying the existence of the record set up by the plaintiff's first replication disposed of the whole case; and consequently the whole action of the jury subsequently had was extrajudicial and merely nugatory. The plea of the statute of limitations is a plea in bar of the whole action, and the legal effect of the finding upon the issue made upon the rejoinder to the replication is, that no matter is shown to take the instrument sued upon out of the operation of the act, and that consequently the plea must prevail. Upon the finding of the court, therefore, upon the issue thus submitted, the defendant was entitled to a final judgment in his favor, and that, too, wholly irrespective of the other issues; whereas, if the finding had been in favor of the plaintiff, it would not have entitled her to a final judgment upon the merits, but the extent of such finding would have been that the statute bar set up by the plea was avoided, and that if the defendant should succeed in his defence, he must do so on one of the other issues. If this view of the finding by the court be correct, then it is that the jury had nothing before them, and that consequently their finding was unauthorized by law. It is clear that no good could result from a finding by a jury upon the plea of *nil debet* and payment after it had been judicially ascertained that the action was barred by the statute of limitations. The replication admitted that three years had elapsed since the cause of action accrued and before the institution of this suit, but set up by way of avoidance that she had previously commenced a suit within three years, which she afterwards abandoned; and that, within one year from such abandonment, she instituted this suit. This being the legal import of her replication, it is clear that when the court ascertained that there was no record of the essential facts set up as an avoidance of the statute bar, the plea itself stood confessed, and as a matter of course there was an end of the case. If the jury had found the issues submitted to them in favor of the plaintiff, she could not have had a judgment, as this would have presented the anomaly of a defendant having succeeded upon a plea in bar and a judgment in favor of the

plaintiff in the same case. The action of the jury upon the remaining issues after the court had found for the defendant upon the issues of *nul tiel record*, being merely extrajudicial, it is obvious that the plaintiff lost nothing by way of a waiver of her rights.

We are satisfied, therefore, that the judgment of the Independence Circuit Court herein rendered, is erroneous; and consequently, the same ought to be, and is hereby reversed, and remanded to be proceeded in, according to law, and not inconsistent with this opinion.

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SHROPSHIRE VS. THE STATE.

In a criminal case, after plea of not guilty, and verdict, defendant cannot interpose the objection that the grand jury by whom the indictment was found was composed of a greater number than that prescribed by law: the objection should be reached by plea in abatement. Such objection, however, does not exist, in point of fact, in this case,

In this case, the record shows that, at the term at which the indictment purports to have been found, sundry indictments were returned into Court by the grand jury and filed, but there is no record entry showing that this particular indictment was so returned, and the defendant, being convicted, urges this as a grounds of error: HELD, That, inasmuch as our statute, (*sec.* 86, *ch.* 52, *Dig.*,) forbids such an entry, except in case where the defendant is in custody, or on bail, the objection was untenable here.

The record shows that, at the time the indictment was found, *A. B. Greenwood* was prosecuting attorney, and that when the case was tried, *A. B. Greenwood* presided as judge, but the record does not show that any objection was made to the competency of the judge, nor is there any proof of record that Judge *Greenwood*, and the prosecuting attorney *Greenwood*, were the same person. It was urged, on appeal, by the defendant, as grounds of reversal, that the judge was incompetent to

try the case, having acted as prosecuting attorney when the indictment was preferred—and that this Court judicially knew that the same person filled said offices respectively at the times referred to. But this objection is overruled, on the grounds that though this Court might take judicial notice that *A. B. Greenwood* was prosecuting attorney when the indictment was found, and that *A. B. Greenwood* was Circuit Judge when the case was tried, yet it could have no judicial knowledge that the prosecuting attorney and the judge were the same person—and, it is further held, that defendant, in some mode, should have objected to the competency of the judge at the trial, and put the evidence of his incompetency of record.

The defendant was convicted of murder in the first degree, and claimed a new trial, on the grounds that the verdict was contrary to law and evidence. This Court, after reviewing, and duly considering the evidence, refuses to disturb the verdict, holding it to be well warranted by the evidence.

Appeal from Carroll Circuit Court.

Indictment for murder. The transcript shows the following state of facts:

"At a Circuit Court began and held at the court-house in the town of Carrollton, in the county of Carroll, State of Arkansas, on the first Monday in May, 1846, it being the fourth day of said month, present, the Hon. SEABORN G. SNEED, Judge, the following proceedings were had: *to wit:*

"This day came the sheriff of said county, and returned into Court here, the following list of Grand Jurors, *to wit:* Jacob A. Meek, Jeremiah T. Meek, John Campbell, Dennis Lewis, Wm. H. Wilson, Nathaniel Rudd, William Wood, William Plumley, John Boyd, William May, Seth Wade, Beal Gather, Henry McMillian, George Rowland, and Mathew Bristow, *sixteen* good and lawful men of said county, freeholders or householders thereof; and the said John Campbell, William Wood, Nathaniel Rudd and George Rowland, having failed to appear; ordered by the Court, and in accordance with said order, the sheriff returned into Court here, Jonathan Dunlap, George Suggs, James T. Officer, John Dunlap and Arthur B. Baker, instead of the said absentees aforesaid, which said persons being citizens and householders or

freeholders, present and duly returned as aforesaid, having been duly sworn, with Beal Gather as foreman, in terms of the law, first being empannelled, were charged touching their duties, retired to consider thereof, in charge of the sheriff.

"Ordered that Court adjourn until to-morrow morning, 8 o'clock.

"Tuesday morning, May the 5th. Court met pursuant to adjournment, present Hon. S. G. SNEED, Judge.

"And on this day these further proceedings were had, *to wit:* The grand jury came into Court, and filed here divers bills of indictments; and two of their body were discharged for inability to serve, (George Suggs and Jacob A. Meek,) and Smith S. Matlock and Garrett Green, were summoned instead: who were sworn in terms of law, retired in *conjunction with that body to consider of their duties.*

"Ordered that Court adjourn until to-morrow morning, 8 o'clock.

"Wednesday morning, May 6th. Court met pursuant to adjournment, present, as on yesterday. When these further proceedings were had: Came the grand jury, and having no further business, were discharged, after depositing various bills of indictments.

"Ordered that Court adjourn until court in course."

"At a Circuit Court which was begun and held at the courthouse, &c., in the county of Carroll, &c., on the sixth Monday after the fourth Monday in *February, A. D.* 1851, it being the 7th day of April, when present and presiding, the Hon. ALFRED B. GREENWOOD, as Judge of said Court, the following proceedings were had, *to wit:* Ordered by the Court, that Court adjourn until to-morrow morning, 9 o'clock. A. B. GREENWOOD, Judge.

"Tuesday morning, 9 o'clock, April 8th. Court met pursuant to adjournment. And on this day these further proceedings were had, *to wit:*

STATE OF ARKANSAS,
COUNTY OF CARROLL.

In the Circuit Court of said county of Carroll, and to the May term thereof, A. D. 1846.

The Grand Jurors for the State of Arkansas, duly selected,

summoned, returned, tried, empannelled, sworn and charged to inquire in, and for the body of the county of Carroll aforesaid, upon their oath, present that JAMES SHROPSHIRE, not having the fear of God before his eyes, but being moved and seduced by the instigation of the *Devil*, on the 1st day of March, A. D. 1846, with force and arms, in the county of Carroll aforsaid, in and upon one LEWIS WILLIAMS, in the peace of God and the State of Arkansas, then and there being, feloniously, willfully, and of his malice aforethought, did make an assault; and that the said James Shropshire, a certain rifle gun of the value of ten dollars, then and there loaded and charged with gunpowder, and one leaden bullet, which rifle gun, he, the said James Shropshire, in both his hands, then and there had and held to, against and upon the said Lewis Williams, then and there feloniously, wilfully and of his malice aforethought, did shoot and discharge, and that the said James Shropshire, with the leaden bullet aforesaid, out of the rifle gun aforesaid, then and there, by force of the gun powder shot and sent forth as aforesaid, the said Lewis Williams, in and upon the left side of the back bone of him, the said Lewis Williams, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, giving to the said Lewis Williams, then and there, with the leaden bullet aforesaid, so as aforesaid shot, discharged and sent forth out of the rifle gun aforesaid, by the said James Shropshire, in and upon the left side of the back bone of him, the said Lewis Williams, one mortal wound of the depth of ten inches, and of the breadth of one inch, of which said mortal wound, the said Lewis Williams, on the said first day of March, in the year aforesaid, in the county aforesaid, instantly died: and so the jurors aforesaid, upon their oath aforesaid do say that the said James Shropshire, the said Lewis Williams, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the State of Arkansas.

A. B. GREENWOOD, *Pros. Att.*
for 4th Jud'l. Cir't., State of Ark.

"And upon the said indictmeet are the following endorsements:

STATE OF ARKANSAS,
vs.
JAMES SHROPSHIRE } *Murder.*

A true bill: BEAL GATHER, *Foreman of the Grand Jury.*

Filed, this 6th day of May, 1846.

J. A. HICK, *Clerk.*

The record then shows that defendant, Shropshire, having been served with a copy of the indictment, was brought into Court, arraigned, pleaded not guilty, tried by a jury, and a verdict returned against him for murder in the first degree, Hon. A. B. GREENWOOD, presiding as Judge.

The record does not show that any objection to the competency of the judge was made, or that it was waived—the record is silent on this subject.

The counsel for Shropshire moved for a new trial on the grounds that the verdict was contrary to law and evidence, which was overruled, and he excepted, and took a bill of exceptions, setting out the evidence.

Sentence of death was pronounced against Shropshire by the court, but, he appealing, the judgment was stayed until the opinion of this court could be taken.

The following testimony was introduced upon the trial, as set out in the bill of exceptions:

Smith S. Matlock, witness for the State, testified: I was acquainted with Lewis Williams in his life-time. I examined him after he was dead: this was in the month of March, 1846. Deceased was lying on his face, rather on his right side. I went from this to where I supposed he had received the shot. The bullet appeared to have passed in through the lower part of the shoulder blade, and came out on the front and lower part of the neck, and on the opposite side thereof. This was all the wound I saw. This took place in Carroll county. We supposed that it was about 19 steps from where the person appeared to have

stood, whom we supposed shot deceased, to where deceased was when shot. There was snow on the ground; all the tracks of the deceased, and of the person that shot him, were plain to be seen. It is about seventy-five yards from the deceased's house to the place where the shooting seemed to have taken place; and the tracks of the deceased, and of the person whom I supposed shot him, came from the direction of the house, but not one after the other, or upon the same ground. The way deceased ran after he was shot, was directly from the house, and towards a path that led to the nearest settlement, and fell dead after he had run about 150 yards. From the tracks, it seemed that deceased had been behind the crib near which he was shot. He seemed to have walked about fifteen steps from the crib, and stopped where we supposed he was shot. From this place he seemed to have run; and in about two or three steps, I saw the first blood. The ground was nearly level at this place. In retracing the steps of deceased, I saw a rock on the way that looked like it had been dropped in the snow—it would have weighed two pounds. The footsteps of the person that appeared to have shot deceased did not come directly toward the crib, but came within fifteen or twenty steps, and turned back, and seemed to follow tracks of deceased until he shot. The deceased had no weapon about his person when found. He was in his shirt sleeves, and had his sleeves rolled up. I don't know who shot him.

The State introduced two other witnesses, (Samuel Carus and L. Allred,) who proved substantially the same facts, and also that the snow fell on the Friday night previous to the killing.

Robert Dawson, witness for the State, testified, that he was the first man that got to deceased after he was killed. That, before he got there, he heard a hallooing, which alarmed him; that he ran, and when he got in sight of the house, the noise appeared to be between him and the house, a little to the right hand, under the hill. When he got in sight, he saw John Shropshire riding towards the noise, and before he got there Shropshire had gone back. When he arrived, Nancy Williams was ringing her hands and making a mighty to do. She was the wife of de-

ceased, and was standing within fifteen or twenty steps of deceased. He was shot, but witness knew not by whom. The remainder of his evidence was substantially the same as that of the above witnesses.

Jesse Tober, witness for the State, testified that he and prisoner were at the house of Lewis Russell, and prisoner told him that he was afraid that his (prisoner's) children had been his ruin —that he was afraid that he had killed Lewis Williams. That he had gone to the house of Williams (the deceased,) and said to him, "What sort of way is this that you and your wife get along?" That the deceased got mad, and that he (prisoner) struck at deceased with a chair; and the deceased went out of the house, and prisoner pursued a short distance. That deceased had a couple of rocks in his hands, and said that he would kill prisoner; that at that time prisoner had his gun on his arm, and fired it off for the purpose of scaring deceased, and did not aim to hurt him, and was afraid that the bullet had glanced the stable, and killed deceased. This conversation was had on the evening of the day on which deceased was killed. The prisoner remained but a short time with witness. Witness had not seen him since, until the present term of this court. That this was the first information witness had of the difficulty between deceased and prisoner.

On cross-examination, witness also stated that he was not certain whether it was the prisoner, or the wife of the deceased, that told him about drawing the chair; but he recollected that prisoner said that he followed deceased out of the house.

Edward Roach, witness for the State, testified, that one week after deceased was killed, prisoner made the following statement to him in Madison co: That, on the morning before the deceased was killed, there being snow on the ground, the wife of the deceased (who was the daughter of the prisoner) came to the house of the prisoner crying, and complained to prisoner that the deceased had put her out of the house, and drove her off. That, next morning, prisoner concluded to call on his neighbor Riggs, to go with him to deceased's to talk to him; that, whilst prisoner was at Riggs', the wife of the deceased, and her sister, passed by, on their way

to deceased's. That prisoner then concluded not to go to the house of deceased, but would hunt around in hearing of deceased's house, so that if there should be any fuss after deceased's wife reached home, he would hear it. That, in going on his way to deceased's, he found the wife of deceased sitting down crying. Prisoner asked her what was the matter? That she replied that she was afraid to go to the house. That he laid his gun down, and said he would go with her; that, on reaching the house, he asked deceased what the fuss was for? That deceased thereupon flew into a passion, and commenced cursing; that prisoner drew a chair, and deceased left the house, and went off; that the wife of the deceased asked prisoner where deceased had gone, and prisoner said towards Dawson's; that deceased's wife then said that deceased had gone after Dawson's gun, and prisoner had better get his gun; that prisoner then went and got his gun; that deceased soon returned with two rocks in his hands, and, as he came, prisoner discharged his gun for the purpose of scaring deceased; that when the gun fired deceased broke to run; prisoner then started home, and, before he had got out of hearing, he heard the screams of deceased's wife and her sister; that after prisoner got home, he sent his son, John, to deceased's, to ascertain what was the matter; John went, and, when he returned, reported that deceased was dead; and prisoner then left, and went as far King's River, that night, which was Sunday.

Here the State closed her evidence.

Nancy Williams, witness for the defendant, and wife of deceased, testified, that deceased was killed in the month of February, 1846, that on Saturday, the day previous to the killing, it had snowed, and was still snowing—that deceased got up from the breakfast table and commenced whipping her child, and beat it very badly; then threw it up and swore that he would kill it or make it eat. Witness told deceased not to kill it; he then beat witness with a stick; he had cut her hand with a knife the Tuesday before. [Witness exhibited to the jury the scar of the stick and knife.] Deceased then threw witness out of the house and stood in the door of the house with a stick in his hand, and said

she should never come into the house again, that if she did, it would be at her own risk. Witness said she would have to go somewhere, that she could not stay there and freeze. Deceased answered, and said to witness—*'go to hell!'* Witness then went to the house of one Riggs and warmed, thence to the prisoner's, and told her mother how she had been treated, and asked her to get one of the boys to go and see if deceased would let witness have her child, which yet sucked. The boys refused to go lest they should have a difficulty with Williams, the deceased. Witness stayed all night at prisoner's. Next morning she got her sister to go home with her; on their way near to deceased, witness stopped and sent her sister to the house to ascertain if deceased would allow her to go to the house. Whilst witness was waiting by the wayside; prisoner came and enquired of her what was the matter, (witness was crying,) she replied, she was afraid to go the house; prisoner offered to accompany her to the house. Before they got to the house prisoner laid his gun down, and did not take it to the house with him. When prisoner and witness got to the house, prisoner said to deceased, "*good morning,*" and said "this was a bad way of getting along; driving Nancy out of the house from her child, in the cold to freeze her to death." Deceased said he had a right to whip his own child when he pleased. Prisoner said, yes he had such right. Deceased then said he would whip his wife when he pleased, and jumped up and went out of the house, and said to prisoner that he was ready for him, "*G—d damn him.*" Prisoner then got up and went out. Deceased went off cursing and swearing, saying that he would go and get Dawson's gun, and kill prisoner. Prisoner then come into the house, and said to witness that deceased had gone for a gun to kill him; prisoner then started home, and, in a few minutes afterwards, deceased returned, with two rocks in his hands, swearing he would kill prisoner, and called for him; prisoner was yet in hearing; and answered, "Here I am." At this time, deceased was approaching the house, but turned and advanced upon prisoner with the rocks, swearing that he would kill him. Prisoner twice ordered deceased to lay down his rocks, but prisoner replied

that he would not do it. Witness then heard the report of a gun, when she started to see what was the matter, and met prisoner, and asked him if he had shot, and prisoner answered yes, but not for the purpose of killing deceased. Witness asked him where deceased was, and prisoner answered that he had gone over to the clift, where rocks were plenty; that he (prisoner) did not shoot to kill deceased; that deceased kept rushing on him; that he shot to scare him, and make him lay his rocks down, but had not hurt him. Prisoner then went on home, and witness found deceased at the clift dead.

When witness and prisoner first went to the house, deceased had his sleeves rolled up, and had his axe setting in near by the side of the door.

At the time prisoner shot, he and deceased were fifteen steps apart. Deceased had the rocks, swearing that he would kill prisoner before sun-down; was going towards him. Witness heard her mother tell prisoner, before the difficulty, that deceased had threatened to kill him. The clift, where witness found deceased dead, was about one hundred and fifty yards from the house of deceased. Witness saw deceased running after the gun fired. The shooting was done within about eighty yards, witness thought, of the house, near the stable. She saw prisoner's son, John, ride up near to where deceased was lying dead, and ride off again slowly toward home. This was some considerable time after deceased was killed, and before any of the neighbors came, after receiving information of the killing.

Cross-examined: The stick deceased struck witness with on the arm, and made the scar, was round, and a little larger than her thumb. After deceased went out into the yard, prisoner drew a chair. Witness did not see both the parties when the gun fired, but judged they were about fifteen steps apart from the noise. She did not recollect whether she told Robert Dawson, at the body of deceased, where it lay on the day of the killing, that prisoner drew a chair on deceased, and run him from the house. Witness was in the house, suckling her child, when the gun fired. Did not know how far it was from the house to where prisoner left

the gun, but it was opposite the end of the house from where the chimney was, and the door was on the opposite side of the house. Saw deceased just before the gun fired from where she was, but did not see prisoner, but heard him and deceased talking.

The above was all the evidence in the case, as set forth in the bill of exceptions.

The court, at the instance of the Attorney for the State, instructed the jury generally, and, at the instance of defendant's counsel, gave the following instructions:

1. If the jury believe, from the evidence, that deceased had gotten the rocks spoken of by the witness, and was advancing on defendant with them, and that he had a well-grounded belief that deceased designed committing a felony on the person of him the defendant, with said rocks, they must find him, defendant, not guilty.

2. The State having gone into the confessions of defendant in relation to the difficulty charged in the indictment, the jury must take as evidence the whole of his confession, as said to have been made to witness Roach, and must pass on it as other testimony, and they cannot reject a part of such confession, and not all.

3. If they believe, on the whole evidence, that defendant killed deceased, but that he killed him either in defence of himself, or of his daughter, they must find him not guilty.

4. If they believe, from the evidence, that deceased, at and before the time of the alleged shooting, was rushing fiercely on defendant, with rocks, swearing he would kill him, it was not necessary for defendant to give back from deceased until he could not give further because of some wall, hedge, or ditch, but that he had the right to kill deceased before giving back so far.

5. It is the duty of the jury, if possible, to reconcile the testimony—the whole of it on both sides—and they are not at liberty to reject any part of it because of immaterial variances.

6. If they have a single doubt as to the killing being done feloniously, and in pursuance of a sedate, deliberate mind to mur-

der deceased, they must find defendant not guilty of murder, as charged.

7. That doubts from the evidence must always operate as an acquittal of the prisoner.

E. H. ENGLISH, for the appellant. The appellant claims a reversal of the judgment of the court below on several grounds, following:

1. The record states that the sheriff returned into court to serve as grand jurors, at the term of the court at which the indictment purports to have been found, "*sixteen* good and lawful men," &c. That *four* of them (naming them) failing to appear, *five* others (naming them) were summoned in their stead, making, in all, *seventeen*.

It is true that the clerk enumerated but *fourteen* names as constituting the original list returned by the sheriff, but the legal conclusion upon the record must be that there were *sixteen* upon the list, because, *first*, the record states that there were "sixteen good and lawful men," &c.; and, *second*, the statute (*Digest* 628) makes it the duty of the county court to select, and the sheriff to summon *sixteen*, and the presumption of law is that those officers discharged their duty according to law.

There being then *sixteen* returned by the sheriff, and *four* of them absent, and *five* summoned in their stead, it follows that the grand jury was composed of *seventeen* men.

If this conclusion is correct, does the fact that the grand jury, by which the indictment purports to have been found, was composed of *seventeen* men, vitiate the indictment?

A grand jury shall be composed of *sixteen* persons, qualified, &c. *Digest*, *p.* 397, *sec.* 64. Also *p.* 628–9.

The consent of twelve grand jurors is necessary to find a true bill. *Digest*, *p.* 400, *sec.* 83.

Suppose that, instead of *sixteen*, one hundred men are empannelled on a grand jury; it is clear that it would be easier to get *twelve* out of *an hundred*, than to get twelve out of *sixteen* to find a bill against a man. And so every man above *sixteen* that is

taken upon the inquest, increases the chances against the accused.

To illustrate: if twelve votes are necessary to elect a man to an office, he could get them more easily out of *an hundred* than out of *sixteen;* and so every additional man above sixteen would increase his chances of election.

It is true that one man makes but little difference; but if it be legal to go one beyond the legal number, where is the stopping point? The principle is as much violated by one as by one hundred additional men.

2. It does not appear that the indictment was found, or returned into court, by the grand jury.

The court commenced on the 4th day of May, 1846; and, on the 5th and 6th, the record shows that the "grand jury came into court, and filed divers indictments," &c., without showing against whom or for what offences. Then follows the adjourning order for the term. In the proceedings of a term of the court held five years thereafter, the indictment is copied, with no showing of record how it came into court.

The record no where shows that the indictment in this case was found and returned into court by the grand jury; which is necessary to guard the defendant against all imposition and fraud, as directly held in *Chappel vs. The State*, 8 *Yerger* 166.

In *Goodwyn vs. The State*, (4 *Smedes & Marsh.* 538,) the entry of record was as follows: "The grand jurors returned into court an indictment against William S. Goodwyn, indorsed a true bill, William M. C. Mims, foreman of the grand jury, and retired to consider of further presentments. Said indictment is in the words and figures as follows, to wit:" &c. [Then followed the indictment.]

The court, recognizing the principle that it is necessary for the record to show that the indictment was found and returned into court by a grand jury, held that the above entry showed that an indictment was found and returned into court by the grand jury against Goodwyn, and that other entries of record showed the charge to be *murder*.

In this case, several entries show that Shropshire was charged and tried for murder, but no entry shows that an indictment was found and returned by a grand jury against him.

It is true that the indictment copied in the record, is endorsed a true bill, and purports to have been signed by a foreman, and it is endorsed filed by the clerk. But neither of the endorsements shows that it was found and returned into court by the grand jury.

3. The defendant was tried by an incompetent judge. *A. B. Greenwood*, the record shows, was the attorney for the State when the indictment was preferred—it is signed by him as such. He no doubt prosecuted in the case for some five years, and then tried the case as judge, without any waiver of incompetency of record, or otherwise, as far as we are advised from the proceedings of record.

It is urged, by the Attorney General, that he was not *of counsel* in the case within the meaning of the constitutional provision on the subject; that there is no showing of record that the prosecuting attorney and the judge are the same person; and that there is an implied waiver of the objection, &c.

The constitution declares that "No judge *shall preside* on the trial of any cause, &c., in which he may have been *of counsel*, &c., except by consent of all parties." *Art.* 6, *sec.* 12.

The term *counsel* or *counsellor* is not used in our constitution, laws, or practice, in contradistinction to that of *attorney*. No such classification of the profession into attorneys, counsellors, &c., exists in this country as in England. They are called indiscriminate *attorneys* or *counsellors*, &c.

A. B. Greenwood was "*of counsel*" in this case. He was the attorney of the State, employed to prosecute, and, as such, drew the indictment, and conducted the cause until he ceased to be prosecuting attorney and went on the bench. His feelings were, no doubt, to some extent, enlisted in the prosecution, he obtained an *ex parte* view of the case by the examination before the grand jury, and every reason or argument that would have rendered the attorney of Shropshire incompetent to act as judge in the case, applied to him. The constitution makes no exception in favor

of one who has been of counsel for the State in a cause, but the disqualification is, as it ought to be, general. The object is to obtain a judge who is impartial, and has not in any manner prejudged the case, as the whole section of the constitution in question most clearly indicates.

But it is urged that the prosecuting attorney, *A. B. Greenwood*, and the judge, *A. B. Greenwood*, are not the same person.

Where no particular circumstance tends to raise a question as to the party being the same, identity in name is sufficient for an inference against him. *McNamee vs. United States*, 6 *Eng. Rep.* 150.

But this court *judicially knows* that *A. B. Greenwood* was *prosecuting* attorney of the judicial circuit from which this case comes at the time the indictment was preferred, and he was *judge* of the same circuit when the case was tried. See 1 *Greenl. Ev.* 8.

Courts take judicial notice of the essential political agents or public *officers* of the State.

But the attorney general urges that the silence of the record raises the presumption that the incompetency of the judge was waived. Will this court presume, in a case of this magnitude, that the defendant waived any important right? The presumption would rather be that he preferred to raise the objection on error, instead of making it at the trial. The defendant has a right to select his own time for raising legal objections to proceeeings against him, unless the objection be purely matter in abatement, which he might waive by pleading to the merits.

This is a question of power. Judge Greenwood was constitutionally incompetent to try this case. He had no more right or power to try it than Col. Reagan, Shropshire's counsel, had. So far as this case was concerned, he was no judge. How could he get the power to try it? By the *consent of the parties*, says the constitution. This consent was as necessary to enable him to try this case, as his election, and commission were to empower him to try cases generally.

The record shows *affirmatively* that he was disqualified. Should

it not affirmatively show that the disqualification was removed by the *consent* of the parties?

The usual practice is for the consent of parties to be made of record, or at least for the record to state that they did consent. This being the usual practice, no such entry appearing of record, the presumption is that no such consent was given.

The incompetency of the judge could only be cured by the *consent* of the defendant for him to try the case. The term *consent*, implies *affirmative action* on the part of the defendant. How then could he empower the judge to try the case by being *silent* on the subject. The constitution does not say that the incompetent judge shall be qualified to try the case by the *silence* of the defendant, or by his failure to raise the objection when arraigned, but by the *consent* of parties. The record showing the disqualification of the judge, the defendant was not bound to say any thing on the subject, if the judge and prosecuting attorney chose to praceed with the case, until such time as he might think proper. He thinks proper now to raise the objection. If the indictment had been bad in substance, he might have gone to trial, and raised the objection on arrest, or on error, as he might think proper: and so as to the competency of the judge, the incompetency appearing of record.

The attorney general urges that the objection should have been raised *by plea to the jurisdiction*, and that it was waived by going to trial on the merits. In criminal cases, want of jurisdiction of the subject matter, or particular offence, may be shown on the trial, or on error, and is never waived. The qualification of the judge is not matter for a plea. The want of qualification is suggested, &c.

But the attorney general forgets that the consent of defendant —affirmative action—was necessary to empower or qualify the judge to try the case. How, then, I repeat, could this be done by *silence* on his part?

No motive is attributed to Judge Greenwood. The presumption is that he and the prosecuting attorney overlooked the fact that he had been prosecuting attorney in the case.

4. The court below erred in refusing a new trial. I think that no just minded person can read the evidence in this case, and not be shocked at the verdict. Whether this was a case of justifiable killing, or murder in the second degree, I shall not discuss; but that it was not murder in the *first degree*—that the old man ought not to be hung for the offence—I think there can be no doubt.

The evidence makes the following case, substantially:

The State proved the death of Williams by several witnesses, but failed to connect Shropshire with it except by introducing his own statements about it. His declarations, as introduced by the State, and the testimony of Nancy Williams, wife of deceased, who was the only eye-witness to the killing, and who was introduced in his behalf, connect Shropshire with the killing as follows:

The deceased, who seems to have been a rash, if not a brutal man, abused his *child*, abused his *wife*, and drove her out of doors. She, naturally, went to the house of her father, Shropshire, for shelter and protection. On the next morning, the old man pursuaded her to return to her husband, and try to live with him, intending to hunt near the house of his son-in-law, so that he might be in hearing, and go to the relief of his daughter, should it become necessary. He followed on, and found her sitting by the wayside, crying, afraid to go to the house. The old man concluded to go with her, and fearing no doubt that the appearance of his gun might make a wrong impression on Williams, he left it behind, and went to the house with the daughter. He remonstrated with his son-in-law in reference to his ill treatment to his wife; but he, instead of listening to the admonitions of age, and the appeals of the parent in behalf of the daughter and the wife, flew into a rage, and manifested a disposition to violence. The old man probably raised a chair; this, however, is not certain from the evidence. Williams started off with the avowed purpose of getting a gun from one of the neighbors, but returned soon after with rocks, still maifesting intention to violence. The old man, in the meantime, having gone out to where his gun was, and seeing Williams with the rocks, coming toward him, fired,

with the purpose to alarm and stop him, but the shot took effect. His intention was not to kill, as the State proved by his declarations.

On reading the evidence, the natural feeling is that Williams met the fate which one so brutal to his wife, and child, and rash toward the father-in-law—whose purpose was to reconcile him to his wife, deserved. But it seems to me that no intelligent jury could make it more than manslaughter any way. That it was not murder in the first degree, is manifest.

"All *murder* which shall be perpetrated by means of poison or by lying in wait, or by any other kind of *wilful, deliberate, malicious* and *premeditated* killing, &c., shall be deemed murder in the *first* degree," &c. *Digest*, 323.

Under this statute, the offence must not only be *murder*, but it must be wilful, deliberate, malicious and premeditated murder; the policy of the Legislature, in accordance with the spirit of the age, being to continue capital punishment only in the most aggravated cases of murder, substituting imprisonment in the State prison for murder of a lower degree.

Mr. Justice SCOTT, in the case of *Bivens vs. The State*, (6 *Eng.* 460;) after reviewing decisions of several States on similar statutes, clearly defines murder in the first degree. According to the doctrine there held, it was necessary for the State to prove in this case, to make it murder in the first degree, "that the actual death of the party slain was the ultimate result sought by the concurring will, deliberation, malice and premeditation of the party accused. That there was a wilful, deliberate, malicious and premeditated *specific* intention on his part, to take life—that the killing was determined on before the act of killing. Though the design to kill need not be formed any great length of time beforehand, yet, it is necessary that the premeditated intention to kill should have actually existed as a *course* determinately fixed on before the act of killing was done, and was not brought about by *provocation* received at the time of the act, or so recently before as not to afford time for reflection."

Here the State proved by the declarations of Shropshire that

he had no intention to kill at all. But even if the State could resort to his declarations to prove the killing, and then repudiate so much of them as were exculpatory, and leave the intention to kill to be inferred from the instrument used, still all the circumstances show that it was not premeditated and deliberate, but that it occurred suddenly under great *provocation, if not* under circumstances of justification.

In the absence of proof of extenuating circumstances, the law implies malice from the act of killing, sufficient to constitute the offence of murder in the *second degree.* But this is *not the rule* with respect to *murder of the first* degree. To establish this degree of guilt the commonwealth must show those circumstances which evince a *deliberate intention to take life. Haggerty's Case*, reported in *United States Criminal Law*, (*by Lewis*,) 403.

In the case of *Mitchell vs. Slate*, 5 *Yerger. R.* 340, the distinction between murder in the first and second degrees, under the Tennessee Statute, from which ours is copied, is clearly defined. See the opinion of *Catron.* It was there held, that to constitute murder in the first degree, the killing must be done with a formed design to kill, with deliberation and premeditation, before the mortal blow is given. The fact that it was *maliaious* and *wilful*, in the *common law sense* is *not sufficient.*

If a design to kill be formed upon the sudden impulse of passion, disconnected with any previous design to kill, though it be executed wilfully and maliciously, it will not constitute murder in the first degree, but murder in the second degree only. *Ib.*

At common law, such malice might be implied from the act of killing, or from the character of the instrument used, as would constitute murder, but it is clear from the above authorities, that the law will not imply such malice from the killing or instrument as will constitute murder in the *first* degree under our Statute.

JORDAN, for the State. The objection raised to the competency of the court, if available at all, should have been by plea to the jurisdiction. But it does not appear of record that the prose-

cuting attorney who signed the indictment, and the judge who tried the cause, are the same person; and if it did so appear, this is not a case wherein he was "of counsel" as contemplated in *sec.* 12, *Art.* 6, *Const.*

That the evidence fully warranted a verdict of murder in the first degree; see the principles laid down in *Wharton's Crim. Law* 277, 285, 286, 288, 289, 290. *Respublia v. Mulattò Bob*, 4 *Dallas* 135. 2 *Stark. Ev.* 711, and authorities cited. *Whitesford's case*, 6 *Rand.* (Va.) *Rep.* 721. *U. S. Crim. Law, by Lewis*, 392, 393, 396, 397. 2 *Wheeler, Cr. Ca.* 84.

Mr. Justice WALKER delivered the opinion of the Court.

The defendant was indicted, tried and found guilty of murder in the first degree, upon which judgment was rendered against him.

Various grounds of objection are urged against the validity of the proceedings in the Circuit Court, several of which, though technical, in a case of this kind should receive the most careful consideration. For we are free to recognize and preserve unimpaired, all the safeguards which the law has thrown around the citizen, when arraigned upon a charge involving life itself, and to give him the full benefit of them.

The first ground of objection is, that seventeen, instead of sixteen, grand jurors were empannelled and passed upon the indictment under which he was arraigned and tried. This objection, if true, in fact, should have been reached by plea in abatement. It is, however, founded on a misapprehension of facts. The names of all the grand jurors are set out upon the record, but eleven of the first panel, answered to their names, and five others were returned, who being sworn and charged, composed the legal number.

The next objection is, that the record does not show that this particular indictment was returned into court, andordered to be filed. The statute expressly forbids such an entry, unless in cases where the defendant is in custody or out on bail. (*Sec.* 86, *ch.* 52, *Dig.*) The object of the statute is, to keep the defendant

ignorant of the fact until he is arrested; otherwise, it would be rarely the case that a defendant could be caught. The authorities referred to may be good under other statutes, but cannot prevail under ours.

The next ground is, that the judge who presided at the trial of the cause, was the attorney for the State, at the time the indictment was found. Of this there is no proof. No objection was taken at the trial by plea, motion or otherwise; nor is there any proof that these are the same persons. The defendant's counsel contends that we should judiciously know, who the officers of the courts are. Concede this to be true, we know that at the time that the indictment was found, A. B. Greenwood was attorney for that circuit. This knowledge only extends to him as an officer. Whether he is an intimate acquaintance, or an entire stranger, in no respect changes the case. When he goes out of office, we cease to take judicial notice of him, or to know anything of the changes of pursuit which may engage his time, and when as an incumbent of a different office, we recognize him as such; it is with no reference or connexion with his former position, nor do the names add to or detract from such knowledge. This rule has its foundation in the necessity for its existence.—Judicial notice of officers, and of their signatures, seals of office, &c., are all necessary starting points to be taken upon faith and credit due to them, as connected with the administration of justice. As incumbents in public trust, they are known for the time being but in no other respect whatever.

The true mode of reaching objections of this kind is not altogether clear. This court, in the case of *Caldwell ad. v. Bell & Graham*, (1 *Eng*. 228,) held, that suggestion or motion was necessary in in order to raise the question; and even that practice is involved in difficulty. There is no precedent for the practice, for the practice in the English courts, and it is very questioneble whether an attorney there, would not be fined for a contempt, should he propose to a judge to decide whether he was judge or not. But, however, this may be, the question is not raised here; there was no objection to the competency of the judge. We ju-

dicially know, that Judge Grennwood is the incumbent in office in that circuit; and in the absence of evidence of his disqualification, we must hold him fully competent to preside.

There is no question of law disconnected from the motion for a new trial in the case. That is solely as to whether the verdict is, or is not contrary to law and evidence.

It appears, that in the month of February, 1846, in the county of Carroll, Arkansas, Lewis Williams, a resident of said county, was shot near his own house. No one appears to have been present at the time he was killed, except the wife of the deceased, and possibly her sister, who, however, was not called as a witness. So far as regards the time, place, the identity of the person killed, and his death at the hands of the defendant, there seems to be no question. The whole contest is narrowed to an enquiry as to the circumstances under which the killing took place, and the probable motives which induced the defendant to commit the act.

The circumstances which most probably led to the difficulty, which terminated in the death of Williams, were connected with, or grew out of his treatment to his wife, who was the daughter of the defendant, and for them we are almost entirely dependent on her own account of the affair. She was the only witness examined on the part of the defendant, and according to her account of the matter, was whipped, or beaten with a stick, and turned out of doors by her husband, without any other provocation than that she requested him to desist from whipping her child. She went to her father's, staid all night, and related to her mother the occurrence; whereupon, on the next day her sister and father accompanied her to the house of deceased. The sister had been sent on in advance by the wife, to see whether her husband would permit her to return, and, whilst she was waiting by the wayside to learn the result, her father came by and learning the facts, left his gun, and went with her to the house of deceased, greeted him kindly, and inquired the cause of his ill treatment to his wife. Deceased became angry, asserted his right to whip either his wife or child, and went out of the house, and said he was ready for defendant; that defendant drew a chair on

deceased after he had left the house. Deceased then went off, saying, that he would get Dawson's gun, and kill defendant. Defendant started home, and before he got out of hearing, deceased returned with rocks in his hands, threatening the life of defendant and called for him. Defendant heard him and replied, "here I am." Deceased was at that time appoaching the house, but turned, and advanced upon defendant, threatening to kill him, and refused to put the rocks down when requested. Witness then heard the report of the gun, and started to see what was the matter, met the defendant, who told her he had shot but not to hurt the deceased, who was rushing upon him: that deceased ran towards the cliff where rocks were plenty. Witness also stated that the parties were about 15 steps apart when the gun fired. She saw deceased advancing to her the moment when the gun fired; she did not see defendant shoot; was sitting suckling her child at the time the gun fired; the parties were about 80 steps off from the house; she saw deceased run off after the gun fired.

This is substantially the evidence of the only eye-witness to the transaction, who deposed, and the credit due to it must in some degree, depend upon its consistency as a statement of facts, and with the other evidence in the case.

The State introduced two witnesses, who deposed as to different confessions made by the defendant to them. To the first, the defendant stated that he was afraid his children had been his ruin; he was afraid he had killed deceased; that he went to the house of deceased, and inquired of him about his difficulty with his wife, whereupon he became angry, and defendant had struck at him with a chair; that deceased went out of the house, and the defendant followed him a short distance; deceased had rocks in his hands, with which he threatened defendant, who having his gun on his arm at the time, fired it off to scare the deceased; that he did not aim to hurt him, but was afraid the bullet had glanced the stable and killed him. Witness had never before heard of a difficulty between deceased and his wife.

The second confession, after reciting the circumstances which led him to the house of deceased, is, that the deceased be-

came angry when he mentioned the object of his visit, and that the defendant drew a chair on him; that he left the house and went off; that deceased's wife asked where he had gone, he answered, towards Dawson's, whereupon, she said he had gone to get Dawson's gun, and defendant had better get his gun, which he did; that deceased returned with rocks in his hands, and as he came, defendant discharged his gun to scare him, and started home. As he went, heard the wife of deceased and her sister screaming.

The State then called some three or four witnesses, neighbors of deceased who went to the place that evening, and examined the body and the ground on which the shot took place. They all give the same account of the matter. There was snow on the ground, and they state that they could distinctly see all the tracks made by the parties. They found the deceased's body about 150 yards from where deceased was shot, followed the track to the place where they supposed the parties stood when the gun fired: they were about 19 steps apart and about 75 steps from the house; the tracks of both parties came from towards the house, though not directly following each other: from the tracks, it seemed that deceased had stopped behind the crib, and seemed to have walked on about 15 steps and stopped; there he was shot: it was two or three steps from there before they saw blood: the tracks of the person who, they suppose, shot deceased, did not go directly up to the crib, but came within 15 or 20 steps, and then turned back and seemed to follow the tracks of deceased until he was shot: deceased ran 150 yards off from the house towards the path to the nearest settlement; in following the track where deceased ran, there was a rock, about two pounds in weight, which appeared to have been dropped in the snow: deceased had no weapons about him; he was shot in the lower part of the shoulder, and the ball came out in front in the lower part of the neck; there was no other wound perceived.

These are the material facts in the case; and they should be examined in a two fold point of view; first, to reconcile, if possible, the conflicting evidence of the witnesses, and to determine

the credit due to the witnesses as their statements stand thus reconciled or contradicted by other evidence; and then to apply the evidence to the case under consideration.

The jury had also a right to consider the weight due the evidence of a witness from the relationship which such witness bore to the parties, his or her opportunities for thorough accurate information, from the manner of deposing, whether full and circumstantial on points favorable to one side and reluctantly as to such as are prejudicial or unfavorable to that side, as well as when the statements are improbable in themselves as existing under the known or admitted circumstances connected with them. And in this case, when the witness, the daughter of the defendant, related as the only provocation given her husband for the cruel conduct which she says followed the request on her part to desist from whipping the child, the treatment to her is so disproportionate to the offence, (if such it could be called,) that whilst it blackens the character of the deceased, if true, it invites for its unnatural enormity an increased scrutiny as to the probability of the act itself. So, the improbability that a blow, stricken with a round stick on the arm, would cut it so as to leave a scar to be seen more than four years after, without breaking the bone of the arm, or so injuring it as to render it useless for a time, and have made it the subject of complaint and observation at the time, is altogether improbable, nor is it less so, that with a knowledge of the facts and threats and acts of the parties at the time the shot was receeived, that being the wife of one and the daughter of the other, she could have sat suckling her child where she could see her husband advancing upon her father, but not her father, who she knew had a gun (taken at her own suggestion, too, according to his account of the affair.) Surely, if there ever was a time when the breast of woman would refuse to yield sustenance to her offspring, it might have been for the moment suspended then. These things could not have escaped the observation of an intelligent jury. Nor is it to be presumed that they failed to remark that, without interrogatory, (so far as the record shows,) she volunteered to state that she had heard her mother tell her father, some time

before the killing, that deceased had threatened defendant's life, thus linking a threat and its communication to the defendant in a single sentence without interrogatory and without the slightest reference to any cause or circumstance to justify it. Nor is there such throughout the whole of the evidence. On the contrary, the only witness who alludes to the previous state of feeling between the deceased and his wife, stated that he had never, before the circumstance related as giving rise to the difficulty in this case, heard of any difficulty between them. These circumstances were all calculated to cast suspicion upon the evidence of this witness, and, when the facts which she relates in several material points are flatly contradicted by other facts and circumstances, might, in the estimation of the jury, have been sufficiently strong to have induced them to reject her evidence as wholly unworthy of credit. Thus, she stated that her father drew a chair on the deceased after he had left the house. Aside from the improbability of this, the defendant's own confessions expressly contradict it. She says that when deceased went off, defendant came in the house and told her that deceased had gone for a gun to kill him (defendant) with; defendant says, in his confession, that she told him that deceased had gone to get a gun to kill him with, and he (defendant) had better get his gun. She says that, after communicating to witness where deceased had gone, defendant started home, and answered to call of deceased when he returned; such is not the account given by the defendant. But the most important point is, that when deceased came back with rocks, he inquired for defendant, and, upon his answer, on his way home, deceased turned and advanced upon defendant with rocks; aside from the great improbability that a man who had been made to leave his own house by simply raising a chair on him, would attack the same man with a gun, with no other means of defence than rocks, it is just as impossible for her statement with regard to the fact of his advancing on the defendant to be true, as if some four disinterested spectators, placed there for the purpose of seeing whether there was an advance or not, made by the deceased upon the defendant, had sworn that such was not the case: for,

as many such witnesses swear that they examined the tracks, that all the tracks were plain to be seen in the snow, that both the tracks of the deceasedand of him who they suppose shot him came from towards the house, though not one immediately after the other, until within some 15 or 20 steps of the crib, the tracks of the defendant or him who shot (and as to the identity of person there is no dispute) turned and followed on the track of the deceased until he was shot. The tracks of the deceased were all receding, not advancing steps. The shot was received in the back and came out in front. It was impossible that he could have been facing defendant at the instant of the shot. The statement of this witness, aside from all contradictions, was certainly untrue in this material particular, and if so, under a well recognized rule of evidence, might have been by the jury, wholly disregarded.

And the defendant's statements are not only contradictory in themselves, but flatly contradicted by these witnesses. The deceased could not possibly have been rushing upon him, as he stated in his second confession (for, in his first, he does not so state it.) It is impossible for him to have done so without the tracks having been seen by those witnesses who followed the tracks and examined the signs so closely as to notice even the falling of a rock into the snow—men who, from their residence and pursuits, it may well be presumed, were eminently fitted to detect the slightest impression made, not alone in the snow, but even the flint covered mountain sides of their neighborhood. These facts are not to be mistaken, and from them the jury were well warranted in the conclusion that the shot was made either at the time when the deceased was not aware of it, or at least not advancing to assail the defendant. He was found dead, and wholly unarmed. It is highly probable, from the circumstances, that he had a rock in his hands when shot, or otherwise there is no accounting for that apparently dropped in the snow on the way in which he ran.

In view of the whole of the circumstances, it is probable that the difficulty did arise out of the treatment by the husband (the deceased) to his wife; but whether that was or not of the aggra-

vated character related by the wife, is much to be questioned. Whether true or false, however, if credited by the defendant, and he acted under it as true, it was the same as to him if probable in itself. If the defence had been rested upon sudden passion, the feelings of an indignant father at the treatment of his daughter, and the conduct of the father had been consistent with such feelings and influences, a jury might have hesitated long whether their verdict should not have been milder in consideration of such influences.

But the defendant, according to his own account of the affair, places his acts upon entirely different ground, and makes the act to follow the occurrences in the house, in which it is evident he was the principal aggressor, and even then he does not follow it up as an act under the influence of passion suddenly aroused, but of deliberation to alarm the deceased and make him throw down the rocks which he held in his hand. The effort to make it appear the result of accident or a glancing shot not aimed, is altogether irreconcilable with the facts, aside from its inconsistency in other respects with the evidence. The shot in the back shows that the relative position of the parties could not have been such as to require it, and as all the circumstances show that time was given for passion to cool and reason resume its empire, of which it was the province of the jury to decide as well as of all the other facts and circumstances of the case, and from which they were well warranted in finding the defendant guilty of murder in the first degree.

There is no question of law ruled against the defendant in the case, no improper conduct on the part of the jurors, or improper influences affecting their decision, or in any wise calculated to influence them improperly in making it. And after the most attentive consideration of the whole of the evidence before them, we are led to the conclusion that their verdict was well sustained by the evidence; and that the Circuit Court did not err in refusing to grant to the defendant a new trial in this case.

The judgment and decision of the Circuit Court of Carroll

county must, therefore, in all things, be affirmed, and the cause remanded, that the State may cause the judgment and sentence of the Circuit Court to be carried into execution under the provisions of the statute. *Dig.*, *p.* 418, *ch.* 32, *sec.* 206, 207.

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BYERS & MCDONALD VS. FOWLER ET AL.(*a*)

A judgment of a Circuit Court of the United States, rendered, by default, upon a return of the marshall showing a defective service of the writ upon defendant, might be reversed, on error, but cannot be treated as a nullity when questioned in a collateral proceeding.

The Circuit Courts of the United States are endowed with such general jurisdiction as to entitle their judgments to the benefit of all legal intendments necessary to support and uphold them until reversed or annulled by a superior tribunal. *Borden et al. vs. State, use, &c.*, 6 *Eng.* 519, *cited.*

In this case, the marshal returned that he served the writ by leaving a copy with a member of the family, but did not state that he left it at defendant's usual place of abode, as required by statute; judgment was rendered on default, execution issued, and defendant's lands sold; the purchasers filed a bill to quiet their title, and it was objected that they purchased under a void judgment: HELD, As above, that the judgment might, possibly, be reversed, but was sufficient to uphold complainants' title when questioned collaterally.

The failure of a sheriff or marshall to advertise lands for sale under execution in the mode prescribed by statute, will not invalidate the title of the purchaser—such statutes are directory to the officer, and whilst a failure on his part to comply with their provisions, will make him responsible to the injured party, it cannot affect the title of the purchaser, unless it be affirmatively shown that he was cognizant of the irregularity.

In this case, the marshal did not advertise the lands in the mode, or sell at the time, prescribed by our statute, but followed a rule of the Circuit Court of the United

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NOTE(*a*).—This case was decided at the January term, 1851.

States for the District of Arkansas, adopted 10th October, 1842, and after the passage of the act of Congress (of August 1, 1842) adopting the law of the State regulating proceedings under executions—the defendants contended that the Circuit Court of the United States had no power to make the said rule, and that the title of complainants was not valid, inasmuch as the lands were not advertised in the mode, and sold at the time, prescribed by our statute: HELD, That, even if the Circuit Court of the United States had not the power to make the rule in question, (which point is waived,) and the marshal should have followed the statute of the State, as to the mode of advertising, and time of selling the lands, still, as it was not averred in the pleadings and proven that complainants were cognizant of such irregularities, their title was valid.

A judgment of the Circuit Court of the United States for the District of Arkansas, operates as a lien upon all the lands of defendant throughout the State; and this, too, independent of the act of Congress (of August, 1842) adopting the laws of the State in regard to judgments and executions, such lien being the result of previous legislation by Congress.

Under act of Congress, (May 7, 1800, sec. 3,) where a marshal sells lands, and goes out of office before making the purchaser a deed, the court, out of which the execution issued, on proper application setting forth the facts, may order his successor in office to make the deed, and a deed so made is valid.

A deed to lands sold by the marshal, and acknowledged by him before the Circuit Court of the United States of the District of Arkansas, may, upon the certificate of such acknowledgment, be admitted to record in the office of the Recorder of the county where the lands are situate; this is clearly the law since the adoption of our statute on the subject of executions, &c., by act of Congress (of August, 1842,) if not before.

Where a marshal is removed from office after a *fi. fa.* has come to his hands, he has, nevertheless, power to execute it, and may levy upon and sell lands under it; but after he has levied upon the lands, it is irregular for his successor in office to take charge of the process and make the sale, and a sale so made may be set aside as irregular by direct application, but will not be held void when called in question in a collateral proceeding.

In this case, after the *fi. fa.* came to the hands of Rector, as marshal of the United States of the District of Arkansas, he was removed from office; after his removal, his deputy levied the writ on lands; and a deputy of Newton, the successor of Rector, made the sale under the same *fi. fa.*: HELD, As above, that the sale was irregular, and might have been set aside on a direct application; but being questioned in a collateral proceeding, the title of purchaser was good, the sale not being absolutely void.

Where property is sold under execution, and purchased by a party for the use and benefit of the defendant in the execution; and in fraud of the rights of creditors, it remains subject to the claims of creditors, and the vendee of such party, purchasing with a knowledge of such fraud, will not be protected in his title against the judgments of such creditors, or persons purchasing under them.

But, on the contrary, a *bona fide* purchaser, for a valuable consideration, without notice of such fraud, will be protected in his title.

The answer of a party claiming to be such innocent purchaser, must state the deed of purchase, the date, parties and contents, that the vendor was seized in fee and in possession; the consideration must be stated, with a direct averment that it was *bona fide*, and truly paid, independently of the recital in the deed. Notice of the fraud must be denied previous to, and down to the time of paying the money and the delivery of the deed, &c.

A general replication to the answer in such case will not cure the defect of a failure on the part of defendant to aver notice of such fraud down to the delivery of the deed to him by his vendor; and without such averment, the party must fail to sustain his title regardless of the sufficiency of his proof that he was an innocent purchaser.

In this case, the lands of Tully were sold in August, 1841, by the marshal, and bought by Grollman, for the use and benefit of Tully, in fraud of creditors; and Grollman sold the lands to McDonald; afterwards, F. & D. purchased the lands under execution against Tully on a judgment junior to the one under which Grollman purchased, but founded on a debt existing at the time Grollman purchased. F. & D. brought this bill to quiet their title; defendant McDonald claimed to be an innocent purchaser of Grollman for a valuable consideration, without notice of the fraud between Tully and Grollman, but failing to aver want of notice of such fraud down to the time of the delivery of the deed from Grollman to him: HELD, That his defence was insufficient; that the lands in his hands were subject to the judgment under which F. & D. purchased, and they were entitled to all the equities of the plaintiffs in the judgment.

A party cannot complain that the court struck out a portion of his answer calling on complainants for discovery, when it appears, upon the whole case, that the discovery sought, if obtained, could have been of no avail.

It is the right of an innocent purchaser, for a valuable consideration, without notice, to have the value of permanent and useful improvements, made by him before suit brought by the rightful owner, set off against the rents and profits.

McDonald having failed in his defence, by not averring in his answer that he was without notice of the fraud down to the time of the delivery of the deed to him by his vendor, yet, inasmuch as it appears, from the evidence in the cause, that he was an innocent purchaser, for a valuable consideration, without notice: HELD, That, in equity and good conscience, he should not be charged with more costs than he may have incurred in defending the suit.

Appeal from the Chancery side of the Jackson Circuit Court.

On the 5th April, 1845, William F. Denton and Absalom Fowler filed a bill in the chancery side of the Jackson Circuit Court, making, in substance, the following allegations:

That John R. Neff and Peter Neff, as partners, under the firm

of Neff & Brother, on the 2d day of April, 1841, after declaration filed, and process issued and served in due form, recovered a judgment against Lewis B. Tully, in the Circuit Court of the United States for the District of Arkansas, for the sum of $3,473 92 debt, and $296 damages, and for costs of suit. That, on the 7th day of May, 1841, Neff & Bro. sued out a *fi. fa.* upon said judgment, returnable to the 1st Monday of October then next, which, on the day it was issued, came to the hands of the marshal of said District to be executed, and was, by him, returned no property found. That, on the 4th day of February, A. D. 1843, the judgment remaining wholly unsatisfied, Neff & Bro. sued out another *fi. fa.* thereon, returnable to the then next March term of said Circuit Court of the United States, which came to the hands of the marshal of said District on the 6th day of February, 1843, to be executed, and was by him, on the 8th day of the same month, duly levied on the following lands, situate in the county of Jackson, in said District and State of Arkansas, as the property of said Lewis B. Tully: Lot number 2, of the south-west fractional quarter of section 6, in township 11 north, range 2 west; also, lot number 3, of the north-west fractional qr. of same section; also, lot number 4, of the south-west fractional quarter of same section; also the east-half of the north-east quarter of section 35, in township 12 north, of range 3 west; also, the south-west quarter of the north-west quarter of section 36, in same township and range; also, the north-west quarter of the south-west quarter of the same section; and the north-west quarter of the north-west quarter of the same section. That said marshal, after having duly advertised, in accordance with law, and the rules of said court, by giving twenty days previous notice of the time and place of sale, by at least three advertisements, put up in the most public places in said county of Jackson, that said tracts of land would be sold to satisfy said judgment, did, in conformity therewith, proceed to sell the said lands, as the property of said Lewis B. Tully, at the court-house door of said county of Jackson, on the 20th day of March, 1843, according to law; and at such sale, complainants (Denton & Fowler) purchased said

lands for the sum of *sixteen dollars and fifty cents*, in *the aggregate*—which sum they then paid to said marshal, who duly applied the same, as far as it would go, to the satisfaction of said judgment. All of which would more fully appear by a transcript of the said declaration, writ and service, judgment, *fi. fas.*, and marshal's returns thereon, exhibited with the bill, and marked "*Exhibit A.*"

Complainants further allege, that, after they so purchased said lands, and before Thomas W. Newton, the marshal who made the sale, executed a deed to them therefor, he, the said Newton, was removed from office by the President of the United States, and Henry M. Rector appointed marshal in his stead; whereupon complainants applied to said Circuit Court of the United States, in the April term thereof, 1844, setting forth such facts, and said court made an order upon said Henry M. Rector, as such marshal, to execute a deed to complainants for said lands; as would appear by a transcript of said application and order exhibited and marked "*B.*" That, accordingly, Rector, as such marshal, on the 3d day of April, 1844, executed and delivered to complainants, in due form of law, a deed for said lands, reciting said judgment, *alias fi. fa.*, levy and sale, the application and order for said Rector to execute the deed, and conveying to them all the interest and estate of said Lewis B. Tully in said lands, and an estate in fee therein; which deed was duly acknowledged by said Henry M. Rector, as such marshal, before the said Circuit Court of the United States, on the 24th day of April, 1844, and was afterwards, on the 25th day of June, 1844, filed, for record, in the Recorder's office of said county of Jackson, and duly recorded in Record Book "C," pages 71, 72, which would fully appear by the deed and certificate of acknowledgment and registration thereto annexed, exhibited and marked "*C.*"

That said judgment was a lien upon said lands from its date until the purchase of them by complainants.

That one H. Van Grollman, who was an alien, had not declared his intention to become a citizen of the United States, and was therefore incapable of taking or holding real estate in Arkansas,

at an irregular sale by the marshal of said District, under certain executions, which were irregular and void, on or about the 14th August, 1841, became the purchaser of said lands in open fraud, and with the funds, and for the express and sole use, of the said Lewis B. Tully, the defendant in said irregular executions, and as whose lands they were then levied on and sold. That said irregular executions, as complainants were informed, were in favor of Edward Stone and William Stewart against said Tully; and John C. Wagner and Christian F. Wagner against said Tully, and were issued from the office of the clerk of said Circuit Court of the United States. That said sale was made to said Grollman by one Ephraim Frazer, who represented himself as the deputy of Elias Rector, the then marshal of said district; and that, afterwards, Thomas W. Newton, without authority of law, executed to said Grollman a deed for said lands, as marshal of said District.

Complainants expressly charge that said Grollman purchased said lands in open and palpable fraud, in trust for said Tully, and with his funds, and with the express and open understanding that he was to hold them for the sole and exclusive use and benefit of the said Tully, and to protect said lands fraudulently against and from the creditors of said Tully, and that said purchase so made by Grollman was fraudulent and void; and that, notwithstanding such purchase by him, said lands were still subject to be sold, as the lands of Tully, to satisfy the judgment of Neff & Bro., and that complainants acquired a valid title thereto by their purchase aforesaid.

That Grollman, together with Ferdinand C. Fulcher, William Byers, and Alvin McDonald, claiming title under Grollman and Tully, had taken possession of said lands, and had been, for a year past, receiving the rents and profits thereof—which were of the annual value of $300, were still (one, part, or all of them) receiving the same, and unlawfully withheld the possession of said lands from complainants.

That William Byers claimed title to said lands by virtue of a pretended and illegal purchase at a sheriff's sale, under an exe-

cution against said Tully, and a deed executed by the sheriff of said county of Jackson, in pursuance thereof.

That Tully and Grollman resided in the county of White, William Byers in Independence, and Fulcher and McDonald in the county of Jackson, all in the State of Arkansas, and were made defendants.

That complainants had, at various times, applied to defendants to deliver up to them the said lands, and the deeds or papers under which they claimed title or possession, and to account to them for the rents, issues and profits; and complainants hoped that they would have complied with such reasonable request, as in conscience and equity they ought to have done, but they had wholly refused to comply with such request.

Complainants prayed that defendants be compelled to answer, &c., &c., and that each of them should particularly set forth and discover, according to the best of their knowledge, whether said Grollman was an alien, and had ever, in due form of law, declared his intention to become a citizen of the United States, and been naturalized: and, if so, that they be required to produce record evidence thereof; and whether Grollman purchased said lands, or any part thereof, as above stated: and, if not, then in what manner, and at what time, he did purchase the same, or any part thereof; and whether said Grollman purchased said lands, or any part thereof, with the money of said Tully, or for his use and benefit, or under any understanding whatever, with Tully, that said purchase was to be made, or was made, for him, or his use and benefit, at the time of such purchase, or at any time thereafter; or to protect said lands from the creditors of said Tully, for said Tully's benefit; and whether said defendants were in possession of said lands, or any part thereof, and what was the annual value of said lands, and of each and every lot thereof; and that said defendants exhibit their title papers, if they had any, and deliver them up, to be cancelled; and that they admit generally and specially each and all of the allegations in the bill; and be compelled by decree of the court to deliver up to complainants the quiet possession of said lands, and to deliver up all

their title deeds, or muniments of title, to be cancelled and vacated, and to account to complainants for the rents, issues and profits of said lands; and that all right, interest, and estate of the said defendants, in and to said lands, be divested, and passed to and absolutely vested in complainants, and their heirs and assigns forever; and that defendants be compelled to execute a deed or deeds to complainants; and that the title of complainants to said lands be settled, and quieted against said defendants by decree of the court; and for general relief.

"*Exhibit A*"—Shows that, on the 4th December, 1840, Neff & Bro., by Absalom Fowler, attorney filed a declaration in the Circuit Court of the United States for the District of Arkansas, against Lewis B. Tully, on two notes, dated on the 14th March, 1839, and due at six and nine months, for the aggregate sum of $3,473 92 principal. That a summons was issued, in the ordinary form, to the marshal of the District, returnable to the March term, 1841, which was returned thus: "Executed the within by delivering a copy thereof to a white member of the family of the defendant over the age of fifteen years, and informing said person of the contents. Done in Jackson county, District of Arkansas, Dec. 18, 1840. E. RECTOR, *Marshal.*

By JOHN K. TAYLOR, *Dep.*"

That, during the return term, on the 2d day of April, 1841, Neff & Bro. obtained a judgment by default against Tully for the amount of the notes sued on, with interest, &c. The judgment recites that "it appeared to the court that defendant Tully had been legally served with process in the case," &c.

That, on the 7th May, 1841, a *fi. fa.* was issued on the judgment, and returned by the marshal no property found, as alleged in complainants bill. That on the 4th day of February, 1843, an *alias fi. fa.* was issued thereon, to the marshal of the District, returnable to the following March term. Upon this *fi. fa.* was endorsed a direction, by Absalom Fowler, Esq., attorney of Neff & Bro., to the marshal to levy on the lands described in the bill. The marshal, THOMAS W. NEWTON, by his deputy, Geo. A. Wor-

then, returned upon the *fi. fa.* that he levied on the lands in question, on the 8th day of February, 1843, "and the same I duly advertised for sale, which sale was fixed to be made on the 20th day of March, A. D. 1843, at the court-house door of Jackson county aforesaid; when and where, the same being offered for sale by me, William F. Denton and Absalom Fowler became the highest bidders and purchasers of said tracts of land, bidding for the first described of said tracts, [*the lands are described in the return as in the bill,*] the sum of $1; for the second, the sum of $2 50; for the 3d, the sum of $2 25; for the 4th, the sum of $2 75; for the 5th, the sum of $2 25; for the 6th, the sum of $2 75; and, for the 7th, the sum of $3 00; the proceeds of which, all amounting to $16 50, is applied in part payment of the marshal's costs on the within writ. The defendant has no other property upon which said writ can be levied. March 21, 1843."

"*Exhibit B*"—Shows that at the April term of the said Circuit Court of the United States, Denton & Fowler filed a petition, stating the recovery of the said judgment by Neff & Brother, against Tully, the issuance of the *alias fi. fa.*, the levy upon the lands aforesaid, the sale thereof, and purchase by them; that after the sale, and before the execution of a deed to them, Newton had been removed from the office of marshal of said District, and Henry M. Rector appointed in his place, by the President of the United States, and praying an order of court upon Rector to make them a deed to the lands; and that the court made the order as prayed, on the 22d April, 1844.

"*Exhibit C*"—Shows that on the 23d day of April, 1844, Rector executed to complainants a deed for the lands in accordance with the order of court; and duly acknowledged the same on the next day before said court, and that the deed with the certificate of acknowledgment attached, was filed in the office of the Register of Jackson county, on the 25th of June, 1844, to be recorded, and duly recorded, as alleged in the bill.

At the return term, May, 1845, process having been duly served on defendants, *Lewis B. Tully* and *Ferdinand C. Fulcher,* and they failing to appear, a decree, *pro confesso,* was entered against them.

Defendants, William Byers and Alvin McDonald, filed answers to the bill, to which complainants filed replications. During the progress of the case, McDonald filed a first and second amended answer, the latter of which will be set out hereafter.

Answer of William Byers to the original bill: He had been informed—and supposes it to be true, that Neff & Bro. recovered judgment against Tully, in the Circuit Court of the United States for the District of Arkansas, at the time, and for the amount, alleged in the bill; that executions issued thereon, said lands were levied on, sold, and purchased by complainants as stated in the bill, but he knew nothing of the regularity and legality of the obtaining of said judgment, issuance of said execution, levy and sale, &c., and demanded proof of the regularity and legality of all said proceedings in the premises.

He admitted that said Herman Van Grollman, (who, he was informed, was an alien,) at a sale made by the deputy marshal of said District, under certain executions, (as to the regularity of which he knew nothing,) about the time named in the bill became the purchaser of the lands described in the bill in open fraud, and with the funds and for the use of Tully, the defendant in the supposed irregular executions, as whose property the lands were levied upon and sold. He was informed that said executions were in favor of Stowe & Stuart vs. Tully, and Wagner & Wagner vs. Tully, and were issued from the office of the clerk of the Circuit Court of the United States for said District of Arkansas, as alleged in the bill. Respondent was informed and believed that said sale was made to Grollman, by one Henry A. Engles, as deputy marshall of said District, and not by Ephraim Frazer, as was supposed in the bill. That said Thomas W. Newton, as marshal, made a deed to said Grollman, without authority of law, to said lands, as the sale of said lands was not legally advertised.

Respondent was present at said illegal sale by said deputy marshal, Engles, to Grollman, at the town of Elizabeth, in the county of Jackson. A few moments before the sale, Tully took him aside from the people assembled, and asked him if he had

come to bid upon his (Tully's) property and lands to be sold; and respondent told him he had not. Tully then requested him not to bid, and told him that the times were hard, that judgments to a large amount had been obtained against him, there was no money in the country, and if he could not get a friend to bid in said property and lands for his use, they would be sacrificed and he ruined; and further, that he (Tully) had a friend who would bid them in for his benefit, if they did not go too high; and, if they were bid up to any considerable amount, he would not be able to purchase, as he had no money except the amount of his [Tully's) quarterly salary as Register of the Land Office at Batesville. Respondent assured Tully that he did not come there to purchase the lands, and that he would not do so, as he had not the money to do so if he wished to purchase them. Tully and respondent then returned to the place where Engles was about to sell the lands, and when he proclaimed them for sale, Tully arose, and requested him to suspend for a few moments, that he wished to make a few remarks to the people present. Tully then addressed the people assembled, and requested that no one should bid upon the lands, and said that he hoped some friend of his would bid them in for him, so that he could afterwards have the use of them to pay his honest debts—that there were a few persons who wished to sacrifice him, and, if the lands should be sold so that he could not have the use of them, he would be utterly unable to pay his debts. After Tully had concluded his remarks, and Engles offered the lands for sale, Tully stepped to one side, and taking said Herman Van Grollman by the arm, brought him close to the side of Engles, and he bid off the lands for a small sum. At the time Tully made his speech, Grollman was present, and in hearing. Respondent was informed that Grollman bid in the lands for the benefit of Tully, and paid for them with his funds, and that Tully had received the consideration of such of the lands as Grollman had since sold. That Grollman purchased said lands, under an agreement with Tully, to hinder and delay the creditors of Tully from collecting their debts, and to defraud them, &c.

Byers further answered that he claimed to be the rightful owner of the lands named in the bill; he claimed under a deed from Isaac Gray, sheriff of Jackson county, who sold the same to him by virtue of an execution in favor of Peter Powel & Co. against Tully. That, on the 18th May, 1841, Powel & Co. recovered, in the Jackson Circuit Court, by confession, a judgment against said Tully for $406 94 debt, with interest at 10 per cent. from the 5th day of January, 1838, by way of damages and for costs. That, on the 5th day of January, 1842, a *fi. fa.* was issued thereon to the sheriff of Jackson county, which came to the hands of Gray, as such sheriff, to be executed; and, on the 26th of the same month, he levied upon the lands aforesaid, and advertised the same for sale according to law, at the time, place, and in the manner prescribed by law; and at the time and place advertised for the sale of said lands, said Gray, as such sheriff, sold all of said lands to respondent for $25, and, on the 17th of May, 1842, the return day of the *fi. fa.*, returned the same, with his proceedings in the premises endorsed. A transcript of said judgment, execution, and return, was exhibited, marked "*Exhibit A.*" That, on the 18th of May, 1842, said sheriff made him a deed to said lands, and duly acknowledged the same before the Jackson Circuit Court, and on the next day respondent filed the same in the office of Register of said county for registration, and it was duly recorded. A copy of the deed and certificates of acknowledgment and registration, was exhibited, and marked "*Exhibit B.*" That said judgment of Powel & Co. against Tully, was a lien upon said lands, and that, by virtue of said judgment, execution, sale and deed, respondent claimed to be the rightful and legal owner of said lands, &c.

That defendant Mc Donald was, and had been for over two years, in possession of a portion of said lands, (specifying them) and the rents and profits thereof were worth from $75 to $100 per annum. That Mc Donald pretended to hold under a conveyance from Grollman dated about the 7th January, 1842, but that it had never been legally acknowledged or recorded; and that respondent, at the time he purchased said lands, had no notice

of the pretended sale from Grollman to McDonald. That the open fraud between Tully and Grollman was of public notoriety at the time McDonald made said purchase, and the circumstances such as to put a prudent man on inquiry. Respondent charges that McDonald, at the time he purchased, had full knowledge that Grollman purchased the lands in fraud of Tully's creditors and held them for the use and benefit of Tully, and that McDonald had notice of the said judgment of Powel & Co. against Tully, and that it was a lien on said lands. That the consideration which McDonald gave for the lands purchased by him of Grollman, was, with his knowledge, paid over to Tully for his use and benefit.

That defendant Fulcher held a portion of the lands named in the bill, as tenant of respondent, but respondent did not know the value of the rents and profits thereof—he had received none of the rents and profits of said lands.

Respondent further alleged, that the sale of said lands, in the bill mentioned, made by the said marshal to the complainants, was not made on the first day of any term of the circuit court of Jackson county, between the hours of 9 o'clock A. M., and 3 o'clock P. M., nor whilst the said court was in session, nor in the manner prescribed by the statute regulating the sale of real property under execution.

Respondent claimed that the pretended title of complainants, and of the other defendants, should be cancelled &c., that his title to the lands should be quieted, and that McDonald &c., should account to him for rents and profits &c.

"*Exhibit A.*" to Byers' answer, shows that on 18th May, 1841, Powel & Co. obtained judgment by confession against Tully in the Jackson circuit court (Byers acting as their attorney.) That on the 5th January, 1842, a *fi. fa.* was issued thereon to the sheriff of Jackson county, levied on the lands in question, sold on the 16th May, 1842, by the sheriff, and purchased by Byers as alleged in his answer.

"*Exhibit B.*" is a deed from the sheriff to Byers for the lands,

with the certificates of acknowledgment and registration, as stated in the answer.

November term, 1845. The bill was taken for confessed against Grollman, and an interlocutory decree entered accordingly. William F. Denton's death was suggested, and his heirs made parties to the bill in his stead.

May term, 1846. No court.

November term, 1846. Defendant William Byers filed a cross-bill against complainants, and all the other defendants in the original bill; and by consent of parties leave was granted to Mc Donald to file an amended answer to the original bill, and his answer to the cross-bill by the next term. Fulcher entered his appearance to the cross-bill, and publication was ordered as to Tully and Grollman, it appearing that they were non-residents.

Byers' Cross-bill, after noticing the original bill, and the steps that had been taken in it, alleges, in substance, that on the 18th May, 1841, judgment was rendered, by confession, in the Jackson circuit court in favor of Powel & Co. against Lewis B. Tully; upon which a *fi. fa.* was issued on the 5th day of January, 1842, returnable the 2d day of May term following; which writ was delivered to the sheriff of Jackson county (Gray) on the 26th day of January, 1842, and was, on the same day, levied on the lands described in the original bill, as the property of said Tully; and after due and legal advertisement, the said lands were sold by said sheriff, at the door of the court house of Jackson county, on the 16th day of May, 1842, being first day of court, and purchased by him, Byers, for the sum of $25. A certified copy of the judgment, execution, and return is exhibited, marked *A.*, the same as *Exhibit A.* to his answer to the original bill. That on the 18th day of May, 1842, in pursuance of said sale, the sheriff made, and acknowledged before said court, in due form, a deed conveying to him said lands, and on the 19th day of the same month the deed was filed in the recorder's office of said county, and duly recorded: A copy of the deed and certificates of acknowledgment and registration, is exhibited, marked *B.* That the judgment of Powel & Co. from its date, to the sale aforesaid,

was a lien upon said lands, paramount to all others; and that under said judgment and execution, he, Byers, purchased the absolute title to said lands, Tully being the owner of them from the date of the judgment until the time of the sale.

That Herman Van Grollman, (now a non-resident,) who was an alien, and never had, in due form of law, declared his intention to become a citizen of the United States, and was incapable of taking or holding real estate in Arkansas, at an irregular and pretended sale by the marshal of the United States for the District of Arkansas, under certain pretended executions, which were irregular and void, on or about the 14th day of August, 1841, pretended to become the purchaser of said lands, in open fraud, and with the funds, and for the express use and benefit of Tully, the defendant in the executions. That said irregular and void executions were in favor of Stowe & Stewart vs. Tully and Wagner & Wagner vs. Tully, and were issued from the office of the clerk of the said Circuit Court of the United States for said District. Said sale was made by one Henry A. Engles, who pretented to be a deputy marshal of said District. That the lands were not levied, advertised, or sold, according to law; that the sale was not at the court-house, or on the first day of any term of the Jackson Circuit Court, and that the whole proceedings were illegal and void. That a deed was made, by Thomas W. Newton, as marshal, to Grollman, for said lands, without authority of law. That Grollman purchased with a full notice that the execution and the proceedings thereon were irregular and void; and in open and palpable fraud, in trust for Tully, and with the funds of said Tully, and with the express and open understanding that he was to hold them for the sole and exclusive use and benefit of said Tully, and to protect said lands fraudulently against the judgment of said Powel & Co., and the other creditors of said Tully.

That defendant, Fulcher, pretended to claim a portion of said lands, under a purchase from Grollman, but that he purchased with a full knowledge of the frauds aforesaid, &c.

That defendant, McDonald, pretended to set up a title to a portion of said lands by virtue of a pretended purchase from Groll-

man: that at the time of his purchase, it was a matter of general and public notoriety, in the county of Jackson, that the said sale to said Grollman was fraudulent; and that at the time Mc Donald made said purchase the lien of the Powel & Co. judgment was in full force; that Grollman at that time had no deed; that he never has had any; that the one he did obtain was not acknowledged or recorded according to law. That Mc Donald had notice of the lien of the judgment of Powel & Co. and of the fraud between Grollman and Tully; that the conveyance from Grollman to Mc Donald was fraudulent and void as against him, Byers; and that it was not duly executed, acknowledged and admitted to record..

That the complainants in the original bill claimed said lands under an irregular and void sale, made under irregular and void executions. That the execution issued in favor of Neff & Bro., under which they purchased, was not in the form prescribed by law—was not made returnable on any return day known to the law—and the whole proceedings upon said *fi. fa.* were irregular and void: that the marshal did not advertise said lands according to law—did not put up three written advertisements in each township in Jackson county as required by law—nor at the court house door—nor did he expose said lands for sale at the court house door of said county on the first day of any term of the circuit court held in said county of Jackson, nor did he sell the same between the hours prescribed by law; and that the pretended sale of the marshal of said lands to Fowler & Denton was irregular and void.

That the said judgment of Neff & Bro. against Tully was void, and no lien upon said lands. That the judgment of Powel & Co. was a lien on the lands from the time it was rendered until the sale to him, Byers—that he had purchased said lands, obtained a deed therefor, and caused it to be recorded before the execution issued under which Denton & Fowler purchased, and that at the time they purchased the lands, they had full knowledge of his title.

That Henry M. Rector, as marshal of said District, without

authority of law, executed a deed to Denton & Fowler for said lands, and the same had never been properly acknowledged, or proven, and admitted to record in the recorder's office of Jackson county; and that said deed could not be received in evidence against him, Byers.

That Mc Donald was in possession of a portion of said lands; *to wit:* Lot number 2 of the south-west fractional quarter section 6, 80 acres; also Lot number 4 of the south-west fractional quarter of section number 6, 74 2-100 acres; also Lot number 3 of the north-west fractional quarter of section number 6, 120 21-100 acres, all in township 11 north, range 2 west, in the county of Jackson; and that said lands had been in Mc Donald's possession for upwards of four years then past, and the rents and profits thereof were of the annual value of $100. That he, Byers, was in possession of the other lands. That Mc Donald, though often requested, had refused to surrender up said lands, or account to him for the rents, &c. That complainants in the original bill, by their clamor about their pretended title, had hindered him from making sale of said lands at a fair price, &c. *Prayer*, that his, Byers', title be quieted, and all other titles cancelled, &c., and that Mc Donald account for rents and profits &c.

May term, 1847. Complainants in the original bill took an interlocutory decree, by default, against defendants Tully and Fulcher; and filed their answers to the cross-bill, to which replications were filed. Byers took an interlocutory decree by default against Tully, Grollman, and Fulcher, on his cross-bill. Mc Donald filed his answer to the cross-bill, and his second amended answer to the original bill. On motion of Byers, so much of Mc Donald's answer to the original bill as was in the nature of a cross-bill was striken out as such, but permitted to remain as part of his answer, to which he excepted. Complainants in the original bill filed a replication to Mc Donald's second amended answer, and the cause was set down for hearing, at the next term, on bills, answers, exhibits, replications and depositions, &c.

Mc Donald's second amended answer to the original bill, is in sub-

stance as follows: as to the said judgment of Neff & Bro. against Tully, the executions issued thereon, the levy and sale of said lands, the purchase by Denton & Fowler, their title therefrom derived, &c., mentioned in the original bill, defendant knows nothing, and calls for strict legal proof; but he denies that said judgment was a lien on the lands sold under it from the day of its date, until the said sale.

As to the title claimed by defendant Byers, mentioned in the bill, respondent knows nothing.

As to the said purchase made by Herman Van Grollman, at a marshal's sale of lands mentioned in the bill, and whether the said sale was irregular, and whether the execution, under which the sale was held, was void, or whether the purchase by Grollman was made in open and palpable fraud, and whether it was made with the funds, and for the use of Lewis B. Tully, all of which are charged in the bill to be facts, this respondent, of his own knowledge, knows nothing. It is true that he is in possessien of Lot number 2 of fractional south-west quarter of section 6, in township 11, north, range 2 west, 80 acres; Lot number 4, of same quarter, 74 2-100 acres; and Lot number 3 of fractional north-west quarter of same section, 120 2-100 acres, part of the lands mentioned in the bill. It is also true that respondent obtained possession of said lands, and derives his title thereto from said Grollman, but respondent avers that he purchased said lands of said Grollman for a valuable consideration, *to wit:* for the sum of $1,600, which was the full value, and a high price for said lands. That he purchased and fully paid for said lands without any notice of any prior lien or incumbrance upon them, and without any notice or suspicion that the title of Grollman was tainted, or, in any way, affected with fraud betwixt him and Tully, or by fraud of Grollman alone, or Tully alone, or by fraud of any person whatever. That at the time of the said sale made by the U. S. marshal to Grollman, mentioned in the bill, he was not a resident of Jackson county, nor did he become so until sometime after that; and that during his negotiation for said lands and purchase of them, he knew nothing, and heard of no-

thing calculated to throw a doubt or suspicion upon the title of Grollman, and respondent thought that by purchasing of Grollman, he was obtaining a full, complete and perfect title to said lands and therefore gave the full value therefor. His purchase of said lands of Grollman is evidenced by a deed of conveyance from Grollman to him already on file as "*Exhibit C.*" to his answer to the cross-bill of Byers, and is made part hereof. That supposing his title aforesaid to said lands to be valid, and unquestionable in law, he has proceeded to make valuable and permanent improvements thereon, in erecting a dwelling house, out houses, and in clearing and fencing the lands, which improvements are worth at least $1000.

Respondent further answering, but reserving and claiming for himself the full benefit of the protection granted and extended by courts of equity to purchasers for a valuable consideration without notice, as if he had rested his case upon that protection, says that he, as before stated, does not personally know the facts and circumstances connected with the title of Grollman to said lands, but he has been informed and believes that Grollman purchased the same at public auction, a sale made by the marshal of the U. S. for the district of Arkansas, under and by virtue of certain executions which had been issued on judgments obtained in the U. S. Circuit Court for the district of Arkansas against Lewis B. Tully: one in favor of Stowe & Stewart, rendered on the 13th March; 1841, for $820 60 debt, $218 18 damages, and one in favor of Wagner & Wagner rendered on the 30th March, 1841, for $2,113 84 debt, and $338 12 damages: which said executions properly issued on the 15th April, 1841, and the said sale had under them on or about the 14th August, 1841; and that in pursuance thereof, the marshal for said district executed a deed for the lands mentioned in the original bill, including those of which this respondent has possession, on the 2d May, 1842; which was duly acknowledged on the following day, and in good time filed for record in the recorder's office of Jackson county; which facts relative to the issuance of said executions, levy, sale and deed more fully appear by a certified copy of the deed of Thom-

as W. Newton, U. S. Marshal for said district of Arkansas, conveying said lands to Grollman already exhibited in this case, as "*Exhibit B.*" in this, respondent's answer to the cross-bill of Byers, and prayed to be taken as part of this answer, the original not being in possession of respondent.

Respondent has been informed, and believes, that in obtaining said judgments, issuing executions upon them, levying said lands, selling and conveying them, all the requirements of the law in relation thereto were fairly and strictly observed, and that the whole proceedings were fair, regular and legal.

As to bidding off said lands by Grollman at said sale for the use and benefit of said Tully, and as to his alleged paying for them with the funds of said Tully, and as to buying them in fraud, although this respondent personally knows nothing, yet he is informed and believes the said purchase was made by said Grollman with his own money, for his own use, and without any design to defraud any person, but if such was the case this respondent never knew any thing thereabout.

Respondent does not know whether said Grollman is an alien, but is informed and believes such to be the fact, but avers that Grollman before the date of his said purchase of said lands, in due form of law, declared his intention to become a citizen of the United States; and was in pursuance thereof admitted to full citizenship by decree of the Lawrence circuit court, at its April term, 1843; a certified copy of the record relating thereto respondent asks leave to file as a part of this answer, already proffered as "*Exhibit A.*" in his answer to the cross-bill of Byers; saving to himself the right to insist as he does, and as he is advised, that it is immaterial, and has no bearing upon the rights and interests of this respondent, and of the several parties to this suit, whether said Grollman be an alien or not, or whether he had or not declared his intention to become a citizen of the United States, inasmuch as said Grollman never was, by inquisition of office, declared an alien, and incapable of taking, holding and conveying real estate.

Respondent avers that complainants, at the time of their pur-

chase, had full notice of respondents possession of, and title to, the lands above described.

Respondent having fully answered the allegations and interrogatories contained in the bill, according to the statute allowing a defendant to interpose new matter in his answer, avers and charges that the complainants, in the original bill, are not entitled to the protection of a court in equity, against this respondent, as a purchaser for a valuable consideration without notice; as the bill is not prosecuted by any creditor of Tully, or by any person for the use of such creditors, but by the complainant, Fowler, who was the attorney for Neff & Brother, for his own use and benefit, and for the use and benefit of the heirs of William F. Denton, the said Denton also being an attorney associated with said Fowler in this bill, and connected with him, as appears by the bill, in the purchase of the lands in possession of orator, and the other lands mentioned in the bill; and he charges that said complainants' taking advantage of their situation as attorneys at law, and having purchased said lands for a nominal consideration, thereby intending, and now by this suit are to obtain possession of, and title to, said lands, without value paid therefor, and against the equity of respondent.

Respondent also avers and charges that defendant, Byers, complainant in said cross-bill, also purchased said lands for a nominal sum, and was the attorney of Powel & Co., under whose judgment and execution he claims title, and that he is defending the original bill, and prosecuting said cross-bill for his own use and benefit, and not for that of Powell & Co., or for any creditor of Tully or Grollman: and respondent charges a corrupt and wicked combination betwixt defendants Tully and Grollman, and complainant Denton, to throw suspicion upon, and to affect injuriously, the title of this respondent in this, that Tully and Grollman, after having been served with process to appear and defend this suit, corruptly and illegally agreed to, and did leave the country, without answering the bill in order that the charges of fraud in said bill contained against said Tully and Grollman might be confessed to the injury of this respondent in his defence.

And this respondent charges to have been done at the corrupt, iniquitable instance of the said William F. Denton, who paid the said Grollman and said Tully a valuable consideration for so doing, who received the same, and consummated the said corrupt agreement. And respondent asks that the complainants herein be required to answer the charges contained in this answer, and particularly whether the said Tully and Grollman did not leave without answering this bill, and in pursuance of their corrupt agreement with the said Denton to that effect: and whether the said Denton did not corruptly pay, and the said Tully and Grollman both, or either of them, receive a valuable consideration for neglecting to answer, and refraining from answering the original bill herein; and particularly whether the said Denton did not pay to the said Tully and to the said Grollman, or to one of them, and whether they, or one of them, did not receive from Denton a certain *stud-horse*, called "Consul," for the consideration as above stated.

Respondent asks that this answer be made a cross-bill as to said Tully, Grollman, Fulcher and Byers, and that they be required to answer said charges and allegations, &c.

McDonald's answer to the cross-bill, is substantially the same as his answer to the original bill.

"*Exhibit A.*" to McDonald's answers, shows that Grollman declared his intention to become a citizen of the United States in the Superior Court of the Territory of Arkansas, on the 16th of January, 1834, and took the final oath of naturalization before the Circuit Court of Lawrence county, at the April term, 1845.

"*Exhibit B.*" to McDonald's answers, is the deed of Thomas W. Newton, as marshal of the United States for the District of Arkansas, to Grollman, for the lands in question. The deed recites that *Stowe & Stewart* recovered a judgment in the Circuit Court of the United States for said District, against Tully, on the 13*th March*, 1841, &c. That *Wagner & Wagner* recovered judgment against Tully, in the same court, on the 30*th March*, 1841, &c. That, on the 15th April, 1841, a *fi. fa.* was issued on the former judgment; and, on the 11th of the same month, a *fi. fa.* was

issued on the latter judgment, to the marshal of said District, both of which came to the hands of Elias Rector, then marshal, on the 23d day of April, 1841, and were levied, by Ephraim Frazer, Rector's deputy, on the lands in question. That Newton, who succeeded Rector in the office of marshal, by his deputy, Henry A. Engles, after giving due notice, according to law, sold said lands at the court-house door of Jackson county, on the 14th of August, 1841, and Herman Van Grollman became the purchaser thereof for $51 86. The deed is dated May 2d, 1842, was acknowledged by Newton, as marshal, before the Circuit Court of the United States for said District, on the next day, and filed in the office of the Recorder of Jackson county, to be recorded, on the 2d day of December, 1842, and duly recorded, as appears by the certificates attached to the deed exhibited.

"*Exhibit C.*" to McDonald's answers, is the deed from Grollman to him, for the lands claimed by him, dated 7th day of January, 1842, stating $1,600 to be the consideration, to which Jas. Robinson and E. Blansett are subscribing witnesses. Appended to the deed, is a certificate of the Recorder of the county of Jackson, that it was filed for record in his office on the 18th day of April, 1843, and was duly recorded.

Byer's motion to strike out so much of McDonald's said second amended answer to the original bill, as set up new matter, and propounded interrogatories to the other parties, was based upon the following grounds, as stated in the motion: 1. That such matter could not be set up after the cause was set for hearing: 2. The charges made, and the information sought, were irrelevant to the matters in issue as it regarded McDonald, as the answer of one defendant could not be taken as evidence against another defendant: 3. If the said allegations were not stricken out, and defendants required to answer, and publication made, &c., it would create great delay and hardship on him, Byers.

Fowler's answer to Byers' Cross-bill, is, in substance, as follows: As to the alleged judgment of Powel & Co. against Tully, the issuing of a *fi. fa.* thereon, the levy upon said lands of said Tully, and sale thereof to Byers, the execution, acknowledgment and

registration of such deed from the sheriff of Jackson county to Byers; and as to the alienage of Grollman, as alleged in the said cross-bill, defendant knows nothing of his own knowledge, or otherwise, except from the papers in the cause, as set forth by Byers, and from rumors; but defendant denies that said Byers acquired, by such deed, any title, or right, to the possession of said lands in law or equity. Defendant has been informed, believes it to be true, and so admits, that said Grollman, by a fraudulent arrangement with Tully, on or about the month of August, 1841, at a real or pretended sale, by the marshal, purchased said lands, in open fraud, and with the funds, and for the express use and benefit of Tully, as alleged in the cross-bill, but as to the particulars of such sale, as detailed in said cross-bill, defendant knows nothing.

Defendant, further answering, says that he, and the minor heirs of Denton, complainants in the original bill, to the best of his knowlegde and belief, are the legal owners of said lands, by the means, in the manner, and for the consideration, set forth in the original bill and exhibits, which are made part of this answer.

Defendant positively denies that, at the time at which he and Denton purchased said lands, this defendant had full notice, or any other degree of notice, or had ever had even by rumor, of said title, real or pretended, of said Byers to said lands; nor does defendant now know, or believe, that said Byers has any title thereto; and insists and avers that the said deed of said marshal to him and Denton, the acknowledgment and registration thereof, said sale so made to them by the marshal, the levy, execution, and judgment, under which the same was made, were all regular, and in strict accordance with law, and that their title thereunder is paramount to that of said Byers, and to the titles and claims of all other persons, and is in all things a perfect legal estate.

The answer of the heirs of Denton to the Cross-bill, by their guardian, states that they, being minors, are strangers to the matters and things in the cross-bill contained—that they are infants under the age of ten years, and claim such interest in the premises

as they are entitled to, and submit their interest to the court.

May term, 1848.—The cause came on to be heard before the Hon. JOHN T. JONES, Judge, and the following final decree was rendered:

In this cause, it was agreed between complainants in the original bill, and said William Byers and Alvin McDonald, that all the depositions on file, except that of Ferdinand Fulcher, may be read on the final hearing of this cause, waiving formal objections, &c., and reserving objections to matters of substance, &c.; whereupon this cause came on to be heard, by consent of parties, and in pursuance of an order of court heretofore made (said bills having been taken as confessed against Tully, Grollman, and Fulcher) upon bills, answers, replications, exhibits, and depositions; and the scope of the original bill, cross-bill, answers, exhibits and depositions appears to be that the said Absalom Fowler and William F. Denton, then infull life, but now deceased, on the 20th day of March, 1843, purchased at a sale of the mnrshal of the District of Arkansas, made under an execution on a judgment rendered in the Circuit Court of the United States for said District, on the 2d day of April, 1841, in favor of Neff & Bro. against Lewis B. Tully, the following described lands, as the property of said Tully, situated in said county of Jackson, to wit: [*Here the lands are described as in the bill,*] which lands were afterwards by deed conveyed by the marshal to said Fowler and Denton. That, on the 14th of August, A. D. 1841, at a sale under certain other executions, the said Grollman, by a fraudulent bargain with the said Tully, purchased the same lands, as the property of said Tully, to hold the same in secret trust, for the use and benefit of said Tully, and took a conveyance therefor from the marshal. That the said Byers, on the 16th day of May, A. D. 1842, purchased the same lands at a sheriff's sale of said county, under an execution on a judgment in favor of Peter Powel & Co., against said Tully, rendered by the Circuit Court of said county, in May, A. D. 1841, and took a deed therefor from the sheriff, which was acknowledged and recorded, as also the said deed from the marshal to Grollman. That said McDon-

ald afterwards, with notice of the fraudulent bargain so made between said Tully and Grollman, purchased and took a deed from said Grollman therefor, the said land above described as lots number 2, of the south-west fractional quarter; lot number 3, of the north-west fractional quarter, and lot number 4, of the south-west fractional quarter of said section number 6, and had possession of the same at the time of said purchase made by said Denton & Fowler, and still holds the possession thereof against the said complainants. That the said lands so held by said McDonald are of the annual value of $75. That said Byers and Fulcher have had possession of the residue of said lands, the said Fulcher for the years 1843, 1844, 1845, and 1846, and that their annual value is $75. That said minor complainants are the heirs at law of said William F. Denton, &c. And upon the hearing of said cause, all of the depositions on file (except Fulcher's) were read as evidence, the parties respectively objecting to such portions thereof as they deemed irrelevant, incompetent, or not material to the matters in controversy, and the complainants in the original bill, and said Byers objected specially to the deposition of said John Robinson, on the grounds that, from the other evidence in the cause, it appears that he is interested and incompetent to testify. The several answers and exhibits to said bills and answers were also read in evidence, and also the original deeds from the marshal to said Fowler and Denton, and from said sheriff to said Byers, and from said Grollman to McDonald, the execution of the last being proven *viva voce* on the hearing, and also the record copy of the said deed from the marshal to Grollman, copies of all of which were also exhibited in the cause; Margaret F. Denton was admitted and proven to be guardian of said minor heirs, &c.; the complainants in the original bill also filed and read in evidence two rules of the said Circuit Court of the United States; and also read in evidence the original commission of the President to Thomas W. Newton, as marshal, a true copy of which is annexed to and made a part of Newton's deposition; and the said McDonald read in evidence a duly certified copy of certain rules of the said Circuit Court of the United

States, numbered 1, 4, 5, 6, and 10, a true copy of which is filed with the papers as evidence in this case: WHEREUPON all the matters in controversy being seen and heard by the court, here sitting in chancery, it is of the opinion that the complainants aforesaid in and to the original bill are entitled to the relief prayed therein, and that the said complainant in said cross-bill is not entitled to the relief prayed therein: It is, therefore, ordered, adjudged, and decreed, by the court here, that the said deed from the said marshal of the United States to the said Hermon Van Grollman, and the said deed from the said Hermon to the said Alvin McDonald be and the same are hereby cancelled, vacated, and declared null and void to all intents and purposes; and it is further ordered, adjudged and decreed that all right, title, interest and claim of the said Lewis B. Tully; Herman Van Grollman, Ferdinand C. Fulcher, and William Byers, and each of them, legal or equitable, in and to the said lands, and each and every part and parcel thereof, and all the right, title, interest and claim, legal or equitable, of the said McDonald, in and to the said lands above particularly described, to wit: [*describing them*] be absolutely and forever divested from and out of them the said Tully, Grollman, Fulcher, Byers and McDonald, and be and the same is hereby vested in fee simple in the said Absalom Fowler, and the said *Frances Jane Denton, Franklin D. Denton, Elvira F. Denton*, and *William F. Denton*, minor heirs of the said William F. Denton, deceased, and in their heirs and assigns forever. And it is further ordered, adjudged, and decreed, that the said Alvin McDonald deliver possession of the said three last described lots of land above stated to be, and which are now in his possession, immediately to the said complainants; and that the said William Byers and Ferdinand Fulcher forthwith deliver up to the same complainants the residue of the lands first above described, and so in their possession, and that on their refusal, or on the refusal of the said Alvin to deliver up such immediate possession to such complainants, that such complainants have the use of all process of this court proper to put them into such possession. And it is further ordered, adjudged, and decreed, that the said Alvin Mc-

Donald pay to the said complainants to the original bill the sum of $390, the amount found due by the court, on account of use and occupation, and the value of the rents, issues and profits of the said lands so held, and used, and enjoyed by him, as aforesaid; and also all the costs of the said complainants to the said original bill in and about their said original bill expended, except such costs as they have incurred in prosecuting such bill against the said Byers and Fulcher, and that the said complainants have execution thereof. And it is further ordered, adjudged, and decreed, that the said defendant, Ferdinand C. Fulcher, pay to the said complainants in said original bill the sum of $300, the amount found due from him to them on account of the use and occupation, rents, issues and profits of the said lands so used and enjoyed by him as aforesaid; and also all their costs in and about the prosecution of said original bill against the said Fulcher by them expended, and that they have execution thereof. And it is further ordered, adjudged, and decreed, that said William Byers pay to the said complainants all their costs expended in prosecuting their said original bill against him; and also that he pay to the said defendants to said cross-bill all their costs by them severally expended in the defence of the said cross-bill.

Byers' Bill of Exceptions. On the hearing of the causes, Byers took a bill of exceptions to decisions of the court on the following points:

1. He objected to the reading in evidence of *Exhibits A. and B.* to the original bill, because they did not show such valid judgment, execution, and proceedings thereon, as could warrant the marshal in selling the lands in controversy, but the court overruled the objection.

2. The court permitted the complainants in the original bill to read in evidence the following rule of the circuit court of the U. S. for the district of Arkansas, adopted *October* 10, 1842, against the objection of Byers—"Where real estate and slaves, or either, shall be taken by virtue of any execution issued from this court, it shall be the duty of the officer levying the same, to expose the same to sale, at the court house door of the county where the

real estate is situated, or the slaves are seized, at such time as to enable him to make his return in due season, having previously given twenty days notice of the time and place of sale, by at least three advertisements put up in the most public places in the said county, one of which shall be put up at the court house door of said county; and if there be a newspaper published in said county, such notice shall be given by one advertisement in said newspaper, and one advertisement put up at the court house door."

3. The complainants in the original bill offered to read in evidence the original deed from Henry M. Rector, as marshal, to them for said lands, with the certificates of acknowledgment and registration thereto attached, a certified copy of which was made "*Exhibit C.*" to the original bill, to the reading of which Byers objected, unless they proved the execution thereof, he contending that said deed never had been lawfully acknowledged, or recorded; but the court overruled the objection.

4. McDonald, after proving the execution of the deed from Grollman to himself, by James Robinson, an attesting witness, offered to read it in evidence, the complainants in the original bill, and Byers objecting, but the court overruled the objection.

5. McDonald offered in evidence the record of the deed from Thomas W. Newton, as marshal, to Grollman with the acknowledgment thereof, to the reading of which complainants in the original bill, and Byers objected, on the ground that McDonald had not made a sufficient showing that he had not control of the original deed, having made no other showing than what appears in his answer, that said deed is lost, destroyed or not under his control; and because it did not appear from said record that said deed was duly and lawfully acknowledged, or properly admitted to record, but the court overruled the objection.

Depositions for complainants in the original bill:

Thomas W. Newton testified that he was appointed marshal of the U. S. for the district of Arkansas, on the 20th April, 1841, as would appear by a copy of his commission annexed. That on the 7th day of May, 1841, he received a letter from the Secre-

tary of State of the U. S., dated 22d April, 1841, notifying him of his appointment, and on the 5th day of June, 1841, he took the oath of office, and entered upon the discharge of his duties as marshal, and continued so to act from that time until sometime in the year 1843.

John Ringgold deposed that he was cashier of the branch of the Bank of the State of Arkansas at Batesville, from the time it went into operation until he was succeeded by the Receiver appointed under the act of liquidation. That Grollman was not indebted to the bank as principal whilst he was cashier. That in Feb'y 1842, said McDonald, had discounted in the bank a note for $513, in which he was principal; and Alexander Robinson and James Robinson securities. That of the proceeds of the note, McDonald paid the bank $465, for Tully, which was applied upon a judgment which the bank had against Tully in Independence circuit court. McDonald never made any payment to the bank for the benefit of Grollman, whilst witness was cashier; witness continued cashier until late in the spring of 1843.

Charles B. Magruder deposed that he was appointed Executive Receiver of said branch bank about the month of February 1844, and continued an officer of the bank until January, 1846; and that during that period Grollman had no liability in bank as principal, and McDonald made no payment for him during that time to the bank. The bank held some judgments against Tully.

Charles D. Cook deposed that he was qualified as Financial Receiver of said branch bank on the 2d Feb. 1847, and had examined the books of the bank as far back as 1842. Grollman's name did not appear upon the books. In Feb. 1842, McDonald discounted a note, and applied $465 of the proceeds to the credit of Tully, as stated by Ringgold. He never paid the bank any thing for Grollman.

George A. Worthen deposed that he was deputy marshal to Thomas W. Newton, on the 6th February 1843, and so continued until after the 20th March following. That on the 6th February 1843, an execution in the case of *Neff & Bro. v. Tully* dated 4th

Feb., 1843, came to his hands, and on the 8th of the same month he levied upon the lands in controversy. That said lands were advertised to be sold at the court-house door in the county of Jackson on the 20th March, 1843, by notices posted up in accordance with the rules of the U. S. Courts concerning the sale of lands under execution, *to wit:* by posting up three written advertisements in the most public places in said county, one of which he put up at the court-house door, more than 20 days before the 20th day of March aforesaid, the day fixed for the sale. That on said 20th March 1843, he offered said lands for sale, at said court-house door, to the highest bidder, and Wm. F. Denton, for himself and Absalom Fowler became the purchaser thereof at the price stated in the return made to said execution, &c.

Andrew Jackson Greenhaw. The deposition of this witness is so awkwardly and obscurely expressed, that it is almost impossible to understand the sense of it. The substance of it seems to be that in February, 1842, he was living with Tully, at his residence, near Elizabeth, in Jackson county, and that under the direction of Tully, who pretended to be acting as the agent of Grollman, he went to the residence of McDonald, received of him, and delivered to Tully, a wagon, yoke of oxen, and *Jack-screw,* in part payment of the lands which McDonald had bought of Grollman. That said property remained in possession of Tully until the fall of 1842. That McDonald resided in the southern part of the State at the time Grollman purchased the lands at marshal's sale.

Job K. Greenhaw deposed that the property referred to by the last witness was sold under execution, in the fall of 1842, as the property of Tully, as he understood.

Iram Chadwick, deposed, in substance, that in the fall of 1842, Grollman told him that he had purchased Tully's lands and other property at marshal's sale for the benefit of Tully, and held it to keep off the creditors of Tully, so that Tully could sell it himself, and pay his debts, and that any sale Tully might make of it would be good, &c. After Grollman had purchased Tully's property in Jackson county, he took some of the cattle, horses,

&c., to White county, where he resided, and afterwards Tully moved to White county—sometimes one of them, and sometimes the other was in possession of the cattle &c. The general understanding in the community where Grollman and Tully lived was that Grollman held the property for the benefit of Tully.

Edwin R. McGuire, deposed that he was in Jackson county in the summer of 1841; a short time before Engles, the deputy marshal, sold the lands and other property of Tully, and heard one Harris speak of buying the lands. After the sale, a few days, he heard Harris say, in a crowd, that he had intended buying the lands, but Tully requested persons present at the sale not to bid, and said he had a friend to bid the property in for him, and he, Harris, did not bid, but Grollman bought the property. That "Tully treated them, and gave a big dinner, and how could a man bid under such circumstances?" It was the general impression through the county, as far as witness knew, that Grollman bought the property for the benefit of Tully.

James Robinson, deposed, in substance, that in the summer of 1841, he was present at the sale of Tully's property, by Engles, the deputy marshal, in Elizabeth, Jackson county. About the time the sale commenced, Tully stood up and made a few remarks to the by-standers. He said, in substance, that he had shipped produce to a large amount to plaintiffs in the execution, that they exacted specie of him, which was out of his power to raise, and had not given him the credits he was entitled to. That he had not spoken to any friend to purchase the property, but if any friend should step forward and bid, it was not, and should not be to defraud plaintiffs, or any other just creditor, for he intended to pay every dollar he justly owed. The sale then went on, and Grollman bought the property—Judge Haggard bid on the property. At that time, witness was one of Tully's securities in the bank at Batesville, for over $500, and owing to what Tully said, he did not purchase, being satisfied that Tully would pay the debt; he intended to bid, but for what Tully said. Part of the lands purchased by Grollman, was the same sold by Alex. Robinson to Tully, and was at the time witness was deposing

(Nov., 1847) occupied and cultivated by Alvin McDonald, and John Robinson. On the 7th January, 1842, he witnessed a deed from Grollman to McDonald for the lands last referred to. McDonald was to pay Grollman $1,600 for the said lands. McDonald put his note in bank for about $513, which went in satisfaction of the note of Tully upon which witness and Alexander Robinson were securities. McDonald also let Grollman have, in payment for the lands, a wagon and several oxen. Grollman told McDonald to deliver the wagon and oxen to Tully, and Tully would "fetch" them to him in White county. Sometime before the sale from Grollman to McDonald, there was an execution out on the bank debt of Tully above referred to. When witness last spoke to Tully about settling this debt, Tully told him Grollman was about selling some lands, and if he effected the sale, he would get him to settle the debt. Tully referred to the sale to McDonald, and McDonald afterwards settled the debt as above. A short time after the sale by Grollman to McDonald, Tully moved from Jackson to White county. John Robinson had told witness that if McDonald's title to the land was ever settled, he would sell witness the north end of it, which, joined his land. John Robinson was the father-in-law of McDonald.

When McDonald bought the land of Grollman, there was some sixty acres of it cleared. He and Robinson cleared and fenced about 20 acres more in 1846-7. It was worth about $1 50 rent per acre. When McDonald purchased the land it was in bad repair. He and John Robinson commenced building and clearing in 1842, and continued to improve. They built a good dwelling house, kitchen, negro cabins, corn cribs, and cleared some five acres during the years 1842-3-4. These improvements were worth about $600. The improvements made in 1845-6-7 were worth $300. McDonald was to pay Grollman $1,600 for the land. Had no knowledge of Tully's giving a public dinner on the day of sale. He saw and eat none, nor was he invited to eat. McDonald paid a full price for the land, and he advised McDonald to purchase it, thinking Grollman's title good. At the time Grollman bought the land, McDonald did not live in Jackson county. Wit-

ness had lived in said county since the year 1842. Recollected no rumor, about the time of the sale, as to any fraud between Grollman and Tully; if there had been he would have taken no notice of it. Tully was present when Grollman made the deed to McDonald. It was made at the house of Tully. Tully was a lawyer.

H. T. Webb, testified as to the occupancy of the lands in question by McDonald and Fulcher, the value of the rents, &c. He had lived in Jackson county for ten years, some three years of which he had been sheriff. It was the general impression, as far as his knowledge extended, that at the sale of Tully's property in August, 1841, by Engles, the deputy marshal, Grollman purchased for Tully's benefit; could not say how far his knowledge extended—had heard the matter frequently spoken of by various persons—had not heard it differently spoken of—did not know how many of the persons referred to were at the sale; did not know how many persons he had heard speak of it. Had heard a great deal of such rumors since the suit was commenced, and a great deal before. His impression was that McDonald was not in the county at the time of the sale.

William Steen, testified that shortly after the sale of Tully's property in August, 1841, it was the general report through the neighborhood that Grollman purchased the property for the benefit of Tully—"that it was not a fair thing."

John C. Pugh, testified that he was present at the sale, and heard Tully's speech, but did not recollect much about it. Tully said something about shipping corn to plaintiffs in the execution; and about wanting friends, and having none. Grollman bought the property. He took off some of the stock, a jack, and some horses. The personal property was sold at Tully's residence. Witness went there to bid for a negro, but Tully told him it was not worth his while, as Grollman was "*lousey*" with specie, and would bid over him. The property was sold for specie, which was not plentiful in Jackson county then—witness hed *some himself*—did not recollect how much, but thought he had *some five dollars!*

B. H. Blount, testified that he went from Batesville, with Engles,

the deputy marshal, to the sale of Tulley's property in August, 1841—Engles induced him to go by telling him that Tulley's lands would sell for but little—not more than enough to pay the costs on the executions—and that he could make a speculation by purchasing them, and offerred to loan him the money to buy them with. Witness went to the sale, intending to bid for the lands, but when he got there Tully took him aside and pursuaded him not to bid, telling him that he had made an arrangement with Grollment to bid the property in for his benefit—that he had the money to furnish him, and would make him bid enough to pay the costs. Tully told witness that there were judgments against him to a considerable amount, and if all his property, real and personal, was sacrificed at the sale, he would be unable to pay his debts. Tully said that he had not more money than would pay the costs, and if witness bid for the property it would be sacrificed. That Grollman was a friend of his, and would buy the property for his benefit, and that he intended to appropriate it to the payment of all his honest debts. Witness then told Tully, being so appealed to, that if Grollman would bid in the property for his use and benefit, to be appropriated to his honest debts as he stated, and would bid enough to pay the costs, he, witness, would not bid. Before Engles sold the lands, Tully made a speech to the persons present requsting them not to bid, and expressing the hope that some friend of his would bid them in for him. The lands were sold, and Grollman bought them.

Rufus Stone, testified that he was present at said sale of Tulley's property. There were a large number of persons present. The general understanding there, on that day, was that Grollman bought the lands for the benefit of Tully. Witness heard a great many persons speak of it. Wm. Byers was present, and when the sale was about to take place, gave public notice that he had obtained a judgment against Tully, in the Jackson Circuit Court, [in favor of Powel & Co.,] which was a lien upon the lands. Grollman afterwards told witness that he had purchased the lands for Tulley's benefit, and that he made nothing by it. Some considerable time after that, Tully contracted with him, witness,

for the horse *Consul*, for which he agreed to give him $800 on McDonald and John Robinson, which sum he represented as being due him from them, as part of the consideration for the lands sold by Grollman to McDonald. Witness was to take the horse to White county, where Tully was to deliver him the claim on McDonald and Robinson for $800, and a good horse to ride home. A short time afterwards, he took the horse to Searcy, White county, where he met Grollman, and told him he was about to trade with Tully, and Grollman said that any trade witness might make with Tully about what was yet due from McDonald and Robinson upon said lands, would be right. When witness saw Tully, he offered to give him an order on McDonald and Robinson for the $800, but he would not take it, and the trade fell through. Grollman was son-in-law to Tully. Tully continued to claim the ownership of the property bought by Grollman at the marshal's sale, and was considered in possession thereof until he left Jackson county; and it was a matter of general notoriety in the county, from the time of the sale that Grollman held the property for the use and benefit of Tully.

After Byers purchased the said lands, Fulcher acknowledged that he was in possession under him. The rent of the lands in possession of McDonald and Robinson was worth $200 per annum. They had been in possession since the spring of 1842.

Phillip Holcom, deposed that a short time before said sale, Tully applied to him, as a friend, to bid in the property for him, which he declined. On the next day after the sale, Grollman told him that he had purchased the whole of Tully's property, lands, horses, cattle and other personal property for about $60. It was a matter of general notoriety from the time of the sale, in the neighborhood, and country around, that Grollman had purchased the property to befriend Tully. Tully continued in possession of the property, and exercised ownership over it until he moved to White county, in February, 1842, when he took the personal property with him, except the cattle, which he left in the care of witness until spring, and then came after them, and took them to White county: witness did not know what become of the personal pro-

perty after it was taken to White county. Sometime in January or February, 1842, Tully sold to Alvin McDonald the Robinson farm [the portions of the lands in question claimed by McDonald,] and told witness that he got Grollman to come over from White county, and make a deed to McDonald. Tully received from McDonald two yoke of oxen and one wagon in part payment for said land. Some time in the spring of 1843, and a short time after Denton had bought the lands in controversy, witness was at the farm bought by McDonald, and McDonald and John Robinson were present. McDonald asked Robinson if he had paid Tully any more towards the place, and Robinson replied that he had paid him some $12 or $15 in money. McDonald then said to Robinson not to to pay any more towards the land until he saw more about it—that they might lose the land—that Grollman's title might turn out not to be good, and if they lost the land "Grollman's hide would not hold shucks unless he made them safe." Sometime after Grollman purchased the land, he offered to sell witness a part of it, and told him that if he could trade with Tully, he, Grollman, would make the deed. Tully was present at the time, and told witness if he thought proper to purchase the land, his wife would relinquish dower; but witness was afraid of the title, and did not buy. When Tully moved from Jackson county, he took with him the oxen and wagon which he had received from McDonald in part payment of the place. Witness was present when Wm. F. Denton purchased the land in question, in the spring of 1843, at marshal's sale. McDonald, Tully and Grollman were also present, and notice was given, in the presence of Denton, that the lands did not belong to Tully.

Complainants in the original bill, also read in evidence a *Rule* adobted by the Circuit Court of the United States for the District of Arkansas, on the 6th October, 1842, as follows:

"Writs of execution and other final process issued and hereafter to be issued, on judgments and decrees rendered in this court, and the proceedings thereupon, shall be the same, except their style, as are now used in the courts of the State." (See Acts of 19th May, 1828, and of August 1st, 1842.)

Complainants in the original bill also read in evidence the rule of court in relation to sale of lands and slaves under execution, adopted Oct. 10th, 1842, which is copied above in the bill of exceptions taken by Byers.

Isaac Gray, proved, that as sheriff of Jackson county, under the execution in favor of Powel & Co., against Tully, he levied upon, sold, and conveyed the lands in question to Byers, as alleged by Byers in the cross-bill.

DEPOSITIONS ON THE PART OF M'DONALD.

Wm. W. Tunstall, deposed that he was present in Elizabeth, when deputy marshal, Worthen, sold the lands in controversy and Denton purchased them. Denton told witness on returning to Jacksonport, that McDonald had forbid the sale, saying he had bought the lands of Grollman. Denton said he expected he would have a law suit about them. Sale was in February or March, 1843.

Thomas T. Tunstall, also testified that he was present at said sale, and McDonald forbid the sale of the lands claimed by him.

James Robinson, deposed that he was present when Tully's property was sold by Engles—and Grollman was the purchaser. The sale took place at the house where court was usually held, in Elizabeth. Good many persons present. McDonald bought about 270 acres of said lands of Grollman in the year 1842. He agreed to give $1,600 therefor. He paid by note $513, to the Branch Bank a Batesville, in part payment of the lands. Witness knew of Grollman receiving of McDonald a wagon and several yoke of oxen in part payment. There were other bidders at the sale besides Grollman—Haggard was one. So far as witness knew, it was a fair sale.

Alexander Robinson, deposed that he was present when Tully's lands were sold by Engles. Haggard and some other persons bid for the lands—Grollman was the purchaser. So far as witness knew it was a fair sale. It was his intention to bid. McDonald purchased part of the lands of Grollman, and paid him

$1,600 for them; $500 of which he paid in Bank; he let him have one wagon, four yoke of exen and a mule. Witness heard Grollman say he had sold the land to McDonald, and was present when the deed was made and delivered. Two judgments against Dunbar's estate were also taken as part payment by Grollman of McDonald. Tully was the attorney of Grollman, and he told witness that the whole amount was paid by McDonald; and from other information, witness believed the whole was paid.

James Waddell, deposed that McDonald purchased the lands of Grollman at about $1,600, and he, at the request of McDonald, paid Grollman $160, part of the purchase money. Grollman got of McDonald four yoke of oxen, a mule, and McDonald assumed a debt in the Bank at Batesville, in payment for the lands. McDonald lived in Pike county when Grollman purchased the the lands at Tully's sale. Witness was satisfied, from circumstances, that McDonald had paid Grollman about $1,600 for the lands.

Elias B. Roddy, deposed that he got two judgments of Grollman, amounting to about $600, which he understood Grollman got of John Robinson.

John C. Pugh, deposed that he was present when Tully's property was sold by Engles, and heard Tully's speech—Tully said he had shipped some corn, and got no returns—that he needed friends, but seemed to have none, and his property was bound to go to pay his debts. The lands were sold at the court-house, and Grollman bought them. The deputy marshal then went to Tully's residence, and sold his personal property, and Grollman bought that. The property was sold for specie, and witness was under the impression that Grollman was the only man among them who had any.

William Robinson, deposed that he was present at said sale. William Byers was also there, and said afterwards that the reason he did not bid for the lands was that he did not have the money. The improvements put up by McDonald after buying the lands of Grollman were worth $1,000. McDonald was living

in Pike county at the time of the sale, and did not come to Jackson for sometime afterwards. Witness never heard of any other claim until after McDonald had bought. He thought McDonald paid a high price, but advised him to buy, believing the title to be perfectly good.

John C. Saylors, deposed that he knew the land bought by McDonald of Grollman—never heard of any other claim to the lands at the time McDonald purchased. Improvements made by McDonald worth at least $1,000, the most of which was made in the first and second years after he went on the place. Witness would not believe *Rufus Stone* on his oath.

John A. Robinson, deposed that the improvements made by McDonald upon the lands were worth $1,000 or $1,200—the improvements were made during the first and second years after McDonald went on it. Witness was present at Tully's sale, when Grollman purchased the lands in 1841. McDonald then lived in Pike county, and did not come to Jackson for a considerable time after. Witness did not hear anything of any other claim for some eighteen or twenty months after McDonald purchased the lands of Grollman, but always believed McDonald's title to be good. Witness would not believe *Rufus Stone* on his oath.

John Robinson, deposed that he was present at the sale of Tully's lands, when Grollman purchased—several persons bid. Grollman sold part of the lands to McDonald for $1,600. McDonald paid him at the time of the purchase, or a few days after, about $1,498, and some two months after $75. McDonald also did considerable blacksmith work for Grollman in payment for the lands. Witness was present when the sheriff of Jackson county sold the said lands, and William Byers purchased in the spring of 1842. He gave notice, in the name of McDonald, to persons present, and particularly Byers, that the lands belonged to McDonald. Had since heard Byers say that the reason he did not buy Tully's lands when Grollman purchased, was that he did not have the money. At the time Grollman purchased, McDonald lived in Pike county, and was not in Jackson county until

some three or four months afterwards. The improvements put upon the lands by McDonald were worth about $1,200: and witness never heard of any other claims to the land until some time after McDonald purchased, and witness believed his title to be good.

McDonald proved the execution and delivery of the deed from Grollman to him for the lands, at the time it bears date, by James Robinson, one of the subscribing witnesses.

McDonald also read in evidence the following rules adopted by the Circuit Court of the United States for the District of Arkansas:

RULE I. *March term, March* 30, 1839. "That forms of mesne process, except the style, and forms and modes of proceedings, and the practice in suits at common law in this court, shall be the same as are now used in the Circuit Courts of this State, except so far as they have been otherwise provided for, by acts of Congress, subject however to such alterations and additions as the court shall, in its discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper from time to time by rules to prescribe to this court concerning the same."

IV. *March term, June* 19, 1839. "Writs of execution upon final judgments, orders or decrees in equity, rendered in this court, shall issue in the same manner, and the proceedings thereon shall be the same in all respects, except the style, as is prescribed by chapter 60, of the Revised Statutes of this State, with the exception hereinafter mentioned—and the provisions of said chapter 60, so far as applicable to this court, and except as hereinafter specially provided, are hereby adopted as the rules of governing executions from this court."

V. *March term, June* 19, 1839. "The following sections and parts of sections of said chapter 60, are declared to be excepted out of the above rule, and not to be in force as to proceedings in this court, *to wit:* Sections 6, 7, 8, 9, 10, 17, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, and 47. (See rule 17.)

VI. *March term, June* 19, 1839. "Executions upon judgments or decrees of this court shall teste on the day of issuing thereof,

and shall be made returnable to the first Monday in any month, so that there be not less than four calendar months, and not more than six calendar months, between the teste and return day of such writ."

X. *March term, June* 19, 1839. This rule refers to the sale of real estate and slaves, and is the same as that copied in the bill of exceptions of Byers above.

The above is the substance of so much of the evidence in the case as is deemed material and relevant to the points decided by this court.

Byers and McDonald applealed to this court.

BYERS, appellant. The complainants in the original bill have no right to the land in controversy: 1. Because the judgment upon which they claim was absolutely void, and no valid proceeding could be had thereon—the sale under the execution issued could convey no title. 2. Because title to lands can only be acquired or lost according to the laws of the State in which they are situate, and a sale under execution, to convey title, must conform to the statute law of the State, which was not done in this case. 3. Because the judgment under which they claim was no lien upon the land; whilst the judgment under which the appellant purchased was a lien from its date.

1. The judgment was absolutely void. By rule of court adopted at March term, 1839, the forms of mesne process and practice in suits at law were conformed to those of the Circuit Courts of the State; and the mode of serving process of summons is prescribed in section 14, *ch.* 126, *Digest.* The return of the marshal does not show a service of the summons according to the mode prescribed; nor did the defendant appear. A judgment by default in such case is absolutely void, as the court had no jurisdiction of the person of the defendant. (*Smith v. Dudly*, 2 *Ark.* 65. *Webb v. Hanger et al.*, 2 *ib.* 124. *Clark v. Grayson, ib.* 149. *Woods Ex parte*, 3 *Ark.* 532. *McKnight v. Smith*, 5 *Ark.* 406. *Pool v. Loomis, ib.* 110. *Cross Ex parte*, 2 *Eng.* 44. *Gilbreath v. Kuykendall*, 1 *Ark.* 50. *Rose v. Ford*, 2 *ib.* 31. *Dawson et al.*

v. State Bank, 3 *ib.* 505. *Ringgold et al. v. Randolph*, 4 *ib.* 428. 5 *ib.* 157, *ib.* 308, *ib.* 517, *ib.* 664. *Miller v. Barkloo*, 3 *Eng.* 318. *Dixon v. Watkins et al.*, 4 *Eng.* 139. *Vaughn v. Brown*, *ib.* 20,) and will be so held in a collateral proceeding. *Enos v. Smith*, 7 *Smedes & Mar.* 85, 2 *ib.* 351, 5 *ib.* 210. *Campbell et al. v. Brown & Wife*, 6 *How.* (*Miss.*) *Rep.* 230, *ib.* 106, 114. 15 *J. R.* 141, 19 *ib.* 31. 11 *Wend.* 652. 10 *Pet.* 161.

2. Title to lands can be acquired or lost only according to the laws of the State. According to the laws of Congress, approved 19th May, 1828, and 1st August, 1842, executions on judgments rendered in the United States' courts and the proceedings thereupon, were to be the same as in the State courts; and the only rule that the United States' courts could adopt upon the subject, was to make the practice therein conform to the subsequent legislation of the States respectively. By the 17th rule of court, adopted on the 6th October, 1842, at the March term of the United States' Circuit Court, in pursuance of the law of Congress, the 52, 54, 60, 62, 63, and 64th sections of chapter 67, Digest, were adopted as the law regulating executions issued upon judgments in the United States' court and the proceedings thereupon. The marshal then was bound to advertise the land, sell at the time and place and in the manner prescribed by the State law; and execute and acknowledge the deed to the purchaser before the circuit court of the county where the lands lie, before the same could be admitted to record.

That the United States' court could not make any rule relative to the sale of real property other than the statute law of the State; see *Mc Cracken v. Hayward*, 2 *Howard's Rep.* 608.

The rule of property must be the same in the United States and the State courts. *Gwinn v. Breedlove*, 2 *How.* 36. *Gwinn et al. v. Barton*, 6 *Howard* 7. *United States v. Daniels*, *ib.* 11. *Collins v. Stanbrough*, *ib.* 21. 1 *Gall.* 18. 4 *Wash. C. C. R.* 349.

The law of the State is the rule of property in the United States' courts. *Hind et ux. v. Vattier*, 5 *Peters* 401. 2 *Peters* 656. *Gardner v. Collins*, 2 *Peters* 85. 3 *Peters* 127. 6 *Cond, Rep.* 63.

6 *Peters* 297. 2 *Cond. Rep.* 438. 6 *ib.* 75. 6 *Wheat.* 577. 5 *Cond.* 193. *Ib.* 684.

Title to real estate can pass only according to the law of the State in which the land lies; and as the marshal did not sell the land in controversy, upon the execution under which the complainants became the purchasers, according to the mode prescribed by the State law, the sale conveyed to them no title. *Story's Con. Law* 428, *&c.* 708. *Darby v. Mayer*, 10 *Wheat.* 465, *ib.* 192. 2 *Ham.* 124. 4 *Cowen* 510, 527 *note.* 6 *Binn.* 359. 6 *Pick.* 286. 1 *Paige* 220. 20 *J. R.* 254. 3 *Mass.* 414. 1 *Har. & John.* 687. 9 *Wheat.* 566. 7 *Cranch* 115. 14 *Ves. jr.* 541. 6 *Paige* 627. 6 *Madd.* 16. 5 *Barn. & Cress.* 438. 9 *Bligh.* 32, 88. 2 *H. Black.* 402. 2 *P. Wms.* 290. 2 *Ves. & Beams* 130.

3. The judgment under which the complainants claim, though rendered in the Circuit Court of the United States on the 2d day of April, 1841, was no lien upon the lands; whilst the judgment under which this appellant claims, though rendered on the 18th May, 1841, was a lien upon such lands—being rendered in the Circuit Court of Jackson county where the lands lie.

The lien of judgments of the Circuit Court of the United States is derived entirely from the State law, and when enforced as a lien it is done alone on the authority of the State law. Judgment liens are rules of property, and as such binding on the Federal courts. *Reid v. House*, 2 *Humph. Rep.* 576. *Andrews v. Wilks*, 6 *How.* (*Miss,*) *Rep.* 554. *Ross v. Duval*, 13 *Pet.* 45. 5 *ib.* 358. 1 *Kent's Com.* (5 *Ed.*) 248, *note. Tarpley v. Hamer et al.*, 9 *Smedes & Marsh.* 310. The act of the Legislature prescribing the liens of judgments (secs. 3, 4, 5. 6, *chap.* 93, *Dig.*) clearly did not intend that a judgment should be a lien on the real estate of the defendant beyond the limits of the county where the court rendering it was held. The liens of judgments of the Federal court, not being derived from act of Congress, but created solely by the State laws, cannot be more extensive than the liens provided by the law; and that is that the judgment shall be a lien on the lands situated in the county where the court is held. In New York, the judgments of the Federal court have been de-

cided to be liens throughout the State, because judgments of the court of Common Pleas when certified to the Supreme Court and docketed, become liens throughout the State: so, in Ohio, because the judgments of the court of Common Pleas are liens throughout the State: so, in Indiana, because the judgments of the Supreme Court are liens to the extent of the State. But the judgments of the Supreme Court of this State are not liens until filed in the Circuit Court. See the cases of *Show & Winter v. Jones*, 2 *McLean's Rep.* 78, also 6 *Paige R.* 446, 4 *Kent's Com.* (5 *Ed.*) 248. *Gantly v. Ewing*, 3 *Howard* 713. This point, in principle, was expressly and directly decided by the the High Court of Errors and Appeals of Mississippi, in the case of *Tarpley v. Harmer et al.*, 9 *Smedes & Marsh.* 310.

As to McDonald's claim. The purchase by Grollman under the marshal's sale was fraudulent, and void as to the creditors of Tully; and McDonald, having notice of the fraud before he paid for and acquired title to the land, cannot protect himself as an innocent purchaser for a valuable consideration without notice.

Newton, as marshal, had no authority to sell under a writ that issued to his predecessor Rector, and was levied by him; and if he had authority to make such sale, he could only do so on the first day of the term and at the court house door.

1. A combination between the debtor and purchaser at a judicial sale, that the the latter shall purchase at a depreciated price, for the benefit of the debtor, is fraudulent as to his creditors: so is every sale with intent to injure or delay the creditors; and this may be proved by circumstances or by the declarations of the parties. 1 *Story's Eq. sec.* 293. *Jones v. Caswell*, 3 *John. Cas.* 29. *Doolin v. Ward*, 6 *John.* 195. *Hawley v. Cranmer*, 4 *Cowen Rep.* 717. *Velber v. Howe*, 8 *John.* 444. *Thompson v. Davies*, 13 *John.* 112. 1 *Fond. Eq., ch.* 4, *sec.* 4 *note x.* *Story's Eq.* 190. *Asten v. Asten*, 1 *Ves.* 268. *Watkins v. Stocketts*, 6 *Har. & John.* 435. *Brogden v. Walker*, 2 *Har. & John.* 292. *Clayton v. Anthony*, 6 *Rand.* 285. *Major v. Deer*, 4 *J. J. Marsh.* 586. *Glenn v. Haff*, 2 *Gill. & John.* 132. *Moore v. Tracy*, 7 *Wend. Jackson v. Frost*, 6 *J. R.* 135. *Looker v. Haynes*, 11 *Mass.* 498. *Hill v. Payson.* 3

Mass. 559. *Croft v. Arthur*, 3 *Dess. Eq. Rep.* 223. *Jackson ex dem. Bush*, 20 *J. R.* 5. *Mackey v. Cains*, 5 *Cow.* 547. 9 *Cow.* 73. *Crary v. Sprague*, 12 *Wend.* 41.

2. To constitute a *bona fide* purchase without notice, for a valuable consideration, the purchase must be made in good faith without notice of any outstanding title previous to the execution of the deed and payment of the purchase money. *Sugden on Vend.*, *ch.* 18, *p.* 157, (*n.*) Notice before payment of the purchase and delivery of the deed is equivalent to notice before the contract. *Sugden on Vend.* 729. *Frost v. Beekman*, 1 *J. C. R.* 288, 231. *Jewell v. Palmer*, 7 *J. C. R.* 65. *Murry v. Finster*, 2 *J. C. R.* 157. 4 *Des.* Whatever is sufficient to put a purchaser upon inquiry is good notice. *Sug. on Vend.* 532. *Story's Eq. sec.* 399. *Pitney v. Leonard*, 1 *Paige* 461. *Pendleton v. Fay*, 2 *Paige* 202. If a party means to defend himself on the ground that he is a purchaser for a valuable consideration without notice, he must deny the fact of notice and of every circumstance from which it can be inferred. *Murry v. Ballon*, 1 *J. C. R.* 575. 3 *Paige* 437, and allege that his vendor was seized in fee. 3 *J. C. R.* 344. As to this defence by way of answer, see 2 *Dan. Ch. Pr.* 826, *& note.* 7 *Paige* 517. *Story Eq. Pl. sec.* 847 *note*

3. The execution under which Grollman purchased was issued whilst Rector was marshal, and the levy was made by him, after his removal, whilst the sale was made under the same writ and levy by his successor Newton. That Newton had no legal authority to sell the land under such circumstances, see Act of Congress of 7th May, 1840. *Bower Bank v. Morris*, *Wallace's Rep.* 127.

FAIRCHILD, for the appellant McDonald. The marshal's sale at which Grollman became the purchaser of the lands in controversy was made in 1841, and before the passage of the Act of Congress by which the law of 1789, relative to sales under executions upon judgments in the United States' Courts was extended to the new States, and while the United States' Circuit Court had full authority to pass rules regulating the issuing executions and the proceedings under them; and the sale under which Groll-

man purchased was in strict conformity to the rule upon the subject.

Though the sale to Grollman may have been fraudulent against Tully's creditors, Mc Donald was a purchaser for a valuable consideration without notice of the fraud, and he ought to be protected in equity. *Jerrard v. Sanders*, 2 *Ves. jr.* 458. *Story's Eq. sec.* 152, 153, 381, 631, 409, 410, 411, 434. 436, 108. *Com. Dig. Chancery*, 4 *J.* 11. 2 *Fondb. Eq. B.* 2, *ch.* 6, *sec.* 2 *and notes;* 1 *ib. B.* 1, *ch.* 1, *sec.* 7, *note u.* *Frost v. Beekman*, 1 *J. C. R.* 300. *Sorrell v. Sorrell*, 4 *Ark.* 301. *Bumpass v. Palmer*, 1 *J. C. R.* 219. 3 *J. C. R.* 147. 8 *J. R.* 141. *Anderson v. Roberts*, 18 *J. R.* 515. *Vauck v. Briggs*, 6 *Paige* 329. 4 *Kent* 179. *Beebe v. Bank N. Y.*, 1 *J. R.* 573. *Jackson v. Henry*, 10 *J. R.* 197. *Ferrars v. Cherry*, 2 *Vern.* 384. *Patrick v. Chenault*, 6 *Ben. Munroe* 316. *Vaughn v. Haun*, *id.* 348. *Boyce v. Waller*, 2 *id.* 94. *Lemmon v. Brown*, 4 *Bibb* 308. *Lindsey v. Rankin*, *id.* 482. *Copeland v. Curry*, 1 *Bibb* 176. *Clay v. Smith*, *id.* 522. *Floyd v. Adams*, 1 *A. K. Marsh.* 74.

This defence may be put in by answer as well as by plea. *Story's Eq. Pl. sec.* 851, *note* 3 *to sec.* 846, *p.* 787, 788, 3 *ed.* 2 *Dan'l Ch. Pr.* (*Perkins ed.*) 818, 819. *Jerrard v. Sanders*, 2 *Ves. jr.* 454. 2 *Wheel. Am. Chancery Dig.* 299, (29). 2 *Paige* 576. And after replication complainant cannot object to answer. *Story's Eq. Pl. sec.* 877. 2 *Wheel. Am. Ch. Dig.* 298 (11).

It is clear from the answer of McDonald and the proof that he had no notice of the fraud, nor any reason to suspect fraud until after payment of all or nearly all of the purchase money; and that he paid the full value of the land; and having the legal title and the prior equity, the decree ought to have been in his favor. *Berry v. Mu. Ins. Co.*, 2 *J. Ch. R.* 607. *Bristol v. Hungerford*, 2 *Vern.* 525. *Johnson v. Slagg*, 2 *John.* 524. *Ensign v. Colburn*, 11 *Paige* 503. McDonald's equity was fixed though he did not get his deed until after Byers' purchase. *Northup v. Metcalf*, 11 *Paige* 570.

The decree against McDonald for rents nnd profits without allowing as a set-off the value of permanent improvements, was

certainly against every principle of law and equity. *Porter v. Hanly*, 5 *Eng.* 194. *Green v. Biddle*, 5 *Cond. Rep.* 385. *Murray v. Gouverneur*, 2 *John. Cas.* 442. *Patrick v. Marshall*, 2 *Bibb* 45. *Hadden v. Chorn*, 8 *Ben. Mun.* 79, 80. *Clay v. Miller*, 2 *Litt.* 280. *Barlow v. Bell*, 1 *A. K. Marsh.* 246. *Patrick v. Woods*, 3 *Bibb* 29. 4 *J. J. Marsh.* 170. 1 *Vern.* 159, *and note* 1. 2 *Kent* 334, 335. *Story's Eq. Pl. sec.* 851. 2 *Wheel. Am. Ch. Dig.* 637. *Sugden on Vend.* (*Phil. Ed.* 1820) 515, 525, 526. And so was the decree against him for costs. *Patrick v. Marshall*, 2 *Bibb* 45. 8 *Ben. Mon. ub. sup.* 1 *John. Ch. Rep.* 582, *id.* 183. 11 *Paige* 638.

WATKINS & CURRAN, also for McDonald. The sale to Grollman was not void in consequence of any defects in the judgments or executions, under which he purchased, or of the acts and proceedings of the marshal in making the sale. There is no proof showing that Grollman's purchase was in fraud of Tully's creditors.

Even if fraud is established, there is no proof fixing notice upon McDonald. And as McDonald claims under judgments of the oldest date, and the judgments of the United States' Court are liens throughout the State, his title is the best.

The cases of *Wayman v. Southard*, 6 *Pet. Cond. Rep.* 1, *and The Bank of United States v. Halstead*, 1 *Pet. Cond. Rep.* 22, establish these propositions: 1st, that Congress has by the constitution exclusive authority to regulate the proceedings in the courts of the United States, and the States have no authority to control those proceedings, except so far as the State process acts are adopted by Congress, or by the courts under authority of Congress; that by the act of 1789, the proceedings on executions and other process in the Courts of the United States, in suits at common law, were to be the same in each State, respectively, as were used in the courts of the State at that time, subject to such alterations and additions as the courts might make: that the State laws have no force or effect *per se* in the United States' Courts: that the 34th section of the Judiciary act of 1789, does not apply to the process or practice of the courts: that the State laws in relation to executions and the proceedings therein are not binding

upon the national courts unless adopted by act of Congress or rule of court.

The State laws were not adopted by the United States Court for the District of Arkansas, nor was there any act of Congress upon the subject until the act of 1828, which is limited to the States then in existence, (act of Congress of 19th May, 1828, section 3, *Beers v. Haughten*, 9 *Pet.* 329. *Lessee of Walden v. Craig's heirs*, 14 *Peters* 147. *The United States v. Knight*, 14 *Pet.* 491. *Ames v. Smith*, 16 *Pet. Rep.* 303,) and the act of 1842, which was subsequent to Grollman's purchase, and the executions and proceedings thereunder being strictly in accordance with the rule of court regulating process, the sale to Grollman conveyed a good title.

That the acts of 1789 and 1828 did not apply to this State until the passage of the act of 1842, subsequent to Grollman's purchase, and that the courts until then had power to prescribe rules and regulate the form of its executions and the proceedings under them, and was not bound to conform to the State law upon the subject, see *Fullerton et. al. v. Bank of United States*, 1 *Pet.* 604. *McCracken v. Hayward*, 2 *How. Rep.* 615.

These propositions being established, all of the objections taken to the forms of the writs under which McDonald claims and the proceedings of the officer in executing the same, are obviated and answered.

But even if these positions are not correct, the defects relied upon by Byers would not have the effect to render McDonald's title void. It might be voidable in a direct proceeding, but certainly is not void so as to be questioned in a collatteral proceeding by a third person. A purchaser's title is not vitiated because the marshal departs from the mode of advertising pointed out by the statute, and the rule of court, (*Minor v. The Prest. and Select. men of Natchez*, 3 *Smedes & Marsh.* 602. 5 *How. Miss. Rep.* 253. nor for an irregularity in which the purchaser did not participate, (1 *Bibb.* 155, 2 *ib.* 218, 202, 401, 3 *ib.* 216, 3 *J. J. Marsh.* 439. 6 *Mun.* 110. 4 *How.* (*Miss.*) *R.* 267. 1 *Hill's Rep.* 239, 380. 4 *Rand. Rep.* 427,) nor for an incorrect return, (1 *John. Case* 153, 155.

1 *J. R.* 454. *Cal. & Caines Cases* 350. 1 *Har. & Gill*, 174. 6 *Gill & John.* 503,) nor on the ground that the levy was not made until after the return day, (*Jackson v. Roswell*, 13 *John. R.* 97.) And even where the judgment had been paid, (*Saunders v. Caldwell*, 1 *Cow. Rep.* 622,) and where the statute declared that the sale shall be void unless the proper notice is given. (1 *Yerg.* 469. 5 *Yerg.* 215. 7 *Yerg.* 428.) That a failure to advertise does not effect the title of a *bona fide* purchaser, see, *Lawrence v. Speed*, 2 *Bibb.* 401. 3 *J. J. Marsh.* 439. 1 *Nott & McCord* 11, *ib.* 408. *Hay. N. C. Rep.* 24. 3 *Murphy Rep.* 364. 4 *Wend.* 462.

Irregularities in an execution and the sale thereunder can only be objected by a party, and then only in a direct and not a collateral proceeding. *See* 16 *J. R.* 537. 1 *Cowen* 736. *Graham's Prac.* 363, and cases there cited.

The objection that the levy was made by Rector and the sale by his successor, Newton, is contradicted by the return of the marshal, the order of the court directing the deed to be executed and the recitals in the deed. It is true that the execution issued whilst Rector was marshal, but upon his removal it was handed over to his successor, Newton, and by him executed. 6 *Bac. Abr.* 159. *Dallman Shffs.* 15. *Allen on Shffs.* 15.

That a judgment of the United States Court is a lien on land throughout the District, see 1 *Peters S. C. Rep.* 453. 2 *McLains Rep.* 78. 5 *Ohio* 400. It is a well settled rule that a judgment, unless restricted by statute, is a lien co-extensive with the territorial jurisdiction of the court. 1 *Ohio Rep.* 261. 2 *Ohio* 65. *Ohio Rep. Cond.* 140.

It is true that where a purchaser has notice of the fraud in his vendor, before he has paid the consideration, he cannot be protected in equity. This is upon the principle that he is not injured, that he can protect himself by refusing to pay. But in a case like this, where the purchaser had been put into possession, had made valuable improvements, had paid nearly the entire consideration—the full value of the property, without any notice whatever, and without any redress upon the vendor, equity will not lend its aid to set aside his purchase. The extent of the rule is

that where a purchaser receives notice before he makes payment of the purchase money, the land in his hands becomes bound from that time by the prior equity, to the extent only of the purchase money that then remains unpaid. *Harper v. Eno et al.*, *Freeman's Ch. Rep.* 323, and cases there cited.

FOWLER contra. One of the first questions which arise in this case, as between the original complainants and Byers, is the extent of the lien of a judgment rendered by the Circuit Court of the United States. Although there may be no express statute declaring that the judgment shall be a lien on lands, yet the courts have uniformly construed the statute, (13 *Edw. I., ch.* 18,) which gives the writ of *elegit*, as creating a lien by such power. *Scriba, &c. v. Deans et al.*, 1 *Brock. Rep.* 170. *Sellen v. Corwin et al.*, 5 *Ohio Rep.* 403. *Den v. Jones*, 2 *McLean's Rep.* 80. *Manhattan Co. v. Evertson*, 6 *Paige Rep.* 467. *Martin & Yerg. Rep.* 32. *Peck's Rep.* 31. 13 *Pet. Rep.* 479. 2 *Saund. Rep.* 69, *note* 1. *Massengill v. Downs*, 7 *How. U. S. Rep.* 765. 2 *Brock. Rep.* 253. A judgment of the United States Court is as much a lien on lands as the judgment of a State court. *Andrews v. Wilkes*, 6 *How.* (*Miss.*) *Rep.* 567. And it is well settled that the lien of a judgment, whether State or Federal, is co-extensive with the territorial jurisdiction of the court. *Roads v. Symmes et al.*, 1 *Ham. Ohio Rep.* 281. *Den, &c. v Jones*, 2 *McLean's Rep.* 78. 6 *Paige Rep.* 467. 5 *Ohio Rep.* 408. *Bank of Cleveland v. Sturges et al.*, 2 *McLean's Rep.* 343. 7 *How. U. S. Rep.* 766. The judgment under which the complainants claim, being in full force at the rendition of the judgment under which Byers claims, created a lien upon the lands of which he was bound to take notice. 6 *How. Miss. Rep.* 563. *Cond. Rep.* 506.

The proceedings subsequent to the judgment are also valid and vest title in the original complainants as purchasers. The acts of Congress of September 29th, 1789; May 8th, 1792, May 19th, 1828; which were extended by the act of 1842, to the State of Arkansas, requiring that writs of execution and other final process on judgments in the Circuit of the United States, and the

proceedings thereupon shall be the same as in the respective State courts, merely requires such a conformity to the State laws, as the organization and powers of the United States courts would permit; and whilst the forms of proceeding must of necessarity be somewhat diferent, effect is given to the principle. (*Lessee of Dunn's heirs v. Gaines & Gillett*, 2 *McLean's Rep.* 345.) And the rule of court directing the mode of issuing executions, the return day thereof—the place of sale of real estate, was as strict a conformity to the State law as could be adopted, and the court in adopting the rule properly rejected that portion of the law requiring the sale to take place on the first day of the State Circuit Court, as it was impossible for the marshal to attend the different courts of the State.

But admitting that there was irregularity attending the marshal's sale—that he deviated from his duty—that he did not give the notice required by law, the marshal may be responible, but his acts are not void as to a *bona fide* purchaser at his sales—the irregularity or omission does not vitiate the sale. *Pres. & Select. men of Natchez v. Minor*, 10 *Smedes & Mar. Rep.* 258. *Reynolds v. Rye*, 1 *Freem. Ch. Rep.* 470. 8 *Mo. Rep.* 460. 1 *Monroe* 95. 3 *Marsh. Rep.* 281. 6 *Monroe Rep.* 33. *Hamilton v. Shrewsbury*, 4 *Rand. Rep.* 431. 4 *Smedes & Marsh. Rep.* 622. 10 *Pet. Rep.* 477. 2 *Bibb. Rep.* 402. 3 *J. J. Marsh.* 439. 1 *Nott & McCord* 12. 3 *Bibb Rep.* 216. 3 *How. U. S. Rep.* 714. 7 *Humph. Rep.* 60. 6 *Yerg. Rep.* 309. *Wright's Ohio Rep.* 458. 7 *Yerg. Rep.* 430.

As to the acnowkledgment of the deed by the marshal, it must of necessity be done before the Circuit Court of the United States, as that court alone has the power to control the acts of its marshal, its process, its sales, or to confirm the acts of its marshal.

The validity of the judgment under which the complainants purchased is settled by the case of *Borden et al. v State, use Robinson*, decided January term, 1851.

As to McDonald's title. The evidence shows conclusively that the purchase by Grollman at the marshal's sale was a gross fraud as to the creditors of Tully: and may be set aside in equity; that Grollman held the land as trustee for Tully and subject to

the judgments and executions of his creditors. *Bunts v Cule*, 7 *Blackf. Rep.* 267. *Anderson et al. v. Lewis et al.*, 1 *Freem. Ch. R.* 206. *Baker v. Dolyns et al.*, 4 *Dan. Rep.* 225. 1 *Hayw. Rep.* 95. 6 *Monroe Rep.* 111. 1 *John. Ch. Rep.* 406. 1 *Ves. jr.* 120. *Roberts on Frauds* 521. 2 *How. U. S. Rep.* 318. *Galatian v. Erwin, &c.*, 1 *Hop. Ch. Rep.* 54. 8 *Smedes & Marsh.* 313. *Sand. et al. v. Codwise et al.*, 4 *J. R.* 583. 1 *Paige Rep.* 283. 6 *J. R.* 195. 3 *Johns. Cases* 31. *Elliot v. Horn*, 10 *Ala. Rep.* (*N. S.*) 352. 4 *Yerg. Rep.* 550. 1 *Hill N. Y. Rep.* 144. 2 *J. R.* 5.

A purchaser under a sheriff or marshal's sale under the judgment of a creditor is entitled to the benefit of the Statute of frauds equally as the creditor himself. *Hildreth v. Jands*, 2 *J. Ch. Rep.* 35, 49. 7 *Blackf. Rep.* 68. 1 *McLean's Rep.* 39. 4 *Wash. C. C. R.* 137. 1 *Paige Rep.* 508. 4 *Rand. Rep.* 212.

McDonald having purchased with notice took the lands subject to Tully's creditors in the same manner as they would have been in Grollman's hands. *Stiver v. Stiver*, 8 *Ohio Rep.* 221. 1 *Wash.* (*Va.*) *Rep.* 41. 1 *John. Ch. Rep.* 575. 4 *Rand. Rep.* 308. 1 *Story Com. on Eq., sec.* 395. 2 *J. Ch. Rep.* 42.

The rule of equity is well settled too, that where a defendant claims to be a purchaser without notice, he must expressly deny notice in his answer, though it be not alleged in the bill. *Denning v. Smith*, 3 *John. Ch. Rep.* 245. 6 *Paige Rep.* 466. *Halsa v. Halsa*, 8 *Mo. Rep.* 308. *Woodruff v. Cook*, 2 *Edw. Ch. Rep.* 264. *Pillow's heirs v. Shannon's heirs*, 3 *Yerg. Rep.* 509. *Sug. on Vendors* 556. 1 *Freem. Ch. Rep.* 207, *ib.* 335. 1 *John. Ch. Rep.* 575. 6 *Rand. Rep.* 590. 1 *S. & Marsh. Ch. Rep.* 121. *Ib.* 343.

And such notice must be denied previous, and down to the time of paying the money and delivery of the deed, and proved. *Boon v. Chiles*, 10 *Pet. Rep.* 211. 1 *Wash. Rep.* 41. *Story v. Windsor*, 2 *Atk. Rep.* 630. 3 *Yerg. Rep.* 512. *Sug. on Ven.* 555. *Gremstone v. Carter*, 3 *Paige Rep.* 423. *Thompson v. Mason and wife*, 4 *Bibb.* 193.

Independent of the fraud, Grollman acquired no title at the marshal's sale for want of authority in the marshal to make the sale. Upon the removal of the marshal his functions terminated without notice, and a sale of lands afterwards upon which he

had previously levied is void. (*Overton and King v. Gorham and Darley*, 2 *McLean's Rep.* 510.) The levy by Rector, after his removal was void, and the sale by his successor, Newton, under the same writ conveyed no title to Grollman. (*See U. S. Statutes at Large*, 61, *Ch.* 45. *Gordon's Dig.*, (*Ed. of* 1841,) *p.* 162, *Art.* 617.) And McDonald was bound to prove the authority of the officer to make the sale, (1 *Cow. Rep.* 640. 5 *Yerg. Rep.* 65. 4 *How. Miss. Rep.* 271. 1 *Monroe* 155. 4 *Smedes & Marsh.* 622. *Pet. C. C. R.* 64, 545.)

McDonald was properly decreed to pay rents and profits from the time of filing the bill (*Blackhouse, adr. v. Jett, adr.*, 1 *Brockenb. Rep.* 515. *Green v. Biddle*, 5 *Cond. Rep.* 383. *Leford's Case*, 6 *Co. R.* (*Part* 11) 52. *Rosevelt v. Post*, 1 *Edw. Ch. R.* 579.) And is not entitled to compensation for improvements, because having taken possession under color of title adversely to the right owners, he cannot be considered, by legal fiction, as a trustee or agent for them. *Winthrop v. Huntington*, 3 *Ham. Ohio Rep.* 329. 2 *Story Com. on Eq. sec.* 697. *Gillespie v. Moon*, 2 *John. Ch. Rep.* 602. 5 *ib.* 416. 2 *Bibb.* 44. 3 *ib.* 298.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The objection to the service of the original summons in the case of Neff & Brother instituted in the Circuit Court of the United States for the District of Arkansas, and under the judgment rendered in which the complainants in the original bill claim title, is well taken in fact, but is untenable in point of law. The service did fail to state that the summons was left at the usual place of abode of the defendant, as required by the statute, and might, possibly, upon a direct proceeding in an appellate court, have been reversed. Such a defect, however, cannot operate to render absolutely void the judgment rendered in that case. The Circuit Courts of the United States are not of that special and limited class, to which no presumptions are extended, but on the contrary, they are endowed with such original and general jurisdiction as to entitle them to the benefit of all legal intendments necessary to support and uphold their acts until reversed

or annulled by a superior tribunal. See *Borden et al. v. State, use of Robinson*, 6 *Eng*. 519.

The next point made relates to the power of the Circuit Court of the United States to adopt a certain rule, since the act of Congress of 1842. It is contended that, inasmuch as that act adopts the State law prescribing the form and regulating the proceedings under a writ of execution, the Federal court had no authority to adopt any rule variant from the one therein prescribed, and that therefore the complainants, having purchased under an execution enforced in obedience to such rule and not in strict conformity with the State law, their purchase is void. We deem it unnecessary to investigate the question thus presented, as in no event could it affect the rights of the parties claiming under the execution. The only result of this position, upon the assumption that it is true, would be that the sheriff had failed to observe all the requisites prescribed by the State law, and that therefore irregularities had intervened in the sale. The court of Appeals of Kentucky, in the case of *Hayden v. Dunlap*, reported in 3 *Bibb*, at page 219, said, "But were the intention of the Legislature still doubtful the highly inconvenient consequences, which would inevitably result from a construction that would vitiate the sale on the grounds now under consideration, ought, we think, to be decisive against its adoption. If the purchaser of lands under execution might, at any time within which a real action may be brought, have his title impeached by proof that the defendant in such execution had personal estate of which the demand could have been made, or that the sheriff had not advertised or given notice to the defendant according to law, it must be obvious to every one that no prudent man would bid for land exposed to sale a sum any thing like adequate to its value. Such a construction, as it would render the title insecure, would consequently tend to diminish the price of land sold under execution, and would in so much be prejudicial as well to debtors as to creditors. We must, therefore, conclude that in these respects the act is merely directory to the officer. Without doubt it is his duty to comply with its directions, and for a breach of his

duty he would be responsible to the injured party; but such a breach of duty is not in itself sufficient to avoid the sale." This is doubtless the true doctrine, and it is well sustained not only by reason but also by high authority. See *Wheaton v. Sexton*, 4 *Wheat. Rep.* 503. *Cox v. Nelson*, 1 & 2 *Mon. Rep.* 95. *Rector v. Hartt*, 8 *Misso. Rep.* 448. *Cromer v. Van Alstyne*, 9 *John. Rep.* 385. *Beeler's heirs v. Bullett's heirs*, 3 *Marsh. Rep.* 281, and *Adamson et al. v. Cummins ad.*, 5 *Eng. Rep.* 533.

But it is insisted that as the complainant Fowler was the attorney of record in the original suit and became the purchaser under the execution, he was bound to take notice of all irregularities. This proposition is too broad to square with the law. The court, in the case already referred to of *Beeler's heirs v. Bullett's heirs*, said that, "The law directing, first, chattels, then slaves, and lastly land to be taken, is directory to the sheriff. If he violates it to the injury of the debtor in an execution he may be responsible for that injury. But it does not result that the purchaser of lands so taken under execution, even if he be the creditor who has not been instrumental in causing the sheriff thus to violate the law, is to have his title affected especially after he has tried by other fruitless executions to reach other estate before he touched the land. The defendants seem to mistake the law, so far as to suppose that the plaintiff claiming under a sale by execution is bound to show that all the requisites of the law in making the sale have been complied with, instead of placing the *onus probandi* on the other side, and compelling him who opposes the sale to prove it irregular,"

The High Court of Errors and Appeals of the State of Mississippi, in the case of *Doe ex dem. Starke v. Gilbert and Morris*, also said that, "The law is well settled by an unbroken chain of adjudicated cases, that a mere irregularity for which an execution would be voidable merely, does not affect the right of a purchaser under it. This doctrine was recognized by this court in the case of *Snyder v. Vancompen*, decided at the present term. The variance cannot be regarded as any thing more than an irregularity for which the execution would be voidable, and might

be set aside on application of the defendants. There was a good judgment to support it; and it was an authority to do all that the decree had authorized. That it authorized a levy on the individual property of the defendants, was evidently a clerical mistake, arising no doubt from a misconception of the decree. On the application of the plaintiff, it might have been amended to conform to the decree. 5 *J. R.* 100. 1 *Cowen*, 313. It is admitted that a sale under a voidable execution does not affect the right of the vendee, if he be a stranger to the judgment and execution, and purchase without notice of the defect; but it is said that the rule cannot apply to Starke, who was plaintiff in the execution and therefore bound to know of the defects, and in support of this position the case of *Simonds v. Catlin*, 2 *Caine's Rep.* 61, is relied on. In that case it was held that the plaintiff, who was the attorney in the original suit, was properly chargable with notice of every irregularity attending the execution, but there is a material distinction between that case and the one at bar. There, a motion was made after verdict in ejectment to set it aside. "1st, Because a *fieri facias* issuing into a different county than that in which the venue is laid without a testation, is void." The court sustained the motion for this and another reason, for both of which the execution was not voidable merely but void; and was therefore improper evidence. A party to a void process could acquire no title under it, and this seems to be the reason of the case. Starke's execution was at most only voidable, and did therefore give title to the vendee under it. Even if it could have been set aside on the application of the defendants, they have not thought proper to have this done, and being only voidable, while it is permitted to remain in force, it must have the effect of a regular execution. No person can have a right to question it but the parties, and they must do it directly and not collaterally. 1 *Cowen*, 313. 16 *J. R.* 574, *Jackson v. Robbins*. The language of Chancellor KENT, in the last case cited, may with great propriety be applied in the case before us. In regard to an execution which was irregularly issued, he says, "In the first place, the better opinion is that if execution issued without *scire facias*,

the sale under it would not have been void. It might have been voidable and liable to have been set aside by the Supreme Court, upon motion, as irregular, or by this court, upon error, as erroneous, but until that was done the title would have stood. This question of irregularity or error never can be discussed collaterally in another suit. It is not a point in issue in this action of ejectment." The opinion from which this language was extracted, was delivered in the court for the correction of errors, and it may be presumed that every point was fully investigated. Let it be supposed then that Starke was a purchaser with notice, of what had he notice? Of a mere variance which he could have amended and which did not vitiate the execution, but at best only furnished a ground for setting it aside by the direct application of those who were interested. It could not be questioned collaterally. The case would have been different if it had been void. That which is void is essentially inoperative from the beginning and can have no binding quality. We therefore think that the condition of Starke was not materially different from that of a stranger, and the variance between the decree and execution did not justify the ruling of them out." The principle to be deduced from that case and those cited in it, when applied in this, is perfectly conclusive in favor of the purchase of the complainants. Admitting all the irregularities alleged to exist, they could not be brought up collaterally to affect a sale made under a valid execution, and more especially by a stranger to the original judgment. This is the settled doctrine upon the subject, and will be found to run through all the authorities. The requisites prescribed by the statute in respect to the mode of proceeding under an execution, are merely directory to the officer, and in no case can the purchaser be the sufferer by an omission to observe them, unless he can be shown to have been cognizant of the fact: There is no pretence that the complainants were cognizant of any neglect of the marshal in this particular; and in the absence of such allegation and proof to establish that fact, their purchase cannot be affected by it.

The exhibit of a rule, which purported to have been adopted

by the Federal court, and which was somewhat variant from the one prescribed by the State law, it is presumed, was offered by the complainants to meet the charge of irregularity alleged in the defendant Byers' cross-bill. The complainant in the cross-bill having wholly failed to charge a knowledge of the fraud perpetrated by the officer, if indeed such fraud was committed, no issue could be made in respect to it, and consequently the complainants in the original bill stood exonerated by the law. This being the case, all of their efforts to negative the idea of fraud on the part of the officer were a work of mere supererogation, and whether they succeeded or not; cannot affect the question of their title.

The next ground of objection relates to the extent of the lien, created by a judgment rendered in the Circuit Court of the United States. It is urged that the lien of such judgment does not extend beyond the limits of Pulaski county, in which the court is situated. In the case of *Conrad v. Atlantic Insurances Co.*, 1 *Peters* 453, the court say, the judgments in the Federal courts within the District of New York, are liens upon real property in like manner as judgments of the State courts, and to the extent of the local jurisdiction of the court. And so in every other State the judgments of the Federal courts have the same lien, to the extent of its jurisdiction as the judgments of the highest court in the State." The case of *Doe ex dem. Shrew and Winter v. J. D. Jones*, 2 *McLean's Rep.* 83, is directly in point. The court in that case said, "If, as contended the liens of the judgments of this court be limited to the county in which they are rendered, as in the inferior courts of the State, the judgments of this court have, in effect, no lien. The law of the State which extends the lien of a judgmant of the Circuit Court of the State to any county within which the record of such judgment shall be recorded, can have no application to this court. We have no right under it to require our judgments to the recorded by any clerk of the State court. The law of Indiana regulating judgments and executions, as it stood in 1828, is the law of Congress by adoption. Effect must be given to the provisions of this law, so far, at least, as they are adapted to the organization and powers of this court. If

the rules of proceeding by the circuit courts of the State be followed by this court, effect is given to them without reference to the limited jurisdiction of these courts. The limits of the State, in the exercise of the jurisdiction of this court, are as the limits of the county to the local court. The modes of judicial proceedings and rules of property are different in the different States, and in adopting those rules, Congress designed, as far as praticable, to give the same effect to them in the courts of the Union as in the courts of the State. No other course of legislation could have been so well calculated to produce a harmonious action in the judicial departments of both governments. But if a State law, being framed in reference to the limited jurisdiction of the State courts, for this reason cannot constitute a rule for the Federal courts, the legislation of Congress on the subject has been in vain. Such has not been the view taken by the courts of the United States. The law of the State regulates the proceedings of a sheriff on execution. He is to advertise the property, real and personal, &c., but his duties are all limited to the county. The same rule governs the marshal, and operates throughout the State. The principles of the State law are adopted, but the instruments which give effect to those principles are necessarily different, and they are made to operate throughout a more extended jurisdiction." The case of *Massingill et al. v. Downs, 7 Howard's U. S. Rep.*, is to the same effect. In that case the court say, "The Circuit Courts of the United States exercise jurisdiction co-extensive with their respective districts. And it has never been supposed that by the process act of 19th of February, 1828, which adopted the process and modes of proceeding of the State courts, the jurisdiction of the circuit courts was restricted. The "process and modes of proceeding" in the State were adopted by Congress in reference to the jurisdiction of the circuit courts and not with the view of limiting the jurisdiction of those courts. In those States where the judgment or the execution of a State court creates a lien only within the county in which the judgment is rendered, it has not been doubted that a similar proceeding in the Circuit Court of the United States would create

a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process or by express statute. Any other construction would materially affect and in some degree subvert the judicial power of the Union. It would place suitors in the State courts in a much better condition than in the Federal courts."

But if it should be supposed that, inasmuch as the laws of this State, in regard to judgments and executions, were not adopted by Congress until August, 1842, and subject to the rendition of the judgment under which the complainants in the original bill claim title, that therefore the judgment could not create a lien throughout the State, we answer that such lien does not depend alone upon the adoption of the State law, but that it existed prior to and independent of such adoption. It was said, in reference to this point, by the court in the case already referred to of *Doe ex dem Shrew and Winter v. J. D. Jones*, (2 *McLean's Rep.* 79,) that, "as land was not liable to be sold on executions or extended at common law, it is clear that at common law the judgment created no lien on the land of the defendant. But the argument is not sustainable that a judgment cannot operate as a lien on real estate unless this effect be specially given to it by statutory provision. The statute of 2 *West*, 13 *Ed.* 1, gave the *elegit* which subjected real estate to the payment of debts, and this, as a consequence, it has always been held, gave a lien on the lands of the judgment debtor. 3 *Salk.* 212. 1 *Wils.* 39. 2 *Leigh* 268. 6 *Randolph's Rep.* 618. 4 *Peters* 124. 2 *Brock.* 252. 2 *Bl. Com.* 418. 2 *Bac.* 731. 5 *Peters* 367. The same doctrine was held by the Supreme Court of this State, in a learned and able opinion in the case of *Ridge v. Prather*, 1 *Black.* 401. The court say, "We have always had a statute at least as strong as that of *West.* 2, by virtue of which judgments are liens upon real estate." But until the act of 1818, there was no statute declaring that judgments should be a lien on real estate. In the view of the court such lien arose from the various acts subjecting lands to execution. The thirteenth section of the act of 1818, entitled "an

act to prevent frauds and perjuries," gives a lien on the real estate of the defendant from the time of signing the judgment. This statute, it would seem, was introductive of no new principle, but gave effect from a specified time to a judgment lien. It is unnecessary to enquire whether, prior to this time, the lien took effect from the commencement of the term or not: it is enough to know that it existed. The lien under this statute, as well as that which existed before the statute, being general, must have extended throughout the State. The circuit courts had power to to issue execution to any county in the State. And as their jurisdiction, thus to enforce their judgments, extended throughout the State, the lien must have been co-extensive with their jurisdiction." We entertain no doubt therefore that, in either state of case, the judgment under which the complainants claim, operated as a lien upon the real estate of Tully throughout the State.

The next and last objection urged by the defendant Byers to the title of the complainants, is, that the marshal's deed, under which they claim, had not been acknowledged or admitted to record according to the requisitions of our statute. The act of Congress of May 7, 1800, section 3, provides that "Whenever a marshal shall sell any lands, tenements or hereditaments, by virtue of a process from a court of the United States, and shall die or be removed from office, or the term of his commission expire before a deed shall be executed therefor, by him to the purchaser, the purchaser or plaintiff at whose suit the sale was made, may apply to the court from which the process issued, setting forth the case, and assigning the reason why the title was not perfected by such marshal: and thereupon the court may order the marshal for the time being to perfect the title and execute a deed to the purchaser, he paying the purchase money and costs remaining unpaid." The complainants alleged in the petition and established all the facts necessary to authorize Rector, the successor of Newton, to execute and acknowledge the deed. They satisfied the court out of which the execution issued, that, after Newton had sold the property, and before he had executed a deed to themselves who were the purchasers, he was removed from of-

fice, and that Rector had been appointed his successor. The court, upon the showing, ordered Rector to execute the deed, which he did, and acknowledged the same before the court. But it is also contended that, although the deed shall have been properly executed and acknowledged, yet it was not a fit subject for record in the office of the clerk of the Jackson Circuit Court. If any doubt could have existed as to the propriety and legality of recording the deed before the adoption of our execution law by the act of 1842, there certainly cannot now remain the least ground for such a doubt. Our statute, after providing for the execution and acknowledgment of deeds by the sheriff before the Circuit Court of the county, then declares that any deed so executed shall be recorded as other conveyances of land, and thereafter such deed, or a copy thereof, or of the record certified by the recorder, shall be received in any court in this State without further proof of the execution thereof. The act of Congress, by adopting this statute, though necessarily permitting a departure so far as the court before whom the acknowledgment should be made, does most clearly authorize its record in the county where the land is situated when so acknowledged.

We have now carefully examined each objection urged by the defendant Byers against the claim set up by the complainants, and have not found the first one sustained by the principles of the law. We will next proceed to look into those raised to the claim of McDonald.

The first point made in respect to this branch of the case, is, that the marshal, who conducted the sale at which Van Grollman purchased, was not clothed with legal authority to make such sale, and that consequently Van Grollman did not derive any title from it. If this position be correct, it will necessarily follow that McDonald, who deduces his title from Van Grollman, will be left without any basis upon which to rest his claim. The act of Congress passed in 1800, is relied upon to sustain this position. The 3d section of that act provides "that where a marshal shall take in execution any lands, tenements, or hereditaments, and shall die or be removed from office, or the term of

commission shall expire before sale, or other final disposition made thereof, the like process shall issue to the succeeding marshal, and the same proceedings shall be had as if such former marshal had not died or been removed, or the term of his commission had not expired." The ground taken is, that, as the execution, under which the sale was made, was levied by Rector, and that, after his removal from office, the sale was conducted by Newton, his successor, it was void for want of authority, and that consequently no title passed to Grollman, the purchaser. It is contended, on the part of McDonald, that the ground assumed is not true in point of fact, but that, on the contrary, there is an utter failure by the record to show that any levy had been made by the predecessor of the marshal, who made the sale, or that in case it shall appear that such levy was made by him, it is then insisted that it was so made after his removal, and that, as such, it is a mere nullity. It is clear that, in case that the execution in question shall fall within the operation of the act of 1800, and the levy shall have been made by marshal Rector, or by his deputy, after his removal from office, that such levy was irregular, and could have been taken advantage of by the parties interested upon a direct application to the court for that purpose. Upon this point, we are not without authority. In the case of *Overton & King vs. Gorham & Durk*, (2 *McLean's Rep.* 510,) the court say, "The 3d section of the act of the 7th May, 1800, provides "that where a marshal shall take in execution any lands, tenements, or hereditaments, and shall die or be removed from office, or the term of his commission shall expire before or after sale or other final disposition made thereof, the like process shall issue to the succeeding marshal, and the same proceedings shall be had as if such former marshal had not died or been removed, or the term of his commission had not expired. From this provision, it is clear that the sale in this case was irregular. After his removal from office, the marshal, under the act of 1789, has power to execute all such precepts as may be in his hands; but the act of 1800 provides that his successor shall sell the lands on which he has levied but not sold before his removal. Notice to the late

marshal of his removal was not necessary. His functions were terminated by the act of his removal.

It appears, by reference to the testimony in the cause, that Newton was appointed on the 20th of April, 1841, and that the levy was made by Frazier, the deputy of Rector, on the 8th of May of the same year. The question now to be determined is, whether an execution thus circumstanced, is in full life, and clothes Newton with such authority as to enable him to pass title to the purchaser under his sale. The true test of a void process occasioned by an irregularity, is believed to be found in the rule laid down by GOULD, J., in the case of *Luddington v. Peik*, 2 *Cow. Rep.* 702. He said, "The irregularity must be in the process itself or in the mode of issuing it: it cannot be irregular when sued out according to the established course of practice." If the state of facts existing at the time the process issued, be such as to render it unlawful, that is sufficient. We are not to understand, by appearing irregular on the face of the process, that the irregularity is stated in the writ. It frequently appears by reference to extrinsic circumstances. Thus a writ tested and returnable out of term is irregular. When and where the terms are held by law, and how long the court was in session, is not stated in the writ, a knowledge of this is derived from other sources, and yet it may truly be said the writ is bad on the face of it. (See 1 *Cow. Rep.* 740.) We will now proceed to apply this test to the execution in question. It is not pretended that any obstacle existed in the way of its issuance at the time it first went forth; nor is it claimed that it bears any irregularity upon its face; but, on the contrary, it is conceded that it issued by authority and that it is fair and regular upon its face. But it is insisted that under the operation of the Acts of Congress it ceased to exist for all legal purposes, *eo instanti*, upon the removal of marshal Rector, in whose time it was issued, and that consequently any action under it by Newton, his successor, was irregular and void. We do not so understand the operation of the acts referred to. The levy not having been made until after the removal of Rector, it is clear that the case cannot come within the opera-

tion of the Act of 1800, and must of necessity fall within that of 1789. The latter act provides that "Every marshal or his deputy, when removed from office, or when the term, for which the marshal is appointed, shall expire, shall have power, notwithstanding, to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office, and the marshal shall be amenable, &c. If this be the correct construction it follows that the levy by Rector's deputy was strictly legal and regular and that nothing more remains to be decided but the propriety and legality of the sale by his successor. Here we are met by the argument that as Rector possessed the power under the law to complete the execution of the writ, that therefore, Newton, his successor, could not legally do the same thing. We are free to admit that the sale made by Newton, under the circumstances, was irregular, and that upon a direct application to the court, by any of the parties interested, it would have been set aside; but it is by no means clear that the objection can be entertained in a collateral proceeding. The objection urged against the sale under which McDonald claims title, is not founded upon any defect in the execution itself; but, on the contrary, it is leveled solely at the individual who assumed to exercise the functions of an officer on that occasion. From the view which we have taken of the law as applicable to the execution in question, we are satisfied that the removal of Rector did not make the slightest impression upon it, but that it still retained all its vitality until exhausted by its full and final consummation. It is shown by the testimony that Newton was the marshal of the District at the time of the sale, regularly commissioned and qualified, and that, to say the least of it, if not *de jure*, he certainly stood in the attitude of marshal *de facto* to the writ under which he acted in making the sale. We conceive that every reason that could possibly obtain in favor of upholding sales, where mere irregularities not affecting the validity of the process itself had intervened, will apply with all their force to one situated like the one before us. The individual who conducted the sale was not only reported in the country as the marshal, but he

was in truth and in fact the lawful officer duly commissioned and qualified to act as such. If the public under such a state of case should not receive the protection of the courts in their purchases, it would necessarily destroy all confidence in such sales and tend to the great and manifest injury of all parties concerned. We are therefore clear that the execution having issued by lawful authority, and there being no legal impediment to its full and final consummation, the most that the irregularity alleged could amount to, would be to render the sale voidable and not absolutely void, and consequently not liable to be assailed in a collateral proceeding.

It is conceived unnecessary to notice the objection to McDonald's title founded upon a supposed defect in the lien of the judgment under which Van Grollman purchased, on the failure of the marshal to advertise or sell at the time and place prescribed by the State law, as all the ground in reference to those irregularites has been explored whilst answering similar objections to the title of the complainants in the original bill.

The next point taken by the complainants is that Van Grollman's purchase being fraudulent as against the creditors of Tully, and McDonald being cognizant of such fraud before he consummated his purchase, their equity is paramount and consequently must prevail. We consider that it would be a waste of time and unnecessary labor to comment in detail upon all the evidence tending to fix fraud upon Van Grollman in the purchase at the marshal's sale, as the current runs so strong in that direction as to leave no ground for a rational doubt upon that subject. The testimony is perfectly conclusive that Van Grollman purchased the property for Tully's use and benefit, and such being the state of fact, it is equally clear that in case McDonald was cognizant of the fraud before he consummated his purchase, that his claim must yield to that of the complainants. But if, on the contrary, he was a *bona fide* purchaser for a valuable consideration, without notice, the judgment under which his vendor purchased being the oldest, his equity is necessarily prior to that of the complainant's and must prevail against it.

But we are here met by the position that the answer of McDonald is insufficient in point of law, even admitting the sufficiency of his proof to entitle him to the benefit of the defence set up by him, and the case of *Boone v. Chiles*, amongst others is relied upon. We will now proceed to look into this matter, and to see how the case actually stands. In the case of *Boone v. Chiles*, 10 *Peters Rep.* 210–11, the court say: "It is a general principle in courts of equity that where both parties claim by an equitable title the one who is prior in time is deemed the better in right. 7 *Cr.* 18. 18 *J. R.* 532. 7 *Wh.* 46; and that where the equities are equal in point of merit the law prevails. This leads to the reason for protecting an innocent purchaser holding the legal title against one who has the prior equity: a court of equity can act only on the conscience of a party: if he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction. *Sugden on Vend.* 722. Strong as a plaintiff's equity may be, it can in no case be stronger than that of purchaser who has put himself in peril by purchasing a title and paying a valuable consideration without notice of any defect in it or adverse claim to it: and when, in addition, he shows a legal title from one seized and possessed of the property purchased, he has a right to demand protection and relief. 9 *Ves.* 30, 4, which a court of equity imparts liberally. Such suitors are its most especial favorities. It will not inquire how he may have obtained a statute, mortgage, encumbrance, or even a satisfied term, by which he can defend himself at law, if outstanding; equity will not aid his adversary in taking from him the *tabulo in non fragio*, if acquired before a decree. *Shower P. C.* 69. 4 *B. P. C.* 328. 1 *D. & E.* 767. *P. C.* 65. 7 *V.* 576. 10 *V.* 268, 70. 11 *V.* 619. 2 *Ch. Cas.* 135–6. 2 *Vin.* 161. 1 *Vent.* 198. Relief will not be granted against him in favor of the widow or orphan. *P. C.* 249. 2 *V. Jr.* 457–8. 5 *B. P. C.* 292, nor shall the heir see the title papers. 18 *Vin.* 115. 1 *Ch. Case* 34, 69. 2 *Freem.* 24, 43, 175: it is a bar to a bill to perpetuate testimony or for discovery. 1 *Harrison's Ch.* 261. 3 *Sugden* 723–4. 1 *Vern.* 354, and goes to the jurisdiction of the court over him: his conscience

being clear, any adversary must be left to his remedy at law. 2 *V. Jr.* 457. 3 *V. Jr.* 270, 183. 9 *V.* 30. 18 *J. R.* 532. 7 *Cr.* 18. But this will not be done on mere averment or allegation; the protection of such *bona fide* purchase is necessary only when the plaintiff has a prior equity, which can be barred or avoided only by the union of the legal title with an equity, arising from the payment of the money and receiving the conveyance without notice, and a clear conscience. It is setting up matter not in the bill; a new case is presented, not responsive to the bill, but one founded on a right and title, operating, if made out, to bar and avoid the plaintiff's equity, which must otherwise prevail. 7 *V.* 33, 34. The answer setting it up is no evidence against the plaintiff, who is not bound to contradict or rebut it. 14 *J. R.* 63, 74. 1 *Munf.* 396–7. 10 *J. R.* 544–8. 2 *Wh.* 383. 3 *Wh.* 527. 6 *Wh.* 464. 1 *J. C.* 461. It must be established affirmatively by the defendant independently of his oath. 6 *J. Rep.* 559. 1 *J. Rep.* 590. 17 *J. Rep.* 367. 18 *J. Rep.* 532. 2 *J. C.* 87, 90. 4 *B. C.* 75. *Amb.* 584. 4 *V.* 404, 587. 3 *J. C.* 583. In setting it up by plea or answer, it must state the deed of purchase, the date, parties and contents, that the vendor was seized in fee and in possession; the consideration must be stated with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to and down to the time of paying the money and the delivery of the deed; and if notice is especially charged, the denial must be of all the circumstances referred to from which notice can be inferred: and the answer or plea show how the grantee acquired title. *Sugden* 766–70. 1 *Atk.* 384. 3 *P. W.* 280–1, 243, 307. *Amb.* 421. 2 *Atk.* 230. 8 *Wh.* 449. 12 *Wh.* 502. 5 *Pet.* 718. 7 *J. C.* 67. The title purchased must be apparently perfect, good at law, a vested estate in fee simple. 1 *Cr.* 100. 3 *Cr.* 138–5. 1 *Wash. C. C.* 75. It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. 7 *Cr.* 48. 7 *Pet.* 271. *Sugden* 722. Such is a case which must be stated to give a defendant the benefit of an answer

or plea of an innocent purchaser without notice: the case stated must be made out, evidence will not be permitted to be given of any other matter not set out. 7 *Pet.* 271.

We will now proceed to test the answer of McDonald by the rules thus laid down. He admits in his second amended answer that he was in possession of a portion of the lands described in the original bill, but avers that he obtained possession and derived his title to the same from one Herman Van Grollman, that he purchased the same from said Grollman for a valuable consideration, that is to say, for the sum of sixteen hundred dollars, which was the full value and a high price for said lands, and that he had purchased and fully paid for said lands without any notice of any prior lien or encumbrance upon the lands, and without any notice or suspicion that the title of Grollman was tainted or in any way affected with fraud. He further states that at the time of the marshal's sale, under which Grollman purchased the property in dispute, he was not a resident of Jackson county, and that he did not become a resident till some time after, that during his negotiation for said lands and purchase of the same, he heard nothing, nor did he hear any thing calculated to throw doubt or suspicion upon the title of Van Grollman, and that he believed he was getting a full, complete and perfect title, and that his purchase of the said lands is evidenced by a deed of conveyance from said Van Grollman to him, which is already on file in this case and marked as exhibit C., in his answer to William Byer's cross-bill herein, and which he prays may be taken as a part of this answer. He further states that, supposing his title to said lands to be valid and unquestionable, he has made valuable and permanent improvements thereon by erecting a dwelling house and out houses, clearing and fencing, &c., and that said improvements are worth at least one thousand dollars. He then sets out the proceedings under which Van Grollman purchased the lands, and then concludes this branch of his answer by exhibiting a copy of the marshal's deed to him. The profert of the deed from Van Grollman to McDonald, contained in the answer of the latter to Byers' cross-bill, and to which reference is

made in his second amended answer to the original bill, is as follows, *to wit*: "And this respondent says that the sale made by Grollman to himself is witnessed by a deed from said Grollman to him for conveyance of said lands, which deed is herewith filed and marked exhibit C., and prayed to be taken as a part of this answer." This answer is clearly defective in failing to aver want of notice down to the delivery of the deed from Van Grollman to himself.

But it is insisted that it is now too late to raise the objection since there is a general replication filed to the answer. This position might be correct as to matters of mere form, but it cannot be admitted where matters of substance are involved. A party is not allowed to state one case in a bill or answer and make out a different one by proof; the allegata and probata must agree. 4 *Mad. R.* 21, 9. 3 *Wh.* 527. 6 *Wh.* 468. 2 *Wh.* 380. 2 *Pet.* 612. 11 *Wh.* 103. 6 *J. R.* 559, 63. 7 *Pet.* 274, and also the case of *Boone v. Chiles*, already referred to at page 209. The reason is obvious, why such an averment is absolutely necessary in order that the party may fill the character of an innocent purchaser for a valuable consideration without notice. For if he had not obtained the deed, so as to become invested with the legal title, though he may have paid the last cent of the purchase money, his title was merely equitable, and as such would be subject to all the equities upon it in the hands of the vendor, and he would have no better standing in a court of equity. 7 *Cr.* 48. 7 *Pet.* 271. *Sugden* 722.

The answer falls far short of the legal standard in several other particulars. It simply avers that his claim is founded upon a deed, but wholly fails to state its date or contents; nor is it stated that the vendor was seized in fee and in possession. These defects may or may not have been cured by the replication; and upon this point we express no opinion; yet it is certain that, to say the least, it would be much safer to adhere strictly to the rule laid down in framing an answer. We are satisfied, however, that by the failure of McDonald to aver want of notice of the fraud charged in the bill against his vendor down to the time of

the delivery of his deed, his defence is incomplete, and that as such he must fail of success, and that without regard to the sufficiency of his proof. From this view of the case, it is clear that McDonald can occupy no better or higher ground than Van Grollman, his vendor, and as a necessary consequence, if the complainants could have succeeded over the latter, they must be permitted to prevail in a contest with the former.

It appears from the testimony on file in the cause that the instrument upon which the judgment of Neff & Bro. was founded, and under which the complainants in the original bill set up their title was executed in March, 1839, and payable six months after date, and that the sale to Van Grollman took place in 1841. From this it is clear that Neff & Bro. were creditors of Tully at the time of the sale to Van Grollman, and if such sale was made in fraud of their rights, it is equally clear that as to them it was void. The testitmony bearing upon this point is voluminous, and would require much time to comment upon the whole of it; yet we would forego all such considerations in case it presented any conflict, but we are saved the necessity by the fact that the whole current runs the same way, and is so strong as to leave no ground for a rational doubt. The fraud charged upon Tully and Grollman may therefore be considered as a fixed fact, and therefore if the effects of such fraud are to be extended to McDonald, it is clear that he cannot be sustained in his pretensions.

The case of *Stoval v. The Farmers' & Mechanics' Bank of Memphis*, is strongly in point, to show that the sale to Van Grollman was fraudulent as to the creditors of Tully. The proof in that case was that means were resorted to which were calculated to prevent a fair competition in the sale, and that the party who actually purchased the property, was heard to say that he had done so for the benefit of the defendant in the execution. This, with the further evidence of continued possession, constituted the substance of the testimony in that case, upon which the court below found against the purchaser at the sale, and the appellate court affirmed the judgment. The suit in that case was prosecu-

ted by the creditors themselves, and in that respect there is a difference between the two cases, and the question which results is whether parties claiming under a judgment of such creditor can claim the benefit of his position. This point was expressly ruled in the case of *Hildreth v. Sands*, 2 *John. Ch. R.* 35, which is quoted with approbation in the case of *White v. Williams*, 1 *Paige Ch. R.* 508. It is there said, "There is no doubt the complainant is in a situation to take advantage of the statute remedy. He is a *bona fide* assignee of the judgment, and had an equitable interest in it for his own protection, as endorser of the note, even before that assignment. As a purchaser of the premises, under the judgment, he is also entitled to all the rights which the judgment creditor could have. There can be no doubt, from the view which we have taken of the whole case, that the property claimed by Mc Dondald is liable in his hands to the judgment of Neff & Brother, and the purchasers at marshal's sale, under such judgment, being entitled to all their rights, it is equally clear that the complainants in the original bill acquired by such purchase a complete title as against Mc Donald. This conclusion reached, it necessarily results that the claims of both Byers and Mc Donald must yield to that of Fowler and the representatives of Denton, and that the decree of the court below is correct so far as it is confined to the question of title.

It is urged that the decree is erroneous for the fact that the chancellor sustained the motion of Byers, to strike out the interrogatories contained in Mc Donald's second amended answer. This answer charged a corrupt agreement between the defendants, Tully and Van Grollman, and Denton, one of the complainants in the original bill, the purport of which was that Denton had bribed Tully and Van Grollman to leave the country, and decline answering the bill, so that the fraud charged against them might stand confessed, and thereby injure the claim of Mc Donald. We do not deem it material to inquire whether the matter called for would be admissible in evidence or not, so as to aid the defence set up by Mc Donald, as it is clear from the testimony in the record, that an answer by both Tully and Groll-

man, positively denying every allegation in relation to fraud in the marshal's sale, would have been fully and effectually disproved and overturned. The legal effect would have been the same, and consequently there is no ground of complaint in that particular.

The next, and, as we conceive, the only remaining question important and necessary to be determined, relates to the proper disposition of the rents and profits and the improvements made upon the land; and also to the costs of suit. It is shown by the testimony that McDonald purchased on the 7th of January, 1842, and that the decree was taken against him on the 15th of June, 1848, embracing a period of more than seven years; that at the time he entered upon the lands, there were from fifty to sixty acres in cultivation, and that it was worth from one to two dollars per acre per annum, and it also appears that the improvements which he had put upon the land were worth from one thousand to twelve hundred dollars. This bill was filed on the fifth of April, A. D. 1845, and more than three years after McDonald's purchase. If it is allowable under the circumstances of this case to give to the party in possession compensation for his improvements, we most assuredly shall be inclined from our views of the testimony to do so, at least to the extent of the rents and profits claimed for the use and occupation of the land. The testimony tending to bring home a knowledge of the fraud to McDonald in the purchase of Van Grollman, is of the feeblest and most unsatisfactory character, and however obligatory we might have considered it upon the merits, from the fact of the finding of the court below, we cannot regard it as by any means conclusive when applied to the question of damages. It is clearly the right of an innocent purchaser for a valuable consideration without notice to have the value of permanent and useful improvements set off against the claim of the rightful owner to the extent of the rents and profits. This doctrine is distinctly laid down by the Supreme Court of New York in the case of *Jackson v. Loomis*, 4 *Cowen Rep.* 172. That was an action of trespass for mesne profits. The court in that case say, "There is certainly no

reason, in general, why the owner of lands should be compelled to pay for improvements which he neither directed nor desired as a condition on which he is to gain possession of his property. But where an occupant has taken possession under a *bona fide* purchase and made permanent improvements, it is very hard for him to lose both land and improvements. If the plaintiff is not content with acquiring possession of his property in an improved condition after he has neglected to assert his title for a number of years, it is certainly equitable that the defendant should be allowed the value of his improvements made in good faith to the extent of the rents and profits claimed. "This view of the subject is fully supported by *Green v. Biddle*, (8 *Wheat. Rep.* 81, 82,) and the authorities there cited, especially *Coulter's Case*, (5 *Co. Rep.* 30.) Most clearly the defendant should not be compelled to pay an enhanced rent in consequence of his own improvements." The Supreme Court of the United States, in the case of *Green v. Biddle*, (5 *Cow. Rep.* 385,) when commenting upon the Kentucky statutes concerning occupying claimants of land, and declaring the common law rule in relation to damages recoverable by the rightful owner, say, "It is laid down, we admit, in *Coulter's Case*, 5 *Co.* 30, that the disseizer, upon a recovery against him, may recoup the damages to the value of all that he has expended in amending the houses. See also *Bro. tit. Damages, Pl.* 82, who cites 24 *Edw.* 3, *C.* 50. If any common law decision has ever gone beyond the principle here laid down, we have not been fortunate enough to meet with it. The doctrine of *Coulter's Case* is not dissimilar in principle from that which Lord KAINS considers to be the law of nature. His words are, "It is a maxim suggested by nature that reparations and meliorations bestowed upon a house, or on land, ought to be defrayed out of the rents. By this maxim we sustain no claim against the proprietor for meliorations, if ihe expense exceed not the rents derived by the *bonae fidei* possessor." He cites *Papinian* 1, 48, *de rei vindicatione*. Taking it for granted that the rule, as laid down in *Coulter's Case* would be recognized as good law by the courts of Virginia, let us see in what respects it differs from the act of

Kentucky. That rule is, that meliorations for the property (which necessarily mean valuable and lasting improvements) made at the expense of the occupant of the land, shall be set off against the legal claim of the proprietor for profits which have accrued to the occupant during his possession." It is clear that the testimony in this case, under the rule thus laid down, will not warrant the decree in respect to damages. The improvements made by McDonald, consisted of dwelling houses, kitchen, negro cabins, corn-cribs, stakes, clearing land, digging well, &c. James Robinson testifies that the improvements made in 1842, 3 and 4, were worth six hundred dollars, and that those made in 1845–6 and '47, were worth three hundred dollars. It was also testified by others that all the improvements were worth from one thousand to twelve hundred dollars. The improvements specified were doubtless of a permanent and beneficial nature, and the defendant McDonald having entered in good faith, so far as the testimony shows, he is clearly entitled to have a deduction in consideration of his improvements made before suit brought, to the extent of the rents and profits claimed. McDonald purchased on the 7th of January, A. D. 1842, and according to the evidence, as found by the Chancellor, the rents and profits did not exceed the sum of seventy-five dollars per annum. The improvements made anterior to the 5th of April, 1845, the commencement of this suit, were proved to have been worth six hundred dollars, and the rents and profits down to that time at the same rate could not have exceeded two hundred and forty-three dollars and seventy-five cents, which of course would leave the sum of three hundred and fifty-six dollars and twenty-five cents, to be set off against such rents and profits as shall have accrued since that period. This suit having been commenced on the 5th of April, A. D. 1845, and a final decree having been rendered on the 15th June, A. D. 1848, embracing about three years and two months, the rents and profits during that time could not have exceeded two hundred and thirty-seven dollars and fifty cents according to the rate fixed, which would be minus the value of the improvements made before suit brought just one hundred and nineteen dollars and

seventy-five cents. This latter sum he cannot claim, as the time of the institution of the suit which operates as notice of an adverse claim to the land is his limit of recovery by way of compensation, and that recovery is strictly confined to improvements made in good faith before the institution of the suit. It was said, by KENT, Justice, who delivered the opinion of the court in the case of *Murry v. Gouverneur*, (2 *John. Case* 441, 2 *in error*) that as to the sum expended, it may be left for liquidation in an action for the mesne profits, if the respondents should think proper to sue for mesne profits. The action for mesne profits is a liberal and equitable one, and will allow of every kind of equitable defence. It was also held in Pennsylvania, (*Hylton v. Brown, C. C.*, April, 1818. *Whart. Dig., Ejectment*, 1 *Pl. p.* 188. *U. S., Reports*,) that "the value of improvements made by the defendant may be set off against a claim of mesne profits, but profits before the demise laid should be first deducted from the value of the improvements. We entertain no doubt but that the defendant McDonald was entitled to compensation for improvements made before suit brought, and in case they are equal in value to the rents and profits claimed to set them off to the entire extinguishment of such rents and profits. This having been already ascertained it necessarily follows that he ought to be discharged and released from that part of the decree which awards damages against him.

The last point to be considered relates to the proper disposition of the costs. From the testimony contained in the record, we think that there can be but little pretence that McDonald was cognizant of the fraud with which the title of his vendor was tainted, at the time he made his purchase. It is in proof that he did not reside in the county of Jackson at the time of the marshal's sale to Van Grollman, and that he did not settle in that county till some time thereafter, and there is certainly no evidence of a reliable character going to establish a knowledge of such fraud after he went into Jackson, and before his purchase. We feel satisfied from the fact of his absence at the time of the marshal's sale, the dearth of the evidence to bring a knowledge of

the fraud home to him after he went into Jackson county, and from the price which he paid for the property, as well as the secret character of the defect in his title, that his purchase and entry were in good faith. This being the case, though he failed upon the merits, and perhaps more from a defect in his answer than the insufficiency of his proof, we cannot believe that it would be consonant with the principles of equity and conscience to visit upon him more costs than he may have incurred in defending this suit. We are therefore of opinion that the whole of the decree rendered in this cause, except so much as awards damages and costs against McDonald, ought to stand; but that so much as gives damages and costs against him ought to be reversed, and that the same as to costs be so entered as only to allow such costs as he may have himself incurred in his defence of this suit in the court below and also in this court; and also that the complainants in the original bill pay all their costs in both courts.

It is therefore, ordered, adjudged and decreed, that the decree rendered by the Chancellor in the court below, except so far as it relates to the damages and costs adjudged against the said McDonald, be and the same is hereby affirmed, and that said decree as to the said damages and costs be and the same is hereby reversed and held for nought, and that the said McDonald be discharged and released from the same, and further, that so much as relates to costs as against him be reversed and held for nought, and the said McDonald pay all such costs as he may have incurred in his defence against the said original bill in this court as well as in the court below, and that the complainants pay all such costs as they may have incurred in the prosecution of said original bill against the said McDonald in both courts.

A petition for reconsideration was filed by McDonald, and overruled.

Cunningham vs. Ashley & Beebe.

A complainant in equity, as at law, can only recover on the strength of his own title, and he is not in a condition to assail the title of the defendant, unless he shows a right in himself to the land in controversy. Where the bill alleges fraud in procuring the patent from the Government, to the defendant, the chancellor will not interpose to relieve the complainant, until he shows that the fraud, if it exists, has operated to his injury, and, unless the fraud and injury concur, the court will not inquire into the alleged fraud.

The complainant claims the land in controversy by virtue of the location of a Cherokee pre-emption, and also by virtue of his own claim to a pre-emption under the Act of 29th of May, 1830, both originating in the favor and founded upon the gratuity of the Federal Government; upon compliance with the terms and conditions of the Acts of Congress granting those bounties to the settler, he could acquire a vested right, and without such compliance, he must be regarded as a mere trespasser and intruder, without any color of right at law or in equity, and unless he shows that he has so complied, or has been prevented from doing so, by the agents of the Government, or the fraudulent acts of the defendants, he can have no claim to relief in equity.

The complainant claimed to enter the land in question by virtue of the Cherokee pre-emption right, as the assignee of the original claimant, under several successive assignments. The application to enter was refused by the district land officers. In the absence of any proof of the genuineness of these assignments, or showing that they were proved before the land officers, the court will presume that their refusal was predicated upon that ground. The land officers could not have allowed such entry in the name of the assignee, unless they were satisfied of the validity of the assignments.

The complainant also relies upon an equitable claim of entry in the name of Morrison, the original claimant. The only evidence of the right to a pre-emption is the certificate of the Register, issued to Wylie, assignee of Morrison. The court is of opinion that, under the Act of Congress granting such pre-emption, the land proposed to be entered should be designated before the adjudication upon the claim, which was not done in this instance, and the claim if allowed and the entry permitted, the adjudication would necessarily appear as the joint act of the Register and Receiver.

The certificate in question purports to be issued by the Register alone, and does not necessarily import a joint adjudication by the land officers. But independent of these objections, it no where appears on the part of the complainant, that at the time of the application to enter, or at any time before the expiration of the law, any evidence was ever produced to the land officers, that Morrison or the

complainant, had made any improvement upon the land in question, or that it was unimproved, and for that reason subject to entry under the pre-emption, as contemplated by the Act of Congress.

The right of the complainant to a pre-emption to the land in question, under the Act of the 29th May, 1830, was adjudicated by the land officers, and rejected. Their adjudication as to the facts of cultivation and possession, if in favor of the complainant, would have been conclusive.

The proof offered by the complainant at the land office, was defective as to these facts, but that the same land officers, about the same time allowed other pre-emptions upon similar proof, affords no presumption that they intended to allow that of the complainant. There may have been other satisfactory evidence adduced before the land officers, as to these claims, of which no memorial was preserved.

The decision of the land officers rejecting the claim of the complainant, is that of a legally competent, although special tribunal, and he cannot assail the adjudication on any other grouud than a want of power in the officers, or fraud in the defendants, or those under whom they claim, touching the decision.

Appeal from Pulaski Circuit Court in Chancery.

THE transcript in this case contains *eight hundred and fifty-six pages*, and if all the matters therein embraced, were stated, the case would make a volume of itself, but as the complainant has taken the case to the Supreme Court of the United States, and as, after it is there decided, it will be fully reported by the Reporter of that court, and republished in our Reports, in accordance with usage, it is deemed sufficient to state such facts here as are necessary to a proper understanding of the points decided by this court; which are as follows:

On the 27th day of January, 1841, Mathew Cunningham filed a bill in Pulaski Circuit Court, alleging that in the month of July, 1821, he settled upon, and commenced to improve, the south-east quarter of section 3, in township 1 north, range 12 west, lying south of the Arkansas river, and in that part of the Territory of Arkansas now known as Pulaski county; no other person being then settled upon, improving or cultivating said quarter section of land. That having settled thereon for the purpose of permanent residence, improvement and cultivation, he immediately commenced erecting buildings thereon, and clearing and improving part thereof for cultivation, and from that time to the present

day, (the time of filing the bill,) continued to improve, cultivate and hold possession, of a portion of said quarter section of land; and from that time until the autumn of 1831, continuously resided thereon, in a dwelling built and standing entirely thereon, and had no residence or improvement elsewhere; at which time (autumn of 1831) having built himself a new dwelling house in part, on said quarter section, and in part on an adjoining fraction of land, accommodating the same to a street in the then town of Little Rock, he removed to said dwelling, and there continued ever since to reside, with part of his dwelling house, and all of his other buildings, and out-houses upon said quarter section. That from his first settlement to the time of filing the bill, there had been no cessation or intermission in his said residence, improvement and cultivation, and his actual and undisturbed possession of part of said quarter section of land.

That on the 26th day of May, 1824, the sale of said quarter section was authorized by law, and on that day, and on the 25th December, of the same year, he had made improvements, erected buildings, and was residing thereon, and did in that year cultivate a portion thereof, and said land was then, and long afterwards, within the Land District of Lawrence, of said Territory.

That one William Morrison was entitled to a right of pre-emption in Arkansas Territory, on the 26th day of May, 1824, or in his stead his legal representative, under the 5th section of the Act of Congress of 12th April, 1814, entitled "An Act for the final adjustment of land titles in the State of Louisiana and Territory of Missouri," in that country north of the river Arkansas, ceded to the Cherokee Indians July 8, 1817; and being so entitled, he, or his legal representative was, on the 26th day of May, 1824, under an act that day approved, entitled "An Act concerning pre-emption rights in the Territory of Arkansas," expressly authorized, in lieu of such his pre-emption right, to enter with the Register of the Land Office of the Lawrence Land District, any tract of land in that District on which he, or his legal representative, had made improvements previous to May 26th, 1824, or any unimproved tract in that District, the sale of

which was authorized by law, not exceeding one quarter section, to be bounded by the lines of the public surveys.

That Morrison, by his agent, William Wylie, before the 29th of November, 1824, established such right, by proving the necessary facts required by law, at the Land Office, in the Lawrence Land District, which evidence was taken in writing, but has been mislaid or lost.

That on such proof being made, the Register of said Land Office judicially determined and adjudged it sufficient; and on the 29th November, 1824, issued his official certificate, as follows:

"No. 23. LAWRENCE DISTRICT,
Land Office at Batesville,
Register's Office, Nov. 29th, 1824.

I hereby certify that Wm. Wylie, assignee of Wm. Morrison, has produced to the Register and Receiver of Public Monies, sufficient evidence to entitle him to a right of pre-emption on the lands ceded by the United States to the Cherokee Indians, as is of record in this office; which pre-emption can be located agreeably to an Act passed by Congress, on the 26th of May, 1824, entitled "An Act concerning pre-emption rights in the Territory of Arkansas." (Signed) H. BOSWELL, *Register*."

That Wylie, previous to December 23d, 1824, sold the pre-emption right to John L. Lafferty, who, on that day, sold it to John P. Brown, who, on the 25th December, 1824, sold it to complainant, each of which sales was for a valuable consideration, and evidenced by assignment on the back of the certificate.

The assignments, as they appear upon the certificate, as exhibited with the bill, are as follows:

"I assign the within certificate to John L. Lafferty, for value received. (Signed) WM. WYLIE."

"I assign the within certificate to John P. Brown, for value received of him, as witness my hand and seal, December 23d, 1824. (Signed) JOHN L. LAFFERTY."

"I assign the within certificate to Mathew Cunningham, for value received, witness my hand, the 25th of December, 1824.
(Signed) J. P. BROWN."

That on the 25th December, 1824, complainant, by Sam C. Roane, his attorney in fact, applied to the Register at Batesville, to enter and purchase under said pre-emption said quarter section of land above described, by notice in writing, this being more than two weeks previous to the time of offering for sale any lands adjacant to it; and that he then offered and tendered the government price for the tract; but that the application was rejected on the sole ground that the tract had been previously located by certain New Madrid claims.

That said tract of land has never been offered for sale by the United States.

That in pursuance of orders from the General Land Office, the deposition of Roane was taken on the 10th July, 1839, proving that he so applied to enter the tract, and tendered the government price, which deposition and other papers were forwarded to the General Land Office.

That complainant cultivated part of the tract in 1829, and was residing on it on the 29th May, 1830, and so was entitled to a pre-emption on it under the act of that day; that it was then subject to pre-emption, and that he proved his right thereto on the 27th of May, 1831, before the Register and Receiver at Batesville, and a justice of the peace, by proving, by his own affidavit, and that of other persons, such cultivation and residence.

That the Register and Receiver adjudged the proof sufficient, and allowed and confirmed his pre-emption under the Act of 1830; that the tract had not been proclaimed for sale, and he then applied to enter it, and tendered the government price, but it was refused on the ground of its location by the same New Madrid claims.

That his claim was allowed, and reported to the General Land Office as allowed, but some person has forged on the envelope of the proof, the word "*rejected*" over the signatures of the Register and Receiver.

That in 1820, the lands adjoining the tract were laid out into a town called Little Rock, which became the seat of government of the Territory and State of Arkansas, and is a city.

That Ashley settled in the town, with his family in 1821, boarded with complainant in 1821 and 1822, for some months, and was cognizant of all the facts alleged in the preceding part of the bill.

That Ashley, at an early day, became interested in the New Madrid claims, and for a long time prosecuted them, and urged them on the government, and so prevented complainant from getting title to the tract until he (Ashley) found they would be declared void.

That then, in the year 1838, he procured Beebe to join with him, in whose name the tract was entered, with the floating pre-emption claims of Samuel Plummer and Mary Imbeau; the first claimed under the Act of 29th May, 1830, and the supplemental act of July 14, 1832, and the second, under act of June 19, 1834.

That after long prosecuting his claims through an agent, complainant went to Washington in 1837, remaining there from December, in that year, until July, 1838, and there presented his Cherokee pre-emption, and urged that the New Madrid claims were void; that Ashley and Beebe, by counsel, opposed him, and urged the validity of the New Madrid claims, and finally obtained a decision that they were valid.

That whilst urging the validity of these claims, they bought up the floats and located them on the tract, without notice to him, with an agreement to keep the locations secret; that these locations were made on the 6th and 7th days of June, 1838, while he was in Washington, against his consent, and contrary to law and the regulations and rules of the Treasury Department; many of which rules and regulations are cited in the bill.

That with similar floats, Beebe at the same time located the rest of the city, and that there was no law allowing any such floats.

That the sanction of the commissioner of the General Land Office, to these locations was obtained by fraud, and fraudulent representations and statements made by Ashley and Beebe, and the land officers at Little Rock.

That on the 29th of May, 1839, complainant applied to the Register and Receiver at Little Rock, to enter the tract with his

pre-emption, under the act of 1830, and tendered the price, which was refused, and he appealed to the Geneal Land Office, where, also, his claim was rejected; *after which*, for the first time, the New Mardrid claims were decided not to hold the land, and the locations by floats were confirmed.

That this pre-emption, under act of 1830, was rejected on grounds that do not, in fact, exist.

That the assent of the Commsssioner of the General Land Office to the locations by the floats, was obtained by persuading him that there had been a virtual compliance with the requisition of a certain circular of the General Land Office, of October 11th, 1837, when there had been no such compliance; and the Commissioner was unintentionally deceived in regard to the facts, and led to believe that the locations on the tract were effected by circumstances which really only applied to the locations on the residue of the city; and that the issuance of the patents was obtained by fraud.

The bill prayed that the patents of Ashley and Beebe to the said tract of land, be delivered to complainant, or cancelled, and the title vested in him.

Defendants, Ashley and Beebe, answered the bill at great length, denying any pre-emption right in complainant, setting up a regular and fairly obtained title in themselves, and positively denying all the allegations of fraud made in the bill.

The cause was heard in January, 1848, before the Hon. WM. H. FEILD, judge, on bill, answers, replications, exhibits, and depositions, and the bill was dismissed for want of equity.

The objections taken by defendants to the pre-emption claims of complainant, and the evidence in relation thereto, sufficiently appear in the opinion of this cout.

TRAPNALL, FOWLER and PIKE, for the Appellant.

WATKINS & CURRAN, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

As fraud and injury must concur to warrant the interposition of the chancellor sought by this bill, it will be unnecessary to enquire into any alleged frauds on the part of the defendants that have worked no injury to the complainant. His claim to relief must rest primarily upon his rights to the land in question, in fraud of which the patents were procured by the defendants. These rights, if they exist, are founded upon the alleged Cherokee pre-emption right of Morrison, to which the complainant claims to be the successor; and upon his own alleged pre-emption right under the act of Congrss of the 29th May, 1830; both originating in the favor, and founded upon gratuity on the part of the Federal Government, although in advancement of that public policy which looks to the transmutation of the wild public domain into cultivated fields and private property.

There can be no doubt but that Congress may rightfully attach to a pure donation of a portion of the public domain, such terms and conditions as it pleases, and may invest the subordinate officers of the Federal Government with powers to determin questions of fact concerning the same, and to ascertain and settle conflicting claims touching such donation. And this would be no less true although such authority might be denied as to the confirmation of imperfect titles derived from the former proprietors of the country, and it might be held as to these that such questions could only be settled by those tribunals appointed by the constitution and laws for the settlement of every ordinary question of property, unless the parties interested should voluntarily submit to some other mode of settlement, or to some other tribunal of their own selection.

And it seems equally clear that beyond the scope of the several acts of Congress upon which these two claims of right are predicated, the complainant has no place upon which to rest any pretence of right to the land in question. For, beyond this boundary, he is a mere intruder and trespasser, destitute of any color of right or title either at law or inequity. He therefore can have

no equity that can avail him before the Chancellor, that is not based upon his compliance, either actual or constructive, with the terms and conditions of these acts of Congress: and if he has such, from this source it must have sprung into being, and it can have life from no other. Consequently, if he has not complied with those terms and conditions, or been prevented from doing so by the agents of the General Government or the fraudulent acts of the defendants, he has no claim to the relief he seeks by his bill.

We shall first bring to this test the claim of right under the alleged Cherokee pre-emption right, and then to the like test the other alleged pre-emption right.

Claiming to succeed to the rights of Morrison under the former of these two claims through a number of assignments, the complainant insists that, as such successor, he was entitled to a preference in becoming the purchaser of the tract of land in question. He does not, however, pretend that, as such successor to, or legal representative of Morrison, he pursued the letter of the act of Congress touching the claim. But that his own and the acts of Wylie in the prosecution of the claim, amounted together to a virtual or substantial compliance with the provisions of this act. And that consequently he was entitled to enter the land in question either in his own name or in that of Morrison: and that the right of preference in either name is sufficient as to this point for all the purposes of his bill.

It seems clear to us, however, that there is no foundation for the alleged right of entry in the name of the complainant, because it does not appear either that any evidence was offered in the Land Office, tending to show that the complainant was the then rightful successor to the rights of Morrison, or that such rigtful succession was by the land officers adjudged in his favor without evidence. It is true that the successive assignments from Wylie, the first alleged assignee of the rights of Morrison, down to the complainant were all endorsed upon the certificate of the Register, No. 23, that was presented to the land officers and filed in their office, at the time of the complainant's written application to enter the land, but it does not appear that any evidence

at all of the genuineness of any of these assignments was ever offered to the Register and Receiver or to either of them, and we know of no rule of law which made these assignments evidence of themselves: nor does it appear that their genuiness was recognized by any act of the land officers. On the contrary, their only act shown us in the premises—that of the refusal of the complainant's application to enter the land in question—may, for any thing that appears to the contrary have been on this very ground. And we see no good reason why such a refusal upon such a ground might not be regarded as authorized by the law, under which the claim was preferred to the land officers. Indeed it would seem manifest that when one would present himself as the successor to the rights of a pre-emptor, and ask for an entry in his own name, that under the law he would not only have to show the proper grounds for the alleged pre-emption right, but, in addition to this, should show his own succession to the rghts of the pre-emption. Thus, if it were admitted that all else had been done to comply with the terms and conditions of the grant of the right of preference, the failure to prove the alleged assignments was fatal in this case, to the claim of entry in the name of the complainment, there having been no act of the land officers shown which dispensed with their establishment by proof.

We are next to examine as to the alleged equitable claim of entry in the name of Morrison.

This is sought to be sustained by the certificate of the Register of the land office, issued in favor of Wylie assignee of Morrison. There is no other proof as to this relied upon, and there is none besides either way. It is not pretended that this certificate is authorized by any of the express provisions of the act of Congress, touching these claims, or by any regulations or instructions relating to this act emanating from the Secretary of the Treasury or the Commissioners of the General Land Office. It is insisted, however, that it is conclusive evidence that a right of pre-emption was judicially allowed to Morrison, and that this pre-emption right thus adjudged, was then, without further judicial action on the part of the Register and Receiver, subject to be located

(in the name of Morrison at least) upon any tract of the public land contemplated by the act of Congress out of which it sprung.

We think it manifest that it was contemplated by the act of Congress in question that the tract of land to be entered should be designated before the adjudication upon the claim of a pre-emption right that was to authorize the entry, and that, consequently, in a regular course of proceeding under its provision only the particular tract designated before the adjudication was subject to entry for the satisfaction of the pre-emption right adjudged.

But, admitting the irregularity, which, as to this, seems in this case to have occurred, to be a mere error, and not subject to be called in question collaterally or otherwise impeachable than by a direct proceeding, still it will not follow that the Register's certificate in question is sufficient, much less conclusive evidence of an adjudication in favor of Morrison, by the Register and Receiver. Because, having been unauthorized by law as an instrument of evidence, it is but the certificate of an individual, which might be evidence of his own act, but could not evidence the act of another. Such a certificate, upon common law principles, could amount only to an admission by the party giving it of his own official act. And to permit it to establish such an act of another without some express provision of law would be to disregard at least two well known rules of evidence. For it would be allowing the *ipse dixit* of one, not under oath as to the matter said, to establish a fact against a third person without an opportunity of cross-examination.

Nor can any aid be derived for the complainant from the considerations urged by his counsel that as against the government a right of preference was no privilege, but such only as against individuals, and that he claimed not against the government, but under it, and was therefore entitled to the fullest benefits of every admission of her officers. Because, whether in such case a technical privilege or not, nothing short of a compliance with the provisions of the law, or an admission on the part of the government, through her officers, that the terms had been complied with, can

found any such claim to the land, as would be recognized by a court af justice; and here the admission is only by one of two officers who were authorized to do a joint judicial act.

Nor did the practice of the general land office, as to these Cherokee certificates and the assignments upon them, as shown by the deposition of Doctor Fraily, conflict with these principles of law; because the action there was always after the entry of of the land by persons claiming to be the assignees of Cherokee pre-emptors. At which period the duplicate Receiver's receipt was as good evidence of his judicial action preceding the entry as the Register's certificate was of his. And indeed the Receiver's receipt in such case purporting upon its face to have been issued on account of a Cherokee pre-emption, in connection with the Register's return of the corresponding entry, was legitimate evidence of the joint adjudication of these two officers in favor of the pre-emption right; because this was their final action in the mode pointed out by law and the regulations of the land department, and was the direct result of such joint adjudication. And not unlike the "patent certificates," prescribed by the regulations for the Register and Receiver at Little Rock, dated August 26th, 1828, under the donation act of the 24th May, of that year, which, in connection with the monthly list of cases adjudicated ordered to be forwarded to the General Land Office by the Register and Receiver, was evidence of the joint judicial action of the two officers upon the claim for a donation and of the particular tract entered. (*Inst. &. Op. No.*, 349, *p.* 413.)

The language of the certificate is dubious, and by no means necessarily imports that an adjudication was actually made by the two land officers. All that is stated in it may be true, and nevertheless an adjudication might not in fact have been made, but deferred; and there can be no presumption to aid this uncertianty, because it does not appear that all the regular steps contemplated by the act of Congress had been taken—no tract of land having been designated for entry—that would have made it the imperative duty of the two officers to adjudicate the claim.

But if all these objections were disregarded, and the certificate

was received as evidence of all it purports, and its language construed most favorably for the complainant, and the irregularity as to the designation of the tract of land considered as cured either by the supposed judicial action previously to the issuance of the certificate, or by the subsequent written notice and application of the complainant by his attorney, Roane, still the complainant cannot be considered as having made out his case. Because it no where appears that any evidence was ever produced in the land office, either before or at the time when the application for the enty was made by the attorney, Roane, or subsequently before the expiration of the time allowed by the act of Congress to show either that Morrison or the complainant had made any improvement upon the land in question, as contemplated by the act of Congress, or that the same was unimproved and for that reason subject to the pre-emption entry. And the rejection by the Register and Receiver of the application for the entry when made, as shown by the deposition of Roane, cuts off any presumption in the complainant's favor as to either of these facts.

We think it clear, thereof, that it has not been made to appear either that the complainant, or those under whom he claims, or all of them together, have complied with the terms and conditions of the act of Congress on which this Cherokee pre-emption claim is founded, either by means of their own acts or, in addition to these, by admissions on the part of the government by the acts of her agents.

Nor has any fraudulent acts on the part of the defendants, or those under whom they claim, been shown, which could have prevented a full compliance on the part of the complainant with all the terms and conditions of the law. Nothing is attempted to be shown as to this, except the location of the New Madrid claims, which were afterwards declared void, and any obstacle to the complainant and to those under whom he claims, presented by these locations during the time they rested upon the land in question, could have been overcome by a complete compliance with all the requirements ef the act of Congress, although the naked entry might have been refused on such completely regular appli-

cation. And there is nothing shown as to these New Madrid claimants to indicate that they were not, in making the location, as honestly presenting what they supposed to be their own rights, as the complainant and to those under whom he claims were in presenting what they supposed to be theirs: and under such circumstances any relaxation of effort or short comings of the complainant cannot in equity be laid at the door of the defendants.

Nor has it been made to appear that the complainant and those under whom he claims, were prevented from a complete compliance with the act of Congress, by the agents of the government, as it does not appear that they either refused to permit him to do all needful acts, and make all necessary proofs, or that they dispensed with a strict compliance in any particular in which he failed. It is true that they refused his application to enter the land in question, and at that time it was legally subject to entry (because the supposed location that was then upon it, was absolutely void as was subsequently declared,) but this was no wrong to the complainant unless he can also show that, at that time, he and those under whom he claims, had in all things complied with the terms and conditions of the act of Congress, and thereby entitled himself to the entry, or that in the particulars in which he had fallen short, a strict performance in law or in fact had been dispensed with either by the neglect or refusal or affirmative action of the Register and Receiver within the discretion committed to them by the law of Congress And we find no such showing made out by the testimony.

Then, in the light of these several views, we feel clear that the complainant has failed to establish any equity which can entitle him to relief in the premises founded upon his alleged Cherokee pre-emption claim. And even had we held the certificate in question evidence of a complete virtual compliance with the terms and conditions of the act of Congress in matter of fact, and also in matter of law, in a corresponding regular adjudication in his favor by a tribunal of competent powers, neverthless the allegations in the bill are two narrow for the relief sought in alleging the judicial examination and determination to have been by the

Register only, instead of by the Register and Receiver, as provided by the act of Congress.

We have next to examine the complainant's alleged equity founded upon his pre-emption claim under the act of Congress of the 29th May, 1830.

In this, as in the other claim, the entry was refused although the application was within the time prescribed by the act of Congress, and the tract of land was at that time legally subject to entry under the law. But, does the complainant show his title to entry? Did he comply with the terms and conditions of the act of Congress under which he made the application for entry either in fact or in law?

He does not contend that there was strict compliance in fact on his part; but as to this, insists that inasmuch as other pre-emption claims were allowed by the same land officers on proofs even more defective than those exhibited by him, that his must therefore be taken and considered as sufficient. This mode of reasoning can avail him only in case there was an adjudication in his favor by the land officers. If there was none, it is incumbent on him to show that he did all, as far as he was able, that he was required to do under the law. His application was not for a pre-emption right in gross, but for a preference in the purchase of the particular tract of land in controversy founded upon his alleged compliance with the act of Congress, and the facts, as to occupancy and cultivation, a pre-requisite to the preference he claimed, had to be established to the satisfaction of the Register and Receiver. Had his application been allowed by these officers, no question would have been open as to the sufficiency of the proofs offered to establish these facts. Their decision in favor of the application would have been a judicial determination as to the sufficiency of the proof which could not have been collaterally enquired into. But the record shows distinctly that the application, as we have stated it, was rejected.

It is insisted, however, that, although this is true, there is nevertheless enough in the record to show that there was a judicial determination in favor of the sufficiency of the proof, and by

this means the complainant is saved from the necessity of now showing to the chancellor that he did, in fact, strictly comply with the law; or, in other words, enough in the record to authorize him, as a foundation for relief, to present a compliance in law, instead of a compliance in fact. We have not been able, however, to find this position sustained by the evidence, which, in every legal view that we can take of it, fails to show that the judicial action of the Register and Receiver was in fact in favor (and not against) the sufficiency of the testimony offered as to the occupancy and cultivation, while, at the same time, it was against the claim to the entry of the land in question, simply because that was then covered by the New Madrid claims, or because the plats were not then in the land office.

The fact that other pre-emption claims were allowed by the same officers upon testimony apparently more unsatisfactory than that which seems to have been adduced before these officers, in support of the complainant's claim, is by no means conclusive that his must have been adjudged sufficient, if passed upon at all. Because, for aught that appears to the contrary, there may have been, in all such cases, other corroborating oral testimony, or facts may have been within the knowledge of the officers, of which no memorial has been preserved. And in all such cases, where the claims were allowed, being thus sustained by a judicial sentence in their favor, the claimant ceased to be interested in the preservation of any memorial of such additional corroborating testimony, and a foundation is thus laid for a stronger presumption in favor of other testimony than in cases where the claims were rejected. Because in the latter class of cases, inasmuch as the claim was unsustained by any judicial action in its favor, if the claimant relied upon its justice, and desired to prosecute it further, his interest would impel him to take all needful steps to preserve to the fullest extent all such additional testimony.

We might, therefore, to some extent, well presume, upon this ground alone, that there was additional testimony in aid of that preserved in cases that were allowed on apparently unsatis-

factory testimony, and, in aid of this presumption so grounded, would be the legal presumption that these officers had done their duty and required sufficient testimony, although they had failed to preserve some portion of it. While, on the contrary, in rejected cases, neither of these grounds of presumption would exist in favor of such additional testimony, but both would be directly against its having ever been adduced. And the same would be true as to the evidences of any judicial determination in his favor. Because if any such determination was in legal effect in his favor, although in terms against him, he would have been directly interested in taking steps that would have resulted in some memorial that would have distinctly shown the true legal signification of such decision—steps which, in effect, might have performed the usual office of a bill of exceptions. And when no such action was taken on his part, or shown to have been attempted, there would seem to be no foundation for any presumption in his favor, not embraced within terms of the efficient action of the Register and Receiver.

The evidence in this record, bearing upon the question as to to what was the determination of the Register and Receiver upon the complainant's application to them to obtain a preference in the purchase of the tract of land in controversy, under the provisions of the act of Congress, tends, for the most part, to show not a qualified or special, but an unqualified or general rejection or allowance of the claim. Certainly the official papers produced in evidence bearing upon this point are almost wholly of this character, and beside these there is but little evidence direct or circumstantial any way otherwise. And we have seen that nothing can be presumed in favor of the complainant on this question, and consequently, that whatever may restrict or qualify this determination of the Register and Receiver, or establish it in any way different in substance from what its terms purport, must be shown on his part.

The word "Rejected," endorsed on the original papers over the signature of the Register and Receiver, in connexion with the mass of testimony taken by deposition, to show that it was a

custom almost invariable with the district land officers, to endorse the result of their adjudication in this manner, is direct evidence to show affirmatively an unqualified rejection by the officers at Batesville of the complainant's claim to a preference in the entry of the land in question, under the act of Congress, on which it was founded. And this, in the absence of all other testimony and of any provision of law, or regulation of the General Land Office, relating to the production or preservation of evidence of such adjudication, would in itself be absolutely conclusive against the claim for relief.

The return to the General Land Office, by the Register and Receiver at Batesville, after the expiration of the law, of a list purporting to exhibit all pre-emption claims allowed at that office during the life of the law, signed by both of those officers, and accompanied by a letter from them to the Commissioner of the General Land Office, advising him that it is "a list of all the claims granted under the act of Congress of the 29th of May, 1830," corroborates that of the endorsement upon the original papers, and is, in itself, strong negative testimony that the complainant's claim was never allowed by these officers. Rutherford's certificate, as is shown by his deposition, was based entirely upon Dickinson's abstract, sent to the Land Office at Little Rock, after the establishment of the new land district, and was made out from this, without any examination of the original papers in his office. And this abstract of Dickinson's, as appears by his deposition and by other facts and circumstances in proof, was based entirely upon a paper in the hand-writing of Pentecost, not signed by either of the Land Officers, but found in the Land Office at Batesville by Dickinson, when he entered upon his official duties there, and which purports to be "A list of pre-emption claims allowed at the Land Office at Batesville, from the 8th January, 1831, to the 30th June, 1831, under various acts of Congress." And Pentecost says that this list was made out by him while a clerk in the Land Office at Batesville, under and by the direction of Boswell, the then Register.

The complainant contends that this list, so made out by Pen-

tecost, and found in the Land Office by Dickinson, is better evidence of what was the decision of the Register and Receiver on the complainants claim than the endorsement upon the original papers, or the return made to the General Land Office. And he predicates this upon the position that the endorsement upon the original papers was a mere custom, while, under the circular of the 7th February, 1831, (*Inst. & Opin., p.* 448,) it was the official duty of the Register and Receiver to keep in the Land Office a "list or abstract" like this. And as, under the same circular, it was the official duty of these officers to "transmit a copy" of such "list or abstract" to the General Land Office after the 29th May, 1831, he contends that the return to the General Land Office before mentioned, made by these officers, was a mere copy, and, as such, is a lower grade of evidence than the list found in the office.

It will be found, however, by an examination of this circular, that the "abstract or list" directed to be kept in the Land Office was not a general list embracing all pre-emption claims allowed under every pre-emption law that had been passed by Congress, and whether the plats embracing such claims were in the office or not, but simply an "abstract or list" of claims allowed under the act of the 29th May, 1830, in cases where the plats were not in the office. And it will be found also, by an examination of the return to the General Land Office, that it is not a true copy of the list found in the Land Office at Batesville, and does not purport to be a copy of that, or any other paper, or record, or to have been made upon the data of any such, nor does it purport to embrace only cases that were allowed where the plats were not in the Land Office, but all cases allowed under the act of Congress entitled "An act to grant pre-emption rights to settlers on the public lands," which act, by the joint letter of the Register and Receiver, transmitting the report to the General Land Office, appears to be the act of the 29th May, 1830.

Both the list found in the Land Office and the return of the officers to the General Land Office, are more comprehensive than the circular, and the list is also more comprehensive than

the return in embracing all claims allowed under "various acts of Congress," while the return only embraces all claims allowed under the act of 29th May, 1830. Neither the list then found in the Land Office, nor the return sent to the General Land Office, would seem to be such papers as would have been probably executed under this circular in the regular course of official business. And if it were supposed that the officers intended the list to be a substantial compliance with the circular, (although more comprehensive,) and superadded the excess for their own personal convenience in offering data for other returns under other circulars or instructions from the General Land Office, still the return to the General Land Office would not harmonize with such a supposition, because it is more comprehensive than the circular as to claims to be returned, and also does not purport to be "a copy," nor is in fact a copy of the list in so far even as cases were concerned in which the plats were not in the office, if it be true that the plat for township number 1, N. of range 12 west, was not in the office when the complainant's case was allowed as contended by him, and it is expressly shown by Tully's deposition that the plat was in the office some twenty days before the date of the return.

This list, then, so found in the Land Office, cannot be said to present within itself any satisfactory evidence of the character assumed for it—any intrinsic evidence of its authenticity as evidence of the highest grade to establish what was the adjudication of the Register and Receiver on a pre-emption claim. So far from this, when it is remembered that it purports to embrace not only all cases allowed under the act of 1830, whether the plats embracing the lands claimed were in the Land Office or not, and also all such cases under various acts of Congress and is not authenticated by the signatures of the officers, or either of them, and that it is shown by the deposition of Pentecost to have been made out by him under the direction of the Register alone, and that it is in no way shown that it ever was recognized or approved by the Receiver, or was in any way, otherwise, their joint official act, and that it is expressly contradicted, as to what was the decision of the Register and Receiver on the complain-

ants's claim by other direct competent testimony, it sinks in the scale of testimony, at least as low as the place assigned it by Tully, in his first deposition, that is to say, to "a mere index to, or memorandum of, higher official testimony."

This return, then, to the General Land Office, was not a mere "copy," as contended by complainant's counsel, but an original official act of the Register and Receiver at Batesville, and although not provided for by the terms of the act of Congress, or directly embraced by any express general instructions from the Commissioner of the General Land Office, was nevertheless the joint official act of the General Land Officers at Batesville, over their signatures, and recognized as such in the General Land Office, where, from the endorsement upon it, it was received and filed accordingly, and the copy read in evidence was certified by the Commissioner of the General Land Office, under the seal of that office as taken from its files. Under similar laws of Congress, like acts of the Registers and Receivers of the District Land Offices have been, from time to time, recognized as official, and like papers when received from these offices have been regarded as official acts by the commissioner of the General Land Office. (See *Inst. & Opn.*, *p.* 395, letter dated May 10, 1826. *Ib.*, *p.* 397, 398, dated July 13, 1826. *Ib.*, *p.* 539, dated 9th December, 1818.) Such being the character of this paper, we are of the opinion that it was competent primary evidence of its purport and far superior in dignity to the general memoranda found in the land district at Batesville.

This return, however, does not purport to show what was the decision of the Register and Receiver at Batesville, upon the complainant's claim, but only to exhibit all pre-emption claims, granted by these officers, under the act of the 29th May, 1830, both in that class of cases, where the plats of survey were in, and where they were not in the land office. And, as the complainant's claim is not embraced among the cases reported, this return affords strong negative testimony that it was never allowed.

And thus, this return corroborates the direct testimony of its unqualified rejection found endorsed over the signatures of the

Register and Receiver, on the original proofs presented to those officers in support of the application, which we have already briefly alluded to, in connexion with the testimony taken by deposition, to show that such endorsement of the result of an adjudication (when the claim was rejected) was almost the universal custom of the district land officers. And there is no provision of the act of Congress, or regulation of the General Land Office or any other custom of the district land officers proven, under which any higher evidence of the rejection of a claim to a preemption can be had than the endorsement to that effect upon the proof offered signed by the two land officers, who made the decision. We think, therefore, that such an endorsement, so signed officially by the two land officers, is equally competent primary evidence of the rejection of a claim as the return so signed officially would be of the allowance of one. When a claim might be rejected, no further official act than to note its rejection, could be within the scope of the official duty of the Register and Receiver, unless some further action was affirmatively required by the applicant seeking the reversal of the decision. To report such a case to the General Land Office, unless at the instance of the applicant, who might seek the reversal of the decision, could be of no possible utility, nor could there in such case be any reason to do more than briefly note officially the rejection.

In case of the allowance of the claim, however, further duties would be incumbent on the Land Officers, the discharge of which would produce direct evidence of what had been their decision, even if not in any way noted at the time. And if there was no impediment to the immediate entry of the land claimed, and that was done at once, there would be no utility in either noting the allowance of the claim, or of making any return of its allowance otherwise than by a return of the entry.

So that the noting of the rejection, and that of an allowance of a claim, stand on somewhat different grounds as to utility and official duty, and in case there might be conflict between the noting of a rejection upon the original proofs, and a subsequent

return of allowance in the same case, the question as to which might be the better evidence of the decision of the land officers in such a case, might depend upon the particular circumstances of that particular case.

In the case before us, however, we have no such question to decide, because the endorsement of rejection upon the original papers, does not conflict, but harmonizes, with the return to the General Land Office made by the Register and Receiver, and they mutually support each other. This concurring testimony, unopposed as it is by any facts or circumstances in proof, in any material degree inconsistent with such a conclusion, establishes very clearly, as we think, the unqualified rejection of the complainant's claim.

Then, so far from its having been shown on the part of the complainant that there was a judicial determination by the Register and Receiver in favor of the sufficiency of the proofs as to occupancy and cultivation, the very reverse is settled in the establishment of the decision of these officers rejecting his claim: for this was the very question before them, on which their judicial discretion was to be exerted, and is necessarily included in the unqualified rejection of the claim.

And here we might well conclude, and hold that the complainant has wholly failed to establish equity that can entitle him to relief. Because it is not contended in his behalf that it has been shown that the proofs offered in support of his claim before the Register and Receiver were sufficient in point of law to establish the facts of occupancy and cultivation contemplated by the act of Congress; but that although not so, nevertheless, they were so received, considerd and adjudged by these officers: and that on this basis he must be regarded by the chancellor as having virtually, so far as he was able, done all in his power to comply with the law and was prevented from perfecting his title by unauthorized acts or omissions on the part of the government and her agents. And we have just seen that the very reverse of such a decision has been established by the testimony. Consequently, having shown no actual compliance with the law to the full ex-

tent of his ability, and no judgment of the Register and Receiver by which any defects in his proof might be cured, and no refusal of these officers to determine his case, and in general no neglect, refusal or impossibility of action on the part of the government or its agents responsive to what was required of him under the law, he has established no title to the land in controversy either at law or equity.

Under this state of the case, the effort on the part of the complainant to show, upon the basis of possibilities and probabilities, that the decision of the Register and Receiver was substantially and radically different from what its established terms purport, is not unlike an effort to show by like means that the judgment of a court of competent jurisdiction was the reverse of what it purports on is face. If in fact and in truth the proofs in this case were considered and adjudged by the Register and Receiver sufficient to establish the occupancy and cultivation contemplated by the act of Congress, and their rejection of the claim was really because the land in controversy was then covered by the New Madrid claims, or for any reason other than that the occupancy and cultivation was not satisfactorily shown, the complainant could have taken steps by which all this might have distinctly appeared on the files or records of the land office at Batesville, or of the General Land Office, either as parcel of the decision itself, or in a manner equally as authentic as the evidence which now shows the decision.

But having failed to show that he took such steps or was prevented on the part of the Government, every presumption in favor of the regular and rightful action of the Register and Receiver now stands in full force against him. And consequently every fact and circumstance relied upon on his part to show that the decision against him was only against his naked application to enter and pay for the land, and not against the sufficiency of his proofs in support of his alleged pre-emption right, is easily to be reconciled with the hypothesis that the decision against him was because of the insufficiency of these proofs.

If then the complainant could be permitted to assail this decis-

ion of the Register and Receiver against him—a decision of a legally competent although special tribunal—on any other ground than want of power in these officers or fraud in the defendants or those under whom they claim, touching the decision, nothing short of an affirmative showing that would override all presumptions in its favor, could avail him. And his case, as it appears in this record, is far short of that standard. And as there is no pretence of want of authority in the officers who made the decision, no showing that it was ever reversed or set aside, and no proof that it was procured by fraud in the defendants or those under whom they claim, no case has been made to authorize us to disregard it.

The complainant then having wholly failed to establish any title, legal or equitable, to the land in controversy, in virtue of either of his alleged claims, it is entirely unnecessary to examine and decide upon his charge of fraud against the defendant, in obtaining the patents to the land from the General Government, because, although this charge might be found true, no relief could be decreed to the complainant; he having shown no title, the fraud could not, therefore, injure him.

We therefore hold, upon the whole case, that the complainant is not entitled to any such relief as he has prayed in his bill, and that in the decree of the court below dismissing it, there is no error. That decree must therefore be affirmed.

THE STATE ET AL. VS. CURRAN.

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It is not inconsistent with the usages even of despotic governments for a subject to sue his sovereign in his own courts of justice, and this right in the subject was unqualified in the English Government, until the usurpation of the Feudal Kings; and was afterwards always allowed in a qualified form—by petition. Our Constitution affirmatively, and not by implication, directs that provision shall be made for suits against the State. It follows that a right of a citizen to sue a State is not derogatory to common right, or subversive of the true principles of the common law, but is in harmony with both, and it cannot be supposed that the people, in convention, in directing that the Legislature should provide in what courts, and in what manner, suits may be commenced against the State intended that these provisions should be any other than such as would advance this right in the citizen to apply to the courts of justice for the redress of grievances. Hence, the statutes authorizing suits against the State are to be liberally construed.

Under the provisions of *Chap.* 157, *Digest*, when so construed, the State may be sued as well in chancery as at law, and as well for property as money demands, and in this view every provision of the various statutes touching the subject will be found sensible, effective, and in harmony.

A law in force when a contract is made, cannot, by its legitimate operation, impair its obligation in the sense of the Constitution of the United States, for the reason that the existing laws are to be regarded as entering into, and forming a part of any contract or stipulation between the parties.

Where an act of incorporation is a grant of political power; where it creates a civil institution to be employed in the administration of Government, or where its whole funds belong to the public, the charter is completely within legislative control. Such corporations are created by the mere will of the Legislature, and are in no way the result of contract; while those through which the Legislature seeks to accomplish some public purpose, by the instrmentality of a second party, who is to advance some money, labor or property, are the direct result of contract. The one is within legislative control, while the other cannot be dissolved, under the provision of the Federal Constitution, otherwise than in pursuance of a power to do so reserved by the State, to be exercised upon the happening of some contingency, and is therefore one of the stipulations out of which the incorporation sprung.

This classification of corporations obviates the difficulty and disputation arising from the ordinary division of corporations into public and private.

The Bank of the State of Arkansas was of the class of corporations that are within the legislative control, and the Legislature possessed the power to repeal its

entire charter, on any of its provisions, when, in the exercise of constitutional discretion, the public interest might seem to require it.

Had the Legislature simply repealed the charter of the Bank previous to 11th January, 1843, when the common law as to the effect of the expiration of corporations, &c., was repealed and other provisions made, (*Digest, Ch.* 39, *Sec.* 16,) all its real estate would have reverted to the original grantor or his heirs, its personal property would have vested in the State, and the debts due to and from the bank would have been extinguished. In such case, the bill-holder would have had no remedy except that growing out of the 28th section of the charter, whereby the State contracted with the bill-holders that the bills should be receivable in payment of all debts due the State.

Where the Legislature possesses the power to repeal the charter of a corporation, and exercises it, the courts will not presume that such power was improperly or unconsciously exercised.

The Legislature possessing the power to repeal the charter of the Bank of the State, and the acts placing the bank in liquidation being but a partial exercise of that power, on the failure of the Bank, in the judgment of the Legislature to accomplish the objects of its creation, are all declared to be constitutional and valid acts.

The Legislature possessing the power to place the Bank in liquidation, husband its assets, and provide for the appropriation of them to the discharge of the liabilities of the Bank as it might deem just and expedient, the acts exempting the debtors of the Bank from the process of garnishment, making provision for the disposition of the bills of the Real Estate Bank on hand, and for the transfer of the Real Estate of the Bank to the State are valid acts, and a judgment creditor of the Brnk cannot, by Bill in chancery, subject such assets to the satisfaction of his demand, though his judgment be obtained on the bills of the Bank.

Appeal from the Chancery side of Pulaski Circuit Court.

THIS was a bill filed by James M. Curran, in the chancery side of Pulaski Circuit Court, against the Bank of the State of Arkansas, John M. Ross, Financial Receiver, and David W. Carroll, attorney of said Bank, the State of Arkansas, and Charles J. Krebbs, determined before the Hon. WM. H. FEILD, Chancellor, in February, 1850.

The bill alleged that, on the 2d November, 1836, by act of the General Assembly, the Bank of the State was incorporated, for banking purposes, with general powers of deposit, discount, and circulation, having all the privileges, franchises, and liabilities incident to such corporation, with a capital stock of one million

of dollars, to be raised by the sale of the bonds of said State, and also of all public funds belonging to said State to be therein deposited, said State becoming thereby a stockholder in said Bank to the amount so deposited; and it was further provided, in and by said act of incorporation, that said incorporation should consist of a Principal Bank, to be located at the city of Little Rock, and a branch thereof to be located at Fayetteville, another branch thereof at Batesville, and another branch thereof at Arkansas Post, each with power to issue bills and notes, to circulate as currency, and that the officers of said Bank should be managed and conducted by local boards of directors, to be elected by the General Assembly, and certain officers to be appointed by such boards, and by a general board composed of delegates from the principal Bank at Little Rock, and each of said Branches to hold its sessions at the principal Bank at Little Rock, having a general superintending and controling power over the business and management of said corporation. And it was in, and by said act further, and amongst other things, provided that the profits and dividends to be declared by said Bank, from time to time, should be added to the amounts deposited, as capital stock in said Bank by said State, and form a part of said capital; and that said Bank should at all times have on hand a sufficient amount of specie, or specie means, wherewith to pay and redeem all its outstanding circulation, and that the bills and notes of said Bank, issued for circulation, should be received in payment of all debts due to said State; and thereto the faith and credit of said State was, in and by the act aforesaid, in effect, pledged and guaranteed.

That said Bank went into operation in the year 1837, and the capital stock of said Bank, of one million of dollars, and the further sum of one hundred and forty-six thousand dollars, by subsequent act and authority of said General Assembly, was raised by the negotiation and sale of the bonds of said State, and the public funds of said State, derived from the Seminary and Common School, and Saline funds, proceeds of per centage derived from the sale of the public lands, and chiefly from the

surplus revenue of the United States, apportioned by the act of Congress to said State, amounting altogether to the sum of $350,753 00, were deposited in said Bank and made a part of the capital stock thereof, so that the capital stock of said Bank, actually realized and paid in, consisting wholly of specie, and specie means, amounted to the gross sum of one million four hundred and ninety-six thousand, seven hundred and fifty-three dollars and two cents.

That said Bank having gone into operation and issued bills and notes for circulation to a large amount, on the 7th day of November, 1839, by resolution of the general board thereof, definitely and finally suspended specie payments, and public notice of such suspension together with the alleged reasons therefor was, by order of said Bank, published in all the newspapers of this State, and thenceforward said Bank (with the exception of certain of her notes, comparatively trifling in amount, made payable at the Principal Bank aforesaid, and which were for a time redeemed at the counter thereof,) has ever and utterly and notoriously refused to pay or redeem in specie, any of her bills and notes issued to circulate as currency.

That on the 31st of January, 1843, said Bank continuing insolvent, and unable to meet and discharge its liabilities in specie, an act was passed by the General Assembly of said State to liquidate and settle the affairs of said Bank. At that time the assets of said Bank amounted to the sum of $1,832,120 45, consisting of bonds, bills, and notes due to, and discounted by her, and of notes of other Banks, specie on hand and Real Estate, and that more than four-fifths of such assets consisted in choses in action, and debts due to said Bank. At the same time the notes issued by said Bank in circulation, outstanding and unredeemed, amounted to the sum of $302,805, and her specie on hand to the sum of $90,301. And Orator avers that, at the same time, of the gross assets aforesaid of said Bank, the sum of $1,000,000 was good, available, and collectable. By the act last aforesaid, said Bank was deprived of all power to loan money, or to make any further issues of her bills, and notes for circula-

tion, the principal Bank, and each of said branches were placed in the hands of an Executive and Financial Receiver, and an Attorney to whom were turned over the assets thereof, and who were required to collect the debts due to said Bank, and to receive in payment of such debts, first, specie, or the notes of said Bank in circulation, and when the circulation was called in, then to receive in payment for such debts any of the bonds of said State, issued for capital stock of said Bank; and that (after reserving the sum of $2,000, in specie for expenses) said officers, were required specifically to apply all specie on hand, or that might thereafter be received, by paying the same as dividend pro rata, from time to time, to, and among the holders, of the notes of said Bank, until the circulation thereof should be wholly taken up, and then to distribute the specie remaining, pro rata, as dividend for the payment of interest in arrear, on the bonds of said State aforesaid, and after paying such interest, to report the residue of specie, if any, on hand to the next session of the General Assembly. By the same act, the corporate existence of said Bank, her power to contract, sue and be sued and so forth, was expressly reserved and retained to her, and it was thereby further enacted, that all bonds given by the State to said Bank, for moneys borrowed of her by the State, (and which orator avers amounted to the sum of at least $300,000) should be given up and cancelled, and the amount of the same, with the interest accrued thereon, should be a credit on the capital stock of said Bank, consisting of the surplus revenue, and other funds as aforesaid, put in by said State, and further enacted that no debtor of said Bank should be garnisheed on any debt, demand or judgment, owing by the Bank to any person or corporation.

At the same session by act passed over veto, on the 3d day of Feb., 1843, the officers of said Bank were required to set over to the credit of the State, the sum of $15,000 in specie, on account of the capital stock put in by the State, and which sum was thereby declared to be an especial appropriation to pay members of that General Assembly, when at the same time, all other officers and public servants were required, by existing laws or usage,

to receive at par in payment of their compensation and salaries, the depreciated notes of said Bank and branches.

That no pro rata dividends or payments in specie, ever were made or declared to or among the holders of the notes of said Bank, as contemplated by said act of liquidation, and before any such dividends were or could be declared or made, the General Assembly, on the 4th day of January, 1845, by act to amend the act of liquidation, authorized the officers of said Bank to compromise debts due to her, and take property in payment, &c., for any such debts, and required said officers to receive in payment of debts due said Bank, the bonds of the State for capital stock of the Bank, notwithstanding her outstanding bills and notes for circulation might not be taken up; and by act passed over veto, on the 10th day of January, 1845, the General Assembly, at one sweep, took from said Bank all her specie or par funds, and required that all specie or par funds then, or that might thereafter be on hand, should be immediately transferred to the State Treasury, and which were especially set apart and appropriated, *first* and *before* any of said par funds were paid out for any other purpose whatever, to pay the members of that General Assembly both their per diem and mileage, &c., and by said act all the current expenses of said State thereafter accruing, were required to be paid in Treasury Warrants or State Scrip; no notes of said Bank were to be paid out, except for salaries or indebtedness previously accrued; that nothing should be received in payment for taxes or revenue, but par funds or Treasury Warrants. Section 28 (being the one pledging the faith of the State that the notes issued by said Bank or branches, would be received in payment of dues to the State,) and so much of section 13, of the charter of said Bank, as provided that certain public funds accruing to the State, should be deposited in the Bank and form part of its capital, was repealed, and all such funds in said Bank were declared to be a deposit there, to the credit of the State, subject to be drawn by appropriations, &c., and section 40 of chapter 18, of the Revised Statutes, requiring the State Treasurer to keep his deposits in said Bank, was repealed, and the

Treasury required to be kept by the Treasurer, in one of the vaults of the banking house at Little Rock, and by the same act the sum of $16,000 (in State scirp) was appropriated to pay the salaries of the officers of said Bank, and judgments that were or might thereafter be obtained against said Bank.

By act approved December 23d, 1846, the Financial Receivers of said Bank were authorized to pay off all judgments against the Bank by transfering to such judgment creditors the notes of certain non-resident debtors of the Bank, provided the same be taken in payment without recourse, and provided such judgment creditor would convey to the State of Arkansas by deed in fee simple, all Real Estate or property of the Bank, caused to be sold by him under any such judgment.

By another act of said General Assembly, approved December 23d, 1846, the title to all Real Estate and property of every kind purchased by said Bank or taken in payment of debts due to her, was declared to vest in the State of Arkansas, and that the title for Real Estate so taken should be taken in the name of the State. And by another act, approved December 23d, 1846, the salaries of the officers of said Bank were required to be paid out of the assets of the Bank.

By act of said General Assembly, approved January 9th, 1849, said Branches of said Bank were called in and abolished, the officers thereof, except the attorneys, dispensed with, and all the assets of said Branches concentrated at said principal Bank at Little Rock, and placed under the control and management thereof for collection; and by the same act the officers of said Bank were also required to receive in payment of debts due to said Bank, the bonds of said State, issued for capital of the Real Estate Bank of the State of Arkansas, (another Banking institution heretofore chartered by said General Assembly, the bonds therefore amounting, principal and interest in arrear, to at least $2,000,000, were collaterally secured by mortgage of Real Estate, and which said last mentioned Bank, was, and is insolvent) and it was thereby further enacted, that in any suit instituted by said State Bank, she should not be ruled to give security for costs, but that

the State should be liable to pay costs rendered against the Bank.

That since the passage of said liquidation act of the 31st of January, 1843, whereby the State arbitrarily declared the bonds of the State given to said Bank for moneys borrowed of her by the State, to be cancelled, and undertook to make herself a privileged and preferred creditor of said Bank, said State has from time to time, under various pretexts, wrongfully and arbitrarily taken from said Bank, and appropriated the same to her own use divers other large sums of money, in specie, notes of said State Bank and branches, and notes of other banks, amounting to the further gross sum of at least $200,000.

Orator further represents, that, on and prior to the 3d day of May, 1849; being the owner and holder of sundry of the bills and notes of said Bank of the State of Arkansas, and its branches, duly issued for circulation pursuant to the charter thereof, prior to the year 1843, amounting to the sum of $9,355, consisting of bills of the denomination of not more than one hundred nor less than five dollars, he instituted ninety-four suits thereon, numbered from one to ninety-four, both inclusive against said Bank, before John C. Peay, Esq., one of the Justices of the Peace of said State, for Big Rock township, (wherein said principal Bank is situated,) in said county of Pulaski; having filed said bills and notes with said justice therefor: whereupon said justice issued process of summons in due form of law, in each of said suits, against said defendant, the Bank of the State of Arkansas, returnable before the said justice at his next monthly court, to be thereafter holden by him, at his office in the city of Little Rock, in said township, on the 12th day of May, 1849; which said several suits of summons came to the hands of the constable of said township, and were by him duly served, &c., when and where the said defendant, the Bank of the State of Arkansas, by her attorney in that behalf, appeared, and upon trial had in each of said several suits before the said justice, orator, by the consideration of the said justice, recovered against said Bank for his debt and damages together with his costs in each of said suits, amounting in the

aggregate to the sum of $9,355, for his debt, and $5,314 25 for his damages, less a remitter for the sum of $8, (being $5 of the debt and $3 of the damages,) entered by orator before the said justice, on the 23d day of May, 1849, in one of said suits being case No. 89. Orator further represents, that on the 19th day of May, 1849, he sued out and caused to be issued by the said justice, a writ of *fieri facias* execution, of, and upon each of said judgments running, &c., returnable, &c., and directed to the constable of said township, whereby *after* reciting the several and respective judgments aforesaid, the said constable was thereby commanded, &c., and which said several writs of execution afterwards on the same day and year last aforesaid, came duly to the hands of said constable, and were by him afterwards on the 23d day of May, 1849, returned and filed before said justice, with the return of said constable endorsed on each of said writs, that said defendant, the Bank of the State of Arkansas, had no goods or chattels whereof to levy the same. And on the 28th day of May, 1849, orator caused to be made out by the said justice, a duly certified transcript of each and all of the judgments aforesaid, and caused the same to be filed by the clerk of Pulaski Circuit Court in his office, who thereupon, on the same day last aforesaid, entered each of said several judgments, in the docket of said court for judgments and decrees, and noted thereon the time of filing said transcripts respectively. And on the same day and year last aforesaid, orator sued out and caused to be issued from the office of the clerk of said court, a writ of *fieri facias* execution of and upon each of said docketed judgments, duly issued and tested and signed by said clerk, and under the seal of said court, and bearing date the day and year last aforesaid, and returnable to the second day of the June term of said court in said year, running in the name of said State and directed to the sheriff of said county, whereby after reciting in each of said writs respectively, the recovery of the judgments aforesaid, the issuance and return of executions thereon, the filing of said transcript and docketings of said judgments as hereinbefore stated, the said sheriff was thereby commanded that of the goods and chattels, lands and

tenements of said defendant, the Bank of the State of Arkansas, he caused to be made the amount of debt, damgages and costs in each of said executions respectively specified, which said several writs of executions afterwards on the same day last aforesaid came duly to the hands of said sheriff to be executed, and were by him, afterwards, on the 5th day of June, 1849, returned and filed in the office of said clerk, with the return of said sheriff endorsed on each and all of said last mentioned writs of execution, that said defendant, the Bank of State of Arkansas, had no property, goods or chattels, lands or tenements in his county, whereof to satisfy the same or any part thereof.

That the costs in each of said judgments so adjudged to your orator, including the cost of docketing said judgments in the office of said clerk and of issuing and returning said executions from this court, amount to the sum of $5 99, and in the aggregate to the sum of $563 06. All of which matters and things respecting the recovery of said several judgments by orator, and the issuance and return of executions thereon, would more fully appear in and by the record thereof, remaining on the law side of said court, a duly certified a transcript whereof was exhibited, &c.

That in pursuance of the manifest policy and intention of said State, and of the combination between said State and said Bank, to hinder, delay and defraud the holders of the notes of said Bank, and among them orator, from having or recovering any payment or satisfaction of their just and lawful demands against said Bank, and to deprive such holders of all legal means and remedies for enforcing of said notes, and in effect to postpone them in favor of other creditors, when by law and usage, and the charter of said Bank, and the act of liquidation first above mentioned, the circulation of said Bank was, and ought to have been first paid and redeemed, said Bank has from time to time purchased or received in payment of debts due and owing to her, from various persons, a large amount of real estate, but has falsely and fraudulently caused the title thereto to be taken and conveyed and assured directly from said Bank debtors to and in the name of said State, in some instances the consideration therefor purport-

ing to have been by said State, and in other instances by said Bank, when, in truth, no part of such consideration was in any instance paid by said State or out of public funds, but on the contrary thereof was paid by said Bank, or out of her means and assets; and of such fraudulent purchases and conveyances which have come to the knowledge of orator, he here enumerates the following, namely:

On the 12th day of March, 1847, James Lawson, as assignee in trust for Ebenezer Walters, by his deed of that date conveyed to said State lots numbered five and six, in block numbered three, in the city of Little Rock, west of the Quapaw line, with their appurtenances, &c., in fee, for the consideration expressed of $2,000, received from said Bank, and said Walters by his deed of same date conveyed and assured to said State the same premises and estate expressed to be for the same consideration, being in fact a debt due by said Walters to said Bank, thereby cancelled and paid, and the 12th day of September, 1848, His Excellency, Thomas S. Drew, as Governor of said State, by his deed of that date, under the seal of the State, conveyed and assured to one Adelaid Krebbs, the said lots numbered 5 and 6, in block 3, in said city of Little Rock, for the consideration of $2,000, paid by said grantee, but to whom the same was so paid is not therein stated, said deed purporting to be executed pursuant to act of Assembly entitled "an act to direct the officers of the Bank" of the State of Arkansas, to take title to "Real Estate, in the name of the State of Arkansas." And on the 13th of day of September, 1848, the said defendant, Charles J. Krebbs, and said Adelaide, his wife, by their deed of that date, sold and conveyed said lots 5 and 6, in block 3; to one Charles P. Bertrand, by way of mortgage to indemnify said Bertrand, as to the security of said defendant, Charles J. Krebbs, for the sum of $900, the same being in part for the consideration of the sale and conveyance, as above stated from said State to said Adelaide Krebbs, and for which amount said Charles J. Krebbs, as principal and said Charles P. Bertrand, as his security, had executed their two notes under date of the 13th September, 1848, for the sum of $450, each payable to said

Bank of the State of Arkansas, in one and two years from the date thereof. And orator avers that in fact, said sale of said lots was made by said Bank to said Charles J. Krebbs, and the consideration therefor wholly received from him by said Bank, and that so much of said consideration being the sum of $900, as above stated, remains wholly due and unpaid, and that the terms of the contract between said Bank and said defendant, Charles J. Krebbs, is due and payable in specie. And orator submits that either said lots and appurtenances or the amount of the unpaid purchase money due therefor as aforesaid, in lien thereof, ought, in equity, to be subjected to the satisfaction of the judgments against said Bank in favor of orator, as he should elect.

On the 4th day of December, 1847, Albert Pike, and Mary, his wife, by their deed of that date, conveyed to the State of Arkansas, lots numbered 1, 2, 3, 10, 11 and 12, in block numbered 7, in said city of Little Rock, west of the Quapaw line, for the consideration of $3,500, paid by said Bank therefor.

On the 2nd day of March, 1848, John Wassell, and Margaret, his wife, and David J. Baldwin, and Sarah Ann, his wife, by their deed of that date, conveyed to said State the north-west quarter of section 10, the south-west quarter of section 10, the south-west quarter of section 3, the east-half of the north-east quarter of section 9, the east-half of the south-east quarter of section 9, and the east-half of the south-east quarter of section 4, all in township 4 north, of range 9 west, containing 720 acres, with the appurtenances, situated in Prairie county, for the consideration of $5,532, therein expressed to have been paid to them by said State; and on the 8th day of March, 1848, said Wassell and wife, by their deed, made a further conveyance and assurance to said State, of, and for the same lands and premises last mentioned, expressed to be for a like amount of consideration, received in Arkansas bank notes, and orator avers, that in fact both of said last mentioned deeds were upon the same identical consideration.

On the 12th day of June, 1848, William G. Thornton, by his deed of that date, conveyed to said State, the west-half of lots

numbered 1, 2 and 3, in block numbered 81, in said city of Little Rock, west of Quapaw line, and improvements thereon and appurtenances, including the office and banking-house of said Principal Bank, for the consideration of $1,416, as therein expressed to have been paid him by E. N. Conway, as Auditor of Public Accounts, for said State, said deed only purporting to convey all the title acquired by said William G. Thornton, in or to said banking-house and lots, by purchase thereof made by him, under execution on a judgment in favor of the United States, against said Bank, rendered in the Circuit Court of the United States for the Arkansas District, and also under execution at sheriff's sale, on a judgment in favor of Alfred Wallace, against said Bank, rendered in this Honorable Court on the law side thereof. And orator, in fact says, that said real estate and premises last mentioned were sold and stricken off by said marshal at his sale aforesaid, to said William G. Thornton, on the 10th day of April, 1848, at, and for the sum of $750, bid therefor by said Thornton, and were accordingly conveyed in due form of law to him by said marshal, and that the same premises were sold and stricken off by said sheriff, at his sale aforesaid to said William G. Thornton an the 17th day of April, 1848, at and for the sum of $655, bid therefor by said William G. Thornton, and were accordingly conveyed to him in due form of law by said sheriff. That said William G. Thornton is the brother of Abner E. Thornton, Esq., who before said marshal's sale was and thence until and after said conveyance last mentioned to said State, continued to be the Financial Receiver of said Bank; that the amounts paid by said William G. Thornton upon and his bid at said marshal's and sheriff's sale, for the purchase of said real estate and premises, were advanced to him for that purpose by said Receiver, out of the moneys of said Bank, or loaned to him by said Receiver, who reimbursed himself therefor out of the assetts of said Bank so that said property was bid in for, and with the money of said Bank; that no consideration whatever was paid by said State or any officer thereof for her to said William G. Thornton, for his conveyance aforesaid to said State, and that no consideration

therefor was received by said William G. Thornton, other than the moneys of said Bank.

On the 16th day of October, 1848, Peter T. Crutchfield and Elizabeth Ann, his wife, by their deed of that date, conveyed to said State the south fractional half of the north-west fractional quarter, north of Arkansas river, and the south residuary half of the north-east quarter, north of Arkansas river, both in fractional section 36, in township 1, north of range 11 west, the west-half of section 26, in township 3, south of range 10 west, and lots numbered 7, 8 and 9, in block numbered 40, in said city of Little Rock, being the east-half of the half block on which said Crutchfield resided for the consideration of $6,666 66 expressed to be in payment of so much of the indebtedness of said Crutchfied to the Bank of the State of Arkansas, and for which amount he was thereby declared to have credit, &c. And on the 21st day of April, 1848, the said State, by the deed of His Excellency, the Governor thereof, of that date, under the seal of State, after reciting and setting forth a certificate from John M. Ross, Esq., as Financial Receiver of the Bank of the State of Arkansas, to the effect that said Peter T. Crutchfield had paid back to said Bank the sum of $2,000, at which price said Bank had received from him said lots 7, 8 and 9, in block 40, in said city, in payment of his indebtedness to her, &c., conveyed said lots to Francis Juliet Crutchfied for the consideration of the said sum of $2,000 such deed purporting to be so made by the request of the said Peter T., and on the same 21st day of April, 1849, said Peter T. Crutchfield and wife, by their deed of that date, conveyed to the State of Arkansas, the south-west quarter of section 27, the west-half of the north-west quarter of section 27, the south-east quarter of section 28, the south-half of the north-east quarter of section 28, and the west fractional half of the north-west fractional quarter of fractional section 34, all in township one, north of range 14 west, situate in Pulaski county, containing altogether, 525 acres of land, and expressed for the consideration of $3,400, paid to them by the officers of said Bank for said State.

On the 4th day of August, A. D. 1848, Luther Chase and

Rosina, his wife, by their deed of that date, conveyed to the State of Arkansas, lots numbered 1, 2, 3, 4, 5, 6, 7, 8 and 9, in block numbered 59, in said city of Little Rock, for the consideration expressed of $1,800, purporting to be paid by said grantee.

On the 2d day of November, 1848, said Albert Pike and wife, by their deed of that date, conveyed to said State lots numbered 10, 11, and 12, in block numbered 101, in said city of Little Rock, west of Quapaw Line, for the consideration expressed of $3,700.

On the 10th day of February, 1849, Elias N. Conway, by his deed of that date, conveyed to said State lots numbered 1, 2, and 3, in fractional block 4, in Rectortown, adjoining said city of Little Rock, for the consideration expressed of $300, Arkansas Bank paper.

On the 13th day of March, 1849, Lorenzo Gibson, and Louisa C., his wife, and James Lawson and Absolom Fowler, by their deed of that date, conveyed to said State the south-west quarter of section 33, and the north-east quarter of the south-east quarter of section 32, in township 2 north of range 12 west, containing 200 acres, expressed to be for and in consideration that said Bank of the State of Arkansas, had agreed to, and did thereby, release a certain judgment in her favor rendered in this Court on the 12th day of November, 1846, against Gibson, Lawson and Fowler, for $4,184, with interest thereon, at 10 per cent. per annum, from the 8th day of December, 1843, until paid.

On the 5th day of April, 1849, Samuel D. Blackburn, and Elizabeth K., his wife, by their deed of that date, conveyed to said State, the east half of the north-east quarter containing 80 acres, the north-east fractional quarter south of Arkansas river, containing 87 75-100 acres, the north-east quarter of the south-east quarter containing 40 acres, and the north half of the south-east quarter of the south quarter, containing 20 acres, all in section 3, in township 3 north, of range 14 west, with improvements, &c., expressed to be for the consideration that the Bank of the State of Arkansas had agreed to, and did, release, said Samuel D., from a debt he owed to said Bank, amounting to the sum of $2,100.

On the 11th day of June, 1846, Thomas S. James, by his deed of that date, conveyed to said State, the north-east quarter and the east-half of the north-west quarter of section 27, in township 6 north, of range 9 west, containing 240 acres, expressed to be in consideration of $870 Arkansas money.

Orator further represents that said Bank of the State of Arkansas has purchased, and taken in payment of debts due to her from various persons, other real estate, as he is informed and believes, to a large amount, and fraudulently caused the same to be conveyed to said State, but the description of the lands so conveyed, and the names of the persons conveying the same, are unknown to orator, and cannot be ascertained without the aid of a discovery from said Bank.

And he further represents that said defendant, the Bank of the State of Arkansas, has in her possession, or in the hands, possession and custody for said Bank and belonging to her, of her officer, John M. Ross, the Financial Receiver, and David W. Carroll, the attorney of said Bank, or one of them, a large amount of the bills and notes for circulation issued by said Real Estate Bank of the State of Arkansas, but the amount and identity of such bills and notes are unknown to orator, and cannot be ascertained without a discovery of the same and the production thereof, by said defendant, the Bank of the State of Arkansas, or her officers aforesaid.

And he further represents that said defendant, the Bank of the State of Arkansas, has due and owing to her, from various persons, a large amount of debts which as orator is advised are subject to be paid in —— equal annual instalments from and after the passage of said act of liquidation first mentioned, and payable in the bills and notes of either of said Banks, or with any of the Bonds of State, issued for capital stock of either of said Banks, and therefore of an uncertain and contingent value, but the names of the persons owing such debts, the several amounts thereof, due by such persons respectively, how evidenced, and when due, or to become due and payable, are unknown to orator, nor can the same be ascertained without the aid of a discovery

from said defendant, the Bank of the State of Arkansas, or her officers aforesaid.

Orator further represents, that the judgments aforesaid in his favor against said defendant, the Bank of the State of Arkansas, remain wholly unsatisfied, and said defendants, although often requested thereto by orator, have refused, and do utterly neglect and refuse to pay the same in whole or in part, and that by means of the fraudulent acts and doings of said defendant, the Bank of the State of Arkansas, and said State, orator is deprived of all legal remedy to enforce the satisfaction of the same.

Prayer: that said defendants may set forth and discover, what Real Estate or other property, with a full and accurate description thereof, other than that hereinbefore enumerated and described, has been conveyed to said State, by any debtor of said Bank of the State of Arkansas, or in payment of debts due said Bank, and that they may also set forth and discover what amount of the bills and notes issued by said Real Estate Bank is now in possession or custody of said Bank of the State of Arkansas, or of either of her officers aforesaid, and belonging to her, and that may be produced and brought into court, subject to its decree in the premises—and that they may also set forth and discover, what debts, if any, are due and owing by any person or persons to said Bank of the State of Arkansas, and the several and respective amounts thereof, by whom the same are owing, how evidenced, and when due or to become due, and that by decree of this honorable court the said Charles J. Krebbs may be required to pay orator in satisfaction of so much of orator's judgments aforesaid against said Bank, the amounts so as aforesaid due or to become due from said Charles J. Krebbs to said Bank, in specie—and that all the real estate aforesaid, and all such as may be discovered as aforesaid, may be sold by a commissioner to be appointed for that purpose, as the property of said Bank, free and discharged of any false and pretended right or claim thereto on the part of said State, to satisfy orator's said judgments, and subjected to the payment thereof, and that all such bills and notes issued by said Real Estate, and belonging

to said State Bank, that may be so discovered and produced may also be subjected and condemned to the payment of orator's said judgments, and by such commissioner sold to satisfy the same—and that by such decree, if it should become necessary for the satisfaction of orator's said judgments, such persons, so ascertained and discovered to be indebted to said Bank of the State of Arkansas, (and who, when so discovered and ascertained, orator will make defendants hereto, with apt and proper words to charge in the premises to that end,) may be required to pay orator in further satisfaction and discharge of judgments, the amount or value thereof that may be due or to become due by them respectively, to the said Bank of the State of Arkansas; and that orator may have such other and further relief in the premises as the nature of his case may require.

The Bank demurred to the bill for want of equity.

Defendant Krebbs demurred to the bill on the grounds that it sought to compel him to pay money to the complainant by process similar to garnishment, when, on the face of the bill, it appeared that, by law, the debtors of the Bank could not be garnisheed.

The State, by the Attorney General, also demurred to the bill for want of equity.

The court overruled the demurrers, and defendants rested; whereupon a decree was rendered that defendant Krebbs pay to complainant the amount of his indebtedness to the Bank, when due according to the terms of his contract, &c.

That unless the Bank paid to complainant by a given day the residue of his debt, certain lots and lands described in the bill, as the property of the Bank, transferred to the State under the act referred to in the bill, be sold to satisfy the same, &c., by a commissioner appointed for the purpose.

That should the proceeds of the sale of said lots and lands be insufficient to satisfy the demand of complainant, the Financial Receiver of the Bank be required to turn over to the commissioner a sufficient amount of the notes of the Real Estate

Bank on hand to satisfy the same, and that they be sold for that purpose. Defendants appealed.

F. W. & P. TRAPNALL, for the State, contend:

1st. That the State is not suable of common right. 3 *Black.* 255–6. "No action will lie against the sovereign," and can only be sued in the mode pointed out by law. *United States v. Clarke*, 8 *Peters* 444. A sovereign independent State is not suable except by its own consent. Per C. J. MARSHALL, *Cohens v. State of Va.*, 6 *Wheaton* 264. *United States v. Burney*, 3 *Hall's Law J.* 128. *United States v. Wells*, 2 *Wash.* 161. *Ex parte Madraggo*, 7 *Peters* 627. *Horner v. De Young*, 1 *Texas Rep.* 769. In the State of Mississippi, the State, by law, is suable by bill in chancery only, and cannot be sued in an action at law. 10 *Smedes & Marshall* 169. In *Divine v. Harise*, it is adjudged that the State cannot be sued, and although the constitution provides that "the General Assembly shall direct by law in what manner and in what courts suits may be brought against the commonwealth, yet as that body never complied with the direction, the only mode of relief was by petition to the Legislature. OWSLEY, Judge, in a dissenting opinion admitted that the State could not be sued.

2d. The State had an unquestionable right under the censtitution to have the lands taken by the Bank conveyed to her. It was necessary to save them from a sacrifice ruinous to the country, and which would avail nothing to the creditors of the Bank, and this was not a fraud on them.

S. H. HEMPSTEAD, for the Bank.

WATKINS & CURRAN, contra.

Mr. Justice SCOTT, delivered the opinion of the court.

The first question to be determined is that presented on the part of the State of Arkansas, who, by her counsel contends that no suit can be brought against the State, without her consent, and then only in the mode indicated by that consent, and insists

that, by the law arising upon the facts in this record, no such consent has been given as to make her amenable in this case. And this question is to be solved by an exposition of our constitutional and statutory provisions touching the point in the light thrown upon them by the principles of the common law and the regulations of the English statutes on this subject, or, in other words, by the general principles of public or municipal laws and the known usage of other enligetened nations.

And it may be safely assumed that it was never contemplated by the people when they instituted the government under which we live that the rights of property should be less secure under our institutions, than under those of other enlightened and refined nations that had before arisen in the world. Because, it was the great purpose of all our regulations to elevate individual man by securing for him all his more important rights that he might have a staid foundation and a free scope for the pursuit of happiness.

That the subject should be allowed to implead the sovereign in his own tribunals and have justice meted out to him according to law, has been, by no means, unknown in governments far less popular and free than our own. Even the more despotic governments have not entirely denied this priviledge. To say nothing of the governments of the ancient world whose history affords examples in point, those of Spain, France, Prussia and England have almost always, in some form or other, allowed of this right in the subject, and in some instances, have afforded him imperative process for its vindication. Indeed the principle from which it spings has been, in theory at least, openly avowed by most, if not all the governments as existing in their roots. In the coronation ceremony of the King of Arragon, not only was it avowed in the language used when the crown was bestowed, but also by interposing between the person of the bestower and the King elect, an impersonation of law, thereby more emphatically to declare that the law was greater than the King, and was to remain between his subject and himself. Nor was this altogether in effect but an idle phantasm in the constitution of the Spanish

monarchy, as is shown by the historical fact that after Don Diego, the son of Columbus, had wasted two years in fruitless solicitations at the court of Spain for the rights in the new world that had descended to him from his father, he resorted to the council of Indian affairs, and there obtained a legal sentence against Ferdinand. And thust by the integrity of that tribunal was placed in the enjoyment of rights that had been denied him by an unjust monarch.

And it was the boast of the great Frederick of Prussia, who disdained to avail himself of any of the privileges of sovereignty when they conflicted with any of the rights of property of his subjects, that "in the estimation of justice all men are equal, whether the Prince complain of the peasant, or the peasant complain of the Prince."

And such was the law of the Saxon Kings, and up to the time of Edward I. of England. And the process by which these rights of the subject were conferred was not then precatory but mandatory and imperative, "command Henry, King of England." Nor is it known at what precise period the law of England was changed: it is known, however, that for several centuries last passed, the process has been changed to petition of right, that although the process has been changed for the enforcement of these rights, the rights themselves have not been otherwise any the less recognized.

Since the change of the law in this respect the subject, when a plaintiff, cannot proceed against the crown either for property or money, otherwise than by petition. But not so, however, when the crown enters the courts as a defendant in a suit instituted by itself as plaintiff. In that case, the crown disrobes itself of its privileges and comes down to the equality of the subject, and henceforward in the litigation of the rights touching that subject matter the subject has all the rights against the crown that under like circumstances he would have in the courts against another subject, his peer. And this will appear not only by the remarks of Lord SOMERS, in the Banker's case, (1 *Freeman*, 331. 5 *Mod.* 29. *Skinn.* 601,) when he instances the case of a title found for

the King by office, and the subject comes into the proceedings to traverse the King's title and show his own right to the thing, but by the other cases he cites. And is also the foundation of the Judge of the High Court of Admiralty in England in a case cited from *Cal. Jur.* 68, that, "In any case where the crown is a party it is to be observed that the crown can no more withhold evidence of documents in its possession than a private person. If the court thinks proper to order the production of any public instrument that order must be obeyed. It wants no insignia of an authority derived from the crown.

And doubtless upon the same foundation in a proper case, an injunction might issue from one of our courts against an unconscionable judgment obtained by the State against a citizen even in case the laws provided no means for making the State a defendant in any case. But although this might be so, and in such a case a bill in chancery, of the class of bills not original, would be the rightful remedy, this would lay no just foundation upon which the citizen could claim a right to every remedy against the State which could be achieved by all others of that class of bills, and thus include cases of wrong where the State had not by appearing in the courts as plaintiff, submitted to the jurisdiction. as seems to be contended for in argument: Because such a conclusion would be too broad for the premises, and consequently its greater part would have no logical connexion with that foundation.

Nor could the subject, when a plaintiff in a suit against the crown proceed, even by petition of right any further than the petition itself, until there had been first an act on the part of the crown, which, as an act on its part as defendant, was precisely equivalent to that which it does as plaintiff when it goes into the court as such; which act was an endorsement on the part of the King, "Let right be done to the party;" upon which being done, unless the Attorney General confessed the suggestion contained in the petition, and the relief was thereupon awarded, a commission was issued to the proper tribunal to inquire into its truth, where the King's Attorney pleads in bar,

and the merits were determined upon issues of fact or demurrer in every respect as between subject and subject.

This is all laid down in the old books, and is collected by the learning and industry of the several judges who deliver opinions *seriatim* in the case of *Chisholm's ex'r v. The State of Georgia*, (2 *Dallas R.* 419,) from which we learn also that the Petition of Right not only lay for every sort of estate in lands, but for chattels real and personal, and for rights growing out of civil injuries and those founded in contract express or implied. And that after the statute 8 Edward I, which so directed, all such petitions as touched the seal, came to the king through the hands of the chancellor; those which touched the exchequer, through the exchequer, and those which touched the justices or the laws of the land, through the hands of the justices, and all others through some chief minister.

But although there was so much uniformity in the mode of presentation, there was some contrariety as to the endorsement made upon them on the part of the crown. And this contrariety seems to have determined the destination of the petition so far as the tribunal was concerned, that was to be commissioned to dispense justice touching its subject matter. The usual endorsement, however, was in the general terms we have mentioned, and in all such cases the commission went to the chancellor. But if the endorsement was special as to a particular tribunal, or otherwise, the commission corresponded. This contrariety arose in some cases from the prayer of the petition itself, as if it was special that the command should be sent to the justices to proceed to examination, and award the justice due, the endorsement would be made accordingly, and then the justices might proceed without even any commission, the petition and the answer endorsed upon it giving them sufficient jurisdiction. And Lord Somers remarks, that, after thorough examination, he had been unable to find even a single case where the general endorsement had been made in any case belonging to the revenue, the usual endorsement in such case having been to the treasurer and Barons, commanding them to do justice; sometimes, however, a

writ was issued from the chancery, directing the payment of the money immediately, without taking notice of the Barons. Thus it appears that an endorsement on the part of the crown was necessary in every case, and that it served the double purpose of signifying a submission to the jurisdiction of some court, and to point out the particular tribunal; the remedy by petition, being as remarked by Blackstone, "matter of grace and not matter of compulsion," it could not proceed beyond the petition without a gracious dispensation on the part of the crown.

The extent of this remedy, as we have seen, seems to have been thus received as law until the time of Lord Mansfield, who, in the case of *Macbeath v. Haldeman*, (1 *Durn. & East* 172,) in support of the doubt suggested in that case, whether the petition would then lay for a money demand touching the public supplies, distinguished such cases concerning the current expenses and public supplies of government from the great mass of other cases where the subjects might have rights against the crown, upon the ground that, since the revolution of 1688, the "supplies had been always appropriated by parliament to particular purposes, and now whoever advanced money for public service, trusts to the faith of parliament." He did not, however, determine the doubt suggested, because, as he said, it was not necessary in the determination of the case before him. But he gave color to its validity not only by these remarks but by the further observation that, in such cases the proceedings would probably produce no effect," because "if there were a recovery against the crown, application must be made to parliament, and it would come under the head of supplies for the year."

Such then was the state of the law at the time of our separation from the mother country. And upon this foundation and the still deeper one that "the King is above the laws," which has been of the essence of the British constitution ever since the time when feudal institutions not only usurped all property in the land, but also the entire administration of justice, is based our American notion that a State cannot be sued by one of its own cisizens without the consent of the Government ex-

pressed in a constitutional form. A notion which might have been plausibly challenged, if the question was an open one in the courts of this country, as a sickly exotic in American soil, where government is not prescribed to the people by a superior power, but is merely the organ of their own sovereignty and the creation of laws enacted by themselves, and which derive all their obligatory force from the mutual consent of those who are to render them obedience. Because in the absence of any affirmative law to create exemption from liability, and as between a citizen who created a State government and that government, on a question relating to any individual right intended to be secured to that citizen by the institution of that government, there could be no more reason for refusing the right according to the established forms of law, than there could be for refusing the same right against another corporation that was also created by the people, not by themselves in person, but by the exertion of the organ of their sovereignty, unless it could be shown that they had first delegated certain powers, and then surrendered to the government thus created all their other powers, which is directly in the face of the Bill of Rights. Because, otherwise, in a government merely of laws, and deriving all its authority from law, there could not be any power or capacity that was above and exempt from law. Such power ought to be inactive in the people, to be exerted according to the forms of the constitution, when deemed proper for a change of the laws; and such capacity might be created for the government by an affirmative exertion of those powers, but the government could not claim it as an inherent birth-right, otherwise than the feudal Kings did, by usurpation.

But the law is otherwise settled in all the courts of this country, and we shall so hold it, especially as it seems to have been so taken and accepted by the framers of our constitution, in making the provision that our Legislature should direct by law in what courts and in what manner suits may be commenced against the State. (*Const. of Ark.*, *Dig.*, *p.* 48, *sec.* 22.) In pursuance of this provision of the constitution, several statutes, more or less

touching this subject, were enacted by the legislature at their session of 1837-8, all of which, although approved on different days, took effect on the 20th March, 1839, and are to be construed together, as if passed on the same day, unless some of their provisions are repugnant to each other, and in that case the later is to repeal the former provision. (*Dig.*, *p.* 960, *sec.* 6.)

Upon examination, we are unable to perceive any conflict that amounts to repugnance, and therefore the provisions of all can stand and have effect. The provision, (*Dig.*, *p.* 961, *sec.* 1) that "All actions against the State shall be brought in the Circuit Court of the county in which the seat of government is situated," is easily reconcilable with that making it the duty of "each attorney for the State," to "defend all suits brought against the State, or any county in his circuit," (*Dig.*, *p.* 191, *sec.* 2,) by the provisions of the revenue laws touching actions "deemed local at common law," (*Dig.*, *p.* 796, *sec.* 7,) and also by some of the provisions of the escheat law, (*Dig.* 482, *sec.* 25, 26.) Beyond these apparent conflicts, we have observed no want of harmony in the various provisions of the several statutes touching this subject in chapters 20, 21, 41, 64, 126, and 127. That the legislature designed by the various provisions of these enactments, and by others touching the law of costs, to perform the duty directed by the provision of the constitution in question, is to be gathered no less from the subject matter of these provisions, than by the language used.

It is insisted, however, that, in ascertaining what the legislature did provide in this connection, a strict construction should prevail, and that nothing should be intended in favor of the citizen's right to sue the State that is not within the express and explicit letter of the statute. No authority is produced for this except a case decided by the Supreme Court of Texas, (1 *Texas R.*, *p.* 769,) where the court remarks "that no State can be sued in her own courts without her consent, and then only in the manner indicated by that consent;" but no authority is cited or reason given, nor does it appear that the remark was made in reference to any question of construction, but simply to assert a gen-

eral doctrine of the law, which would certainly be true if consent was given and a "manner" of proceeding fixed, and all others excluded. But upon a question whether more than one manner was provided, it could have no application, except by asserting, by implication, a rule of strict construction at the same time that it concedes the right of the government to fix more "manners" of proceeding than one.

Nor has any good reason been elsewhere assigned, so far as our researches have extended, why a rule of strict construction should govern a question like this. We have seen that it is not inconsistent with the usages even of despotic governments for a subject to sue his sovereign in his own court of justice, and that this right in the subject was unqualified in the English government until the usurpation of the feudal Kings, and was afterwards always allowed in a qualified form. And that by our constitution it is affirmatively directed to be provided for by legislative enactment, and not silently transferred within the sphere of their discretion like many other matters without any notice. And it is known, as we have elsewhere said, (*Carnall v. Crawford, Co.* 6 *Eng*[illegible]d 621,) that it was one of the objects of Magna Cha[illegible]e the right of Englishmen to apply to the courts of just[illegible] the redress of grievances upon the footing of fundamental absolute rights, and this has certainly never been lost sight of in American institutions, but always kept plainly in view.

The right of a citizen to sue a State, then is not derogatory to common right, or subversive of the true principles of the common law, but is clearly in harmony with both, and it cannot be supposed that the people, in convention, in directing that the Legislature should provide in what courts and in what manner suits may be commenced against the State, intended that these provisions should be any other than such as would advance this right in the citizen to "apply to the courts of justice for the redress of grievances." The spirit of the law then would rather demand a liberal than a strict construction. At any rate, we can perceive no valid reason, either intrinsic or extrinsic, why we should inter-

pret these acts of the Legislature as we would a criminal statute that had created a new crime, or misdemeanor, or a civil one that had taken from a citizen a common law right. With these observations, we now proceed to the construction.

If we restrict the right of the citizen to sue the State, to what are technically actions at law and exclude chancery proceedings, and then restrict these actions at law, still further, to the recovery of money demands, excluding the recovery of property, and then further restrict these particular actions to judgment merely, these various incongruities will appear in the law both intrinsic and extrinsic.

1. As to phraseology—"suits" is the word used in the constitution, and that word is defined in the Mirror to be "the lawful demand of one's right"—a definition that is amply broad to include every proceeding instituted in a court of law or chancery. The title of chapter 157 of the statute is, "suits by and against the State." In the third section of the same act are the words "all suits against the State." And in the second section of chapter 20, it is made the duty of the respective prosecuting attorneys to "defend all suits brought against the State." T[illegible]suit," then, wherever it occurs, would have to be narro[illegible]ean-ing to actions at law.

2. As to proceeding no further than to judgment. The same section (*Dig.*, *p.* 962, *sec.* 5) that would restrict proceedings against the State to no progress beyond a final judgment, would seem to place the same restriction upon proceedings in favor of the State. The words of the act are "all suits by or against the State," &c. Besides the provisions of the next section, which directs the Auditor to transmit "to the General Assembly a copy of such judgment and the proceedings thereon," could have no effect so far as proceedings thereon are concerned, because that would be the end of the proceedings. And the act (*Dig.*, 193, *sec.* 4) making it the duty of the clerk of the Pulaski Circuit Court to keep a judgment docket for judgments by and against the State, cannot supply this defect even if that could be regarded as a proceed-

ing on the judgment, because that was passed in the year 1843.

3. As to the restricting the proceedings to such demands only as would be recoverable by an action at law:

Even if it could be supposed that the convention and the Legislature had no eye to the security of the right of the citizen, and had only regard to the motive which seems to have induced the passage of the statute 8 *Edward* I, on the same subject, as disclosed by its preamble, to wit: "whereas the business of Parliament is interrupted by a multitude of petitions which might be redressed by the chancellor and the justices," that motive itself would seem to have been sufficient to have prevented a discrimination such as the supposed one: for surely there would be in general less interruption to legislation by the examination of the grounds of a claim recoverable at law than one founded upon accident or mistake or other subject of equitable cognizance. And when the design to secure justice to the citizen is admitted as a concurrent motive, the improbability of any such designed discrimination is greatly enhanced: for surely the right of the citizen is as worthy of regard in case of equitable as in a case of legal cognizance.

4. As to restricting the proceedings to money demands at least, excluding demands for property: This, more than either restriction, has less of reason for its basis, whether the interest of the State or that of the citizen is considered. Because a provision of law for a suit for property against the State *eo nomine* is at best much more matter of form than matter of substance, and the consideration of this point will develop how little the question we are considering deserved the prominence that has been given to it, and the gravity with which we have considered it. The most that such a provision can effect is to settle a question of title touching property between a citizen and the State by one suit instead of two. If such a proceeding was not authorized, the citizen claiming title to property held by the State would take proceedings against any officer of the government in the possession or occupancy of the property, and would recover it on the

strength of his own title shown. If the State had in fact paramount title, she would be driven to an after suit to regain it, not having thought proper to make her title available to her in the first action by way of defeating it. If in fact she had no paramount title, then no wrong is done her by the citizen's recovery in this indirect way. The case of *Wilcox v. Jackson*, 13 *Peters R.* 498, is a case of this class, where ejectment was sustained against the commander of a military post.

The interests of the State, when she chooses to assert them in such a case under the name of the party to the record, are as well defended as if she was in fact a party herself. Where the right is in the plaintiff, and the possession in the defendant, the inquiry cannot be stopped merely by the assertion of title in the State. But the court will proceed to investigate the assertion and examine the title, and if the pretensions of the plaintiff are well founded, and those set up under the State are not, the plaintiff must recover the thing he sues for, and no wrong is done the State. If it was true that the court could not adjudicate between private parties upon any subject matter when the peeuniary interests of the State might be injuriously affected, because the State herself could not be sued without her consent, then no suit could be maintained by a non-resident against a citizen for the recovery of personal property because the removal of it might affect her revenues. So far from this, it is no objection if the State be the sole party in interest, and the contest be in fact one between the plaintiff and the State in truth and fact, although but nominally between the plaintiff and the defendant. The cases of *Osborn vs. The Bank of the United States*, (9 *Wheat.* 738,) and *The Michigan State Bank vs. Hastings*, (1 *Douglass Mich. R.* 225,) are of this kind, and there are other cases which go to the fullest extent in establishing this doctrine. It will be seen then, that, so far from such a restriction militating against the interest of the State, those interests will be promoted at least to the extent of preventing any temporary deprivation of the possession of property that she might hold by good title in any case.

But all these incongruities will disappear if the statute be con-

strued to allow the State to be sued as well in chancery as at law and as well for property as for money demands, and then every provision of the various statutes touching the subject will be found sensible, effective, and in harmony.

The process of summons is to be served upon the Auditor in the commencement of any suit against the State for several reasons; and whether the suit be for property or money, some of these concur to make him the most appropriate officer in the entire government to whom the summons should be sent, as will at once appear when we contemplate his public functions. The statute (*Dig.*, *p.* 201, *sec.* 7) provides that he "shall be the general accountant of the State, and keep all public accounts, books, vouchers, documents, and all papers relating to the contracts of the State and its debts, revenues, and fiscal affairs, not required by law to be placed in some other office." Thus, whether the suit be for property or money, the papers relating to the title or the contract in question would in general be in his office, and thus afford data for advice by him to the appropriate prosecuting attorney, (*Dig.* 191, *sec.* 2,) for the proper defence of the State. If the suit had been for property, and the plaintiff had recovered against the State, and had been awarded possession, then no less is it the duty of the Auditor to "transmit to the legislature a copy of the judgment and the proceedings thereon, (which in that case would be the award of possession,) that "an appropriation might be made to satisfy the judgment," because such judgment would not be satisfied until the costs adjudged against the State had been paid, and this could only be done by an appropriation by the legislature, because of the provision of the statute exempting all property of the State, real and personal, from sale by execution. *Dig.* 278, *sec.* 15.

And besides, by this means, the legislature would be obviously advised that property had been recovered from the State; and would also have data for investigation into the official conduct of the prosecuting attorneys touching the conduct of such suit.

Adopting, then, the more liberal construction of the statute that make it effective and harmonious in all its provisions and

phrases, and which carries out fully the manifest design of the constitution, which, as we have said, was to advance the right of the citizen to resort to the courts of justice for the redress of grievances, we are of opinion that this objection raised on the part State cannot be sustained: on the contrary, the State was properly made a party.

This brings us to the consideration of the merits of this cause, which has rightly been considered by counsel as an important one. Not important, however, on account of the magnitude of the sum involved; for that, as was justly observed by Spencer Roane, in the case of *The Commonwealth v. Beaumarchais*, (3 *Call. R.* 145,) "is but a secondary consideration with any just government, and no consideration at all with any upright judge," but because that certain important principles of law are involved, and that in their discussion the honor and justice of the State have been in some sort implicated.

It is insisted with earnestness that the liquidation acts of our legislature are unconstitutional; and are unjust and iniquitous in operating to make the State a preferred creditor of the Bank. We must necessarily examine the first ground of objection, and whether or not the second will be responded to at all will depend, in a great measure, upon the result of such examination.

Certain principles, which seem to govern this question and elucidate it satisfactorily, are as well settled perhaps as any in the law. A law in force when a contract is made, cannot by its legitimate operation impair its obligation in the sense of the constitution of the United States, for the reason that the existing laws are to be regarded as entering into, and forming a part of any contract or stipulations between the parties. (*Blanchard v. Russell*, 13 *Mass. R.* 16.) And it was upon this foundation that the Supreme Court of the United States, in the case of *Ogden v. Sanders*, (12 *Wheat.* 213,) held that a bankrupt or insolvent law of any State, which discharges both the person of the debtor and his future acquisitions of property, was not a law impairing the obligation of a contract, so far as it respects debts contracted subsequent to the passage of such law. And this doctrine is

elsewhere recognized and is perhaps no where seriously contested.

It is also equally well settled that when an act of incorporation is a grant of political power, where it creates a civil institution to be employed in the administration of the government, or where the whole funds of the institution are public funds, the charter is completely within legislative control. (4 *Wheat.* 518.) Such corporations are created by the mere will of the legislature, and are in no way the result of contract; while those, however, through which the legislature seeks to accomplish some public purpose, by the instrumentality of a second party, who is to advance some money, labor or property, are the fruit and direct result of contract. The one is within the control of the legislature, as we have said, while the other cannot be dissolved, under the provision of the Federal constitution, otherwise than in pursuance of a power to do so reserved by the Stare to be exercised upon the happening of some contingency, and is therefore one of the stipulations of the contract out of which the incorporation sprung.

Thus, it will appear that much of the mystery that labor and learning have thrown about a dry point of law so plain, is the result of the ordinary division of corporations into public and private, instead of corporations that are either such as are independent of all contracts that respect property, or some object of value, or which confer rights which may be asserted in a court of justice, and such as are the fruit and direct result of such a contract. And this will the more plainly appear, when we consider that all constitutional corporations are, in some sense, public, as they must be designed to effect some public good, as contradistinguished from private advantage, otherwise they would be monopolies, that are declared in the Bill of Rights to be "contrary to the genius of a Republic." (See *Miller v. Williams*, 11 *Iredell R.* 511.)

That the State Bank of Arkansas was of the class of corporations that are within the legislative control, has never been seriously contested. And that it cannot be otherwise considered, will abundantly appear by the consideration that, as an institu-

tion to be employed in the administration of the Government, its funds were exclusively public funds; and its creation was in no way the fruit and result of a contract, there having been no second party whose concurrent act with the legislature was to give it life and being. This power over the entire charter necessarily embraced a like power over each one of its provisions as fully as the whole together, and authorized the legislature to take from the institution any power or capacity that had been conferred, whenever, in the exercise of their constitutional discretion, the public exigencies would seem to require such diminution.

And previous to the 11th January, A. D. 1843, when the legislature repealed the common law as to the effect of the expiration of a corporation, either by its own limitation, judgment of forfeiture, or by legislative enactment, and made other provisions of law in their stead, (*Dig.*, *p.* 278, *ch.* 39, *sec.* 16,) had the legislature exerted this undoubted power of repeal, and dissolved the charter of .he State Bank without making any further provision, which they had the power to withhold, all its real estate that remained in the corporation up to the moment of its expiration, would have reverted back to the original grantor, or his heirs, (see *Angell & Ames on Cor.*, *ch.* 5, *sec.* 2, 3d edition, p. 159, and the numerous authorities there cited,) the personal property would have vested in the State, or the people, (*ib. p.* 160); and the debts due to and from the Bank would have been extinguished, (*ib. p.* 160, and authorities there cited, and the case of *The State Bank v. The State*, 1 *Blackf. R.*, *p.* 283, 284,) where this point is examined on principle, as well as tested by authority, and *Fox v. Herch*, 1 *N. C. Eq. R.* 559, GASTON Judge, delivering the opinion of the court.

And in that case the holder of one of the bills of the State Bank would have had no remedy save only that which sprung out of his direct contract with the State, resting upon the 28th section of the Bank charter, whereby the State contracted with the bill-holder that the bills and notes of the Bank should be received in payment of all debts due to the State of Arkansas. And yet the bill-holder could not have complained that his contract with

the Bank for the payment of the bill (whether in that contract with the Bank it had been either stipulated or not that his bill should be paid first and in preference to any other debt due by the Bank,) had been in the slightest degree impaired within the meaning of the constitution of the United States; because all these laws that we have referred to were in existence and in full force at the time he made his contract with the Bank, and entered into and were part and parcel of the very contract and stipulation between him and the Bank for the payment of the bank bill on the part of the Bank. Every party contracting with a corporation being presumed by law to understand the nature and incidents of such a body politic, its liability to dissolution, and the consequences of such dissolution, the power of the legislature over its life and constitution and the legitimate sphere of the operation of the constitutional provision for the integrity of contracts; and is presumed to contract in reference to all those contingencies and regulations. (*Angell & Ames on Cor., p.* 160, and authorities there cited.)

If this were not so in reference to rights that had not become vested by inhering in things, the absurdity would result that the mere creature was greater than its creator, the stream higher than the fountain, and the disastrous consequences upon the State Governments would be incalculable, in rendering immutable many civil institutions that might be set on foot for purposes of its internal government, and which, to subserve those purposes, ought to vary with varying circumstances. Accordingly, Judge STORY remarks, in the case *Mumma v. The Potomac Co.*, (8 *Peters at p.* 287,) that "It would be a new doctrine in the law that the existence of a private contract of a corporation should force upon it a perpetuity of existence contrary to public policy and the nature and objects of its charter."

And this principle is alike applicable to the repeal of corporations which are the fruit and direct result of contract, when the power of repeal is expressly reserved to the legislature; and in neither case will the courts presume that the power of repeal has been improperly or unconscientiously exercised by the legis-

lature. (*McLaren v. Pennington*, 1 *Paige Ch. R.* 109.) Nor would the case be varied in principle if the note-holder's contract with the Bank for its payment was of a date subsequent to the change of the common law as to the consequences of the dissolution of the charter of the Bank, otherwise than as that statute varied this law, and to this extent varied his actual contract with the Bank. In neither case, then, could his contract have been impaired by an absolute repeal of the charter of the Bank, although, in the one case, his debt against the Bank would have been extinguished, and in the other, under the provisions of the statute, his rights, although preserved, would have been in abeyance until the action of the legislature should be had thereon, unless some provision otherwise was made by the legislative act of dissolution. (*Dig.*, *p.* 278, *sec.* 16.)

This being the legitimate result as to the question of constitutionality, had the Legislature dissolved the charter of the Bank, instead of placing it in liquidation as it did, it cannot be any the less the result of those acts of liquidation unless a mathematical absurdity could be admitted that a part is not included within the whole. Because the true nature and character of these acts are of the caste of true acts of dissolution, and as such are clearly embraced within the power to destroy the Bank, which we have seen was within the legitimate discretion of the Legislature—in fact, are but the result of the exercise by that body of those very powers of destruction in a modified form and to a limited extent. And this is plainly enough to be seen in the intrinsic character of the various provisions of the liquidation acts in which it manifestly appears that, in the judgment of the Legislature, the bank had failed to accomplish the public purposes and ends in their view at its creation, and had ceased to be a safe custodian and depository of the public funds; and in this condition was a rightful subject of dissolution at their hands.

And thus these acts of the Legislature declare their own true source and character, and present themselves as legitimate instruments for the constitutional power of the Legislature over the life and constitution of the bank. And in thus exhibiting the judg-

ment of the Legislature upon the exigency of the bank's short comings and condition at the time when it was put in liquidation, and the true nature of the powers thereby exercised in the acts placing it in liquidation, all foundation is taken away for any argument that could be based upon the ground that, although the Legislature had the clear right to destroy the bank by a dissolution of its corporate character, they could not, constitutionally and by any and every capricious, arbitrary and unconscionable intermediate act, impair the obligation of the bank to a bill-holder.

And, besides this consideration, we have already seen that the courts will never presume that the legislature has improperly and unconscientiously exerted such a power. And even if this was not so, in the case before us there is no possibility of any such presumption as to the acts in question; because the allegations of the complainant's bill abundantly show that the bank had failed to accomplish the public purposes in view at its creation before these acts were passed.

In the light of these views then, we hesitate not to declare it as our opinion that the lequidation acts in question are all constitutional.

These acts then being laws of the land, they must have force and sway in their legitimate scope without regard to their effect upon what would have been otherwise the complainant's rights under the general laws of the land. Because, as to his rights in the premises, as we have seen when considering the constitutional question, there was no defect of legislative power from constitutional limitations and restrictions upon it: and consequently they can only be claimed and meted out by the measure of the liquidation laws, in which we include all acts of the legislature touching the assets of the Bank that have passed since the day when that body, for public purposes and with public ends in view, legitimately placed that institution in liquidation.

The effect of these liquidation laws upon all the rights of the complainant founded upon the general law, as we shall more fully see in the sequel, being inevitably to place all such rights in abeyance at the legislative will to the extent that they may

come in conflict with these paramount laws. A state of being for these rights contracted for by the complainant in his executory contract with the Bank. Because the power of the legislature over the life and constitution of the Bank, and all that was embraced in that power was then the law and in force, and as such formed a part of this very contract or stipulation between the complainant and the Bank. And by this means the complainant, as to rights springing from this contract, and to this extent, voluntarily disrobed himself of what would have been otherwise his constitutional guaranties, by a like process as that by which a party voluntarily dispoils himself of such guaranties when he contracts for a summary judgment against himself. And although the public policy of a country may, and perhaps does, set some bounds to such relinquishments of private rights, none such are animadverted upon or held for nought by the law that falls short of a direct conflict with some known public policy: and in this case, so far from there being any such conflict, the voluntary conflict in question is in direct harmony and in furtherance of the policy of the State in the premises.

And in determining the true interpretation and legal effect of these various enactments, we are not to limit our examination to the provisions of those simply which are stated in the complainant's bill: but it is our province, in search of the law—facts being in general the proper subject of pleading—to go far beyond this and consider together all the enactments touching in any way the same subject matter, and also such uncontradicted history and public documents of the times of these several enactments that may shed light upon their various provisions. *Conway Ex parte*, 4 *Ark.*, *p.* 367, 368. *Warner v. Brees*, 23 *Wend.*, *pages* 134, 135, 136, 140.

And in these lights it may be remarked in reference to the origin or foundation of these enactments, that a civil institution with large money capital furnished by the State, and important powers for good or for evil, employed in the administration of the State government, and in that capacity entrusted with all the public funds, had abused its trust and signally failed to achieve

the public ends in view at its creation. And yet its operations had been such that the pecuniary interest of the great mass of the citizens of the State had become so blended with that of the State and both were so much identified with the fate of this institution, that its continued existence with its then powers and capacities, or its sudden destruction, would be alike disastrous to both. Thus an emergency arose which demanded conservative action on the part of the Legislaiure, looking both to the interest of the State and to that of the citizen, which stamps these laws, in an eminent degree, with the character of remedial laws, and authorizes that construction of them which shall be most consonant to their reason and spirit, and will best suppress the mischief and advance the remedy.

At the same session of the Legislature at which the first liquidation act became a law, another act of a general and permanent character also became a law, which provides that when "any corporation shall expire or cease to exist, either by its own limitation, judicial judgment of forfeiture or by legislative act, the common law in relation to corporations shall not be in force in relation thereto, but the goods and chattels, lands, tenements and hereditaments, and every right or profit issuing out of or appertaining thereto, moneys, credits and effects of such corporation shall immediately vest in the State, in trust for the uses and purposes by said charter contemplated; and each and every and all right, upon the expiration or dissolution of said corporation shall be and is in abeyance until the action of the Legislature shall be had thereon unless provision shall be made by law for the management of said corporation fund in contemplation of such dissolution." (*Dig.*, *Ch.* 39, § 16, *p.* 278, 279.) This statute indicates, as the result of legislative wisdom, a permanent general policy for the State in reference to the civil death of corporations, having, among others, two leading features, that is to say, on such dissolution all rights which were of it, and in its favor, in its life shall vest in the State in trust, and all rights against it shall be in abeyance at the legislative will unless special provision of law be made to the contrary. And thus excluding all coercive

measure against the State in her capacity of trustee for the purposes contemplated by the charter of the dissolved corporation.

And this general policy, so set on foot, lays a reasonable foundation for the construction of laws by analogy, which have for their manifest object the preservation and equitable distribution of the assets of such institutions when placed by law in a state of liquidation, and persuasively urges that such laws should be so construed as to advance this policy. And by a state of liquidation we understand that intermediate condition of a corporation over whose life and constitution the Legislature has power in which it is placed by law in being shorn of its powers and capacities to progress as originally designed, but left with all its powers and capacities to retrograde and close up its affairs.

And especially would this analogous rule of construction seem reasonable when it was manifest that the Legislature had been superinduced to force such an institution into liquidation upon conservative considerations, because of exigencies that had arisen from the abuse of powers and trusts on the part of such corporation to the injury of the public, and that its pecuniary affairs were thereby in an insolvent condition. For in no other way than by allowing affective energy to such laws for the preservation and equitable distribution of the assets could the conservative interposition of the Legislature be advanced, although at the expense of a corresponding abatement of a right to proceed against such assets, founded upon the general law. And especially would such a rule be not unreasonable against one whose rights lived alone in the grace of the Legislature.

In the various acts of the legislative, and public documents to which we have seen it is our province to look for a true interpretion of the law as applicable to the case before us, we learn that the Bank capital was derived from two sources, to wit: from the sale of 1,169 bonds, executed by the State to the Bank to be sold for money to constitute its permanent capital: and 2d, from certain spectfic funds which were for the most part trust funds in the hands of the State, and which, by the 13th section of the Bank charter, were to be "deposited in the principal Bank and consti-

tute a part of the capital thereof;" but providing that the dividends declared by the Bank should be pro rata carried to the credit of each of such specific funds respectively; although the aggregate of all dividends should be subject to the control and disposal of the Legislature, and providing as to a portion of these specific funds, to wit: the seminary and school funds, that they might be at any time withdrawn—both principal and interest—without any action on the part of the Legislature. As all these specific funds were liable to be called for by the objects for which they were created, they could not reasonably be considered as a part of the permanent capital of the Bank in the same sense that the funds arising from the sale of the State bonds might be so considered; because to place them upon such a footing would pre-suppose a breach of trust on the part of the State, which cannot be presumed.

From like sources we learn that the Legislature has always regarded the Bank as being in an insolvent condition from the time that it was put in liquidation; although its condition might then have been regarded by them as more sound than it has been since shown to be by various public documents. By the act of 31st January, 1843, (*Sess. Acts, p.* 77,) by which the bank was shorn of its power to issue notes in discount of any check, promissory note, bill, bond or other obligation, or to loan money in any manner whatsoever, and all its affairs were placed in the hands of a board of managers, any vacancy in whose office in the recess of the legislature to be filed by the chancellor of the district, and abolishing its offices of president, cashier, clerk, teller and directors, and making various provisions of liquidation, it was among other things provided that no person indebted to the Bank should be subject to be garnisheed for the satisfaction of any debt, demand or judgment against that institution in favor of any individual, company or corporation whatever; (*ib. p.* 86, *sec.* 30,) and at the same time provision was made for the security and collection of all debts due the Bank and for the equitable distribution of their proceeds among various classes of creditors.

At the next session, by act passed the 10th January, 1845,

(*Sess. Acts, p.* 90,) $16,000 were appropriated out of the State Treasury to pay the salaries of the officers of the State Bank, "as other officers of the State," and to pay judgments that had been then or might thereafter be obtained against the Bank. And $200 were in like manner appropriated to pay an individual for services rendered in the collection of debts due the Bank. (*Ib.*, *p.* 132.) And so much of the thirteenth section of the Bank charter was repealed which directed, as we have seen, that certain specific funds in the custody of the State should constitute a part of its capital. (*Session Acts, p.* 95, *sec.* 19,) and these funds declared subject to appropriation by the Legislature. And certain par funds, then on hand, in the Bank, and other such to be received, were directed to be paid into the Treasury to the credit of the Bank on account of the surplus revenue fund. And the Financial Receiver at Little Rock was authorized and required, if practicable, to exchange any notes of the Real Estate Bank and branches then on hand or to come on hand for State bonds sold by the State Bank, and providing for the cancellation of any such bonds so taken in.

At the next succeeding session, judgments against the Bank were authorized to be paid off with judgments in her favor or with notes of that class where the right of renewal had been forfeited, but upon certain conditions only; and among others, that a judgment creditor of the Bank should convey to the State by "fee simple deed" any real estate or other valuable property that he had theretofore caused to be sold by virtue of any judgment against the Bank, or so much of such as would be of equal amount to that so paid him. (*Sess. Acts, p.* 113, 114.) And by another act of the same session, (*ib.* 123, 124,) it was provided "that hereafter the title to all real estate and property of every kind purchased by the Bank or taken in payment of debts due said institution, shall vest in the State of Arkansas, and the title for real estate so taken shall be taken in the name of the State of Arkansas." And there was a further provision that the governor should be authorized to exchange any property so taken by the Bank for an equal amount of bonds of the State executed for the

benefit of the Bank, the value to be estimated at the price allowed by the Bank. And by an act passed the 11th January, 1851, all such lands on hand are directed to be sold by the State Land Agent.

And by an act passed the 9th January, 1849, (*Sess. Acts, p.* 73,) all State bonds on hand in the State Bank, taken in payment of debts due this institution, which were originally sold by the Real Estate Bank to realize her capital are directed to be exchanged for such bonds originally sold by the State Bank, or the coupons of such, and all such State bonds or coupons so received by exchange are directed to be cancelled. And further providing, that the State Bank shall not thereafter be ruled to give security for the costs of suit, but that the State shall be liable for all judgments for costs against the Bank. (*Ib.* 73.) And there are two other acts of the same session by which money is appropriated from the Treasury to redeem lands that had been previously sold by judgment creditors of the Bank. (*Sess. Acts* of 1849, *pages* 183, 184 *and* 204.)

There are various other provisions, of some of these several acts, which, although we have considered them, we do not deem it necessary particularly to specify: from all of which, however, when considered together, it seems to have been manifestly the intention of the Legislature, from the day when the Bank was put in liquidation, to preserve the assets from waste while in process of closing up its affairs, and to dtstribute the same upon some scale approximating to an equitable one among all parties interested; and that the whole process of closing up and of distribution should be within its own discretion.

That the legislature had the constitutional right to assume this attitude towards the Bank and all having dealings with it, we have already seen, and the only question is, whether or not they have actually so regulated and disposed of the assets of the Bank as to place them beyond the reach of the complainant by judicial process; and it is to determine this question that we have been examining all these various enactments of the legislature, and public documents, to arrive at their true meaning.

We have seen then what were the leading objects of the legislature as to the assets of the Bank, to wit: their equitable distribution upon a scale to be fixed by themselves and their preservation from waste; and we have also seen, in the source and object of these liquidation acts, that they were in an eminent degree remedial laws. How, then, shall that provision be construed, which enacts that no person indebted to the Bank shall be subject to be garnisheed by any person having a claim or debt against the Bank? Shall it be construed as simply cutting off that statutory process? What was the mischief? If we were to extend our examination no further than to the provision of that particular enactment in which this provision is, the 30th section, we should find abundant reason to doubt whether the construction should be so narrow; because in these we find a scale of priority fixed among the creditors of the Bank which could be as well disturbed by a creditor's bill as by process of garnishment; and the same remark may be made as to any advantage that it might be imagined was intended to be secured for the Bank debtor on account of the currency being at that time depreciated. When, however, we look beyond this statute and consider it in connexion with those subsequently passed, relating to the assets of the Bank, although we find this particular scale of priority abandoned, nevertheless we see in various enactments a steady and uniform purpose on the part of the legislature to control the outgoings, and apportion the avails of the Bank assets, as they themselves shall deem most equitable and just. A purpose that is directly in conflict with any right elsewhere to seize upon and appropriate such avails while in process of collection, and alike inhibits a creditor's bill from such an office, as the less searching statutory process of garnishment.

Then when the true mischief is considered, which was the insolvency of the Bank, the jeopardy of public faith and public credit, of public and trust funds and of private interests, all commingled and at hazard to an extent to call for the direct interposition of the sovereign power in whose justice all must trust, and that power not only interposed, but in affording the remedy

has signified a settled purpose to determine upon the outgoings of the scanty avails of this wreck of capital and of credit, it would seem to be worse than sticking to the bark to admit of a construction of the provision in question, that will thwart this settled purpose. Not that a sovereign should not be powerless before right, even before a right that exists only by his own grace, but that he should be alike just to himself and to all, and especially alike just to those who confide to him their trusts.

And the same course of observations apply to the paper of the Real Estate Bank, which the complainant seeks to make available. This has been turned by the legislature to the benefit of the bond-holders. The Financial Receiver is authorized and instructed to exchange it for bonds of the State sold by the State Bank, and these bonds, when so taken in, are directed to be cancelled in the Executive Department of the State government. And by a like process the bonds sold by the Real Estate Bank that may have been taken in by the Financial Receiver, are to be exchanged for bonds sold by the State Bank, and these in like manner cancelled

And by act approved the 23d December, 1846, the lands were brought within the same rule of exemption by affirmative legislative action in relation to them like that legislative action in relation to the debts due the Bank, and the Real Estate Bank paper, and the Real Estate State bonds, which we have just considered; and this was required no less to sustain the general purpose for the legislative distribution of the avails of the assets of the Bank, than to prevent their waste in the sacrifice of lands at execution sales, that had so frequently occurred, as we learn from the face of several of the acts of liquidation.

And thus all the assets of the Bank are placed by law beyond the reach of judicial process at the suit of the complainant, as to whom as we have seen in examining the constitutional question, the power of the legislature so to place them was clear.

But it is insisted that nevertheless, all this is as but cob-web before the chancellor, because of alleged fraudulent combination between the Bank and the State to hinder and delay creditors,

since fraud vitiates every thing and holds fraudulent things as no things. If such acts and regulations be fraudulent, it is because the law makes them so; and these are the acts and regulations of the law itself, enacted by the power that made the law of fraud, and can therefore with equal power unmake that law as to these acts and regulations.

But althoug denied relief by law as to the Bank, why not be allowed it as against the State, who according to the law, as just declared, may be sued in chancery, as well as at law? This is but raising the constitutional question again in a new form, and is easily answered; because the State having interposed not in her corporate, but in her sovereign, capacity, by the terms of the very contract on which the complainant would seek relief as against this defendant, all his rights live but in grace, and his remedies exist in entreaty only. The chancellor's arm is therefore powerless for his aid, unless he could exhibit on his part the guarantees of the constitution, of which, as we have seen, he has voluntarily disrobed himself as against the State, in the capacity in which she is a party to this transaction.

Upon the whole case, we consider there is no equity in the complainant's bill, and therefore that the chancellor erred in overruling the demurrer interposed and rendering his decree. The decree must be reversed, and the cause remanded, with instructions to sustain the demurrer.

SHOUSE ET AL. v. NEWTON, EX'R.

As to evidence of payment of a judgment.

Appeal from Pulaski Circuit Court in Chancery.

Bill by Newton, executor of Walters, against Shouse & Loyd, determined in Pulaski Circuit Court.

The facts are stated in the opinion of this court.

BERTRAND, for the Appellant.

WATKINS & CURRAN, contra.

Mr. Justice WALKER, delivered the opinion of the Court.

This bill was filed to enjoin a judgment at law upon the ground that it had been paid, and the fact as to whether it was or not paid is the only matter at issue.

It appears that Thorn & Lemon were, as partners, engaged in transporting the United States Mail from Little Rock to Rock Roe, and that the defendants were blacksmiths on the route engaged to do work for them: that, after the defendants' account against them amounted to $108 78, Thorn sold out his interest, and the contract was continued in the name of Lemon, Pitcher & Walters, at which time, from the directions of Pike, their trustee, the statement of Lemon, the evidence of Graham, the agent, and the answer of the defendant, we are of opinion that the successors of the firm of Thorn & Lemon assumed to pay the debts then outstanding against them. Defendants were continued by the successors until after the death of Pitcher, and up to the 29th September, 1844. On the 13th of October, 1845, defendants filed their account of $100, for balance due on work done from 26th September, 1843, to 29th September, 1844, against Lemon & Walters, as the surviving partners of Lemon, Pitcher & Walters,

upon which judgment for that amount was rendered in their favor, which judgment remained unsatisfied on the 24th of February, 1846, at which time Shouse applied to Walters for a settlement, in which reference was made to the judgment, but so indefinite as only to show that it was the subject of conversation, and also to the account against Thorn & Lemon, which Walters refused to pay. A payment was then made and receipt taken for $62 50, which purported upon its face to be for the last quarter's pay for work done between the 27th June, and 27th September, 1844, a period embraced by the account on which the judgment was rendered, and purported also to be in full of all demands against Lemon, Pitcher & Walters, and also of Lemon & Walters, signed by Shouse, in his individual name. There is no doubt from the evidence of Graham, the agent, but that of this sum $39 were taken from credits entered on account of Thorn & Lemon by them; so that only $23 50 were actually paid. From all the circumstances, it is most probable that this payment was intended to liquidate and settle that much of the judgment, although it purports to be on the account for part of the time, for then there was no account except the Thorn & Lemon account which Walters had refused to pay. Walters was bound for that account, and the withdrawal of the credit from it was in fact no payment, for in the proportion as he took from the one he increased the other. Shouse received the $23 50. There was no other demand to which it could apply, and it is but just that he should give credit by that amount.

The Circuit Court therefore erred in decreeing a perpetual injunction of the judgment at law. Let the decree be set aside with costs, and the cause remanded to the court from whence it came, with instructions to credit the complainants by the sum of $23 50, as of the date of the receipt, and either render a decree in that court for the residue of said judgment with interest and costs of suit and damages upon the debt injoined less $23 50, or dissolve the injunction as to the residue thereof as may best comport with the equitable rights of the parties, as now presented upon the record by death or otherwise.

MOSS V. ASHBROOKS ET AL.

A plea of former suit pending, is a plea in abatement.

Pleas in abatement should be framed with the greatest accuracy and precision. They should be certain to every intent; without any repugnancy, and direct and positive in their allegations, and not argumentative.

A plea to a bill in Chancery that a former bill had been brought for the same matters, a demurrer sustained thereto, an appeal to the Supreme Court prayed and granted, by which the jurisdiction of the case was transferred to the Supreme Court, where the matters arising upon the bill had not been adjudicated or determined, is not a good plea of former suit pending. The plea should allege specifically that the appeal had been regularly certified to the Supreme Court, and was still therein pending.

To constitute a decree in Chancery, dismissing the cause, a bar to a subsequent bill for the same matter, between the same parties, there should be a decision on the merits.

In this case a demurrer was sustained to the first bill, and complainant declining to amend, the bill was dismissed: HELD, that such decree could not be pleaded as a bar to a second bill for the same matter.

Appeal from the Chancery side of Pike Circuit Court.

Bill in chancery, filed by John M. Moss, against Moses Ashbrooks, William Ashbrooks, William Boone, and wife, Angeline, determined in the Pike Circuit Court, in March, 1850, before the Hon. JOHN QUILLIN, chancellor.

The bill alleged that Samuel Irwin, who died in Washington county, Mo., by his last bill bequeathed to the children of said Moses Ashbrooks: Samuel, Angeline, William and Mary Jane, three slaves, Caroline and her two youngest children, which will was duly probated, &c., and is exhibited.

That defendants are the same persons named in the will. Said Samuel died without heirs, and Mary Jane was also dead.

That the two youngest children of Caroline were male, and named George and Jefferson, and since the death of Irwin, Caro-

line had four other children, females: named Mary Ann, Catharine, Nancy and Malinda.

That all the debts of Irwin were paid, and all of said slaves delivered by his executor to Moses Ashbrooks for his children; who was, in 1846, appointed by the Probate Court of Pike county, guardian for his children, Samuel, William, Angeline and Mary Jane, gave bond &c., as such, and holds the slaves in that capacity.

That Angeline intermarried with Boone, one of the defendants.

That about the 24th of December, 1846, complainant intermarried with said Mary Jane; and soon thereafter, said Moses Ashbrooks, representing himself, and pretending to act as the guardian of complainant's wife, delivered to him two of the said negroes, George and Mary Ann, declaring that he had no further right to them, but that they belonged to complainant in right of his wife, by virtue of said marriage.

That complainant's wife died, leaving an infant son, James Moss, issue of complaint's marriage; and said infant died after his mother, without issue. That after their deaths, said Moses Ashbrooks took the said negroes from complainant, and holds, and refuses to deliver them up.

That no partition or division of the slaves was ever made among the legatees, but those delivered to complainant were not more than his just share.

That said Moses Ashbrooks never filed any inventory of the estate of his wards, or made any settlement in respect thereto; and has received and used the hire of said slaves for a long time without accounting therefor. He is insolvent, and very little could be made out of him, and his securities in the guardian's bond are worth nothing of consequence. He and the other defendants design to run and remove the negroes. That the will contemplates a division of the negroes whenever any of the children arrive at full age. That the delivery to complainant of the two negroes aforesaid vested in him the title, and he is entitled to them, but that said Moses Ashbrooks refuses to restore them to him, or account for their hire.

Prayer—that a receiver be appointed to hold the negroes until decree, unless security is given, an account of hire &c., general discovery, and partition and division of the negroes amongst the legatees.

The will gives the negroes to the children of Ashbrooks unconditionally, to be equally divided. By a subsequent clause it is expressed that "it is my will and devise that there should be a guardian appointed to take charge of the property until the four children come of age."

The defendants filed a plea, in substance as follows:

"The said defendants, by protestation, not confessing any or all of the matters and things in complainant's bill to be true, as the same are therein set forth, do plead thereto, and for cause of plea, say that heretofore and before the filing of said complainant's bill, to wit: on the 3d day of June, 1848, the said complainant did exhibit his bill of complaint in this court against these defendants for the same matters and causes, and to the same effect, and for the like relief, and purposes as he the said complainant *now* doth by his present bill demand and set forth; to which said bill of complaint those defendants did interpose their general and several demurrer, and complainant joined in said demurrer, to wit: at July term 1848, &c., and this court at said term did adjudge that said demurrer be sustained, and those defendants were by said judgment and decree hence discharged; from which judgment and decree complainant then and there prayed an appeal to the Supreme Court of the State of Arkansas, which said appeal was then and there granted in accordance with the form of the statute in such case made and provided; all which appears of record in this court; by means of which judgment and order granting an appeal, the jurisdiction of said cause, and the matters thereof was transferred to said Supreme Court; and the matters and things arising upon said bill have not been adjudicated or in any wise determined by said Supreme Court. Wherefore said defendants do plead said former bill and the proceedings, final decree and the appeal therein in bar of the pre-

sent bill, &c., and pray if they should further answer, and to be dismissed," &c.

By agreement, the plea was set down for argument as to its sufficiency, in substance and form, and for trial as to its truth—a replication being filed in short.

Complainants admitted the parties in the two bills to be the same.

The court found the plea to be true in point of fact and in substance and form sufficient, and dismissed the bill, &c.

The first bill and proceedings upon it, are made part of the record by bill of exceptions.

The main facts of the first bill are the same as the last; but in the first bill complainant insisted that the delivery of the two slaves to him by Ashbooks as alleged, constituted a valid division, and prayed to have that division confirmed, and the negroes deliverd to him, and in the alternative for a division, &c., and for hire after the negroes were taken from complainant after the death of his wife. No injunction, or receiver, is prayed in the first bill, or any charge made as to the insolvency of Moses Ashbrooks.

The record of the proceedings on the bill shows a demurrer filed and sustained; complainant refused to amend, and elected to rest on the bill: defendants were discharged, with costs, and complainant prayed an appeal, which was granted. This was all the evidence adduced on the hearing of the plea.

PIKE & CUMMINS, for the appellant. In pleading a former judgment at law and an appeal, it is necessary to state the appeal, and that the Superior Court has reversed or affirmed the judgment. It is not a final judgment if the appeal be pending. *Story's Pl.* 120, 185, 186. And so, in chancery. *Sumado v. Furtado*, 3 *Bro. Ch. Rep.* 61. 2 *Danl. Ch. Pr.* 758. In chancery the plea must show that the subject matter was *res adjudicata*—an absolute determination that the party had no right. A mere dismissal of the bill for want of prosecution, or a dropping of the bill by complainant, or a mere dismissal unless on final hearing, never

can be pleaded in bar. *Brandelon v. Ord*, 1 *Atk.* 571. *Rosse & others ass. v. Burt & others*, 4 *J. Ch. R.* 300 *Holmes v. Remson*, 7 *J. Ch. R.* 290. *Neafie v. Neafie*, 7 *J. Ch. R.* 1. *Mitf. Pl. in Eq.*, 278, 279, 280. *Story's Eq, Pl., sec.* 790, 791, *&c.* The plea in this case does not show any final decree whereby the rights of the parties were adjudicated directly and finally; and the proof does not go even as far as the allegations in the plea, for there is no showing in respect to the appeal further than the mere grant of an appeal.

WATKINS & CURRAN, contra.

Mr. Chief Justice JOHNSON delivered the opinion of the court. To this bill the defendants interposed their plea in which they alleged that the complainant had previously exhibited his bill in the same court against them for the same matters and causes and to the same effect, and for the like relief as that which is now demanded and set forth, that to the former bill they interposed their demurrer, which was sustained by the court, and they dismissed and discharged, and that the complainant at the same term of the court prayed an appeal which was then and there granted. They then averred that by means of the judgment and order granting the appeal, the jurisdiction of the cause and the matters thereof was transferred to the said Supreme Court, and that the matters and things arising upon said bill had not been adjudicated, or in any wise determined by said Supreme Court, wherefore they pleaded said former bill, and the proceedings to final decree therein, and the appeal therein, in bar of the present bill, &c., and then concluded by praying the judgment of the court whether they should be compelled to make answer to said bill, and to be dismissed with their costs, &c. The record shows an agreement by the parties, that this plea should be tried as well upon its sufficiency of form and substance as upon the truth of the allegations therein contained. The court below, upon the hearing, found the plea to be true and sufficient in substance, form and fact, and decreed that said plea be sustained, and that

the complainant be barred from having or further prosecuting his bill in this cause against these defendants, and that said bill be dismissed, &c. Under this agreement the legal sufficiency of the plea is still an open question, and if the defence therein contained shall be found to be insufficient in law to bar the present suit, there will be an end of the case, and we shall be relieved of the necessity of passing upon the evidence adduced to establish its truth. The plea, though in terms in bar, is essentially in abatement as well in its subject matter as in its conclusion. We shall therefore treat it as a plea in abatement, and proceed to determine upon its legal sufficiency to defeat the present suit.

Is this plea so framed as to come up to the legal standard? As these pleas delay the trial of the merits of the action, the greatest accuracy and precision are required in framing them; they should be certain to every intent and be pleaded without any repugnancy. (See 1 *Chitty's Pl.* 444.) It is also a rule in pleading that the plea shall be direct and positive in its allegations and not argumentative. This plea, when setting up the pendency of the first suit in this court, averred that by means of the judgment and order granting the appeal, the jurisdiction of the cause and the matters thereof was transferred to the said Supreme Court, and that the matters and things arising upon said bill had not been adjudicated or in any wise determined by said Supreme Court, wherefore they pleaded said former bill and the proceedings to a final deeree therein, and the appeal therein in bar of the present bill, &c. This is most clearly not such an averment of the substantive facts necessary to make the defence attempted to be set up as the law of pleading would recognize. There is no substantive averment that the appeal was ever certified to this court, or that it is still pending here, but on the contrary we are left to infer that these essential requisites have been complied with, from the allegations that a decree had been rendered, and an appeal prayed and granted, and from the argument that thereby the jurisdiction of the cause had vested in this court, and that the matters and things arising upon said bill had not been adjudicated or in any wise determined by said Supreme Court. The necessity for

specific and substantive averments to the effect that the appeal had been regularly certified to this court, and that the same was still pending, is clearly deducible from the case of *Clay's ad. v. Notrebe's Ex.*, (6 *Eng. Rep.* 639.) We are therefore clear that the certificate of the appeal and its pendency in this court, are not stated with that degree of directness and precision required by law, and that consequently the plea is insufficient and ought to have been overruled.

But let it be supposed that the plea is in fact what it purports on its face, which is a plea in bar, and then see whether it could so operate upon the state of facts as presented by the record. The decision of this question will depend upon the fact of whether the decree in the former action was directly upon the merits of the question in controversy, or whether it only operated to defeat the bill for the time being, but without having drawn in question the real merits of the cause. The case of *Lipping v. Kedgwin*, (1 *Mod.* 207,) is directly in point. In that case, an action in the nature of a conspiracy was brought by the plaintiff against the defendant, in which the declaration was insufficient. The defendant pleaded an ill plea, but judgment was given against the plaintiff upon the insufficiency of the declaration, which ought to have been entered *Quod defendens eat inde sine die*, but by mistake or out of design, it was entered *Quia placetum praedictum in forma praedicta superius placelat, materia que in eodem contento, bonum et sufficiens in lege existet etc., ideo consideratum est per Cur, quod Quer. nil capiat per billam.* The plaintiff brings a new action and declares aright. The defendant pleads the judgment in the former action and recites the record verbatim as it was, to which the plaintiff demurred. And judgment was given for the plaintiff, *nisi causa, &c.* NORTH, Chief Justice, said, "There is no question but that if a man mistake his declaration and the defendant demurs, the plaintiff may set it right in a second action. But here it is objected that the judgment is given upon the defendant's plea. Suppose a declaration be faulty, and the defendant take no advantage of it, but pleads a plea in bar, and the plaintiff takes issue, and the right of the matter is found for

the defendant, I hold that in this case the plaintiff shall never bring his action about again; for he is estopped by the verdict. Or suppose such a plaintiff demur to the plea in bar: there, by his demurrer, he confesseth the fact, if well pleaded, and this estops him as much as a verdict would. But if the plea were not good, then there is no estoppel. And we must take notice of the defendant's plea; for upon the matter as that plea falls out to be good or otherwise, the second action will be maintainable or not." The other judges agreed with him in omnibus. The case of Rosse and others, assignees of Snow v. C. Rust and others, representatives of A. Rust, (4 *J. Ch. Rep.* 299,) and Neafie v. Neafie, (7 *J. Ch. Rep.* 1,) are equally direct and conclusive upon the question. In the former of those cases, there was a decree dismissing the bill in the first suit at the hearing (the cause having been set down for hearing by the defendant upon leave previously had and obtained on a previous default of the plaintiff,) because no person appeared on the part of the plaintiff. Upon that state of fact, the question was whether the decree in the former suit was a bar to the latter. The court, when responding to this issue, said, "The merits of the former cause were never discussed, and no opinion of the court has ever been expressed upon them. It is therefore not a case within the rule rendering a decree a bar to a new suit. The ground of this defence by plea is, that the matter has been already decided, here has been no decision on the matter. In *Brondlyn v. Ord*, (1 *Atk.* 571,) Lord HARDWICK said "that where the defendant pleads a former suit, he must show it was a *res adjudicata*, or absolute determination of the court that the plaintiff had no title. A bill dropped for want of prosecution, is not to be pleaded as a decree of dismission in bar to another bill." The same doctrine is stated in Lord Redesdale's Treatise. (*Milf. Pl. p.* 195.) The decree in this case was equivalent to a judgment of non-suit at law. The plea was overruled, and the defendants ordered to answer. The same court, in the case last referred to, said, "A bill regularly dismissed upon the merits may be pleaded in bar of a new bill for the same matter, for if the same matter or the same title should be

drawn into question again by another original bill, it would as the cases say, introduce perjury, and make suits endless." The cases to this point were referred to in *Perine v. Dunn*, (4 *J. Ch. Rep.* 142.) But in the cases I have looked into upon dismission of former bills, the new bill was brought by the same party who filed the original bill, and there is said to be a material distinction between a new bill by such a party and a new bill concerning the same subject by the defendant in the first suit. To make the dismission of the former suit a technical bar, it must be an absolute decision upon the same point or matter; and the new bill it is said must be by the same plaintiff, or his representatives, against the same defendant or his representatives.

A decree dismissing a bill upon the merits does not establish any new right to be carried into effect; it only declares that the plaintiff has failed to establish the equity which he had set up, and if he has had his claim dismissed upon the merits, he ought not to be permitted to sue the defendant again, with a fresh introduction of his claim." The same doctrine is laid down in the case of *Perine v. Dunn*, (4 *John. Ch. Rep.* 141), where numerous authorities are cited by the court. It is clear that under these authorities the matter set up in this plea, if considered as pleaded in bar, is not a bar to this suit, and that therefore, even upon that ground, it should also have been overruled. We are satisfied, therefore, from every view which we have been able take of the defence set up in this case, that it is wholly insufficient to defeat the present suit, and that consequently the court below erred in deciding otherwise. It is therefore ordered, adjudged and decreed, that the decree of the Pike Circuit Court herein rendered, be and the same is herey reversed, annulled, and set aside with costs, and it is further ordered that the cause be remanded to said Circuit Court to be proceeded in according to law, and not inconsistent with this opinion.

BIZZELL ET AL. VS. STONE ET AL.

To authorize a set-off, the debts must be mutual, and due to and from the same persons, in the same capacity.

A debt contracted by an intestate cannot be set-off against one contracted with his administrator in favor of the estate, because it interferes with the course of administration.

And this rule obtains in equity, whether the estate be regarded as solvent or insolvent, except on a proper showing of equitable circumstances requiring a departure from the rule.

Appeal from the Chancery side of the Sevier Circuit Court.

The facts of this case are stated in the opinion of this Court.

WATKINS & CURRAN, for the appellants.

PIKE & CUMMINS, contra. The same rule exists in equity as at law upon the subject of set-off, except where there are some equitable circumstances requiring a departure from the common law rule. (*Green v. Darling et al.*, 5 *Mass.* 201. 2 *Story's Eq.*, *p.* 816, 817. *Jennings v. Webster*, 8 *Paige* 503. *Simon v. Hart*, 14 *J. R.* 63. 2 *Cow.* 139.) The debt must be due from the same parties in the same right. 2 *Story's Eq.*, *sec.* 1437. *Duncan v. Lynn*, 3 *J. C. R.* 351. *Dale, &c. v. Cook*, 4 *J. C. R.* 11. See also, 1 *Ark.* 31. 4 *ib.* 602. 5 *ib.* 15. *Menifee's adm'r v. Ball et al.*, 2 *Eng.* 520.

In this case the debt attempted to be set-off accrued after the intestate's death, and was due to the administrators, and therefore is not in the same right, and cannot be set-off against a debt due the intestate in his life time. (*Fry v. Evans ad.*, 8 *Wend.* 530. 2 *Hill* (*N. Y.*) *Rep.* 210. *Willes* 103. 4 *J. C. R.* 11. 10 *Paige Rep.* 319.) The debt in this case was due to the administrators, and might be considered as their own, particularly if

they had paid the estate or accounted for the property. *Biddle v. Wilkins*, 1 *Pet.* 686. *Talmadge ad. v. Chapee and others*, 16 *Mass.* 71.

Mr. Justice WALKER delivered the opinion of the Court.

This suit is brought to procure a set-off of cross demands under the following state of facts: Bizzell (the complainant) and one Stone are the joint owners of a claim allowed and classed in the Probate Court against the estate of Robert McDonald, deceased, upon a debt contracted by the intestate in his life time amounting to $1,310. Complainant also owns another claim of $100 against said estate, which he acquired by purchase. At the sale of the intestate's estate, complainant bought $1,388 worth of property, and executed his bond with security for the payment thereof to the administrators in their individual right, upon which judgment at law has been rendered against complainant and his securities. He charges that the estate is solvent, and that one half of the first claim, and the whole of the second, should be set-off against that much of the judgment at law, and for this prays a decree.

Under this state of case, the most important question is, can a debt contracted by the intestate be set-off against one contracted with the administrator in favor of the estate. We think it very evident that it cannot. Our statute provides for the allowance, classification and payment of debts against estates; so as to place all claims of equal grade upon the same footing. It provides for the sale of property, collection of debts, and a settlement in which the whole amount collected is charged against the administator, and *pro rata* distribution of the money collected is made amongst the several creditors of the estate having due regard to the classification and amount of the claim, so that each claimant of the same class receives an amount proportionate in amount to his claim.

In order to protect this equitable distribution of the assets of the intestate's estate and give it effect, it is necessary to bring the whole of the assets before the court; for if one creditor has

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a right to withhold from the administrator the amount due by him to the estate, on the ground of set-off, every other creditor under like circumstances might do the same, until the whole estate might be appropriated to the payment of a few debts to the exclusion of others of the same grade. For instance, suppose an estate to be worth $500, and A. B. and C. have each claims of equal grade for $500. At the sale of the property, A. buys it all: if this doctrine of set-off, be allowed, it follows that A. pleads his set-off, gets the whole estate, and leaves B. and C., whose claims are equally meritorious, unpaid.

But in this case it may be said the estate is solvent, and therefore, as there is enough to pay all of the debts, it is unjust and oppressive to withdraw means from the debtor which will necessarily be soon refunded to him. Aside from others, there is this objection to the ground assumed: an estate may be solvent today, that is there may be evidence of sufficient estate out of which to make payment, and yet by the presentation of other claims or a waste or destruction of the estate, it may become otherwise. It is moreover an effort to withdraw from the Probate Court the determination of the question of solvency or insolvency, whose legitimate province it is to determine that fact. But admit that the chancellor had the power to determine this point, (and we are free to admit that cases may arise where it might be his province to do so,) yet in this case there is a mere general statement of the fact, without attempting to set forth the facts and circumstances to sustain it. Whether or not the Probate Court has ever brought the administrator to an account, the time elapsed for the presentation of claims of the same class, or whether the debts, with the exception of this, are outstanding, does not appear.

Therefore, whether the estate be considered solvent or insolvent, (unless under other additional equitable circumstances, the force of which we cannot anticipate,) we must deny to the creditor the right of set-off. There is no mutual subsisting debt between the parties: indeed all of the parties are not before this court. We are not left to the statute and the force of reason

alone for the correctness of our opinion; but find several adjudicated cases directly in point, to some of which it may suffice to refer. *Dale et al., executors of Fulton v. Cooke*, 4 *J. Ch. Rep.* 11, was a suit in chancery to set-off a debt due by the testator in his life-time against a debt contracted since his death. The court held that it was an established rule in the courts of law, that if Executors sue for a debt created to them since the testator's death, the defendant cannot set-off a debt due to him from the testator. In the case of *Fry v. Evans, adm'r, &c.*, 8 *Wend.* 530, NELSON, Justice, said, "The plaintiff in both courts declared for a cause of action, which arose after the death of the intestate, and in such cases it is well settled that the defendant cannot set-off a demand against the intestate." This case of *Fry v. Evans*, like that which we have under consideration, was a suit on contracts with the Executor for money had, and property bought since the death of the testator. The contract in this case places the question in even a stronger point of view than these. Here the note was not only taken since the death of the intestate, but made payable to the plaintiffs in their individual right. So that there was clearly no mutual subsisting debts between the parties. For these obvious reasons the demurrer to the bill was well taken.

Let the judgment of the Sevier Circuit Court be in all things affirmed.

COOK VS. COOK ET AL.

In this case a number of slaves came to the husband by marriage, and he afterwards conveyed them by deed of gift, to his children by a former wife, reserving to himself the use of the slaves during his life. After his death, the wife filed a bill to set aside the deed of gift to his children, and for dower in the slaves, alleging

that the deed was made by connivance of the parties, to defraud her of dower in the slaves: HELD, that by the marriage the husband acquired an absolute title to the slaves, with full power to dispose of them; that the dower right of the wife did not attach until the death of the husband, and hence she having no vested right in the slaves at the time the conveyance was made, was not in a condition to take advantage of the alleged fraud for the purpose of setting it aside, and obtaining dower in the slaves.

One who would set aside a deed as fraudulent, must show that he has legal existing rights, that they are affected by such fraudulent contract, and that the contract is in fact fraudulent.

Held, however, upon all the facts of the case, that it did not appear that the husband conveyed the slaves to his children to defraud the wife of dower, her dower being ample in his other property.

Appeal from the Chancery side of the Hempstead Circuit Court.

This was a bill for dower filed by Mary G. Cook, against Robert T. Cook, Francis Hopkins and wife Mildred E., William F. Campbell and wife Sarah E., Francis A. Cook, Edwin R. Cook, James O. Cook, Laura J. Cook, James F. Johnson, Eliza Walker and Augusta Johnson, and determined in the Hempstead Circuit Court before the Hon. JOHN QUILLIN, chancellor, in May, 1850.

Complainant alleged that she married William Cook in Virginia, in September, 1838, being then a widow. That in that State Cook always lived, to the time of his death.

That when she married him she owned a large property—a cotton plantation, stock, &c., in Sevier county, Arkansas, including —— slaves.

That on the marriage, she gave him in money $8,000, and a carriage and horses worth $1,500.

That he used the plantation, slaves, and personal property during his life, and disposed of the money, carriage, and horses.

That before and after their marriage, Cook gave to his children by a former marriage (the defendants) large amounts of his own money and property.

That on the 5th September, 1845, prevailed upon by his children, the defendants, who were prompted by ill-will towards her, with

a fraudulent intent and design to deprive her of her just rights in the property owned by her before the marriage, her husband made a deed gift, in consideration of natural love and affection to such children, by which he conveyed to his son, R. T. Cook, and son-in-law, Francis Hopkins, in trust equally for all seven children, fifteen negroes, then on the farm in Sevier county, Arkansas, reserving to himself their use and services during his lifetime; and on the 24th November, 1845, on the same inducement and for the same purpose, another deed conveying the same negroes on the same trusts, and with the same reservation, to them and another son as trustees.

That all these slaves came from her, being hers at the marriage.

That the deed was fraudulent, a shift and device, *a will in disguise*, and without valuable consideration.

That the deeds were recorded, but the negroes were not delivered, but all remained in his possession until his death.

That he died May 5th, 1847, leaving a will; by which, after loaning certain property to her during her natural life, (including her own land,) and which property was not nearly a third part of his estate, he gave the whole of his property to his children.

That by the law of Virginia she was allowed to elect, by deed, and take dower, within a year after the death, which she did.

That the executors renounced, administration was granted, and all debts paid, and dower was assigned to her of the property in Virginia; but the amount is inadequate to maintain her in her former condition of life without extravagance, and leaves her in comparative dependance.

That the defendants have divided the negroes: states the value of the negroes.

The dower assigned to her is not stated any more specifically than as above.

The will leaves her, for life, three negro men, three negro women and a small girl over eleven years old: the land in Sevier county, horses, &c., or instead of this land and stock, a house and lot in Virginia, beds, &c., carriage and horses.

After demurrer overruled, the defendants answered:

The answer admits that complainant owned the land in Sevier county, 160 acres, of which 50 or 60 were in cultivation, with a small amount of stock, &c.

That the father gave, before his marriage, one negro man, and other property, in all worth $1,800, to his daughter Mildred.

To his daughter Sarah, after marriage, three slaves, and other property, worth in all $1,800.

To his son Robert, after marriage, four slaves, worth $2,500.

Denies that she gave her husband $8,000. Says it was $2,411 71, and a carriage, horses and driver, worth together $700 or $800.

Denies all agency of the children in procuring the deed of trust.

That the second deed was made, because Robert, one of the trustees, refused to act under the first, it being made in his absence.

Admits that the slaves so conveyed came to Cook by the complainant, and all except two remained on the farm in Sevier county until his death.

Denies all fraudulent intent, or that the deeds were wills in disguise.

Denies that all the debts of the estate have been paid.

States her dower assigned in Virginia to have been—Personal property, $571 53; nine slaves, appraised at $2,225; in money, $50; the interest of $5,371 16, proceeds of real estate; money out of proceeds of two slaves, $300.

And in Arkansas, 13 bales of cotton, worth $325; of proceed of personal estate, $291 53; proceeds of lands, $50.

That she is entitled to dower in 35 shares of turnpike stock, of nominal value of $3,500; 6 shares academy stock, worth $300; one-seventh of 5,000 acres of land in Virginia; 300 acres of land in Mississippi, and 1,080 acres in Hempstead county, Arkansas.

Denies that that the dower is inadequate. States that the negroes in the deeds of gift were appraised to, and worth $6,300.

The other averments of the bill were admitted. The complainant filed replication, and the case was heard on the bill, an-

swers, exhibits, and replication, without evidence, and the bill was dismissed for want of equity.

The deeds of gift referred to in the bill, and exhibited, are similar in form. The first is as follows:

Know all men by these presents, that I, William Cook, of Liberty, Bedford county, Virginia, for and in consideration of the natural love and affection which I have to, and for my children, *to wit:* Robert T. Cook, and Mildred E. Hopkins, of Sevier county, Arkansas; Sarah E. Campbell of Hopkinsville, Christian county, Kentucky; Francis A. Cook, Edwin R. Cook, James O. Cook and Laura J. Cook, of Liberty; Bedford county, Virginia; and for divers good causes me thereunto moving, and for the further consideration of ten dollars in hand paid by Robert S. Cook and Francis Hopkins, of Sevier county, Arkansas, the receipt whereof I do hereby acknowledge, have and do by these presents give, grant, bargain, sell, convey and confirm in and to said Robert T. Cook and Thomas Hopkins aforesaid, their heirs, &c. forever, for my above named children in equal portions and their heirs respectively forever, the following negro slaves, now in Sevier county, Arkansas, on my plantations therein, *to wit:* [*naming them,*] and the future increase of the females thereof forever; hereby reserving to myself the use, services and heirs, &c., of all said slaves and their increase during my natural life, and, with that, reserve to myself, then equally divided by suitable commissioners between my said seven children, and then I hereby convey the right and title in and to the whole of said slaves and the future increase of the females thereof, to said Robert T. Cook and Francis Hopkins, as trustees and the survivor of them, their heirs, &c., for the benefit of my said above named seven children and their and each of their heirs respectively forever in equal shares, hereby confirming to said trustees, and the survivor of them and the heirs, &c., of said survivor in trust as aforesaid, the right and title in and to said slaves (with the reservation of the use and benefit of their labor and services to myself during my natural life) forever against the claim of all and every other person or per-

sons. Witness my hand seal, this 5th day of September, 1845.

WM. COOK, [SEAL.]

The deed was acknowledged in Bedford county, Virgina, on the day it bears date, and filed for registration in the Recorder's office of Sevier county, Arkansas, 2d October, 1845.

WATKINS & CURRAN for the appellant, contended that the instrument conveying the property in this case, though called a deed, was a testamentary disposition of property, and in effect a will; and courts will look to the substance and not to the form of the instrument. The true rule is that an instrument in any form, the purposes of which are not to take place until after the death of the party making it, is a will. *Shergold v. Shergold, Prerog.* 1714. *Thorold v. Thorold*, 1 *Phillim.* 1. *Milledge v. Lomar*, 4 *Desaus. Rep.* 617. 1 *Williams on Ex'rs, p.* 59. *Manly v. Lakin*, 1 *Hagg.* 130. *Henderson v. Fairbridge*, 1 *Russ.* 497. *Hixon v. Hixon*, 1 *Ch. Case* 248. The distinction between a will and all other instruments of conveyance is that the former takes effect after the death of the grantor. A writing in the form of a deed has been held a good will. *Hichson v. Witham*, (*Finch.* 95.) *Rigden v. Vallier*, (2 *Ves.* 252;) so also in the form of an indenture (*Dyer* 166, 2 *Lean.* 159;) in the form of articles of agreement, (*Greene v. Pronde*, 1 *Mod.* 117;) in the form of a letter, (*Haberfield v. Browning*, 4 *Ves. Jr.* 200 *note;*) so in the form of a deed of gift to take effect after death. *Ballard v. Slade*, (2 *Law Reports, N. C.* 596. *Shergold v. Shergold*, 2 *Ves.* 349. *Harbergman v. Vincent*, 2 *Ves. Jr.* 205. Where the intention is that it shall not operate before death, it is then testamentary. *Allixin's Ex'r Exr's v. Allison* 4 *Hawks N. C. Rep.* 149. *Thayer v. Thayer*, 14 *Vermont Rep.* 107, where the facts are almost the same as in the case before the court. This principle was otherwise ruled in the case of *Lightfoots' Ex'r. v. Colgin and wife*, 5 *Munf.* 49, but that case is overruled by the case of *Ruth v. Owen*, 2 *Rand. Rep.* 507.

PIKE, contra, contended that as the deed was not revocable by

the grantor, it could not be "a will in disguise," and cited and relied upon the cases of *Lightfoot's Ex'r. v. Colgin*, 5 *Munf.* 42. *Stewart v. Steward*, 5 *Conn.* 317. *Holmes v. Holmes*, 3 *Paige* 363.

Mr. Justice WALKER delivered the opinion of the Court.

This suit was instituted to set aside certain deeds of trust alleged to have been made in fraud of the rights of the complainant, and to allow her dower in the estate so conveyed.

To entitle the complainant to recover, it is indispensably necessary, not only to alleged and prove that such fraud was in fact perpetrated, but it is also equally necessary to show that the complainant had a vested interest in the estate so conveyed; for, although the parties to the deed may have entered into it with the purpose and intent to defraud, yet, unless the rights of the complainant were affected thereby, she should not be heard to complain. In the case of *Lightfoot's Ex'rs v. Calgin & wife*, 5 *Munf. Rep.* 71, a question of this kind was presented under circumstances much resembling the one before us. Judge RONAE, in delivering his opinion, said, "Admitting this deed to be clearly fraudulent, does it not cease to be so quoad the appellees, if they have no interest to entitle them to impeach it? Must there not be two parties before a deed can be considered and set aside as fraudulent, the party defrauding and the party defrauded, and can the last exist unless he has a vested interest? It is held that by common law, a person having a debt due him, or a right or title to a thing, might avoid a fraudulent conveyance made to deceive or defraud him of that right or debt; but it is said that if the conveyance was precedent to the right or debt, there was no way to set it aside, and again it is held that he who hath a right, title, interest, debt or demand *mere puisne*, shall not avoid a fraudulent gift or estate precedent by the common law. It is by these principles of the common law that the case before us is to be tested; for the statutes made in aid thereof only apply to creditors and purchasers."

And this court held in the case of *Meux v. Anthony et al.*, 6 *Eng.* 411, that one who would set aside a deed as fraudulent,

must show that he has legal existing rights, that they are affected by such fraudulent contract, and that the contract is in fact fraudulent, citing 1 *Mun.* 196, *ib.* 281, 4 *ib.* 561. 2 *J. R.* 283, 4 *ib.* 671, 682, 687.

So that we may safely say that it is not sufficient that there are remote, possible, contingent rights, which may be affected by the transfer; but there must also be existing vested rights or interest in the property conveyed.

The estate conveyed by deed in this case was slaves which came to the grantor by marriage with the complainant. There can be no doubt but that the husband's title to the slaves thus acquired was as absolute and perfect as if held by purchase, and consequently his right to sell them the same. The wife had no other or greater interest in them than in any other slaves owned by the husband. And here the inquiry arises, what was that interest? Is it possible that an unqualified, unlimited estate can exist in one, and another or lesser estate exist in another at the same time? Unquestionably not, for the former covers every interest, and there is none left to be held. The complainant therefore had no vested present interest in the slaves. The interest which she claims is a dower interest, not existing, yet dormant during the life of the husband, as in the case of real estate, but dower in such property as he may be possessed of at the time of his death. Place this shadow of title upon the most favorable grounds then, and it is a right dependent upon a contingency, that is, if the husband should die possessed of the property the law will confer an interest. Under this view of the case, fully sustained by the authorities already cited, we have no hesitation in saying that even if these deeds were affected with fraud, the complainant had no such existing vested rights in the property as to entitle her to be heard upon an application to set them aside.

We are, however, by no means prepared to say that the facts in this case show it to be fraudulent. It is quite evident that much importance has been attached to the fact that the slaves conveyed by the husband came to him by marriage with the

wife, and that his after disposition of them was esteemed an infringement of the rights of the wife Such, we have shown, is not the case. Her rights were no greater in these slaves than in any others owned by the husband, whether held by purchase or otherwise. Nor is there the hardship in this rule by which the husband acquires title to the personal property of the wife by marriage, which is supposed to exist; for whilst the husband acquires title to the personal property, he becomes liable for the wife's debts, and she at the same time acquires a life estate in dower to all of his lands then held, or which may be thereafter acquired. So, that whether the one or the other is the gainer in a pecuniary point of view, (if that should be considered an inducement for its consummation) must depend upon their circumstances respectively at the time the marriage is consummated.

In this instance, so far as we may infer from the facts presented, the wife was certainly gainer. Her estate at that time consisted of 160 acres of land and about $10,000 worth of personal property. The husband, estimating his property at its supposed value at his death, owned about 10,000 acres of land, several improved town lots and about $10,000 worth of personal property. It will at once be seen that at any fair ordinary value of this property, the wife's dower would equal, if not exceed, the whole amount of estate which the husband acquired by marriage; and it is quite evident that she has actually received for dower more than the whole value of the slaves so conveyed. It is true that there is no data from which a certain estimate may be made, but enough appears to render it altogether probable that no injustice has been done her; but, on the contrary, that considering her age and the fact that she had no children to provide for, she has quite an ample estate to sustain the most respectable position in society, which it is presumed a lady of her advanced age could desire to occupy.

Looking, then, beyond the circumstances of the parties to inducements for perpetrating a fraud upon the rights of the wife, there is no evidence of ill feeling or disrespect between the husband and wife; on the contrary, so far as we may infer from the

facts before us, the most perfect harmony and good feeling existed. The deeds were made several years before the husband's death. It was altogether natural and proper that the father, in advanced life, should provide for his children. The amount given, in view of the number of children, and the amount of estate was quite reasonable, and the fact that the property was in Arkansas, the residence of part of his children and remote from his own, at once suggests the propriety as a matter of convenience of selecting it in preference to other property. These circumstances are susceptible of a construction favorable to the honest intentions of the grantor, and should be so considered in the absence of countervailing circumstances connected with them. Of this class there is one which does not well harmonize with the avowed intent of the grantor. It is in the reservation of the use of the slaves during his life. This is not altogether reconcilable with the idea that he desired to advance the interest of his children, a portion of whom may well be supposed to desire the use of the property, and the residue of the children too young to take charge of it. In this respect, the deed partakes of the nature of a will. It suspends the use of the property until the death of the donor. Ill health, advanced age, dislike to the wife, the amount conveyed and other like circumstances, when connected with this reservation of the property until death, would have gone far to fix upon the husband the design to substitute this instrument for a will; but such is not the case in this instance. On the contrary, with the exception of this reservation of use in the deed, the facts are all reconcilable with the general avowed purpose of the deed, and must be so considered by us. Wherefore we are of opinion that the evidence is not sufficient to sustain the allegation of fraud.

Had this, however, been otherwise, and a fixed and avowed determination on the part of the husband to defeat the widow's right to dower, there is not wanting high authority for sustaining the validity of the deed: In the case of *Lightfoot's Ex v. Calgin and wife*, above cited, it appears that Lightfoot, being the owner of a large estate, of advanced age, in bad health, and only a

few months before his death, became displeased with his wife, and took counsel as to the most effectual means of placing his property beyond her reach after his death, and thereupon in pursuance of such counsel, conveyed by deed in trust for the benefit of his children by a former wife, 75 slaves, and all of his other personal estate including money and debts, reserving to himself the possession and use thereof during his life. In this case it will be seen that the motives, the declarations, the circumstances and the act, all tended to fix upon the grantor the intention to cut off the widow, yet the court of appeals of Virginia, after a thorough investigation of the subject, held the deed valid.

It is unnecessary, in the case before us, to press the inquiry further, or to decide whether a deed evidently intended to take the place of a will manifestly unjust to the wife should or not be set aside. It is sufficient to say that such is not the state of case before us.

The decision of the Hempstead Circuit Court must in all things be affirmed.

AIKIN V. HARRINGTON ET AL.

Where the allegations of the bill are denied by the answer, they must be supported by two witnesses, or one with corroborating circumstances.

Where there is an interlocutory judgment, by default, against one of several defendants in chancery, it must abide the result of the final decree, and if another defendant suceeeds on an answer going to the entire equity of the bill, the bill should be dismissed as to all the parties, and costs adjudged to the party in default as well as to the defendant answering.

Appeal from the Chancery side of Arkansas Circuit Court.

This was a bill in chancery filed by Gude Aikin against Allen S. Harrington and Quinton Nix, in the Circuit Court of Arkansas county.

Nix made default, and an interlocutory decree was rendered against him.

Harrington answered, and on the hearing of the bill the court decreed that it be dismissed for want of equity, and that both defendants recover their costs, &c.

The other facts appear in the opinion of this court.

HEMPSTEAD, for the appellant.

Mr. Justice JOHNSON delivered the opinion of the Court.

This was a bill filed to set aside a sale of land for fraud. The fraud complained of consisted in certain promises which were charged to have been made by the defendant Harrington, to the complainants' agent, that in case he would not bid for the land, but would permit him to become the purchaser, he would give a reasonable time for its redemption, and further that the defendant Nix purchased the same land of Harrington with a knowledge of the justice of the complainant's claim. The answer of Harrington admits that a specified time was given by him for the complainant to redeem the land by the payment of his entire debt and also all the expenses of the sale, &c., but he positively denies that he either paid or offered to pay the same within the time specified, and further that he made no promises to prevent any person from bidding for the property at the time of his purchase.

This answer is opposed by the testimony of a single witness, and that, too, without the aid of any corroborating circumstances. Indeed it is very questionable whether, even admitting the testimony in its fullest force, it could have availed the complainant, as all that he claimed was a reasonable time to redeem, and although a long time had elapsed, he utterly failed to show that

he had made any effort to pay the debt and to avail himself of his privilege. We are satisfied, however, from the proof as presented by the record, that the essential allegations of the bill were not sustained, and that therefore the decree was properly rendered in favor of Harrington. Harrington having succeeded upon his answer, which went to the entire equity of the bill, it is clear that no decree could be taken against Nix, and that consequently the decree is right in giving costs to both defendants. The cases of *Harrison's heirs v. Dererniah*, (2 *Bibb.*, *p.* 349) and *Cunningham's heirs v. Steele*, (1 *Litt.* 52,) are directly in point. In the former of which cases the court said "It was contended that the Circuit Court should have decreed against the defendant, Friend, against whom the bill had been taken for confessed. It is a general rule in suits at law that if one defendant plead to the whole cause of action and the other suffers judgment to go by default, if a verdict be in favor of the plea judgment shall be entered for both defendants. From analogy, the rule must be the same in chancery. The sufficiency of the complainant's claim was put in issue by the answer of one of the defendants, who holds under the same claim with Friend. Their equity being defective the court did right in dismissing the bill as to all the defendants." And in the latter, the same court said "Nor do we suppose the decree can be sustained against such of the appellants as failed to answer the bill. If there had been no answer by either of the appellants, the allegations of the bill, after being taken for confessed, might be sufficient to authorize a decree against all, but after an answer by any, denying the equity asserted by the appellee and putting him on the proof of his allegations, without proving his equity, the appellee can have no relief decreed against any of the appellants, as was held by this court in the case of *Harrison's heirs v. Dererniah*, 2 *Bibb.* 349. The two cases referred to are directly in point, and are believed to be based upon sound principles. The decree of the Circuit Court of Arkansas county, herein rendered, is in all things affirmed.

STEVENSON v. McKISSICK.

Under the provisions of Digest, p. 659, 660, 661, on the failure of the principal to pay a justice's judgment, stayed by recognizance, before the expiration of the stay, the recognizance operates as a joint judgment against the principal and stayer, upon which execution may issue against both.

On suggestion of the death of the principal, execution may be issued against the stayer alone.

The recognizance becoming a joint judgment, on the expiration of the stay, upon which the stayer is as subject to execution as the principal, he cannot injoin the judgment on the grounds that the creditor neglected to take out execution against the principal until he become insolvent, though notified to proceed against him.

Appeal from the Chancery side of Crawford Circuit Court.

Bill for injunction by Stevenson against McKisick, determined in Crawford Circuit Court.

The bill stated that, on the 6th of July, 1846, McKissick obtained a justice's judgment against Henry Fleman, for $63 33, on which, execution was stayed for six months, on recognizance of the complainant as security. That at the time Fleman owned two ferry boats, and other property, more than sufficient to pay off the judgment—but dying in December, 1846, insolvent, all such property was sold by the administrator, and applied to other expenses and demands against the estate. That McKissick never took any steps to enforce the lien of his judgment on said personal property, though required to do it by the complainant—but allowed it to be exhausted, and all remedy against Fleman's estate lost; and, on the 5th August, 1848, sued execution against

complainant, which was returned from time to time, and had at last been levied on his property. The bill prayed injunction, temporary and perpetual, and general relief.

The court sustained a demurrer to the bill for want of equity, and complainant appealed.

TURNER and PIKE & CUMMINS, for the appellant. The Statute, *sec.* 134, *ch.* 95 *Digest*, makes the judgment a lien on the personal property of the debtor; and, by *sec.* 135, the execution can be levied on the security's property, only where the officer can not find property of the principal on which to levy. As the obligation of the security is only conditional, and the creditor neglected entirely to enforce his claim against the principal, the security is discharged.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

We entertain no doubt of the correctness of the decree rendered by the Circuit Court in this case. The statute, under which the proceeding complained of was had, makes the judgment against the principal, if not discharged before the expiration of the stay, operate as a joint judgment against the principal and stayer, and, as such, susceptible of being enforced against them both jointly, while living, or either upon the suggestion of the death of the other. The case of *Cabeness v. Garrett*, 1 *Yerg.* 491, 493, is directly in point and entirely conclusive of this question. The statute of Tennessee, upon which that case was decided, provides, that "If the judgment shall not be discharged at the time the stay of execution has expired, then any justice of the peace of the county, having such judgment in his possession, may issue execution against the principal and his securities, without any intermediate process." The court, in the case already referred to, when passing upon the true construction of the statute, said "An execution issued against the principal, whose death had been suggested, and the stayer pursues the act of

1801, *ch.* 7, *sec.* 1, above cited. For, by it, the judgment against the principal, if not discharged before the expiration of the stay, operates as a joint judgment against the principal and stayer, upon which execution is to issue accordingly, both by this act and the common law." Under this construction of the act in question, it is perfectly clear that, after the expiration of the stay, upon the suggestion of the death of the principal, an execution could legally issue against the bail. But it is contended that the respondent has lost his remedy against the bail by delay. If the stayer, upon the expiration of the stay, became a joint debtor with his principal and liable as such, he is equally subject to an execution within the period prescribed by the law. It is not alleged in the bill, as an objection to the issuance of the execution, that more than a year and a day have elapsed, and that no *scire facias* has been sued out against the bail to show cause against its issuance; and, in the absence of such allegation, the legal presumption is that no such ground of objection exists in fact. We are satisfied, therefore, from every view of the case, as presented by the record, that the bill contains no equity upon its face, and that, therefore, the Circuit Court decided correctly in sustaining the demurrer to it. The decree of the Circuit Court is therefore in all things affirmed.

HAYNIE VS. MCLEMORE.

Part of the matters in controversy between the parties remaining undetermined, and the cause continued by the court, there is no final decree from which an appeal will lie.

Appeal from the Ouachita Circuit Court in Chancery.

This was a bill in Chancery filed by Francis Haynie against Pleasant Mc Lemore, determined in the Ouachita Circuit Court at the April Term, 1851, before the Hon. JOHN QUILLIN, Chancellor.

The bill alleged that defendant sued complainant at law on an account for money had and received, &c., and work and labor, &c. That complainant interposed by way of set-off an account for a larger amount than that claimed by the defendant. That at the trial complainant was deprived of the benefit of the testimony of an important witness, who was suddenly taken sick, &c., and judgment obtained against him, &c.. Prayer that the judgment be set aside, and for injunction, &c. Temporary injunction granted in vacation,

At the return term, defendant answered, and then filed a motion to dissolve the injunction, upon which the court rendered the following decree;

"Come again the parties by their solicitors, and it is by the

court ordered, adjudged and decreed, that except as to the sum of fifty dollars of the judgment at law, with the interest on said fifty dollars, the injunction in this case be dissolved; that damages be assessed on the amount of one hundred and seventy-one dollars and ninety-three cents of the judgment at law at the rate of six per cent., making the sum of ten dollars and thirty-one cents damages; that execution issue from this court for said six per cent. damages, and that execution issue from the common law court for the amount of the judgment at law, except the fifty dollars in which the injunction has not been dissolved; and that the defendant recover against the complainant all the cost in and about said motion to dissolve the injunction, to be included in the execution for the ten dollars and thirty-one cents damages aforesaid. And this cause is continued."

Complainant appealed to this court. Appellee's counsel moved to dismiss for want of jurisdiction, on the ground that there was no final decree in the court below.

Mr. Justice SCOTT, delivered the opinion of the Court.

The decree in this case is interlocutory beyond all question; it has no resemblance to one that is final. As to fifty dollars of the sum in controversy the remedy sought, has neither been granted nor refused, and the cause has been continued by the court in express terms. As to this sum the injunction has neither been perpetuated, nor has the bill been dismissed. Something therefore remains to be done by the court between the parties remaining in court. While this is the case, no final decree can be rendered from which an appeal will lay under our statute, contemplating as it does but one final decree in a cause. (*Crittenden, Ex parte*, 5 *Eng*. 350.) Let the motion be granted.

FULLERTON VS. HOUPT.

Declaration radically defective in form and substance, and judgment thereon by default, reversed. | 12 399 | 58 41 |

Writ of Error to Hot Spring Circuit Court.

This case comes from the Hot Spring Circuit Court, and the declaration is the work of that singular, but conscientious man, *John D. Pollok*, who was a *preacher* and a *lawyer*, and who now sleeps with his fathers. The declaration is in these words:

"Egbert Houpt, as executor of the last will and testament of Henry Houpt, deceased, plaintiff in this suit, by attorney, complains of John W. Fullerton, defendant herein, of a plea that he render unto said plaintiff the sum of six hundred dollars, which said defendant owes to, and detains from, said plaintiff.

For said plaintiff declares and says, that heretofore, to wit: on the 28th day of December, A. D. 1848, to wit: at the county aforesaid, the said defendant, by and under this style and signature of J. W. Fullerton (alias John W. Fullerton), made his two certain writings obligatory, sealed with his seal, and now here to the court shown, bearing date the day and year last aforesaid, one for one hundred dollars, whereby he (J. W. Fullerton) promised to pay on or before the first day of March, A. D. 1849, and the other one for five hundred dollars, whereby he promised to pay on or before the first day of October, A. D. 1849, the above

sum of five hundred dollars, making in both the sum of six hundred dollars, the sum above demanded, for value received, and then and there delivered said writings obligatory unto said plaintiff's *testator*.

Yet the said defendant, although often requested so to do, has not as yet paid said sum demanded, and in said writings obligatory specified, *but only a small part thereof, to wit: the sum of thirteen dollars and forty-five cents, as shown by a credit on the back of the writing obligatory for the sum of one hundred dollars,* but to pay said writings obligatory, *hath almost* wholly failed, neglected and refused, and still neglects and refuses, to the damage of said plaintiff to the amount of the sum of five hundred and eighty-six dollars, the sum specified hereinbefore, and to the further damage of said plaintiff to the amount of the sum of twenty-five dollars and forty-five cents, and therefore suit is brought."

J. D. POLLOK, Att'y.

Defendant made default, and plaintiff's attorney took judgment for the amount of the larger obligation, withdrawing the other.

Mr. Justice SCOTT delivered the opinion of the Court.

The declaration in this case is radically defective both in form and substance.

Let the judgment be reversed, and the cause remanded, with leave to the plaintiff below to file an amended declaration.

LAWSON VS. BETTISON.

12 401
66 184

A case pending from term to term under an agreement that it is to be settled out of court—the plaintiff's attorney, before term, informs the defendant's attorney that *he must come and pay up:* at the term when the case is *called* the plaintiff and defendant's attorneys, after *some reference* to the agreement, submit the cause to the *court by consent. This is no such surprise upon the defendant, who is absent, as will entitle him to relief in a court of equity.*

When a person employs an attorney, he is concluded by his acts or omissions, where no fraud or unfairness is made to appear.

But if fraud or unfairness, affecting the trial at law, is shown, a party appealing to a court of equity must show that injury to him was the result—a general allegation of injury is not sufficient, as for instance that he had a good defence of which he was deprived—he must state what the defence was and it must appear sufficient.

A party seeking relief in equity on the ground of surprise in obtaining a judgment at law against him, must show that the surprise was not in consequence of negligence on his part.

An attorney is not authorized to receive depreciated paper, at its real value, or other property in payment of his client's judgment, unless by his express authority; and if he receives such may, issue execution without regarding it as a payment.

Appeal from Chancery side Pulaski Circuit Court.

This was a Chancery appeal from Pulaski county.

On the 18th September, 1848, Lawson & Thorn filed their bill against Bettison, in which they allege:

That on the 29th September, 1841, Bettison recovered of Whitmore the sum of $225 debt, and $16 10 damages, and cost of suit. Execution issued thereon to March term, 1842, of Pulaski Circuit Court, and was placed in the hands of Lawson, then sheriff, on 30th October, 1841, to be executed: that Lawson was unable to find any property of Whitmore out of which the execution could be satisfied; but before the return day of the execution, one Resley, a friend of Whitmore, proposed to Fowler, the attorney for Bettison in said judgment, to pay him $265, in Arkansas

Bank paper, at the current rate—it being about twenty-five per cent below par: that Fowler, the attorney, acceded to this proposition, received the money and gave receipt therefor to Resley: that no part of this $265, in Arkansas money, came into the hands of Lawson as sheriff; and from that time, (March, 1842,) Fowler retained the money so received, and nothing more was said on the subject until October, 1842, when Whitmore was arrested on a charge of counterfeiting. On 17th November, 1842, Fowler caused an alias execution to issue on the judgment, returnable to March term, 1843, and directed it to be levied on a box containing some specie, notes, &c., which had been taken by the sheriff as the property of Whitmore, after his arrest—which levy was accordingly made.

After the second execution was issued as aforesaid, said Fowler brought to Borden, who was deputy to Lawson, a bundle of Arkansas Bank notes, amounting to $265, alleging they were the same received of Resley, and required the deputy to make sale of them, which he did on legal notice: on the day of sale: Fowler holding the notes in his hand while the deputy cried them off. Fowler became the purchaser of them at $117; said Lawson being wholly ignorant of the matter until after the sale. It is insisted this $265 should be held a credit on the execution at its value when received. Lawson endorsed the fact of this receipt on the execution issued in October, 1841: that the box of specie levied under last execution was paid out partly in discharge of costs of prosecutions against Whitmore, and to Ashley & Johnson, on their motion made in court, for that purpose and sustained by the court.

That on the 24th April, 1844, said Bettison sued Lawson on his official bond, and Thorn his surety, alleging breaches, *First:* Failure to sell said $265, in Arkansas paper; *Second:* Failure to pay over the moneys levied on as aforesaid—in which suit Lawson employed Albert Pike as his attorney, who put in pleas and made up the issues.

That Lawson, whether responsible or not on that basis, proposed to Bettison to settle with him the residue of said judgment,

&c., after crediting thereon the $265, Arkansas money, Bettison being at the time indebted to him in costs and for fees, as sheriff the amount of such balance, and have the last suit dismissed. To this B. assented, and stated the settlement should be made with Fowler, his attorney, who had money in hand belonging to B. and would pay Lawson any balance due him; and Lawson then made out his account against Bettison for $74 76, and handed it to Pike, his attorney, to effect the settlement and have the suit dismissed. That Pike then called on said Fowler and proposed to make the settlement, to which F. agreed; but from some cause unknown the matter was postponed from time to time and the suit continued for several terms. And Lawson, being apprised of the arrangement with Pike and Fowler, paid no further attention to the suit, supposing it would be settled without further difficulty.

In July, 1846, Pike left the State and was gone about a year. And L. having several other important suits in Court, gave Ringo & Trapnall, attorneys, a statement of the cases he wished them to attend to in Pike's absence, but entirely omitted the suit of B. for the reason that he supposed it would be settled, and no step would be taken in it, until Pike should return. But in the absence of L. and his attorney, the said F., in April, 1847, took judgment against L. on his own evidence for $190, residue of debt, with six per cent interest from date, and ten per cent damages per month on said sum of $190, until paid, with costs of suit; on which judgment execution had issued and been levied on L's. property—Fowler only crediting the original judgment with $117, instead of $198 75, the value of the Arkansas money when Fowler received it, according to the rate agreed on. And if credit had been given for the $117, when it was actually received, the balance of the debt could not have exceeded $153; and if the credit of $198 75 had been given as ought to have been done, the balance would only have been $65.

That Lawson is advised he had a valid defence to the whole action, and if Fowler had given him notice of his intention to prosecute the action in violation of the agreement, and enabled

him to exhibit his defence at the trial, he could not have got judgment for one cent. That he never knew of the rendition of the judgment until the term expired, &c.

The bill prays an injunction, general relief, &c., and is verified by his affidavit.

Exhibits are made of the various judgments, executions, &c.

On the execution against Whitmore to March term, 1842, is this endorsement by Lawson, sheriff: "Levied this execution on " two hundred and sixty-five dollars in Arkansas Bank notes, " which is to be taken at the value at this time, that is, what it " is selling for."

JAMES LAWSON, Jr., *Sheriff.*

" Came to hand 30th October, 1841.

LAWSON, Jr., *Sheriff.*"

On the execution against Whitmore to March term, 1843. Lawson returns the levy on the box of specie and Arkansas Bank paper, and its surrender on order of court, to Whitmore's attorneys; and then proceeds "I also levied on two hundred and sixty- " five dollars in Arkansas Bank notes, from which I made one hun- " dred and seventeen dollars ($117,)" balance of debt unpaid and no other property. Signed "JAMES LAWSON, Jr., *Sheriff.*

By WM. B. BORDEN."

An injunction issued. On 22d October, 1848, Bettison filed his answer.

He admits that prior, to his leaving Arkansas, he placed various claims, and among others that against Whitmore, but which was in truth a note on Whitmore and Resley both, in the hands of Fowler for collection, upon which judgment was rendered as stated in bill.

He states on information derived from his attorney, that, on the first execution, Lawson levied on the $265, Arkansas money, as the property of Whitmore, of which $200 was paid Fowler, and was then only worth $80 in specie, as was proven on the last trial, *not* by Fowler but other business men, which latter sum was credited at the time. That he is in like manner informed that Lawson never paid over the residue $65 to any one, but

converted it to his own use. On like information he denies Resley ever proposed to pay $265, Arkansas money at the current rates, or Fowler ever accepted such proposal, or that the money was ever paid to said Fowler or he ever gave a receipt thereof, or Resley ever paid a cent to said Fowler, or that Fowler ever received any other than the $200 from Lawson.

Admits on information of his attorney issuance of the alias execution against Whitmore, which was directed to be levied on box of specie, notes, &c., at suggestion of Lawson, and the same was seized accordingly which box contained $148 50 in gold; and the Bank paper to $265, which was sold as by return for $117; and alleges, on information, that Lawson *falsely* returned on said execution that said box had been by order of Court turned over to Whitmore's attorneys, and said alias writ had been returned by order of Bettison's attorney.

On information, he utterly denies the statements in the bill in regard to Fowler's presenting the Bank notes and holding them at the sale and buying them in for $117: but alleges that at the sale of the Bank notes levied on in the box, Fowler was a bidder, but denies he ever bought any portion of it, or any part of it ever was delivered to Fowler. Denies Lawson ever paid out in costs or otherwise the contents of said box, as alleged in the bill; and if he did, that it was wrongfully done, after he had been required to pay the same over to Bettison on said judgment, and had been notified he would be held responsible unless he did so.

On information, he further admits the institution of the suit on Lawson's official bond: That, at May term, 1844, said cause was not reached: That there was no November term, in that year: That, at April term, 1845, the case was continued at the earnest request of Lawson on promise to pay and settle the amount due by next term, which he did not do: That, at October term, 1845, the case was not reached: at April term, 1846, Lawson and Thorn filed ten pleas in bar, and to some replications filed demurrer, which were submitted but not decided at that term: That, October term, 1846, the demurrer was again submitted but not decided; but at April term, 1847, the demurrer was overruled; and on same

day, 22d April, 1847, the case was submitted to the court as a jury, by D. J. Baldwin, the attorney who had represented and was still representing him in the case, and said attorney was present during the progress of, and until the case was tried and judgment rendered—part of the issues being found for Lawson and Thorn a part against them: and on the trial Lawson was allowed all just and legal credits. That a writ of error was prosecuted from said judgment, and said judgment affirmed in the Supreme Court.

On like information, denies that Pike ever called on said Fowler to settle the matter, or the case was postponed to have such settlement; but Pike had stated to Fowler that Lawson would pay up the balance, and the case was delayed as above stated and not otherwise; and there never was any other agreement that the progress of the cause should be suspended until settlement, but only one continuance assented to, that the settlement might be made. Admits Pike was absent as stated in bill, but Baldwin remained and attended to the suit. Denies Lawson's attorney was absent at the trial, but was present. The case was tried on the *record* evidence and the testimony of other witnesses than said Fowler, who only proved a demand on Lawson and a credit in his favor. That no credit was given for $198 75 or $117, stated in bill, because Lawson was not entitled to either, and only to the credit above stated as having been given. On like information, denies Fowler prosecuted the suit in violation of any agreement; but on the contrary said Fowler repeatedly warned Lawson and Baldwin, his attorney, that unless immediate payment were made he should prosecute the suit, and exact every thing he could by law obtain for his client, and at the October, term, 1846, specially requested Bettison to inform Lawson of this—insists Lawson had made full defence at law—knows nothing of the account of seventy odd dollars claimed by Lawson, but if correct is willing to settle—insisting the same has no connection with said suits.

Denies that Lawson ever applied to him (Bettison) for settlement until after last judgment was rendered. That in Summer

of 1847, Lawson did complain to him of the hardship of his having to pay damages, &c., but Bettison refused to interfere and referred him to his attorney, Fowler. Lawson offering to pay principal and interest. Lawson never intimated he then had any claim on him for costs, nor does he believe he has any. He exhibits a transcript of the record in the case against Lawson and Thorn corresponding with his statements in respect to it.

On the 2d January, 1849, replication was entered, and cause set for hearing.

The cause was finally heard 16th August, 1850, upon bill, answer, exhibits, depositions, of G. N. Peay, and exhibts, C. P. Bertrand, A. Fowler, Wm. B. Borden, D. Ringo, A. Pike, D. J. Baldwin and Geo. Resley, and the admission that the order on Lawson to turn over the box of specie, &c., levied as Whitmore's, to the attorneys of Whitmore, was taken to the Supreme Court by Lawson and the decision reversed in 1843.

The Court dissolved the injunction and dismissed the bill, from which decree Lawson and Thorn appealed to this Court.

The evidence of Baldwin, Ringo, Bertrand, Peay and Fowler is fully stated in the opinion of the Court—except that Fowler deposes to the facts in regard to the seizure and sale of the Arkansas money, box, &c., and the credits due and given to Lawson substantially as they are stated in the answer.

BORDEN, a witness for Lawson deposed, that, in 1842, he was deputy to Lawson, and had in hand the execution of Bettison against Whitmore; and called on Whitmore for the money, who said it was Resley's debt, or he was some way concerned, and that the money would be paid as soon as Resley returned, Resley did return and proposed to pay in Arkansas money. Witness told Fowler of the offer, who said, if the money were paid down, he would take the Arkansas paper, as he could then use it. The money was then paid to witness, through Dr. Sprague, and was immediately handed to Fowler by witness. Some time after Fowler said witness must sell the Arkansas money, and witness did sell the $265, for $117, and Fowler bought it. Witness never had the $265 after he had handed it to Fowler—he holding

it in his hands on the day of sale, and stating if any one purchased it, he would at once deliver it up. Witness made a note in his memorandum book, at the time of the sale, of the Arkansas money, the price, &c. Fowler was the attorney for Bettison.

PIKE, a witness for Lawson deposed:

That he had been retained generally by Fowler in his cases, and among others in the case against Lawson & Thorn. On its being first called in Court, Lawson informed witness it would be settled out of court by Lawson and Fowler, and on speaking to Fowler, he told witness same thing. The case was continued several times and always by consent, and witness always understood from Lawson and Fowler that the case would be settled out of Court. Witness always understood there were only some calculations to make and no disputed facts, to effect a settlement —though he cannot say Fowler ever stated this distinctly to him, for Fowler never said a great deal about it, did not say as much about it as Lawson did. At all events, no opposition was manifested by Fowler to continue the case, and he seemed not disposed to press a trial. Witness never supposed there was to be any trial in Court. Witness went to Mexico in July, 1846, and remained absent till July, 1847. Pleas were filed without consulting Lawson under the general retainer.

RESLEY, another witness for Lawson, deposed:

That, in November, 1841, or thereabouts, he was called on by Borden, deputy to Lawson, in regard to the execution of Bettison v. Whitmore and witness; which witness had agreed to pay—the judgment being for some $265. That witness and Borden then went into the sheriff's office, where they met Fowler; and after some conversation in regard to the execution, it was agreed that Arkansas money should be received in payment of it. Witness immediately went to Dr. Sprague's house in town, got the Arkansas money, returned immediately to the sheriff's office, and counted down the Arkansas money, in payment of the execution, in presence of all said parties, and witness supposed all were satisfied. Witness remained some time in town, and supposed the money had been accepted by Fowler and the matter closed.

Witness took no receipt—as all parties were present, he deemed it unnecessary.

The proceedings had in the Common Law Court, on motion of Johnson and Ashley, attorneys for Whitmore, to compel Lawson to surrender and turn over to Whitmore or his atterneys, the box of specie, &c., are exhibited in the deposition of Peay; among other things containing the response of Lawson to the rule entered against him, to show cause against that surrender. In this, Lawson alleges Whitmore had been arrested and committed by an examining court, to answer charges for counterfeiting, &c.—that Whitmore had been indicted, and six indictments found against him, which were then pending. That by order of the examining Court $148 50 in gold and silver coin had been turned over to him as sheriff, to be safely kept subject to the lien of the State, for the payment of all fines and costs that might accrue in said prosecutions—and as further cause for retaining the money, Lawson recites the judgment of *Bettison v. Whitmore*, and, after stating the payment of the $265, in Arkansas money at its par value, on the first execution in March, 1842, as detailed by Borden, and that the balance remained unpaid, alleges that, in virtue of an alias execution issued thereon, in November, 1842, he seized said $148 50, and held the same, first to satisfy the lien of the State; second, to pay said residue of judgment, about $175, as he alleges.

The damages assessed, and judgments rendered therefor, against Lawson and Thorn, were $190, with lawful interest and costs; and damages by way of penalty on the $190, at ten per cent. per month from the first day of May, 1843, until the whole judgment should be paid.

The other material facts of the records and exhibits are sufficiently stated in the opinion of this court.

F. W. & P. TRAPNALL and WATKINS & CURRAN, for the appellant, argued this cause at length, upon the facts, to show that the judgment at law was obtained against the appellant by surprise and contrary to an express understanding and agreement be-

tween the parties that the matters in dispute should be settled out of court: that the judgment at law was contrary to equity and good conscience; that the debt for the recovery of which the suit was instituted upon the sheriff's bond had been paid to the plaintiff's attorney.

FOWLER, contra, contended that, if the appellant had any defence to the suit, he should have made it in the action at law; and, having failed to do so, he had lost the benefit of it by his own negligence; that the judgment at law was conclusive against him; that the allegations in the bill did not entitle him to relief in Equity; that no relief could be granted to him unless by allowing him to falsify his own official acts as sheriff, which the law would not tolerate; that the proof in the case showed no violation of any agreement on the part of the appellee or his counsel, and no sufficient equity to entitle the appellant to the relief sought.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The question first presented in this case is whether the appellant has been surprised by the appellee, and that too without any negligence on his part; and secondly, in case that such surprise has been shown, whether it has been productive of any injury. The whole case must turn upon the fairness or unfairness of the conduct of the appellee's counsel in procuring the judgment at law, and this can be determined alone by the testimony as it is exhibited upon the record. The bill charges in substance that in consequence of an understanding between the counsel of both parties that the case should be settled out of Court, he was thrown off his guard and that therefore it was that he failed to defend at law. The respondent on his part denies that any unfairness has been practised, but on the contrary insists that he has had the benefit of a fair and regular trial at law, and that consequently such a case does not exist as to call for the intervention of this Court. We will now proceed to look into the testimony and to ascertain if practicable how this matter really stands. David J.

Baldwin, the partner of Albert Pike, and one of the attorneys of the appellant expressly admits that Col. Fowler, (the attorney of the appellee,) notified him at a term of the Court previous to the trial, that he intended to exact the full penalty. He also stated that when the case was called, he (Baldwin) was arranging the papers for the purpose of discussing a demurrer, and that whilst thus engaged Col. Fowler spoke to him of some arrangement or understanding between himself and Major Lawson, but that if he (Baldwin) desired to go on and settle the case upon the record as shown he had no objection. He stated that he then told him (Fowler,) that Major Lawson had before told him the same thing, but that, as the case had been called for trial he supposed that he (Fowler,) intended to go on with it. He then stated that in the existing state of things and as the matters involved in the case which lay entirely within the knowledge of himself (Fowler) and Lawson, that for himself he would rather not have anything further to do with it, and finally that as Mr. Pike had previously managed the case, and as he did not understand the merits of it he would positively have nothing to do with it. Daniel Ringo also a witness for the appellant, stated that he was present at the trial in the court of law, and that he had no recollection that Mr. Baldwin appeared in the case, but that, on the contrary, his best recollection was that no person appeared on the part of Lawson. This is the substance of the testimony on the part of the appellant touching the alleged surprise. The appellant appeared before the Court at the time of the trial and the rendition of the judgment. The first piece of evidence, in order, on the part of the appellee is the record, which is as follows, to-wit: "And now at this day came the said parties by their respective attorneys, and the Court being now well and sufficiently advised of the matters of law arising on the demurrer of said defendants to the plaintiff's first and second replications, to their fifth plea in this case, doth consider and adjudge that said demurrer be overruled: whereupon the said parties waived their right to have a jury in this case expressly, and by consent, submitted the cause and the issue joined to the Court in place of a jury, &c.

Gordon N. Peay testified that he was the clerk of the Court, and present at the trial of the case at law between Bettison and Lawson and Thorn, that he distinctly recollected that on the trial of said case both parties appeared by their attorneys, Col. A. Fowler for the plaintiff (Bettison,) and David J. Baldwin for the defendants, (Lawson & Thorn,) that after the judgment was rendered on the demurrer in said case, the parties waived their right to a jury, and the cause was submitted by consent of parties to the Court, in the place of a jury, and that David J. Baldwin, as the attorney for the defendants, Lawson and Thorn, was present at the trial and submitted the case to the Court for them. Charles P. Bertrand, another witness introduced by the appellee, testified that he was present at the trial of the case between the same parties, in the Pulaski Circuit Court, that D. J. Baldwin, as attorney, represented the defendants, that according to his best recollection a jury was waived by him and the cause submitted to the Court sitting as a jury. Absalom Fowler, the last witness introduced, testified that he instituted the suit at law mentioned in the bill and answer for Bettison against Lawson & Thorn, who filed several pleas in bar thereof and thereto, signed by Pike & Baldwin, their attorneys, that said suit was continued from term to term on request of said Lawson and especially at one term on his request made through Albert Pike, one of his said attorneys, that he would settle up by the next term, and pay over whatever might be found due from him to said Bettison, which he believed to be the April term, 1845; that at the April term, 1847, a demurrer, which said Lawson & Thorn had filed to a part of the pleadings, was overruled: that Mr. Baldwin, one of said attorneys and who had argued the demurrer, being then present, and on the overruling of said demurrer, said Baldwin rested thereon, but voluntarily consented to submit, and did then and there voluntarily and freely submit the issues joined and the whole cause to the court sitting as a jury, and waived the right to a trial and assessment of damages by a jury. He further stated that said Pike never proposed to make a settlement of the matter with him for Lawson, and that he never at any time agreed that

the progress of the suit at law should be suspended until such settle ment was made, and that at the term previous to the judgment he sent a message to Lawson by his said attorney, Baldwin, to come and pay up as he expected or intended to exact of him all that the law would give to Bettison, specifying ten per cent. per month and lawful interest. The current of testimony tending to show that Baldwin appeared and represented Lawson at the trial of the cause in the court of law, is wholly irresistible and consequently that fact must be regarded as fixed and unalterably established. (*See* 11, *Illinois* 91.)

It will not be necessary, under the state of case here presented, to discuss the legal effect of an appearance by an attorney at law, who is a mere volunteer and acts without the authority of the party, whom he assumes to represent. The attorney, who is proved to have represented Lawson in this case was not only authorized to practice law in the Court where the trial was had and the judgment rendered, but he was likewise the attorney of record regularly employed and retained by Lawson to represent his interests and to protect his rights in the defence of the case. This proposition being true, it would seem to be quite immaterial whether Lawson actually knew that the trial would take place at the term of the Court at which it was brought on or not. The Court of Appeals of the State of Kentucky, in the case of *Barrow v. Jones* (10*th J. J. Marshall*, 470) said, "We are of opinion that the bill does not present a case which authorized the relief given. It was the fault of the complainant's attorney, to go into trial unprepared, or if he did, to suffer a verdict to be rendered in the absence of the complainant, or any authorized agent. For injuries resulting to clients from negligence or inattention on the part of their attorneys, Courts cannot give redress against the other party to the suit. Redress must be sought in a new action against a new party. The discovery of evidence or new testimony relevant to the point in issue, which, by reasonable diligence, could have been produced, is no cause for a new trial; going into trial unprepared should rather operate against an application for a new trial, instead of in its favor.

Where it does not clearly appear that the result of a new trial ought to be in favor of the applicant, it should be awarded with much caution if at all. The case of *Green v. Robinson* (5 *Howard Rep. Mississippi*, 105) is to the same effect. The Court in that case said, that "It is a general principle that the judgment or decree of a Court of competent jurisdiction shall be final as to the subject matter decided, and not as to that merely, but as to every other which might have been decided. The law abhors multiplicity of suits, and it is a cherished object with Courts of Justice to put an end to litigation. Some period must be prescribed to controversies of this sort, and what period can be more proper than that which affords a full and fair opportunity to examine and decide all claims of the litigants. This imposes no hardship since it only requires a reasonable degree of vigilance and attention. But a contrary course might be highly oppressive and endanger the stability of titles and the security of all our rights. Hence it has become an established rule that equity never will interfere to grant a new trial of a matter which has already been discussed in a Court of law, a matter capable of being discussed there, and one of which a Court of Law has full jurisdiction. 2 *Story's Eq.* 179. It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize the Court to intefere. Equity, then, as a general rule, will not interfere where the party could have availed himself of the defence on which he seeks a new trial or injunction, and neglected to make it on the trial. Neither will he be relieved, if he was prevented from doing so by the mistake of his counsel in filing the plea which does not cover his defence. 2 *Story* 180." "In *Bateman v. Willac*, 1 *School & Lefroy*, 201, Lord REDESDALE observed that a bill for a new trial was watched with extreme jealousy. The Courts must not only be satisfied that injustice has been done, but that it was not owing to the mere inattention of the party. In *Williams v. Lee*, 3 *Atkins* 224, Lord HARDWICK lays down the same rule, and remarks that relief will only be granted after verdict in cases where the plaintiff knew the fact to be otherwise than what the jury have found and

the defendant was ignorant of it at the trial. The case of *Young v. Donner* is also strongly in point. See 5 *Litt. p.* 10. The Court, in that case, said that "Where by fraud or any artful contrivance of one party, or by unavoidable accident, a valid defence is kept out of sight, the Chancellor may interpose. But it is not sufficient for the party applying to the Court of Equity for a new trial, to exhibit good grounds; he must also show that it was out of his power, owing to some substantial cause, to make the application to the Court of Law in due time. In this case the complainant was represented upon the trial by an attorney at law of his own selection, and of course, one in whom he had confidence to manage his defence and to guard his rights. This being the case the legal presumption is that he was duly and fully advised of every fact and circumstance which could be used in behalf of his client, and also that his client was kept duly advised as to any matter that would make either for or against him, and which had come to the knowledge of the attorney. The fact that the attorney consented to the trial and joined in the submission of the cause to the Court, and that too after having been apprised of an understanding that it was to be settled out of Court, raises a presumption, which is scarcely resistible, that he had previously apprised his client of the intention of his adversary to exact the penalty given by the statute. But the ground of surprise charged and relied upon in this case is that Fowler, the attorney of Bettison, in violation of his agreement to settle the case out of Court, brought on the trial and obtained the judgment, and that too without ever having given any notice of such his intention. This allegation is utterly unsupported by the proof. The testimony shows most clearly that no such intention ever was entertained by Fowler, until after the cause was actually called by the Court. Baldwin testifies himself that when the cause was reached upon the docket and called by the Court, that Fowler spoke to him of some arrangement or understanding between himself and Lawson, but that if he (Baldwin) wished to go on and settle upon the record as shown, he had no objection. He further stated that he then told him (Fowler) that

Lawson had before told him the same thing, but that as the case had been called for trial he supposed that he (Fowler) intended to go on with it. This is the testimony of the appellant's own witness and as a matter of course, he cannot object to abide its legal effect. It most assuredly would not be contended that here is any evidence that Fowler intended prior to the calling of the cause to urge or insist upon a trial at that term. It is perfectly apparent that so far from Fowler intending to urge a trial at the term at which the judgment was rendered, the proof is strong that such was not the case; but that, on the contrary, his expectation was to continue it over, and that he only consented to take it up and to dispose of it, when Baldwin, in rather a taunting manner, intimated his readiness to go into the trial. It will be found, upon a close scrutiny of the testimony of both Fowler and Baldwin, that Fowler did not say that unless Lawson came forward and settled that he would progress with the suit, and exact the full penalty, but that the purport of his message was that he must come and pay up, as he intended or expected to exact the full penalty. What was the necessary inference which Fowler must have drawn from the conduct of Baldwin, when he found him in the case arguing a demurrer, and after the law arising upon the same was adjudged against his client, resting upon it, and submitting the cause to the Court to be tried upon the issues joined? Was he not fully authorized to conclude that Baldwin had delivered his message and that upon a consultation between him and his client, Lawson, they had waived the privilege of a private settlement, and preferring to take the chances of a trial in Court, had resolved to do so? This is the only rational conclusion to which he could arrive, in view of all the facts and circumstances connected with this transaction. Indeed the plaintiff in the suit at law would seem to have better ground of complaint than the opposite party, for it is obvious that he did not anticipate a trial and that it was necessarily forced upon him. True it is, that Baldwin stated that after having taken up the case for the purpose of arguing a demurrer, it was suggested to him by Fowler that there was an

understanding between the parties that it should be settled out of Court, and that upon such suggestion he first expressed a desire to get out of the trial, and, that finally, he absolutely refused to go into it. This portion of his testimony is completely nullified by the record and the other proof introduced upon the trial, and consequently must be regarded as being entirely out of the view of this Court. Under this view of the evidence, it is clear that there is not the slightest groud of surprise that can fairly be predicated upon the conduct of Fowler, but on the contrary he is shown to have acted with the most perfect fairness and consistency throughout the whole transaction; at least, so far as bringing on the trial is concerned. We are therefore clear, that so far from Fowler intending to take any advantage of Lawson by bringing on the trial, at a time when he was not present and prepared to make his defence, he did every thing that could have been required of him, when he signified his willingness to continue it again, and only consented to take it up when he was invited to it by Lawson's attorney.

When a party employs an attorney at law, either to prosecute or to defend his suit in the Courts of the country, he presents him to the opposite party and to the world as his accredited agent, and as such, he must be concluded by his acts, or omissions, where no fraud or unfairness is made to appear. But upon the supposition that fraud or unfairness has been shown, so as to occasion a surprise, the point to be determined then is whether the appellant has been injured thereby. If he has failed to disclose a legal defence to the action instituted by the appellee upon his official bond, then it is that although he may have been the victim of fraud or contrivance, still he is not entitled to relief in a Court of Equity. That this is the law, is fully established by the authorities already referred to, as well as numerous others which might be cited. By his return upon the several executions exhibited, the appellant has furnished ample evidence from which the Court was fully warranted in finding the amount against him, which is specified in the judgment.

The point now to be decided is, whether the showing which he

has made in his bill, admitting that he had availed himself of its entire benefit, would have discharged him from his legal liability. It was expressly adjudged by this Court, in the case of *Randolph v. Ringgold et al.*, (5 *Eng. Rep.* 282,) that an attorney at law, who acts under his general authority as such, has no power to receive nor to give directions for the receipt of any thing but legal current money upon executions for their clients, and that in such a case the debt remained unpaid, and that the plaintiff in execution might elect to set aside the sheriff's return, and sue out an alias execution, or sue the attorney for the value of the debt collected." This doctrine is well supported by authority, and its soundness is believed not to admit of a single doubt. What then is the state of case in relation to payment as disclosed by this bill? The allegation in the bill is that Presley, a friend of Whitmore, paid Fowler, the attorney of the appellee, two hundred and sixty-five dollars in Arkansas bank paper, and that such payment entitled the judgment to a credit of one hundred and ninety-five dollars and seventy-five cents, and further that he was advised that he had a valid defence to the whole action, and that if Fowler had given him any notice of his intention to prosecute his suit, and thereby enabled to set forth his defence on the trial, that Bettison could not have obtained judgment for one cent. Admitting the payment to have been made in Arkansas paper as represented in the bill, it is clear that Bettison was not precluded by it from a recovery against Lawson, unless it has been shown that Fowler was vested with a special authority to receive such payment by Bettison. The answer of Bettison, which is the only evidence touching that matter, is that, "In the summer or fall of 1847, Lawson, in Louisville, Kentucky, stated that it was a hard case for him to pay the damages embraced in said judgment, but that he was willing to pay the principal and legal interest if he (Bettison) would compromise at that, which he refused to do, but referred him to his attorney, Fowler, as having the control of the case, and stated he did not mean to interfere at all, but would leave it entirely to said Fowler. We do not understand from what Bettison said upon that

occasion that he admitted that Fowler had authority to receive the amount actually and justly due in depreciated paper, but simply that if he should deem it unjust to exact the penalty, he might remit the same, and this would seem to be the full extent of his admission, as that was all that Lawson requested. If this be the extent of his admission, then it is, that under the authority already cited, the payment in Arkansas paper, even though it had been the whole amount of the debt, would not have amounted to an extinguishment, and as such it would have been inadmissible as evidence of payment on the trial at law. True it is that he further alleges that had he been advised of Fowler's intention to insist upon a trial, that from the advice which he had received, he believed that he could have made a complete defence. What the character of this full defence was, does not appear, and consequently it is not entitled to any consideration whatever. Upon an application of this nature, it is indispensable that the particular facts constituting the defence should be disclosed in order that the Chancellor may determine whether it could have availed the party or not on the trial at law, and consequently, whether he has suffered any injury by not being permitted to have the benefit of it. But there is yet another view of this case, which, if it stood alone upon it, would leave it a doubtful question whether the relief sought ought to be granted. The law is well settled that the complainant is required to present himself under circumstances, showing clearly that the facts which he charges as the foundation of his surprise, are unmixed with negligence on his part, (See *Town v. Sneed*, 4 *Eng. Rep.* 540, and the authorities there cited.) What then are the facts of this case as presented by the proof? In April, 1844, Bettison instituted his suit against Lawson upon his official bond, and at the April term, 1847, the judgment complained of was rendered by the Court. Here then are just three years permitted to elapse by Lawson in order to bring about a settlement of the case out of court, and that too without one scintilla of showing, that he ever, during the whole of that time, came forward and made the slightest effort to effect such settlement. It certainly cannot be that

he supposed he would be permitted to keep the cause forever pending upon a mere matter of favor and indulgence, and that extended too without any apparent motive, or the least consideration by his adversary. It cannot be reasonably contended that Fowler, by consenting to continue the case from term to term for the space of three years, was therefore under any legal obligation to continue it forever. This would be a most unreasonable and unfair construction of the understanding as disclosed by the testimony, and all that could be claimed either in law or morals, would be a reasonable time for Lawson to procure his proof and to come forward. If Fowler consented to a continuance of the cause for three years, as a matter of favor to Lawson, and solely to give him an opportunity to prepare himself for the settlement, we consider that in all conscience he can have no just cause of complaint, and more especially when it is not made to appear that Lawson ever, during the whole time, used the least exertion to bring about the object for which he had caused so great delay. This state of fact, it seems to us, cannot be said to show that kind of diligence which the law favors, but, on the contrary, a high degree of negligence. Upon this ground, therefore, we think, to say the least of it, that Chancery would not regard his application in a very favorable light. In view of the apparent harshness of the penalty which the law visits upon the sheriff, who retains money in his hands and in order to afford all the relief which could be granted in accordance with the principles of equity, we have looked into this case in all its various phases, and after a full and thorough investigation, we have been forced to the conclusions already announced. This being the case, the decree must in all things be affirmed.

WHITING & SLARK VS. BEEBE ET AL.

12 421
56 191
12 421
57 220
57 231
12 421
f80 303

This court has repeatedly held *original* writs void for want of the signature of the clerk, and like defects, but the courts have generally held such defects in *judicial* process to be amendable.

Adhering to the former decisions of this court as to such defects in *original* writs, yet in view of the enlarged powers of courts in amending *judicial* process, the court holds that although such writ, without the signature of the clerk, as required by the constitution, is erroneous, yet it is not necessarily void, and the court from which it issued, upon application for that purpose, might either quash or amend it as the circumstances of the case might require.

Some of the former decisions of this court have been made under an erroneous impression with regard to the effect which the constitution had upon the validity of process—that as the constitution required the signing, &c., it could not be dispensed with, and where a constitutional defect existed, the writ was void.

But a directory enactment of the constitution is of no more validity as a law, than a like enactment by statute—both are laws, though emanating from different law-making powers.

Instead, therefore, of looking to these, the true inquiry is, is the writ so totally defective as not to perform the offices of a writ, and what will be the effect of the amendment upon the rights of the parties?

Where a writ is defective in a matter that is amendable, it will be considered as amended when collaterally questioned.

In this case, a *fi. fa.* was issued in the usual form, but *wanting* the *signature* of the *clerk*, and levied on lands, but returned without sale; under an alias *ven. ex.* issued thereon, complainants purchased, and seek confirmation of title, and it is objected that the original *fi. fa.* was void: HELD, That said *fi. fa.* being valid and formal, in all other respects, was not void but amendable, and being called in question collaterally, would be considered as amended.

By the common law, there are but two writs given the creditor to enforce satisfaction of his judgment, that of *fi. fa.* agains the goods, and *levare facias* against the goods, and also issues and profits of lands. By statute, he was allowed also the writ of *ca. sa.* against the body of the debtor, and the writ of *eliget* against his lands; and the levy on goods, the arrest of the body of the debtor, and the delivery of a moity of the land, were each held an unqualified satisfaction of the judgment.

The above rule as to the effect of a levy upon goods, (as laid down in *Clerk v. Withers*, 2 *Ld. Ray.* 1072), was recognized by most of the American courts, until a change in the rule was announced in the *People v. Hopson*, 1 *Denio* 574, which

change in the rule has generally been acquiesced in by the courts of the United States.

The rule so modified is, that a mere levy on sufficient personal property, without any thing more, never amounts to a satisfaction of the judgment. But so long as the property remains in legal custody, the other remedies of the creditor will be suspended. He cannot have a new execution against the person or property of the debtor, nor maintain an action on the judgment, &c.; and this rule may be regarded as settled by authority.

And after a full review of decisions, this rule is held to apply to a levy upon lands, and the case of *Anderson v. Fowler*, 3 *Eng. R.* 388, is adhered to and confirmed.

The law gives to the creditor the right to select which of the several means of enforcing satisfaction he will avail himself of, but when he has made such selection, will never permit him to abandon it capriciously.

He may prefer to take his debtor into custody on *ca. sa.* [*in cases provided by statute,*] and whilst so held, all other satisfaction is denied him. But if the debtor escape, the creditor may resort to other process for satisfaction.

So the creditor may elect to take goods by *fi. fa.* in satisfaction, and when he has done so, the satisfaction is precisely the same in principle as if he had taken the body of defendant—whilst he holds them in execution, the law gives him no other indemnity. But should they, by acts not the fault of the creditor, be lost to the debtor, or appropriated according to law, and found insufficient, then, on the same principle that the escape of the debtor entitles the creditor to further process, he may sue out an *alias fi. fa.*; yet like a voluntary discharge of the debtor from custody, if the goods are appropriated or wasted by the acts of the creditor, or his accredited agent, the satisfaction would become complete, at least to the amount of the value of the goods so wasted.

So, also, where a levy is made and a delivery bond (which, by statute, has the force of a judgment when forfeited) is taken and forfeited, the levy is discharged, and the bond so forfeited held to be a satisfaction of the former judgment. Yet should the bond be quashed, the effect thereof would be to revive the former judgment.

The law gives but one satisfaction, and where the party takes it, he must abide by it if sufficient—it must however be sufficient—if partial, it is not a good bar. The law presumes the debtor able to pay his debts, and commands the officer to take property of sufficient value to make him a full satisfaction. The court will presume that he has done this, and therefore until the levy is legally discharged, it must be considered and held as such. The creditor, until it is shown to be otherwise, *can make no step backward.*

Such being the effect of a levy upon lands, as well as upon goods, it necessarily follows, that where a *fi. fa.* has been levied upon lands, and returned without sale, a *ven. ex.* with a *fi. fa.* clause cannot properly issue thereon. A simple *ven. ex.* directing the sale of the property, which, by the return of the sheriff upon the original fi. fa appears to be in his lands unsold, is the appropriate writ.

The Court is not of the opinion, however, that such writs of *ven. ex.* with fi. fa. clause are absolutely void, or that a sale made of property levied upon under the fi. fa

clause thereof, whilst the first levy remains in force, should, in all cases, be set aside. The satisfaction by such original levy is contingent, and not like an actual payment and satisfaction of the judgment.

Such writ of *ven. ex.* with fi. fa. clause is analogous to the execution that issued in *Dixon v. Watkins et al.*, 4 *Eng. R.* 139, after stay by recognizance on appeal, which this Court held to be *voidable* because it issued against a legal prohibition, but not absolutely *void.*

So a levy upon sufficient property to satisfy the judgment, imposes a legal prohibition upon the creditor to forego all further process of satisfaction until, upon appropriation of the property levied, it is found to be insufficient in value to satisfy the judgment. Hence such writs of *ven. ex.* with *fi. fa.* clauses, though not absolutely void, being issued whilst a legal prohibition rests on the creditor from pursuing his remedy upon the judgment, are voidable, and should be, on proper application for that purpose, set aside.

But where such writs are not set aside, but property is levied on and sold under such fi. fa clause, and the purchaser is cognizant of such legal prohibition, and irregularity of the process, Chancery will not decree to him a confirmation of title under the purchase, though it might be otherwise with an innocent purchaser, purchasing in good faith without knowledge of such prohibition and irregularity in the process.

It has been held, upon high authority, that the only questions which can arise between an individual claiming a right under the acts done, and one denying their validity, are power in the officer, and fraud in the party.

The sheriff derives his power to sell lands not from the statute, but from the judgment and execution. The judgment is evidence of the liability of the property, and the executien is evidence of the sheriff's general power.

The sheriff cannot sell by virtue of the lien of the judgment, without an execution.

A sheriff does not acquire such an interest in land as to enable him to sell without a writ after the return day thereof, though this may be the rule as to goods.

The office of the writ of *ven. ex.* is not, in case of the sale of lands, a mere command to hasten the action of the sheriff, to require him to do that which he had the power to do independent of the writ of *ven. ex.*, but it confers upon him the power to sell, as well as commands him to proceed to do so.

The fi. fa. when levied and returned is *punctus officio.* The *ven. ex.* relates back to the fi. fa. and the levy and return upon it, and the power of the officer commences under the *ven. ex,* just where the sheriff under the fi. fa. stopped. He had levied whilst the fi. fa. was in force, but the power was revoked by limitation before sale. The *ven. ex.* does not therefore confer power to levy, but to sell. Those two writs are in fact but one writ, the latter being designed to complete what has been commenced.

In this case, a fi. fa. was levied on lands, and returned without sale; a *ven. ex.* with a fi. fa. clause issued, which was levied upon additional property, and returned without sale. An alias *ven. ex.* issued, commanding the sheriff to sell the property originally levied on under the fi. fa: HELD, That the sheriff could neither

levy on, nor sell under this writ, any other property than that which was originally levied on, and which he was commanded by the writ to sell.

A levy or sale of other property than that described in his writ, were acts beyond his authority—not an erroneous exercise of power granted, but an assumption of power not granted; and is for that reason void: and a purchaser under such sale could acquire no title.

Beach having a judgment against De Baun & Thorn, the following entry of satisfaction was made of record, by the attorneys of Beach: "The said defendant, Thorn, having arranged and secured to the satisfaction of the attorneys of said plaintiff, (Trapnall & Cocke) the judgment in this case, they do hereby, and with the consent and agreement of the said De Baun, acknowledge full satisfaction of the said judgment so far as the said Thorn is concerned, without prejudice to the rights of the said plaintiff to sue out executions and recover the said judgment and costs of the said De Baun"—Signed by said attorneys. To which, De Baun added:—"I, James De Baun, do consent to the above satisfaction in the manner and form as therein provided."—Signed by De Baun: HELD, That if this discharge had been made by the plaintiff in person, it would, beyond doubt, have been, in law, a full satisfaction and discharge as to both defendants, upon the principle that as the creditor is entitled to but one satisfaction, though made by one, it enures to the benefit of all. That even where it is expressly understood, and is made part of the terms of release and satisfaction, that such shall not be its effect as against other defendants, it has been held to extend to all.

HELD, further, that it was a matter of doubt whether the attorneys, for the consideration expressed in the face of the above entry, could make a release which would bind their client; but as it appears that Beebe, who succeeded to the rights of the plaintiff in the judgment by assignment, fully recognizes and affirms this act of the attorneys, and asserts and sets up in his answer that it is a full and complete satisfaction as to Thorn, it follows, that being a satisfaction as to him, it is, by operation of law, a satisfaction also, as to De Baun. That De Baun had probably estopped himself from setting up this satisfaction. Yet the satisfaction was not the less complete: estoppel is not the denial of the existence of a fact, but a denial of the right to interpose it.

HELD, further, that the said judgment, so far as third persons, lien creditors, were concerned, should be considered as satisfied, and its lien upon lands of defendants discharged, and that a person purchasing under an execution upon said judgment could acquire no valid title.

As a general rule, the answer of one defendant to a bill cannot be used against another; but to this rule there are exceptions, one of which is (2 *Dan. Ch. Plead. & Prac.* 982,) that in case where the rights of the plaintiff, as against one defendant are only prevented from being complete by some question between the plaintiff and a second defendant, the plaintiff is permitted to read the answer of such second defendant for the purpose of completing his claim against the first.

In this case, Gray & Bouton and Beach held judgments against DeBaun which were a lien on all his lands; Whiting & Slark held a mortgage subsequent to the said judgments on part of said lands; executions being sued out upon said judgments

(which had been assigned to Beebe), Whiting & Slark filed a bill to compel the judgment creditors to resort for satisfaction first to the lands not embraced in their mortgage, to foreclose, &c. The lands were all sold, under the executions, and Whiting & Slark purchased the mortgaged premises—the sales were set aside, other executions issued on said judgments, the lands again sold, and Beebe purchased the mortgaged premises. Whiting & Slark filed a supplemental bill, setting out their purchase, and the subsequent purchase of Beebe, alleging that the lien of said judgments was dischaged by payment of the judgments, &c., making said judgment creditors, Trapnall, their attorney, and Beebe defendants: HELD, That the answer of Trapnall, who was cognizant of all the facts, had control of the judgment, &c., as to payments upon the judgment of Gray & Bouton, was evidence against his co-defendant Beebe, under the rule above stated.

HELD, further, that the answer of Trapnall was evidence against his co-defendant Beebe, on the grounds that Beebe was a purchaser *pendente lite,* and was bound by evidence taken against his vendor, &c.

The authorities establish the following positions: *First,* that the institution of the suit (particularly where it relates to the title or disposition of property,) is constructive notice to all purchasers after suit commenced: *Second,* that a purchaser *pendente lite* acquires no title by his purchase, which he can set up or assert to the prejudice of the rights of the parties litigant, and that the suit will be heard and determined upon the merits as it stood between the parties litigant, perfectly irrespective of any rights which he may have acquired by such purchase, which, if valid for any purpose, can only be so as between himself and his vendor, to enable him, upon the determination of the suit to succeed to the rights of such vendor, or perhaps if a party to the suit, to enable the court, after determining the rights of his vendor favorably, to decree them to him.

HELD: That Beebe was not the less a purchaser *pendente lite,* under the circumstances, because he purchased the judgment of Gray & Bouton before the filing of the original bill of Whiting & Slark—that Beebe could not occupy a stronger position than Gray & Bouton would have done had they been the purchasers under their own judgment—that before the sale, the original bill having been filed, alleging that the Gray & Bouton judgment had been satisfied by a prior levy, which was undisposed of, that there was also other sufficient estate out of which to satisfy their senior judgment lien without coming upon the property embraced in the complainants' mortgage, and that a large portion of their judgment had been paid, but not credited, &c., they could not have caused the mortgaged premises to be sold under their judgment, and purchased them, pending the original bill, without being subject to the rules applicable to purchasers *pendente lite;* and that Beebe, as their assignee, could acquire no greater rights than they possessed.

That Gray & Bouton having failed to answer, but Trapnall, their attorney, who had control of the judgment, and was cognizant of the payments, &c., having answered, his answer was in effect their answer, and was, under the circumstances, evidence against Beebe.

Where payments have been made on a senior judgment, a junior creditor has a right to demand that the payments be credited, before sale of the property under the senior jugdment, because he has a right to pay off the senior incumbrance,

and thereby disencumber his junior lien, which he could not do, nor could he be prepared to elect whether he would or not, until the credits were entered.

In this case, it appearing that a large portion of the Gray & Bouton judgment had been paid, that Beebe, the assignee of the judgment, and also T. the attorney of G. & B., knew of such payment, but, failing to enter the credit upon the judgment, proceeded to sue out execution and sell property as though the whole face of the judgment were due: HELD, That such procedure was unjust to junior creditors, if not grossly fraudulent.

A judgment lien is a security against subsequent purchasers and incumbrancers, which denies to the debtor the right to alien or incumber his property, to the prejudice of the rights of the judgment creditor for a given period (in most instances fixed by statute.)

It is also a right springing out of, and dependent upon the judgment for its existence, and follows the condition of the judgment.

If the judgment is reversed or set aside, the lien is *eo instanti* discharged; if paid, it is merged in the payment; if suspended by injunction or supersedeas, the lien is also suspended; and therefore as a levy operates as a *prima facie* satisfaction, and whilst undischarged satisfies and suspends the judgment, the lien must also be suspended with it; and should the levy prove insufficient to satisfy the judgment, as by the discharge of the levy, the judgment is restored to its full effect upon the estate of the debtor; so, also, does the lien, unless in the mean time it has expired by limitation, or has been discharged by the act of the creditor, upon the return of the creditor for further satisfaction, maintain its grasp upon the whole estate of the debtor to the full extent that it did when first created; and intermediate sales of property by junior lien creditors, or by the debtor between the first levy and the discharge thereof, if such discharge takes place before the statute limitation, will be held subject to such lien.

The lien is not an intrinsic quality of the judgment itself, but is a quality added to it—an effect of the mere existence of the judgment, which can have no independent existence, but is dependent upon the judgment, and follows it as a shadow does a substance; hence if it is cut off from it, either by the act of the party, the satisfaction or extinguishment of the judgment, or by limitation of time, upon general principles, it is lost, for there ceases to be any thing to which it can be attached.

A lien being a mere contingency, or right dependent upon a subsisting thing, of course cannot rest upon a contingency, no more than a presumption can rest upon a presumption, or one contingency upon another, or a shadow exist without a substance.

The lien on the Gray & Bouton judgment expired on the 23d March, 1843: on the 20th March, three days before the lien expired, a *sci. fa.* issued to revive the lien, and it was revived on the 16th January, 1846. In June, 1843, the property in dispute (upon which Whiting & Slark held a junior mortgage) was levied on, sold at the November term, 1843, and purchased by Beebe (assignee of the judgment) by virtue of an execution issued upon said judgment, the levy and sale both being after the issuance of the *sci. fa.* but before the revival of the judgment: HELD, That the revival of the judgment did not relate back to Beebe's purchase,

so as to constitute him a purchaser under a senior lien, and thereby cut off the "intervening equities of junior lien creditors."

The statute makes the judgment, from its date, a lien on all the lands of the debtor situate in the county, in which it is rendered, for the term of three years from its date. It also confers a right upon the creditor to revive his judgment lien by suing out *sci. fa.* at any time before the lien expires; and then in the 13th section, provides, that if the *sci fa.* be sued out before the lien expires, the lien of the judgment revived shall have relation to the day on which the *sci. fa.* issued, &c. HELD, That when the legislature declared that the judgment lien, when revived, should relate back to the date of the *sci. fa.*, it was intended, that the lien, when revived, should act upon the whole estate of the debtor, to the same extent that it did prior to its suspension by limitation, in an unqualified sense, as related to the debtor; and that it also revived all the secondary rights of the senior creditor as between himself and the junior creditor; subject, however, to such intervening equities as might have arisen between the time of the suspension and the revival of the judgment, for these might have accrued to him even under the first lien.

In addition to Beebe's purchase under the Gray & Bouton judgment, he claims that De Baun & Thorn were joint owners of the premises in dispute, prior to the mortgage of Whiting & Slark; that Thorn sold his interest to De Baun in the premises, for which De Baun paid so much money, and agreed to pay the debts of a partnership which had existed between them; and Thorn executed a bond to De Baun binding himself to make title to his half of the premises on payment of all such debts, which was duly recorded, but which did not specify the debts. That Ringo held a note on said partnership, afterwards obtained judgment thereon, under which Beebe (who bought the judgment) purchased Thorn's interest in the premises, and insists that the debt of Ringo constituted a specific lien upon Thorn's interest in the property, paramount to the mortgage of Whiting & Slark, which was executed by De Baun upon the whole property after said sale from Thorn to De Baun. A transcript of the record of the suit of *Ringo v. De Baun & Thorn* is exhibited by Beebe, into which is copied the firm note on which the judgment purports to have been founded, but it is not made part of the record by oyer or otherwise. Whiting & Slark deny that the judgment of Ringo was founded on such firm debt: HELD, That the Court erred in permitting Beebe to produce, on the hearing the original note, prove, *viva voce*, its execution, that it was marked filed among the papers of the suit of *Ringo v. De Baun & Thorn*, and read it in evidence, inasmuch as it was not an exhibit in the case. That unless a paper is made an exhibit, *viva voce* evidence is not admissible to prove its execution on the hearing—that even when exhibits are thus proven on the trial, the evidence is, in most instances, limited to the mere execution of the instrument—that when any additional fact is to be established in order to make the exhibit evidence, as in this case, the identifying it as the note sued on, the proof is inadmissible, &c.

HELD, further, that whether the interest of Thorn in the premises, reserved by his said bond to DeBaun, was a trust or mortgage interest (and it could not extend beyond that) it was questionable whether it was subject to sale by execution or not, under our statute, which subjects the real estate of the defendant, whether held by

patent, or by a third person for his use, of which he is seized in law or equity, to sale.

HELD, further, that in an equitable point of view, the security afforded in a deed of trust or mortgage, only extends to those debts set forth and recorded in the deed, or perhaps where notice is brought home to the purchaser of the estate thus pledged. That in order to effect the rights of Whiting & Slark as junior lein creditors, it was necessary to have brought notice home to them, not alone of the existence of the transfer of Thorn to DeBaun, and reservation in favor of creditors, (of which the registry of the bond was notice) but it was necessary to have set forth the identical debt upon which this prior equity was to be founded, so that the junior purchaser might take notice at his peril what he purchased—that such not having been the case in the bond of Thorn, the prior equity of Beebe, who held under Ringo, must fail.

Beebe entered the premises, *pendente lite*, under the claims in litigation, and held subject to the final disposition of the suit. In that position, having purchased the premises at tax sale: HELD, That he necessarily purchased in trust, and that the purchase enured to the benefit of the *cestui que trust*, when the suit should determine who he really was. Taxes paid under such circumstances, are a charge upon the rents, &c.

Where an answer admits the receipt of money at one time, and sets up that at another time, and in another adjustment, it was repaid, the repayment is the affirmance of a new act, and must be proved.

DeBaun filed a cross bill against all his mortgage and judgment creditors and purchasers of his property at execution and trust sales, setting out all incumbrances upon his property, his indebtedness, &c., alleging that owing to impending circumstances, and the acts of some of his creditors in their contest with each other for priority of right to the proceeds of the sale of his property, &c., &c., a most shameful sacrifice and waste of the property was made, &c., &c., alike prejudicial to the interest of other creditors and to himself, &c., and praying that all the sales be set aside, that the property and securities be marshaled, the property resold and proceeds applied according to equity, &c.: HELD, That he was not entitled to the relief prayed, because, 1*st*, it appeared that he not only acquiesced in, but was an active agent in producing the very acts of which he complained, and 2*d*, because he fraudulently removed a large portion of his property upon which some of his creditors held a trust deed, and did not, like an honest debtor, surrender up his property for the benefit of his creditors, &c., &c.

Appeal from the Chancery side of Pulaski Circuit Court.

On the 29th May, 1843, Augustus Whiting and Robert Slark, of New Orleans, filed a bill in Pulaski Circuit Court against James De Baun, and others, to foreclose a mortgage, &c., containing substantially the following allegations:

That on the 14th December, 1840, James De Baun was indebted to complainants in the sum of $5,836, for which he executed to them three notes, of that date; one for $1,936, due at eighteen months; another for $1,950, due at twenty-four months, and the third for $1,950, due at thirty months, each to bear interest at ten per cent. after due. Copies of the first and second notes were made *exhibits A.* and *B.*, the third was alleged to be in New Orleans, but a copy would be subsequently filed as *exhibit C.*

That to secure the payment of said notes, De Baun executed to Whiting & Slark, on the 13th February, 1841, a mortgage upon the following lots situate in the City of Little Rock, to wit: beginning at the south-west corner of block number one, as designated in the platt of said city at the intersection of East Main and Markham streets, thence east on said Markham street, fifty-two feet and nine inches, fronting on the north side of said Markham street, running back at right angles from said Markham street eighty feet, of the same breadth of fifty-two feet nine inches, containing 4,220 square feet of land. Also a lot, beginning at a point on the north side of Markham street fifty-two feet and nine inches east from the south-west cornor of said block number one, thence east on the north side of Markham street and fronting thereon twenty-five feet, and extending back at right angles the same breadth of twenty-five feet, to the alley running through said block one hundred and forty feet more or less: together with all the buildings, improvements &c., &c., thereon &c., which deed of mortgage was duly acknowledged by De Baun, and recorded according to law on the said 13th of February, 1841. A copy of the mortgage and certificates of acknowledgment and registration is made *exhibit D.* That no part of the mortgage debt, or interest, had been paid to complainants, the mortgaged property had been forfeited in law, and the mortgage was subject to foreclosure.

That John Brown, H. N. Aldrich, Jacob Mitchell, J. D. Fitzgerald, Eli Colby and James Nelson (made defendants) were, and had been for some time in possession, severally or jointly,

of said mortgaged property, and a large amount of rents was then due from them, and daily increasing, which rents belonged to complainants by virtue of the mortgage, and were withheld from them.

That prior to the execution of said mortgage, John Gray and Charles Bouton (made defendants) by Trapnall & Cocke, their attorneys, recovered a judgment, in Pulaski Circuit Court, against James De Baun for $1,811 89 debt, and $326 damages and costs; and that Lewis Beach (made defendant) by the same attorneys, recovered, in the same Court, a judgment against said De Baun and Thomas Thorn (made defendants) for $1,988 50, and costs, upon which judgments executions were issued, and levied on lots *eight* and *nine*, in Block 38, in said City of Little Rock, and the *north-west fractional quarter of section* 20, *towship* 2 *north*, *range* 11 *west*, half of mine hill, 50 56–100 acres, and *also fifty-three acres* of land in *township* 1 *north*, *range* 11 *west*, which property, so levied on, was appraised to the sum of $4,-862 50, a sum sufficient to satisfy both of said judgments, but which had not been sold. Transcripts of said judgments, and proceedings thereon are made *exhibits E.* and *F.* That, in addition to said levies, complainants were informed and believed that De Baun had paid on said judgments about $2,800, but that no entry thereof had been made of record.

That at the time of the execution of said mortgage, there were no encumbrances on said mortgaged property but the judgments aforesaid, and that said judgments were also a lien upon all the real estate of De Baun, which consisted of a large quantity of lands and city lots, described in the bill; all of which real estate was subject to said judgments, and complainants alleged, should be sold to satisfy them before the mortgaged property.

That notwithstanding such lien upon all of said real estate, and such levy of said execution, complainants were informed and had reason to believe, that Gray & Bouton and Beach had issued other executions on said judgments, and placed them in the hands of James Lawson, sheriff of said county, with orders to sell first said mortgaged property to satisfy said judgments, to

the great injury and oppression of complainants, and for the purpose of depriving them of the benefit of their mortgage; and that De Baun, confederating with them to effect the same end, had also required the sheriff to sell the mortgaged property first, all of which was contrary to equity, &c.

The bill prayed discovery of the amount paid on said judgments, the amount of rents due from the tenants in possession of the mortgaged property; that De Baun, Beach, and Gray & Bouton might be compelled to sell, and make the balance due on said judgments, out of said real estate, leaving the mortgaged property to the satisfaction of complainants' debt; that defendants account, &c; that said mortgage be foreclosed, the property sold, and the proceeds thereof, rents, &c., be applied to the payment of complainants' debt, and for general relief: also injunction to restrain the sale of the mortgaged property under said judgments until after the other real estate of De Baun was sold in satisfaction thereof.

Exhibits A. B. and *C.* are copies of the notes of De Baun to Whiting & Slark referred to in the bill, secured by the mortgage, and agree in date, amounts &c., with the allegations in the bill.

Exhibit D. is a copy of the mortgage and certificates of acknowledgment and registration, corresponding with the allegations of the bill.

Exhibit E. shows that on the 23d March, 1840, Gray & Bouton recovered judgment, *nil decit*, against De Baun, in Pulaski Circuit Court, on a promissory note due 19th March, 1837, for $1,811 89, debt, $326 damages, with interest at six per cent. &c., and costs. On the 19th February, 1841, an execution was issued thereon, in the usual form, *but wanting the signature of the Clerk*, to the sheriff of Pulaski county, returnable 7th September, 1841, upon which sheriff Lawson, returned that he had levied on the lots and lands described in the bill as having been levied on under this execution, and one in favor of Beach; that the property was appraised at $4,862 50, and failing to sell at two-thirds of its appraised value, was reserved from sale. On the 31st December, 1842, a *vend. ex.* with a *fi. fa.* clause was issued

on said judgment, reciting the former levy, &c., commanding the sheriff to sell the property, and in case the debt, &c., were not made of the said property, that he make a further levy, &c., returnable 2d March, 1843. On which *vend. ex.*, the sheriff, Lawson, made the following return:—"Levied on the three lots known as the Alhambra, in the City of Little Rock, 31st Dec., 1842." —— "Returned unsatisfied, by order of plaintiffs atto., the 25th March, 1843."

Exhibit F. shows that Lewis Beach, by Trapnall & Cocke, attorneys, brought assumpsit against De Baun and Thomas Thorn, in Pulaski Circuit Court, for goods, wares, &c., &c., and that on the 27th March, 1840, judgment was rendered by consent of parties, in favor of Beach for $1,988 50. That on the 19th February, 1841, a *fi. fa.* was issued thereon to the sheriff of said county, returnable 7th September, 1841; upon which, sheriff Lawson made the same levy and return as on the execution in favor of Gray & Bouton. On this writ is also endorsed a note by the Clerk as follows:—"This execution is satisfied as to Thomas Thorn, and the whole amount is to be collected from James De Baun, by order of the plaintiff."

On the 31st December, 1842, a *vend. ex.* with a *fi. fa.* clause was issued, reciting the former levy, &c., commanding the sheriff to sell the property levied on, and in default of satisfaction to make a further levy of the goods, &c., of De Baun, returnable to March term, 1843; upon which the sheriff, Lawson, returned:—"Returned unsatisfied by order of pl'ffs atts., this 25th March, 1843."

On the day the bill was filed (29th May, 1843,) on application of complainants' solicitor, the Court ordered that, on their giving approved security in the sum of $3,000 to Beach, and Gray & Bouton, an order issue to the sheriff, requiring him to reserve from sale the mortgaged property, until the other property of De Baun levied on, was sold by him, and the bond of the solicitor, A. Fowler, Esq., was filed and approved as sufficient.

On the 12th June, defendants filed a motion to set aside this order, and all the sales made by the sheriff in conformity there-

with, on the grounds that the order was improperly made, and the sales void.

On the 3d of July, the Court set aside said order, and the sales.

On the 22d December, 1843, *John Brown* filed his answer to the bill. He states that on the 22d December, 1840, he leased of James De Baun, for five years, that portion of the mortgaged premises known as the *Alhambra*, at a stipulated price. That under this lease he had occupied the property, and paid the rent to Be Baun, until 21st April, 1843. That on the 22d April, 1843, he was notified by Roswell Beebe that he had purchased the premises at a trust sale, made under a deed of trust executed by De Baun and wife to Reardon, Woodruff and Watkins, on the 4th September, 1841, and that he claimed the rents from the date of said notice forward. That being advised that Beebe's purchase was legal and valid, he occupied under him to the 27th November, 1843, and paid him rent at the rate of $600 per annum in Arkansas bank notes, and from thence to the time of answering, had continued to hold under him at the rate of $360 per annum in good money. That on the 27th November, 1843, the premises were sold by the sheriff, under executions against De Baun, and purchased by, and duly conveyed to Beebe, and that, under an order of Court, the sheriff put Beebe into possession, and that respondent had thenceforward occupied the premises as his lessee. That defendants Nelson and Colby had occupied a part of the premises under respondent, &c.

On the 3d January, 1843, complainants entered their replication to the answer of Brown.

Supplemental bill of Whiting & Slark—On the 26th January, 1844, Whiting & Slark obtained leave to file an amended or supplemental bill, &c., &c., in vacation; which they filed on the 27th February following, and in which, after reciting the allegations of the original bill, they make the following averments, in substance:

That after the execution of said mortgage to them, and on the 26th February, 1841, James DeBaun executed to Beirne & Burn-

side, of New Orleans, a mortgage upon the same property, to secure a debt of about $6,000. That on the 4th day of September, 1841, DeBaun and wife executed upon the same, and other property, a deed of trust to Wm. E. Woodruff, Lambert Reardon and Geo. C. Watkins, to secure the payment of debts, &c., therein specified.

That on the 25th May, 1842, in the Circuit Court of the United States for the district of Arkansas, Louis Chittenden recovered judgment against DeBaun for about $1,000.

In Pulaski Circuit Court, on the 24th September, 1842, Wm. H. Witherill recovered judgment against DeBaun for about $900.

In the same Court, on the 7th March, 1841, Isaac K. Jessup and Henry J. Beers recovered judgment against De Baun for about $2,900.

In the same Court, on 19th September, 1842, Edward Gottschalk recovered judgment against De Baun for about $450.

In same Court, 12th November, 1841, the Real Estate Bank of the State of Arkansas recovered against De Baun, Woodruff and Ben. Johnson, a judgment for about $3,100.

In same Court, 26th September, 1842, Wm. Gasquett, James Gasquett, and Peter Conway recovered judgment against De Baun for about $500.

In same Court, the Real Estate Bank, on 28th September, 1842, recovered a judgment against De Baun, Watkins, Roswell Beebe, James Irwin and Julian Imbeau for $630.

In same Court, on 23d June, 1843, Daniel Ringo recovered a judgment against De Baun and Thomas Thorn, for about $1,900.

In same Court, 26th June, 1843, Beverly Chew, for the use of Trustees of the Real Estate Bank, (naming them) recovered judgment against De Baun for about $2,600.

In same Court, 12th November, 1841, Ralph Marsh and John D. Marsh recovered judgment against De Baun for $580 debt, and $47 82 damages and costs of suit, upon which an execution was issued on the 23d December, 1841, returnable to March term, 1842, which was levied on the property mortgaged to complainants; the

property appraised at $25,000, and not sold because no person bid two-thirds of said appraised value, and said execution so returned. Whereupon, on the 1st May, 1843, a *vend. exponas* was duly issued, directed to the sheriff of Pulaski county, commanding him to sell said lots, which writ came to the hands of said sheriff immediately. A transcript of said judgment, execution, *vend. ex.* returns, &c., is made, *Exhibit G.*

In same Court, 28th September, 1841, the Real Estate Bank recovered against De Baun, Bender and Beebe, a judgment for $3,500, with interest, &c. &c., upon which an execution was issued on the 30th October, 1841, returnable to March term, 1842, came to the hands of Lawson, sheriff, on same day, and was levied on the mortgaged premises, which were appraised at $25,000, and failing to sell for two-thirds of that sum, the execution was returned accordingly. Whereupon, on the 17th April, 1843, a *vend. ex.* was issued to said sheriff, returnable to the May term, 1843, commanding him to sell said property, which came to his hands on the same day. A transcript whereof is made, *Exhibit H.*

That in the same Court, on the 12th November, 1841, Tunis Waldron, Fred. S. Thomas, Charles L. Day and Fred. T. Mygatt recovered a judgment against De Baun for debt $1,465 27, and $186 80 damages, &c., upon which an execution issued on 23d December, 1841, returnable to the following March term, was levied by Lawson, sheriff, on the mortgaged premises, which were appraised at $25,000, and failing to sell for two-thirds of this amount, were not sold, and the execution returned accordingly. On the 1st May, 1843, a *vend. ex.* was issued thereon, returnable to May term, following, which came to the hands of said sheriff, &c. A transcript whereof is made *Exhibit I.*

That on the 31st December, 1842, Gray & Bouton sued out upon the judgment and execution referred to in the original bill, and made *Exhibit E.*, a *ven. ex.*, with a *fi. fa.* clause, returnable to the March term, 1843, commanding the sheriff to sell property previously levied on, and in default of satisfaction, to make an additional levy, &c., and said property being insufficient, the

sheriff levied on the mortgaged premises, and returned the writ unsatisfied by order of the plaintiff's attorney. That on the 2d day of May, 1843, an alias *ven. ex.* was issued thereon, returnable to the May term, 1843, which came to the hands of Lawson, sheriff, on the day it issued, &c. A transcript whereof is made *Exhibit K.*

That upon the judgment and execution of Lewis Beach, referred to in the original bill, a *ven. ex.* with a *fi. fa.* clause was issued on the 30th December, 1842, returnable to the March term, following, commanding the sheriff to sell the property previously levied on, and in default of satisfation, to make a further levy, &c., and the property being deemed insufficient, the sheriff levied on the mortgaged premises, and returned the writ without sale. On the 2d May, 1843, an alias *ven. ex.* was issued, returnable to the May term, 1843, commanding the sheriff to sell the property levied on under the original execution, and in default of satisfaction, to make a further levy, &c. A transcript whereof is made *Exhibit L.*

That the two writs of *ven. ex.* issued 2d May, 1843, and described in *Exhibits K.* and *L.* were levied by Lawson, sheriff, upon the mortgaged premises, besides other property, immediately after they came to his hands, &c.

That in pursuance of said levies above described, and in obedience to said writs so made returnable to March and May terms, 1843, said Lawson, sheriff, duly advertised all the lots and lands so levied on to be sold on the first day of the May term, 1843, at the Court-House door of said county, &c., which would appear by the return of said sheriff upon said writs as shown in *Exhibits G., H., J., K., L.*, a copy of which advertisement is made *Exhibit M., &c.* That on the 29th May, 1843, being first day of the May term, in pursuance of said advertisement, &c., Lawson sold the lands, &c., so levied on, which lands, and the names of purchasers, &c., are as follows: 1,000 acres, being lands mortgaged to Real Estate Bank, *to wit:* South-east quarter, and north-half of south-west quarter, section 13, township 1 north range 13 west; and north-half of north-west quarter, section 17, township 1 north, range 12

west; north-east-half of the south-east quarter; the north-east quarter and south-west quarter of section 18, same township and range; the north-east quarter, south-west quarter and north-west quarter section 19, same township and range; the east-half of the north-east quarter, section 24, township 1 north, range, 13 west, sold to *Frederick W. Trapnall*, the attorney of Beach, and Gray & Bouton, for $903. A tract of land containing 6 91–100 acres, and another of 9 56–100 acres to *C. P. Bertrand* for $18. The west-half of the north-east quarter; the north-east and south-east quarters, and the north-west and south-west quarters of section 24, in township 1 north, range 13 west, the south-west quarter of section 33, and west-half section 34, in township 4 north, range 14 west; the east half of the south-west quarter of section 13, township 3 north, range 10 west; the north-east fractional quarter of section 2, township 4 north, range 15 west; the north-west and north-east quarters of section 9, south-west quarter of section 10, in township 2 north, range 13 west—sold to said *Trapnall* for $190. The south-east quarter and north-east quarter of section 10, the south-west and south-east quarters of section 3, the south-west and south-east quarters of section 10, in township 3 north, range 14 west—sold to *Samuel D. Blackburn* for $15. The south-west quarter of section 21, in township 3 north, range 15 west—sold to *Jacob Faulkner* for $60. The west fractional half of section 2, township 3 north, range 11 west—sold to *L. R. Lincoln* at $4. Lot number five in block number 1, east Quapaw line in the city of Little Rock, to said *Trapnall* at $225. Lots 7 and 8 in block number 38, in same city to *F. W. Desha* at $100. Lots number 4 and 6 in block number 161, to *Joseph. Fenno* at $35. Lot number 9 in block number 38 to said *Trapnall* at $220, and lots number 7 and 8 in block number 1 in Little Rock, known as "*De Baun's corner*," being the mortgaged premises, to complainants, *Whiting & Slark*, by their attorney *A. Fowler, Esq.*, at $903 56, making in all as stated by the said sheriff $2,890; all of which would appear by reference to *Exhibit D.* and the returns of the sheriff upon the several writs contained in *Exhibits G., H., K., L., Exhibit O.* hereafter mentioned, and by the original re-

turn made by the said sheriff of said sale on the said *ven. ex.* last issued in said case of *Beach v. De Baun & Thorn*, "which said original return was afterwards surreptitiously torn off by said sheriff, and was delivered to complainant's attorney, by one of his deputies, mutilated, which, or a part of it is in the hand-writing of said sheriff, and was originally signed by him as such, and is now held by complainants subject to inspection," &c., and a copy thereof made *Exhibit N.*; and which would also in part appear by by a book of sales kept by such sheriff, the production of which was prayed. That said sheriff made a similar return at said May term on said *ven. ex.* returnable to that term, in the case of *Gray & Bouton v. De Baun* above mentioned, which return was true in fact, and after the adjournment of said May term, and without leave of said court, "said sheriff surreptitiously withdrew from the files of the office of the clerk of said Court, the said writs of *vend. ex.*, which he had returned to that term, and which were returnable thereto, in the said cases of *Beach v. De Baun & Thorn*, and *Gray & Bouton v. De Baun*, and tore off the returns which he had made thereon, one of which is set forth in said *Exhibit N.*, and made out new returns thereon, as now appear in said *Exhibits K.* and *L.*, which pretended returns so made as they now appear thereon, complainants aver to be in part absolutely false, especially as to the re-payment of the said sum of $903 56 to them, through their said agent and attorney, and that they are in other respects defective, garbled, and in law no returns at all; and that said returns torn off by said sheriff are the true legal returns, and binding upon said sheriff and other parties," one of which is alleged to be in possession of Lawson, and complainants pray that he may be compelled to produce it; and admit them as the legal returns.

That Trapnall purchased the lands struck off to him at said sale for the use and benefit of his clients, Beach, Gray and Bouton. That after the sale of all of said lands except the mortgaged premises, complainants' attorney made public proclamation forbidding the sale thereof, alleging that they held them by virtue of said mortgage, but the attorney of Beach, Gray & Bouton insisted upon

the sale, and directed the sheriff to proceed, declaring at the time that the judgments of Beach, Gray & Bouton had been in part satisfied, and that but $2,400 was due upon them together, at the time the sale commenced. That the sheriff thereupon offered the mortgaged premises for sale, despite of the remonstrance of complainants, and they, by their said attorney, to protect their rights were compelled to bid therefor, and did bid, with others, among whom were said Trapnall and Beebe, and complainants being the highest bidder became the purchasers at the price above named. That when the said property was struck off, said Fowler informed the sheriff that it was purchased for the use and benefit of complainants. That on the next day complainants, by Fowler, paid to the sheriff, Lawson, the purchase money ($903 56¼) informing him that the purchase was made for complainants; that the money so paid him was theirs, and the payment made for them, and Lawson received it as such; and afterwards, on the 6th June, 1843, executed to Fowler the following receipt therefor:—"June 6th 1843. Received of A. Fowler, one thousand dollars, on account of purchases made at sheriff's sale on the 29th of May, 1843, under executions of Beach v. DeBaun & Thorn, and Gray & Bouton v. De Baun, and Danner v. Gibson, for Whiting & Slark, for yourself, and for F. A. Desha, 7th June, 1843."

"JAMES LAWSON, Jr. Shff."

A copy of which receipt is made *exhibit O.* and the original held subject to inspection, &c.

That the whole of said $1.000, was the money of complainants, of which Lawson was specially informed at the time of its payment, and was a certificate of deposit for that sum, made by complainants in speceie in their own names, in the bank of Louisiana, and endorsed by them to Fowler to be used by him, and was endorsed by him, in blank, and delivered to Lawson, and applied at the time of its payment specially to their own purchase made as aforesaid first, and the residue to be applied to said other purchases; and Lawson received it as specie, and in full payment of the said mortgaged premises so purchased by

complainants. That Lawson applied the same to the payment of the said judgments of Beach, Gray & Bouton, or improperly applied it to his own use, as he immediately transmitted said certificate to said bank, or caused it to be done, and drew the specie thereon.

That Fowler, soon after, drew up a deed of conveyance under such purchase, with proper recitals, to be executed by said Lawson as such sheriff, to complainants for said mortgaged premises, and presented it to Lawson to be by him executed, and acknowledged, &c, but Lawson refused so to do &c.

That sometime, either before or after said sale, said Beebe and Trapnall entered into a contract in writing, by which Beebe was given control of said judgments of said Beach and Gray & Bouton as if they were his own, in consideration of which, he assumed to pay the amount thereof to Trapnall, or his said clients at a future day, and thereupon Beebe assumed control of said judgments, and continued to control them; which writing complainants allege to be in possession of Beebe or Trapnall, and pray its production &c., or the discovery of any such contract, &c.

That after said sales so made by said sheriff, for a sum more than sufficient to satisfy said judgments of Beach and Gray & Bouton, and after they had been by such sale so legally satisfied, Beebe, or some one for his benefit, caused other writs of *ven. ex.* to be issued on said judgments, and in other cases against De-Baun and others, for the purpose of practising a fraud on complainants, for the benefit of Beebe, and caused the mortgaged premises to be again seized in execution and sold at the November term of said Court, 1843, when they were purchased by Beebe, and the sheriff conveyed them to him in palpable fraud of complainants' rights, Beebe well knowing that the property belonged to complainants. That early in the year 1843, Beebe, obtained by fraud, the possession of said premises, and had received, and was receiving the rents &c.

Prayer that Lawson, as such sheriff, be compelled to execute a deed to complainants for the mortgaged premises so purchased

by them at said sale, conveying to them all the interest of De Baun, Thorn, Beebe and Reardon therein; and that Lawson, if he had not done so, be compelled to pay over the purchase money to the proper judgment creditors, and in default of their re-receiving it of him, that he deposit it in Court subject to its order; or that said defendants who had liens on the mortgaged premises prior to the lien of complainants, be compelled to receive of them the amount due on such prior liens, (which complainants offer to pay,) and that they be compelled to allow to complainants the full benefit of such prior liens.

That Beebe and other defendants account with complainants for rents and profits, &c., of the mortgaged premises, &c.; that the title of Beebe, and of the other defendants, legal or equitable to the mortgaged premises, be divested, and vested in complainants; and that Beebe be restrained from collecting further rents, &c. Complainants pray also as in the original bill. The persons named in the original and supplemental bills are made defendanst, &c.

Exhibit G., to Supplemental bill, shows that on the 12th November, 1841, Ralph Marsh & Co., recovered judgment against De Baun, in Pulaski Circuit Court, for $580 debt, and $47 82 damages, &c. On 23d day of December, 1842, a *fi. fa.* was issued thereon to the sheriff of said county, returnable 8th March, 1843, which came to the hands of Lawson, sheriff, 4th January, 1843, and was by him, as shown by his return, levied on the premises mortgaged to Whiting & Slark, (described in the levy as three lots in block one;) that De Baun claimed the benefit of the appraisement act, the property was appraised at $25,000, and failing to sell for two-thirds of its appraised value, was not sold. On the 1st May, 1843, a *ven. ex.* was issued thereon, returnable to the term to commence in the same month; upon which Lawson, by his deputy Thomasson, returned that after duly advertising said property, he offered it for sale on the 29th May, 1843, being the first day of said term, at the Court House door, &c., and that Absalom Fowler became the purchaser thereof at $903 56, which was

applied to the satisfaction of executions in the hands of the sheriff issued on judgments against De Baun of a prior date, &c.

Exhibit H., to Supplemental bill, shows that on the 28th September, 1841, the Real Estate Bank recovered judgment, in Pulaski Circuit Court, against said De Baun and Lambert Reardon for $3,500 debt, with interest, &c. On the 13th day of October, 1841, a *fi. fa.* was issued thereon to the sheriff of said county, returnable to March term, 1842, upon which Lawson made the same return as upon the *fi. fa.* in favor of Ralph Marsh & Co., above mentioned. On the 17th April, 1843, a *ven. ex.* was issued thereon, returnable to May term following, which recited the former levy (describing the property as the south parts of lots 7 and 8 in block one, &c.,) and commanded the sheriff to sell, &c, upon which the sheriff, Lawson, by his deputy Thomasson, made the same return as upon the *ven. ex.*, in favor of Ralph Marsh & Co., above mentioned, with an additional return, in substance as follows: But previous to said sale, on the 29th May, 1843, application was made by Fowler, counsel of Whiting & Slark, to the judge of said Court, who, upon the showing made, ordered said sheriff to expose to sale all the other property of De Baun levied on, before selling the mortgaged premises, which order he obeyed, in contravention of the written direction of De Baun, given under section 35, chapter 60, Revised Statutes. That subsequently to said sales, said order, and the sales made in conformity therewith were set aisde by said Court, and that thereafter said Fowler applied to said sheriff, and received back the said sum of money bid by him for said property, &c. Wherefore said sheriff could not have the same in Court, &c.

Exhibit I., to Supplemental bill, shows that on the 12th November, 1841, Waldron, Thomas, Day, and Mygatt, partners, &c., under the style of Waldron, Thomas & Co., recovered, in Pulaski Circuit Court, a judgment against De Baun for $1,465 27 debt, and $106 80 damages, &c. That on the 23d Dec., 1841, a *fi fa.* was issued thereon to the sheriff of said county, returnable 8th March, 1842, upon which Lawson, sheriff, made the same levy and return as upon the execution in favor Ralph Marsh & Co., above mentioned. That on the 1st May, 1343, a *ven. ex.* was

issued thereon, returnable to the term to commence in that month, upon which the same return was made as upon the *ven. ex.* in favor of Ralph Marsh & Co., described above in *Exhibit G.*

Exhibit K., to the Supplemental bill, is *first,* the *ven. ex.* issued on the judgment in favor of Gray & Bouton against De Baun, 31st Dec., 1841, to the sheriff of Pulaski county, with a *fi. fa.* clause, which is described in *Exhibit E.* to the original bill, upon which Lawson returned that he had levied upon "3 lots known as the Alhambra, in the city of Little Rock," and that the writ was returned unsatisfied by order of plaintiff's attorney. *Second,* an alias *fi. fa.* issued thereon 2d May, 1843, returnable to the term to be held in that month, reciting the judgment, the issuance of the original execution thereon, 19th Feb., 1841, that it was levied upon lots 8 and 9, in block 38, and north-west fractional quarter of section 20, township 2 north, range 11 west,; half of mine hill, 50 56-100 acres; part of town. 1 north, range 11 west, 53 acres, as the property of De Baun," the appraisement, failure to sell, &c., and (*taking no notice of the first ven. ex.,*) commands the sheriff: "that you expose to sale, and do sell the property above specified and levied upon, as aforesaid, and that you cause to be made the debt, damages, and interest, together with the sum of $65 05 costs, and you cause to be made the debt, damages, interest and costs aforesaid, and have the same before said Court," &c. Upon which Lawson, sheriff, made the following return, in substance: "By virtue of the within writ, &c., I have caused the lands and tenements therein mentioned and described, together with other property levied upon as defendant's sufficient to satisfy said writ, to be advertised, and to be sold according to law on the 29th May, 1843, it being first day of Pulaski Circuit Court; upon which day, on the application of A. Fowler, Esq., as counsel for Whiting & Slark, the judge of said Court, upon showing, &c., ordered me, as such sheriff, to expose to sale all the property of said De Baun levied on as the property not mortgaged to said Whiting & Slark, before I exposed to sale the property mortgaged, and which is the lots upon which the Alhambra is situated in Little Rock. That, in obedience to said order, I

did sell the property levied upon and advertised as the defendant's, in compliance with said order, in contravention to the written direction of said De Baun, as provided for by 35th section, chapter 60, Rev. Stat. That, subsequent to said sale, said Court set aside said restraining order, and the sales made in conformity therewith. That the lands and tenements levied on as the property of De Baun, situate at the corner of Markham and East Main st., in block one, Little Rock, and upon which the judgment upon which the within writ issued was a lien, were regularly offered for sale on the 29th May, 1843, as ordered by said Court, and Absalom Fowler became the purchaser thereof at $903, which was duly paid to me. That after the court set aside said order and sales, said Fowler applied to me and received back the said sum of $903; wherefore I cannot have the money before the Court," &c.

Exhibit L., to the Supplemental bill, is *first,* a *ven. ex.* with a *fi. fa.* clause issued to the sheriff of Pulaski on the judgment of of Beach against De Baun and Thorn, which is made part of *Exhibit F.* to the original bill. For the substance of this writ, and the sheriff's return thereon, see allegations in the original bill, and said *Exhibit F.* as stated above. *Second,* an *alias ven. ex.* issued upon said judgment on the 2d May, 1843, with a *fi. fa.* clause, reciting the judgment, original execution, levy and return, commanding the sheriff to sell the property levied on, and in default of satisfaction, to make a further levy of the goods and chattels lands and tenements of defendants, and returnable to the May term, 1843—upon which Lawson made the same return as upon the alias *ven. ex.* in favor of Gray & Bouton, above set out as part of *Exhibit K.*

Exhibit M., to the Supplemental bill, is a copy of the notice of the sale of De Baun's property given by Lawson, and referred to in the above returns.

Exhibit N., to the Supplemental bill, is a paper purporting to be a return on an execution, to which there is no signature, in substance as follows: "Levied the within and annexed execution on the following described property, as the property of James De

Baun; 1000 acres of land more or less, it being the lands mortgaged to the Real Estate Bank, lying as follows, [*here follows a list of lands corresponding with those described above in the supplemental bill,*] which were advertised to be sold on the 29th day of May, 1843, when Fred. W. Trapnall became the last and highest bidder at the sum of $903. Also tracts of land [*describing them*] to C. P. Bertrand for $18. Also [*describing further list of lands*] bought by Fred. W. Trapnall for $190. [*Further list*] to Samuel D. Blackburn at the sum of $15. [*Further list*] to Jacob Faulkner at $60. [*One tract describing it*] to L. R. Lincoln at $4. Also lot [*describing it*] to Fred. W. Trapnall at $225. Also lots 7 and 8 in block one, E. Quapaw line, in Little Rock, as De Baun's corner, to A. Fowler at $903 56. Also lots [*describing them*] to F. W. Desha at $100 Also interest in block 101, lots [*describing them*] to Joseph Fenno at $35. Also lot [*describing it*] to Fred. W. Trapnall at $220, making in all the sum of $2,890. That under and by virtue of a restraining order from the judge of the Circuit Court, I was unable to comply with the requisitions of defendant in the sale of the property, which order of defendant is herewith enclosed"——————

Lawson's answer to original and supplemental bill.—On the 3d June, 1844, Lawson filed his answer. He had no personal knowledge of the indebtedness of De Baun to complainants, the execution of said mortgage upon the *Alhambra* property to secure the payment thereof, nor did he know of whom, or on what terms, the tenants of the mortgaged premises held. Admits that Gray & Bouton recovered judgment against De Baun, and Beach obtained judgment against De Baun and Thorn, and that executions were issued thereon, and levied, as alleged in the bill. Has no distinct knowledge or recollection of the alleged payments upon said judgments by De Baun, nor does he know whether they constituted the only liens upon the mortgaged premises prior to the said mortgage. Admits that said judgments were a lien upon all the real estate of De Baun situate in Pulaski county, and that his lands, in ordinary times of prosperity, would have brought more than sufficient to satisfy said judgments. That writs of

ven. ex. were issued thereon to respondent, as such sheriff, commanding him to sell property levied on, and to make the money to satisfy said judgments, but denies that he was instructed by the plaintiffs therein to sell the *Alhambra* property first, but alleges that he was so instructed by De Baun, in writing, more than three days before the time of sale. Admits that an injunction was issued restraining him from selling the mortgaged premises until after the sale of all other property of De Baun, but this was contrary to the said instructions given by De Baun. Admits that Trapnall, Bertrand, Blackburn and Faulkner bid off property at said sale on the 29th May, 1843, but expressly denies that complainants bid off any of De Baun's property; and alleges that Fowler, their solicitor, bid off the *Alhambra* property, as appeared from the sale's book kept by respondent, referred to in the supplemental bill—that Fowler declared at the time, in presence of the multitude assembled, that he bid off said property for himself, and not for any other person. Was not positive that Fowler made this declaration, as he was standing at a little distance from him, and there was great "*noise and confusion*," but he so understood him. That Fowler did not state to him at the time that he was buying for complainants, nor does he believe that he so stated in the hearing of any other person at the sale. That at the time of the sale, and since, it was notorious that he made the declaration above referred to, and respondent never heard any other pretence until Fowler presented to him, for execution, as such sheriff, a deed to said property in favor of complainants several days subsequent to said sale.

That during the May term, 1843, respondent made return of said writs of *ven. ex.* mentioned in the supplemental bill, "and never did make but one return thereon, and the insinuation in said supplemental bill that there was another "original" return to said writs is wholly false, and the charge that a supposed original return to said writs was surreptitiously torn off and mutilated is equally false, and the alleged copy of such supposed return made *Exhibit N.* is not, nor ever was the return of respondent, as such sheriff, to either of said writs, said writs now being on

file, &c., with the only returns ever made thereon by respondent."

That from the large amount of property sold by respondent on said sale day, the urgency of purchasers for deeds, and the great number of executions to be returned with long and particular returns, it was impossible for him to perfect his returns by the second day of the term—the return day—and his habit was to make notes or memorandums of the facts in each case, and after deeds were made out, to draw up formal returns, and append them to the executions; and this course was pursued by him in regard to sales made on the day aforesaid. His memorandums did not always show all the facts proper to be noticed in a return, but only such as would enable him to make out deeds. It was such a memorandum that complainants obtained from a deputy of respondent, "and with so much parade and misapprehension of the truth, seek to charge him with fraud in the discharge of official duties." The memorandum book referred to in the supplemental bill was strictly private, but subject to the inspection of any person desiring it, and which he would produce in court when required. He repeats his denial of tearing returns from said writs, and substituting others, as charged. Alleges that *Exhibits K. and L.* to the supplemental bill show the true and only returns made upon said writs, and that the charge that parts of said returns were false, was knowingly and falsely made, being wholly a fabrication without foundation. "That the attorney of complainants, in whose handwriting the bill appears, at the time of making said charge, knew that the return made by respondent upon said writs, stating the return to him of the money by him paid for property bid off at said sale was true, every word of it."

Fowler bid off at said sale of property amounting to $1,058 56¼, of which he paid respondent but $1,000, which he received under the belief that it was paid by Fowler on his own account, being a payment on his bids generally, and not upon any particular one. He did not apply said money to the satisfaction of the executions in favor of Beach and Gray & Bouton, nor convert it to his own use, but returned it to Fowler. Upon the re-

ceipt of the said certificate of deposit, respondent cashed it at par. On the same day, Trapnall & Cocke forbade his crediting the judgments of Beach and Gray & Bouton with said money, alleging that the sales were void, and would be set aside, which was afterwards done, on their motion. That as soon as said sales were set aside, Fowler, in open court, and in the hearing of many members of the bar, publicly requested respondent, as such sheriff, to return said $1,000, to which respondent replied that he would do so, but preferred an order of court therefor; upon which the judge remarked that the sales having been set aside, the money could be refunded without such order; to which Fowler assented, but remarked that if the money was not refunded, the rule would go on application, &c. Whereupon, respondent immediately, in the presence of the court and bar, returned to Fowler a U. S. Post office draft for $756 14, as part of said $1,000, a copy of which draft, with endorsements, respondent had in his possession, and would produce it if required. Not having in his pocket the balance of the money at the time, respondent requested Fowler to call at his office on his way home, and receive the residue, to which Fowler assented. Respondent went at once to his office and put the residue, $243 86 in specie, into a bag, and directed one of his deputies to hand it to Fowler when he should call for it, and take his receipt therefor, as also for said $756 14, whereupon respondent left town for his residence in the country, where he was taken sick, and so remained for several weeks. Believing the transaction closed according to agreement, respondent gave himself no further trouble about it, until long afterwards, when suit was instituted in the U. S. Circuit Court for the District of Arkansas, by complainants against respondent, and others, upon the same grounds, substantially, charged in the bill and supplement.

Respondent found on his recovery from his said illness that Fowler did not call for the residue of said money, according to agreement, but kept the amount paid him as aforesaid, without receipting therefor, leaving respondent with no evidence of payment but the recollection of persons present. That with a full

knowledge of these facts, Fowler fabricated the charges contained in complainant's bill, &c., impeaching the official integrity of respondent, &c.

Admits that Fowler presented to him for execution a deed for said property in favor of complainants, but being advised of the application to set aside said sales, he declined executing it. Whereupon, on the 22d June, 1843, Fowler filed, in the name of complainants a motion for a rule upon respondent to show cause why he should not execute said deed; but upon the response of respondent, the rule was discharged. A certified transcript of said motion, and proceedings, is made *Exhibit No.* 1. Copies of two executions issued upon the judgments of Beach and Gray & Bouton, to November term, 1843, with Lawson's return thereon, are also exhibited.

That said sales being set aside, the executions in favor of Beach and Gray & Bouton remained unsatisfied, as though no sale had taken place.

Knows nothings, of his own knowledge, as to said agreement between Beebe and Trapnall.

Admits that after May term, 1843, executions were issued upon said judgments, came to his hands, and were duly executed by respondent—the mortgaged premises were sold under them first day of November term, 1843, and Beebe became the purchaser. All of which things were done by respondent without fraud or collusion. He knew of no fraud in the issuance of said executions by Trapnall, or in the purchase of the property by Beebe, and believed there was none, &c.

Prayed leave to deposit said sum of $243 86, so that his said deputy might be released from the further trouble and responsibility of its custody.

Exhibit No. 1 *to Lawson's answer*, shows that complainants filed a motion for a rule upon him to show cause why he should not execute said deed, alleging their purchase at said sale, &c; that Lawson responded to said motion, alleging that the sale was made in accordance with the restraining order above referred to, but contrary to De Baun's instructions (exhibiting De Baun's di-

rections as to the order of sale,) that his understanding was that Fowler purchased for himself, &c., and the pendency of the motion to set aside the sales, &c. That the Court heard the motion, and refused the rule.

Roswell Beebe's Answer.—On the 4th June, 1844, Beebe filed his answer to the original and supplemental bills. He denies that complainants were entitled to the rents, &c., of the mortgaged premises, because the mortgage had not been foreclosed, nor judgment obtained against the mortgagor, &c. Admits that Gray & Bouton recovered judgment against De Baun, and that Beach recovered judgment against De Baun & Thorn as alleged in the bill, and shown by *exhibits E. and F.* thereto. That executions were issued thereon, returnable to September term, 1841, levied and returned as shown by said exhibits. That the judgment in favor of Beach had been satisfied as to Thorn, and the execution was so endorsed. Avers that the appraisers who valued the property levied on under said writs, were not sworn, and that they appraised it above its value. Admits that writs of *ven. ex.* issued on said judgments, returnable to March term, 1843, as shown by said exhibits. That they were returned on the 25th March, 1843, unsatisfied, by order of plaintiffs' attorney, in consequence of the passage of an act 1st February, 1843, changing the March term of said Court to the last Monday in May; and that other writs of *ven. ex.* were issued to the May term, 1843. That by virtue of the appraisement act of 23d December, 1840, and the said act of 1st February, 1843, the property levied on under the original *fi. fas.* could not have been sold earlier than at May term, 1843. Avers that the said writs of *ven. ex.* issued to May term, 1843, were illegal and void. That the one in faver of Beach, being a *ven. ex.*, could only authorize the sale of property previously levied on; and that the *fi. fa.* clause therein ran against the property of both De Baun and Thorn, when the judgment had been satisfied as to Thorn, and was so endorsed on the several executions issued thereon. That the *ven. ex.* in favor of Gray & Bouton only authorized the sale of property previously levied on, and that no property was or could have

been legally sold under either of said writs, on the first day of May term, 1843, except the property levied on, and appraised under the original *fi. fas.* which did not include the mortgaged premises.

Admits that payments had been made on said judgments, but whether prior or subsequent to the mortgage of complainants, he was not informed: and avers, upon information, that there was due thereon, on the 29th May, 1843, about $2,600 or $2,700. Denies that said judgments were the only incumbrances upon the Alhambra property, at the time said mortgage was executed. Avers that there was an incumbrance long prior to the mortgage, amounting to between $2,000 and $2,500, being a debt of the mercantile firm of De Baun & Thorn, which was a specific lien upon said property, and other property in the city of Little Rock, and which remained unpaid at the time of the dissolution of said firm—that Thorn sold to De Baun his undivided half interest in said property, and as part of the consideration therefor, De Baun agreed to pay said debt, as would appear by an authenticated copy of the contract between them, bearing date 4th April, 1838, and made *exhibit No.* 1.

Admits that said judgments of Beach and Gray & Bouton were a lien upon all the other unincumbered real estate of De Baun, situate in Pulaski county, but denies that it was as great in quantity, value, &c., as alleged in the bill. Avers that the most valuable of his city property was incumbered, &c., that the lands were wild, and in detached tracts, and that the whole of De-Baun's real estate situate in said county, other than that mortgaged to complainants, free of incumbrances, could not have been sold by the sheriff for a sum sufficient to satisfy said judgments.

Denies that the plaintiffs in said judgments instructed the sheriff, Lawson, to sell the mortgaged premises first; but avers that De Baun, on the 12th May, 1843, gave the sheriff written directions, under the statute, specifying the order in which he desired his property to be sold on the 29th of said month, a copy of which is made *exhibit No.* 2, which directions Beebe avers to

have been binding on the sheriff. That afterward, on the 25th May, 1843, De Baun and counsel, changed said directions in many particulars, a copy of which directions so changed, was incorporated in the preceedings of complainants to compel Lawson to make them a deed to the mortgaged premises, a transcript of which is made *exhibit No.* 3. Alleges that all sales made contrary to said directions were illegal and void, and that the sheriff made said sales contrary thereto, but in conformity with the restraining order mentioned below.

That upon application of Fowler, as attorney for complainants, after the hour of nine o'clock. A. M., and after the sales had commenced, on the first day of May term, 1843, the Judge of Pulaski Circuit Court, on an *ex parte* showing, ordered, adjudged and decreed, that on complainants giving approved security in the sum of $3,000, payable to Gray & Bouton and Beach, an order issue requiring the sheriff to expose to sale all the property of De Baun levied on, other than the mortgaged premises, before he exposed to sale said mortgaged property. A transcript whereof is made *exhibit No.* 4; which order was served upon the sheriff during the hurry and bustle incident to the selling of a large amount of property within legal sale hours &c. Respondent alleges that said order was illegal, void, and that the sales made in obedience thereto were void, and conferred no title upon purchasers.

Admits the recovery of the judgments against De Baun and De Baun & Thorn, and the execution of the mortgage and deed of trust by De Baun, &c., as alleged and enumerated in the supplemental bill, and sets them out *to wit:* the mortgage by De-Baun and wife to Beirne & Burneside; the deed of trust by the same to Reardon, Woodruff and Watkins, to secure debts amounting to $25,000. The judgmenst of Chittenden, Witherell, Jesup & Beers, Real Estate Bank, Gottchalk, William & James Gasquett and Conway, Real Estate Bank, Ringo, Chew use &c., and Ralph Marsh & Co., describtng them substantially as in the supplemental bill, as to dates, &c., as well as those mentioned below. The issuance of a *fi. fa.* on the last named judgment, levy

on the property mortgaged to complainants, appraisement thereof, failure to sell, and the issuance of a *ven. ex.* thereon, 1st May, 1843, as alleged in the supplemental bill, and shown by *exhibit G.* thereto. The judgment of Waldron, Thomas & Co., *fi. fa.* thereon, return, and *ven. ex.* as alleged in the supplemental bill, and shown by *exhibit I.* thereto. Judgment of Real Estate Bank against De Baun, Reardon et al., the *fi. fa.* and *ven ex.* thereon, &c.

That the returns upon the said executions in favor of Ralph Marsh & Co., and Waldron, Thomas & Co., returnable to May term, 1843, were made out, as shown by *exhibits H. and G.* to the supplemental bill, by Lawson's deputy, Thomasson, immediately after the closing the said sale on the 29th May, as was usual, and did not state all the facts in relation to the sale—did not set out said restraining order, and the subsequent decree of the Court setting aside said sales, which are embraced in said *exhibit No.* 4. That under the same circumstances, Thomasson endorsed a similar return upon the execution in favor of the Real Estate Bank against De Baun, Reardon et al., before the sales were set aside, but it was not returned with the two above referred to. That it was produced with said other two, and the executions in favor of Beach and Gray & Bouton, on the hearing of the motion to set aside the sales, but was afterwards lost or mislaid, and not found until after the adjournment of Court, and so the sheriff was unable to make the same returns thereon as were made upon the executions in favor of Beach and Gray & Bouton, which were the only true returns, stating all the facts, &c.; and so respondent alleges that the returns upon said executions in favor of Ralph Marsh & Co., and Waldron, Thomas & Co., as they appear in said *exhibits G.* and *I.*, were erroneous and void, not exhibiting all the facts in relation to the sales, the setting of them aside &c. That a short time before the adjournment of said Court, at November term, 1843, it accidentally came to the knowledge of respondent, and the sheriff, through Fowler, that said execution in favor of the Real Estate Bank was on file in the Clerk's office, and thereupon, on application to the Court,

the sheriff was permitted to amend his return thereon, stating the same facts returned upon the executions in favor of Beach and Gray & Bouton.

Admits (again) the issuance of the *ven. ex.* on the Gray & Bouton judgment, returnable to March term, 1843, the levy upon the Alhambra, and its return unsatisfied, in consequence of the act changing the time of holding the Court, above referred to, and the issuing of an *alias ven. ex.* to the May term, 1843, thereon. The issuance of the first *ven. ex.* on the Beach judgment, its return unsatisfied for the same cause, and the issuance of the second *ven. ex.* thereon, returnable to May term, 1843, but avers that the plaintiff's attorney, with the assent of De Baun, on the 27th May, 1840, entered of record a full release and satisfaction of the judgment as to Thorn (a copy of which is made *exhibit No.* 5) which was endorsed upon each of the executions issued thereon, and therefore the *fi. fa.* clause in said *ven. ex.* was illegal and void, and that by virtue thereof no property was or could be legally sold except that originally levied on as the property of De Baun, which did not embrace the Alhambra, &c.

Denies that the *ven. ex.* issued on the Gray & Bouton judgment to May term, 1843, was legally levied upon the Alhambra property, &c., because it only authorized the sheriff to sell the property originally levied on. Denies also that the said *ven. ex.* on the Beach judgment was legally levied on said property, because the judgment had been satisfied and released as to Thorn, and yet the writ ran against the property of both him and De Baun, as above, &c.; and for the same reason all the said executions issued on the Beach judgment, respondent alleges to be void, and conferred no authority to levy upon and sell said property, &c.

Admits that *exhibit M.* to the supplemental bill is a correct copy of the sheriff's advertisement of the sale, but denies that the lots and lands therein descrsibed were legally sold by the sheriff on the 29th May, 1843; and particularly denies the legality of the sale of "De Baun's Corner" (the mortgaged premises) to complainants as alleged in the bill, &.

Beebe further denies that *exhibit N.* to the supplemental bill, was the original return, or intended to be, of the alleged sales under the Beach *ven. ex.* &c., or that it was fraudulently torn off by the sheriff as alleged by complainants, and, without means of knowing, denies that said *exhibit* is truly copied from the original paper.

Was informed and believed that Fowler purchased the property known as "De Baun's Corner" (the mortgaged premises) at said sale in his own name, and the sheriff so entered it at the time in his book of sales, a copy of which entry is made *exhibit No.* 6. That Fowler declared publicly at said sale, in the presence of many credible persons, that he was bidding upon said property for himself, and the sheriff did not know that he purchased for complainants until he afterwards presented him a deed for execution, &c. Admits that the sheriff made a similar memorandum at May term, 1843, on the *ven. ex.* in favor of Gray & Bouton but denies that it was a true return of all the facts in relation to said sale, or that it was ever made out and appended to said writ for that purpose, or for any other than as information to the Court, to show how he had executed said writs of *ven. ex.* under said restraining order.

Denies that Lawson, sheriff, fraudulently withdrew from the files of the Clerk's office the said writs of *ven. ex.* in favor of Beach and Gray & Bouton; but avers that at the adjournment of the May term of said Court, 1843, said writs had been returned to the Clerk in accordance with usage in such cases, that during the pendency of the motion to set aside said restraining order and said sales, the sheriff was required to produce said writs, &c., and done so; and appended to them a memorandum, hastily written out, for the purpose of exhibiting to the Court and parties interested, what had been done in the premises, but in so doing, did not intend, or consider said executions as regularly returned, but merely in possession of the Court as his papers, and thereafter subject to his control, to be officially returned, with proper returns, showing all the facts, &c., after the final action of the Court thereon.

Denies that the returns made upon said writs as shown by complainants' *exhibits H.* and *L.*, are either false, garbled, or defective as alleged, but avers the same to be substantially true in all respects, and that they exhibit all the important and material facts, &c.

Respondent denies that he bid upon the mortgaged premises as alleged; and denies, and does not believe it to be true, that when Fowler bid off said property, he informed the sheriff that he purchased for complainants, and not for himself.

Admits that Fowler paid the sheriff said certificate of deposit for $1,000 in the purchases of himself and Desha at said sale, which purchases amounted to $1,050 66, as shown by the bill, and respondent's *exhibit No.* 6.

That said certificate of deposit belonged to complainants, and was sent by them, with other certificates of deposit, to Fowler, for the purpose of discharging liens upon said mortgaged premises, prior in date to their mortgage. That the sheriff signed said receipt for said $1,000, presented to him by Fowler, on the 6th June, 1843, being about ten days after said sale, without noticing its contents, further than to see that it was a receipt for that sum. Denies that Lawson applied said money to the satisfaction of the judgments of Beach and Gray & Bouton, or to his own use, as charged in the bill. Avers that the sheriff in good faith, converted said certificate of deposit into specie, or its equivalent, for convenience of distribution, but was soon advised that the money could not be received in satisfaction of said judgments, and that application would be made immediately to set aside said sales. That afterwards, at the request of Emzy Wilson, to oblige a friend, and collect $200, he advanced a portion of the money obtained for said certificate of deposit, and took in exchange a warrant drawn by the Postoffice Department upon the Treasurer of the United States, in favor of Wilson, for $756 14, bearing date June 14th, 1843, upon the back of which, an order was drawn by the Treasurer, Selden, on the Bank of Louisiana, at New Orleans, of the same date of the warrant, which

was endorsed by Wilson, &c. A copy of the warrant is made *exhibit No.* 7.

That afterwards, on the 6th July, 1843, said restraining order and said sales were set aside, as shown by *exhibit No.* 4. This was done on the eve of the adjournment of Court, at which time Fowler requested that said money be re-paid to him: the sheriff immediately assented, and gave him at the moment, in the presence of the Court and Bar, said Postoffice warrant, and, by an agreement of parties, Fowler was to call at the sheriff's office, at four o'clock P. M. of that day, and receive the residue of the $1,000, but never called for it. Fowler placed said warrant in the hands of Hyman Mitchell, of Little Rock, who, about 26th July, 1843, transmitted it to Walton & Sheaf of New Orleans, to whom it was paid by said bank 18th August, 1843, as appeared by their endorsement, and the original warrant transmitted to the General Postoffice where it remained on file.

Admits that Fowler prepared, and tendered to Lawson for execution, a deed for said mortgaged premises in favor of complainants, which Lawson declined to execute; and avers that thereupon Fowler moved for a rule upon Lawson to compel him to execute said deed, which, on the response of Lawson, was refused by the Court, as shown by *exhibit No.* 3.

Avers again that the mortgaged premises were struck off to Fowler, in his own name at said sale, and not for complainants, and that neither of them had a right to a deed thereto, the sale being illegal in consequence of being made contrary to De-Baun's directions, under the statute, &c.; and for the further reasons that the *ven. ex.* in favor of Gray & Bouton only authorized the sheriff to sell the property previously levied on, which did not include said premises; and that the judgment against De-Baun & Thorn "had been fully and legally paid and satisfied by a regular written release of satisfaction as to one of the parties aforesaid, as shown by *exhibit No.* 5; and therefore a full discharge as to the whole judgment and the defendants."

Beebe further answers, that on the 20th March, 1843, he purchased the said judgments of Gray & Bouton and Beach, and they

were assigned to him by Trapnall & Cocke, the attorneys of said parties, they being empowered so to do; for which he gave his bond, secured by mortgage on real estate; and afterwards, in December, 1843, paid the purchase money, which was the balance due on said judgments, (except costs) amounting to about $2,400; at which time the said bond and mortgage were cancelled, and he had no written evidence of said contract except said assignment. At the same time he paid the costs due on said judgments, amounting to about $200, which, with interest on said sums to the time of answering, and additional costs in said cases, amounted to about $2,700. That he was induced to purchase said judgments, on information that complainants would not advance the money to pay them off, and release the mortgaged premises therefrom, with the view, by that means, of placing himself in a position, if a contingency happened, of saving himself from entire loss, on account of liabilities which he had incurred as one of De Baun's securities, which he was bound to pay, had actually assumed, and afterwards paid, amounting at the time to about $4,000—being De Baun's indebtedness to the State and Real Estate Banks, interest, costs, &c.

That long before he purchased said judgments he was convinced that the means of De Baun were daily diminishing, from various causes, thereby rendering him unable to pay his debts; and on looking into the condition of the property embraced in the deed of trust above referred to, and the incumbrances upon it, he was satisfied that it would not indemnify the securities, wherefore he decided to take the best method he could to save himself, without prejudicing the rights of others.

Respondent also purchased of Daniel Ringo a judgment obtained by him against De Baun, in Pulaski Circuit Court—against De Baun & Thorn, which, with interest and costs, at the time of answering, amounted to the sum of $2,200, making the aggregate of said three judgments about $4,900. That all his acts and intentions in relation to the purchase of said judgments were regular and fair, and not done with any intention to hinder complainants in the collection of their claims in any just and lawful way they

might think proper: and that he had done nothing in reference thereto, which could not be fully sustained by those just and equitable rules which govern individuals in usual and ordinary business transactions. He had paid all claims against him as De Baun's security, amounting to about $4,000, which, with the purchases made by respondent at the sale under the deed of trust, and properly chargeable to the premises in question, would amount in the aggregate to about $10,750, including charges and incidental expenses, and which is the true amount the premises in question cost him.

That if complainants had in due season fairly and honestly come forward and paid off the prior liens upon said mortgaged premises, which were considerably less than their claims, it would have left their mortgage free of incumbrances and fully indemnified them. That all the proceedings of complainants in procuring said restraining order, &c., having been declared illegal, and set aside, and the Court having refused to compel Lawson to make them a deed, as aforesaid, other writs of execution were regularly issued upon said judgments in favor of Beach and Gray & Bouton, and which still remained unsatisfied with the exception as to the said release of Thorn; and also upon a judgment in favor of the Real Estate Bank against De Baun, Reardon and Beebe, commanding the sheriff to sell the property levied upon to satisfy the same, and that for want of sufficiency of the property levied on, he was commanded that of the goods and chattels, lands and tenements of said defendants, he cause to be made the debts, &c. That said executions in favor of Beach and Gray & Bouton were levied on the premises and improvements in question, regularly advertised and exposed for sale at the Court house, &c., in Little Rock, on the 27th day of November, 1843, being first day of November term of said Court, and respondent, Beebe, became the purchaser of De Baun's right, title and interest therein, for the sum of $325. That Fowler was present at said sale, and made no objection thereto within the knowledge of Beebe. That said several executions having

been so legally executed, were returned, &c., copies of which are made *exhibits No.* 8, 9, 10.

That previous to said sale, De Baun gave the sheriff written directions as to the order in which he desired said propery as well as all other of his property levied on, to be sold, which were complied with, as far as could be—a copy of which instructions is made *exhibit No.* 11. That afterwards, the said sheriff executed to respondent, a deed for the property so purchased by him in due form, a copy of which is made *exhibit No* 12.

That on the 20th March, 1843, a writ of *sci. fa.* to revive said judgment of Beach and of Gray & Bouton, and continue them as a lien upon the real estate of De Baun, was regularly issued, &c., returnable to the May term, 1843, which was duly executed by the sheriff, upon De Baun and Thorn, a transcript of the proceedings on which is made *exhibit No.* 13.

Respondent avers that by virtue of the sale, purchase and deed aforesaid, he acquired a valid title, in law and equity, to all the interest possessed by De Baun in the said property.

That on the 23d June, 1843, in Pulaski Circuit Court, Daniel Ringo recovered a judgment against De Baun & Thorn, late partners &c., under the style of James De Baun & Co., for $1,-500 debt, $484 50 damages, with interest on debt and damages, at the rate of ten per cent. from the date of the judgment, and for $7 35 costs; which debt was contracted by said firm before its dissolution, as evidenced by a note bearing date 20th March, 1837, a transcript whereof is made *exhibit No.* 14. That a *fi. fa.* was issued thereon, 8th September, 1843, returnable to November term, following, which was levied by said sheriff, among other property, upon the undivided one half interest of said Thorn in and to said premises and improvements in question, including a similar interest of his in other lots. That the same was regularly advertised and exposed to sale at the Court house, &c., on the first day of November term, 1843, and purchased by respondent for $50, that is, the interest of Thorn in the premises in question. That Fowler was also present at said sale, and made no public objection thereto, within respondent's knowledge. A

copy of which writ and return is made *exhibit No.* 15. That the sheriff afterwards executed and acknowledged, in due form, a deed to respondent for Thorn's interest in the premises under said sale and purchase, a copy of which is made *exhibit No.* 16.

That by virtue of deeds from Byrd and wife, and Ashley and wife to De Baun & Thorn, one undivided half of said mortgaged premises was legally vested in said Thorn, certified copies of which deeds are made *exhibit No.* 17. That upon the dissolution of said firm of De Baun & Thorn, Thorn sold to De Baun, among other property, his said interest in said property, for divers good and valuable considerations, and amongst which was, that De Baun should pay the debts, &c., of the firm then outstanding, so as to absolve Thorn from all liability on account thereof, and then Thorn was to make him a deed in fee, with relinquishments of dower, &c., to his said half of said lots and improvements, which would more fully appear by the covenant of Thorn, bearing date 4th August, 1838, which was duly recorded, &c., a certified copy of which is made *exhibit No.* 1. That the note of James De Baun & Co., to Ringo, upon which the judgment above referred to was obtained, was one of the debts due by, and outstanding against said firm, and therefore said judgment constituted a specific lien upon said premises at the time of its rendition, paramount to all other liens created subsequent to said covenant of Thorn. Wherefore respondent alleges that by virtue of his said last purchase, and said sheriff's deed, the said half interest of Thorn vested in him, without reference to other titles, &c.

Denies that he obtained title to said property by any fraud, or unfair or illegal means. Avers that he obtained possession of so much thereof as he was in the possession of, without any such means. That on the 2d day of April, 1843, he became the purchaser thereof, among other property of De Baun, at a public auction, held at the residence of said De Baun, in said county, by and under the direction of Reardon, Woodruff and Watkins, trustees of De Baun, by virtue of a certain deed of trust, executed, acknowledged, and recorded by De Baun and wife, for the purpose of securing them, this respondent, and others as securi-

ties of said De Baun, which deed bore date September 4th, 1841, a certified copy of which is made *exhibit No.* 18. That in pursuance thereof, said trustees duly executed to respondent a deed of conveyance for the property so purchased by him at said trust sale, a certified copy of which is made *exhibit No.* 19.

That immediately after said purchase, he caused the sheriff to serve a notice upon the persons occupying the premises, that the accruing rents belonged, and must be paid to respondent, a copy of which is made *exhibit No.* 20. The occupants at the time, were H. N. Aldrich, J. D. Fitzgerald, Eli Colby, Thomas J. Reynolds, John Brown and Charles Galloway. Subsequently, about the 11th October 1843, Wm. B. Wait came in possession of the portion of the premises occupied by Aldrich, and respondent caused a similar notice to be served on him, a copy of which is made *exhibit No.* 21. That he had received a portion of the rents from the occupants, and was continuing to receive rents from all of them except Fitzgerald, who refused to pay. Respondent had regularly instituted suits against said occupants at the expiration of each month, (excepting a portion of the time next succeeding the 22d April, 1843,) before a Justice of the Peace, for the rents, and obtained judgment therefor in every instance, which included nearly all the rents due from said 22d of April, to the time of answering; an occount of which would be furnished the Court, though respondent denies complainants right to such account, as they had no interest in the matter.

That upon the execution to respondent of the sheriff's deeds made *Exhibits No.* 12 & 16, he caused a rule to be entered in Pulaski Circuit Court against the occupants, and those supposed to be in possession of the premises, *to wit:* De Baun, Fitzgerald, Wait, Brown, Colby, John P. Smith and George Waring, who severally, after being served with legal notice, failed to appear except Fitzgerald, whereupon the Court ordered that the sheriff put respondent, as an executive purchaser, into possession of the premises and tenements thereon, and the sheriff, on the 13th December, 1343, did put him into possession thereof, except that part occupied by Fitzgerald, without opposition to the order. A

copy of the order and sheriff's return is made *Exhibit No.* 22—by means whereof he alleges that his possession of the premises was lawful, &c.

That complainants were not entitled to a deed to the said property—that they never purchased it. That the property having been sold under judgments constituting liens upon it prior to complainants' mortgage, the mortgage was cancelled, and its foreclosure barred. That by their own negligence and fraud, they had been mainly instrumental in defeating any claim they might have had under the mortgage—that they caused the premises to be levied on and sold vnder the prior liens, when they might have advanced the means to discharge them, and had the full benefit of their mortgage—that they possessed large means, and credit, and were well able to make such advances, and the property was of sufficient value to justify them in so doing—that before the sale on the 29th May, 1843, they were advised to make such advances by attorneys of this State, in New Orleans, that they did send money to Fowler for that purpose, but it was not so applied, but on the contrary, they, by said attorney, on the morning of the day of sale, procured said restraining order, requiring the sheriff to sell De Baun's property in a particular manner, &c., which was illegal, as afterwards decided by the Judge on more mature reflection, &c.

That in addition to the titles to said property, acquired by respondent as aforesaid, the same was exposed to sale, at the Court house, in Little Rock, on the 3d December, 1842, by Thomas W. Newton, United States Marshal, under an execution issued on the 8th June, 1842, upon a judgment obtained in the United States Circuit Court, for the District of Arkansas, in favor of Lewis Chittenden against said De Baun, on the 23d May, 1842, and purchased by Trapnall & Cocke, who afterwards conveyed it to him. That by virtue thereof, respondent became from thence forward entitled to the possession, rents, &c., of the premises.

That although De Baun had parted with his interest in the property, yet as defendant in execution, he had the right under the statute, to direct the sheriff what portion of it to sell first, and

so on, until the executions were satisfied, and that respondent approved the directions given by De Baun to the sheriff, &c.

Denies the right of complainants to injunction, restraining order, &c., as prayed, alleging respondents responsibility for any sum that might be decreed to them, &c.

Exhibit No. 1., *to Beebe's answer*—is the bond of Thomas Thorn to James De Baun, dated on the 4th August, 1838, in the penal sum of $15,000, conditioned, after reciting that Thorn being the owner of one undivided half of certain lands, &c., including the *Alhambra* or *corner* property, in consideration of $10,000 to him paid by De Baun, had sold to De Baun, his heirs, &c., all his right, title, interest, &c., in and to his undivided half of said lands, that whenever after it should appear that De Baun had fully paid, adjusted and arranged the debts due by, and outstanding against the mercantile firm theretofore existing between De Baun & Thorn, in such manner as to relieve Thorn from all liabilities or damage on account of said co-partnership, upon the reasonable demand of De Baun, his heirs or assigns, said Thorn should execute a good and sufficient warrantee deed of conveyance of an estate in fee simple, in and to one undivided half part of said lands &c., with the appurtenances, &c., with relinquishment of dower, unto De Baun—then said bond to be void—else to remain in force. Which bond was duly acknowledged and recorded on the 18th August, 1838.

Exhibit No. 2, *to Beebe's answer*, is the written directions of De Baun to Lawson, dated 12th May, 1843, specifying the order in which he desired his property levied on to be sold, and requiring the sheriff to sell the mortgaged premises first, &c.

Exhibit No. 3, *to Beebe's answer*, is a transcript of the proceedings on the motion of complainants against Lawson to compel him to execute a deed to them for the mortgaged premises, under their alleged purchase on the 29th May, 1843. The motion was made 22d June, and determined against them, on the response of Lawson, &c., on the 7th July, 1843. Appended to Lawson's response, is the modified directions of De Baun to Lawson in reference to the sale of his property, bearing date 25th May, 1843,

referred to in the answer of Beebe, in which Lawson is required to sell the *corner* property first.

Exhibit No. 4, *to Beebe's answer*, is a transcript of the proceedings in this case at the May term, 1843, showing that on the 29th of May, on an *ex parte* application of Fowler, as solicitor of complainants, the restraining order so often above referred to was made. That on the 12th June, 1843, Trapnall & Cocke, filed a motion to set aside said restraining order, and the sales made on the 29th May, in conformity therewith—the motion seems to have been made in behalf of Gray & Bouton, Beach and De Baun. That on the 3d July, 1843, (as appears from a *nunc pro tunc* entry of 6th July,) said motion was sustained by the Court, and said order and sales set aside and held for naught.

Exhibit No. 5, *to Beebe's answer*, is a certified copy of a record entry, as follows :

"PULASKI CIRCUIT COURT, IN VACATION, JUNE, A. D. 1840.

Lewis Beech, *Plaintiff*,
vs.
James De Baun & Thomas Thorn, *Defendants*. } *Debt.*

Judgment 27*th March*, 1840, *for* 1,988 50, *residue of debt and costs —book K. page* 449.

The said defendant Thomas Thorn, having arranged and secured to the satisfaction of the attorneys of the plaintiff, Trap- & Cocke, the judgment recovered in this case, they do hereby, and with the consent and agreement of the said James De Baun, acknowledge full satisfaction of the said judgment so far as the said Thomas Thorn is concerned, without prejudice to the rights of the said plaintiff to sue out executions and recover the said judgment and costs of the said James De Baun.

TRAPNALL & COCKE,
Attorneys for Plaintiff.

May 27*th*, 1840.

I, James De Baun, do consent to the above satisfaction in the manner and form as therein provided, May 27th, 1840.

J. DE BAUN."

Exhibit No. 6, *to Beebe's answer*, is a copy of an entry made

in Lawson's sales book in reference to the sale on 29th May, 1843, certified by him, which is as follows :

"P'ts 7 & 8, B. one, west Quapaw line, De Baun's corner—apprst. run out.

A. FOWLER, $903 56¼.

P'ts 7 and 8 B. 38, apprst. run out as in lots 8 and 9. Lot 8, value $400.

F. W. DESHA, $100."

Exhibit No. 7, *to Beebe's answer*, is a copy of the Post Office warrant, and endorsements, described in the answer as having been paid to Fowler by Lawson, certified by the Auditor for the Treasury of the Post Office Department.

Exhibit No. 8, *to Beebe's answer*, is a *ven. ex.* with a *fi. fa.* clause issued on the Gray & Bouton judgment, 14th July, 1843, returnable to the November term, following, commanding the sheriff to sell the property levied on under the first execution, and in default of satisfaction, to make a further levy, &c. From the return of the sheriff on this writ, it appears that by virtue of the *fi. fa.* clause therein, he levied on the *Alhambra* property, and the other lots and lands of De Baun described above; that he duly advertised, and sold the same on the 27th November, 1843, and Beebe purchased the Alhambra property, at $325. Trapnall purchased most of the lands—(see De Baun's cross-bill for particulars of this sale) amount of sales $1,875.

Exhibit No. 9, *to Beebe's answer*, is a *fi. fa.* issued on the judgment of Ringo against De Baun & Thorn, 8th September, 1843, returnable to the following November term; which the sheriff levied on the property above referred to, including the *Alhambra*, advertised and sold the same on 27th November, 1843, and Beebe purchased Thorn's interest in the *Alhambra* property at $50.

Exhibit No. 10, *to Beebe's answer*, is a *ven. ex.* with a *fi. fa.* clause, issued on the judgment in favor of the Real Estate Bank against De Baun, Reardon and Beebe, 13th July, 1843, and returnable to November term following, reciting the original levy on the *Alhambra*, *&c.*, upon which the sheriff made the same return as on the execution in favor of Gray & Bouton, above, (*Ex-*

hibit No. 8), showing a sale of the *Alhambra* to Beebe at $325, on the 27th November, 1843.

Exhibit No. 11, *to Beebe's answer*, is a copy of directions given by De Baun to the sheriff in reference to the order in which he required his property to be sold under the above writs, but protesting against the legality of the sale—the *Alhambra* is put last, except some other city lots.

Exhibit No. 12, *to Beebe's answer*, is a deed from Lawson, sheriff, to Beebe, for the *Alhambra* property, executed, acknowledged &c., on the 28th November, 1843, reciting a sale under a *ven. ex.*, with a *fi. fa.* clause on the Beech judgment, and also the sale, and purchase by Beebe, under the above writs of *ven. ex.* in favor of Gray & Bouton and the Real Estate Bank (*Exhibits No.* 8 and 10), conveying to him all the interest, &c., of De Baun therein &c.

Exhibit No. 13, *to Beebe's answer*, is a *sci. fa.* to revive the judgment of Beech against De Baun and Thorn, issued 20th March, 1843, and returnable to the May term, following, which was executed on De Baun, 21st and on Thorn 24th March, 1843. Also a *sci. fa.* to revive the judgment of Gray & Bouton, against De Baun, issued same day, returnable same term, and executed 21st March, 1843. The *sci. fa.* on the Beach judgment, recites that the judgment remains unsatisfied as to *De Baun*, and commands the sheriff to summon him to show cause &c., but the writ was served on Thorn also.

Exhibit No. 14, *to Beebe's answer*, shows that on the 27th September, 1842, Daniel Ringo commenced suit against De Baun & Thorn, late partners, &c., in Pulaski Circuit Court, on a note for $1,500, &c., made by said firm to him 29th March, 1837, and obtained judgment thereon 23d June, 1843, for debt, interest, &c., [see opinion of Court for further particulars of this exhibit].

Exhibit No. 15, is a *fi. fa.* upon said judgment, issued 8th September, 1843, returnable to November term, 1843, under which Beebe purchased the interest of Thorn in the *Alhambra* as shown by *Exhibit No.* 9, above.

Exhibit No. 16, is a deed from Lawson, sheriff, to Beebe for Thorn's interest in the *Alhambra* property, purchased by Beebe

under the said judgment and execution in favor of Ringo, executed &c., 28th November, 1843.

Exhibit No. 17, *to Beebe's answer*, is *first*, a deed from Richard Byrd and wife to De Baun & Thorn, for that part of the Alhambra, or mortgaged premises, described first above in the mortgage of Whiting & Slark, executed 26th January, 1836, acknowledged and filed for registration 28th same month. 2d. A deed from Chester Ashley and wife to De Baun & Thorn for the remainder of said mortgaged premises, executed 16th November, 1836, acknowledged and filed for registration next day. 3d. A deed from Ashley and wife to De Baun for same property, executed 2d, anckowledged on the 4th, and filed for registration on the 20th November, 1839.

Exhibit No. 18, *to Beebe's answer*, is a deed of trust, with power of sale, executed by De Baun and wife, on the 4th September, 1841, to Woodruff, Reardon and Watkins, upon the *Alhambra* property, and a large amount of other real and personal property, to secure them, Beebe and others as securities of De Baun in various debts [see De Baun's *cross*-bill for particulars.]

Exhibit No. 19, is a deed from said trustees to Beebe, of the *Alhambra*, and other property, executed by them, on the 24th day of April, 1843, in pursuance of a sale of said property made by them, under said deed, on the 22d April, 1843, and purchased by Beebe.

Exhibit No. 20, is the notice given by Beebe, on 22d April, 1842, to Aldrich, Fitzgerald, Colby, Reynolds, Brown and Galloway, tenants, of his purchase of said property at said sale, and that he should claim future rents, &c.

Exhibit No. 21, is a similar notice to Wait, given 19th October, 1843.

Exhibit No. 22, is a transcript of the order of Court, made 4th December, 1843, directing the sheriff to put Beebe into possession of the premises (except that portion occupied by Fitzgerald) as an execution purchaser, and the sheriff's return that he executed the same 13th December, 1843.

May term, 1841—Complainants except to the answer of Lawson,

1st, That he neither admits nor denies the execution of the receipt for $1,000, copied in the bill; 2d. That he did not produce said sales book, nor a copy thereof, &c.

Answer of De Baun to original and Supplemental bills.—On the 18th June, 1844, De Baun filed his answer. Admits his indebtness to Whiting & Slark; the execution of said mortgage; tenants named in possession; the recovery of said judgments by Gray & Bouton, and Beach; the issuance of the original *fi. fas.* thereon, levy on property described in the returns, its appraisement at $4,862 50, alleging that it was worth that sum; that a writ of *ven. ex.* with *fi. fa.* clause was issued on each of said judgments, returnable to March term, 1843, and returned unsatisfied in consequence of the act changing the time of holding said Court. That on the 2d May, 1843, other writs of *ex. ven.* issued on said judgments, with a *fi. fa.* clause in the one in favor of Beach, but not in the other.

That there was no lien on said mortgaged property prior to said mortgage except as follows: That he and Thorn owned that, and other property jointly—on the 4th August, 1838, he purchased Thorn's interest, agreeing to pay the debts of the firm, &c., and Thorn executed to him the bond set out in *Exhibit No.* 1, to Beebe's answer; whereby the debt due Ringo, by said firm, referred to in Beebe's answer, became a lien on said undivided half interest of Thorn, upon which debt judgment was obtained by Ringo against De Baun & Thorn, 23d June, 1843.

That the said judgments of Gray & Bouton and Beach were a lien on all his real estate situate in said county of Pulaski, consisting of city lots and lands which are described in the answer, a large portion of which were mortgaged to the Real Estate Bank, to secure stock and stock loan, &c.

That said executions, and others, being levied on most of said property, he required Lawson to sell it in a particular order (mortgaged premises first) as shown by *Exhibit No.* 2, to answer of Beebe, and *Exhibit* 6, to Lawson's answer.

Admits the execution of said mortgage to Beirne & Burnside,

the trust deed to Woodruff, et al., and the recovery of the several judgments, as alleged in the supplemental bill.

Admits the issuing of the executions in favor of said Real Estate Bank, Waldron and others, and Marsh and Marsh, the levy and appraisement under each, and the issuance of the *ven. ex.* in each as alleged.

Admits that levies were made upon the several executions aforesaid, sheriff sold the property on 29th May, 1843, in conformity with said order of Court, and purchases by the persons, and at the prices alleged.

Knows nothing as to the alleged fraud of the sheriff in making returns on said writs.

Does not know whether Trapnall purchased at said sale for himself or clients, but presumes he purchased for his clients, as he could not, in equity, hold property so purchased without their consent.

Fowler forbid the sale on the 29th May, 1843, and Trapnall urged it, as alleged, but does not remember whether Beebe or Trapnall bid on the mortgaged premises.

Does not know that Fowler informed the sheriff that he purchased for himself, when the premises were knocked off, but has conflicting information in regard thereto.

Knows nothing of the payment of said money by Fowler to Lawson, the receipt therefor, its appropriation, refusal to make the deed, &c., &c.

Believes that Beebe had before then bought said judgments of Gray & Bouton, and Beach—had the control thereof, and had bound himself to resort only to said mortgaged property, and to the property originally levied on by the original executions on said judgments, for satisfaction thereof, but did not know when the contract was.

Admits that Beebe caused writs of *ven. ex.* to issue to November term, 1843, on the judgments of Gray & Bouton and Beach, and that other executions also issued to the same term; but whether this was done to practice a fraud on complainants, he does not know, but presumes it was done because said first sales were

canceled by the court. Admits that said mortgage property was seized by virtue of some of said executions, and sold, and the interest therein of respondent and Thorn purchased by Beebe, and a deed executed to him therefor by the sheriff.

That said second sale of the mortgaged premises was a nullity, for various reasons apparent on the face of the writs, &c., and for the same reasons, and others, the first sale was likewise a nullity. Admits that Beebe had obtained possession of said property under orders of court, and had received the rents, &c., to what amount he did not know, but denies that the rents, &c., belong to complainants.

Admits correctness of all the exhibits to the original and supplemental bill, except *Exhibit N.*, as to which knows nothing.

There had been paid on the claim of Gray & Bouton, before judgment, on the 28th January, 1839, $1,025 14; and on said judgment of Beach, on the 10th September, 1840, $1,125.

Cross-Bill of De Baun.—On the 18th June, 1844, De Baun filed a cross-bill against all his mortgage and judgment creditors, and all persons who had purchased any of his property &c., to wit: Whiting & Slark, the trustees of Real Estate Bank, Beebe, Ringo, Thorn, Gray & Bouton, Beach, Beirne & Burnside, Jessup, Beers, Woodruff, Reardon, Watkins, Pendleton, Whitmore, Sabin, R. W. and Ben. Johnson, Marsh & Marsh, Waldron, Thomas, Day, Mygatt, Chittenden, Gottschalk, Witherell, Wm. & Jas. Gasquit, Conway, Keeler, Robins, Fowler, Desha, Trapnall, Fenno, Bertrand, Blackburn, Faulkner, Lincoln, Le Baron, Drew and Jose Maria Medrano; alleging that before and at the time of the inception of the liens and incumbrances hereinafter specified he was seized and possessed of a large amount of real estate in said county of Pulaski, or of certain interest and rights in the different portions thereof, hereinafter stated: *to wit:* (*No.* 1 and 2), lots 7 and 8 in block one (*same mortgage to Whiting & Slark*). (*No.* 3), lots No. 4, 5 and 6, block No. 38, west Quapaw line, Little Rock. (*No.* 4), lots 8 and 9, same block. (*No.* 5,) lot 7 same block; of which lots he and Thorn were joint and equal owners on the 4th August, 1838, on which day he, De Baun, pur-

chased Thorn's interest therein, for $10,000, paid Thorn and an agreement to pay the debts of the firm, and Thorn thereupon executed to him the bond for title made *Exhibit No.* 1 *to Beebe's answer*. Submits that said instrument operated, in equity, as a conveyance of said property to him, with reservation therein of a lien, or equitable mortgage, in favor of Thorn, to which any creditor of the firm would be entitled in equity, to be substituted.

That whatever interest he had in said lots marked *Nos.* 1, 2 and 4, by virtue of his original ownership, and said bond of Thorn, he still retained when the liens, &c., hereinafter mentioned accrued.

That before any of said liens or incumbrances commenced, on the 13th November, 1839, he sold to Pendleton, for $2,000, evidenced by note, said lots 4, 5 and 6 in block 38, marked above as (*No.* 3,) and executed to Pendleton his bond for title on payment of the note, which was duly acknowledged on the day of its date, and filed for record on 13th May, 1843. On the 6th April, 1843, by deed duly acknowledged, and filed for record 1st May, 1843, he and wife conveyed said three lots to Pendleton. Said bond is made *exhibit A. A.* and the deed *B. B.*

Before the inception of any of said liens, &c., on the 28th November, 1839, he sold to Whitmore, and contracted to convey to him on payment, for $1,500, said lot 7, in block 38, by instrument of that date not now in his possession. On the 3d February, 1840, by direction of Whitmore, he and wife conveyed said lot to Sabin, by deed of that date, acknowledged and recorded in April, 1841, and made *exhibit A. C.*

Submits that, under the circumstances, said lots, 4, 5, 6 and 7 were not, as would thereafter appear, subject to liens hereinafter mentioned.

(*No.* 6). Lots number 4, 5 and 6, in block 101, in said city, west Quapaw line, whereon a frame house stands—whereto he never had any title; Ashley contracted to convey them to Bingham upon payment of $1,800, to whose contract orator succeeded, built a house theron, and then being unable to comply with said

contract forfeited the same, Robins took his place, and likewise forfeited the same.

(*No.* 7). Lot 5, in block one, in new town of Little Rock, east Quapaw line—which orator and wife, on 22d October, 1840, for $5,500 to him paid, conveyed to Le Baron, by deed duly executed and acknowledged, and on 12th June, 1841, recorded: made *exhibit C. C.*

Orator was at the same time first aforesaid seized and possessed of the following lands in said county: west-half north-west quarter section 17; east-half section 18; south-half of west-half of south-west quarter section 18; north-east quarter of south-west quarter section 18; north-east quarter section 19; south-west quarter of north-west quarter section 19, all in township one north, range 12 west; north-half of south-west quarter, section 13; south-east quarter section 13; east-half of north-east quarter, section 24, all in township one north, range 13 west—which lands he, on 17th August, 1839, by deed of that date acknowledged and recorded, mortgaged to the Real Estate Bank to secure ninety-seven shares of stock, and $4,850, borrowed of the Bank, on stock credit, 18th January, 1840, payable by equal annual instalments running to 25th October, 1856, with interest, &c., which sum remained wholly unpaid. On 28th April, 1843, the trustees of said Bank filed a bill to foreclose said mortgage, making judgment creditors, &c., parties, which bill was pending in said Court, and would be made *exhibit D. D.*, if required, &c.

He was at the same time seized and possessed of the following other lands in said county: (13) north-west quarter of south-west quarter of section 17, in township one north, range 12 west: (14) north-west quarter of north-east quarter section 23: (15) north-west quarter of south-east quarter section 24: (16) north-east quarter of south-west quarter section 24: (17) south-west quarter of north-east quarter section 24, all in township one north, range 13 west: (18) north-west quarter (part) of north-east quarter of section 5, township 2 north, range 11 west: (19) 52 acres purchased of Amors, in township 1 north, range 11 west: (20) undivided half of north-west fractional quarter of section 20,

known as Mine Hill, township 2 north, range 12 west: (21) two small tracts purchased of Collins amounting respectively 6 9–100 and 9 56–100 acres, in north-west quarter section 10, township 1 north, range 12 west: (22) north-east quarter section 9: (23) south-west quarter section 10, in township 2 north, range 13 west: (24) north-east fractional quarter of section 6, township 3 north, range 9 west: (25) west fractional half of section 2, township 3 north, range 11 west: (26) south-west quarter of south-east quarter section 10: (27) north-west quarter of north-east quarter section 10: (29) east fractional-half of south-west quarter section 13: (31) south-east quarter of north-east quarter, section 10: (32) north-west quarter of north-east quarter, section 10: (33) south-west quarter of south-east quarter section 3, in township 3 north, range 14 west: (34) north-west quarter of south-west quarter, section 21: (35) east-half of south-west quarter, section 21: (36) south-west quarter of south-west quarter of section 21, township 3 north, range 13 west: (37) south-west quarter of south-west quarter of section 33: (38) west fractional-half of section 34, township 4 north, range 14 west: (39) north-west quarter section 8, township 3 north range 13 west: (40) west fractional half section 2, township 4 north, range 14 west.

The earliest lien, charge or incumbrance on any part of which lands was created by said bond to said Thorn, and the next, said mortgage to said Bank, and the liens subsequent thereto, were the following *to wit:* [The amounts of most of these judgments, &c., being stated before in the supplemental bill, the Reporter omits them here.]

March 23d, 1840, judgment in favor of Gray & Bouton.

March 27th, 1840, judgment of Beach against De Baun & Thorn, on a firm debt.

Fi. fa. sued out to revive lien of each of said judgments March 20th, 1843, duly executed.

Feb'y 13th, 1841, mortgage to Whiting & Slark on (*Nos.* 1 *and* 2.)

February 26th, 1841, mortgage to Beirne & Burnside on same property to secure $6,290 22, with interest, made *exhibit E. E.*

March 27th, 1841, judgment of Jessup & Beers.

September 28th, 1841, judgment of Real Estate Bank against De Baun, Woodruff, Reardon and Beebe.

September 4th, 1841, deed of trust to Reardon, Woodruff and Watkins, on said lands mortgaged to said Bank, and also said lands numbered 14, 15, 16, 17, lots numbers 1 and 2, divers negroes and large quantity of personal property to secure R. W. Johnson, Woodruff and Thorn, as securities of orator on bill of exchange, held by Real Estate Bank for $3,000, dated 18th March, 1840, due at 18 months, subject to a credit of $9,990 71, paid July 23d, 1841; Beebe and Reardon as his securities on note to said Bank, dated 8th June, 1840, due at 125 days, for $3,500; Imbeau, Erwin, Watkins and Beebe, his securities on note to said Bank, dated 20th July, 1840, due at 125 days for $630; Woodruff and Ben. Johnson, his securities on a note to said Bank, dated 20th September, 1840, due 6th February, 1841, for $3,100; Woodruff and Watkins his securities, on a note to State Bank, dated 15th August, 1841, due at 6 months, for $600; Woodruff and Stevenson, securities, on a note to said Bank, dated 19th May, 1840, due at 6 months, for $6,500; Beebe and Ashley his securities in a bill held by said Bank, drawn by Beebe and accepted by orator for $1,600, dated November 2d, 1840, due at five months; with power of public or private sale, to discharge said liabilities without preference or priority *pro rata*.

On 12th November, 1841, judgment of Real Estate Bank against De Baun, Woodruff and Ben. Johnson, judgment of Ralph Marsh & Co., and judgment of Waldron, Thomas & Co.

May 24th, 1842, judgment of Chittenden.

September 19th, 1842, judgment of Gottschalk.

September 24th, 1842, judgment of Witherill.

September 26th, 1842, judgment of William and James Gasquett and Peter Conway.

September 28th, 1842, judgment of Real Estate Bank against Watkins, Beebe, Erwin and Imbeau for $630 (secured by said deed of trust).

December 3d, 1842, judgment in favor of Real Estate Bank against De Baun, Mitchell and Thorn for $2,800, &c.

June 23d, 1843, judgment of Ringo against De Baun & Thorn for firm debt.

June 23d, 1843, Beirne & Burnside obtained judgment against De Baun for part of their said mortgage debt, $2,096 74 debt, $175 damages, &c.

June 26th, 1843, judgment of Chew, use trustees Real Estate Bank. Same day said trustees recovered against orator and Mark Izard in same Court.

April 6th, 1843, George G. Keeler established a mechanic's lien for $644, on west-half of north-west quarter of south-west quarter of section 18, township 1 north, range 12 west.

June 26th, 1843, judgment of Robins for $1,596 72, to be satisfied out of lots 4, 5, 6 in block 101, being mechanic's lien, relating back to 29th March, 1843. The above are all the liens ever created or existing on said lands, &c.

The earliest liens upon any portion of said property were the debts of De Baun & Thorn, due to Beach and Ringo, which were equitable liens on the undivided half of the said premises in blocks 1 and 38, as aforesaid. The next oldest lien was said mortgage to the Real Estate Bank, which would be foreclosed during the then term of the Court, the amount of the debt secured whereby was $4,850, with interest, &c., payable in the paper of the Bank, then worth forty cents on the dollar. The next oldest liens were the judgments of Gray & Bouton and Beach.

Sets out the release of Thorn from the Beach judgment, 27th May, 1840, as shown by *exhibit No.* 5, to Beebe's answer, and submits that though he, De Baun, was not thereby released, yet it was a consequence of said argeement that no lien thereafter remained on said undivided half of the premises in block number one, by virtue of said bond of said Thorn as to said Beach, but said lien was extinguished, and lost to him; and it was another consequence that as to other creditors of orator, said release of Thorn operated a release of orator, to this extent, that the lien of said judgment on all property of orator was thereby relinquished and utterly lost as against all other liens.

That previous to May, 1843, Beebe purchased said judgments

of Gray & Bouton and Beach, and bound himself, in the contract of purchase to resort exclusively to said numbers 1, 2, 4, 19 and 20, for satisfaction thereof, whereby both said judgments then ceased to be liens upon all other property of orator.

That no execution issued on either of said judgments of Gray & Bouton and Beach, until 19th February, 1841, nor on that of Jessup & Beers until 7th May, 1841, on which days respectively *fi. fa.* was issued on each, returnable to September term, 1841, and levied on numbers 4, 19 and 20, (the latter described in the levy as township 2 north, range 11 west,) which property was appraised to the sum of $4,862 50, and no person bidding two-thirds thereof, it was reserved from sale.

On 31st December, 1842, writ of *ven. ex.* with *fi. fa.* clause was issued on each of said last named judgments, returnable to March term, 1843, which were returned unsatisfied by order of attorneys of plaintiff's in consequence of an act changing the time of holding the then next term of the Court.

Whereupon, in the case of Jessup & Beers on the 17th April, 1843, and in the cases of Gray & Bouton and Beach, on 2d May, 1843, writs of *ven. ex.* were issued, the first and last of which contained a *fi. fa.* clause, but the one on the judgment of Gray & Bouton contained no such clause as would appear by *exhibits K. & L.*, to the supplemental bill, and a copy of the writ of Jessup & Beers, made *exhibit F. F.*

That on said judgments obtained respectively by the Real Estate Bank, on the 28th September, 1841, by said Waldron and others, and Marsh & Marsh, writs of *fi. fa.* issued; on the first, 13th October, 1841, and on the other two, 23d December, 1841, each of which was levied on said numbers 1 and 2, being premises in block number 1, which were appraised at $25,000, and no one bidding two-thirds therof, were not sold; and that writs of *ven. ex.* issued in each of said cases: on said judgment of said Bank 17th April, 1843, and on said two other judgments 1st May, 1843, simply commanding the sale of said premises.

That said sheriff levied said writs in the cases of Gray & Bouton and Beach, on all the lands and premises aforesaid except

said lots 4, 5, 6 and 9 in block 38, and except number 27 as above designated. He also levied the same on the following lands, none of which ever belonged to orator: north-east fractional quarter section 2, township 2 north, range 13 west; north-west quarter of north-east quarter of section 24, township 1 north, range 13 west; north-east quarter of south-east quarter of section 24, township 1 north, range 13 west; east-half of north-west quarter of section 18, township 1 north, range 12 west—said writ of Jessup & Beers was also levied on personal property of orator.

Said writs of Gray & Bouton, Beach, Jessup & Beers, R. E. Bank, Waldron and others, and Marsh & Marsh, were the only executions issued against orator to the May term, 1843: that, on said levies being made, he, protesting against them as illegal, on the 12th and again on the 25th May, 1843, in writing notified the sheriff to sell said lands in certain order therein stated, *to wit:* first, all said premises in said city, in the order following:

First, lots 7 and 8 in block 1 [*Nos.* 1 & 2.]

Second, lots 4, 5 and 6 in block 101 (*No.* 6.)

Third, lots 7 and 8 in block 38 (*No.* 5 and part *No.* 4.)

Fourth, lot 5 in block 1 east Q. Line (*No.* 7.)

And to sell said lands in a certain order therein prescribed, all of which would more fully appear by *Exhibit No.* 2 to Beebe's answer, and *Exhibit C.* to Lawson's answer to original and supplemental bill. He also thereby required said sheriff, as by law he had the right to do, to sell a large portion of said lands, at and upon the lands themselves, instead of selling them at the Court-house door, as by said *Exhibits* will also appear.

States the filing of the original bill by Whiting & Slark, on the 29th May, 1843, the day of sale, the parties, its prayer, the restraining order made by the Court in reference to said sales, the subsequent rescinding of said order and sales, the second sale and Beebe's purchase, the filing of the supplemental bill, parties, and prayer, &c.—that the sale was made in conformity with said order on the 29th May, 1843, and submits, *first:* that upon the presentation of the bill no such order could legitimately be granted, but that the application should have been to suspend and delay all

sales until the whole matter could be heard and determined, because the preliminary order prayed by the bill was only matter for a final decree; and because the prior incumbrancers had the right to offer to substitute Whiting & Slark to their liens, on their prior debts being paid, which prior debts Whiting & Slark must have paid, or their bill thereupon have been dismissed; and therefore such order, and the succession in which such sales were made, being contrary to the directions of orator, such sales were at his option voidable; but whether, as the whole property was exposed to sale, said creditors could, or could not avoid said sale, orator was not advised.

Second: That after said bill was filed, Gray & Bouton and Beach appeared thereto, and thereby the whole matter was transferred into this forum [*Pulaski Circuit Court in Chancery*], and said property could be sold only under a decree in equity adjusting all conflicting rights and interests.

Third: That as there was no mandate for a further levy in said writ of Gray & Bouton; as such mandate in said writ of Beach was void; as by agreement made by Beebe, the owner and assignee of said judgments, they were to be satisfied only out of said Nos. 1, 2, 4, 19, and 20; and as said *fi. fa.* clause in said writ of Jessup & Beers was void, so that said premises in block No. 1, were not levied on by one, and could not be levied on by either; therefore no sale could legally be made, or was in law made, under either of said writs, of said premises in block No. 1; nor could said judgment of Beach, in equity interfere with any other claim, owing to said release of said Thorn.

Fourth: That under said writs of said R. E. Bank, Waldron and others, and Marsh & Marsh, no other property than the premises in block No. 1, could be levied on or sold, there being in them no mandate for further levy.

Fifth: That as before either of these last mentioned judgments was obtained, said deed of trust had been on a good and valid consideration, executed, and was good in law, orator had parted with all his interest in said premises in block No. 1, the original

levy on said premises by the writs of those judgments was a nullity, and said judgments never constituted any lien thereon.

That tract No. 16 was, before orator became the owner thereof, forfeited to the State for taxes, afterwards sold by the State, and was held by Medrano, as to the validity of whose title orator knew nothing.

So far as orator had been able to ascertain from the imperfect and conflicting memoranda of said sheriff, the following purchases were made at the sale in May, 1843:

Fowler purchased No's 1 and 2, for $903 56.

Desha purchased lots 7 and 8, in block 38, (being No. 5 and part of No. 4,) for $100.

Trapnall purchased No. 7 for $225—and lot 9, in block 38, (part of No. 4,) for $220.

Fenno purchased No. 6, for $35.

Trapnall purchased all the lands mortgaged to said bank for $903.

Bertrand purchased No. 21, for $18.

Trapnall purchased No's. 16, 37, 38, 22, 23, and west-half of north-east quarter, and north-west quarter of south-west quarter of section 24, township 1 north, range 13 west; and east-half of south-west quarter section 13, township 3 north, range 13 west; and north-east fractional quarter of section 2, in township 4 north, range 15 west; and north-west quarter of section 9, in township 2 north, range 13 west, (none of which belonged to orator) for $190.

Blackburn purchased Nos. 31 33 and 26, for $15.

Faulkner purchased Nos. 35 and 36, for $60.

Lincoln purchased No. 25 at $4.

Also appeared from a memorandum of the sheriff in Exhibit C. of Lawson's answer, that Trapnall also purchased Nos. 17, 29, 34—Lincoln No. 18—Blackburn No. 27, and Bertrand No. 16.

Submits that as to the lands mortgaged to said bank, the sale being made after the bill filed to foreclose, the purchaser took nothing by said sale; obtained no right to redeem—that the or-

der of Court setting aside said sales could not operate to give the judgment creditors of orator the right to interfere with the course of proceedings of said Court upon said bill, by suing out executions at law, and selling and sacrificing said property, but only to draw the whole matter into said forum there to be determined by decree—that the whole matter in regard to said levies, being by the said bill and proceedings transferred into said Court, it would not permit a common law tribunal to interfere with the progress of this suit by causing sale of the property over which this Court had obtained equitable jurisdiction.

Yet, after said rescinding and annulling order was obtained, and said original bill still pending and unanswered, writs of execution were caused to issue from the common law side of said Court as follows:

On judgment of Gray & Bouton, a *ven. ex.* to sell property originally levied on by their *fi. fa., to wit:* No's. 4, 19, 20, with alleged *fi. fa.* clause; dated July 14, 1843.

On judgment of Beach, a like writ to sell same property, with *fi. fa.* clause; dated July 14, 1843.

On said judgment of Real Estate Bank, obtained 28th September, 1841, a like writ to sell same property originally levied on by execution on same judgment, *to wit:* Nos. 1 and 2, being premises in block No. 1, with a *fi. fa.* clause; dated July 13th, 1843.

On said judgment of Ringo, a *fi. fa.*, dated September 8th, 1843.

On the judgment of Jessup & Beers, a *ven. ex.* to sell the property originally levied on by the execution on that judgment, being Nos. 4, 19 and 20, with a *fi. fa.* clause; dated October 3d, 1843.

On judgment of Marsh & Marsh, a *ven. ex.* to sell Nos. 1 and 2, with a *fi. fa.* clause; dated September 25th, 1843.

On judgment of Waldron et al., a like writ to sell Nos. 1 and 2, with *fi. fa.* clause; dated October 1st, 1843.

On judgment of Gottschalk, Wm. H. Witherill, and Gasquett

and others, writs of *fi. fa.*. dated September 29th, and others September 30th, 1843.

On judgment of Beirne & Burnside, a *fi. fa.*, dated 9th September, 1843.

On judgment of Chew, a like writ, dated September 13th, 1843.

On judgment of Robins, a special execution against said property, No. 6—dated 29th September, 1843.

No other executions were issued against him to November term, 1843, and on none of them were levies made, except on those of Gray & Bouton and Beach, Real Estate Bank, Jessup & Beers, and Ringo: all which were levied on part of the lands above mentioned, *to wit:* on Nos. 19, 20, 22, 23, 25, 26, 34, 35, 36; on all said lands mortgaged to the Real Estate Bank; and on No's. 1, 2, 3, 4, 5, 6, 7 and 39, and on a tract never owned by orator, *to wit:* north-east quarter of section 2, township 4 north, range 15 west.

All which were offered for sale on the 27th November, 1843, at which sale the following purchases were made:—*Beebe* purchased Thorn's interest in Nos. 1 and 2, for $50—in No. 3, for $551—in No. 4, for $56—in No. 5, for $11. The interest of orator in Nos. 1 and 2, for $325—in No. 4, for $435—in No. 5, for $50—and in No. 7, for $425.

Trapnall purchased all the lands mortgaged to said Bank for $330—No. 26, for $5—No. 22, for 30—No. 23, for $15—No. 19, for $110—said tract not owned by orator, for $10—No. 39, for $5—and the west fractional half of section 2, in township 2 north, range 11 west, for $11.

Faulkner purchased Nos. 34, 35 and 36, for $80—*Lincoln* No. 20, for $45—*Fenno* No. 21, or the Archer place, for $12—and *Robins* No. 6, for $5.

All which would appear more fully by *Exhibits* 8, 9, 10, and 15, of the answer of Beebe, and by *Exhibits* from *F. F.* to *R. R.* inclusive, hereto.

As to all which proceedings, he submits that the *fi. fa.* clause in all said writs of *ven. ex.* was illegal and conferred no power

on the sheriff; that at the utmost, no property except No. 4, 19 and 20, could legally be sold under the executions either of Gray & Bouton or Beach; that said writs in favor of said Bank and Ringo were illegally levied on such of said property as was included in said deed of trust, among which were Nos. 1, 2, 14, 15, 16 and 17, and said lands mortgaged to said Bank, except the east-half of the west-half of the south-west quarter of section 18, in township 1 north, of range 12 west, because said judgments were no liens thereon. That whatever lien said Ringo had, or could be substituted to, under said bond of Thorn, he could only enforce in equity; that the judicial sales previously made could legally be cancelled only by judicial proceedings, whereto the purchasers should have been parties; and, consequently, that a subsequent sale of the same property was void.

That if any portion of said property was legally sold under said execution in favor of Ringo, it was held by the purchaser subject to all liens prior to Ringo's judgment, and orator was entitled to have the same made available in satisfaction thereof.

Before said sales under executions, or either of them had been made, *to wit:* on the 22d April, 1843, Reardon, Woodruff and Watkins, under and by virtue of said deed of trust, did sell, and on the 24th of same month, convey to Beebe, all the land and negroes mentioned in said deed of trust, for $426; under which sale, if valid, Beebe held said property, subject to, and charged with all prior liens, *to wit:* said judgments of Gray & Bouton, Beach, Jessup & Beers, said mortgages to Whiting & Slark, Beirne & Burnside; and, moreover, all the levies made on said property after said sale, were mere nullities.

On the 18th March, 1844, another writ issued on said judgment of Jessup & Beers, which, reciting said several executions theretofore issued on said judgment, the original levy, appraisement, reservation from sale, and the subsequent levy on the writ to November term, 1843, and that the whole property so levied on had been sold, except Nos. 3 and 4; commanded said sheriff to sell the residue of said property, &c., with a *fi. fa.* clause, upon which, said sheriff advertised and sold Nos. 3, 34, 37, 38, 29, 31, 33 and

40, which lands were sold as follows: No. 3, to *Jessup* for $10—No. 18, to same for $1—No. 37, No. 38 and No. 40, to same for $7—No. 29, to same for $7—No. 31 and 33, to same for $30—No. 24, to *Drew*, for $18—as would appear by said writ and return made *Exhibit R. R.*

Submits that the whole of said sales were void for the several reasons before stated—that there were no other executions issued against him to May term, 1844, and no sales had been made of any of his lands except as above.

That no legal sale had been made of any of said lands; but, if any legal sale had been made of any of them, still no legal sale had been made of any of the land mentioned in said deed of trust, and especially Nos. 1 and 2.

That no legal sale had been made of No. 3, either of the interest of orator or Thorn therein.

That if any legal sale had been made of lots 4, 19 and 20, such sale was made under the executions of Gray & Bouton, Beach, Jessup & Beers and the purchasers hold said lands subject to the lien of the said debt of Ringo.

That whatever other lands had been sold, had been sold under said execution of Ringo, and still stood charged in the purchaser's hands with all previous liens.

That whatever interest Thorn had in any of said lands, neither had been, nor ever could be legally sold on any of said executions.

That said sale under said deed of trust was advertised for the 4th March, but postponed to the 22d April, 1843, by the trustees; that owing to various circumstances, and especially to the general belief that the trustees could make no title to the property, no bidders were present, so that Beebe bought at what price he chose; said sale being made at orator's residence, in the country, and not in Little Rock; in consequence whereof, said property sold for nothing, and the sale ought in equity to be set aside.

That said bill for $1,600 due the Bank of the State [one of the debts secured by the deed of trust] was in part paid by orator, but Beebe settled the residue, being $1,600, on 29th April, 1842, by

paying in the paper of said bank, worth 50 cents on the dollar, $153 38, and executing his note for $1,500 due at six months.

That Woodruff settled said notes to said bank, one for $6,500, and one for $600, [debts secured by said trust deed,] on the 27th December, 1842, by paying $864 40, in paper of the bank, worth 50 cents on the dollar, and giving his note for $7,100, which note, and said note given by Beebe, were payable by ten annual instalments in the paper of the bank.

Said bill for $3,000, held by the Real Estate Bank, [one of the debts secured by the trust deed,] had not been paid or settled, but judgment had been obtained against orator, which was the said judgment in favor of Beverly Chew, and suits were pending against Johnson and Thorn thereon; and there had been paid on said bill, besides $990 71 in said deed of trust mentioned, the further sum of $38 86, October 14th, 1840, and $113 18 paid November 21, 1840.

That said note (named in said deed of trust) to said bank for $3,100, on which the judgment above mentioned, rendered 12th November, 1841, was obtained, was settled by Woodruff and Ben. Johnson, on 1st May, 1844, by note for $4,107 50, being amount then due in the paper of that bank.

That said note (named in said deed of trust) for $630, to said Real Estate Bank, was settled by Beebe 25th May, 1843, (being same note on which judgment was obtained on 28th September, 1842,) by his note dated 1st January, 1843, for $795 37, the amount then due on it in the paper of said bank.

That before said judgment on the 28th September, 1841, was obtained, *to wit:* on 14th October, 1840, the note for $3,500 to said Real Estate Bank, on which said judgment was obtained, was renewed by Reardon and Beebe, by their giving said note for $3,000 in said deed mentioned, executed by orator as principal, and them as securities, orator paying all the curtail and interest; so that said judgment never was any lien on any of said lands, and all proceedings under it were void; and said note for $3,000 was settled as of the 1st January, 1843, on the 25th May, 1843, said Beebe paying paper of that bank, and by his note

$1,366 60, and said Reardon $2,204; all which notes so executed by said securities to said bank were payable by eight annual instalments from 1st January, 1843, in paper of said bank, and all payments were made in such paper worth fifty cents on the dollar.

That the whole amount of sales under said deed of trust was $1,270 62 in good funds, deducting wherefrom the sum of $426, the amount paid by Beebe for the lands and negroes, (inasmuch as he never obtained possession of said negroes,) there remains $844 62, which is equal to $1,689 24, in Arkansas paper. Besides which, Reardon had received in Arkansas money, from the sale of goods placed in his hands by orator $2,230 85; and orator placed in the hands of Woodruff, assets, such as notes and accounts, to about the amount of $18,000, to be collected by him, in consideration whereof he agreed to assume in the bank, the amounts settled by him as aforesaid, and to refund to orator any balance received by him after re-paying to himself the amount of his said assumption; all which assets were due and payable in good funds, and a large part of them, how much orator does not know, have been collected, a list of which assets would be made *Exhibit V. V.*

The only amounts which had been paid on any of said judgments (excepting always the amounts received by said sales under execution) are as follows: on the claim of Gray & Bouton, orator paid before judgment, on the 28th January, 1839, $1,025 14, with which amount said judgment should have been, and was agreed to be credited as of that date. On the judgment of Beach, he paid, on the 10th September, 1840, $1,125.

That the property aforesaid, owned by him when the original bill was filed, was amply sufficient in amount and value to have paid every debt he owed in the world, and would have done so if it could have been fairly sold and properly disposed of; but that in consequence of the filing of said bill and the doubt thereupon created as to the validity of said first sale, and of the order and manner in which said property was sold; and in consequence of the conflict between said two first sales, the uncertainty

of any title to be obtained, and the certainty of buying litigation; the amount of each of said three sales respectively, was not one twentieth part of the value of said property, as was apparent from the prices themselves; inasmuch as said Nos. 1 and 2, then were, and still are worth at least $20,000, and the whole of said property at least $50,000, at a very moderate and reasonable estimate in good money; so that not only had nearly the whole of orator's property been sacrificed, if said sales or any of them were valid, for less than $2,000, a few only of his debts were paid, and he was utterly ruined, but innocent persons to whom he sold in good faith had been robbed of property honestly acquired, faithfully paid for, and hardly earned.

Prayer—that all of said sales be cancelled and held for nought; all deeds and pretended titles thereunder obtained, cancelled and avoided; that said trustees, and each of them, under said deed of trust, render a full account of all moneys and assets received by them as aforesaid; that said Beebe render a full account of all rents of any of said property received, or which ought to have been received by him; that said property and the securities aud assets aforesaid be marshaled, and said lands sold by a commissioner, to be appointed by the Court, after said liens have been paid according to priority, as far as personal assets will extend, and the proceeds thereof faithfully appropriated according to equity, so that, if possible, said property sold by orator to Le Baron, might be saved to him as a *bona fide* purchaser, and likewise said property sold to said Pendleton and to said Whitmore, and that if necessary, a receiver be appointed to receive and collect said assets in the hands of Woodruff.

Or, that if the whole of said sales cannot be cancelled, then that the lands, if any, which had been legally sold, and whereon prior liens still rested and were charged, be sold by such commissioner to satisfy said liens, after and with the like marshaling of securities; and that all moneys paid for and on account of said illegal sales, be returned to the persons properly entitled thereto; and all moneys illegally appropriated or paid, rightly and properly appropriated; and that all the property of orator

be faithfully, and to the best advantage applied to pay and satisfy his just debts—for general relief—and that no decree be rendered in said original suit until this cross-bill was heard and determined.

The Exhibits to the cross-bill are, substantially, as stated therein.

July 3d, 1844—Decree *pro confesso* on original bill as to Aldrich, Thorn, Ben. Johnson and Erwin. Disclaimer by Fowler to cross-bill—most of defendants to cross-bill enter their appearance, and cause continued.

April term, 1845—Ben. Johnson answered—admits execution of the trust deed, for the benefit of himself and others, and that the Real Estate Bank recovered judgment against De Baun, Woodruff and himself, 12th November, 1841, for about $3,100—no knowledge as to truth of the other allegations in the bill, and denies generally.

Lincoln answered cross-bill. He purchased number 20 at both execution sales, and claims one or the other to be valid. Did not purchase number 25 and 18, as alleged.

Blackburn answered cross-bill, disclaiming title, except as to Nos. 27, 29, 31 and 33, which he alleges he purchased at Marshal's sale, 3d December, 1842, under execution on the Chittenden judgment, for $13, which he offers to surrender on repayment of purchase money, &c. He paid nothing and claimed nothing, on his other purchases at said sales.

Replication to Ben. Johnson's answer by Whiting & Slark.

Trapnall answered original and supplemental bill (May 29th, 1845.) He states that the late firm of Trapnall & Cocke, as attorneys at law, obtained judgments against De Baun on the claims of Beach, Gray & Bouton, and afterwards in the cases of Jessup & Beers, Chittenden, Witherill, Gottschalk, Gasquet & Co., Waldron, Thomas & Co., and Ralph Marsh & Co. That the judgments of Beach and Gray & Bouton were obtained before the mortgage of Whiting & Slark, and were a lien on the mortgaged premises. That long after said judgments were rendered, and before any sale of said property, Beebe represented to him

that he, having been De Baun's security, for a large amount, had been deceived, and defrauded by him and greatly damaged thereby, and thought if he could get control of said judgments, with a prior lien on said property, he might extricate himself without much loss, and proposed to pay to respondent, on the day of the sale of property under executions on said judgments, or shortly after, what might be due on said judgments, and confine said judgments and executions thereon exclusively to the property embraced in said mortgage, commonly called De Baun's corner, and have the proceeds of all other property sold under said judgments applied to the other judgments against De Baun.

Respondent, confiding in Beebe's representations, and finding that he might by said agreement open the way for making all, or part of said prior judgments, out of the residue of De Baun's property, consented to the proposition, and an agreement was drawn up to the effect as stated above, and assignment made of said judgments to Beebe, and Beebe gave a mortgage to secure the payment of what might be due on said judgments. On the day of sale, complainants exhibited their original bill, obtained said restraining order, under which a sale was made by the sheriff; and property purchased by different persons as stated in supplemental bill, and amongst the rest the mortgaged premises (De Baun's *corner*) was struck off to Fowler. Respondent was under the impression that Fowler declared at the time that he was bidding for himself; and he certainly did not, so far as respondent knew, intimate that he was purchasing for complainants.

Said sale was afterwards set aside, &c. Afterwards, other executions were issued on said judgments, and the property again sold at the succeeding term of the Court, and purchased as stated in said supplemental bill. Shortly after which, Beebe paid Trapnall & Cocke about $2,400, being in full of the residue of said judgments and interest, exclusive of costs, remaining after deducting all payments by De Baun previous to said assignment: upon which respondent surrendered to said Beebe said mortgage, and he believes the agreement aforesaid, is lost, as he could not, after diligent search, find it.

Respondent, as to said lands so purchased by him as aforesaid, objects to any re-sale or marshaling to that extent of the property of De Baun, because, *first*: said sale, his purchase, the sheriff's deed (made exhibit A.) were all valid in law, and equity, and gave respondent full title, &c.

Second: All of said lands so purchased by him, were on the 28th May, 1844, sold by the sheriff, for taxes, &c., due thereon, according to law, purchased by Beebe, who took the sheriff's deed therefor, and on the 14th September, 1844, Beebe and wife conveyed said lands to respondent, which deeds were duly recorded, &c., and gave him a valid title, &c.

Third: Because by the transfer of said judgments made as aforesaid to Beebe, before said sales, and lien by virtue of said judgments on any of the lands and property of De Baun was released by Beebe, and he bound himself to confine said judgments and executions thereon exclusively to *De Baun's corner*, the property embraced in said mortgage as aforesaid.

Admits the execution of the mortgage to complainants, deed of trust to Beirne & Burnside, judgments on said claims, executions on judgments of Beach, Gray & Bouton, filing of the original bill, order of Court thereon, sale by the sheriff at May term, 1843; but as to the returns of the sheriff, the payment of the money, &c., tendering of a deed, &c., as alleged, he does not recollect any thing with certainty. Heard a discussion in court about it, but remembers none of the particulars.

Admits that the second sale was made as alleged, which was forbidden by Fowler, and respondent thinks he made a counter proclamation as alleged. Admits purchase made at second sale as alleged—that Beebe purchased the Alhambra property, got into possession of part of it at least, had been receiving rents, &c., and that a deed was made to him by the sheriff therefor.

At said sales, he did not bid for, or purchase, said property as attorney for Beach and Gray & Bouton.

On the judgment of Beach, $1,125 was paid 10th September, 1840, and on the claim of Gray & Bouton $1,025 14 was paid to them on the 25th June, 1841, which ought to have been credited

on said judgment, and of which Beebe was aware, and the assignment, was only for the residue of the judgment, and this was the only payment of which respondent was aware.

Trapnall (on same day) filed his answer to the cross-bill of De Baun. Admits that De Baun owned property as alleged—his purchase of Thorn—conveyance to Pendleton—the execution of mortgages, deeds of trust, recovery of judgments, issuance of executions, sales and purchases, &c., as alleged. States the same facts in reference to the transfer of the judgments of Beach and Gray & Bouton, &c., to Beebe, as stated in his answer to the original bill. Claims title as in said answer—also states that at the sale under the trust deed, Beebe purchased the homestead, embraced in the mortgage to the Real Estate Bank, and afterwards conveyed the same to him.

Pendleton answered the cross-bill, (June 7th, 1845,) admitting all the allegations therein to be true—states that he purchased of De Baun, supposing him to be the legal owner thereof, on the 13th November, 1839, said lots 4, 5 and 6 in block 38, at $2,000, gave his note therefor, took bond for title, and afterwards paid the note, and obtained a deed therefor—bond and deed were both recorded as alleged in the cross-bill. Submits that said lots were not subject to any of said liens, as said bond was recorded before any sale thereof under said executions. That after purchasing, he erected a house, &c., thereon, at an expense of $8,000, before said sales, and he submits that if any execution purchaser had obtained title to Thorn's interest thereon, they ought to be divided so as to leave the house on defendant's portion.

Le Baron answered cross-bill of De Baun same day, admitting the truth of the allegations thereof. He purchased 22d October, 1840, of De Baun said lot 5 in block one, paid him therefor $5,500, and obtained therefor a deed as alleged in the said cross-bill, and prays the protection of his rights as an innocent purchaser.

Sabin answered the cross-bill, (June 9th, 1845,) admitting as true all the allegations therein—states Whitmore's purchase of De Baun, lot No. 7 in block 38, his purchase of Whitmore, and

De Baun's deed to him as alleged in the cross-bill, exhibiting De Baun's bond for title to Whitmore.

Ringo answered the original, supplemental, and cross-bills (June 10th, 1845.) He admits the recovery by him of judgment against De Baun & Thorn, on a firm debt, as alleged in the bills; that on the 25th November, 1843, he sold and assigned the same absolutely to Beebe, for a valuable consideration, without recourse; and disclaims any interest in the matters in controversy.

June 12th, 1845—Replication to answers of *Blackburn* and *Lincoln* to cross-bill. Suits abated as to *Whitmore*, in consequence of his having been sentenced to the Penitentiary. *Imbeau's* death suggested, and abatement as to him. Decree *pro confesso* on original bill as to *Mitchell, Fitzgerald, Colby's administrator, Nelson, Gray, Bouton, Beach, Woodruff, Reardon, Chittenden, Witherill, Jessup, Beers, Gottschalk, Wm. and James Gasquet, Conway, Chew, Ralph and John Marsh, Waldron, Thomas, Day, Mygatt and Trustees of Real Estate Bank*, to become final, unless they showed cause on or before 3d day next term.

Drew filed a disclaimer to cross-bill, June 13th, 1845.

Reardon, Woodruff and Watkins filed a joint and several answer to De Baun's cross-bill (June 14th, 1845.) They admit the execution of the deed of trust to them, by De Baun and wife, on 4th September, 1841, for the purposes therein stated, and above shown. State that before and at the time said deed was executed, the lands enumerated therein were heavily encumbered by mortgages and liens of judgments, as set forth in said cross-bill, which rendered the security of the deed of trust, so far as the lands were concerned, practically of little or no avail.

On 22d April, 1843, respondents having been before then duly notified and required to make sale under said deed, and in like manner on 25th June, 1843, and both of said days, having given the notices thereof contemplated in the deed, fixing time and place in accordance with the wishes of De Baun, they sold all the lands embraced in said deed of trust, and the right and title under and by virtue of the same to the slaves embraced therein, which slaves De Baun had removed beyond the reach of respon-

dents, and failed and refused to deliver up to them, and also all the other property, &c., embraced in said deed which could be found, or which they were unable to obtain possession of; a correct account whereof, together with expenses, &c., showing the amount of money which came to the hands of each trustee, the amount of expenses paid by, and compensation due to each trustee, and the nett balance of proceeds due to, or in the hands of each of said trustees, respectively, subject to be appropriated towards debts of De Baun, as enumerated in said deed, was made *Exhibit A*.

On 25th May, 1843, and afterwards, sundry judgment creditors of De Baun, alleging said deed of trust to be void, under the bankrupt act of 19th August, 1841, caused writs of garnishment to be sued out, and served upon respondents; as supposed debtors., &c., of De Baun, whereby they were greatly hindered in the execution of said trust, pending the same, and the same remained pending until after the exhibition of the cross-bill.

Reardon for himself states that, on the 1st January, 1843, he purchased of Imbeau part of a lot of goods which De Baun had sold to him during the previous summer, and held his paper therefor, for which goods respondent arranged with Imbeau & De Baun to pay in Arkansas money $2,230 85, equivalent to $800 or $1,000 par funds, which De Baun and Imbeau agreed that he might apply upon a judgment in favor of the Real Estate Bank against De Baun as principal and respondent and others as securities, obtained 27th September, 1841, for $3,500, with interest at ten per cent. from 14th October, 1840, and De Baun cancelled the paper of Imbeau to the amount of the value of the goods so purchased of Imbeau by respondent; and respondent took Imbeau's invoice and bill of sale for said goods, and soon after paid for the same to the amount, and in the manner so as aforesaid stipulated. Further states that not more than from one-half to two-thirds of the amount or value given by him for said goods had been or was likely to be realized from them—denies that there is in his hands any part of the amount agreed to be paid, and paid

by him, as aforesaid for or on account of said goods subject to be marshaled, as contemplated by said cross-bill.

Has in his hands $201, of said trust fund, as shown by *Exhibit A.*, subject to appropriation under the deed, &c.

Woodruff, for himself, states that on the 26th December, 1842, he purchased of De Baun certain notes, accounts, claims, and judgments, and took De Baun's assignment thereof, supposed to amount to about $15,000, for which he assumed and paid certain debts of De Baun to the State and Real Estate Banks, amounting to $10,000, and relinquished to that extent the interest of respondent under said deed of trust. About one-half of the claims, &c., so transferred to him, were worthless, a large portion of the residue doubtful, and only collectable by compromise, &c., subject to off-sets, &c. He had only been able to realize nominally of the whole amount about $1,513, and had not actually realized, above expenses, &c., more than $1,000. That said assignment was absolute, unconditional, and in good faith, &c. Denies all right of complainant to call on him for an account thereof, or to have the same marshaled, &c. Prays leave to file a copy of said assignment, release, assumption, and statement of amount collected, &c., marked *Exhibit B. C.* Has in his hands, as one of the trustees under said deed, as shown by *exhibit A.*, $1,191, including amount bid by Beebe for lands and negroes at the trust sale, *to wit:* for lands $232, for negroes $191, making $426, subject to appropriation under the deed, &c.

Watkins answered for himself that no part of the trust funds had came into his hands as trustee. He was entitled to $118 88, for expenses, &c.

Exhibit A., referred to in the above answer, shows amount of sales on 22d April, 1843, under the trust deed $898 25. May 25th, 1843, $635 25: total $1,533, which is reduced by expenses and compensation to trustees to $1,270 62. Also a statement of the part thereof held by each trustee, &., &c.

Replication to said answer, *June 18th*, 1845. Same day said trustees filed a disclaimer to the original and supplemental bills,

stating the making of said trust deed, and the execution of the trust by them before the filing of said bill or supplement.

Replication to Trapnall's answer to original bill *June* 18*th*, 1845; also to answer of De Baun.

Desha answered the cross-bill of De Baun, (18th June, 1845,) stating that by his agent, Fowler, he purchased, at the sale on 29th May, 1843, lots 7 and 8 in block 38, at $100; and paid the money to the sheriff, but ascertaining that he could not get a title without litigation, he instructed Fowler to get his money back, if he could; and Fowler did, on the last day of said May term, receive back from Lawson said $100, and afterwards paid it to him. He therefore disclaims an interest, &c. Said answer is sworn to by Fowler.

June 18*th*, 1845: First exception to Lawson's answer to original bill sustained, and second overruled—complainants ordered to produce for inspection *exhibit O.*, before Lawson was required to answer further.

Replication filed to Beebe's answer to original bill, (exceptions having been previously filed thereto, and now withdrawn.) Beebe moved to strike out the said replication because it was not in time, the court overruled the motion, and he excepted.

Lawson filed an amendment to his answer to the original bill (23d June, 1845,) stating, in substance, that Fowler presented to him for his signature the receipt for $1,000, which, in the hurry of business, he signed, without looking at it further than to see that it was for the proper amount. It was in the hand-writing of Fowler, except the date, and Fowler informed him it was for the money paid by him on his purchases at the sale on the 29th May, 1843. *O.* was a correct exhibit of it. Replication to Lawson's answer.

Whiting & Slark filed their answer to De Baun's cross-bill 25th October, 1845. They admit that De Baun owned the real estate described in the bill, and that Thorn executed to him said bond. Admit the recovery of the judgments of said Beach and Gray & Bouton; deny the legality of said writs of *sci. fa.* to revive them, aver that neither of them had been revived, and that in the case

of Beach, the writ had been adjudged bad at the then present term of Pulaski Circuit Court, and judgment rendered thereon against Beach. Aver that both of said judgments had been fully paid and satisfied, in part before, and in part since the filing of the original bill, and that they constitute no lien on any of said real easte. State the execution of their mortgage; admit the recovery of the other judgments mentioned in the cross-bill, but deny that the Ringo judgment was upon a debt contracted by said firm mentioned in said bond from Thorn to De Baun. Allege that, on the 26th June, 1843, they recovered a judgment against De Baun, in Pulaski Circuit Court, on part of their mortgage debt, for debt $3,886, and damages $303, with interest, &c., made *Exhibit P.*, which, they aver, constituted a lien upon all the real estate of De Baun in said county from its rendition, and pray that said lien may be enforced, if the Court should decree a resale of the property.

Deny that the lien of the Ringo judgment was precedent to their mortgage, and insist that the release of Thorn from the Beach judgment, 27th May, 1840, operated as an extinguishment of the lien of said judgment on the property mortgaged to them, as also upon the other real estate of De Baun.

Admit that they, by their agent, Fowler, purchased the premises mortgaged to them, at the sale in May, 1843, as alleged in their supplemental bill, and that they paid the sheriff therefor as therein stated. They submit that the action of the Court setting aside the said restraining order, and said sales, was illegal and void, and that the sale so made to them was in full force, valid, &c. That the restraining order was legitimately granted, and that De Baun had no legal or equitable right, under the circumstances of the case, to direct what property should be first sold, when such direction was to operate to the prejudice of the lien of respondents under their mortgage.

They deny, on information from Fowler, that he made any purchase in his own name, or for himself, at said sale on the 29th May, 1843, but aver that he purchased for them, as in their supplemental bill alleged.

Exhibit P. shows the recovery of judgment against De Baun by respondents, as above alleged.

Beirne & Burnside filed their answer to original and cross-bills, *Oct. 27th*, 1845—they know nothing of the allegations contained in said bills except what follows—on the 17th February, 1841, De Baun was indebted to them in the aggregate sum of $6,290 20, payable by several instalments, evidenced by three notes of that date for $2,096 75 each, at 18, 24 and 30 months, to bear interest 10 per cent. after due, made *Exhibits Q. R. S.;* to secure the payment of which De Baun executed to them a mortgage on the same premises mortgaged to Whiting & Slark, on the 26th February, 1841, which was duly acknowledged and recorded, and is made *Exhibit T.*—at which time, they aver, on information, that there was no incumbrance or lien upon said premises but said mortgage of Whiting & Slark, and deny that said judgments of Beach, Gray & Bouton and Ringo were prior liens thereon—that if said judgments of Gray & Bouton and Beach ever were liens on said premises, they had expired by lapse of three years, had not been revived by *sci. fa.* and could not be—also that said judgments had been fully paid and satisfied.

That they obtained judgment in Pulaski Circuit against De Baun on said note first due as above, for the amount thereof, on 22d June, 1843, which is made part of *Exhibit T.*, and which judgment remained in full force, &c.—they pray that all said sales under execution, be set aside as illegal and void, that all the real estate of De Baun mentioned in the bills, be sold, under decree of court, and their said debts paid out of the proceeds of sale—the *Exhibits* to this answer are as stated therein.

Replication to answers of Whiting & Slark and Beirne & Burnside to cross-bill, 29th Oct., 1845—also to answer of Beirne & Burnside to original bill.

Dec. 16, 1845—Suits abated as to Real Estate Bank in consequence of forfeiture of its charter. Decree *pro confesso* against John Brown on supplemental bill.

BEEBE filed his *answer* to the *cross-bill* of De Baun, 23d Jan'y, 1846. He admits that De Baun & Thorn were the owners of the

property described, and De Baun the owner of the other property named in the cross-bill; that Thorn sold his interest to De Baun as alleged, which vested in him a valid title subject to the conditions specified in the conveyance. Admits that De Baun made the mortgages and several conveyances set forth in *Exhibits AA, BB, CC, AC,* and *EE,* but denies their validity as against his purchases of said property, and insists that the property was subject to the judgments of Gray & Bouton, Beach and Ringo.

Admits the execution of the other mortgages, &c., and the recovery of judgments against De Baun, &c., as alleged. That the debts of De Baun & Thorn to Beach and Ringo were the earliest liens upon the property owned by them jointly; prior to other firm debts; and that the debt of Gray & Bouton was the next oldest lien upon the property of De Baun, except the mortgage to the Real Estate Bank, which was prior upon the property therein specified.

Admits his purchase of the Gray & Bouton and Beach judgments of Trapnall, and his agreement to resort for satisfaction thereof to no other property, except the corner, on which judgments controlled by Trapnall & Cocke were a lien, but denies that he agreed to resort exclusively to Nos. 1, 2, 4, 19, and 20 for satisfaction as alleged in the cross-bill. After said transfer, Trapnall & Cocke continued to give directions in their names as to process upon said judgments, &c.

Does not know whether all the executions named in cross-bill issued to May term, 1843, or not—admits De Baun's directions to the sheriff as to order of sale. Admits the filing of the original bill 29th May, 1843, prayer, restraining order, and the setting of it, and the sales, aside as alleged. States the issuance of said executions to November Term, 1843, sale on the 27th of that month, his purchases, sheriff's deeds, &c., as stated in his answer to original bill, and alleges that he acquired valid titles thereunder. Avers that the *fi. fa.* clause in said writs of *ven. ex.* was legal, and authorized the levies and sales made under them: that the sale on 29th May, 1843, was illegal and void, and properly set aside. Avers that inasmuch as De Baun was hope-

lessly bankrupt, and his property would not pay a fourth of his debts, and all his real estate was (except a small portion) levied on and sold, at said November term, 1843, and did not sell for enough to satisfy but one of said judgments, that said levies under *fi. fa.* clause was not only a reasonable but necessary consequence, and therefore no injury was done De Baun thereby. Denies that De Baun's property was unnecessarily sacrified through his acts or agency. Avers that all the property sold on the 27th November, 1843, was regularly levied on, advertised, and sold according to De Baun's directions, and all parties interested, notified of the sale; yet owing to the general depression of the times, the acts of De Baun, and his advisers in trying to defeat the sale, want of money, &c., competition at the sale was left to the judgment creditors. That De Baun, and his creditors, or attorneys, were present at said sale, took no steps to arrest it, and therefore virtually assented thereto.

Admits the sale under the deed of trust 22d April, 1843, and purchase by him of all the property, at the prices alleged. Avers the legality of said sale, and also of the sale made 27th November, 1843, under executions in favor of Beach, Gray & Bouton and Ringo, and the validity of his titles thereunder. The trust sale was advertised for 9th February, 1843, by consent of De Baun, and all others interested, except Whiting & Slark and Beirne & Burnside, who protested against it by newspaper publication; but afterwards, by agreement of parties, it was postponed to 25th of said month, but on said day but two of the trustees attending, and the personal property having been removed from the premises, or concealed by De Baun, the sale was defeated. It was again advertised, by consent of parties, for the 22d April, 1843, at which time De Baun promised to have the property present; but failed to do so, and in consequence of the said public protestation of said mortgage creditors, and the fact that it was known that De Baun had removed, or concealed the slaves and other personal property, and refused to produce them, but few persons attended: attributes all suspicions thrown upon

the validity of the sale to the conduct of De Baun, &c., and denies blame on his part or that of the trustees.

Alleges that one Nicolay was present at the sale, and bid upon nearly all the property for De Baun. Alleges that the property sold for its full value, considering the incumbrances on the land, the absence of the slaves, &c. The sale was made at the residence of De Baun by his request. Sales amounted to $1,270—Respondent never obtained possession of any of said slaves, (thirteen in number). Afterwards learned that De Baun had removed the slaves to Louisiana, made a pretended conveyance of them to one Merrill, and caused him to convey them to one Taylor, his friend and agent, of Jefferson county, Arkansas, a copy of which last conveyance is made *Exhibit A. No.* 23.

In consequence of bad faith of De Baun in reference to goods turned over to Reardon, respondent was compelled to pay $1,400 of the $3,500 debt to the Real Estate Bank. Avers that De Baun went to Louisiana or Texas in the summer of 1843, sold said slaves, and converted the proceeds to his own use; and was doing an extensive mercantile business thereon in Pine Bluff. Denies that De Baun had property of sufficient value to pay all his debts, if fairly sold, at the time of filing of the original bill, as alleged—attributes all the doubt thrown over the validity of said sales, and the small amounts the property sold for, to the conduct of De Baun. He had endeavored to prevent his creditors from collecting their debts, concealed the condition of his affairs, made a fraudulent transfer of his goods to his brother-in-law, Imbeau—permitted nearly all his real estate to be sold on the 9th December, 1842, by the Marshal of the United States, under execution in favor of Chittenden, and purchased by Trapnall & Cocke for less than $100; all which tended to destroy his credit, &c., &c. His property would not at any time, within the period aforesaid, have sold for enough to pay one fourth of his debts, &c. Denies that the *corner* property was worth $20,000, and avers that it could not have been sold at any time within three years then past for more than $10,000 cash—denies that the property mentioned in the cross-bill was worth $50,000 as alleged,

and avers that it could not have been sold for over one-third of that amount—denies that De Baun was robbed, &c. by any act of his. Avers that De Baun's liabilities, at the sale in May, 1843, amounted to between $62,000 and $65,000, to discharge which, with interest, &c., he was possessed of the real estate described in the cross-bill which was not worth more than $15,000, and could not have been sold for more than two-thirds of that sum in cash. The larger portion of his lands, were wild, detached, unfit for agricultural purposes, &c., a diagram of which is made *Exhibit C. No.* 25.

Represents the deeply involved and failing circumstances of De Baun from 1840, onward, his extravagance, incumbrances upon his property, &c., &c., and alleges that in procuring the assignment of said judgments to him, his purchases at said sales, &c., he acted in good faith, to save himself as one of De Baun's securities, &c., and not with any design to injure him or others.

Sets up the purchase of Trapnall & Cocke at said Marshal's sale, and their conveyance to him of lots No. 8 and 9 in block 38, and the *corner* property, and makes the Marshal's deed to them *Exhibit D. No.* 26, and their deed to him *Exhibit E. No.* 27.

That De Baun neglected and refused to pay the taxes on his lands, &c., and that in September, 1843, the collector of taxes for the city of Little Rock sold lots 7 and 8 in block one, and lots 8 and 9 in block 38 for taxes, &c., due thereon for the year 1843, and respondent purchased the same at $28, as would appear by the collector's certificates made *Exhibit F. No.* 28.

That on the 28th May, 1844, the sheriff sold said lots, as well as all De Baun's other property situate in said county of Pulaski, for the taxes due and unpaid thereon for the years 1842 and 1843, and respondent purchased the whole of it, except a few tracts of land and said lots 7 and 8 in block one, which lots were purchased by Goodrich, and conveyed to respondent by him—the sheriff's deed to Goodrich, Goodrich's deed to respondent, and the sheriff's deed to respondent made under said tax sales, are made *Exhibit G. No.* 29 and *H. No.* 30. That he conveyed all of said lands so purchased by him at tax sales as aforesaid, ex-

cept lots No. 8 and 9 in block 38, to Trapnall (numbering 28 tracts) for the same consideration he paid for them.

Charges a co-operation between De Baun and Whiting & Slark in exhibiting the cross-bill to defraud him, &c.

That on the 16th day of January, 1846, the judgment of Gray & Bouton was revived on said *sci. fa.*, a transcript whereof is made *Exhibit I No.* 31.

The above is the substance of what is deemed material in Beebe's answer—the exhibits are substantially as stated therein.

BEEBE, on 23d January, 1846, filed amendment to his answer to the original bill, showing that on the 16th January, 1846, the judgment of Gray & Bouton was revived, on the writ of *sci. fa.* above referred to. Also setting up the purchase of lots 7 and 8, in block one, (the corner or Alhambra property), at tax sale, by Goodrich on the 28th May, 1844, and the conveyance thereof by Goodrich to him.

Replication to Trapnall's answer to cross-bill of De Baun, 24th January, 1846. Decree *pro confesso* against trustees Real Estate Bank on said cross-bill.

DE BAUN, on 26th January, 1846, filed *an amendment* to *his cross-bill*, showing the sale of the larger portion of his real property, by the Marshal of the United States, on the 3d December, 1842, under an execution on the Chittenden judgment, the purchase thereof by Trapnall & Cocke and Blackburn, and the conveyance of No's. 1, 2 and 4, by Trapnall & Cocke to Beebe; alleging that Beebe pretended to claim title thereunder, notwithstanding the many older liens thereon, &c. Also setting out the sale of said Nos. 1, 2 and 4, for city taxes, in September, 1843, and purchase by Beebe; and alleging the illegality of said sale on the grounds that the property had been before then sold under the trust deed, as well as under the Chittenden judgment, and purchased by Beebe, and he claiming title under such sales, should have paid the taxes, &c. Also alleging irregularity in the sale.

Alleges that Reardon had received a sufficient sum from sale of goods placed in his hands to pay off the said note of $3,500;

and that Woodruff had realized from assets in his hands sufficient to pay said notes for $3,100, for $600 and $6,500.

States that though said negroes conveyed by said trust deed, were afterwards removed out of the State and sold by him, it was done with the consent, and by the advice of Beebe, who aided and encouraged him. De Baun, therein, was fully cognizant thereof, and had selected and pointed out the persons to whom, in the State of Louisiana, they were to be delivered for sale, his (De Baun's) intention being to sell them for the benefit of his securities; but Beebe, having a private design to seize all the proceeds, and retain them, pay himself in good money for payments made for him (De Baun) in Arkansas paper, and so defraud all the other securities of him, De Baun.

DE BAUN, also, on the same day, filed a *supplement* to his *cross-bill*, setting out the sales of his property for taxes, on the 28th May, 1844, the purchases and conveyances thereunder, as above stated by Beebe in his answer—alleging various irregularities in the sales, and that the trustees in the trust deed and Beebe should have paid the taxes for which the property was sold, &c., &c., denying that Beebe derived any title thereby, &c.

That Beebe sued out an execution on the Ringo judgment, under which the *corner* property was levied on and sold, at the then term of the court, and purchased by Lawson at $127, Beebe standing by, bidding, and giving no notice of title in himself, &c.

The *Trustees of the Real Estate Bank*, answered *De Baun's Cross-bill* 22d April, 1846, admitting all the allegations therein as to said bank and its trustees, the mortgages executed to said bank by De Baun, the debts due the bank by him, and the suit to foreclose, &c. That they obtained a decree of foreclosure in said suit, 9th June 1845, against De Baun, Beebe, Keeler, Gray & Bouton, Beach, Jessup & Beers, Ralph Marsh & Co., Waldron, Thomas & Co., Day, Mygatt, Gottschalk, Witherill, William & James Gasquett, Conway and Chittenden: that under said decree, the property embraced in the mortgage was sold, and purchased by them, on 27th October, 1845.

FAULKNER answered the *cross-bill* of De Baun, 11th May, 1846,

stating that at the sale of De Baun's property in May, 1843, he purchased Nos. 35 and 36, and at the second sale he purchased Nos. 34, 35 and 36. He alleges both sales to have been valid.

Replication to Beebe's answer to cross-bill, 20th May, 1846. Also to answer of Faulkner. Decree *pro confesso* against De Baun on cross-bill. Abatement as to Medrano, he having died. Answer of Reardon to original cross-bill, taken as answer to the amended or supplemental cross bill, by consent.

June 15th, 1846. Beebe filed his answer to amended and supplemental cross-bill. Replications to answer of Beebe. Whiting & Slark filed, as part of their answer to cross-bill, *Exhibit Z*. Woodruff granted leave to file answer to supplemental cross-bill by next term.

Beebe's answer to amendment to cross-bill. Avers that said property was listed for the taxes for which it was sold, before he purchased—that said sales were regular, &c. Positively denies, and avers to be false, the allegations in reference to the removal of said negroes by his consent, &c., and gives a full account of his connection with the matter, which it is not deemed material to state.

Avers that his purchases of De Baun's property were not for speculation but to indemnify himself as De Baun's security; and proposes, that if De Baun, or any of his creditors, will refund to him what he had paid as security for De Baun, what he had paid for said judgments, the amount he paid at the trust sale, the taxes he had paid, with interest, and expenses of litigation, including counsel's fees, he would at once freely release all his interest in said property.

Beebe's answer to De Baun's supplement to cross-bill. Avers the regularity and legality of the tax sales on the 28th May, 1844—that the property was listed in the name of De Baun, for the taxes of 1842–3, and that at the time of the sale, De Baun or his tenants, were in possession of the larger portion of it. That no person bid at said sale under execution on the Ringo judgment, but himself and Lawson, and Lawson being well advised of his titles, it was unnecessary to notify him thereof, &c,

Exhibit Z. to the answer of Whiting & Slark to *De Baun's*

cross-bill, is a transcript of the proceedings on the *sci. fa.* to revive the Beach judgment, showing, that on the 22d May, 1845, the writ was quashed on plea in abatement.

Woodruff's answer to amendment to cross-bill. Avers an absolute transfer to him by De Baun of said assets, as in his original answer. Exhibits a copy of the assignment, and list of claims, a copy of his agreement to pay certain debts of De Baun, ane a statement of amount collected by him. The assignment and agreement to pay debts, &c., correspond with the allegations in the original answer. The statement shows that he had collected to the time of filing this answer $2,384 73 of said assets; subject to a deduction of $300 or $400 for expenses, &c.

June 29th, 1847. De Baun's death suggested, and his widow, heirs, administrator, &c., made parties.

Beirne & Burnside filed a *cross-bill*, setting out their mortgage, and praying foreclosure, sale of property, and application of proceeds, rents, &c., to the satisfaction of their debt, after payment of the mortgage debt of Whiting & Slark.

Beebe answered the cross-bill of Beirne & Burnside, 10th December, 1847, admitting the existence of their mortgage, but setting up title to the property under prior liens, as in his answers to the other bills. Other parties entered a general denial thereto in short of record.

Trapnall filed a supplemental answer to De Baun's cross-bill, 27th December, 1847, showing a revival on *sci. fa.* named therein, of the judgment of Jessup & Beers, 31st May, 1845. That *sci. fas.* issued on the judgments of said Witherill, Ralph Marsh & Co., and Waldron, Thomas & Co., 18th July, 1845, which being duly executed, said judgments were revived 3d December, 1845. And averring a purchase of lots 4, 5 and 6, in block 38, by himself under a *fi. fa.* upon a judgment obtained by Key against Taylor, Pendleton and Robins, 4th January, 1844, in Pulaski Circuit Court, and sheriff's deed therefor.

Exhibit I., No. 31, to *Beebe's answer*, to De Baun's cross-bill, shows that on the *sci. fa.* issued in the case of Gray & Bouton against De Baun, 20th March, 1843, the judgment was revived

16th January, 1846, for balance of debt $941, and $327 76 interest.

Decree.—The cause came on to be heard, 13th January, 1848, upon bills, answers, exhibits and replications, aforesaid: the depositions of Henry F. Samuel, Absalom Fowler, Charles Rapley and Gordon N. Peay, on behalf of Whiting & Slark and Beirne & Burnside; the record of the settlement of Lawson, sheriff, with the County Court, at November term, 1842 and 1843, in behalf of De Baun; all and singular the originals of said exhibits, (not being certified transcripts of record) being produced and the execution thereof proven at the hearing; and the Court *decreed*, that all sales made of the *corner* or *Alhambra* property under executions, after the filing of the original bill, be set aside and considered as null and void; that Beebe, and Whiting & Slark, each account for the rents and profits of the tenements situate on said premises during the times they respectively had possession of the same, and be charged therewith, less the amount expended by them for repairs thereon; that Beebe be charged with the amount realized from the sales of the property of De Baun under executions at November term, 1843, less the amount of sales of said *Alhambra* or *Corner*, and the property sold to Whitmore by De Baun, and that he have credit for the amount remaining due and unpaid upon the judgments of Gray & Bouton and Beach, and for all taxes and repairs paid by him on said *Alhambra* property. That Lawson refund to Whiting & Slark the money received by him on account of their purchase at the sales of De Baun's property, at the May term, 1843. A commissioner is appointed to sell the Alhambra property, on the first day of next term, on a credit of nine and eighteen months, with approved security, with ten per cent. interest, &c., and that he apply the proceeds, 1st, to pay costs and expenses of sale; 2d, the amount ascertained to be due Beebe upon the judgments of Gray & Bouton and Beach; 3d, to pay the amount ascertained to be due Whiting & Slark upon their mortgage on the *Alhambra* property; and 4th, to pay the amount ascertained to be due Beirne & Burnside upon their mortgage on said property, so far

as the same will extend in the order above named—directs the notice to be given of the sale, &c., that the commissioner report at next term, &c. That the cross-bill of De Baun be dismissed at the costs of his heirs, &c. That the supplemental bill of Whiting & Slark be dismissed, and the prayer thereof denied, except as against Beebe and Lawson, and Beirne & Burnside, and that complainants pay the costs, except as to said parties.

"And because after the hearing and submisston of this cause, the Court not being sufficiently informed of and concerning certain matters of account touching the premises, did order and direct Gordon N. Peay, Master in Chancery, to take an account and ascertain from the evidence to be adduced before him, and make report of the same to this court, *first*, the amount due and unpaid upon said judgments of Gray & Bouton and Beach, after deducting therefrom the amount realized from said sales at said November term, 1843, excepting therefrom the sales of said *Alhambra*, and said Whitmore and De Baun property: *second*, the value of the rents, issues and profits of said *Alhambra* property, while the same has been in possession of said Whiting & Slark and Beebe respectively, after deducting therefrom the amounts expended by them respectively for improvements, repairs, and for taxes thereon; and *third*, the amount, if any, due from said *Lawson* to said Whiting & Slark upon the sales of the property of De Baun, made at said May term, 1843, and not refunded to them."

"And such account having been taken by said Master, his report is now made and returned before the Court, and is in the words and figures following:

"The Master in Chancery, to whom was referred certain matters of account, &c., in this cause, reports:

"That there is due Beebe, on the judgment of Gray & Bouton, after giving all credits, including interest and costs of suit, as shown by statement herewith filed, marked A., the sum of $324 81.

"That there is due Beebe, on the judgment of Beach, after giv-

ing all credits, including interest and costs, as shown by statement A., &c., $1,562 20.

"That Beebe has been in possession of three of the brick tenements known as the "*Alhambra*," situated on lots 7 and 8, in block No. 1, &c., since the 1st December, 1843, and that the rents thereof amount to $3,654 72.

"Said Beebe has expended in taxes, repairs, improvements, &c., upon said tenements $685 30.

"That after deducting $324 81, the balance due on the judgment of Gray & Bouton; the sum of $1,562 20, the balance due on the judgment of Beach, and also said sum of $685 30, for taxes, repairs and improvements made on said tenements by said Beebe, from said sum of $3,654 72, the amount of the value of the rents aforesaid, there remains against Beebe a balance for rents of said tenements of $1,082 41.

"That Whiting & Slark have been in possession of one of the brick tenements, situate on lots 7 and 8 in block No. 1, &c., since 1st September, 1843; that they have received the sum of $138 88 in rents, and that the total value of the rents of said tenement from the 1st September, 1843, to this date is $872 22.

"That Whiting & Slark have expended in repairs upon said property, the sum of $19 40, which amount, deducted from the said sum of $872 22, the total value of such rents, leaves a balance against them for rents, of $852 82.

"That upon examination of the papers and testimony in this case, and upon the testimony taken by me, according to the instructions of the Court, in relation to the refunding by James Lawson, Jr., late sheriff of Pulaski county, to A. Fowler, as the attorney of Whiting & Slark, of the sum of $1,000, which said Fowler, as such attorney, had paid to said Lawson upon the sales of De Baun's property, under executions to May term, 1843, of this Court, in favor of Gray & Bouton and Lewis Beach, against James De Baun, the Master finds, and so reports, that on the day on which the sales under said executions were set aside by this Court, to wit: on the 3d day of July, 1843, said Lawson paid and refunded to said Fowler, as the attorney of

said Whiting & Slark, the sum of $756, and that the residue of said $1000, to wit: the sum of $244, remains unpaid by Lawson."

Lawson now moved to dismiss the supplemental bill as to him, on the grounds that the complainants' remedy against him, if any, was purely legal, &c.

January 15th, 1848. And now, on this day the Court here, from the evidence in this cause, having computed and ascertained the amount due to said Whiting & Slark for the principal debt, upon their three notes and mortgage, to be $5,836, and the interest thereon, to be $2,965 93, with interest hereafter, from this date accruing on said debt, at the rate of ten per cent. per annum; and the amount due to Beirne & Burnside, for principal upon their said three notes and mortgage, to be $6,290 22, and interest thereon to be $3,087 30, with interest hereafter accruing on said principal debt, at the rate of ten per cent. per annum; from which said amount so found due to Whiting & Slark the said amount of $852 82 charged against them by the report of the said Master is to be deducted, leaving said principal debt still due to them, and accruing interest thereon, at the rate aforesaid, and a residue of $2,113 11 of said interest found to be now due to them; and it is ordered and adjudged and decreed by this Court, that upon the said widow and heirs and administrator of De Baun, deceased, or any of the other said defendants, or any other person for them, paying to Whiting & Slark and to said Beirne & Burnside, the amounts so found due them, respectively, with all accruing interest thereon, and all the costs of this suit, by the first day of the next term of this Court, then said Whiting & Slark and Beirne & Burnside, do execute and deliver to the said legal representatives of said De Baun, deceased, proper instruments of conveyance of the said mortgaged premises, to be approved by the said commissioner, and do respectively cancel and satisfy said mortgages if thereto required; but in default thereof, it is ordered, adjudged, and decreed by this Court, that said widow, heirs at law, and administrator of said De Baun, deceased, and said Beebe, Thorn, Beach, Gray & Bouton, and the

said tenants in possession, made defendants to said original bill of Whiting & Slark, do stand absolutely debarred and foreclosed of, and from all equity of redemption of, in and to the said mortgaged premises: further decreed, that said Beebe do pay over forthwith to Whiting & Slark, the said sum of $1,082 41, so found due from him, by the said Master, for the residue of rents and profits received by him on account of said mortgaged premises, and that they have execution therefor; and that when the same shall have been paid to them, they immediately apply it, as a further extinguishment of so much of their said debt, interest and costs, commencing first with the accruing, and then the accrued interest; and that said Beebe do pay to said Whiting & Slark and Beirne & Burnside, all the costs by them sustained, by reason of the contestation by him of their bills of complaint in this cause.

Further decreed, that said Beebe immediately deliver up possession of the said three brick tenements now in his possession, and the said Whiting & Slark immediately deliver up possession of the brick tenement now in their possession, of and in said mortgaged premises, to said commissioner—that said commissioner, (C. P. Bertrand,) rent them out to the best advantage, to respectable and responsible tenants, for the best rent attainable, holding the rents and profits subject to the order of this Court, and that out of such rents, he expend what may be necessary, in good substantial repairs, in order to the preservation of said property, and report to this Court on the 4th day of the next term thereof, and whenever thereunto required; and in the event of a suspension or reversal of this decree, that he immediately restore the possession of such tenements or tenement to the party from whom he received it.

And the Court being sufficiently advised, on the motion of James Lawson, Jr., to dismiss the supplemental bill of said Whiting & Slark as to him, doth consider that said motion be overruled, and doth order, adjudge and decree, that said Lawson do forthwith pay over to said Whiting & Slark the sum of $244, the amount so found by the Master to be due from him to them,

with interest thereon, at the rate of six per cent. per annum, from the 3d day of July, 1843, until paid; and that they have execution therefor; and that said Lawson do pay to said Whiting & Slark all the costs by them sustained, by reason of the contestation by him of their said bill of complaint.

On the coming of the Master's report, Whiting & Slark, Beirne & Burnside and Beebe, filed exceptions thereto, which were overruled, and they excepted.

Whiting & Slark, Beirne & Burnside, Beebe, and the widow, heirs and administrator of De Baun, appealed from the decree.

At the hearing, Beebe excepted to the opinion of the Court, allowing the settlement of Lawson referred to in the decree, to be read in behalf of complainant's in De Bauns cross-bill.

Whiting & Slark also excepted to the opinion of the Court in permitting Beebe to prove, *viva voce*, the execution of the note of De Baun & Co., on which the Ringo judgment was founded; that it was filed among the papers of the suit, and read the same in evidence. [See opinion of Court.]

DEPOSITIONS referred to in the decree, as read on the hearing, were read on the part of Whiting & Slark, and are as follows:

A. Fowler, Esq., deposed in substance, that he was the attorney of Whiting & Slark, but had no interest in the event of the suit, other than as an attorney, and that his fee was not contingent. That he attended the sale of De Baun's property on the 29th May, 1843, under the directions of his clients, and when the sheriff offered for sale the *corner* or *Alhambra* property, he forbid the sale in a loud voice, which could have been, and he had no doubt was heard by every person present, stating that his clients had a mortgage thereon, and had a right to have it satisfied out of said property, in preference to all other creditors of De Baun. That Trapnall made a counter proclamation, urging the sale, and the sheriff determined to sell; and under the instructions of his clients, and to protect their rights, he bid off said *corner* property for them at $903 50, Trapnall and others also bidding thereon. He informed the sheriff at the time, to the best of his recollection and belief, that he was bidding for his

clients, and not for himself. At the same sale, he had previously purchased one or two other lots in the name of Desha, at $100.

He also purchased of said sheriff, on same day, at said sale, a tract of land at $55, under an execution in favor of Danner against Gibson, and another tract at $500, under an execution in favor of McLain & Badgett, against Hardy Jones, both of which last named purchases he made in his own name. That on the next day, he paid Lawson a certificate of deposit for $1,000, sent him by his clients, which he informed him was the money of his clients, and which he received as such, in payment of said purchase of the Alhambra, so made for them, and was to apply the residue to the purchases made for himself and Desha. That he then distinctly informed Lawson that he purchased the Alhambra for his said clients, and not for himself. That on the 6th June, 1843, he went to Lawson, at his office, and again informed him that his said purchase was for his clients, &c., and Lawson then, after carefully reading it over, and adding the date in his own hand writing, "7th June, 1843," signed the reneipt exhibited with the supplemental bill.

That on the 19th June, 1843, he paid Lawson $58 56¼, the residue of the purchase money for the lots purchased for Desha, and took his receipt therefor, which is annexed to the deposition as *Exhibit No.* 1.

That on the 6th or 7th of June, 1843, he paid Lawson said $500, so bid by him for the Jones' land, and Lawson gave him a receipt therefor, which is made *Exhibit No.* 2.

He afterwards drew up a deed for the *corner* property in the name of Whiting & Slark, and presented it to Lawson for execution, &c., but he refused to execute it, &c.

That having informed Desha about the difficulty of getting title, &c., he directed him the get back his monoy—the $100, so paid the sheriff, if he could, as he did not wish to be involved in litigation.

That during the same term of said Court, (May term, 1843,) the Court quashed the execution under which deponent purcha-

sed Jones' land, set aside the sale, and ordered Lawson, sheriff, to refund to him the said $500, the purchase money, as would appear by an authenticated copy from the records of said Court, made *Exhibit No.* 3.

That Lawson, afterwards, and during said term, returned the executions in favor of Beach, and Gray & Bouton, annexed to each of which was a return of said sales made thereunder, on the first day of said term, entirely different from his pretended returns, which now appear as annexed to, or on said executions; and that said first returns were afterwards torn off from said executions without legal authority—one of which returns is made *Exhibit No.* 4, a copy of which is made part of said supplemental bill. The return annexed, is, in part, written by Lawson, and part by his deputy, Thomasson, and was originally signed by Lawson, in his own hand-writing. Said Thomasson handed it to deponent, as such original return, at his request, after the end of said term of said Court, and then said it had been attached to one of said executions, and that a like return had been annexed to the other, but that they had both been taken off, and other returns attached to said executions, and said Thomasson, as he handed this original return to deponent, tore off the signature of Lawson, as such sheriff, except a payment thereof, which still appears.

On the last day of the term of said Court, and as it was about to adjourn, after said Court had ordered Lawson to refund to deponent said $500, he asked Lawson, in presence of said Court and bar, if he would pay it to him without any further process against him of attachment or otherwise; and also, if deponent wished to take back any of his other bids (meaning the said bid of $100 for Desha, though perhaps, not then expressed,) if he would pay to deponent without calling on the Court to compel him, and he pledged his word to do so; and the Court thereupon adjourned without making any other order against him. Immediately after it had adjourned, and when all had left the court room, as well as deponent recollects, except Lawson and Thompson, a deputy clerk, and deponent, and deponent was remain-

ing to get back said $500, said Lawson asked deponent if he desired to receive back said bid so made for Whiting & Slark, and deponent told him, that even if he had authority from them to do it, he would receive nothing but the said certificate for $1,000, which deponent had paid to him as aforesaid, and he replied that he could not let deponent have it, for that he had sent it to New Orleans and received the cash on it. Lawson then let deponent have a postoffice draft, on New Orleans, for about $750, as well as deponent recollects, in re-payment of deponent's said bid of $500, which the Court had ordered him to refund as aforesaid, and in repayment of said sum of $100 paid to him for Desha—and deponent was to call at his office that evening and make a settlement with him of some mutual accounts and demands between them about their own business, and then account to him for the residue of about $156, on said draft in such settlement; and deponent called at his office the same evening accordingly, and not knowing how they stood, carried down there with him the said residue of about $156, in order to be fully prepared to settle with him, but he was not there, and deponent was informed that he he had gone to his residence in the country, and they had never yet settled their private accounts. Deponent afterwards paid Desha said $100 received back from Lawson, and let Hyman Mitchell, of Little Rock, have said postoffice draft for funds of equal value—and the said James Lawson, as sheriff, or otherwise, never refunded or re-paid to deponent, the said sum of $903 56¼, so paid to him as above stated, for said Whiting & Slark, or any part of the same, in any shape, manner or form, and deponent has never considered himself authorized to receive the same, or any part thereof, nor has he ever tendered the same, or any part thereof, to deponent in any manner, shape or form.

Exhibit No. 1 and 2, are receipts, as stated in the deposition: *Exhibit No.* 3, shows that on the 7th July, 1843, the Court quashed the execution of McLain & Badgett, referred to in the deposition, set aside the sale, and ordered Lawson to refund to Fowler $500

paid for the land of Jones. *Exhibit No.* 4, is the same as *Exhibit N.* to the supplemental bill.

The depositions of Samuel, Rapley and Peay, are exclusively in reference to the occupancy and rents, &c., of the Alhambra tenements, and it is not material to state them.

The case was determined before the Hon. WM. H. FEILD, Chancellor.

FOWLER, for Whiting & Slark and Beirne & Burnside. On the ground of *marshaling* of assets, Whiting & Slark had a right to compel Beach and others, who had prior claims, to go upon the estate which the former could not reach. Where two persons have a lien upon the same piece of property, which is not sufficient to satisfy both, and one of them has a lien on another piece of property which the other has not, he must exhaust such property before he can resort to that which is common to both; and a court of equity will compel him to do so. *Everton v. Booth,* 19 *John. Rep.* 492. *White v. Dougherty et al.*, *Mar. & Yerg. Rep.* 319. *Alston v. Munford,* 1 *Brockenb. Rep.* 279. *Aldrich v. Cooper,* 8 *Ves. jr.* 388. *Dorr v. Shaw,* 4 *John. Ch. Rep.* 17. 1 *Story Com. on Eq., ch.* 13, *sec.* 643, *p.* 596 ; *sec.* 633, *p.* 588. *Wiggin v. Dorr,* 3 *Sumn. C. C. R.* 414. *Laney v. The Duke of Athol,* 2 *Atk. Rep.* 446. *Drake et al. v. Collins,* 5 *How.* (*Miss.*) *Rep.* 256. 1 *Hopk. Ch. Rep.* 469. *Hayes v. Ward,* 4 *John. Ch. Rep.* 132. 2 *McLean's Rep.* 56. 1 *Mad. Ch.* 250. And so a subsequent purchaser has a right in equity to require an execution creditor to exhaust the unsold property of his debtor, before he resorts to that which is sold. *Baine v. Williams,* 10 *Smedes & Marsh. R.* 119.

The purchase made by Whiting & Slark at sheriff's sale was forced upon them by Beach, Gray & Bouton, Beebe, &c., and is valid, and ought to stand unless the executions and the sale are void. The sale to them was complete except the execution &c., of the deed, as the sheriff is the agent of both parties, the entry of the sale is sufficient within the statute of frauds. *Bleecker v. Graham,* 2 *Edw. Ch. Rep.* 648. *Story on Agency, sec.* 27, 107. 1 *Greenl. Ev. sec.* 269. 1 *Sug. on Vend.* 173, 188. *Cooper's Lessee*

v. Galbraith, 3 *Wash. C. C. R.* 550. *Secrest v. Twitty*, 1 *McMullan's* (*S. Car.*) *Rep.* 255, 521. *McComb v. Wright*, 4 *John. Rep.* 659. *Evans v. Ashley*, 8 *Mo. Rep.* 187. *Sims v. Campbell*, 1 *McCord's Ch. Rep.* 53.

Whiting & Slark were innocent and bona fide purchasers, knew nothing of the errors or irregularity of the process, &c., and being strangers thereto, are not affected by them, nor by the irregularities of the sheriff or parties to the proceedings. *Weaver v. Cryer*, 1 *N. Car. Rep.* 340. *Heister's Lessee v. Fortner*, 2 *Bin. R.* 46. *McConnell v. Brown*, 5 *Mon. Rep.* 479. *Jackson v. Rossevelt*, 13 *John. Rep.* 102. *Jackson v. De Laney*, *ib.* 550. *Voorhees v. U. S. Bank*, 10 *Pet. Rep.* 475. 4 *Smedes & Marsh.* 622. *Woodcock v. Bennett*, 1 *Cow. Rep.* 734. *Taylor v. Thompson*, 5 *Pet. Rep.* 370. *Woodnull v. Osborne*, 2 *Edw. Ch. Rep.* 617. *Brown v. Miller*, 3 *J. J. Marsh. R.* 437. *McNair v. Biddle*, 8 *Mo. Rep.* 264. 1 *Nott & McCord* 12. *Barkley v. Scraven*, *ib.* 408. 8 *John. Rep.* 365. *Atkinson et al. v. Rhea*, 7 *Humph. R.* 60. And their purchase is valid, though the levy may have been made under the *fieri facias* clause in the writs of *ven. ex.* and the sale under the second, or after the return day of the writ, or though the writ had never been returned. 10 *Pet.* 477. 4 *S. & M. Rep.* 624. 3 *Co. Rep.*, *part* 5, *p.* 90. 6 *Yerg.* 309. 4 *Cond. Rep.* 521. 1 *Baldw. C. C. R.* 267. *Cox v. Joiner*, 4 *Bibb Rep.* 95. 3 *ib.* 344.

Their purchase is not affected by the order of court purporting to set aside the sheriff's sale, because, the court having no jurisdiction to base such order upon, it is a nullity. There being no notice to the parties interested, no authority to act, no showing of fraud, the order is void. *Bell et al. v. The Tombigbee Rail Road Co.*, 4 *Smedes & Marsh. Rep.* 563. *State Bank v. Marsh*, 7 *Ark. Rep.* *Bentley v. Cummins' ad.*, 8 *ib.* 490. *State Bank v. Marsh*, 10 *ib.* 130. *Woods v. Monell*, 1 *John. Ch. Rep.* 505. *Wood & Null v. Osborne*, 2 *Edw. Ch. Rep.* 617.

Beebe did not take any title by his purchase at the sheriff's sale, after Whiting & Slark had purchased. He was a party to the judgments of Beach, and Gray & Bouton by assignment, and was bound to know that the proceedings were irregular.

The execution in the case of Gray & Bouton was not signed by the clerk, and therefore void. *Const., Art.* 6, *sec.* 14. *Rev. Stat. p.* 777, *sec.* 2, 3. *Gilbraith v. Kuykendall,* 1 *Ark. Rep.* 53. *Woolford v. Dugan,* 2 *Ark. Rep.* 131. 6 *Ark. Rep.* 453. *Powers v. Swigart,* 8 *Ark. Rep.* 365.

The judgment of Beach v. De Baun & Thorn, was satisfied as to Thorn; and therefore satisfied as to De Baun also. 2 *Saund. Pl. & Ev.* 759. 4 *Bac. Abr.* "*Release,*" *G., p.* 281. *Co. Litt.* 232, *a. Bozeman v. State Bank,* 7 *Ark. Rep.* 333. 1 *Selw. N. P.* 43. *United States v. Thompson, Gilpin's Rep.* 621. *Hawkins & Davis v. Thompson,* 2 *McLean's Rep.* 112. 2 *Ham. Ohio Rep.* 89. *Winn v. Wilson's Ex'r.,* 2 *Bay.* (*S. C.*) *Rep.* 578. *Flagg v. Mann et al.,* 2 *Sumn. Rep.* 520.

Both executions were levied on lands, other than the mortgaged premises, more than sufficient to satisfy the judgments, which levies were never disposed of; and that a levy on land is a satisfaction of the judgment, see *Anderson v. Fowler, Anthony v. Humphries, &c., decided at — term.* 2 *Bac. Abr.* 353, 354, *Execution, D. Hopkins v. Chambers,* 7 *Mon.* 262. *McClellan v. Whitney,* 15 *Mass.* 137. *Lasalle v. Moore,* 1 *Blackf.* 227. *Miller v. Ashton,* 7 *Blackf.* 30. *Ib.* 350. *Arnold v. Fuller's heirs* ,1 *Ham. Ohio Rep.* 458. *Cass v. Adams et al.* 3 *ib.* 223. *Martin & Yerg.* 374. 8 *Serg. & Rawle* 378. 8 *Yerger* 460. 13 *Serg. & Rawle* 146. 2 *Bin.* 218. 1 *Freem. Ch. Rep.* 571. 4 *Ark.* 231.

Beebe was a purchaser *pendente lite.* Such a purchaser is bound by the decree without being made a party to the suit, and takes the property subject to the plaintiff's claim and the decree to be made. *Osborne v. United States Bank,* 5 *Cond. Rep.* 754. 1 *Story's Com. on Eq., sec.* 405 *to* 409. *Story's Eq. Pl., sec.* 156, 194, 351. *Murray v. Ballow,* 1 *John. C. R.* 576. *Edmunds et al. v. Crenshaw et al.* 1 *McCord Ch. R.* 264. *Sug. on Vend.,* 537, 535-6. *Lessee of Ludlow v. Kidd et al.,* 3 *Ham. Ohio Rep.* 541. 2 *Mad. Ch. Pr.* 189. *Bennett's Lessee v. Williams,* 5 *Ohio Rep.* 462. *Scott v. McMillen,* 1 *Litt.* 303. *Stoddard's Lessee v. Myers,* 8 *Ohio R.* 209. *Green et al. v. White,* 7 *Blackf.* 244. *Finch v. Newnham,* 2 *Vern.* 216. *The Bank of Utica v.*

Finch, 1 *Barbour's Ch. Rep.* 75. *Thompson v. Hammond*, 1 *Edw. Ch. Rep.* 506. *Scott v. Coleman*, 5 *Monroe* 74. *Morton v. Long et al.*, 3 *A. K. Marsh.* 415. *Garland v. Rives*, 4 *Rand.* 316.

If Thorn, in his sale to De Baun, retained any lien, it was a mere equitable interest which cannot be sold under execution on a judgment at law, and therefore Beebe takes no title by his purchase of Thorn's interest. 2 *Tidd's Pr.* 1003. *Scott v. Schaley*, 8 *East* 467. *Thomas v. Marshall*, *Hard.* 19. *Jackson v. Chapin*, 5 *How.* 487. *Hanck &c., v Brincker*, 3 *Bibb* 250. *Jackson v. Willard*, 4 *John.* 43. *Piatt v. Oliver et al.*, 2 *McLean* 298. 4 *Yerg.* 229. *Hendricks v. Robinson*, 2 *John. Ch. Rep.* 12. *Baird et al. v. Kirtland et al.*, 8 *Ohio Rep.* 23. 1 *John. Ch. Rep.* 56. *Thompson v. McGill & Conn*, 1 *Freem. Ch. Rep.* 405. *Bogert v. Perry*, 17 *John.* 354. 7 *Smedes & Marsh.* 640. *Norris v. Ellis*, 7 *Hump.* 463. *Dig. of Ark.*, *p* 243, *sec.* 130; *p.* 498, *sec.* 25; *p.* 623, *sec.* 3. *Hanley v. Hunt et al.*, 1 *Ham. Ohio Rep.* 256.

The true rule distinguishing between a party to the judgment and a stranger, purchasing under irregular process, will be found to be, that for the errors in the judgment and of the sheriff, which the plaintiff could not have controuled, he is not responsible, and takes title, but for his own acts he is responsible, such as the suing out irregular execution, which justifies the officer, but not the plaintiff. *Woodcock v. Bennett*, 1 *Cowen* 734. *Parsons v. Loyd*, 3 *Wils. Rep.* 345. *Rae v. Milton*, 2 *ib.* 385. 2 *Tidd's Pr.* 936. *Read v. Markle*, 3 *John.* 523. 8 *Humph.* 409. *Weaver v. Crier & Wood*, *N. Car. Rep.* 340. *Glover v. Horton*, 7 *Blackf.* 296. *Adams v. Freeman*, 9 *Johnson* 118. *Clay et al. v. Caperton*, 1 *Monroe* 10. *Young v. Taylor*, 2 *Bin. Rep.* 231.

A levy upon sufficient property is a satisfaction of the judgment, of which joint debtors and third persons may avail themselves as well as he whose property is actually seized. *Taylor v. Dundas*, 1 *Wash.* (*Va.*) 95. *Davis v. Mikell el al.*, 1 *Freem. Ch.* 571. *Baird v. Rice*, 1 *Call.* 22. *Clark & Nance v. Bell*, 8 *Humph.* 28. *Sneed's Ex. v. White*, 3 *J. J. Marsh.* 528. *Bullitt's Ex'r. v. Winstons*, 1 *Munf.* 282. *Young v. Read*, 3 *Yerg.* 298. *Ford v.*

Geauga Co., &c., 7 *Ham. Ohio* 482. 3 *Bibb* 468. 4 *New Hamp Rep.* 174.

If the *fieri facias* issued on the judgment of Gray & Bouton is void, then the *ven. ex.*, under which Beebe purchased, is also void; and cannot be considered as an original *fi. fa.* by rejecting the recitals therein.

Beebe's tax titles can avail him nothing whatever, because they were purchases made *pendente lite;* and if he was legally in possession at the time, or under pretence of legal right, he occupied in the attitude of a trustee for De Baun and his creditors, and the title acquired must in law and equity enure to the benefit of the *cestui que trust*, and not of his own. 2 *St. Ev.* 95. *Haley et al. v. Bennett*, 5 *Porter Ala. Rep.* 472. 5 *Yerg. Rep.* 398. 1 *Cowen Rep.* 575. 4 *Mon. Rep.* 400. 2 *Sum. C. C. R.* 558. 5 *Litt. Rep.* 185. And he was bound to pay the taxes himself. *Barr v. McEwen et al.*, 1 *Bald. C. C. R.* 162.

Whiting & Slark are entitled to the rents and profits of the mortgaged property from the time that the money became due. *Clue et al. v. Woods*, 5 *Serg. & Rawle* 283. *Waters et al. v. Stewart*, 1 *Caine's Cas. in Er.* 68. *Fitzgerald v. Beebe*, 7 *Ark. Rep.* 319. *Chit. on Cont.* 333, 335, 340. *Astor v. Turnet*, 11 *Paige Rep.* 337. *Greene v. Biddle*, 5 *Cond. Rep.* 383. *Estabrook v. Moulton*, 9 *Mass. Rep.* 258. *Trustees, &c. v. Dickson et al.*, 1 *Freem. Ch. Rep.* 483. *Watson v. Spencer*, 20 *Wend. Rep.* 262. *Lansing v. Capron*, 1 *John. Ch. Rep.* 617. *Moss v. Gallimore*, *Doug. Rep.* 270. *Stone v. Patterson*, 19 *Pick. Rep.* 476. *Burden v. Thayer*, 3 *Met. Rep.* 76. And Beebe's purchase being void, he must account for rent at a reasonable rate. *Willamson et ux. v. Williamson et al.*, 3 *Smedes & Marsh. Rep.* 749.

Whiting & Slark are entitled to a decree against John Brown, the lessee of Beebe, for rent from the day the writ was served on him, and also for rent then due and not paid over. *Stone et al. v. Patterson*, 19 *Pick* 476. *Fitzgerald v. Beebe*, 7 *Ark. Rep.* 320. *Magill v. Hinsdale*, 6 *Connect. Rep.* (1 *Vol.* 2 *Series*). 3 *Metc. Rep.* 77. *Gibbons v. Dillingham et al.*, 10 *Ark. Rep.* 15. *Story Com. on Eq. Pl. sec.* 200. *Greene v. Biddle*, 5 *Cond. Rep.* 382. *Wil-*

liamson's adm'r v. The Richardson, 6 *Monroe Rep.* 603. *Berch v. Wright*, 1 *Term Rep.* 383. 4 *Kent's Com.* (4 *Ed.*) 158, 164, 165. 3 *Stark. Ev.* 1,516, 1,518. *Smith v. Shepard*, 15 *Pick. Rep.* 149. *Welch v. Adams*, 1 *Metcalf Rep.* 495. *Lumley v. Hodgson*, 16 *East Rep.* 104. *Powell on Mort.* 227, 228, 232. *Hart's heirs v. Baylor*, *Hard. Rep.* 599. *Moss v. Gallimore*, *Doug. Rep.* 268.

That Lawson, sheriff, was properly made a party, and that he was bound to refund to Whiting & Slark the purchase money, with interest, upon the sale to them being set aside. *Blight's heirs v. Tabin*, 7 *Mon.* 615. *Moore's Ex'r v. Allen*, 4 *Bibb Rep.* 41. *Thompson v. Phillips*, 1 *Bald. C. R.* 27. 7 *Ark.* 427. *Halland v. Craft*, 20 *Pick. Rep.* 337. *Martin v. Broadus et al.*, 1 *Freem. Ch. Rep.* 38. 2 *Story's Com. on Eq.* 694 *to* 696. Lawson's return as sheriff is no evidence that the money was refunded, not being responsive to the mandate of the writ. *Duprey v. Johnson*, 1 *Bibb Rep.* 567. *Fiest v. Miller*, 4 *Bibb Rep.* 311. Nor is the answer evidence—the fact of payment being new matter set up in avoidance, and not directly responsive to the allegations of the bill. *The Planter's Bank v. Stockman*, 1 *Freem. Ch. Rep.* 503. *Vance, &c. v. Vance, &c.*, 5 *Mon. Rep.* 523. 1 *Newel. Ch. Pr.* 329. *Clark v. Spears*, 7 *Blackf. Rep.* 98. 2 *Mad. Ch. Pr.* 446. *Simpson v. Hart*, 14 *John. Rep.* 63, 74. *Green v. Vardiman*, 2 *Blackf. Rep.* 329. *U. S. Bank v. Beverly et al.*, 1 *How. U. S. Rep.* 151. *Atwater v. Fowler*, 1 *Edw. Ch. Rep.* 420. 1 *Bibb* 196. 4 *Hayw. Rep.* 92. *Flagg v. Mann*, 2 *Sumn. C. C. R.* 507. *Jolly v. Carter*, 2 *Edw. Ch. Rep.* 210. *Cathcart et al. v. Robinson*, 5 *Pet. Rep.* 267.

The Circuit Court erred in dismissing the supplemental bill, &c., of Whiting & Slark against the subsequent encumbrancers of the mortgaged estate; for as a general rule, a court of equity will not decree a sale of mortgaged premises until all the encumbrancers are brought before it so that the estate itself may be sold and assured to the purchaser. *Cooper's Equity* 33. 2 *Mad. Ch. Pr.* 179, 182, 188. *Christie v. Herrick*, 1 *Barbour's Ch. Rep.* 260. *Porter et al. v. Clements*, 3 *Ark. Rep.* 381. *Story's Eq. Pl., sec.* 193, 185, 197. *Ensworth v. Lambert*, 4 *John. Ch. Rep.* 606.

Haines v. Beach, 3 *ib.* 461. 1 *Sumn. C. C. R.* 177. 5 *Porter Rep.* 472. *Piatt v. Oliver et al.*, 2 *McLean's Rep.* 306.

A decree for a sale on credit is erroneous without the consent of the parties. *Sedgwick v. Fisk*, 1 *Hopkins Ch. Rep.* 594.

There was error in permitting proof by parol at the hearing that the note for $1,500 and the signature were in the handwriting of De Baun, and that it was the same note paid and filed in Ringo's suit at law; for the note was not made an Exhibit in the cause, and no paper can be proved *viva voce* unless it be made an exhibit and on a previous order and notice to the party. *Crist et al. v. Brashiers*, 3 *A. K. Marsh.* 171. *Pardee v. De Carla*, 7 *Paige* 134. *Chandler's Ex'r v. Neal's Ex'r*, 2 *Hen. & Munf.* 129. *Gresley's Eq. Ev.* (*Ed. of* 1837.) 126. 2 *Daniel Ch. Pl. & Pr.* 1,027, 1,028. *Barrow v. Rhinelander*, 1 *John. Ch. Rep.* 560. *Lube's Eq. Pl.* 87.

The evidence adduced on the hearing was full, clear and conclusive as to the amounts to be decreed, and the court should have found the amount without reference to a Master. *McKay v. Carrington*, 1 *McLean's Rep.* 65. *Le Guen v. Gouverneur et al.*, 1 *John. Cas.* 520. *Field et al. v. Hatland et al.*, 2 *Cond. Rep.* 389.

There was no color or pretence of evidence that Whiting & Slark had been in possession of any part of the premises or had received any of the rents: and if there had been, the Court should not have ordered an account against them, as there was no foundation therefor by an allegation in the pleadings. *The Planter's Bank v. Stockman et al.*, 1 *Freem. Ch. Rep.* 503. *Gresley's Eq. Ev.* 161. *Edmonson v. Baxter et al.*, 4 *Hayw. Rep.* 14. *James v. McKernon*, 6 *John. Rep.* *Irnham v. Child*, 1 *Bro. Ch. Rep.* 94. 1 *Bibb Rep.* 175. *White v. Lewis*, 2 *Marsh. Rep.* 125. *Woodcock v. Bennett*, 1 *Cow. Rep.* 734.

The Master's report should have been set aside for his failure to pursue the statute (*Rev. Stat. p.* 166, *sec.* 76, 78,) and return the evidence to sustain the report. *Peers v. Carter's heirs*, 4 *Litt. R.* 270. *Hammond and wife v. Pearl, &c.*, 6 *Monroe Rep.* 413. *Green's heirs v. Breckenridge's heirs*, 4 *ib.* 544.

As Beebe entered under color of title, he ought not to be allowed for taxes and repairs made as owner: nor would even a trustee be allowed for improvements unless they were necessary, valuable and permanent. *Winthrop v. Huntington and wife*, 3 *Ham. Ohio Rep.* 327. *Van Horne v. Fonda*, 5 *John. Ch. Rep.* 416. 2 *Story Com. on Eq., sec.* 697. *Green v. Winter*, 1 *John. Ch. Rep.* 39. *Morre v. Cable, ib.* 388. *Van Buren v. Olmstead*, 5 *Paige Rep.* 12. 3 *Smedes & Marsh. Rep.* 749.

Beebe is not entitled to a decree under the Gray & Bouton and Beach judgments; because, the lien of the Beach judgment had expired before the suit of Whiting & Slark was instituted and was never revived, and the Gray & Bouton judgment, though revived, was fully satisfied; and the liens of both judgments were waived by the negligence of the plaintiffs and postponed to the junior mortgage. *Porter's lessee v. Cocke, Peck's Rep.* 36. *Mower and wife v. Kip et al.*, 2 *Edw. Ch. Rep.* 166. 1 *Baldw. C. C. R.* 273. 6 *Paige Rep.* 91. The revival by *scire facias* does not extend the lien beyond the revival as against purchasers or encumbrancers whose rigths accrued after the original judgment and before the revival. 6 *Paige Rep.* 91.

The entering satisfaction as to Thorn on the Beach judgment and the agreement of Beebe with Beach & Bouton, to confine the lien to the mortgaged property, forfeited both liens—that a judgment lien may be lost by negligence, or giving time destroys the lien as to other creditors. *Robinson et al. v. Green et al.*, 6 *How. (Miss.) Rep.* 228. 4 *ib.* 140. *Baird v. Rice*, 1 *Call. Rep.* 23. *Kellogg v. Griffin*, 17 *John. Rep.* 276. *Doty v. Turner*, 8 *ib.* 22. *Peck's Rep.* 36. That Beebe did agree to relinquish the judgment lien upon all the property except the mortgaged premises, is proved by the answer of Trapnall, the agent of Beach and of Gray & Bouton, who assigned the judgments to Beebe and whose answer is evidence against him. *Osborn v. U. S. Bank*, 5 *Cond. Rep.* 754. *Fitch et al. v. Stamps*, 6 *How. (Miss.) Rep.* 496. *The Earl of Sussex v. Temple et al.*, 1 *Lord Raym. Rep.* 311. 1 *Greenl. Ev. sec.* 178. *Field et al. v. Holland et al.*, 2 *Pet. Cond. Rep.* 290. *Barraque and wife v. Siter et al.*, 9 *Ark.* 547.

The equitable lien attempted to be set up by Beebe as assignee of Ringo, if valid, could only be asserted, so as to obtain relief, by way of cross-bill. *Troup v. Haight*, 1 *Hop. Rep.* 270. There is no proof of the claim, nor was there a valid registry of it as a lien. The contract between Thorn and Beebe, upon which the lien is alleged to rest, does not specify the note, and could not affect subsequent purchasers and encumbrancers without actual notice proved upon them; for the registry of a trust or mortgage is notice only to the extent of the sum specified in the registry. *Frost v. Beekman*, 1 *John. Ch. Rep.* 299, 300. 4 *Kent's Com.* (4 *Ed.*) 176. *Beekman v. Frost*, 18 *John. Rep.* 564. *Day v. Dunham*, 2 *John. Ch. Rep.* 190. *Bridgen v. Carhartt et ux.*, 1 *Hop. Ch. Rep.* 235. But if the claim be considered as a vendor's lien for residue of purchase money, it is in that case a secret trust, which must be postponed to creditors who are *bona fide* mortgagees. *Bayley v. Greenleaf*, 5 *Cond. Rep.* 235. *Garner v. Chester*, 5 *Yerg. Rep.* 208. 4 *Kent Com.* 147; and which cannot be assigned. *Jackson v. Hallock et al.*, 1 *Ham. Ohio Rep.* 318. 7 *Yerg. Rep.* 13. 6 *How.* (*Miss.*) *Rep.* 365. 1 *Paige Rep.* 506.

The statute of limitations, which may be pleaded in equity as well as at law, had fully run against Ringo and Beebe both upon the note and upon the agreement upon which the lien is predicated, before any proceedings were instituted on the note or steps taken to enforce the lien, and as no plea or counter answer was admissible to Beebe's answer setting up the lien, the objection of *lapse of time* may be suggested for the first time at the hearing. *Baker v. Biddle*, 1 *Baldw.* 418. *Heray v. Dinwoody*, 2 *Ves. jr.* 87. *Waggoner v. Gray*, 2 *Hen. & Munf.* 609. *Story's Eq. Pl.*, *section* 757. 1 *Mad. Ch. Pr.* 99. 4 *Bro. Ch. R.* 269. 7 *Yerg.* 233. 1 *Edw. Ch. R.* 422. 2 *ib.* 333. 17 *Ves. jr.* 95. *Piatt v. Vathier et al.*, 1 *McLean* 160. *Coulson v. Walton*, 9 *Pet.* 82. *Cooper Eq.* 251. 6 *Pet.* 65. 1 *McLean* 17, 538.

An appeal from a final decree necessarily opens for the consideration of the appellate court all prior orders or decrees in any way connected with such final decree. *Atkinson v. Manks*, 1 *Cow.* 702. *Le Guen v. Gouverneur & Kemble*, 1 *John. Cas.* 498. *Gels-*

ton v. Codewise, 1 *John. Ch., R.* 194; and upon the reversal of the decree, this Court ought to render a final decree between the parties. *Const: Art.* 6, *sec.* 2. *Rev. Stat. p.* 175, *sec.* 141, 142. 1 *John. Cas.* 498.

The bill of Whiting & Slark distinctly alleges every thing necessary or material to sustain their application to foreclose; they state a valid mortgage proper for foreclosure, the facts necessary for marshaling securities, to establish their own purchase at sheriff's sale, to set aside Beebe's for irregularity, fraud, &c., for an account, that the defendants are in possession and had encumbrances, with a proper prayer for relief; and if Beebe has prior liens or better titles they are matters of defence for him to set up and need not be set out specially in the bill. (*Lytle et al. v. Breckenridge*, 3 *J. J. Marsh.* 671.) The rule that the *allegata et probata* must correspond, applies to an attempt to introduce facts in evidence totally distinct from those relied upon in the bill: but all the minute circumstances constituting the charge may be admitted under the general allegations; thus, a general allegation of fraud, &c., is sufficient to admit in evidence the minute circumstances tending to establish the charge of fraud, &c. *Gresley's Eq. Ev.* 161. *Ib.* (2 *Am. Ed.*) 232, 233, *&c. Story's Eq. Pl. sec.* 28, 36, 37. *Woodbury & Minot Rep.* 44. 8 *Ark.* 276. 2 *Ves. Sen.* 318. 7 *Yerg.* 563. 8 *Wend.* 339. And under a prayer for general relief, a party may have any relief consistent with the facts stated in the bill. *McNair et al. v. Biddle et al.*, 8 *Mo. Rep.* 267. 5 *Porter Ala.* 26. 2 *ib.* 612. *Bailey v. Benton*, 8 *Wend.* 344. *Allen et ux. v. Coffman*, 1 *Bibb* 472. 2 *Cond.* 361. *Cooper Eq. Pl.* 14; or where the allegations in the bill are defective, and such defects are supplied by the answer. *Rose v. Wyatt & Veal*, 7 *Yerg.* 36. *Mathew v. Hanbury, &c.*, 2 *Vern.* 187. *Gratz v. Redd*, 4 *B. Mon.* 198. *Gresley's Eq. Ev.* 236. 2 *Atk.* 337, 3 *ib.* 132. *Rankin v. Maxwell, &c.*, 2 *Marsh.* 490. *Gaston's heirs v. Bates*, 4 *B. Mon.* 367.

Whiting & Slark are entitled, under their purchase at sheriff's sale, to a decree of absolute title, to possession and for the rents and profits against Beebe for the whole and against John Brown

for such as were due from him and unpaid at the service of the writ upon him, and such as accrued afterwards under his lease from De Baun, as collateral to the primary decree against Beebe.

If neither De Baun nor Thorn had such an interest in the property as could be sold under execution, or the purchase so made by Whiting & Slark was *pendente lite*, then they take nothing by their purchase. But if either De Baun or Thorn had such an interest as might be sold under execution and the purchase was not *pendente lite*, then Whiting & Slark by their purchase acquired such undivided interest and are entitled to a decree therefor, and to have the other half sold under their decree of foreclosure, with a like decree for all the rents and profits, until their mortgage debt shall be satisfied with all interests and costs.

If the three liens or any one of them asserted by Beebe be still in force, then Whiting & Slark are entitled to have the securities marshaled and all the lands subject to such liens respectively which they cannot reach, first sold for the satisfaction of such liens.

If Whiting & Slark take no title by their purchase at sheriff's sale, then, as all of Beebe's asserted liens have been fully extinguished, Whiting & Slark are entitled to a decree:

First: That Lawson refund to them their purchase money with interest.

Secondly: Foreclosure and sale of the mortgaged premises.

Thirdly: An account and decree for all the rents and profits against Beebe from April, 1843, until possession be surrendered.

Fourthly: Decree against John Brown for rents and profits as above stated.

Fifthly: That rents and profits, as far as they will go, be applied to the extinguishment of interest, and then principal of Whiting & Slark's mortgage debt; and then the proceeds of the sales until it is satisfied.

Next, Beirne & Burnside's mortgage debt to be fully satisfied out of the proceeds of the sale if sufficient: and surplus, if any, decreed to whomsoever it may belong.

WATKINS & CURRAN, for Beebe. The only question presented by the pleadings is, whether Whiting & Slark obtained and have title by virtue of their purchase from the sheriff at the May term, 1843. We insist, 1st, that their purchase was void: and 2d, if not void, it was erroneous and properly set aside by the court. If the sale was not set aside, or not legally set aside, they acquired no title under the Beach judgment. 1st, Because the judgment had been satisfied and the lien waived by a release of Thorn. 2d, Because more than three years had elapsed at the time of their purchase, and the judgment was never revived. 3d, Because, even if the judgment had not been satisfied and had been regularly revived, the purchaser could not take title as against the prior judgment of Gray & Bouton.

Whiting & Slark could not have purchased the "corner" property under the execution issued upon the Gray & Bouton judgment to the May term, 1843, because that execution was simply a *ven. ex.* without any *fi. fa.* clause or any authority to the sheriff to levy upon or sell other property than that mentioned in the writ. The writ of *fi. fa.* was not levied upon the property in dispute, and the writ under which Whiting & Slark purchased merely commanded that the sheriff expose to sale the property originally levied upon, and under that writ the sheriff could not sell nor they purchase any other than the property so directed to be exposed to sale. The question then, is, can the sheriff levy upon and sell land without any writ of execution? That the sheriff cannot levy upon or sell lands without a writ of execution in his hands in full force authorizing him to do so. 7 *Ala.* 645. 4 *Hawks* (*N. C.*) 279. 3 *Devereux* (*N. C.*) 279. 2 *Bay's* (*S. C.*) 524. 1 *Dev.* 30. *Ib.* 295. 2 *Dev. & Batt.* 87, and cases cited by GASTON, J., 3 *Smedes & Marsh.* 471.

The restraining order was erroneously granted, and was properly set aside. 1st, Because it was made in direct violation of De Baun's instruction as to the order of sale: 2d, It was made without proper parties—neither the subsequent incumbrancers, nor De Baun's nor Beebe's prior vendees were parties. 3d, It was in effect a final decree, granting the prayer of the bill to

marshal the securities: 4th, It was made without notice to the parties interested: 5th, It was directed to the sheriff, and not to the parties to be affected by it. For these reasons the court had the power and acted properly in vacating the order and setting aside the sales made pursuant to it.

Whiting & Slark, then, have no title by virtue of their purchase under execution, and are not entitled to relief upon that ground as against Beebe, for these reasons: 1st, Because their purchase was void: 2d, Because, even if it was not void, it was properly avoided: and 3d, Because, even if it was not properly avoided, they have not made such a case by their pleadings, as to question, review or put in issue the propriety of the proceedings by which the sale and the order under which it was made, were avoided.

We will proceed to notice the objections to Beebe's title.

In the first place, we contend that Beebe has a valid title to the "corner" property discharged from all incumbrances by virtue of his purchase under the Gray & Bouton execution, at November term, 1843.

But before, noticing the objections, it may be well to examine what questions are put in issue by the pleadings, for the claim of Whiting & Slark to relief against Beebe must depend upon their allegations.

Beebe was not made a party to the original bill, and in the supplemental bill they charge that before the filing of the original bill, he became the owner of the prior judgments, that he bid at the first sale, when Whiting & Slark purchased, and after their purchase, having full knowledge of it, he caused other executions to be issued, had the "corner" property sold, became the purchaser and obtained a deed from the sheriff, and claim to have his title cancelled. The only reason assigned why Beebe's title ought to be cancelled is, that *they had previously purchased and had title under the same judgments;* and this is the only question at issue, and as they fail to show title under the judgments, they are not entitled to relief against Beebe. If there are any extrinsic facts showing that Beebe's title was acquired under cir-

cumstances which legally vitiate it, no relief can be granted against him in consequence of such facts, unless they are put in issue by the pleading. If the defendant sets up and proves a fact which destroys the complainant's title, the latter cannot impeach it on a ground not taken in his bill and not arising from the issue between the parties. *Story's Eq. Pl.* 219. *Gresley's Eq. Ev.* 23. *Lube's Eq. Pl.* 18. 3 *Bligh* 211. 6 *J. R.* 543. 11 *Pet. Rep.* 229. 3 *Paige* 606. 5 *ib.* 29. 7 *ib.* 573. *Lit. Sel. cases* 200. 3 *Ham.* (*Ohio*) *Rep.* 62. 2 *Bibb Rep.* 4, 26.

I. It is objected that an equitable title is not subject to sale under execution. That an equitable as well as a legal estate in land is subject to sale under execution by our statue. *Dig.*, *ch.* 67, *sections* 25, 79; *ch.* 93, *section* 36; but the legal as well as equitable title was in the defendants in the execution under which Beebe purchased.

II. It is objected that the original *fi. fa.* was not signed by the clerk: If not, it was not void, but amendable, and the court will consider it as amended, whenever the question arises collaterally. 5 *N. Car.* 24. 1 *Serg. & Rawle* 97. 5 *Yerg.* 443. 3 *Murphy* 128. 3 *Dev.* 284. *Ib.* 151. 5 *N. Car.* 421. *Coleman's cases* 55. 5 *Wend.* 503. Courts favor judicial and final process. 9 *Mass.* 217. 10 *Ib.* 221. 11 *Ib.* 89. 13 *Pick.* 90. 14 *Ib.* 212.

III. The next objection is that the *fi. fa.* clause in the writ under which Beebe made his purchase, was void; in other words, that a *ven. ex.* cannot be issued with a *fi. fa.* clause: as the legal effect and consequences of a levy on lands are the same as a seizure of goods, and therefore the *fi. fa.* clause is void. We reply: 1st, the legal effect of a levy on land and a levy on goods is different: 2d, if the effect is the same, it does not follow that the sale under the *fi. fa.* clause is void; and 3d, even if the *fi. fa.* clause was improper, the objection cannot be taken by a third person.

The legal consequences of a levy on land and a seizure of goods are not the same. A levy upon land is not in any sense of the term a satisfaction: the debtor is not deprived of the possession of the property seized, as is the case when goods are

taken. 14 *Wend.* 160. 5 *Ohio Rep.* 163. 1 *Penn. Rep.* 426. 9 *Serg. & Rawle Rep.* 16. 2 *Ark.* 578. 5 *Gill. & John.* 102. 10 *Smedes & Marshall*, 584. 5 *Yerg. R.* 227. 4 *Mass. R.* 403. 23 *Wend. Rep.* 490. 4 *Hill (N. Y.) Rep.* 621. 1 *Scam.* 612. 1 *Dev. Eq. R.* 525. 2 *Mich. Rep.* 150. *Ib.* 379. We respectfully submit that the case of *Anderson v. Fowler* (3 *Eng. R.* 388) is not law, and is not sustained by the Courts of any State except of Kentucky, in 7 *Monroe Rep.* 262; and of Indiana, where the adjudications are based on 1 *Black. Rep.* 226, which was a levy on goods, and decided in the case of *Clark v. Withers*, whilst it is directly opposed by the decisions of New York, Ohio, Pennsylvania, Maryland, Mississippi, Tennessee, Massachusetts, Illinois and North Carolina. The case in 3 *Ham. (Ohio) Rep.* 223, was a levy on goods, and the dictum in that case as to a levy on land was repudiated in the case of 5 *Ham. (Ohio) Rep.* 173; that the case of *Shepard v. Rowe*, (14 *Wend R.* 260,) was not overruled by *Green v. Burke*, 23 *Wend.* 499, clearly appears in 4 *Hill Rep.* 621, citing and affirming the principle decided in 14 *Wend.*

But if a levy be satisfaction, the property levied upon must belong to the debtor, and must be sufficient to bring money enough at sheriff's sale to satisfy the debt; which was not the case here. And at best, a levy is but a mere temporary bar or suspension of further execution—a ground for setting it aside on motion.

Irregularity in an execution or sale can be objected to only by the party and in a direct proceeding. 16 *J. R.* 537. 1 *Cow. R.* 736. *Graham P.* 363.

If goods are not taken to the value of the whole, the plaintiff may have a *ven. ex.* for part and a *fi. fa.* for the residue in the same writ. 2 *Saund. Rep.* 47. 1 *Bos. & Pull. R.* 359. 2 *Tidd's Pr.* 934. 2 *Chitt. Rep.* 390. 7 *Law Lib.* 144. 7 *Ala. Rep.* 650. And after a levy upon sufficient goods, an alias *fi. fa.* is only erroneous and voidable, and the proceedings are valid until set aside by the party in a direct proceeding. *Woodcock v. Bennet*, 1 *Cow.* 734. *Mitchell v. Evans*, 5 *How. (Miss.) Rep.* 551. *Scull v. Goodbolt*, 4 *Ala. R.* 324. *Patrick v. Johnson*, 3 *Lev.* 404 *Sher-*

ley v. Wright, 1 *Salk.* 379. 2 *Ld. Raym.* 775. *Spafford v. Beach*, 2 *Doug. Mich. Rep.* 150.

But Whiting & Slark cannot object that the execution was satisfied by the levy, or that, in consequence of the levy, no further execution could be had. This defence is confined to the debtor alone whose goods are seized, and cannot be made by others as in the case of actual satisfaction. *Bradley v. Walker*, 2 *Ark. Rep.* 578. *McGinnis v. Lillard*, 2 *Bibb. R.* 490. *Ontario Bank v. Hallett*, 8 *Cow.* 194. *Green v. Burk*, 23 *Wend.* 500. 3 *Cro. Car.* 75. 2 *Show.* 394. 2 *Saund. R.* 47, *n.* (*a.*) 6 *Vt. Rep.* 237. 2 *N. Hamp.* 298. 18 *Eng. C. L. R.* 273. 24 *Pick. Rep.* 259.

IV. The next objection to Beebe's title is based upon the supposed agreement made by him with Trapnall. To this we reply: 1st. This agreement is not alleged in the bills of Whiting & Slark, and they can have relief only upon the facts charged in their pleadings. 2d. There is no proof of this agreement, except the answer of Trapnall, Beebe's co-defendant. It is a strict rule that the answer of one defendant cannot be read in evidence against another; the reason being that there is no issue between the parties and no opportunity for cross examination. *Gresley's Eq. Ev.* 29. 1 *Gallis R.* 630. 3 *Cond. R.* 319. 4 *Cond. R.* 170. 1 *Greenl. Ev. sec.* 178. 2 *Danl. Ch. P.* 981, *note* (1). *Christie v. Bishop*, 1 *Bar. Rep.* 105. *Grant v. U. S. Bank*, 1 *Caine's cas. in Er.* 112. *Phenix v. Assignees of Ingraham*, 5 *J. R.* 412. *Hunt & Blanton v. Stevenson*, 1 *A. K. Marsh.* 570. *Mosely v. Armstrong*, 3 *Mon. Rep.* 288. *Graham v. Sublett*, 6 *J. J. Marsh.* 44. *Collier v. Chapman*, 2 *Stew. R.* 168. *Singleton v. Gayle*, 8 *Port. Rep.* 270. *Haywood v. Conall*, 4 *Har. & John.* 518. *Jones v. Hardesty*, 10 *Gill & John.* 405. 1 *Stark. Ev.* 284. 1 *Bibb.* 200. 2 *ib.* 470. 9 *Cranch* 156. 1 *Russ. & Myl. Rep.* 200. The case of *Field v. Holland* (2 *Cond. R.* 290) is only that the answer of a defendant may be used by his co-defendant, claiming through him, as to matters which both were called on to answer, in relation to transactions before the sale. The case

of *Osbourn v. U. S. Bank*, (5 *Cond. Rep.* 754) was that of a *pendente lite* purchase, and might have been applicable if Trapnall had been the owner of the judgment instead of a mere agent or attorney, and the transfer had been made after the answer. That the statement of a vendor after the sale cannot affect the title of the vendee. *Gullelt et ux. v. Lamberton*, 1 *Eng.* 10. *Humphries v. McCraw*, 4 *Eng.* 91. 3d. But if the agreement had been alleged and established, it formed no ground for relief against Beebe. The effect of the agreement was not to waive any lien, nor to confine the lien to the "corner" property; but if other property was sold under the judgment, as might have been the case, Beebe would lose the proceeds of the judgment: and if any injury should result to Whiting & Slark by a sale of the corner property, when there was other sufficient property, they might, by injunction, have compelled Beebe to resort to the other property for the satisfaction of the judgments, as in the case of *Screesbough v. Willard*, 1 *John. Ch. R.* 409.

V. The next ground taken by Whiting & Slark is, that they are still entitled to have the securities marshaled. If the junior creditor fails to take proper steps to have the sale enjoined, and permits the property to be sold, he cannot afterwards have the securities marshaled—he can avail himself of this remedy only before the sale under the prior liens. *Drake et al. v. Collins*, 5 *How. R.* 252. But even if the securities could be marshaled after a sale under a prior lien, they could not have been under the present bill, because De Baun's vendees, Pendleton, Sabin and Le Baron, each of whom had a prior lien and equity to Whiting & Slark, were not made parties to the bill. If Whiting & Slark had enjoined the sales, they could not have had a decree marshaling the assets, because the property was sold under the order of De Baun, in the manner most conducive to their interest, and in the manner prayed by them. Whiting & Slark could not have had the securities marshaled in a manner injurious to the alienees of De Baun, whose rights were acquired prior to their interest. The rule in relation to marshaling assets, proceeds upon the principle that full justice may be done to all the

parties without prejudice to any. *Briggs, Gacostor & Co. v. The Planters Bank, Freeman (Mis.) Ch. Rep.* 574. *Woodcock v. Hart,* 1 *Paige Rep.* 185. *Brickenhoff v. Marvin,* 5 *J. Ch. R.* 320. *Everstone v Booth,* 19 *J. R.* 485.

VI. It is contended that Beebe's purchase was void in consequence of the *lis pendens* created by the filing of the original bill of Whiting & Slark. But Beebe was no party to the bill until long after his purchase: and the effect of a purchase *pendente lite* is not to render the contract void, but merely that the purchaser is chargeable with notice and is bound by the decree against the person from whom he derives title without being made a party. *Story Eq.* 394. 2 *Mad. Ch.* 189. *Bennett v. Williams,* 5 *Ham. (Ohio) Rep.* 460. And the rule applies only to voluntary alienations. *Story Eq. Pl.* 284.

VII. It is objected that the lien of the Gray & Bouton judgment was waived by the delay, and by ordering the execution to March term, 1843, to be returned. That the lien of the judgment is not waived by delay in issuing executions, see *Ranken v. Scott,* 12 *Wheat.* 177, *S. C.* 6 *Cond. Rep.* 504. *Green v. Allen,* 2 *Wash. C. C. R.* 280.

VIII. It is contended by Whiting & Slark, that the rule that mere errors in a sheriff's sale will not vitiate it, is confined to cases where the purchaser is a third person, who purchases without notice, and does not apply where the plaintiff is the purchaser, and that as Beebe was the owner of the judgments, any irregularity or defect in the proceedings is sufficient to vacate his purchase. None of the proceedings are shown to have been erroneous. Notice of defects can have no effect upon the sale. Notice only applies to cases where a party makes a purchase with knowledge of a fact which renders it fraudulent; for example, where a party purchases with notice that the judgment has been paid. That the general rule which protects sales unless the proceedings are absolutely void, applies as well to the plaintiff in the execution, as a person having notice, as to a stranger without notice, *vide Drake v. Collins,* 5 *How. (Mis.) Rep.* 253. *Matthews v. Thompson,* 3 *Ham. (O.) Rep.* 272. *Spafford v. Beach,* 2

Doug. (*Mich.*) *Rep.* 150. 4 *Mon. Rep.* 465–474. *Ontario Bank v. Hallett*, 8 *Cow. Rep.* 548. *Reynolds v. Cross & Douglass*, 3 *Caine's Rep.* 267. Where process and proceedings are merely erroneous and voidable, the same can only be avoided by the party, and he cannot make the objection collaterally. 16 *J. R.* 537. 1 *Cow.* 736. 3 *Lev.* 403. 2 *Sutw.* 925. *Cro. Eliz.* 188. 1 *Salk.* 273. 8 *J. R.* 361. 5 *How.* 253. 2 *Ala.* (*N. S.*) 670.

IX. It is objected that the revival of the judgment of Gray & Bouton did not continue the lien, notwithstanding the *sci. fa.* was issued and served before the expiration of the lien. The case of *Mowers v. Kip*, (2 *Edw. Ch. Rep.* 166), was decided upon a statute wherein there is no provision, as in ours, for a continuance of the lien beyond the time limited. Our statute, *Dig. ch.* 93, enacts that "if a *scire facias* be sued out before the termination of the lien of the judgment or decree, the lien of the judgment shall have relation to the day on which the *scire facias* issued," "and the lien *continued* for another period of three years, and so on from time to time as often as may be necessary." *Secs.* 13, 12: and the construction of the statute is settled in the case of *Hubbard v. Balls et al.*, 2 *Eng. R.* 442.

As to combination between Beebe and De Baun, the record clearly shows that if there was any combination, it was between De Baun and Whiting & Slark to defeat Beebe.

As to uncertainty in the return of the sheriff on the execution; the defect, if any, could be supplied by parol, and at all events the description in the deed is sufficient. See 4 *Wend.* 462. 2 *Marsh. Rep.* 256. 3 *Ohio* 272. 9 *Porter* 205. 5 *Ohio* 524.

Independent of all his other claims, Beebe is entitled to hold the land under his tax titles. The conveyances are regular; and if any facts exist which would avoid these conveyances, they are not put in issue.

This cause was further argued at length by PIKE, on the cross-bill of De Baun; and by WATKINS & CURRAN, contra.

Mr. Justice WALKER delivered the opinion of the Court.

In the investigation of the numerous questions which arise in this complicated case, we find it most convenient to dispose of them in the order in which they are presented on the record, referring to the facts as they stand in connexion with the particular points raised.

De Baun, a resident of the county of Pulaski, was, in the year 1840, the owner of a large amount of real estate, situate in said county, and was indebted to numerous creditors, who then, and subsequent to that time, obtained judgments against him, or secured the payment of their debts by mortgages and deeds of trust, thereby creating liens on his real estate, according to date of record. Prior in date was the judgment of Gray & Bouton, rendered the 23d March, 1840; that of Lewis Beach next, rendered the 27th March, 1840; and next in order was the mortgage of Whiting & Slark, (the complainants.) filed the 13th February, 1841.

As the first and most important question grows out of the contest between Whiting & Slark and Beebe, for the property embraced in the mortgage, and upon which there existed prior judgment liens in the above cases, it is not important at this time to enumerate the other claims. They will be referred to as they incidentally arise. Whiting & Slark claim under their mortgage, and as purchasers under senior judgment liens of Gray & Bouton and Beach, at the May term, 1843. Beebe, on the other hand, contends that the sales at the May term were void, and that he, at the November term, 1843, acquired a valid title by purchase under these, and other liens, senior in right to the claim under the mortgage.

Our first inquiry is, did Whiting & Slark acquire such title under their purchase at May term, 1843?

Writs of *fieri facias* issued on the Gray & Bouton and Beach judgments, on the 19th of February, 1841, which were levied on real estate and returned without sale: subsequently writs of *venditioni exponas* issued with clauses of *fi. fa.*, which were levied on

the mortgaged property. These writs were also returned without sale; and in the case of Gray & Bouton a writ of *ven. ex.* issued, directing the sale of the property first levied upon alone. In the case of Beach, a writ of *ven. ex.*, directing a sale of the property first levied upon, with a clause of *fi. fa.*, which was levied on the mortgaged property. Under these writs, Whiting & Slark purchased and claim title.

To the validity of this title, it is objected, first: That the original *fi. fa.* issued in favor of Gray & Bouton was void, because it was not signed by the Clerk. The writ was valid, endorsed and perfect in every other respect.

We have repeatedly held original writs void for this and like defects. The question comes up for the first time as to the effect of like omissions in judicial process, with regard to which there is said to be a marked difference. The first is connected with the inception of the suit. It is that by which the defendant is brought into court. It is the ministerial act of the Clerk, before the Court has gained jurisdiction of the party or the case. The latter is an act after the Court has acquired full jurisdiction of the whole case and the parties, who are presumed to be present and privy to what transpires. In the latter class of cases, such defects as this have almost invariably been amended. *Campbell v. Styles*, 9 *Mass. Rep.* 218 *Young v. Hesmer*, 11 *id.* 90. *Brummell v. Rush*, 10 *id.* 222. 2 *Brock.* 14.

In the case of *The People v. Sherborn*, 5 *Wend.* 103, where a wrong seal had been affixed to a writ of certiorari, an amendment was permitted by affixing the proper seal. So where a writ of *scire facias* had no seal one was affixed. *Chamberlain v. Skinner*, 4 *Cow. Rep.* 550. And where a *fieri facias* issued without a seal, it was amended by affixing the proper seal. 3 *Green.* 29, *Sanger v. Baker*. And this even after levy and sale of property. 1 *Iredell* 34.

And in a very late case, *Brewer v. Sibley*, 13 *Met.* 176, DEWEY, Judge, held that, although a seal was one of the requisites of a proper writ, yet the want of it furnished no cause for a motion in arrest of judgment, and said, "It is a mere defect in form which

if relied upon, must be taken in due season, and if not thus taken, the exception is waived." And the teste of writs, whether original or judicial, have almost invariably been held amendable. *Bronson v. Alpin*, 1 *Cow.* 203. *Ross v. Luther*, 4 *Cow.* 158. *Barber v. Smith*, 4 *Yeates* 185. *United States v. Camp*, 5 *How.* (*Miss.*) 516. *Shumaker v. Knorr*, 1 *Dallas* 197.

And in the case of *Nash v. Brophy & Truler*, 13 *Met.* 478, SHAW, Chief Justice, said, "The allowance of the amendment of the writ, so as to make it bear teste of Daniel Wells instead of John M. Williams as Chief Justice, was right and fully authorized by the Revised Statutes." "The teste is a mere matter of form." *Ripley v. Warren*, 2 *Pick.* 592. It is worthy of remark in these latter cases, that the constitution of Massachusetts requires that writs shall bear teste in the name of the Chief Justice.

And in the case of *Davis v. Wood*, 7 *Misso. Rep.* 164, where their constitution, like ours, required that "all writs and other process should run in the name of the State, bear teste and be signed by the clerk of the court from whence it issues," the question was whether an execution, which did not run in the name of the State, could be read in evidence. The court in that case said, "It may well be questioned whether that clause which directs that all writs and other process shall run in the name of the State, as it also requires all writs to be tested by the clerk, is not applicable alone to writs issued from the higher courts and courts having a clerk. But however this may be, the statute concerning writs directs that those emanating from justices' courts, shall run in the name of the State. In our government, jurisdiction is conferred by the constitution on the superior and inferior courts, and writs are only part of the machinery employed by the courts for the exercise of the jurisdiction with which they are invested. It is not perceived how a writ wanting a constitutional requisite is more defective than a writ wanting a statutory one. The constitution, as well as the statute, is merely directory, and neither the one nor the other expressly makes void a writ not in conformity to its provisions."

And in a case like the one under consideration, where the writ

only lacked the signature of the clerk to make it perfect and formal, it was held by the Supreme Court of Indiana amendable. *Woolbright v. Wise*, 4 *Blackf.* 137.

These various instances of amendment will suffice to show the opinions entertained by most of the American Courts.

We are fully aware of the close connection in principle between this case and some of our former decisions upon the question involved. And whether, if this court was now for the first time called upon to construe the constitution and the statute prescribing the requisites of a writ, and to decide how far and under what circumstances writs would be declared void or amendable, it would adopt a more liberal rule of construction than that heretofore established, we are not called upon in this case to declare. But in the case before us, where judicial process is the subject of consideration, in view of the enlarged powers of courts in amending such process (and no statute confers more ample authority for that purpose than ours does) we are of opinion that although a writ without a signature of the clerk, as required by the constitution, is erroneous, yet it is not necessarily void, and the court from whence it issued, upon application for that purpose, might either quash or amend it as the circumstances of the case might require.

There can be no doubt but that some of the former decisions of this court were made under an erroneous impression with regard to the effect which the constitution had upon the validity of the process, that as the constitution required the signing, &c., it could not be dispensed with, and being a constitutional defect is void. Now, upon a moment's reflection, it will at once be perceived that a directory enactment of the constitution is of no more validity as a law than a like enactment by statute. Both are laws, though emanating from different law making powers. The only difference between the two is that the legislature cannot pass a law dispensing with the requisites prescribed by the constitution, whilst it could repeal that made by its own body. In other respects, they are equal. Instead therefore of looking to these, the true inquiry is, is the writ so totally defective as not

to perform the offices of a writ, and what will be the effect of the amendment upon the rights of the parties? The writ in this case being amendable, when collaterally questioned, as this is, will be considered as amended. *Stevens v. White*, 2 *Wash. Rep.* 203.

The next question presented for consideration is, as to the effect of an undischarged, subsisting levy on land. It is contended on the one side that a subsisting undischarged levy, whether upon goods or land, is a satisfaction of the judgment until discharged according to law and found insufficient. On the other side, it is said that such is not the effect of a levy, or if such should be its effect when made on personal property, that the rule does not apply to a levy on land.

There are but two writs given the creditor by the common law for enforcing satisfaction of his judgment; that of *fi. fa.*, by which he levied on the goods of the debtor, and *levare facias*, by which he not only took the goods, but also the issues and profits of the land. By statute, he was allowed also the writ of *ca. sa.* against the body of the debtor, and the writ of *Elegit* against his lands: (*Plow.* 441;) and the levy on goods. (*Clerk v. Withers*, 2 *Ld. Raym.* 1072;) the arrest of the body of the debtor, (*Foster v. Jackson*, *Hob.* 124;) and the delivery of a moiety of the land. (*Bri. Err.* 257,) were each held an unqualified satisfaction of the judgment. And the rule as laid down in the case of *Clerk v. Withers*, was recognized by most of the American courts for a long while. Thus in New York, KENT, Chief Justice, in the case of *Denton v. Livingston*, as early as 1812, recognized and approved the decision in that case, after which for 27 years, in a series of uniform decisions, it was adhered to, until, in the case of *Green v. Burk*, 23 *Wend.* 490, COWAN, J., for the first time in that State, questioned the propriety of the rule in its unqualified sense, after which BRONSON, C. J., in the case of *The People v. Hopson*, 1 *Denio*, distinctly announced a change in the rule, which has since been generally acquiesced in by most, indeed all of the courts of the United States, so far as we are advised. In that case, he said, "If the broad ground has not yet been taken, it is time it should be asserted, that a mere levy on sufficient personal property,

without any thing more, never amounts to a satisfaction of the judgment. So long as the property remains in legal custody, the other remedies of the creditor will be suspended. He cannot have a new execution against the person or property of the debtor, nor maintain an action on the judgment, nor use it for the purpose of becoming a redeeming creditor."

It would be a useless consumption of time to refer at length to the numerous decisions which substantially affirm this decision. *Kershaw v. Merchant's Bank New York*, 7 *How.* (*Miss.*) *Rep.* 386. *Walker v. Mc Donald*, 4 *S. & M.* (*Miss.*) *R.* 133. *Laslie v. Moore*, 1 *Blackf.* 226. *McIntosh et al. v. Chew et al.*, *id.* 286. *Murry v. Ashton*, 7 *Blackf.* 289. *May v. Hollingsworth*, *id.* 350. *Merchants Bank v. Kempley*, 2 *Doug. R.* 279. *Reynolds et al. v. Executors of Rogers et al.*, 5 *Ohio* 174. *Miller v. Estel*, 8 *Yerg.* 450. *Hopkins v. Chambers*, 7 *Mon.* 260, are all cases in point. So that we may say, so far as a levy on personal property is concerned, that the question is settled. Indeed the counsel seem to have virtually conceded the rule to this extent, but argue strenuously that it does not apply to a levy on land. Because, they say, the reason upon which the rule rests in regard to levies on goods, does not apply to levies on land.

Is this true? The officer acts under the same authority. The property whether lands or goods is alike liable to be levied on; every act necessary to constitute a valid levy in the one instance is also necessary in the other. In either, the officer in making his levy identifies, sets apart and estimates the value of the property taken. When this is done, the levy is complete. It is not necessary to the validity of the levy that the sheriff should take actual possession of the goods. *Ray v. Herbert*, 19 *Wend.* 495. It is all sufficient, if he has the goods within his power at the time. The officer by virtue of his levy, acquires a special interest in the goods arising out of his obligation to protect them and hold them subject to sale. This interest is common to bailees, yet they have no title for any other purpose than that of protection. The property is in the custody of the law. The sheriff is its officer. The title is not changed but remains in the debtor until it is sold,

just as the title to land does. Can it be said then that, because the officer exercises this right, which it is unnecessary for him to exercise, when the levy is on land, the whole legal effect of the levy is changed. The old rule was not based on a change of possession but of title. The modified rule abandoned the reason and the rule together, and left them on the same footing. Thus in the same opinion, in which the rule is changed, the court denies to a levy the effect before then given to it. It is there said, "the mere levy neither gives any thing to the creditor nor takes any thing from the debtor. It does not divest a title. It only creates a lien on the property."

The old rule that a levy was an absolute satisfaction, was established by this process of reasoning. That a levy divested the owner of the possession of his goods, and that possession under the levy was in law a change of title to the property, and as the debtor had lost his title to the property, that the debt was satisfied. The modern decisions, we have seen, hold that a levy and possession under it produce no such effect, and are not an absolute but a *prima facie* satisfaction. Possession then was only relied upon under the old rule in connexion with the levy as effecting a change of title. Beyond that, it was a mere matter of convenience or inconvenience to the holder, for the law, as now settled, is that a "levy neither gives any thing to the creditor nor takes any thing from the debtor." It does not divest a title but merely confers a right to sell; and this right to sell is alike conferred in all cases whether made on goods or land; and as lands and goods are placed on an equal footing as to the effect of the levy, they must be equally so as a satisfaction; and to concede the rule of *prima facie* satisfaction in regard to goods, is, in principle, to concede it also in regard to lands, for as the possession does not confer any quality upon the levy which makes it a change of title to the property and thereby a satisfaction, possession ceases to be more than a mere question of convenience with the debtor, with which the creditor has nothing to do.

So, under the English and American practice, where lands were taken by *eligit* or *levare facias*, as in the case of *Ladd v. Blunt*,

they were held to be a complete and unqualified satisfaction, and upon the same grounds which a levy on goods was so held, the change of title to the property. And this was the case with regard to a levy on lands by *fi. fa.* until the case of *Shepperd v. Rowe*, 14 *Wend.*, where for the first time the distinction was made between the effect of a levy on land and goods. That case is entitled to particular attention as the earliest and leading case for the distinction contended for. Let it be borne in mind that up to that date and in that case and long after, the courts of New York held a levy on goods an absolute satisfaction and extinguishment of the judgment. And in that case admitted such to be the effect of a levy on goods. They denied, however, that a levy on lands went to that extent. The court in that case said, "by the levy on goods, the debtor is deprived of his property; it is not so in the case of a levy on real estate, the debtor notwithstanding the levy holds the title and the possession, and is in the enjoyment of the profits of the land." And again the court says, "The defendant is not without a remedy, for the court on application would stay the suit on the judgment until the sale and return of the execution. We cannot allow, however, a seizure and levy of execution on land to be *per se* an extinguishment of the judgment." Thus, it is distinctly announced that the Court would have stayed the proceeding on the judgment until the sale and return of execution, but would not allow it the effect to extinguish the judgment, as they would had it been a levy on goods instead of land, but they gave it all the effect which was allowed to a levy on goods according to the rule as subsequently settled in the case of *Green v. Burk*, and *The People v. Hopson*. It materially weakens the force of the decisions after this case, which deny that a levy on land is even *prima facie* a satisfaction of the judgment, when it is seen that in almost every instance they quote this case as authority for their decisions, and assign as a reason for the distinction the temporary possession of the property by the officer, between the levy and the sale, the mere exercise of a right resulting from the levy.

An attempt is made in argument to weaken the force of a levy

on land because the judgment lien existed at the time it was made. It is true that there is a general lien thereby created on all lands of the debtor, and it is equally true that, from the delivery of the writ, there is a general lien on all the goods of the debtor: these general liens must in either case necessarily exist at the time the levy is made. But the necessity of the levy is just as great in the one case as in the other. In order to effect a sale of either, it is necessary to select, identify and set apart the particular property taken in satisfaction of the judgment. The creditor is not permitted to take all the property, because it is all bound for his debt, but in the language of his writ, "sufficient to satisfy the debt," and it is, we apprehend, this setting apart and taking in satisfaction which constitute it a satisfaction. The claims or demands of the law on the debtor are then satisfied. To illustrate this point: Suppose A. should covenant with B. that out of his whole estate of land and negroes, B. should select and set apart enough to satisfy his demand of $1,000, to be sold at the expiration of thirty days, unless before that time A. should pay the $1,000, A. reserving to himself the right to say whether land or negroes should be set apart, and also what particular slaves or tracts of land should be taken, provided it should be sufficient in value to satisfy the debt. Upon this covenant, B., in the first instance, would hold a general lien or right to select out of the whole estate of A. This the covenant gives; it is no satisfaction; but when A., in the exercise of his reserved right, points out the property to be set apart and taken, B. is bound to take that alone if of sufficient value, and when taken, the covenant is satisfied, and he cannot come back on A. for other property until it is ascertained by sale that that given up is not sufficient. Nor does it at all change the result that land is given up which B. could not take into actual possession or slaves which he could. Should B. after this, return and take other property of A. before disposing of the first, he would certainly be a trespasser, and if so in the case stated, why not in the case of a levy? The execution was in the first instance a lien on the whole estate of the debtor; the law gave to the creditor a right to have out of his whole estate,

whether of land or goods, sufficient taken and set apart to satisfy his debt and constitutes the officer his agent to do this, but at the same time gives to the debtor the right to say which particular piece of property shall be taken, whether real or personal, and if of sufficient value denies to the officer the right to take any other. Can it be less a satisfaction of the demands of the law because it is land which cannot be removed into possession of the officer? If the creditor may abandon this land, after he has accepted it as satisfaction, and come upon the debtor's property again, is it not evident that he could in the first instance have refused to accept it as satisfaction, for then he had not accepted, yet the law says he shall take it if of sufficient value, and that alone.

We must believe it a violation of law and the rights of the debtor to return upon him for a further satisfaction until the first is found to be insufficient, in due course of law, and if this right to abandon a levy and return upon the debtor be conceded in one instance, where is it to stop? Upon the same grounds, the creditor might return upon the debtor until his whole estate would be either encumbered or withdrawn from him. The statute has expressly provided against this, and this course of reasoning would result in its virtual repeal.

We have been referred to an array of decisions which, it is said, uphold the distinction between the effect of a levy on goods and land. Upon reviewing them, it is found that 14 *Wend.*, 4 *Hill*, 5 *Ohio*, 10 *S. & M.* (*Miss.*), 4 *Mass.*, 9 *Serg. & Rawle* 16, are the only cases in which the question of a levy on lands was presented. The other cases turn upon other points. Thus, in 2 *Ark. Rep.*, the question was whether a levy on the goods of one defendant which were subsequently re-delivered to him without sale, could be pleaded in satisfaction of the judgment by a co-defendant. 5 *Gill & John.* was not a case of levy on land; so far as may be learned from the record, nothing whatever is said about land, or the effect of a levy upon it. 23 *Wend.* was a case of a supposed levy on personal property, it turned out, however, that there was no valid levy made. The case of *Miller v. Estill*,

8 *Yerger* 460, since decided in Tennessee, holds a different doctrine from that contended for by counsel in 5 *Yerger;* 2 *Dev.* was a case of a levy on a lot and slaves; 2 *Douglass* was a case of a levy on goods; 9 *Serg. & Rawle* was a case under the Pennsylvania statute where recognizance was entered into which operated as a stay on the judgment. After the stay had expired, execution issued and was levied on land, and returned without sale, suit was brought on the recognizance; the court held that the creditor has his election to proceed on the judgment or the recognizance, and if on the latter the levy was no satisfaction and could not be so plead, and also that such would have been the effect as between the parties to the original judgment. The same court, in the case of *The Bank of Pennsylvania v. Lalshaw*, 9 *Serg. & Rawle* 9, held that a levy on land could not be abandoned whilst in force, so as to permit a *ca. sa.* and arrest of the person of the defendant. It is true that importance is given to the statute in regard to issuing writs of *ca. sa.*, yet in spirit that statute is not more stringent than ours, which denies any other satisfaction than the property selected by the debtor, if of esteemed sufficient value. So that, taken all together, the decision in this case is of doubtful authority. The case of *Shepperd v. Rowe*, 14 *Wend.*, has already been examined. It went no further when fairly considered than to place a levy on land just where the subsequent decisions placed a levy on goods. The case in 4 *Hill* was decided upon the authority of this case alone, and doubtless without a close examination of it. The case in 5 *Ohio*, clearly makes the distinction contended for, but is placed distinctly upon the ground of a change of possession of the goods in the one instance and not in the other, and quotes as authority the English authorities, the early New York authorities and the case of *Ladd v. Blunt*, 4 *Mass.*, all of which cases upheld and sustained the doctrine of absolute satisfaction, and were made before the rule had been modified as it was in the case of *Green v. Burk*, 23 *Wend.*, and all the after decisions. This change of possession in all these cases was closely associated with an idea of change of property, indeed supposed to have that effect. So far as the

case of *Ladd v. Blunt*, could be held as authority in regard to a levy on land, it will be seen that that case was governed by a statutory proceeding in the nature of *Elegit*, the writ of *Extendi Facias* by which the property was delivered up to the creditor without sale; but even that too was considered and upheld on the ground of change of property. 10 *S. & M.* (*Miss.*) *Rep.*, is a case fully in point. It was made without reference to authority, and fully sustains the position assumed by counsel.

After reviewing these authorities then, we find the Courts of New York, upon the credit of *Shepherd v. Rowe*, 14 *Wend.*; of *Ohio*, upon the authorities of the old cases which rested the rule upon a supposed change of property effected by a levy; the Mississippi and perhaps the Maryland courts may be said to sustain the distinction between the effect of a levy on goods and land. And opposed to these decisions, are the courts of Kentucky and Indiana, Michigan and Tennessee, as will be found by reference to the cases of *Hopkins v. Chambers*, 7 *Mon. R.* 262. *Lessell v. Moore*, 1 *Blackf. R.* 226. *McIntosh et al. v. Chew et al.*, *id.* 289. *Miller v. Ashton*, 7 *Blackf.* 30. *Marcy v. Hollingsworth*, *id.* 350. *Safford v. Beach*, 2 *Day* 153. *Miller v. Estill*, 8 *Yerger* 460.

Thus, in the case of *Hopkins v. Chambers*, it is said, "The first execution on the bond was levied upon a tract of land which does not appear ever to have been sold or released from the execution, and of course no other execution could regularly thereafter issue to take other estate of the defendant, whilst the land seized under the first remained undisposed of and subject to that execution." In *Lessell v. Moore* it was held "that where real estate of the defendant was held by a *ven. ex.*, the plaintiff could not take out an execution of *fi. fa.* and levy on other property, and if done the Court would set it aside as illegal." In *McIntosh v. Chew* it is held "that a levy on goods or land is a satisfaction of the judgment, and may be pleaded in bar of any other action until the insufficiency of the levy appear by sale and return." And so in *Miller v. Ashton;* and in *Marcy v. Hollinsworth*, it was held "that after *fi. fa.* levied on land and before the levy is disposed of, if a second *fi. fa.* issue, it is irregular and void." In the case

of *Safford v. Beach,* although the court denies to the levy the same effect as if made on goods, yet it still treats a second levy as an irregularity, for which even a sale under it might have been set aside upon motion for that purpose in due time, but that a motion after five years was too late. In *Miller v. Estill,* the Court deny to the levy on land the same effect as if made on goods, but hold it to be the inception to a right of satisfaction. From this hasty review of these decisions, it will be seen that the courts of Kentucky and Indiana, in full and unqualified terms, sustain the former decisions of this Court in *Anderson v. Fowler,* and *Anthony v. Humphries,* whilst the later cases in Michigan and Tennessee in qualified terms, but in each case the qualification grows out of an effort to discriminate between absolute and qualified satisfaction, which they concede to be the effect of a levy on goods but deny to a levy on lands the same effect; just as in the case of *Shepherd v. Rowe.*

Upon a review, therefore, of all the authorities on both sides, to which we have had access, it is evident that, if resting upon the number of decisions by the several State courts the preponderance might be in favor of the distinction, the strength of the argument and reason for a different conclusion is however against the distinction; but even if otherwise, unless clearly so, we would not feel at liberty to change the rule as laid down in *Anderson v. Fowler,* and we are far less inclined to do so, when we come to consider the effect which a different rule would have upon the rights of the debtor secured to him by statute, as well as the inroad which it would make upon a general principle which seems to pervade our whole system, that the creditor is entitled to but one satisfaction, and that when he elects which he will take, he shall be bound by such election.

Our statute gives to the debtor the privilege of selecting the property to be surrendered in satisfaction, and if of sufficient value it denies to the creditor the right to take any other. This may be and often is an important privilege to the debtor, a shield thrown around him to protect him from oppression and wrong, and at the same time does no injustice whatever to the creditor,

for it is of no consequence to him what particular property is taken, so that it is of value sufficient to pay his debt. Lands and personal property are alike liable to be taken. The debtor has a right to give up either, and when selected and accepted they alike satisfy the demand of the law, and there is no way by which to preserve unimpaired the provision of the statute, without so considering them. Rid this question of satisfaction of the mistification which is thrown around it by atttempting to connect with it reasons and considerations which were alone applicable to the rule of absolute satisfaction, and it amounts to this, that as the law recognizes but on satisfaction, when the creditor comes upon his debtor for the amount of his debt in money, or property, sufficient, when sold, to bring the money, and takes at his discretion in value property sufficient for that purpose, the property in effect stands until it is sold and the money made, in the place and stead of that much money, and must be presumed to be enough—the creditor has accepted it as such—and it has fully satisfied the demands of the creditor upon the debtor (until upon sale it otherwise appears) as payment would, and where this property is in the mean time, whether in the hands of the officer or immoveable as lands are, has nothing whatever to do with satisfaction; if lands, it is if any thing the more satisfaction, because not subject to waste or total destruction as goods are, and as to this matter of inconvenience in taking from the debtor his property and special property in the officer and change of title, however they might have served as reasons for the old rule of satisfaction in the absence of statute such as ours, yet surely when we consider that the debtor has his election to give up whatever property he chooses and does so, being his own voluntary act whether the one or the other, is matter of choice and convenience to him.

Thus considered, the rule for which we contend harmonizes with a train of decisions upon other branches of the same subject.

The law gives to the creditor the right to select which of the several means of enforcing satisfaction he will avail himself of, but when he has made such selection, will never permit him to abandon it capricously. He may prefer to take his debtor into

custody on *ca. sa.*, and whilst so held all other satisfaction is denied him. But if the debtor should escape, the creditor may resort to other process for his satisfaction. *Taylor v. Thompson*, 5 *Peters* 358. So the creditor may elect to take goods by *fi. fa.* in satisfaction, and when he has done so, the satisfaction is precisely the same in principle as if he had taken the body of the defendant in custody, whilst he holds them in execution the law gives him no other indemnity. But should they by acts not the fault of the creditor be lost to the debtor or appropriated according to law, and found insufficient, then on the same principle that the escape of the debtor from prison entitles the creditor to further process, he he may sue out an alias *fi. fa.*, yet like a voluntary discharge of the debtor from custody, if the goods are appropriated or wasted by the acts of the creditor, or his accredited agent, the satisfaction would become complete, at least to the amount of the value of the goods so wasted. *People v. Hopson*, 1 *Denio* 578. So, also, where a levy is made and a delivery bond (which by statute has the force of a judgment when forfeited) is taken and forfeited, the levy is discharged and the bond so forfeited held to be a satisfaction of the former judgment. *Taylor v. Dundass*, 1 *Wash.* 94. *Cook v. Pills*, 2 *Munf.* 153. *Lusky v. Ramsey*, 3 *Munf.* 433. *United States v. Graves*, 2 *Brock.* 385. *Joyce v. Ferguar*, 1 *A. K. Mar.* 20. *Justices of Mason County v. Lee, id.* 248. *Chitty v. Glenn*, 3 *Mon.* 425. *Young v. Reed*, 3 *Yerger* 298. *Davis v. Dickinson*, 1 *How.* (*Miss.*) *Rep.* 68. *McNutt et al. v. Wilcox & Fearn*, 3 *How.* (*Miss.*) *Rep.* 419. *Sanders v. McDowell's ad'm.*, 1 *How.* (*Miss.*) *Rep.* 9. *Minor v. Lancashire*, 4 *How. Miss.* 350. *Wanger v. Baker, id.* 369. *United States v. Patton*, 5 *How. Miss. R.* 280. *Barker v. Planter's Bank*, 5 *How. Miss. Rep.* 566. *Field v. Moss & Harrod*, 1 *S. & M. Rep.* 349. *Barns Ex. v. Stanton et al.*, 2 *S. & M. Rep.* 461. *Clark v. Anderson*, 2 *How.* 852. *Stewart v. Fergua, Walk. R.* 175. *Connell v. Lewis, id.* 251. *Annis v. Smith*, 16 *Peters Rep.* 304. 4 *How. U. S. S. C. Rep.* 12. Yet should the bond be quashed, the effect thereof would be to revive the former judgment just as setting aside the first judgment would revive

the original cause of action which had been merged in it, and which remained so, so long as the judgment was in force.

And so effectual is this satisfaction that after a delivery bond has been taken and forfeited, it has been held that a second execution, levy and bond on the original judgment are void. *Witherspoon v. Spring*, 3 *How*. 60. In *McNutt v. Wilcox & Farne*, 3 *How*. 419, the court said, "The forfeiture of a forthcoming bond extinguishes or satisfies, as it is said, the original judgment, because it is a proceeding arising on it and has in itself the force and effect, and is of equal dignity with a judgment, and a plaintiff is not entitled to two subsisting judgments on the same cause of action against the same individuals. It is like a second judgment obtained by an action on the first; the plaintiff cannot proceed to enforce the first, but must rely upon the second." Chief Justice SHARKEY has here assigned the reason which extends not alone to judgments but to contracts and the process, to final payment, which upon one cause of action looks to one satisfaction, and in each step closes up the avenues to retroaction to final payment. Thus the account is merged in the bond, the bond in the judgment, the judgment in the further judgment, the levy, *prima facie*, satisfied the judgment; and the payment which is the end of the law discharges them all. These various references however are not to be held as settling the rule in either of them, but to illustrate a general principle.

And in precise analogy to this, do we find the same principles pervading our beautiful system of pleading, the prominent features of which are progressiveness, singleness of issue by confession and avoidance, by which, there is secured to the defendant the full benefit of his defence, and yet compels him to abandon his former ground before he shall rely upon another. The law truly "makes no step backward." So satisfaction is a defence—a plea in bar of a recovery. The law gives but one satisfaction, and when the party takes it, he must abide by it if sufficient. It must, however, be sufficient; if partial, it is not a good bar, and as the debtor could not plead it in bar, so the creditor is not bound by it. The law presumes the debtor able to

pay his debts, and commands the officer to take property of sufficient value to make him a full satisfaction. We must presume that he has done this; and therefore, until the levy is legally discharged, it must be considered and held as such. The creditor, until it is shown to be otherwise, can *make no step backwards.*

Such being our views of the effect of the first levy, it necessarily follows that the writs of *ven. ex.* with *fi. fa.* clauses were improperly issued; a simple *ven. ex.*, directing the sale of the property, which, by the return of the sheriff upon the original *fi. fas.* appeared to be in his hands unsold, was the appropriate writ.

We are not of opinion, however, that these writs were absolutely void, or that a sale made of property levied upon under the *fi. fa.* clause of the writ, whilst the first levy remained in force, should in all cases be set aside. Had there been an actual payment and satisfaction of the judgment, there would have been much reason for holding the subsequent writs and sale void, this would have been at least equivalent to a perpetual supersedeas or injunction. Such was not the nature of the satisfaction in this case: it was dependent upon a contingency which might or might not happen. The decision of this Court in the case of *Dixon v. Watkins et al.*, 4 *Eng.* 139, is in principle the same as the one under present consideration. There, an appeal was prayed, and recognizance entered into, the legal effect of which was to stay all further proceedings on the judgment, after which, and before the final determination of the case in the appellate court, the appellee sued out a writ of *retorno habendo.* The question presented under this state of facts was whether a writ thus issued was void or voidable, and this involved the further inquiry as to whether the judgment was annulled by the grant of appeal and recognizance or merely stayed. It was held (and we thing correctly,) that the judgment was stayed, that a legal prohibition rested on the Circuit Court from executing the judgment appealed from, until by the action of the Supreme Court it should be removed by an affirmance or perpetuated by a reversal, and consequently, that process issued whilst this pro-

hibition existed was erroneous and voidable but not absolutely void, as it would have been had the judgment been annulled or reversed. So, in the case before us, the levy upon sufficient property to satisfy the judgment, imposes a legal prohibition upon the creditor to forego all further process of satisfaction until upon appropriation of the property levied, it is found to be insufficient in value to satisfy the judgment. The cases are strictly analogous in principle, and the rule laid down in *Dixon v. Watkins* decisive of this point. The writs of *ven. ex.* with *fi. fa.* clauses, though not absolutely void, were issued whilst a legal prohibition rested on the creditor from pursuing his remedy upon the judgments, and they will be held voidable, and should, on proper application for that purpose, have been set aside. This was not done, however, and we are brought, in the next place, to consider the effect of these errors upon the titles set up by virtue of the sheriff's sale under them.

And, first, of the title of Whiting & Slark, who have filed their bill for a specific execution of their contract of purchase at sheriff's sale. They say, that through their attorney and agent, they bought the property in dispute, being the highest and last bidders for the same; that it was knocked off to them as such, and so entered by the sheriff in his book of sales kept for that purpose, and so also returned by the sheriff on his executions; that the purchase money was in good faith paid, but that the sheriff, subsequently, upon an order of the Chancery Court (which they allege to be void,) setting aside the sales, refused to make to them a deed; that the sheriff still retains the money so paid.

Bills for specific performance are addrassed to the sound discretion of the Chancellor, to be exercised of course under general well recognized principles, and will be granted or refused according to the circumstances of the case presented, when tested by such principles. The first and most important of which is that the contract shall be so certain and definite that it may be clearly understood, capable of being executed, and just and fair in all its parts. And it is said upon high authority (*Story Com. Eq.* 53) that "Courts of Equity will not interfere to decree a spe-

cific performance except in cases where it would be strictly equitable to make such decree." It is not a matter of right then, but of discretion; and it is said by the same author that it requires a much less strength of case "to resist a bill to perform than to enforce a specific performance." This rule harmonizes with another, which is, that the court will not, in many instances, disturb a right acquired, even though it would not have lent its aid for the purpose of enabling the party to acquire it; because at the very point where fraud, illegality and wrong enters, it may cease to be just and fair in all its parts, and for that reason the Chancellor will stop and refuse to lend his aid in the consummation of that which, perhaps, he would not lend his aid to set aside. It is upon this principle that when a purchaser, who has acquired title, and seeks to protect himself against the effect of illegal or fraudulent acts connected with his title, must not only deny all notice at the time of making his contract, but also that he had no such notice at the time he paid the purchase money and accepted the deed, for if he should discover the fraud or illegality before his contract is fully consummated, it becomes his duty to desist at once from all further ratification of the contract, for if he presists in doing so, he becomes a *particeps criminis* in the fraud or wrong, and his plea of innocence and want of knowledge a falsehood.

Turning to the facts of the case on this point, and testing the equitable rights of Whiting & Slark to specific performance, by the rules to which we have adverted, can it be said that they are innocent purchasers, without notice of the legal prohibition which rested on the execution of the process under which they purchased? It is very clear that they cannot, for they not only aver the facts in their bill and make it a ground of equity, but exhibit the writs as part of the bill, and evidence to sustain such allegation. It is moreover shown that their agent, who purchased for them, was well advised of the whole proceeding. They, however, attempt to evade the force of this rule of notice, by setting up the necessity of the act on their part, that they were forced to buy in protection of their rights. It seems, however, from the evi-

dence, that the sale was made in the order dictated by themselves, and at the remonstrance of other parties; nor were they, as they allege, compelled to act for fear of the consequences arising out of the purchase at this sale under the senior liens, for the irregularity of the sale was well known to them, and they are required to take notice of the legal consequences which would flow from such irregularity, and could, by communicating their knowledge to others, have prevented a salé, which could have defeated their junior lien.

Whilst therefore innocent purchasers who buy in good faith without notice, are favorites of Courts of Chancery, and are by them covered with a broad mantle of protection founded in public policy, which is designed to give assurance to purchasers at judicial sales as well as to do justice to the innocent purchaser, yet, this is upon the supposition that in good faith they are such, for at the instant that knowledge is brought home to them, should they still persist in purchasing, public policy not only does not require that they should be protected, but, on the contrary, that their effort at fraud, oppression, or wrong should be rebuked.

Under all the circumstances of the case, the complainants, in the further examination of the case, will be held as purchasers with notice, and thereby connected with the other actors, participants in enforcing the execution of a judgment known to rest under legal prohibition.

There are other grounds of objection to the validity of the sale under those writs, which we will next proceed to notice. The writ in the case of Gray & Bouton, under which the sale is claimed to have been made, was a *ven. ex.* directing the sheriff to expose to sale the property levied upon by virtue of the first *fi. fa.* without any reference to the corner property in dispute and which complainants claim to have purchased by virtue of this and other writs. The question is, (aside from all other considerations,) could the sheriff sell other property under this writ than that set forth in it, and which he was therein commanded to sell.

It has been held upon high authority that the only questions which can arise between an individual claiming a right under the acts done and one denying their validity, are, power in the officer and fraud in the party. *United States v. Arredondo*, 6 *Peters* 729. *Vorhees v. The Bank of the United States*, 10 *Pet.* 478. In the case which we are considering, had the sheriff power to sell the property in dispute? This involves an inquiry into the source and extent of his power. Chief Justice SHARKEY, in the case of *Minor v. The Select men of Natchez*, 4 *S. & M.* 631, investigated this point with much care and concludes his opinion by saying, "The judgment is evidence of the liability of the property, and the execution is evidence of the sheriff's general authority;" and in an earlier part of his opinion he expressly denies that the officer derives his authority from the statute, but limits it to the judgment and execution. He says, "The truth is, the sheriff derives his power not from the statute but from the judgment and execution." And such also was our decision in the case of *Adamson et al. v. Cummins' ad'r.*, reported in 5 *Eng.* 545. Assuming it to be true, then, that the sheriff's power to sell is thus derived, and looking to the evidences of that authority, we find him commanded to expose certain lands to sale, which had been before that time taken in execution. No power is given to levy on other property or to sell property previously levied upon and not embraced in his writ. But it is contended by counsel that, as the judgment created a lien upon the whole of the defendant's lands, there was no necessity for a levy. We have already dissented from the truth of this proposition. But if this be true, for what purpose does the writ of *fi. fa.* issue? Not to place the property in custody of the law if the lien has effected this purpose, nor to ascertain the amount of the debt, the same judgment that gives the lien furnishes the highest evidence of this; nor to confer power to advertise the property, for the law requires this to be done; nor to ascertain what is "sufficient property" to satisfy the debt, for all of the lands are alike bound, and if any part of it is in custody of the law, it is all equally so. In short, there can be, under the doctrine contended for, no pos-

sible use for the writ of *fi. fa.*, and all the statutory provisions in regard to a levy and sale of land under judicial process, is a mere dead letter, for the same law, which places the property in legal custody, upon principle may also be said to confer power on the officer to sell. The sale then would be under the authority of law, and not of judicial process, which would be alike contrary to the statute, the rights of the defendant under its provisions allowing him to select and point out property at his pleasure if of sufficient value, and the opinion of Chief Justice Sharkey and the array of authorities he presented in the case of *Minor v. The President and Select men of Natchez*, as well as our own opinion in the case of *Adamson v. Cummins' ad'r.* In each of which, after full investigation, it was held that the sheriff derived his power to levy and sell property not from the statute but from his writ. The lien therefore, in our opinion, neither supplies the necessity for, nor office of a writ, to which we must look for power in the officer to sell.

It is argued again, if the judgment lien is not of itself sufficient for this purpose, that when a levy is once made the sheriff acquires such an interest in the property as to enable him to sell without a writ after the return day thereof. It is true that there is a rule to that effect in regard to the sale of goods, which was founded on the supposed change of title in the goods by virtue of the levy, and in the fact that they were presumed to be in the sheriff's possession, and the title to which after sale passed by delivery. Yet even this rule when applied to goods (and we will not say that it does not apply to them), was founded upon principles and grounds which no longer exist. The old rule that a levy divested the owner of title to the property, fell with the doctrine of absolute satisfaction. The reasons for the distinction are, that the purchaser of lands at judicial sale derives title from the judgment, the writ and the proceedings under it; and the law requires that such proceedings shall be returned upon the writ and filed as part of the records under which title is derived. Not so in a sale of goods under a levy; they pass by delivery, not by written record evidence. This point, however, is settled by nu-

merous decisions, amongst which are the cases of *Falkington v. Alexander*, 2 *Dev. & Bat.* 87. *Smith v. Spencer*, 3 *Iredell* 265. *Badham v. Cox*, 11 *N. C. Rep.* 458.

And it is equally clear that the office of the writ of *ven. ex.* is not, in the case of the sale of lands, a mere command to hasten the action of the sheriff, to require him to do that which he had power to do independent of the writ of *ven. ex.*; but it confers upon him the power to sell as well as commands him to proceed to do so. The levy was made under the first writ, which, when returned, was *functus officio*. The *ven. ex.* relates back to the *fi. fa.* and the levy and return upon it, and the power of the officer commences under the *ven. ex.* just where the sheriff under the *fi. fa.* stopped. He had levied whilst the *fi. fa.* was in force, but his power was revoked by limitation before sale; the *ven. ex.* therefore does not confer power to levy; that had already been done; but it does confer power to sell, because the power under the *fi. fa.* had not been executed in that particular. These two writs are in fact but one writ, the latter being designed to complete what had been commenced. Hence the recital of the proceeding on the *fi. fa.* in the *ven. ex.*, and following it the command not to levy, but to expose to sale the property heretofore levied upon.

If any doubt could arise from the nature of the trust or the language of the writ, there are many adjudications sustaining the view which we have taken. In the case of *Lessees of Bowl v. King*, 6 *Ohio Rep.* 3, the question arose just as it does in the case before us, as to whether a levy under a void *fi. fa.* could be executed under a valid *ven. ex.* The court said "The valid *vendi.* does not supply the defect of the original *fi. fa.*. The prelude of the *vendi.* is a previous valid writ of *fi. fa.* and a valid levy upon it: there must have been a seizure in execution upon authority to seize. This the *vendi.* could not confer. The direction to sell is not an authority to take." 11 *N. C. Rep.* 458. 4 *Bibb* 344. 4 *Yeates* 108.

We think it evident, therefore, that the sheriff derived his power to sell from the writ and not by force of a previous levy, admitting such levy to have been made under valid process: and that

the writ of *ven. ex.* conferred upon him no power to levy, but simply to sell the lands described in his writ as having been previously levied upon and remaining unsold. It follows therefore that either a levy or sale of other property than that described in his writ, were acts beyond his authority; not an erroneous exercise of power granted, but an assumption of power not granted; and is for that reason void. *Pitman v. Wiscolt*, 19 *John. Rep.* 76. Whiting & Slark therefore could acquire no title under this process.

We will next enquire whether they acquired title under the judgment lien of Beach. The only difference between the writs in this and the Gray & Bouton case was, that the last writ contained also a *fi. fa.* clause authorizing a further levy and sale, if the first should prove insufficient. Several of the questions which might arise on this writ, we have already disposed of whilst considering the like condition of the writs in the case of Gray & Bouton. We will therefore turn our attention directly to the consideration of a point raised with regard to the sufficiency of this writ which may of itself determine its validity and the effect of a sale under it independent of any other consideration.

It is contended that a written release and acknowledgment of satisfaction was entered of record by the plaintiffs by which Thorn, the joint judgment debtor with De Baun, was discharged and that this discharge as to one was in law a discharge and satisfaction as to both.

The record entry is as follows:

Lewis Beach, *Plaintiff*,
vs.
James De Baun & Thomas Thorn, *Defendants*.

Judgment entered 27th March, 1840, for $1,988 50 debt, and costs.

The said defendant Thomas Thorn having arranged and secured to the satisfaction of the attorney of said plaintiffs (Trapnall & Cocke) the judgment in this case, they do hereby and with the consent and agreement of said James De Baun, acknowledge full satisfaction of the said judgment so far as the said Thomas Thorn is concerned, without prejudice to the rights of the said

plaintiff to sue out executions and recover the said judgment and costs of the said James De Baun.

TRAPNALL & COCKE, *Att'ys*
May 27, 1840. *for Plaintiff.*

TEST: LEMUEL R. LINCOLN, *Clerk.*

I, James De Baun, do consent to the above satisfaction in the manner and form as therein provided.

May 27, 1840. JAMES DE BAUN.

This entry is in accordance with the provisions of the statute, *Dig. p.* 625, which authorizes the entry of satisfaction of judgments by the plaintiff or his attorney of record, the 26th section of which provides that a satisfaction entered in accordance with the provisions of the act shall forever discharge and release the judgment. If the discharge had been made by the plaintiffs in person, there is no doubt but that it would have been in law a full satisfaction and discharge as to both defendants; upon the principle that as the creditor is entitled to but one satisfaction, though made by one it enures to the benefit of both. *Coke Litt.* 232, *a. note* 164. *Rowley v. Stewart*, 8 *John.* 209. *Ferguson v. State Bank*, 6 *Eng.* 514. *Bruton v. Gregory*, 3 *Eng.* 180. *Bozeman v. State Bank*, 2 *Eng.* 333. And even where it is expressly understood and is made part of the terms of release and satisfaction, that such shall not be its effect as against other defendants, it has been held to extend to all. 2 *Ham. Ohio Rep.* 263.

In the case before us, the satisfaction was not entered by the plaintiffs but by the attorneys of record; and it is a matter of doubt whether they, for the consideration expressed, could make a release which would bind their clients. We have repeatedly held that any attorney under his general retainer as such could not accept in satisfaction of a money demand, property or depreciated paper. *Jackson v. Bartlett*, 8 *John.* 361. *Nenaus & January v. Lindsey*, 1 *How.* (*Miss.*) 577. *Keller, use, &c. v. Scott*, 2 *S. & M.* (*Miss.*) 82. *Kellogg & Co. v. Norris*, 5 *Eng.* 18. *Norris v. Kellogg & Co.*, 2 *Eng.* 112. *Griffin v. Thompson*, 2 *How.* (*U. S.*) 257. *Codwin v. Field*, 9 *John.* 263. *Johnson v. Cunningham*, 1 *Ala. R.* 258. *Wickliff v. Davis*, 2 *J. J. Marsh.* 71. *Randolph v. Ring*

gold et al., 5 *Eng.* 281. And if the consideration was expressed in the instrument executed by the attorney, it might readily be seen whether in this respect objectionable or not; but the language, whilst full and unqualified as to the discharge of Thorn and the sufficiency of satisfaction, leaves it a matter of doubt whether they were paid in money or property, or whether other security had been given. They say, "Thomas Thorn having arranged and secured to the satisfaction of the attorneys." We may readily infer from the language used that something besides money was received, and this may be met by the presumption that the attorneys would not act without authority, and that they were specially empowered to receive other satisfaction than money; or that they would not have received it. If left without other considerations than such as are to be drawn from the instrument itself, we would very much question the sufficiency of the satisfaction. It appears, however, Beebe, who has succeeded to the rights of the plaintiff by assignment, fully recognizes and affirms this act of the attorneys, and asserts and sets up in his answer, that it is a full and complete satisfaction as to Thorn, and if so as to Thorn then also by operation of law as to De Baun. It is true that De Baun might and in this instance probably has estopped himself from setting up this satisfaction; yet it is not the less true that the satisfaction is complete. Estoppel is not the denial of the existence of a fact, but a denial of the right to interpose it.

It is unnecessary to press this enquiry further. The plaintiff had an undoubted right to recognize and affirm the acts of their attorneys, whether they had at the time power to have thus acted or not; and that they have done so to the fullest extent, is beyond all doubt. And therefore in the further consideration of this case, the judgment, so far as third persons, lien creditors, are concerned, will be considered as satisfied and the lien discharged. Whiting & Slark therefore could acquire no title to the property in dispute under a judicial sale based upon the judgment and excution in this case. There was no valid judgment in force, and of course no valid sale could be predicated upon it.

Having thus disposed of the judgments and the process which

issued upon them, it is apparent that a consideration of the acts of the chancellor or the parties in conducting the sale could in no respect change the result, and would be a useless consumption of time. We will therefore pass them. There was evidently no valid levy and sale of the property in dispute, and of course no specific execution of the contract of purchase should be decreed.

The next question for consideration is, as to whether adverse title to the mortgaged property has been acquired by purchase under senior judgment liens. If so, there is an end to the matter, so far as complainants' title to the property is concerned.

The bill as originally framed was intended to control the order of sales under judicial process, so as to protect the junior lien of the complainants, whose mortgage embraced only a portion of the mortgager's real estate, and to foreclose the mortgage and subject the lots of land to sale for the payment of their debts. Subsequently, the complainants themselves bought under the senior judgment liens, and subsequent to their purchase, defendant Beebe also bought under the same senior liens: whereupon, on leave previously given, complainants filed their supplemental bill reciting in substance the material allegations in their former bill and setting out their purchase under the senior lien and the sale thereafter made to Beebe, which they allege to be fraudulent. They repeat the prayer for the relief asked in the original bill, and that the title so acquired by defendants be set aside, that defendants account for rents and profits, and that the sheriff be compelled to execute a deed to them, or that the court will decree them a title to the property in dispute.

The bill, and the supplemental or amended bill, are to be considered one complaint, setting forth two grounds of equity; the one arising under the claim as purchasers at judicial sale; the other as creditors under a mortgage, junior to several other claimants. Upon the first ground, we have already decided. Our consideration is now to be directed to the rights of the complainants under the mortgage. If there existed a senior lien under which Beebe purchased, then there can be no doubt (u nles the proceedings were void,) that he acquired a legal title to the

property, which can only be overturned by the complainants' superior equity. If, however, there was no such lien, then of course the complainants would become the senior in time, and hold without showing other equities.

Conceding such senior lien on the part of the defendants to exist, (which they deny), complainants say that the lien of Gray & Bouton was discharged by payment of the judgment; and if not by payment, it was suspended by a prior subsisting levy: that the purchase was *pendente lite* and void; and that it was also discharged by the fraudulent conduct of the defendant.

These several grounds of equity we will proceed to examine. Preliminary to this, however, arises a question of the admissibility of evidence. It is contended that Trapnall's answer cannot be used as evidence against Beebe; and upon this point we are referred to authorities. As a general rule, it is true, that the answer of one defendant cannot be used against another. To this rule there are exceptions; one of which is thus laid down in *Daniel's Chancery Pleading and Practice, Vol.* 2, *page* 982: "In case, however, where the rights of the plaintiffs, as against one defendant, are only prevented from being complete by some question between the plaintiff and a second defendant, it seems that the plaintiff is permitted to read the answer of such second defendant for the purpose of completing his claim against the first."

In *Morse v. Royal*, 12 *Vesy* 355, the answer of an executor was offered as evidence against the residuary legatee who had been made a party to the suit, was received to show that funds came to the hands of the executors, what debts there were and the value of the estate. And in a case where the question arose under circumstances very similar to those in the case before us, Chief Justice MARSHALL held, that where one defendant was called upon to discover facts designed to be used by the complainants, to fix a liability on, or defeat the title of a co-defendant, that such co-defendant may use the answer of his co-defendant as evidence against the complainant; and, of course, if the answer had been favorable to the complainant, he might have used

it against the other defendant. As this is the first time the question has been presented for the consideration of this court, it may not be amiss here, to present the precise state of case before Judge Marshall at the time he delivered his opinion, together with a brief extract from it, that its weight, as an authority, may be more clearly felt. Holland, in 1793, obtained judgment against Cox, which, from that date became a lien upon his real estate. On the 3d of September, 1794, Shepperd bought certain lands of Cox, and took from him a deed, by which he acquired a legal title, subject however, to the prior lien of Holland. In 1799, executions issued, and the lands so sold to Shepperd were levied on and bought at sheriff's sale by Chilton—Gibbons, the agent of the plaintiffs, objecting to the sale. The bill was filed by Shepperd against Holland and Cox, Chilton and others, to set aside the sale made by the sheriff, and the deed under it, on the ground, that before the sale so made, the judgment had been fully satisfied. Holland, Cox, Milton, plaintiff, defendant and purchaser, are in the case before us represented by Gray & Bouton, De Baun and Beebe. And Whiting & Slark, that of Shepperd, with this difference, that they held by deed of mortgage, whilst Shepperd held by deed in fee simple. In that case, the question was, whether Holland's answer could be used as evidence for Milton, and in this, whether Trapnall's answer, the representative and agent who transacted the business for the plaintiffs can be used as evidence against Beebe, the purchaser. Under this state of case, Chief Justice Marshall said: "The whole equity of the plaintiffs depends on the state of accounts between Holland and Cox. They undertake to prove that the judgments obtained by Holland against Cox are satisfied. Surely, to a suit instituted for this purpose; Holland and Cox are not only necessary, but proper parties. Had they been omitted, it would be incumbent on the plaintiffs to account for the omission, by showing that it was not in their power to make them parties. Not only are they essential to a settlement, but in a possible state of things, a decree might have been rendered against one or both of them. Nor is it to be admitted, that the answer of Holland is

not testimony against plaintiff. He is the party against whom the fact that the judgments were discharged is to be established, and against whom it is to operate. This fact, when established, it is true, affects the purchasers also, but affects them consequentially, and through him. It affects them as representing him. Consequently, where the fact is established for or against him, it binds them." *Field et al. v. Holland et al.*, 2 *U. S. Con. Rep. page* 290.

And in the case of *Osborn et al. v. The Bank of the United States*, 9 *Wheaton's Rep.* 733, the same court said: "It is generally but not universally true, that the answer of one defendant cannot be read against another. Where one defendant succeeds to another, so that the right of one devolves upon the other, the rule does not apply. Thus, if a defendant die pending a suit and the proceedings be revived against his heir, or against his executor or administrator, the answsr of the deceased person, or any other evidence establishing the fact against him, may be read against his representatives. So, a *pendente lite* purchaser is bound by the decree without being made a party to the suit; *a fortiori*, he would, if made a party, be bound by the testimony taken against the vendor."

Looking to the issue formed, and the relative position of the parties in interest, we think it very clear that the answer does come within several of the exceptions stated: First, as under the exception stated in 2 *Daniel*. The rights of Whiting & Slark as against Beebe, are only prevented from being complete by the question of satisfaction, between complainants and Gray & Bouton and their agent: and in the second instance, as in the case in 12 *Vesy*, 355. The object of the evidence is to show the amount of credit to which the judgment was entitled."

In the case in 2 *Cond. Rep.*, the counsel for Beebe contend that the answer of Holland was to be used against the complainant, not the defendant; and, therefore, it is not an authority in point, although the reporter so considered it, and placed it in his head note of the report. We think in this the reporter was not mistaken. Chief Justice Marshall placed it on the ground of a discovery sought by the complainant upon a point which would

affect the defendant answering, directly, and the purchaser, consequentially. The right to the discovery is expressly recognized by judge Marshall as well as its effect upon the defendant. Can any one believe that the complainant would have a right to a discovery, but not a right to use it when made? Certainly not. Why was it that the co-defendant had a right to use it against the plaintiff? Surely for the very reason that if it had established facts against such defendant, it would have been evidence against him, and this is what the judge meant when he said, "This fact when established, it is true, affects the purchaser also, but it affects him consequentially, and through him it affects them as representing him. Consequently, where the fact is established against or for him it binds them."

The case in 9 *Wheaton* still presents another, and, if possible, a still stronger ground of exception than either of the others. It is "that a purchaser *pendente lite* is bound by the decree, and if by the decree, he is bound by the testimony when against the vendor, even though he be not made party to the suit. And here, before we further proceed to investigate the admissibility of the answer as evidence, we are met by another preliminary question: Was Beebe a purchaser *pendente lite?* If so, in what attitude does it place him in the investigation of the merits of this case.

A purchaser *pendente lite* is one who, by purchase, acquires an interest in the matter in litigation pending the suit. The reason of the rule is, that if a transfer of interest pending the suit was to be allowed to affect the proceedings, there would be no end to litigation; for as soon as the new party was brought in he might transfer it to another, and render it necessary to bring that other before the court: so that if this interference be allowed a suit might be interminable. And the rule, it would seem, applies with increased force to suits *in rem*, or where the title to the property purchased *pendente* is in litigation. Some decisions go so far as to declare all such titles absolutely void.

The rule, says GREEN, Judge, in the case of *Newman v. Chapman*, 2 *Rand. R.* 100, as to the effect of *lis pendens* is founded on the necessity of such rule to give effect to the proceedings of a

court of justice; without which every judgment and decree for specific property might be rendered abortive by successive alienations." This rule is particularly applicable to proceedings *in rem* and in contests for the title to property, where the decree or judgment of the court is to affect the title to such property. For the reasons above given, the title acquired by a purchaser pending such litigation has, by some of the courts, been held absolutely void, *Gordon v. Payne*, 9 *Dana* 190. *Briscoe v. Bronaugh*, 1 *Texas Rep.* 333. *Worsley v. Scarborough*, 3 *Atk.* 392.

These decisions, if restricted to the effect of the title thus acquired upon the rights of the parties to the subject matter at issue at the time of the purchase, are sustained upon high authority. Thus, in the case of *Murry v. Lyburn*, 2 *John. Ch. Rep.* 445, Chancellor KENT said: "There is no principle better established, nor one founded on more indispensable necessity, than that the purchaser of the subject matter in controversy *pendente lite* does not vary the rights of the parties in that suit, who are not to receive any prejudice from the alienation." In the case of *Gordon v. Payne*, it was said, "The sale made by him was clearly invalid upon two grounds: First, it was made *pendente lite* and after the jurisdiction of the Chancellor had attached; consequently, no sale or other act of the executor afterwards, could change the attitude of the party or the right of the parties." *Gordon v. Payne*, 9 *Dana* 190. "He who purchases during the pendency of a suit, is bound," says Sir WILLIAM GRANT, "by the decree that may be made against the person from whom he derives title. The litigating parties are exempt from the necessity of taking notice of a title so acquired. As to them, it is as if no such title existed; otherwise, suits would be interminable, or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be terminated. The rule may sometimes operate with hardship, but general convenience requires it." The *Bisdop of Winchester v. Payne*, 11 *Ves.* 194.

In the case of *Scott v. McMellen*, 1 *Littell* 307, the court took a distinction between suits for mere preliminary demands, and a suit where the court was investigating rights to property by pro-

ceedings *in rem.* After considering the first class of cases the court proceeds: "Here the complainant was compelled to resort for relief to a court possessing no jurisdiction over the person of the debtor, but possessing competent power over the property Here the property gives jurisdiction to the court; the right of property is in the court, and during the pendency of such a contest no transfer of the property by the debtor can be admitted to produce any prejudicial effect on the complainants demand. In this case we attach no consequence to the circumstances of an injunction having been granted by the court to restrain the defendant from conveying the property. But we go upon the broad and general principle, that after the commencement of Scott's suit, and a *lis pendens* created as to the property, no conveyance of the property by Sam. McMillen can prevail. This principle was adopted at an early period in the history of chancery jurisprudence, has been followed and acted on ever since, by various successive Chancellors, and finally is admitted by all elementary writers on the subject to be the established doctrine of the court."

These authorities, we think, clearly establish the following positions: First, That the institution of the suit (particularly where it relates to the title or disposition of property) is constructive notice to all purchasers after suit commenced. Second, That a purchaser *pendente lite* acquires no title by his purchase, which he can set up or assert to the prejudice of the rights of the parties litigant, and that the suit will be heard and determined upon the merits as it stood between the parties litigant, perfectly irrespective of any rights which he may have acquired by such purchase, which, if valid for any purpose, can only be so as between himself and his vendor, to enable him upon the determination of the suit to succeed to the rights of such vendor, or, perhaps if a party to the suit, to enable the court after determining the rights of his vendor favorably, to decree them to him.

The counsel for Beebe, for the purpose of avoiding the force of these authorities contend, first, That although Beebe, if a third person, would have been subject to the rule governing the rights of purchasers *pendente lite*, yet, as he was the purchaser of the

judgment before the institution of suit by Whiting & Slark, that he succeeded to the equitable rights of Gray & Bouton, who were senior judgment creditors, and that as such he had a right to pursue his remedy as fully and to the same extent as they could have done. Conceding this to be true, or even put it on a stronger ground, and say that Gray & Bouton had themselves been the purchasers under their own senior lien, the question recurs as to whether (after the institution of a suit contesting their right to sell, claiming that their judgment had been satisfied by a prior levy, which was undisposed of, that there was also other sufficient estate out of which to satisfy the senior judgment lien, without coming upon the property embraced in the complainants' mortgage; that $2,800 had been paid on said judgments, but which had not been credited thereon: all of which was distinctly averred in the original bill filed against them,) they could until these rights were settled and determined, sell the property, the title to which was thus fairly put at issue between the senior and junior lien creditors, and acquire, under such purchase a title superior to that which they held under their judgment lien, or which could aid or strengthen it. If so, then it amounts to an infringement of a rule, a maxim founded in reason, that the vendee can, by his purchase acquire no greater title than his vendor possessed. It would be, in effect, offering a title derived solely under his equitable right then at issue, in defence of those rights. Such could never be the case. On the contrary, the rights of this property were fairly put at issue, turning upon the fact as to whether there was other property belonging to De Baun, sufficient to satisfy the senior lien which covered his whole real estate, and the junior mortgage lien which extended only to a small portion of it: and the further independent fact as to whether the judgment had been discharged by payment. And upon the soundest principles of equity, we feel fully warranted in going further, and saying even if all of the judgment had not been discharged by payment, if a considerable amount of it had been paid, but which from carelessness or design, the plaintiffs in the senior judgment had failed to enter as a credit, that the junior

creditor would have a right to demand that these credits be made out and entered before sale; because he would have the right to pay off the senior encumbrances, and thereby disencumber his junior lien, which he could not do, nor could he be prepared to elect whether he would or not, until the credits were entered. That Gray & Bouton could not have acquired a title under such purchase, which would have in any wise aided their equitable defence, we think very evident. And if they could not do so, Beebe, who claims under them and assumes to cover himself from the effects of the rule as purchaser *pendente lite*, cannot. But then the counsel have assumed another ground, which, though not at all reconcilable with their first position, we will for a moment consider. They say that Beebe purchased of Gray & Bouton, before the commencement of the suit. That is true. They took the judgment by assignment. By that we apprehend they only purchased the right to the judgment, that is, took the place and stead of Gray & Bouton, but not the property in dispute. After the most attentive examination of the grounds assumed by the counsel of Beebe, we find nothing which will relieve him from the necessity of relying solely upon the equitable right at issue between Gray & Bouton on the one hand, and Whiting & Slark on the other, so far as his title rests upon the equity growing out of their prior lien.

When therefore the complainants call upon Gray & Bouton and their agent to answer as to whether this judgment has in fact been paid, what right has Beebe to object and say you are not entitled to use their answer, because I am a co-defendant, and it may cause them to lose their suit, and then I shall get no title under my deed from them? Viewed as a third person he need not even have been made a party. His rights are wholly dependant on the merits of the issue between the original parties. It is their suit, not his; or if viewed in the stead of Gray & Bouton their answer is his answer, their defence his. Thus considered there is no doubt but that this is a clear exception to the general rule, for it is only in a limited sense that Beebe can be called a party to this suit. Whiting & Slark then call on Gray & Bouton, and

Trapnall, their agent, to answer and say whether this judgment was or not paid. Gray & Bouton entered their appearance but failed to answer, and the allegations, if they alone had been called to answer touching their interests, would have been taken as true; but in this case, the complainants have also made their attorney and agent, Trapnall, a party, who transacted the whole business and whose answer must be considered as in effect their answer. It will be received then, as evidence for and against the complainants and defendant as fully and to the same extent as if made by them.

Upon the question of payment, the records and the answers of Trapnall and of Beebe (for that like the answer of Trapnall has been called out by the bill and so far as it is responsive to the issue between the parties, upon the merits of the respective claims of Gray & Bouton, and Whiting & Slark to the property in dispute, will be received with like effect as the answer of the party in original interest would) comprise the whole of the evidence. Turning first to the record, we find the original debt by note to be $1,811 89 due 19th March, 1837, at 6 per cent. interest after due. Beebe admits that he was apprised at the time of his purchase that credits for payments before that time made, should have been but were not entered upon the judgments; but does not remember whether before or after the complainants' mortgage was executed, nor does he give the amount, but states that excluding costs he paid in December, 1843, to Trapnall, $2,400, or thereabouts for both judgments. Trapnall's statement is definite and gives precise dates by which we may arrive at the sum due on this judgment. He says that there was paid on the note $1,025 14, on the 25th of January, 1839, which should have been credited on it. It will be seen by calculating the interest up to the payment and crediting the note by the $1,025 14, as should have been done, that there was at the time judgment was rendered, only due about $996 15 instead of $2,137 89, besides costs, and on the day that Beebe purchased the property in dispute at the November term, 1843, there was due, debt, interest and costs, about $1,301 53. It further appears from the return on the writ of *ven. ex.* with *fi. fa.* clause that there was sold under the Gray & Bouton judgments property to the amount

of $1,875, of which the property in dispute sold for $325, and that after deducting this amount and the whole costs of sales left a balance of $1,528 82, being $227 29 more than sufficient to satisfy the whole balance of the Gray & Bouton judgment; and that other property of De Baun on the same day, was sold on other process to the amount of $685.

Suppose these facts had been presented to the chancellor, can there be any doubt what his decision would have been? Surely no one will contend but that the senior lien creditor, when he had sold enough to satisfy his demand, should have stopped and left the junior creditor to the benefit of his lien; but if not, it was clearly the privilege of the junior lien creditor to have paid up the senior lien debt and have protected himself from the utter loss of his debt when the property, from data abundant in this record, was worth more than twenty times what it sold for, and which has rented for more every year since (as far as reports of rents are before us) than it sold for, and the withholding proper credits, whereby there was presented a demand of $2,346, or about that sum, instead of $1,301 53, the amount really due, was a gross violation of the rights of creditors, thus saying to them, my demand is $2,346, which you must pay in order to avail yourself of the benefit of your lien. Beebe and Trapnall both knew of these credits: they were claimed and relied upon in the bill of complaint in this suit and a failure to enter them, whether intentional or not, cannot be viewed otherwise than unjust and oppressive, if not grossly fraudulent.

Turning from this to another ground of objection to the validity of this sale, we will proceed to inquire whether in point of fact, there was any existing lien at the time of the levy and sale.

A lien is a right by law, says Chief Justice SHARKEY, to have a debt satisfied out of a particular thing. It may originate by contract, or by operation of law. In either case the effect is the same. It is a right given by law to have the debt satisfied out of all or any of the defendant's property. *Anderson v. Doe ex dem. Wilkins*, 6 *How.* 562. Chancellor KENT, in his commentaries, vol. 4, page 437, when referring to judgment liens, says "the lien, after all, amounts to but a security against purchasers and encumbran-

cers, for as the Master of the Rolls said, in *Bruce v. The Duchess of Marlborough*, it is neither *jus in re* nor *jus in rem*. The judgment creditor gets no estate in the land, and although he might release all his right to the land, he might afterwards extend it by execution." A judgment creditor has no *jus in re* but a mere power to make his general lien effectual by following up the steps of the law. A failure to do this releases the charge on the property." *Massengill et al. v. Down*, 7 *How. U. S. Rep.* 767.

From these authorities it may be said that a judgment lien is a security against subsequent purchasers and incumbrancers, which denies to the debtor the right to alien or encumber his property, to the prejudice of the rights of the judgment creditor for a given period (in most instances fixed by the statute.) It is also a right springing out of, and dependent upon, the judgment for its existence and follows the condition of the judgment. If the judgment is reversed or set aside, the lien is *co instanti* discharged; if paid, it is merged in the payment; if suspended by injunction or supersedeas, the lien is also suspended; and therefore as a levy operates as a *prima facie* satisfaction and whilst undischarged satisfies and suspends the judgment, the lien must also be suspended with it, and should the lien prove insufficient to satisfy the judgment, as by the discharge of the levy, the judgment is restored to its full effect upon the estate of the debtor, so also does the lien, unless in the mean time it has expired by limitation, or has been discharged by the act of the creditor, upon the return of the creditor for further satisfaction, maintain its grasp upon the whole estate of the debtor to the full extent that it did when first created, (*Estill v. Mitchell*, 8 *Yerger* 452), and intermediate sales of property by junior lien creditors, or by the debtor between the first levy and the discharge thereof, if such discharge takes place before the statute limitation, will be held subject to such lien. 2 *S & M.* (*Miss.*) *Rep.* 436, *Perkins v. Marlow.*

This brief review of the definition of a lien and of its dependencies, is designed to illustrate more clearly our views of its nature and the foundation upon which it rests, which, we have said, is a right, a security given by law to the creditor upon the

property of the debtor, which is not an intrinsic quality of the judgment itself but is a quality added to it—an effect of the mere existence of the judgment, which can have no independent existence, but is dependent upon the judgment and follows it as a shadow does a substance; hence if it is cut off from it either by the act of the party, the satisfaction or extinguishment of the judgment, or by limitation of time, upon general principles it is lost, for then there ceases to be any thing to which it can be attached. This rule will be found in perfect harmony with the common law rule in relation to liens on personal property. Liens at common law only attach to property in actual possession; remove the property and the lien is lost. *Bouvier's Law Dictionary, vol. 2, page* 54. In fine a lien being a mere contingency or right dependent upon a subsisting thing, of course cannot rest upon a contingency, no more than a presumption can rest upon another presumption, or one contingency upon another or a shadow exist without a substance.

Having premised this much in regard to the nature and effect of a lien we will proceed to apply these rules to the facts of the case before us.

The lien on the Gray & Bouton judgment expired on the 23d of March, 1843. On the 20th of March, three days before the lien expired *scire facias* issues to revive the lien, and it was revived on the 16th Jan'y, 1846. In June, 1843, after the lien had expired and before it was revived, the property in dispute was levied upon, and sold at the November term, 1843, by virtue of the judicial process so levied. Under a purchase at this sale Beebe claims to hold the senior lien of Gray & Bouton. It will be seen that both the levy and the sale were made after the lien had expired by limitation and before it was revived by *sci. fa.* The question is, did the revival of the judgment in 1846, relate back to his purchase so as to constitute him a purchaser under a senior lien. If so, it must be by force of the statute alone, to which we will presently revert. At the time of the levy and sale no lien attached to the judgment, because the lien had ceased to exist by limitation, and if it did not exist in the judgment, to what else could it attach?

Not in the *sci. fa.*, that was the mere process of the court to bring the debtor before it. Under this state of case it could, at best, be said to rest upon a contingency, which might or not happen; and we have seen that from its very nature it cannot thus exist, or it must have lain dormant at the time of the levy and sale dependent still upon the same contingency. Concede however, that it could rest upon a contingency and that a sale might be effected under such lien: let us for a moment glance at the practical operation of such a proceeding, and a more apt illustration of disastrous consequences and confusion which would follow could scarcely be presented than the case before us. Here we have some ten or twenty judgment creditors with liens in force, deeds of trust and a mortgage, all except the two last covering the whole of the real estate of a debtor consisting of numerous lots and tracts of land brought up to be sold. The senior lien has expired but a writ has been sued out to revive it. Whether it ever is revived or not must depend upon the chances of future legal determination and the mere will of the plaintiffs in that suit. If they buy the property they may prosecute their *sci. fa.* to judgment; if they do not, it is a matter of no concern to them: they pocket the money which should or not be theirs, dependent upon the same contingency. Other creditors are told to pay off this debt and admit them to be the senior lien creditors, when they certainly are not then and may never be such. They must do this or stand by as was done in the present case and see property admitted to be worth from ten to twenty thousand dollars sold for three hundred and twenty-five. Should it be said that this proceeding is likened to the purchase under a junior lien, that it is held subject to the claims of the senior, the response is, that there is an existing right upon which such contingency may rest, but here there is none. As we have before remarked, it is a contingency upon a contingency.

But how long shall these creditors wait to ascertain the happening of the contingency which overshadows their rights? How long shall the debtor himself be perplexed with such encumbrances? It must be apparent that this doctrine if allowed, gains no

credit for its equity and overshadows a pervading principle in our administration of the law, which encourages bidders at judicial sales by giving them assurance of a good title and also relieves the oppressed debtor from the utter sacrifice of his property. We repeat therefore, that if such is the case it must be by force of the statute and not from any of the known principles or rules applicable to liens.

The statute makes the judgment, from its date, a lien on the lands of the debtor situate in the county in which it is rendered, for the term of three years from its date. It also confers a right on the creditor to revive his judgment lien by suing out a *scire facias* at any time before the lien expires: and then, in the 13th section, provides, that if the *sci. fa.* be sued out before the lien expires, the lien of the judgment revived shall have relation to the day on which the *sci. fa.* issued; or if it issued after the lien has expired, then from the date of the judgment of revival. The only important question arising under the statute is as to the effect which the judgment lien when revived is to have upon the property of the debtor at the date when the *scire facias* issued. Shall we give it effect over all the debtor's property which the former lien had, irrespective of intervening equities which may have arisen between the creditors themselves during the suspension of the lien? or shall we so construe the act as to protect those rights?

That the Legislature intended to connect the revived with the former lien, so as to continue its existence is very evident; but there is no language used by which to determine the extent of the revival. If they meant to restore the lien as fully as it at first existed, it must evidently have been with reference also to the rights as between creditors which accrue to the junior creditor by extinguishment, by acts of the parties, or otherwise, for these might have accrued under the first lien. There are two distinct features in a statute judgment lien. The first and paramount object of the lien is, to prevent the debtor from alienating or encumbering his property to the prejudice of the rights of his creditors: The second object is, to discriminate in priority of right

between the creditors themselves. And this latter is an equitable distinction founded on the rule that, equities being otherwise equal, he, who is first in time, is prior in right. In the first instance, the rights are as between the debtor and his creditors: in the second; as between the creditors themselves, which latter provision has no reference whatever to the debtor, but relates solely as between the creditors themselves, and are purely equitable, giving preference, as between the creditors whose equities are in other respects equal, according to priority of time. And the same principles of equity are applied to, and govern the rights of creditors in every contest for satisfaction. Thus, when the senior creditor, by contracting for other security, by fraud or other act, forfeits his right of lien, it is so considered upon the ground that he thereby sinks his equity in degree, so that it ceases to be equal to that of the junior lien and therefore time does not give prior right. For the rule as to time only applies where equities are equal.

It is also worthy of remark that this rule of discharge of lien by the act of the party has no application as between debtor and creditor. As respects the debtor the lien is only discharged by limitation or satisfaction of the judgment. When therefore the Legislature declared that the judgment lien when revived, should relate back to the date of the *sci. fa.*, we may well suppose that it intended the lien when revived to act upon the whole estate of the debtor, to the same extent that it did prior to its suspension by limitation, in an unqualified sense, as related to the debtor; and that it also revived all the secondary rights of the senior creditor as between himself and the junior creditor, subject however to such intervening equities as might have arisen between the time of the suspension and the revival of the judgment, for these rights might have accrued to him even under the first lien. Any other construction than this would place the creditor under the junior judgment liens, in a worse condition than he was, under the lien before it expired and would defeat the principles of equity which have universal application in such cases.

We must not presume therefore that the Legislature intended

to cut the creditor off from the benefit of intervening equities which might constitute his the better equity. There he had no opportunity to protect them. The issue upon the *sci. fa.* was between the senior creditor and the debtor, and as to him, even though the debt may have been paid (as was the fact in the cases before us) if he failed to plead such payment, the judgment is good against him. But shall we say that it is also good against the junior creditor, who could not be heard in that suit? And yet, if the lien when revived, is to act alike upon the rights of the debtor and the creditor as they existed at the time when the *sci. fa.* issued, the result must be that even though the senior judgment be fully paid and discharged, this revived judgment lien would override and defeat the equities of the junior creditor arising therefrom. Such never could have been the intention of the Legislature; nor have they in this instance used language which necessarily implies that such should be the case. We therefore hold the true construction of the act to be that the revived judgment lien is held subject to such intervening equities as may have arisen between the creditors themselves, between the date of the *sci. fa.* and the rendition of the judgment reviving such lien.

In the case before us, at the time the levy and sale were made the lien had expired by limitation. The plaintiffs' rights under it were, if existing to any extent, dormant or suspended, dependent upon a contingency which might or not happen at an indefinite time. Suppose such to have been the case at the outset, would the plaintiffs' have been held a better equity than one whose claim, though junior in time, was in full force and ready for execution? We should say not. And if not, then is there any good reason for holding it to be a superior equity, if such should become the case at a future time? If so, it would be upon the ground that an equity once acquired could not thereafter be lost.

In this case the sale was not made under a junior judgment lien; but the senior judgment creditor, during the suspension of his lien, sells the property and becomes himself the purchaser, or rather Beebe, who succeeded him in interest, did so. Under

this state of case, the question is, did he acquire a title as senior lien creditor? At that time the lien ceased to attach to the judgment. The purchaser therefore under such judgment acquired no title with such qualities superadded. But it may be said that when the lien was revived, it related back and gave effect to the purchase by way of affirmance of an imperfect title, as one who sells an imperfect title and subsequently acquires a perfect title affirms the first title. The application of this rule must depend upon the fact as to whether Gray & Bouton by the act of revival acquired a title to the property. We apprehend not. A lien is neither *jus in re* nor a *jus in rem*. It conferred no right of property, but a right to sell De Baun's property. If this was not De Baun's property, then the lien did not attach to it. If it was, then it must be sold before he can be divested of title to it. No subsequent sale has been made, and of course no valid lien sale can exist in the purchaser.

Such are the conclusions at which we have arrived; in the correctness of which, we are sustained by the decisions of other courts, not only with regard to the distinction which we have taken, between the relative position of the debtor and his creditors, and between the creditors themselves; but also with regard to the effect of a sale made between the time of the issuance of the *sci. fa.* and the revival of the judgment lien. And although these decisions were made in several instances where the statutes were different from ours, yet the general principles apply with full force.

In the case of *Norton v. Beaver*, 5 *Ohio Rep.* 180, it is said, "When the judgment becomes dormant, the means of enforcing the lien are suspended because they necessarily slumber with the judgment, but when the judgment is revived, it is revived with all its incidents. There is no new judgment recovered on the *scire facias*, but the old one is called into action. The form of execution adopted in practice requires the sheriff to make the money, for want of goods and chattels, from lands owned by the debtor at the date of the judgment. The statute declares that the sale shall vest as good a title in the purchaser as the debtor

had, whilst the land was liable to satisfaction by the judgment. So far as the debtor is concerned the lien of the revived judgment exists in all its original force. But it does not follow that the rights of others acquired or subsisting under the dormancy of the judgment are subordinate to the revived lien. In a country where land is one of the most familiar and ordinary subjects of trade, the policy of the law does not favor liens which impose embarrassment on their transfer. The purchaser who acquires title to land, at a time when no lien exists, or at a time when by the creditor's delay a once existing lien becomes dormant, appears to us to have an equity preferable to him who has indulged in delay. In treating with the debtor he has a right to rely upon the presumption that a dormant judgment is satisfied. The lien of the creditor at this time is indefinite and contingent. It is not a subsisting interest in the lands, but a power to set up an interest that may never be exercised." The case of *Epps & others v. Randolph*, 2 *Call* 103, sustains this opinion.

In the case of *The Bank of Missouri v. Wills & Bates*, 12 *Missouri Rep.* 364, the question came up under a statute like ours, and under very similar circumstances to those in this case, in which it was said, "The judgment, reviving the lien of the junior judgment, was not rendered until after the sale of the premises in dispute. The party thus by his own act having disposed of the property on which he wished to impose or continue his lien, it is obvious that the judgment of revival could not relate back and give the purchaser at sheriff's sale a right which did not exist at the time of the purchase. The party suing out the *scire facias* to recover the judgment was under no obligations to continue the proceedings after the sale. He might have discontinued it at his pleasure. The purchaser therefore could not have been influenced in his conduct by any assurance of the revival of the lien. If the sale of the property did not satisfy the judgment, the revival would have had the effect of reviving the lien on the real estate owned by the defendant in the execution, or which he had disposed of whilst subject to it, but surely a creditor could not thereby entitle himself to a lien on property of the defend-

ant, which had been disposed of by his own act." These authorities will sustain the views which we have already expressed.

We are next called to consider the claims of Beebe as derived through his purchase from Ringo; in considering which under the rule we have laid down in regard to Beebe's position as purchaser *pendente lite*, we will enquire what prior legal or equitable interest Ringo had at the time of Beebe's purchase. Ringo was called to answer, and says that he held a subsisting debt against De Baun and Thorn, which was one of the partnership debts, from which De Baun agreed with Thorn to save him harmless and absolve him from the payment of, which is the same debt on which judgment was recovered. That he sold the judgment to Beebe, and has no interest in the matter. Beebe is also called to answer, and so far as it is responsive to the issue between the claim of Ringo and Whiting & Slark for priority will be held as in effect part of the defence to the original cause of action, and although Ringo disclaims any present interest, his answer, so far as it tends to sustain the equity of his case, will enure to the benefit of Beebe. The interest claimed under this sale arises out of the claim which Thorn has reserved to himself in transferring his undivided half title to De Baun, and in any event only extended to such half interest. Ringo's equity then must be derived through Thorn's equity. In order to establish this it becomes necessary on the part of Ringo or Beebe as his representative to show that the debt sued on was a partnership debt provided for in the transfer, and to predicate the subsequent proceedings upon it. To establish this point, Beebe, in behalf of Ringo, shows a declaration filed on 27th September, 1842, by Ringo against De Baun and Thorn, as partners, trading under the firm name of J. De Baun & Co. The suit was in debt on promissory note executed by the firm on the 29th of March, 1837, due six months after date for the sum of fifteeen hundred dollars with ten per cent. interest from date. Upon which declaration such proceedings were had that on the 23d of June, 1843, judgment was rendered for the plaintiff, Ringo, and thereafter under this judgment a sale was made to Beebe. There is also a note executed by J. De Baun & Co., to

Ringo copied into the record, corresponding with that sued upon, but it was not brought there by oyer or otherwise: no notice is taken of it upon the record, therefore, as we have repeatedly held, it is no part of the record and consequently was not an exhibit in the cause. At this point an issue is raised between Whiting & Slark and Beebe, who for the purpose of proving that the note sued on was one of the debts embraced in the agreement between Thorn and De.Baun and was the foundation of the judgment exhibited in Beebe's answer introduced on the trial of the cause the original note (as they allege) upon which Ringo had obtained his judgment; and against the objections of Whiting & Slark, the Court permitted Beebe to prove, first, the execution of the note; 2d, that it was marked and filed among the papers in the case of *Ringo v. De Baun & Thorn;* and lastly, to read it as evidence in the case; to all of which exceptions were regularly taken and filed at the time.

It cannot be said that the original note was an exhibit in the cause. It was produced for the first time by the defendants on the final hearing of the cause. It has been decided, and we think correctly, that unless made an exhibit, *viva voce* evidence is not admissible to prove its execution. *Crist et al. v. Brashier*, 3 *A. K. Marsh.* 170. And even where exhibits are thus proven on the trial the evidence is, in most instances, limited to the mere execution of the instrument. 2 *Daniel's Ch. Pl. & Pr.* 1,026; or where the instrument comes from the hands of a public officer its custody may be thus proven, but nothing beyond this. And for this reason it is that the execution of a will cannot be proven *viva voce*, because, besides the mere execution of the will, the sanity of the testator must be established, *id.* 1,027: and so where any additional fact is to be established in order to make the exhibit evidence, as in this case, the identifying it as the note sued on, the proof is inadmissible. And even when such evidence, offered to prove an exhibit, is admitted it must be regularly upon application to the Court, and an order for that purpose or notice to the adverse party specifying the exhibit intended to be proven. *Parde v. Deca*, 7 *Paige* 134. *Chandler's Exrs. v. Real*, 2 *Hen.*

& Munf. 129. 2 *Dan. Pl. & Pr.* 1,028. The time given we apprehend, would be rather a matter of discretion with the chancellor.

But in this case where the instrument was not an exhibit and where it required not only proof of its execution but also proof to connect it with the judgment, we are satisfied that *viva voce* testimony was inadmissible.

There was no evidence then connecting any subsisting debt referred to, or embraced in the agreement between Thorn & De Baun, with the judgment under which the sale to Beebe was made, and of course no prior lien existed to that of the judgment itself, which was junior to the claim of Whiting & Slark.

Whether the interest of Thorn was a trust or a mortgage interest (and we apprehend it could not extend beyond that) it is very questionable whether it is or not subject to sale under execution, even under the provisions of our statute, which subjects the real estate of the defendant, whether held by patent, or by a third person for his use, of which he was seized either in law or equity, to sale. How far a lien or security may be considered an equitable estate, or what class of equitable estates the legislature designed to embrace (if there is any distinction or reservation to be made) it is not necessary to determine in order to dispose of the rights of the parties in this case, as by our determination of a preliminary point, this question does not necessarily arise, we will therefore express no opinion with regard to it further than to remark that in several of our sister States, where these statutes are as broad as ours, such interests have been held not subject to sale.

In an equitable point of view there can be no doubt but that the security afforded in a deed of trust or mortgage can only extend to those debts set forth and recorded in the deed, or perhaps where notice is brought home to the purchaser of the estate thus pledged. The authorities upon this point are clear and conclusive. *St. Andrew's Church v. Tompkins*, 7 *John. Ch. Rep.* 16. 4 *Kent Com.* 176. *Day v. Dunham*, 2 *John. Ch. Rep.* 189. *Frost v. Bukman*, 1 *John. Ch. Rep.* 229. In the last case Chancellor KENT says, "The only question with us is, when, and to

what extent, is the registry notice? Is it notice of a mortgage duly registered? or is it notice beyond the contents of the registry? The true construction of the act appears to be that the registry is notice of the contents of it, and no more, and that the purchaser is not to be charged with notice of the contents of the mortgage any further than they may be contained in the registry." And in 4 *Kent* it is said, "It is necessary that the agreement contained in the record of the lien should, however, give all the requisite information as to the extent and certainty of the contract. So that a junior creditor may, by inspection of the record, and by common prudence and ordinary diligence, ascertain the extent of the incumbrance."

The case in 2 *John. Ch. Rep.*, above cited, is still more in point. The Chancellor, in delivering his opinion said, "All the notice in the case is contained in the schedule to the assignment, stating that the title to the fifty lots is, in the name of the defendant, given as collateral security to pay certain notes." And in regard to the effect of this as notice, says, "In this case the notice arising from the schedule is lame and defective. There was no notice as to the amount of the notes, or how many, or when payable. The plaintiff in this case might not have inferred from the schedule that the defendant held any thing more than a nominal title, and perhaps as a mere trustee upon some extinguished debt."

These cases go clearly to show that, in order to affect the rights of Whiting & Slark as junior lien creditors it was necessary to have brought notice home to them, not alone of the existence of the transfer and reservation in favor of creditors, of that, the registry of the conveyance may afford ample constructive notice, but it was necessary to have set forth the identical debt upon which this prior equity is to be founded, so that the junior purchaser might take notice at his peril what he purchased. Such not being the case, upon this ground also the prior equity of Beebe, who holds under Ringo, must fail.

In regard to the tax titles, which Beebe also relies upon, as giving him prior equitable and legal right in the contest for this property, it will be perceived that they were acquired after both

the original and amended bill had been filed and whilst he was in possession as tenant under the contested titles at issue in the suit, to which he had, by the amended bill, been made a party. Under these circumstances he bought them as outstanding adverse titles, not to sustain the claims of the parties litigant to the matter in dispute, but to assert an independent title superior to theirs. The principle which we have recognized in regard to his position as purchaser *pendente lite* denies to him all aid from adverse claims for the purpose of strengthening their title or his through them: or, if placed upon the ground of an independent title and properly established and presented, the purchase was for a charge upon the land if unoccupied, or upon the tenant if occupied. Beebe entered under the claims then in litigation and held subject to the final disposition of those cases. In that position his purchase was necessarily in trust and enured to the benefit of the *cestui que trust*, when the suit should determine who he really was. *Burr v. McEwin et al.* 1 *Baldwin Rep.* 162.

Taxes are a lien on property which is unoccupied, for which it may be sold. 9 *Sergeant & Rawle* 112; or, if occupied, the payment is enforced by a distress upon the tenants, 10 *Serg. & Rawle* 255, and if paid by the tenant it would be a charge upon the rents, and the purchase would enure to the benefit of the true owner of the property under whom he held, which was the very subject of contest in the suit under which he entered. So, when Beebe accounted for rents in his settlement of them with the master, he credited himself with taxes and repairs, and might also have presented the amount of taxes due on the lands for the years for which he had purchased. Upon either of these grounds then, independent of the consideration as to whether these are or not valid tax titles, there can be but little doubt that the defendant acquired no superior equity over the complainants from these purchases.

We have now closed our examination of the several claims of the defendants intended to assert a superior equity to that of the complainants. In the investigation of which we have derived much advantage from the research and industry of the counsel on

both sides. And if in reference to the several interesting questions discussed, we have not adverted in this opinion to all of the grounds assumed or by them deemed material, it has not been because they were not duly considered, or the authorities to which reference was made, examined when accessible. It only remains for us now to take a glance at the relative position of the parties and the probable motives which influenced the principal actors, and determine their rights in view of the several conclusions to which we arrived in the progress of our investigation.

In the development of the facts, in the outset, of the several transactions out of which the present contest arose, it is by no means improbable that De Baun, in view of the storm of bankruptcy which was thickening around him, was quite willing to take shelter under the judgments of Gray & Bouton and Beach, and shelter his property from the grasp of his other creditors; and for that purpose, and that it might be the more effectual, permitted judgment to be rendered *nil dicet* for $2,137 89 debt, and interest, when in fact he had previously paid the whole of it except the sum of $996 15. And the acquiescence in this is readily accounted for on the part of Trapnall & Cocke, when we consider the very ample security furnished by their judgment lien on so large an estate. If there had been no understanding upon this subject between the attorney and De Baun, it is scarcely to be presumed that De Baun would have appeared and suffered judgment to go for more than twice what was really due, or that the attorneys would not have entered all proper credits when they took their judgment. And this conclusion gains much strength from the subsequent conduct of the parties. Nearly a year expired before writs issued on either of the judgments and then only in time to save a revival by *sci. fa.* So we find a release given to Thorn, and, with the full written assent of De Baun, execution is to run for the whole amount of the debt against him. Why, if Thorn had paid the debt, not enter credit in full; if only part, for that much or otherwise to the extent of the satisfaction? A motive at once is found for this in accordance with the previous conduct of the parties, for it is also

shown that upwards of $1,100, on the Beach judgment was paid and yet no credit is entered on the judgment.

At this point, defendant Beebe's position may be defined. It is due to him and it is but fair to presume that at the outset he acted in good faith and bought the property under the trust sale in April, 1843, to save himself from loss as DeBaun's security and with no wish to wrong any one. After this purchase, he found that there was a probability that he might lose the benefit of his purchase and be defeated in his first object. He, no doubt, bought the Gray & Bouton and Beach judgments from motives and considerations of this kind. This he had a right to do. As a prudent man, looking to his rights and interest, it was perhaps his duty to do so. But when he took shelter under this wide spread cover of DeBaun's property, and saw that about half of each of those judgments had been paid, and one of them fully discharged, as to one of the creditors at least, he should have clipped the canvass to honest dimensions, have credited each of these judgments by what was paid, and openly asserted and pressed his rights to the balance. By this means, the junior lien creditors might, if they chose, have paid off the balance really due, and thereby disencumbered their rights, or have bought with a knowledge of the amount they would be liable to pay, in order to protect their title to the property so purchased. His failure to do this and his asserting a claim to the whole amount of the two judgments of about $6,000, which had only cost him some $2,400, and when in fact there was only due between $1,300 and $1,400, was in bad faith and oppressive towards the junior lien creditors if not a palpable fraud upon their rights.

If the purchase was limited, as stated by Trapnall, to the mortgaged property, it was a direct attack upon the rights of the complainants, theirs being a limited lien, and for that reason more flagrantly unjust. Of this, however, there is no positive proof, as Trapnall's answer, in this respect, is not responsive to the allegations of the complainant's bill. Still, all the circumstances tend strongly to show that such was the case. Beebe's object in making the purchase was to multiply claims upon that particular property;

and the subsequent conduct of the parties fully sustains this conclusion; for we see DeBaun, at the sale in May, 1843, acting in concert with Trapnall and Beebe, using his statute rights in directing the sale in such a manner as to defeat the claims of Whiting & Slark. It was also in bad faith to force a sale of this property until the first levy was discharged, and to revive the judgment of Gray & Bouton after it was paid by the sales in November. Beyond this, the struggle on the part of Beebe to protect himself by the purchase of other senior claims, was what might well have been done in good faith.

The main points to be considered, in determining a question of fraud, are, the act done, the circumstances under which it is done, and the effect upon the rights of the opposite party.

In the case before us, Beebe succeeded to the rights of Gray & Bouton, and whether we consider the act as theirs, or theirs through their agent, is not material. The wrong consisted in the first instance in causing a second levy to be made before the first was disposed of; in asserting a claim for the whole amount of the judgments, when they knew that there was but a small amount comparatively due; in concealing from the junior creditors the true amount of their claims; in persisting in selling the property mortgaged, after the other property had sold for a sum sufficient to pay the whole amount really due; and in reviving a judgment which had really been paid, and extending an unjust claim of title over such other estate as might remain unsold—all of which, except the latter act, was clearly to the prejudice of the rights of the complainant; and for which, as well as for the reason that there was no subsisting lien at the time of the purchase by Beebe under the Gray & Bouton judgment, and the several other grounds with regard to the other claims, we are of opinion that the sales and the deeds under which Beebe sets up title to the property contained in the complainants' mortgage ought to be set aside.

We are moreover of opinion, that the complainants have the senior equitable lien on the property in dispute: and that next in order, Beirne & Burnside have the oldest equitable lien, De

fendant Beebe, has, no doubt, acquired a valid legal title to the property under several junior judgment liens and under the statute holds title to the property subject to the prior equitable liens of the complainants, and of Beirne & Burnside, who are entitled to decrees of foreclosure and sale of the property to satisfy their respective claims according to priority in equity: and that defendants Brown and Beebe account to complainants for the rents and profits thereon arising, from the time they respectively entered into possession until the date of such accounting, unless the said Beebe shall elect to pay off and satisfy the prior claims of said Whiting & Slark, and Beirne & Burnside with costs; in which event we see no necessity for holding defendant Beebe to account for rents, but, on the contrary, he is entitled to the same.

Having closed the consideration of the case so far as relates to the issue between complainants and defendant Beebe, we will, before considering the cross-bill of De Baun, consider a collateral issue formed between the complainants and defendant Lawson. And, but for the connexion which the money in dispute has with the title of complainants, which we have decided against them, we would find no very good reason for entertaining the issue or rendering a decree thereon. The complainants have a clear legal right of action against the defendant if their allegations be true; but as equity has taken jurisdiction of the subject matter and the parties, and disposed of one branch of the subject connected with this, and out of which this liability arose, we may proceed to examine into the merits of the case and settle the issue between the parties.

The facts abundantly prove that Whiting & Slark, through Fowler, their agent and attorney, paid the defendant, as sheriff, the sum of $903 56, the amount bid for the property in dispute. Lawson, in his answer, admits the receipt of the money, but says that thereafter, on another day, he paid $756 14 of the money back to Fowler, and that he has $243 86 now in his hands, which he was prepared to pay, but that Fowler failed to call for it as he promised.

It seems that this and several other sales were set aside by the court, and that other moneys passed at that time between Fowler and the sheriff. Fowler's deposition is taken, and he states positively that no part of the $903 56 is paid; that the whole amount remains yet in Lawson's hands. He says that the $756 draft was paid, but on other and different accounts, and shows as an exhibit, the receipt of Lawson for the payment of several sums, which he states was the money so refunded by the payment of the draft. He states that the draft exceeded the amount of the sums he had paid (except that of $903, which he refused to accept,) by $156, which sum it was agreed between himself and Lawson, should be settled on the same evening at Lawson's office; that he attended with the money but Lawson was not there. The receipts, and the positive evidence of Fowler, leave but little doubt of the retention of the money by Lawson, notwithstanding his answer, in which he claims to have repaid part of it. The answer, however, is affirmative in this respect, and he should have made the proof himself to support it. Where an answer admits the receipt of money at one time and sets up that at another time, and in another adjustment it was repaid, the repayment is the affirmance of a new act, and must be proved. Deducting the $156 from the purchase money, there would remain in Lawson's hands $847 56, for which a decree should be rendered in favor of the complainants.

It now devolves upon us to consider the merits of the cross-bill of De Baun, the scope of which is to review the acts of the creditors, to set aside the sales made by them of his property, to re-sell the same and to have the proceeds of such sales appropriated according to their equitable right to the same. He says that, owing to impending circumstances and the acts of some of his creditors in their contest with each other for priority of right to the proceeds of the sale of his property, a most shameful sacrifice and waste of the property was made, alike prejudicial to the interest of other creditors and to himself, and that their acts he could not control. The Bill is drawn with much care, and the facts arranged with a distinctness and order highly creditable

to the counsel who prepared the case; nor do the authorities to which he referred, in the main, fall far short of sustaining the grounds of equity upon which the bill rests. They will not avail the complainant any thing however unless he comes before us as an honest debtor, who has surrendered up his property to his creditors and in good faith endeavored, as far as he could, to protect their rights and his own against the effects of a fraud or injury perpetrated by a portion of them to the injury of himself and others. This we think he has not done, but so far from it, we have much reason to suspect that, in the first instance, he not only acquiesced in the very acts of which he now complains, but was an active agent in producing them. Thus, at the outset he suffers judgment to be rendered in the case of Gray & Bouton for double what was due, took no discharge as to the Beach judgment, but expressly estopped himself from doing so by his written assent to the act, identified himself fully with Beebe and Trapnall in their course at the May term, and at the November term directed the sale of the property which he now says was sacrificed. With what show of equity can he call on the purchasers at that sale to give up the property which they purchased at his direction or otherwise, if made in good faith and without a knowledge of the fraudulent conduct of others? Before he can complain that injustice has been done to his creditors as between themselves, he must do justice to them himself; so far from this, he ran off his whole estate in slaves, although conveyed in trust for the benefit of part of them. When he comes therefore to ask for an equitable account between his creditors, or himself and them, he should at least have come with that property in his hand or tendered an equivalent for it. This he has not done. Under the circumstances of the case the only claims to equity which he may assert must be between himself and Woodruff and others, trustees, and that is a matter which may be inquired into apart from any equities in this case. He brings it here only by cross-bill; that bill we think should be dismissed with costs but without prejudice to such rights as he may have as between himself and the trustees.

Upon consideration of the whole case, let the decree of the Pulaski Circuit Court be reversed and set aside with costs; and a decree rendered in this court upon the equities of the several parties, upon the following points:

First, That the cross-bill of De Baun be dismissed at his costs, but without prejudice to his rights as between himself and others in regard to the deed of trust executed to Woodruff, Watkins and Reardon.

Second, That all of the defendants except De Baun, Beebe, Brown and Lawson be discharged with costs.

Third, That the complainants' mortgage be foreclosed, and a decree rendered in their favor for the full amount of their debt in the mortgages set forth with interest thereon from the time the debts became due until the present time, and that defendant Beebe pay the costs in this behalf expended, so far as relates to his own defence, and also all the costs in behalf of all those defendants under whom he sets up title in defence of his claim against the complainants: and that complainants pay the costs of all other defendants who disclaim an interest, or were not connected with the defence of defendant Beebe. And that the mortgaged property be sold for cash in hand to pay the amount of said decree; the sale to be made at the court-house door in the city of Little Rock, after giving 90 days notice in some newspaper published in said city; the proceeds of sale after paying the expenses of sale to be applied, 1st, to the satisfaction of the decree in this behalf; 2d, the decree of Beirne & Burnside; and lastly, any overplus, after paying each of these demands and costs, to be paid to defendant Beebe.

Fourth, A decree in favor of Beirne & Burnside upon their deed of mortgage for the debt therein set forth with the interest from due until the present time, with costs against the defendant Beebe; and that the estate therein mentioned be sold to pay the same upon the like terms (as regards the sale) as above prescribed: and the overplus, after paying the same with costs to be paid to defendant Beebe.

Fifth, That the several sales made to defendant Beebe, asser-

ting prior equitable liens upon the property in dispute, be set aside and the deeds and conveyances thereof to him, held for nought. But that holding a valid legal title subject to the prior equitable liens of the complainants, Whiting & Slark and Beirne & Burnside, he may, if he will, elect to pay the amount of their decrees with costs, and retain his title to the estate under such junior judgment liens as he claims to hold, and to afford time for doing so, he is allowed until the first Monday in June next, to make such payment, which when made and the evidences thereof shown to the satisfaction of the Chancellor in court sitting, he shall cause full satisfaction thereof to be entered of record in each of said decrees; and thereupon and in that event said defendant Beebe shall be entitled to all the rents and profits arising from the mortgaged premises from the date of his purchase at the November term, 1843: a decree shall be rendered in his favor according to the practice of said court against his co-defendant Brown. But should said Beebe fail to make such payment and cause such entry of satisfaction to be made within the time prescribed, that Beebe and Brown as tenants be held to account to Whiting & Slark, as mortgagees, for rents and profits, and for the purpose of ascertaining fully what may be due, said Circuit Court in chancery may cause proof to be taken in addition to that already taken, and ascertain the amount due for rents and profits (less taxes and necessary repairs to protect the property from waste or make it tenantable,) and render a decree for the same: and the money arising therefrom when received, shall be applied first, to the payment of the costs against complainants Whiting & Slark; secondly, to the payment of the interest and principal of their debt; thirdly, if an overplus, to the payment of Beirne & Burnsides' decree, and if enough to pay one, and not both, then the one paid to be entered satisfied, and a sale to be had on the unsatisfied decree for the amount due thereon; or if not enough to satisfy either, then the sale will be made under both decrees, the overplus in any event, after paying both the prior claims and costs to be paid to Beebe.

Sixth, That a decree be rendered in this court against defend-

ant Lawson in favor of Whiting & Slark for the sum of eight hundred and forty-seven dollars and fifty-six cents, with costs.

And that this decree be certified to the Circuit Court, to be executed according to the several directions herein contained according to equity.

NOTE.—F. W. TRAPNALL, Esq., having complained, in open court, that unjust and unfounded imputations had been made against him, and his deceased partner, John W. Cocke, Esq., in the foregoing opinion, Mr. Justice WALKER handed the Reporter the following note:

In alluding to the probable motives which may have influenced the parties (attorneys and defendant) in withholding certain credits, which should have been entered on the judgments at law, in favor of Gray & Bouton, and Beach, against De Baun, I failed to express, as fully as should have been done, the opinion of the Court in regard to that subject. It is due as well to the attorneys as to Mr. De Baun, to say that the omissions referred to, might have been the result of inattention, or of confidence reposed by the defendant in the integrity of the attorneys, or of other cause, not apparent upon the record. It was certainly not the intention of the Court to impugn the motives of the parties, indeed it was wholly immaterial so far as the other creditors of De Baun were concerned, whether the omissions were the result of accident or design. The effect was the same to them. It presented a larger outstanding incumbrance, than was really due, which it was contrary to equity and good conscience, to assert against their junior liens.

The Reporter will append this as a note to this opinion.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS,

DURING THE JANUARY TERM, A. D. 1852.

ALLEN VS. BYERS AS AD'M.

The period of two years, within which a claim against a deceased debtor must be presented to his representative, commences to run from the accrual of the cause of action: so that, a security paying the debt of the deceased, has two years from the time of payment to present his claim.

Appeal from the Circuit Court of Independence County.

This cause was determined before the Hon. WILLIAM C. SCOTT, at the September Term, 1850, on appeal from the Probate Court of Independence county.

The bill of exceptions states that the appellee's intestate, as principal, and the appellant as security, executed their note on

the 6th February, 1843; that judgment was rendered on the note against the appellant on the 10th of March, 1849; that the appellant paid the judgment on the *24th day of August*, 1849; and presented the demand to the appellee for allowance on the *17th June*, 1850; that the administrator rejected the claim; and the appellant filed his claim for allowance in the Probate Court on the 18th June, 1850; that letters of administration on the estate of the intestate was granted to the appellee on the *29th June*, 1846, and the estate is still unsettled. On the trial in the Probate Court, the appellee pleaded the statute of *non-claim*, which was sustained by the Court, and the motion for allowance refused. The appellant appealed to the Circuit Court; and the judgment of the Probate Court being affirmed, he appealed to this Court.

JOHN H. BYERS for the appellant. The statute of non-claim (*sec.* 85, *ch.* 4, *Dig.*) operates upon the remedy only and not upon the right of action. *Burton's ad'm. v. Lockhart's Ex'r.*, 4 *Eng.* 416. *Miller v. Woodward et al.*, 8 *Mo. R.* 176. *Helm v. Smith*, 2 *Sm. & Mar.* 403.

Allen's cause of action did not accrue until the payment by him to Chapman; and the record shows that he presented his claim and pursued his remedy in apt time after the accrual of his cause of action. *Pogue, use, &c. v. Joyner*, 1 *Eng.* 241. *Frost v. Carter*, 1 *John. Cases* 73. *McDonald v. Bovington*, 4 *Term Rep.* 825. 6 *John. Rep.* 126; 15 *J. R.* 467; 20 *J. R.* 153.

BYERS & PATTERSON, contra, contended that public policy required a strict construction of the act of *non claim;* and that all debts, when due or not, should be presented within the time prescribed.

Mr. Justice SCOTT delivered the opinion of the Court.

This case is within the principle enforced in the case of *Burton's ad'm. v. Lockhart's Ex'r.*, (4 *Eng. Rep.* 416.) The statute of non-claim, like the statute of limitations, does not operate to extinguish the claim but simply to bar the remedy. Indeed the two

statutes differ in language more than in substance. In one instance the bar arises on a failure to sue, in the other on a failure to present.

In the case at bar, the right to recover from the principal arose from the payment of the debt, and is not unpaid by the ommission of the creditor to make due presentment to the representative of the deceased principal debtor. This point was expressly ruled in Alabama in the case of *Cawthorn v. Weisinger*, (6 *Ala. Rep.* 716.) See also *Hook & Wright v. Branch Bank at Mobile*, 8 *Ala.* 580; and in Missouri, in the case of *Miller v. Woodward et al. ad'm.*, (8 *Mo. Rep.* 169.) And the same is intimated by SHARKEY, C. J., in the case of *Cohea et al. v. Cosa, &c.*, (7 *Sm. & Mar. R. at p.* 442,) upon statutes of non-claim full as strong as our own.

The appellant having presented his claim within two years after a cause of action accrued in his favor as between him and the representative of the estate, it ought to have been allowed.

Let the judgment be reversed, and the cause be remanded.

BEEBE VS. BLOCK.

The principle decided in *Brown v. State Bank*, 5 *Eng. Rep.* 134, as to the sufficiency of a promise to avoid the statute of limitations, re-affirmed.

Error to Hempstead Circuit Court.

The plaintiff instituted suit against the defendant on the 4th April, 1850, upon a bond dated 24th January, 1839, at 6 months, for $350 97. The defendant pleaded the statute of limitations,

to which the plaintiff replied "a promise in writing" within five years; and to sustain the issue formed on this replication, read in evidence two letters from the defendant to the plaintiff. The first letter is as follows:

Fulton, June 16*th*, 1849.

"*Roswell Beebe, Esq.*

DEAR SIR:—Gen. Royston holds my note as your agent as follows: $350 97, 6 mos. 20th August, 1839, 10 per cent from date. $200 payment 14th Jan'y, 1843. Note 159 35, 12th August, 1844, 6 per cent from date. The first note was given for lots purchased by me at sale—the other for lots purchased by M. H. Woods, to secure me in the peaceable possession of the Wood's lots. I paid Enoch I. Smith, who now has full possession of Fulton, $200 00. I think the proprietors of Fulton have done the purchasers of lots great injustice; and would not, feeling as I do, pay another cent on my purchase but for circumstances as they exist—I now propose to take up both notes with interest in Arkansas Bank paper, in which the first note is made payable at its value or equivalent deducting the $200 00 for funds paid Smith: if you accede to the proposition, please advise so as I may know how to act in the matter.

I am, very respectfully, your obt. servt,

AUGUSTUS BLOCK."

The second letter is dated 19th August, 1849, and is, in substance, the same as the first one. The Court, to whom the issue was submitted, found for the defendant; the plaintiff moved for a new trial, and, on his motion being overruled, excepted, and has brought the case here by writ of error.

WATKINS & CURRAN, for the plaintiff.

S. H. HEMPSTEAD, contra. To take a case out of the statute, the acknowledgment must be in writing, and must contain an unqualified and direct admission of a previous subsisting debt which the party is liable and willing to pay. *Alston v. State Bank*, 4 *Eng.* 455. *Brown v. State Bank*, 5 *Eng.* 134. *Angell on Lim.* 224, 227.

Tanner v. Smart, 6 *B. & C.* 303. 8 *Cranch* 72. 11 *Wheat.* 309. 1 *Peters* 351. 6 *ib.* 86. 5 *Bin.* 573. 9 *Serg. & R.* 128. 15 *J. R.* 511. 3 *Greenl.* 97.

Mr. Justice WALKER delivered the opinion of the Court.

The only question presented by the record relates to the sufficiency of the written evidence to prove a new promise, such as would take the case out of the operation of the statute of limitation.

The letters offered in evidence were not sufficient to prove an unqualified acknowledgment of the debt as a debt then due, or a promise to pay, such as is necessary to remove the statute bar, as laid down in the case of *Brown v. State Bank*, 5 *Eng. R.* 134, and several more recent adjudications of this Court.

Let the judgment of the Circuit Court be reversed.

FINN AS AD'M. VS. CRABTREE AS AD'M.

Upon the death of one of several defendants in a judgment, the plaintiff has a right to a separate revival against the representative of the deceased.

It is error to render judgment against a defendant without disposing of all his pleas.

Appeal from Lafayette Circuit Court.

This was a *scire facias* against Richard H. Finn as administrator of George Dooley, deceased, to revive a judgment rendered in favor of William Crabtree as administrator, against the said George Dooley, in his lifetime, and others. No affidavit of the

justice and non-payment of the judgment was filed by the plaintiff, nor any objection made in the Court below for the want of such affidavit. The defendant appeared and filed three pleas: first, *nul trel record;* second, *payment*; third, *limitation.* The plaintiff demurred to the last plea; the Court sustained the demurrer, and, without disposing of the other pleas, rendered judgment of revivor. The defendant appealed.

S. H. HEMPSTEAD, for the appellant, after arguing that no writ of *scire facias* could legally issue upon the judgment rendered against the intestate, without the affidavit described by statute, (*Ch.* 4, *Dig.*) cited the case of *Greer v. State Bank*, 5 *Eng.* 456, to the point that the writ of *scire facias* should issue against all the parties to the original judgment; and the cases of *Hammond v. Freeman*, 4 *Eng.* 67. *Stone v. Robinson*, 4 *Eng.* 477. *Hicks v. Vann*, 4 *Ark.* 527. *Reed v. State*, 5 *Ark.* 197. *Phillips v. Reardon*, 2 *Eng.* 257, to show that the Court erred in rendering judgment without disposing of the pleas of *nul tiel record* and *payment.*

Mr. Justice SCOTT delivered the opinion of the Court.

This record presents no ground upon which the question discussed as to the necessity of an affidavit can be raised. And the second objection is not well taken, because the party had a right to a separate revival against the representative of the deceased—the death having severed the defendants.

The remaining objection, however, is fatal to the judgment of revivor, as we have repeatedly held—the two remaining pleas being undisposed of.

Let the judgment be reversed and the cause be remanded.

JOHNSON V. PIERCE ET AL.

A covenant for the payment of money to a person "or his heirs or legal representatives" goes to the executor or administrator, upon his death, and not to the heirs.

A defualt, after legal service, is an admission of all the allegations contained in the declaration; but not that the facts alleged entitled the plaintiff to recover.

The court cannot, where default is made by the defendant, assess the damages in an action of covenant.

Error to Hempstead Circuit Court.

The material facts in this case are stated in the opinion of the Court.

WATKINS & CURRAN, for the plaintiffs. The covenant sued upon is a personal contract, and an action for breach of it must be brought in the name of the personal representative. 1 *Chit. Pl.* 21. 2 *Hen. Black.* 310. 3 *T. R.* 393, 401. The objection for want of legal title in the plaintiff may be taken at any time, even after trial and verdict.

The Court was not authorized to assess the damages. The instrument sued upon was a penal bond and special breaches assigned; a jury sould have been called to enquire into the breaches and assess the damages. *Dig.* 775, *sec.* 5, 7.

S. H. HEMPSTEAD, contra. The judgment by default is an admission of the allegations in the declaration, that Mary Lowe is dead, that the plaintiff's are her heirs at law and as such entitled to sue.

If the plaintiffs were not competent to sue, it should have been plead in abatement. 1 *Chit. Pl.* 14, 482, 483. 1 *Com. Dig.*, *Abate-*

ment E. 16, *E.* 17. 19 *J. R.* 308. 10 *J. R.* 183. 11 *J. R.* 418 *Wheat.* 671.

The bond was for a sum certain, with interest at a certain time: the principal might have been entitled to credits, but that did not enter into the allegation: a writ of enquiry is unnecessary when the sum is certain or may be rendered certain by computation. 3 *J. R.* 153. 1 *Wheat.* 215. 3 *Cond.* 548. 1 *Lit.* 209. 2 *J. J. Marsh.* 48.

Mr. Justice WALKER delivered the opinion of the Court.

Edith Pierce, Deborah Bloyd and Bedith Mills sued Edward S. Johnson on a bond with covenants, executed by Johnson and others to Mary Lowe or her heirs or legal representatives, assigned breaches of the conditions of the covenant and averred the death of Mary Lowe, and that the plaintiffs were her lawful heirs. The defendant failed to plead, and judgment was taken against him by default, and the court, without the intervention of a jury, proceeded to assess the damages and render final judgment for the plaintiffs.

It is evident that this was a personal covenant, not running with the land, and that an action for a breach of such covenant can only be maintained in the name of the executors or administrators of Mary Lowe. 1 *Ch. Pl.* 19. But it is contended for the plaintiffs that, as there was no plea, the judgment by default admitted a right of action in the plaintiffs. It is true that by failing to defend, the defendant admitted the truth of the allegations contained in the declaration, that is, he admitted the existence of every fact which the plaintiff would have been called to prove in order to maintain his action, because by refusing to make an issue with the plaintiffs upon the facts set forth by them, he deprives them of an opportunity of making such proof, and therefore from necessity the facts must stand admitted upon the same principle that whatever is not traversed in pleading is admitted. Default, says Tidd, is an admission of the cause of action, and therefore, when founded on a contract, the defendant cannot prove the contract fraudulent. And so when the action is on a note or

bill, no proof of their execution is required. *Tidd's Pr.* 522. So that, when Tidd says, "Default is an admission of the cause of action," we see from the examples given by him what he means by "admitting the cause of action." It evidently cannot, upon principle, mean more than that the facts alleged in the declaration are admitted, or, in other words, are considered as though they were proven. And this is the extent to which we understand the case cited by counsel in 4 *Humphries Reports*, to go.

But suppose, when they are all admitted as fully as if proven, and still fail to show a legal right in the plaintiffs to recover after allowing the benefit of the statute of jeofails and amendments, shall we say that they are entitled to recover? Most clearly not; unless we could suppose that a default would not only confess the facts alleged, but also furnish additional facts by intendment to be confessed. In the case before us, if the facts, that Mary Lowe was dead and the plaintiffs were her heirs, gave them a right of action, then the admission of these facts, and of the contract and its breach would have entitled the plaintiff to judgment. But we have seen such is not the case. The administrators or executors of Mary Lowe and not her heirs had a right of action for a breach of the condition of the bond. The objection is in the pleading, not so much in form, as that it is a suit upon a cause of action in which the plaintiffs are affirmatively shown to have no interest whatever: and is consequently a defect which no admissions can cure, and which would have been fatal in arrest of judgment even after issue and trial.

As regards the assessment of damages, it is very evident that a jury should have been called to asses damages. Such has been the uniform decision of this Court under our statute. 2 *Ark. R.* 382. 1 *Eng. R.* 490. The Court can only pronounce a judgment upon an ascertained liquidated demand.

Upon both these grounds, the judgment of the Circuit Court was erroneous, and must be reversed.

BANK OF TENNESSEE VS. ARMSTRONG ET AL.

Foreign corporations are not within the saving clause of the statute of limitation put in operation on the 20th March, 1839; but are embraced in the act of 14th December, 1844. *Clarke v. Bk. Miss.*, 5 *Eng.* 525.

A replication must tender an issue of fact and not of law.

Error to Jefferson Circuit Court.

The facts of this case are sufficiently stated in the opinion, to show the points decided.

S. H. HEMPSTEAD for the plaintiff.

F. W. & P. TRAPNALL, contra.

Mr. Chief Justice JOHNSON delivered the opinion of the court.

The judgment sued upon in this case was rendered in the State of Tennessee, in May, 1840, and this suit was not commenced until the 4th March, A. D. 1847. Prior to the passage of the act of the 20th of March, 1839, there was no statute in force in this State as to limitations upon foreign judgments. The provision which embraces them, is the 16*th Sec.* of *Chap.* 99 of the *Digest*, which is, that "All actions not included in the foregoing provisions, shall be commenced within five years after the cause of action shall have accrued." (See 5 *Ark. Rep.* 512, *Baldwin v. Cross;* and *Digest p.* 698.) Corporations are not within the saving clause of the statute of limitations put into operation on the 20th March, 1839, and as a necessary consequence, that statute commenced running against the judgment in suit from the time of its rendition in May, 1840, (5 *Eng. Rep. p.* 525, *Clarke v. Bank of Mississippi.*) But foreign corporations were embraced in the act of 14th December, 1844, by

which the previous limitation was extended for two years in favor of persons residing beyond the limits of this State at the passage of that act. The enactment in favor of persons residing beyond the limits of this State at the passage of the act of December 14th, 1844, was not intended to revive causes of action that were at that time barred by any statute of limitations, the words "notwithstanding, such suit or suits may be barred," having reference not to the time of the passage of the act, but to the time within the period of the two years allowed when any suit might be commenced. Thereby in legal effect prolonging the time of limitation in any cause of action belonging to any non-resident not barred at the passage of the act, (but which would be otherwise barred in the regular running of the statute of limitations, at any time between the passage of the act and the expiration of the period of two years) to the end of that period. (See the case last cited at page 526.) The cause of action, therefore, having accrued in May, A. D. 1840, and the statute having commenced running against it from the day of its rendition, it necessarily follows that it would have been barred in May, 1845, had not the act of 1844 extended it for two years from its date, which, of course, prolonged the time and postponed the bar until the 14th of December, 1846. The cause of action having arisen in May, 1840, and the statute of limitations of 20th March, 1839, having immediately attached to it, it is clear that a plea setting up a lapse of five years since the accrual of such cause of action, would be a complete bar, unless the plaintiff should admit the fact of such lapse of five years, and by way of avoiding its effect, set up by way of replication that it was still not barred, since it was not barred at the passage of the act of 14th December, 1844, and that she had commenced her action within two years from that time. This she has not chosen to do, and, consequently, the plea being a complete bar, and in no way avoidable, must be permitted to prevail.

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The first replication to the plea of five years, is, that the plaintiff existed, resided and obtained judgment in the state of Tennessee, and the defendants removed and resided in the State of

Arkansas, and beyond the jurisdiction of the said State of Tennessee, and that the said plaintiff has not been within the jurisdiction of the Circuit Court of Jefferson county within five years next before commencement of this suit, and that the said disability had not been removed five years next before the commencement of this suit. To put this replication upon the strongest ground for the plaintiff, it cannot possibly amount to an answer to the plea. To admit that the plaintiff resided in the State of Tennessee at the time of the accrual of the cause of action, and that she so continued to reside there up to the institution of this suit, and also that the defendants had been residents of this State during the same time, could not give the least aid to the replication. The construction already given to the several statutes bearing upon the subject, is predicated upon precisely such a state of facts.

The second replication to this plea is, that the statute of five years, by the defendants pleaded, is no bar to the plaintiff's right of action. This tenders no issue of fact, but one purely of law, and consequently, is not admissible by way of replication.

We are fully satisfied that neither of the replications was responsive to the plea, and, that consequently, the Circuit Court decided correctly in sustaining the demurrer to both, and also in giving final judgment against the plaintiff upon her refusal to plead further.

The judgment of the Circuit Court herein rendered, is therefore, in all things affirmed.

BRACKEN VS. WOOD.

An execution must issue within a year and a day of the rendition of the judgment; and regularly continued within a year and a day; or the judgment revived by *scire facias*.

Appeal from the Circuit Court of Phillips.

This cause was determined before the Hon. JOHN T. JONES. The facts are sufficiently stated in the opinion of the court.

F. W. & P. TRAPNALL for the appellant.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

This was a petition filed by Wood, to set aside and quash an execution issued by Bracken against him. The petitioner set out that Bracken, as the assignee of Seany and Langwell, recovered a judgment against him in the Phillips Circuit Court, on the 28th December, 1841, for the sum of two hundred and fifty dollars for his debt, and interest thereon at the rate of six per cent. per annum from the 12th July, 1839, for his damages, together with the costs of suit, &c. He then charged that four separate executions had been sued out upon said judgment, the first of which was issued on the 18th February, 1843; the second on the 10th of August, 1843; the third on the 23d of August, 1844, and the fourth on the 17th of May, A. D. 1850; that the first three were returned by the sheriff wholly unsatisfied, and that the fourth was levied by the sheriff upon his interest in the tavern house situated on lot No. 90, in the town of Helena; and further, that said judgment had not been revived by *scire facias* or otherwise since its rendition, and that no steps or proceeding had been taken to enforce the collection of the same

since the 23d day of August, 1844, until the issuance of the execution dated the 17th May, 1850, and then argues that in consequence thereof, no execution could legally and properly issue on said judgment on the said 17th of May, 1850, and then concludes with a prayer that the last execution which was issued on the 17th May, 1850, may be stayed, set aside and quashed. To this petition, the defendant, Bracken, demurred specially, and the court, upon due consideration had overruled the demurrer, and the defendant having refused to answer over, final judgment was rendered against him, quashing the execution, and also for the costs of the suit.

The question then to be decided is whether the Circuit Court ruled correctly or not in overruling the demurrer to the petition and quashing the execution. It appears from the petition, which stands admitted by the demurrer, that the first writ of *fi. fa.* which issued upon the judgment did not so issue within a year and a day, but that although the judgment was rendered on the 28th December, 1841, the execution did not issue until the 18th of February, 1843. There is no pretence, therefore, that the first *fi. fa.* issued within a year and a day, and that others had been regularly issued within the same space of each other down to the one now before the court, or that the judgment had been otherwise kept alive. In the case of *Aires v. Hardress*, 1 *Strange Rep.* 99, the course proper to be pursued to avoid the necessity of a *sci. fa.* is pointed out. In that case, a *fieri facias* was taken out within the year and a *nulla bona* returned, this was continued down for several years, and then a *capias ad satisfaciendum* issued. And whether that was regular or not, was the question. The court took time to inquire, and the last day of the term the Chief Justice said, "If this were a new case, they should think it hard to take away all *scire facias's*. But the practice had gone so far that there is no overturning it now." Wherefore the execution was held regular. "But it is otherwise if no execution be returned by the sheriff to warrant the entry of continuances on the roll. (See *Blayer v. Baldwin C. B.*, 2 *Wilf.* 82. *Barnes*, 213 *S. C.*) At common law, in real actions where land was

recovered, the demandant, after the year, might take out a *scire facias* to revive his judgment, because being particular in the real action quod the lands with a certain description, the law required that the execution of that judgment should be entered upon the roll, that it might be seen whether execution was delivered of the same thing of which judgment was given; and therefore, if there was no execution appearing on the roll, a *scire facias* issued to show cause why execution should not be. But if the plaintiff, after he had obtained judgment in any personal action, had lain quiet and had taken no process of execution within the year, he was put to a new original upon his judgment, and no *scire facias* was issuable by law on the judgment, because there was not a judgment for any particular thing in the personal action with which the execution could be compared: therefore, after a reasonable time, which was a year and a day, it was presumed to be executed and therefore the law allowed him no *sci. fa.* to show cause why there should not be execution; but if the party had slipped his time, he was put to his action on the judgment, and the defendant was obliged to show how that debt, of which the judgment was an evidence, was discharged. To remedy this, and make the forms of proceedings more uniform in both actions, the statute of *Westm.* 2, 13 *E.* 1, *St.* 1, *Ch.* 45, gave the *sci. fa.* to the plaintiff to revive the judgment where he had omitted to sue execution within the year after the judgment was obtained. (See 2 *B. A. Letter H. p.* 362, and the authorities there cited.) The reason why the plaintiff is put to his *sci. fa.* after the year, is because where he lies quiet so long after his judgment, it shall be presumed he hath released the execution, and therefore, the defendant shall not be disturbed without being called upon and having an opportunity in court of pleading the release, or showing cause, if he can, why the execution should not go. (See same authority, at page 363.) It is clear, under the authorities, that the first *fi. fa.* that issued upon the judgment referred to, was irregular, and consequently would have been holden voidable and quashed upon a direct proceeding instituted for that purpose. This being the case, there was necessarily no basis laid upon

which to build up and support those that were subsequently taken out. It is only in the event that one shall be taken out within the year and a day, that the judgment can be kept up, so as to authorize the issuance of others without the necessity of a *scire facias*. This was not done in this case, and consequently, nothing has yet taken place to remove the presumption of payment which the law raises after the lapse of the year and a day, and consequently, the execution last issued, and which is now sought to be quashed, was irregularly issued and voidable in law, and therefore correctly quashed by the Circuit Court.

The judgment of the Phillips Circuit Court herein rendered, is therefore in all things affirmed.

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STATE VS. ELDRIDGE.

It is a general rule that a criminal charge must be laid in the indictment so as to bring the case within the offence as given in the statute, alleging distinctly all the essential requisites that constitute it.

In all cases where a felonious intent is an element of the crime, constituting an essential ingredient of the offence and descriptive of it, such intent must be charged in the indictment: otherwise where it is no part of the crime, that being complete under the statute without it, and is simply descriptive of the punishment: in such case, it is sufficient to charge the offence in the words of the statute.

Appeal from the Circuit Court of Jackson County.

This was a prosecution for marking hogs: the indictment contained two counts. The first charged that the defendant on, &c., "with force and arms in said county of Jackson, unlawfully did mark four hogs of the value of four dollars, the personal goods and chattels of one Mizza Utley, for the purpose and with the

intent of preventing the identification of said four hogs by the said Mizza Utley, and with the intent to convert the carcasses of said hogs to his own use, the hogs aforesaid then and there not being over twelve months old at the time the same were so marked as aforesaid, contrary to the form of the statute," &c. The second count charged the offence in nearly the same words adding "and said hogs then and there being the subject of larceny."

The defendant moved to quash the indictment "because it does not describe the crime charged in the indictment as being done with a felonious intent, the crime represented in the indictment is made a felony by statute."

The court sustained the motion, and quashed the indictment.

The State appealed to this court.

CLENDENIN, Attorney General, for the State. It is only in cases of felony at common law, and felonies by statute, in which the felonious intent is deemed an essential ingredient in constituting the offence itself, and the description thereof; not where the felonious intent is descriptive of the punishment merely, as in *sec.* 1, *Art.* VI, *part* VI, *ch.* 51, *Dig.*, under which this indictment was found, constituting no part of the crime, that being complete without it, that it is necessary to charge the act to have been done "feloniously," or "with a felonious intent." *United States v. Staats*, 8 *Howard* 40, and *cases cited.*

Where an act done under particular circumstances, with a particular intent, is declared criminal, it is sufficient if the indictment charge the offence in the words of the statute. *Arch. Cr. Pl. & Ev.* 51. *U. S. v. Gooding*, 12 *Wheat.* 460. *United States v. Staats, ub. sup.*

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The only objection made to the indictment, upon the motion to quash, was, that the offence was not charged to have been committed with a felonious intent. The question therefore to be determined, is, is the indictment defective for the reason that the acts charged to have been committed by the defendant, are not

charged to have been committed feloniously, or with a felonious intent. The general rule is, that the charge must be laid in the indictment so as to bring the case within the description of the offence as given in the statute, alleging distinctly all the essential requisites that constitute it. Nothing is to be left to implication or intendment. Generally speaking it is sufficient to pursue the words of the act; but if in pursuing them there should be any ambiguity or uncertainty in charging the offence, the pleader should regard the substance and legal effect of the enactment. And when words or terms of art are used in the description that have a technical meaning at common law, these should be followed, being the only terms to express, in apt and legal language, the nature and character of the crime. In all cases of felonies at common law and some also by statute, the felonious intent is deemed an essential ingredient in constituting the offence, and hence the indictment will be defective, even after verdict, unless the intent is averred. The rule has been adhered to with great strictness, and properly so where this intent is a material element of the crime. Sir William Blackstone observes that the term "felony" originally denoted the penal consequences of the crime, namely, the forfeiture of the lands and goods, but that by long use, it came at last to signify the actual crime committed. He further remarks that the idea of felony is so generally connected with that of capital punishment, that it is difficult to separate them, and that the interpretation of the law conforms to that usage; and therefore, if a statute makes any new offence felony, the law implies that it shall be punished with death, that is, by hanging as well as by forfeiture, unless the offender prays the benefit of clergy. (4 *Bl. Com.* 97. *Wend. Ed.*) This view accounts for the necessity of the averment of a felonious intent in all indictments for felony at common law; and also in many cases when made so by statute; because if it is used, in the sense of the law, to denote the actual crime itself, the felonious intent becomes an essential ingredient to constitute it. The term signifying the crime committed, and not the degree of punishment, the felonious intent is of the essence of the offence, as

much so, as the intent to maim or disfigure, in the case of Mayhem, or to defraud in the case of forgery, are essential ingredients in constituting these several offences. But in cases where this felonious intent constitutes no part of the crime, that being complete under the statute without it, and dependent upon another and different criminal intent, the rule can have no application in reason however it may be upon authority.

The statute upon which the indictment in question is founded, describes the several acts which make up the offence, and then declares the person to be guilty of felony, punishable by fine and imprisonment. The transmission or presentation of any deed or other writing to any office or officer of the government in support of, or in relation to, any account or claim, with the intent to defraud the United States, knowing the same to be false, are the only essential ingredients. The felonious intent is no part of the description, as the offence is complete without it. Felony is the conclusion of law from the acts done with the intent described, and makes part of the punishment; as in the eye of the common law, the prisoner thereby becomes infamous and disfranchised. These consequences may not follow, legally speaking, in a government where the common law does not prevail; but the moral degradation attaches to the punishment actually inflicted. This question arose in a case before PARK, J., on the Northern Circuit in 1831, on the trial of an indictment for burning stacks of grain, which is made felony by the 22 & 23 *Car.* 2. The second count charges the prisoner with aiding and abetting, and an objection was taken that the indictment should have averred that he was feloniously present aiding and abetting. PARK, J., was inclined to think the objection fatal, but allowed the trial to proceed and the prisoner was acquitted on the facts. *Carron and another's case*, 1 *Levin's* Northern Circuit. It again arose before Lord LYNDHURST, C. B., at the Durham Assizes in 1834, on an indictment under the statute of Mayhem, 9 *Geo.* 4, *ch.* 31 & 2. An objection was taken after conviction that the indictment did not allege that the prisoner upon the prosecutor feloniously did make an assault, &c., but it was held that, as the

indictment described the offence in the words or terms of the statute, it was sufficient. (*Deacon on Cr. Law, supft.* 1652, 1681, *Rex v. Thomas Liddle.*) This statute, after describing the acts constituting the offence, concludes, like the one before us, that every such person shall be guilty of felony, and on conviction shall suffer death. The decision therefore bears directly upon the question in hand, and as the principle seems to have been given up in the country from whence it was derived, and at the best is here but the merest technicality, it is difficult to perceive any ground for still giving it effect. It would be otherwise, if the felonious intent was descriptive of the offence, and not simply of the punishment. (See 8 *Howard's U. S. Rep.* 44, 5 *and* 6.) That case is directly in point, and fully conclusive of the question here presented. The statute upon which the present indictment is founded, also describes the several acts which make up the offence, and then declares that the person who shall commit such acts shall be adjudged guilty of larceny, and that he shall be punished in the same manner as if he had feloniously stolen the property. The marking, branding or altering the mark or brand of any animal (the subject of larceny,) being the property of another with an intent to steal or convert the carcass or skin of any such animal to one's own use, or to prevent identification thereof by the true owner, are the only essential ingredients. The felonious intent is no part of the description, as the offence is complete without it. The felony is the conclusion of the law from the acts done with the intent described, and makes part of the punishment; as under our statute the prisoner is rendered infamous and also disfranchised. (*Digest, chap.* 51, *part* 10, and *secs.* 3 and 4.) The objection to the indictment therefore is not well founded in law, and consequently the Circuit Court erred in sustaining the demurrer. The judgment of the Circuit Court of Jackson county herein rendered is consequently, for the error aforesaid, reversed, annulled, and set aside, and the cause remanded, to be proceeded in according to law and not inconsistent with this opinion.

KELLY ET AL. VS. GARVIN, CARSON & CO.

A levy and a delivery bond given and forfeited, constitute an extinguishment of the judgment; and the bond becomes a new judgment.

In a suit on a recognizance in appeal, the defendants plead that after the affirmance of the judgment, a *fi. fa.* issued and a levy made: the plaintiffs reply that—the property not bringing two-thirds of the value, the defendants gave bond to deliver the property at the expiration of twelve months, that the property was returned to them, and not delivered, and the judgment is still unpaid: HELD, That the original judgment is discharged.

And this, though the bond was not returned forfeited by the sheriff: though the writ and bond were returned before the expiration of the stay, and no writ or other process was subsequently issued.

The bond becomes a judgment in such case at the term when the condition is broken, without any return of the sheriff as to the fact of non-delivery or forfeiture of the bond.

Such bond, when broken, is a full discharge of the whole original judgment, though the penalty of the bond be for a much less sum.

The principle decided in *Berry v. Singer*, 5 *Eng.* 487, re-affirmed.

Appeal from the Circuit Court of Benton county.

This was a suit upon a recognizance given to stay proceedings on a judgment in the Circuit Court pending an appeal to the Supreme Court. The plea and replication upon which the decision turns are stated, in substance, in the opinion of the Court.

The cause was argued before the Hon. THOMAS JOHNSON, C. J., and Hon. C. C. SCOTT, J.

FOWLER, for the appellants. The forfeited delivery bond set forth in the plea became a statutory judgment and a satisfaction of the execution and former judgment which was merged in and extinguished by it. *Ark. Dig.*, *p.* 500 *to* 502. *Camp v. Laid*, 6 *Yerg. Rep.* 248. *Joyce v. Farquar*, 1 *Marsh. Rep.* 20. *Harrison v. Wilson*, 2 *ib.* 551. *Lusk v. Ramsey*, 3 *Munf. Rep.* 432. *Love*

v. Smith, 4 *Yerg. Rep.* 129. *Davis v. Dixon's ad'm.*, 1 *How. Miss. R.* 67. 3 *ib.* 60, 419. 1 *ib.* 99, 332. 2 *ib.* 853. *King v. Terry*, 6 *ib.* 514. *McComb v. Ellett*, 8 *Smedes & Marsh. Rep.* 518. 7 *ib.* 797, 8 *ib.* 617.

ENGLISH, contra. The pleadings do not show that the delivery bond was in fact ever forfeited, or so returned by the sheriff; no writ of *venditioni exponas*, or other process authorizing the delivery of the property to the sheriff and a sale by him, was issued after the expiration of the stay, when the property was conditioned to be delivered; no return of the forfeiture of the bond or that the condition was broken is shown; and the bond could not become a statutory judgment until such return after the expiration of the stay. *Sections* 46, 47, *ch.* 67, *Dig. Caudle ad. v. Dare & Caruthers*, 2 *Eng.* 46.

Even if the delivery bond had been forfeited, or had become a judgment, it could not merge the original, as that was for $2,500, and the bond for $899 only. This point is not decided in *Ruddell v. Magruder*, 6 *Eng.* 587. Surely a judgment for $899 cannot be a satisfaction of one for $2,500.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The evidence introduced by the appellees in the Court below, was fully sufficient to entitle them to a verdict as far as the issues on the two first pleas were concerned. The first was *nul tiel* record as to the judgment, and the second, the same as to the recognizance. To negative the truth of these pleas, the record introduced was full and conclusive. To the third, a demurrer was sustained, and the motion for a new trial not having brought the question of the correctness of that decision before the inferior court, it is consequently out of the case as it stands in this Court. (*See Berry v. Singer*, 5 *Eng. Rep.* 487.)

The investigation is therefore now narrowed down to the fourth plea and the proceedings thereon. This plea sets up, in substance, that after the affirmance of the judgment of the Supreme Court and before the institution of this suit, the plaintiffs below,

for the purpose of obtaining satisfaction of said judgment, sued out a writ of *fieri facias* in the usual form, which was levied upon certain goods and chattels therein specified of the value of three thousand dollars, that said levy was also made before the commencement of the suit, that said goods and chattels had not been sold, and that no portion of them had been sold or otherwise disposed of under or by virtue of said writ of *fieri facias*, for the satisfaction of said debt, all of which was verified by reference to the writ and return thereon endorsed. To this plea, the plaintiffs below filed two replications: First, that they did not at the time and for the purpose in the plea alleged, sue out a writ of *fieri facias;* and secondly, that they did, at the time and for the purpose specified in the plea sue out a writ of *fieri facias* in due form of law, which writ was levied at the time and upon the property in the plea, and that said property had not then been sold; and then by way of avoiding the effect of the matter set up in the plea they proceed to set up new matter to the effect that the defendants, Kelly and Cox, after the making of the levy and before the sale, claimed the benefit of the two-third law, and demanded that said property should be appraised according to the provisions of that law, which was then and there done in due form, and further that the property was offered for sale, and that failing to bring two-thirds of the appraised value, the defendants entered into a bond with security, conditioned to deliver the property to the sheriff twelve months from the date thereof, to satisfy said debt, damages and costs; and further that the sheriff then and there delivered the said property to the defendants, Kelly and Cox, but that they had not nor had either of them delivered the property in accordance with the condition of the bond, and that it had not been delivered then or any part thereof to the said sheriff to be by him sold to satisfy said debt, damages and costs, and that the said defendants, Kelly and Cox, or any one else for them, had not paid off and discharged said debt, damages and costs, or any part thereof to said plaintiffs, nor had they paid the said sum of nine hundred dollars or any part thereof, and concluded with a verification. To this second replication, the defen-

dants below interposed their demurrer, which was overruled by the Court and the defendants rested. This second replication therefore stands wholly undefended, and the facts therein alleged must be taken as confessed. The question to be determined, therefore, is whether the plaintiffs below were entitled to a verdict or not upon the assumption that every allegation in the second replication is admitted to be true. We think it perfectly manifest that they are not entitled to a judgment even upon that supposition. The plea sets up matter which, if true, would only constitute a temporary bar, and the matter set up in the replication would not only operate as a temporary bar or mere suspension of other remedies, but it would also constitute a perpetual bar to this action inasmuch as it would amount to an utter extinguishment of the original judgment. The note originally declared upon bears date of the 6th of October, 1840, and was made payable one day after date, consequently the act of the 23d of December, 1840, though repealed by that of 9th December, 1844, was in force as to this contract, under the saving clause by which it was provided that that act should be prospective in its operation, and should not affect debts or contracts then existing. The delivery bond set up and relied upon in the replication having been executed on the 13th of November, 1847, it necessarily falls within the provisions of the act of the 16th of December, 1846, the first section of which declares "that hereafter besides the conditions now provided by law, there shall be inserted in every delivery bond taken by any officer, a further condition that in case the property specified in said bond shall not be delivered as provided therein, the said bond shall have the force and effect of a judgment, on which an execution may be issued against all the obligors thereof." The matter therefore set up in the replication by way of avoidance of the plea, is no answer to the plea, but on the contray goes to show that instead of a mere levy, which could only operate to suspend this action until such levy should be disposed of, it had been carried still further, and that it had been actually matured into a judgment, and consequently into a perpetual bar of this action. In respect to the legal effect of the matter set up

in the plea, we will first advert to *The People v. Hasson*, 1 *Denio* 577 *and* 578. The court in that case said, "It is said that the levy upon sufficient personal property to pay the debt was a satisfaction of the judgment, and consequently that the renewal was void. We have repeatedly held such levy does not always satisfy the judgment. (*Green v. Burk.* 23 *Wend.* 490. *Ostrander v. Walton*, 3 *Hill* 329.) And if the broad ground has not yet been taken, it is time it should be asserted that a mere levy upon sufficient personal property without anything more, never amounts to a satisfaction of the judgment. So long as the property remains in legal custody, the other remedies of the creditor will be suspended. He cannot have a new execution against the person or property of the debtor, nor maintain an action on the judgment, nor use it for the purpose of becoming a redeeming creditor." The doctrine of that case was referred to with approbation by this Court in the case of *Whiting & Slark v. Beebe and others*, decided at the last term. This Court in that case, said "The law gives to the creditor the right to select which of the several means of enforcing satisfaction he will avail himself, but when he has made such selection will never permit him to abandon it capriciously. He may prefer to take his debtor into custody on *ca. sa.*, and whilst so held all other satisfaction is denied him. But if the debtor should escape, the creditor may resort to other process for his satisfaction. *Taylor v. Thompson*, 5 *Peters* 358. So the creditor may elect to take goods by *fi. fa.* in satisfaction, and when he has done so the satisfaction is precisely the same in principle as if he had taken the body of the defendant in custody; whilst he holds them in execution the law gives him no other remedy. But should they by acts not the fault of the creditor, be lost to the debtor or appropriated according to law and found to be insufficient, then on the same principle that the escape of the debtor from prison entitles the creditor to further process, he may sue out an alias *fi. fa.* Yet like a voluntary discharge of the debtor from custody, if the goods are appropriated or wasted by the acts of the creditor or his authorized agent, the satisfaction would become complete at least to the amount of the value of

the goods so wasted (*see People v. Hasson*, 1 *Denio* 578.) So also where a levy is made and a delivery bond (which by statute has the force of a judgment when forfeited) is taken and forfeited, the levy is discharged and the bond so forfeited held to be a satisfaction of the former judgment. In support of this latter doctrine, numerous authorites are there cited. The replication therefore, admitting every allegation contained in it to be true, would not entitle the plaintiffs below to a verdict, as it not only shows an undisposed-of levy, but also an entire extinguishment of the original judgment, and the creation of a new one by force of the statute, and consequently that the plaintiffs below had voluntarily cut themselves off from all other remedies except upon the last judgment. It is clear therefore that the court below found contrary to law; for upon the supposition that the replication is true, which stands confessed, yet the law would not entitle the plaintiffs below to a judgment.

But it is contended by the counsel for the appellees, that it no where appears in the pleadings that the delivery bond was ever forfeited, and that consequently no new judgment has been taken which can operate to merge the one originally rendered by the Circuit Court. It is possible that the first special plea may not contain the necessary averments to amount to a forfeiture and as a consequence a statutory judgment. Whether this be true or not, we have no means of ascertaining, as its legal sufficiency is not made a question before us, as is already shown. It is conceded that no such defence is set up or relied upon in the second special plea, and all that could be claimed under it, if left to stand alone, would be a mere suspension of other remedies, until the levy therein specified should have been finally disposed of according to law. But the question that here arises is as to the effect of the second replication to this plea, which stands confessed as true in point of fact. The replication not only admits the issuance and levy of the execution as set up in the plea, but proceeds further to aver that upon such levy the defendants in the execution claimed the benefit of the appraisement or two-third law, which was extended to them, and that after having executed their

bond, with security, conditioned to return the property to the sheriff twelve months from the date thereof, they failed so to return and deliver it according to the condition of said bond. It may be true that the averments contained in this replication, if set up by the defendant by way of plea, would not be technically sufficient to show a forfeiture of the delivery bond, or a consequent merger of the old judgment into the new one thus created. But how would this rule of pleading operate when applied to the replication interposed by the plaintiff. He does not controvert the facts set up in the plea, but in order to avoid the effects of it, he undertakes to set up new matter, and in so doing, instead of nullifying the effect of the plea, he discloses matter which, if true, and taken in the strongest sense against himself, greatly strengthens the defence set up in the plea and changes it from a mere temporary to a perpetual bar. He has stated by way of replication all the essential facts to constitute a forfeiture, and he most unquestionably cannot complain if he is taken at his word, and if what he has there alleged shall be taken most strongly against himself. We would not hold that he is concluded by his replication, or that by his mode of meeting the plea he has forever barred himself of his remedy, but simply that his new matter is no answer to the plea, and that, if entertained at all, it must necessarily operate to the prejudice of the plaintiffs, or in other words, it being no response to the plea, even though strictly true in fact, it cannot avail the plaintiffs. But it is also contended that it is no where shown in the pleading, that upon the failure of the appellants to return the property levied upon to the sheriff, at the expiration of twelve months, to be sold by him, the sheriff made a return of such forfeiture or that the bond was in fact forfeited. It will be perceived by reference to the act of 1846, section first, that the binding effect of the delivery bond as a statutory judgment, is not left to depend upon the fact of the sheriff's return to that effect, nor to the subsequent steps which are pointed out by the second section of that act. The first section declares, "That hereafter besides the conditions now provided by law, there shall be inserted in every delivery bond taken by any officer a

further condition that in case the property specified in said bond shall not be delivered as provided therein, the said bond shall have the force and effect of a judgment, on which an execution may be issued against all the obligors thereof." The instant the term elapses at which the property was to have been delivered, and it is not forthcoming, the bond, *ipso facto*, undergoes an entire change of character, and is at once elevated to the standing and dignity of a judgment, upon which an execution may be issued against all the obligors thereof. The force and effect of the bond therefore, as a judgment, does not in the least depend upon a compliance with the second section of the act. That section is merely directory to the sheriff pointing out the course to be pursued by him in order to take out an execution against all the obligors.

The cases of *Walker v. Bradley*, 2 *Ark.* 578, and *Caudle, adm. of Poe v. Dare & Caruthers*, cannot be considered as authority in this case, as the bonds in those cases did not mature into judgments upon the failure to deliver the property. It is manifest, therefore, that the plaintiffs have shown by their replication such a state of facts, as if true amount to a statutory judgment, and consequently an extinguishment of the first judgment, upon the principle that one party cannot have more than one judgment for the same subject matter, against another at the same time. But we are here met by the objection that, even admitting that the delivery bond was forfeited, and thereby became to all intents and purposes a judgment, yet it cannot amount to an extinguishment of the first judgment because the bond is for a much less amount of money. The case of *Ruddell v. McGuire*, reported in 6 *Eng.*, at pages 583–4, furnishes a full answer to this objection as well as to the one which we have just discussed. In that case, this court said, "When the bond has been forfeited, it has by operation of law, the force and effect of a judgment on which execution may issue, and the sheriff's return to that effect is conclusive record evidence of the fact of forfeiture, and cannot be contradicted by parol evidence even at the return term. Thus, the non-delivery of the property transforms the bond by opera-

tion of law into a statutory judgment, on which statutory judgment execution may issue against all the obligors in the bond. The execution does not issue upon the bond but upon the statutory judgment which, by operation of law, springs into being upon the forfeiture, and then exists in contemplation of law. And the mode of executing this judgment so developed, is pointed out in the next succeeding section of the statute, which is by the issuance of an execution against all the obligors in the bond for the amount of the debt or damages, and all the interest and costs of suit remaining unpaid. Thus the amount of the bond is not the criterion for the amount of the execution to be issued, but that criterion is the amount of the debt or damages, and all the interest and costs of suit remaining unpaid. And should a case arise where the penalty of the bond might be less than the amount for which the execution should be issued under the express provisions of the statute, it will be time enough for us then to decide whether or not the obligors can have any relief for the excess, and if so, whether that relief can be had in a court of law, or would have to be sought at the hands of the Chancellor. Nor will the sheriff's failure to make the return required of him within two days by the statute, invalidate the statutory judgment; because this is but a failure to produce the evidence of the forfeiture upon which the clerk is to act, and therefore does not make the forfeiture of the bond any the less so in fact. And upon his failure to make his return and endorsement within the two days, the court would compel him to do so by rule and attachment at the application of any party interested either for or against the validity of the bond." We are satisfied, from a full and thorough investigation of this case, that the judgment of the court below is erroneous, and it is consequently reversed, annulled and set aside, and ordered to be remanded, and proceeded in according to law and not inconsistent with this opinion.

THE STATE VS. SMITH.

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59 159

The law knows of but one christian name; and it is no misnomer to improperly include or exclude the initial of a middle name.

Appeal from Conway Circuit Court.

The defendant was indicted by the name of John B. Smith; and pleaded in abatement that he was known and called by the name of *John Smith* and not *John B. Smith*. The State demurred to the plea; but the Court overruled the demurrer and the State appealed.

CLENDENIN, Attorney General. The law allows of but one christian name; middle names are disregarded, (2 *Cow.* 463,) and their omission or insertion incorrectly cannot be pleaded in abatement. 5 *John. R.* 84.

Mr. Justice SCOTT delivered the opinion of the Court.

The law knows of but one christian name. The entire omission of a middle letter is not a misnomer or variance. (*Litt.* 3 *a.* 1 *Lord Raym.* 563. 5 *John. R.* 84. 4 *John. R.* 119 *note a.*) "The middle letter is immaterial, and a wrong letter may be stricken out or disregarded." (*Keene v. Meade*, 3 *Peters R. p.* 9.) The demurrer ought to have been sustained and judgment rendered accordingly.

Let the judgment be reversed, and the cause be remanded.

BEVERLY BROWN v. THE STATE.

This Court will presume that the court below assigned counsel for a prisoner indicted for felony, if he was without counsel and unable to employ any, and requested counsel to be assigned.

Any irregularity in the issuance or direction of the *venire* to summon the petit jury, must be excepted to before the jurors are sworn; not after verdict returned.

A general judgment for costs means such costs as are incurred by the plaintiff in that case against the defendant.

Error to Union Circuit Court.

The original transcript filed in this case contained no statement of the empanneling of the grand jury; and as that defect was assigned for error, the Supreme Court ordered, of its own motion, a special writ of *certiorari* to amend the record. The return to the writ of *certiorari* showed that a grand jury was duly summoned, empanneled and sworn.

The defendant in the Court below, with two others, was indicted for horse stealing. The record states that the indictment was found on the 10th of October; a *venire* to summon thirty jurors "including the original pannel of jurors returned to this term of the Court" was ordered, issued, executed and returned on the 11th day of October. On the 12th, the defendants were brought into Court in custody; the indictment read to them: they pleaded not guilty, and severed : and this defendant tried and convicted, and judgment rendered in accordance with the verdict. The judgment for costs is "for all her cost in this behalf expended."

The record does not show whether the defendant had counsel or not; whether he was able or unable to employ counsel, or whether he requested the Court to assign him counsel; nor that he took exception to any of the proceedings.

E. H. ENGLISH, for the plaintiff, made the following points: 1st, That the record does not show that the grand jury was legally empanneled. 2d, That the defendant had no counsel in the court below. (*Dig. p.* 406.) 3d, That it was in violation of law to order a *venire* before arraignment. 4th, That the *venire* should have gone to the body of the county generally. (*Ch. C. L.* 411, *Dig.* 411.) 5th, That the judgment against defendant was for all the costs—including the costs against his co-defendants before severance.

J. J. CLENDENIN, contra. The issuing of a *venire* before issue joined, is matter of form, and should have been taken advantage of before plea.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The first objection taken to the judgment of the Circuit Court in this case is, that the caption to the indictment fails to show that the grand jury, by whom it was found, were legally empanneled. This ground of objection has been removed by the transcript sent up upon the return of the writ of *certiorari* which was issued by this Court upon its own motion to perfect the record.

It was next intimated by the counsel for the defendant that the Court below erred in proceeding with the prosecution without having first assigned counsel to conduct the defence. Whether the defendant had the aid of counsel or not in the Court below, we have no means of ascertaining, as the record is wholly silent upon the subject. The statute, it is admitted, makes it the duty of the court to assign counsel to conduct the defence of any person about to be arraigned upon an indictment for a felony, in case he shall be without counsel, and shall also be unable to employ any, and in case he shall request the same. The record does not show a request of the court to assign counsel, nor any disinclination on the part of the court to discharge its duty in that respect, and consequently, if the defendant has suffered for the want of counsel to aid him in his defence, he has no means upon this record of obtaining relief. In the absence of any show-

ing of record to the contrary, the legal presumption is that the court discharged every duty incumbent upon it. The objections urged to the time and manner of summoning the jury who tried the case, are all too late to avail any thing. If the *venire* issued prematurely, or was not directed generally to the whole body of the county, the exception might have been taken before the jurors were sworn; and if so taken, might or might not have prevailed according to circumstances; but it is most unquestionably too late to raise such objections after the jurors have been sworn and returned a verdict upon the merits of the case.

The last objection relates to the judgment, in giving the State all her costs in that behalf expended against the defendant. If the State has expended other costs, besides those which she incurred in the prosecution of the present defendant, she cannot collect them from him, as she can only collect such costs under this judgment as she is entitled to from him, and not such as she may be entitled to from other defendants. (See *Brown's ad'm. v. Hill & Co.*, 5 *Ark.* 80, and *Carlock v. Spencer and wife*, 2 *Eng. Rep.* 24.)

We have not been able to discover any error in the judgment of the Circuit Court, and consequently it must be in all things affirmed.

McGOUGH VS. RHODES.

A plea of justification, in an action of slander for false swearing, must not only state the circumstances under which the false swearing occurred; but must also aver that the matter sworn to was material to the matter or cause then in hand.

The 2 *section of ch.* 52 *Dig.*, was not designed to embrace unauthorized or profane swearing; but to extend the action of slander to all charges of false swearing in cases where an oath is required by law.

Where the words spoken are actionable *per se*, there need be no inducement in the declaration: otherwise where the words are not actionable *per se*, or are ambiguous, and require explanation by reference to extrinsic matter, in which case such matter must be stated, and that the words were spoken of and concerning it.

The case of *Carlock v. Spencer and wife*, 2 *Eng.* 12, overruled.

Appeal from Union Circuit Court.

This was an action of slander. The declaration, after the formal recitals, charges that "in a certain discourse which the said defendant then and there had of, and concerning the said plaintiff, in the presence and hearing of the said last mentioned citizens, falsely and maliciously spoke and published of and concerning the said plaintiff the false, scandalous, malicious and defamatory words following, that is to say, 'you have sworn falsely,' meaning that 'you,' meaning the said plaintiff, are perjured."

The substance of the plea, to which there was a demurrer, is stated in the opinion. The court overruled the demurrer, and the plaintiff appealed.

WATKINS & CURRAN, for the appellant.

PIKE & CUMMINS, contra.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

This was an action of slander instituted by the plaintiff against the defendant, in the Union Circuit Court. The charge is, in substance, that the defendant at a certain time and place, and in the presence of divers good citizens, in a discourse which he then and there had of, and concerning the plaintiff, falsely and maliciously declared that he had sworn falsely. To this declaration, the defendant filed four pleas; first, the general issue, and the three latter special pleas of justification. To the plea of the general issue, the plaintiff took issue and filed his demurrer to the other three. The court sustained the demurrer to the third and fourth, but overruled it as to the second. To the de-

cision of the court in thus overruling the demurrer to the second plea, the plaintiff excepted and refused to take issue upon it, but rested; and the court having given judgment against him, he appealed.

The defendant, in his second plea, and the one to which the demurrer was overruled, sets out in detail a judicial proceeding, which he alleges, took place before a certain justice of the peace; who, he avers, was duly commissioned and qualified, and fully competent to administer oaths, that he had jurisdiction of the subject matter of the suit, that the plaintiff, who was introduced as a witness in the case, testified to a certain matter; and that, in so testifying, he swore falsely. This plea is believed to be substantially a good plea of justification to a charge of perjury alleged to have been made against a party, with the single exception that it is not averred that the matter sworn to was material to the cause or matter then in hand. If the defendant intended to justify a charge of perjury, which is quite obvious from the character and contents of his plea, he fell short in the particular just stated—and, consequently, upon that ground, his plea was demurrable. But it is well settled that even a bad plea is good for a bad declaration, and that upon a demurrer to a plea, the court will go back and look into the declaration, and if it shall be found to be defective, the plaintiff having been found to be guilty of the first fault in pleading, judgment will be given against him, and that, too, without any regard to the sufficiency or insufficiency of the plea. To determine upon the legal sufficiency of the declaration, will necessarily involve the question of the true construction of the statute. The 2d sec. of chap. 152 of the Digest, declares "It shall be actionable to charge any person with swearing falsely, or with having sworn false, or to use, utter or publish words of, to, or concerning any person, which, in their common acceptation, amount to such a charge, whether the words be spoken in a conversation of and concerning a judicial proceeding or not." This statute, though general in its terms, never was designed to extend so far as to embrace mere unauthorized or profane swearing, but was clearly intended to

be confined in its operation, to such swearing as is recognized or required by law. It was intended to remedy a defect in the old law, by which the action of slander, when brought to recover damages for a false and malicious charge of perjury, was confined to some judicial proceeding. The legislature doubtless conceived that the reputation of a party might be made to suffer as much from a charge of false swearing in numerous other cases, in which the law requires oaths to be administered as in a regular judicial proceeding before a competent court; and, in view of this, determined to extend the action so as to embrace all cases of legal swearing, or, to speak more properly, all cases or matters in which the various statutes of the State enjoin the administration of an oath as the means of eliciting the truth. The 10th sec. of chap. 113, is strongly corroborative of this construction of the statute referred to. By it, it is declared that "In all cases in which an oath is required or authorized by law, the same may be taken in any of the forms in this act prescribed, in the several cases herein before specified, and every person swearing, affirming or declaring in any such form, or any form authorized by law, shall be deemed to have been lawfully sworn, and to be guilty of perjury for corruptly and falsely swearing, affirming or declaring, in the same manner as if he had sworn by laying his hand on the Gospels and kissing them." This statute puts all oaths which are required or authorized by law upon the same footing with those which may be administered in the course of a judicial proceeding, so far as the consequences of false swearing are concerned, and broadly declares that all such false swearing shall be perjury.

We do not conceive that the legislature by extending the action of slander to all cases where a charge of false swearing has been made, entertained the remotest idea of changing the form of pleadings, either on the part of the plaintiff or defendant. The act, by dispensing with the necessity of a reference to a judicial proceeding, which the old law required in order to make the words charged actionable, by no means designed to dispense altogether with any reference whatever to extrinsic matter. It was

not intended to make the word mentioned in the act, actionable *per se*, like a charge of theft or perjury, but simply to extend the action to other cases of false swearing than such as might be committed in the course of a judicial proceeding. If the defendant, therefore, at the time he uttered the slander charged against him, was speaking of a judicial proceeding, it is equally necessary that such proceeding should be set out in the declaration now, as it was before the passage of the statute; but, if not a judicial proceeding, then reference should be made to such proceeding as was the subject of conversation by the defendant at the time of the uttering of the slanderous words. The declaration is manifestly predicated upon the idea that the statute had made the words themselves actionable *per se;* and that, therefore, no extrinsic matter was necessary to make them so. We cannot consent to this construction of the act. A charge of perjury is actionable in itself, but a charge of false swearing is not actionable, unless connected with some proceeding or matter in which perjury could be committed. We are clear, therefore, that the declaration contains no cause of action, as there is an utter failure to refer to such extrinsic matter as to apprize the defendant of the essence of the charge intended to be made against him, and thereby to enable him to justify himself by pleading the truth of such charges. Where the slander is *prima facie* actionable, as for calling a person directly a thief, or stating that he was guilty of perjury, &c., a declaration stating the defendant's malicious intent, and the slander concerning the plaintiff, is sufficient without any prefatory inducement; but where the words do not naturally and *per se* convey the meaning the plaintiff would wish to assign to them, or are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to show that they were actionable, it must not only be stated that such matter existed, but also that the words were spoken of and concerning it. (See 1 *Chitty's Pl. page* 384) The case of *Carlock v. Spencer & Wife*, reported in 2 *Eng. Rep. at page* 12, so far as it conflicts with the doctrine of this case, is consequently overruled.

Under this construction of the act in question, it is clear that

the court committed no error in overruling the demurrer to the second plea, as the plea, whether good or bad, was fully sufficient for the declaration. The judgment of the Circuit Court of Union county herein rendered, is consequently in all things affirmed.

FENALTY VS. THE STATE.

A disqualification of a grand juror is good cause for challenge before an indictment is found; or of a plea in abatement before the trial; but it is too late to make such objection after verdict.

Appeal from Washington Circuit Court.

This was an indictment for an assault with intent to murder. The defendant was tried and convicted: and then moved the court to arrest the judgment, because one of the grand jurors was not, at the time of acting on said grand jury, nor is he now, a citizen of the United States; and offered to prove the fact. The court overruled the motion in arrest of judgment, and the defendant excepted.

E. H. ENGLISH, for the appellant. It is true, as a general rule, technical motions in arrest, go to matters appearing of record; but the court should set aside the judgment, if illegal in any important matter which is the foundation of the proceedings, whether presented by motion in arrest of judgment, or to set it aside. The constitution and law require the indictment to be found by a grand jury of sixteen good and lawful men, and the indictment is invalid if found by a grand jury not possessing the requisite

number or competency. (*State v. Hawkins*, 5 *Eng*. 77. *State v. Brown*, *ib*. 78.) Had the record showed that the grand jury was not a legal one, the objection might clearly be made on motion in arrest—the objection in this cause is for the same matter—the only difference is in the manner of proof: it is the matter and not the mode of proof that determines whether the objection shall be made by plea in abatement or otherwise.

JORDAN, for the State. A judgment can be arrested only for matters which appear of record. 1 *Ch. Cr. Law* 662. 4 *Burr* 2287.

The matters set forth in the motion should have been interposed by plea in abatement. A defendant cannot move in arrest of judgment for any thing he might have pleaded in abatement. *Howes Pr*. 534. 2 *Black. R*. 1120. 1 *Ch. Cr. L*. 310. 2 *Arch. Pr*. 280.

Mr. Justice SCOTT delivered the opinion of the Court.

The first objection we held untenable in the case of *Brown v. The State*, just decided; and the second cannot be sustained either upon principle or authority. The accused might have challenged for cause before the indictment against him was preferred to the grand jury who found it, and after it was found he might have pleaded in abatement of it, any constitutional disqualification of any of the grand jurors which showed them to be not good and lawful men. After pleading to the indictment, however, and standing his trial on the merits, it was too late to make this objection in any form.

There is no error in the record, and the judgment must be affirmed.

ETTER VS. FINN AS AD.

The statute, allowing claims against the estate of a deceased debtor to be presented to the executor or administrator within two years, does not extend the period of limitation, where the claim would be barred before the two years had expired.

When the statute of limitations commences running, it continues to run; except that the time intervening between the death of the debtor and grant of letters of administration, is not counted.

Error to Hempstead Circuit Court.

This was an action of debt, instituted on the 25th December, 1849, on a writing obligatory, executed by George Dooley, the defendant's intestate, on the 19th December, 1843. The defendant filed several pleas; among them, the plea of limitation, to which the plaintiff replied, that *five years*, the statute bar, had not elapsed when the intestate died, and that the claim was duly presented to the administrator within *two years* after letters of administration were granted to him; the defendant demurred to the replication, and the court sustained the demurrer.

WATKINS & CURRAN, for the plaintiff, admitted that the general principle, that the statute of limitations does not stop when it once commences running, is well sustained by authority, but contended that the principle has nothing to do with the question here presented; that the 85th section of the statute under the title "Administration," (*Chap.* 4, *Dig.*,) prescribing the time within which claims must be presented against the estates of deceased debtors, creates a new rule which applies to all claims not barred at the death of the debtor, whether the claim had one or five years to run. The cases of *Erwin, use Shelby v. Turner ad'x.*, (1 *Eng.* 14,) and *Burton's ad. v. Lockhart*, (4 *Eng.* 411,) are based upon this principle. If the creditor must present his claim within

two years, the converse of the rule must hold good, by a fair legal construction of the statute, and he has the whole two years within which to present his claim, if it is not barred at the commencement of the term. So, in Mississippi, under a similar statute, limitation in such cases does not commence running until after publication made by the administrator requiring creditors to present their claims. *Wren's ad. v. Spon's ad.*, 1 *How.* 115. *Helm v. Smith's ex'r.*, 2 *S. & M.* 427. *Pearl v. Conley et al.*, 7 *ib.* 356.

S. H. HEMPSTEAD, contra, contended that the replication setting up that the claim was exhibited to the administrator within two years after the date of the letters granted to him, is no answer to the plea, and does not avoid the statute: that where there is a complete cause of action, and a party capable of suing, and one capable of being sued, the statute commences running and is not suspended by the death of the debtor, nor prolonged by the appointment of an administrator; that as such case does not form one of the exceptions in the statute, the court cannot make it an exception so as to avoid the limitation: that the act requiring the presentation of claims within two years, has nothing to do with this question, and cited *Prideaux v. Webber*, 1 *Lev.* 31. *Jackson v. Horton*, 3 *Caine's Rep.* 200. *Angell* 205. 1 *Eng.* 17. 4 *Bac. Abr. Limitation, E.* 5. 13 *Wend.* 268. *Beauchamp v. Mudd*, 2 *Bibb* 539. 1 *John. R.* 176. 5 *Barb.* 396. *Angell Lim.* 57. *Troup v. Smith*, 20 *J. R.* 47. *Johnson v. Wren*, 3 *Stew.* 172. *Harper's R.* 135. 1 *McMullan* 333. *Doe v. Jones*, 4 *T. R.* 310. *Hickman v. Walker*, *Willes Rep.* 27. *Langford's ad. v. Gentry*, 4 *Bibb* 468. *McCoy v. Nichols*, 4 *How Miss. R.* 38. *Bal. on Lim.* 166. *Aiken v. Bailey*, 5 *Eng.* 583.

Mr. Justice WALKER delivered the opinion of the court.

In this case, the statute bar had commenced running before the death of the defendant, who died before the bar had matured by the efflux of time, but after his death, and before the claim

was presented to the administrator for allowance or suit brought upon it, the statute bar of limitation had matured.

To the plea of limitations it was replied, that on the blank day of blank, and before the claim was barred by limitation, the intestate departed this life, and that within two years after the grant of administration on his estate, the plaintiff presented his claim and commenced his action. If two years are allowed by the statute after the grant of administration on the estate of the debtor, in which to commence an action against his representative, the effect of which is to suspend the operation of the statute for that length of time, then the replication (if formal) is good. The provisions of the 99th chapter, Digest, will, upon examination, be found to relate to the disabilities of parties plaintiff having a right of action; and the two years given by statute in which to present claims against the estates of deceased persons, was evidently intended to limit the time for the presentation of claims against estates without reference to the general provisions of the statute of limitations, and does not affect the operation of the statute or extend the time for two years, irrespective of the time which the statute bar has run at the death of the testator or intestate.

As a general rule, where a statute commences running, it continues to run on until the bar becomes complete. This general rule has been qualified by this court upon the authority of the decisions of the courts of Maryland, Tennessee, North Carolina, Mississippi and Alabama, as will be seen by reference to the case of *Aiken v. Bailey*, 5 *Eng*. 584, where the death of a party has been held to produce a temporary suspension of the operation of the statute, for then there are no parties competent to sue or be sued. As for instance, if the payor of a note should die after the statute commenced running, but before the statute bar had matured, the time between the death of such party and the substitution of a new party, executor or administrator, would not be estimated in computing the time of the statute bar, but the statute would be held to re-commence running from the date of the substitution of such new party, and continue to run until the

time before the death of the testator or intestate, and that after the substitution of such new party taken together, should form a complete statute bar.

In this view of the case, the replication was clearly defective. It is not shown when the intestate died, nor when letters were granted to the administrator. It is, therefore, impossible to tell from the replication, whether the action was commenced in time to save it from the operation of the statute or not, for in order to estimate the time which the statute had run before the death of the intestate, it was necessary to show when the death took place; and so, also, to show the time which elapsed after the substitution of the new party, it was necessary to show when he was substituted. There was, therefore, no error in the judgment of the Circuit Court in deciding the replication insufficient in law.

Let the judgment of the Circuit Court be in all things affirmed, with costs.

JOHNSON & TILDEN VS. HOSKINS ET AL.

A *scire facias* to revive a judgment is not such an action as reqnires a bond for cost, where the plaintiff is a non-resident, under *sec.* 1, *chap.* 40, *Dig.*

The motion and affidavit to dismiss a cause for failure to file a bond for cost, must not only state the non-residence of the plaintiff, but that no bond has been filed.

Writ of Error to White Circuit Court.

This was a *scire facias* to revive a judgment: the defendant moved to dismiss, for cause set forth in the opinion of this court; the circuit court dismissed the cause, and the plaintiffs sued out a writ of error.

FOWLER, for the plaintiffs. A bond for costs is not required, under the statute, on a *scire facias* to revive a judgment—it not being a new action but a mere continuation of the same suit. 1 *D. & E. Rep.* 389. 4 *Ham. Ohio Rep.* 399. *Pet. C. C. R.* 449. 1 *Ch. Pl.* (8 *Am. Ed.*) 269. *Brown, Robb & Co. v. Byrd*, 5 *Eng.* 535.

Besides, if a bond were necessary, the motion and affidavit are insufficient to abate the suit, as it is not alleged that no bond was filed—which it is necessary to aver in the motion, as a bond for costs is no part of the record. *Cox et al. v. Gaines et al.*, 1 *Eng. Rep.* 435. *Hardwick v. Compbell & Co.*, 2 *Eng.* 120.

BYERS & PATTERSON, contra.

Mr. Chief Justice JOHNSON delivered the opinion of the Court:

The points presented in this case arise out of a motion interposed by defendants in error to dismiss the writ of *scire facias* sued out by the plaintiffs to revive a judgment theretofore obtained against the defendants, and to have execution thereof. The grounds of the motion, as shown by the original transcript sent into this court, are that the plaintiffs were non-residents, and had not filed a bond for costs before the issuance of the *scire facias*. It is not shown by that transcript that the motion was supported by an affidavit or otherwise verified. The transcript last sent up discloses a motion, which is predicated upon the sole ground that the plaintiffs were non-residents, and which motion was duly verified by the affidavit of Hoskins, one of the defendants. The first question is whether it was required of the plaintiffs, in a case like the present, to file a bond for costs; and the second, that in case such bond were necessary, whether the motion and affidavit were sufficient to authorize the court to dismiss the writ. The 1st section of chap. 40, of the Digest, declares that, "In all actions on office bonds for the use of any person actions on the bonds of executors, andministrators or guardians, qui tam actions, actions on penal statutes, and in all suits in law

and equity, where the plaintiff or person for whose use the action is commenced, shall not be a resident of this State, the plaintiff or person for whose use the action is about to be brought, shall, before he institutes such suit, file, in the office of the clerk of the circuit court in which the action is to be commenced, the obligation of some responsible person, being a resident of this State, by which he shall acknowledge himself bound to pay all costs which may accrue in such action." The 2d section of the same act further declares that "If any such action shall be commenced without filing such obligation, the circuit court shall, on motion, dismiss the same, and the attorney for the plaintiff shall be ruled to pay the costs accruing thereon." A *scire facias* on a judgment to procure execution against a party thereto, is not an original suit, but a continuation of the former action, and the execution thereon is an execution on the former judgment. (See *Brown, Robb & Co. v. Byrd*, 5 *Eng. Rep.* 534–5.) The *scire facias* is but a part of the processs of the original action, and not an action in itself, although it may be pleaded to just like a plea, pleaded *puis darien* continuance may be replied to, (see same case, p. 535.) The statute just quoted, doubtless refers alone to original actions instituted by non-residents, and consequently a *scire facias* simply to revive a judgment is not embraced in it. But upon the supposition that it is sufficiently comprehensive to embrace a *scire facias*, it is perfectly manifest that the motion and affidavit contained in the last transcript are wholly insufficient. The only ground laid in the motion is, that the plaintiffs were non-residents of the State, and that is the only fact verified by the defendant. The law requires the motion to present two distinct grounds, the one the non-residence of the plaintiff, and the other that they had not filed a bond for the cost of the suit before its institution. The subject matter of the motion being in abatement, and not appearing of record, every fact therein contained must be verified by affidavit. Neither the motion nor the affidavit were therefore sufficient to entitle the defendant to a dismissal of the writ even in case such bond had been necessary as a pre-requisite to the issuance thereof. The motion disclosed by the first transcript,

contained all the essential facts, yet it was wholly unsupported by any affidavit whatever. (See *Hardwick v. Campbell & Co.*, 2 *Eng. Rep.* 121.) We are satisfied, however, that no bond for costs was necessary as a pre-requisite to this proceeding, and that consequently the court below erred in dismissing it for the want of such bond, or for the fact of the non-residence of the plaintiffs. The judgment of the White Circuit Court herein rendered, is therefore reversed, annulled, and set aside, and the cause remanded, to be proceded in according to law, and not inconsisent with this opinion.

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MASSEY v. GARDENHIRE.

An execution by the Justice of the Peace and a return of *nulla bona,* are pre-requisites to the filing the transcript of a judgment of a justice of the Circuit Court and the issuance of execution therefrom.

But it is not necessary that the execution from the Circuit Court on such judgment, should recite the fact of such issuance and return of execution.

This Court will presume in favor of the judgment of the Court below, unless the record clearly shows that the Court erred.

Appeal from Lawrence Circuit Court.

The appellee filed his petition in the Circut Court to quash certain executions issued by the clerk of the Circuit Court of Lawrence county, which he averred were issued "without authority of law and without any legal or valid foundation, that no judgments have ever been obtained in said Circuit Court, or any other proceedings had there to authorize executions to issue. That they are void upon their face, and should be quashed."

The execution copied into the transcript recites a judgment rendered by a Justice of the Peace against the appellee in favor of the appellant, "which was filed in the office of the clerk of the county aforesaid."

The judgment of the Court recites the filing of the petition "to quash the execution in this case in the hands of the sheriff of this county sued out heretofore on a judgment spread upon the records of this Court by a transcript from a Justice of the Peace, with a prayer therein in said petition," &c.

The Court quashed the execution, and the defendant appealed.

FAIRCHILD, for the appellant. The petition to quash the execution was too vague and indefinite to justify any action in support of it—the petition should have shown in what the execution was defective, and why it was void. 2 *Ark.* 278. 19 *John. Rep.* 36. 9 *John. Rep.* 291. *Chit. Pl.* (8 *Am. Ed.*) 214, 233. *Boyce v. Brown*, 7 *Barb.* 80.

The execution was not void on its face. The issuing of an execution by the justice and return of *nulla bona*, were pre-requisites to the filing of the judgment in the Circuit Court and the issuance of an execution from the latter Court; but it was unnecessary to recite these facts in the execution; no more than it would be necessary to recite the affidavit for a *ca. sa.* under *sections* 3, 6, *ch.* 67, *Dig.*, or *sections* 7, 8, 9, *ch.* 136, *Dig.* See the case of *Steel v. Vandervoot*, 7 *Yerg.* 436. *Wickham v. Miller*, 12 *J. R.* 320. *Chapman v. Fuller*, 7 *Barb.* 72.

BYERS & PATERSON, contra, contended that the execution issued from the Circuit Court on a Justice's judgment, must recite all the pre-requisites prescribed by *sections* 139, 140 *ch.* 95 *Dig.*, or the sheriff would not be bound to execute it, and that the execution was properly quashed.

Mr. Justice SCOTT delivered the opinion of the Court.

The execution in question was *prima facie* good. It was not necessary that there should have been a recital in it that an exe-

cution had been previously issued by the Justice of the Peace and returned "no property found," although this was an indispensable pre-requisite as a step in the proceedings. Nevertheless, as the petitioner sought its quashal upon the ground that it "was issued without any authority of law, and without any legal or valid foundation," and the opposite party appeared and contested the motion and the court granted it, we must presume that the Court decided correctly unless the contray appears upon the record.

And in looking through the transcript we find that the justice's judgment was for a sum over ten dollars; that the transcript was filed with the clerk, and spread upon the records of the Circuit Court, but it does not appear either by bill of exception or otherwise that in fact an execution had been previously issued by the Justice of the Peace and returned *nulla bona;* consequently, in support of the judgment below, we must presume that, upon the hearing, the Court looked to its own records, and, finding this hiatus in the proceedings, quashed the execution for that cause.

The judgment must be affirmed.

WOODRUFF VS. TRAPNALL, ATT'Y., &C.

The notes of the Bank of the State of Arkansas issued previous to the 10th January, 1845, are a legal tender in payment of all debts then due to the State. *Decision of the Supreme Court of the United States* reversing the case of *Woodruff v. Attorney General pro. tem., in* 3 *Eng.* 236.

Judgment and execution thereon; a tender to the attorney, of the full amount in Bank notes; refusal to accept the money tendered; mandamus to compel the acceptance of the tender: HELD, That interest on the judgment ceased at the time of tender.

Quære, should the defendant have brought the money into Court with his application for a *mandamus ?* If so, the omission to object for the failure to bring the money into Court, was a waiver of it.

Motion for Attachment for Contenpt.

The case of *Woodruff v. The Attorney General pro tem.*, reported in 3 *Eng. Rep.* 236, having been reversed by the Supreme Court of the United States, and the Bank notes adjudged to be a legal tender in payment of the judgment, and the mandate of said Court, filed in this Court, the defendant moved for and obtained a per-emptory mandamus to compel the attorney to receive the notes in satisfaction of the judgment. The writ issued commanding the attorney to receive the notes, upon tender thereof, in payment of the judgment and *all interest legally due*, and costs. The defendant offered notes sufficient to pay the judgment and cost, and interest to the 24th February, 1847, the day of the original tender; the attorney refused to receive the amount and discharge the judgment, unless the interest was paid up to the present time; which was refused; and he so made return to the writ. The defendant then moved for an attachment of contempt against him for refusing to obey the mandate of the writ.

WATKINS & CURRAN, for the motion. The only question on the pleadings and decided by the Supreme Court of the United States, was that the Attorney General was bound to receive the full amount of the judgment tendered to him in Bank notes; not the amount of the judgment now, but at the time of the tender. It is true in respect of a tender that the party tendering must keep his tender good, by being prepared to pay the money when demanded, but until demand and failure to pay he is not in default. It is objected that the tender did not stop interest on the judgment, because the money was not paid into court. If this objection were good in a case like the present, it should have been made when the petition was originally filed: and by failing to do so at the proper time the State waived the objection. But it is admitted "that the law of tender which avoids future interest

and costs has no application to this case," because this is not a case where the creditor calls the debtor into court to settle with him there, in which case if the debtor would avail himself of a previous tender he must bring the money into court and have it ready to pay over according to the demand there made, but here the debtor calls the creditor into court to compel him to receive out of court satisfaction of his judgment.

F. W. TRAPNALL, contra. A plea of tender without payment of the money into court, is a nullity. *Shendon v. Smith*, 2 *Hill* 528. *Tidd. Pr.* 566. 1 *Arch. Pr.* 137. *Graham Pr.* 459. 14 *Wend.* 224. But the Supreme Court of the United States in this case say "that the law of tender which avoids future interest and costs, has no application to this case," and thereby recognize the correctness of the position assumed. Ever since the tender, Woodruff has had the possession and use of the money, and should be required to pay interest.

Mr. Justice WALKER delivered the opinion of the Court.

This case comes before us upon the petition of Woodruff for attachment or other process against Trapnall, as the Attorney of the State, for having failed, as is alleged, to receive the amount of the judgment and the legal interest due thereon in Arkansas State Bank notes, in obedience to a permeptory mandamus issued by this Court commanding him to receive the same—the same having by Woodruff, by his attorney, been duly tendered to said attorney. The return made upon the writ admits the truth of the tender of $3,755, (the sum previously tendered on the 24th of February, 1847,) and the due service of the writ, but attempts to justify the refusal to accept upon the ground that legal interest was due on the judgment from the time of the tender on the 24th February, 1847, until the present time, which was not also tendered, and therefore the said Woodruff did not tender the amount of the judgment with the legal interest due thereon, as he was by the writ required to do, before he, as attorney, was bound to accept and receipt for the same.

Thus, it will be seen, that there is no dispute about facts, nor that the bank notes were a legal tender in discharge of this particular debt (as much so as gold and silver would have been.) The decision of the Supreme Court of the United States and the writ of mandamus from this Court are conclusive upon this point: leaving the effect of the tender in 1847, and a failure on the part of Woodruff to deposit in this Court, with his petition for alternative mandamus, the sum so tendered the only question to be decided.

It may safely be assumed upon principle that a legal tender always stops interest and costs, because where the party who contracts to pay, or is adjudged to pay, offers and tenders that which his obligation or the judgment of the Court under the law requires of him, he is no longer in default, and cannot be taxed with either interests or costs, for these only arise in consequence of default. The tender is not a payment, because, from that time forward, he who tenders must hold himself in readiness to pay. So when he pleads a tender, he avers that he did tender and now tenders. The whole question therefore resolves itself into this, was the tender on the 24th of February, 1847, a valid legal tender? This point has been settled by the decision of the Supreme Court of the Unied States: because unless there had been a tender and refusal, no question could have arisen as to the kind of money tendered. The fact that the contest was narrowed down to a mere inquiry as to whether the notes were receivable, does not change the force and effect of the decision upon the plea of tender. That may have been the particular defect insisted upon to vitiate the plea, yet it was the legal sufficiency of the plea which was really before the Court. Just as if time or place omitted was the objection raised to the sufficiency of a plea, the Court would look to the plea as an entire defence or bar, and although the Court should decide that time or place was or not sufficiently pleaded, the judgment of the Court would be upon the plea.

If, as contended for the plaintiff, the money should have been deposited in this Court at the time the petition for an alternative mandamus was filed, instead of taking issue upon the fact

of tender, the objection should have then been made. By failing to do so, (conceding the deposit to have been proper) the objection was waived as fully as if a plea of *non est factum* should be filed without affidavit and issue taken to it without moving to strike it out, the plea would be good, and so we apprehend would be a plea of tender. But this case is more properly assimilated to a case of tender before suit. There the party makes no deposite; he keeps the money and may use it if he will, but must hold himself in readiness to pay. There is no suit then in existence against him for the money. And so after judgment a like duty rests upon him to pay, and the plaintiff has his right to a *fi. fa.* process upon his judgment, just as he had his right to an original writ upon his debt. It is the duty of the party to pay, and when he tenders the money, all that he is afterwards required to do is to hold himself in readiness to pay when called on.

But an effort is made to assimilate this proceeding to a suit at law by the plaintiff for the recovery of money which the plaintiff claims and the defendant refuses to pay, when in truth the very reverse is the state of case. Here the defendant offers and the plaintiff refuses to accept. This is a proceeding on the part of the plaintiff, not the defendant: but moreover this was not a proceeding before us for money. It was no issue as to whether money was or not due; no appeal is made to this Court to have the money brought before us and paid over, but to compel a party to receive money upon a proceeding not before us. But upon principles of equity, if the creditor refuses to accept and use the money, why should he complain that the defendant has had the use of it. He is in no worse situation than he would have been if the money had been placed in Court. And if the creditor refuses to accept, it is certainly not the fault of the debtor that he has not his money or that it is yielding him no interest.

But it is unnecessary to discuss the equity of this case. The tender was made, and has been adjudged a good legal tender, and as such it is clear that the interest stopped at the date of the tender. Therefore, when we directed our process of mandamus to the attorney commanding him to receive the amount of the judg-

ment and the interest legally due thereon, we must be understood as meaning the interest up to the date of the tender.

It is admitted that this sum has been tendered, and consequently the attorney is in contempt of court for having refused to receive it and give the necessary acquittance. But as we are satisfied that the attorney in this instance intended no contempt, but acted in good faith under a misapprehension of the law, and as he has answered in fact what he would set up in excuse, if an attachment should issue, we, under the circustances of the case, impose only the costs of this proceeding upon him, and direct an alias writ to issue.

DAVIS & CO. VS. HANLY, USE, &C.

Notice to the acceptor, or prior endorser to a protested bill of exchange, will be sufficient, if deposited in the postoffice in season to go by the first mail that departs after the commencement of the ordinary mercantile business hours of the day, next succeeding that in which the notice came to hand.

This court will take notice of "the general custom and usages of merchants," as well as of the "general customs of our own country," as matters that are generally known.

Appeal from Phillips Circuit Court.

This was an action against the drawers of a bill of exchange, drawn by J. F. Davis & Co., at Memphis, Tennessee, dated 21st April, 1849, at sixty days, in favor of Lewis, Lendnem and Fields, and accepted by S. N. Norton, payable at Louisville, Kentucky. The case was submitted to the court, who found for the plaintiffs. The defendants filed a motion for a new trial; the court overruled the motion, and the defendants excepted, setting out the

testimony. The bill of exceptions shows that it was in proof that the bill was duly presented at Louisville, the place of payment, on the 23d June, 1849, and protested for non-payment; that notice thereof was sent to Lewis, Lendnem and Field, endorsers, at Hartford, Kentucky; that the notice to the drawers, the defendants, was also enclosed to them, and received by the mail which usually arrived at Hartford, *about the middle of the forenoon on Monday;* that the first mail thereafter for Memphis, the place of residence of the drawers, the defendants, departed on *Tuesday, at 7 a. m.;* that the notice for the drawers was deposited in the box at the postoffice, after the mail on Tuesday had departed, and did not leave, in the usual course of the mail, until Tuesday, the first mail-day thereafter.

PIKE & CUMMINS, for the appellant. It was formerly stated, in general terms, to be the law, that notice should be sent by the first post after dishonor of a bill, or after receipt of notice of dishonor by a subsequent party, but this was relaxed because it might not be possible, in all cases, as the post might leave the moment after the receipt of the notice, and the rule was, that the next convenient post should be availed of, and finally, that sending notice on the day after protest or receipt of notice was good. *Lenox and others v. Roberts*, 2 *Wheat.* 373. 6 *East.* 3. *Amer. Cas.* 343. *Farmer's Bank of Maryland v. Duval et al.*, 7 *Gill & John.* 92. The rule is now settled, that notice must be sent by the mail, (or any mail where there are more than one,) leaving the day after protest, unless it is impracticable to send notice by the mail of next day, when it may be delayed to the succeeding day. The same rule applies to endorsers, who must send notice within the same time to remote parties, atfer they receive notice. *Mitchell v. De Grand*, 1 *Mass.* 176. *United States v. Barker's ad.*, 4 *Wash.* 464. *Eagle Bank v. Chapin*, 3 *Pick.* 180. *Carter v. Burley*, 9 *N. Hamp.* 55–9, 570. *Mead v. Engs*, 5 *Cow.* 303. *Remington v. Harrington*, 8 *Ohio Rep.* 507. *Brown & Sons v. Ferguson*, 4 *Leigh (Va.)* 37. *Townsley v. Springer*, 1 *Louis. Rep.* 124. *Talbot v. Clark*, 8 *Pick.* 54. *Biles on Bills* 209. *Curry v. Bank*

of Mobile, 8 *Porter* 360. *Howard v. Ives*, 1 *Hill's Rep.* 263. *Com. Bank of Natchez*, 3 *Rob. La. Rep.* *Sussex Bank v. Baldwin and another*, 2 *Harrison* 488. 17 *Maine*, 381. 22 *ib.* 125. 1 *S. & M.* 261, 644. 2 *ib.* 71, 445.

ENGLISH, contra. It seems to be now settled that each party into whose hands a dishonored bill may pass, shall be allowed one entire day for giving notice. 3 *Kent Com.* 106, citing in note *C. Bray v. Hardwan*, 5 *Maule & Selw.* 68. *Flack v. Green*, 3 *Gill & John.* 474. *Brown v. Ferguson*, 4 *Leigh* 37: and the rule is now understood to be, that notice put into the postoffice on the next day, at any time of the day, so as to be ready for the first mail that goes thereafter is due notice, though it may not be mailed in season to go by the mail of the day after the default. *Chitty on Bills* 485, *note R.* 5 *Maule & S.* 68. 1 *Moody & Walk.* 22 *Eng. Com. Rep.* 249. *Story on Bills* 334, 2 *Ed. Sec.* 385 337; *Sec.* 288 339; *Sec.* 290, and the authorities there collected on this point.

Mr. Justice SCOTT delivered the opinion of the Court.

When the facts of a case like this have been ascertained, the reasonableness of the diligence is a question of law. (*Jones v. Robinson*, 6 *Eng. R. p.* 511.) In this case, however, it does not specifically appear what facts, the Court setting as a jury, found from the evidence; and under the evidence, as contained in the bill of exceptions, we might be authorized, under the rule of presumption in favor of the verdict and judgment, to conclude that that particular state of facts was found which would place the affirmance of the judgment beyond all question; because it cannot be said that a finding that the notice in question came to the hands of Lewis on the same day that he deposited it in the postoffice, for the drawer of the bill, would be without evidence. We shall consider the case, however, as if the finding as to this point had been that it in fact came to his hands the day before about "the middle of the afternoon." And this is, perhaps, most probable, from the fact that he was post-master at Hartford, and would be

presumed under the proof of that fact, to be in personal discharge of his duties as such, in the absence of all evidence to the contrary.

All the authorities agree, that in fixing the liability of consecutive parties to a bill by notices from one to the other, the party receiving notice is never bound to forward it to the party to be fixed immediately above him on the same day that it reaches him, but may wait until the next day. When, however, we advance beyond this, and endeavor to ascertain precisely at what particular future point of time the notice must imperatively be given, in fact forwarded by packet or deposited in the postoffice, there is much contrariety of opinion. Upon examination of the numerous cases, however, that have been decided upon this latter point, it will be found, that with a view to the same end, two general rules have beeen, more than any other insisted upon. 1st. If it is to be sent by mail, (and the same principle is applied to other cases,) that it must at farthest be put in the postoffice in time to go by the mail of the day next succeeding that on which the notice came to hand, if there be a mail that goes that day, and if not, then by the first mail which goes thereafter 2d. That each party, through whose hands a dishonored bill may pass, shall be allowed one entire day of twenty-four hours for giving notice; and, consequntly, that it will be sufficient if he deposits the notice in the postoffice in time to go by the first mail that departs after the expiration of twenty-four hours from the time that he receives it.

We shall not notice other efforts at an exact rule, because we think that all the cases indicating such, may be resolved into one or the other of these more comprehensive propositions. And we think, that when tested by reason and their practical operation, as shown by cases that have come up, each of these two general rules are obnoxieus to serious objection. The first, for instance, will, in some cases, be utterly subversive in all that is substantial, of that proposition of law which we have first laid down as sustained with entire unanimity by the authorities, that a party shall not be bound to forward the notice the same day that it may

reach him, but may wait until the next day; because by its terms it will equally bind him to deposit the notice in the postoffice if the mail departs within the first hour of the next day, whether it may have reached him on the last hour of the last or of any previous hour of that day. And, although no such extreme case has come up for adjudication, yet various cases have arisen where, to prevent this absurdity, the courts have held, that when the mails depart at such an early hour of the morning of the next day as to have made it the usual practice of the postmaster to make it up and prepare it for delivery to the carrier the night before, although at a late hour; that such a mail was not within the rule, and other like exceptions have been made. *Demmods v. Kirkman*, 1 *Sm. & Mar. R.* 656. *Wemple v. Dangerfield*, 2 *S. & M. R.* 450.

And so the second rule will often operate with unreasonable severity against the party where liability is to be fixed in postponing the notice in effect to the second instead of the first business day after the receipt of the notice, in those cases where the notice might come to hand at the close of the business hours of the day, and the mails departed in the earlier business hours. And where mails departed weekly only, and packets monthly, and each within the earlier business hours of the day, great delay and injustice might result.

This working of the latter rule has induced the adoption of the former one, which is the more modern: and the practical working of the former has, in turn, made it necessary, as we have seen, to except particular cases from its operation. And the reasons given by the courts for these exceptions combined with the legitimate sway of the unbroken rule that the party is not bound to deposit the notice in the postoffice the same day that it comes to his hands, but may wait until the next, very clearly, in our opinion, sustains a general qualification of the first of these general rules, which, when firmly engrafted upon it, would seem to render the rule itself, with this qualification, entirely free from just criticism and supersede the necessity of insisting upon the second to soften the rigor of the first when administered without the qualification. And that qualification is this: that the notice will

be in time if deposited in the postoffice in season to go by the first mail that departs after the commencement of the ordinary mercantile business hours of the day next succeeding that in which the notice came to hand.

The reason always given by the courts for exempting a party from the duty of depositing the notice in time to be sent off by the mail of the next succeeding day, when that mail departed at an unusually early hour, is the obvious one, that to hold the contrary would be in effect to require the party virtually to deposit the notice in the postoffice the same day that it reached him, from which, as we have seen, all the authorities exempt him. And the qualification of the rule that we favor is even more than sustained by the observation of Judge COWEN in the case of *Howard v. Ives* (1 *Hill's R. at p.* 265.) He says, "The next day means the next business day," * * * * and, "It is urged that the morning post was neglected, but the mail for that post closed before the common business hours. The question is, whether the holder used ordinary diligence? It is not necessary to say, that in all cases where there are several mails on the same day, the party may elect by which he will send. Clearly he comes to the mark when he selects that post which leaves next after the hours of business commence for the day. This is the next practicable or convenient post." See also *Meads v. Engs*, 5 *Cow. R.* 307, *per* SUTHERLAND, Judge. *Story on Bills, Ch.* 9, § 288, *p.* 337.

And thus, based on reason, and supported by authority, we shall adopt the first of these two general rules with this qualification engrafted upon it as the true exposition of the law; and when we apply it to the facts of the case at bar, as we have considered them in the strongest light for the appellants, it is clear that the diligence was sufficient to fix the drawers of the bill in question; because the evidence shows that the mail departed at the early hour of 7 o'clock, A. M., which, even at that season of the year, was at least some two hours before the commencement of the ordinary proper mercantile hours of business for that day, as we know, as a part of "the general customs and usages of merchants," as "well as of the general customs of our own

country," and as a matter that is "generally known." (1 *Greenl. on Ev.* 63, 64, § 5, 6.)

Finding no error in the record, the judgment of the court below must be affirmed with costs.

MAIN v. GORDON.

The law does not raise a promise on the part of the vendor of land, upon the cancellation of the contract of sale, to pay for the improvements made by the vendee while in possession: there must be a special promise to pay for such improvements at the time of vacating the sale.

In an action to recover the value of such improvements, the defendant cannot set-off, as damages, the value of wood and timber cut off the land by the vendee in violation of his contract of purchase.

A party, who permits illegal testimony to be given to the jury without objection, cannot, after verdict, avail himself of the error on a motion for a new trial.

Testimony illegal at one period of the trial because no foundation has been laid for its introduction, may, at a subsequent period, become legal and competent, but in such case the party must again offer it in evidence.

Appeal from Crawford Circuit Court.

The declaration in this case contained four counts. The *first* count was for money *laid out and expended:* the *second*, for so much money "due and payable for and in respect of relinquishing and giving up of certain buildings, erections and improvements before then made and erected by the plaintiff in and upon certain lands and premises before that time quitted, relinquished and given up by the said plaintiff, and given up to said defendant at his special instance and request," avering a promise by defendant to pay in consideration thereof: The *third*, was a *quan-*

tum valebat, for the same consideration as in the second: the *fourth*, was for *work and labor*.

The defendant pleaded *non-assumpsit*, and the statute of limitations: to which there were general replications and issues; verdict and judgment for the plaintiff. The defendant moved for a new trial; his motion was overruled and he excepted, setting out the testimony in his bill of exceptions.

John N. Davis, a witness for the plaintiff, testified, in substance, that he knows the plaintiff made certain improvements on the land, in clearing, fencing and building houses; that the plaintiff said that he had purchased the land and was making the improvements for himself; that the plaintiff sold wood and lumber off the land; that Main, the defendant, is now in possession; that it was the witness' understanding that Main was to pay for the improvements, that the plaintiff told him that Main was to pay for them.

The defendant asked the witness, 1st, how much the wood and timber sold by the plaintiff was worth: 2d, was the improvement made by the plaintiff worth more than the wood and timber sold. The plaintiff objected to the witness' answering the questions, and the Court sustained the objection.

The plaintiff then read in evidence, after proof of the handwriting, the following letter and answer:

"Dr. Main: Be so good as to say what you will give me for what I have done on your place and leave it, in writing, and I will come in this evening and see you, as I can't stay until you come.

P. GORDON."

"It is a difficult matter for me to determine what to offer you. It is generally thought that the wood is worth the clearing For the work done on the house and making rails together with old rails, I have thought I could give you a chunk of a horse or the value of one in other property. I have a plain gold watch which I would give you or an 8 day brass clock.

J. H. P. MAIN.

March 24th, 1847.

I have a superior rifle gun, which I will let you have."

The defendant then offered in evidence a writing obligatory, which it is agreed was in the following words :

Know all men by these presents, that I, Pleasant Gordon, have this, 20th day of August, A. D. 1846, purchased of John H. P. Main the south-west quarter of the south-east quarter of section twenty-three, in township eight north, in range thirty-two west, containing 40 acres.

Conditioned, that I am to pay for said land four hundred dollars in twelve and twenty-four months, and I bind myself not to cut or allow to be cut any timber on said land except what is necessary for farming purposes, in order that if the said land should revert to the said John H. P. Main, it may not be injured thereby.

P. GORDON, [SEAL.]

The only other testimony in the case was as to the situation and location of the land.

WATKINS & CURRAN, for the appellant. There is no proof showing a promise to pay for the improvements, and the law clearly will not in this case imply a promise. The offer of a horse, &c., if founded on a consideration, would not be a contract until accepted; and if it had been accepted, the plaintiff could not recover in the present action.

But if the law implied a promise, then, as there was an express stipulation that no wood should be cut off the land, the evidence offered was clearly competent; as in an equitable action any matter can be given in evidence which in conscience should reduce the claim.

JORDAN, contra. No off-set or bill of particulars was filed, nor any notice given to the plaintiff in relation to a claim of reduction of damages on account of the wood; and if there had been, it is not the subject of an off-set, being for unliquidated damages—the evidence was therefore properly rejected.

The evidence of Davis was received without objection, and thereby became legitimate testimony in the cause, and sufficient

to warrant the jury in enforcing a promise by Main to pay for the improvements. *Hazen v. Henry*, 1 *Eng*. 86; *ib*. 428; 2 *ib*. 174; 5 *ib*. 138; 6 *ib*. 630.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

There can be no pretence, under the circumstances of this case, as developed by the testimony, that the law raised a promise on the part of the appellant to pay for the improvements which had been made upon the land in question. The appellee had absolutely purchased the land, gone into possession and made the improvements upon it as his own property, and his having abandoned his property could not in any way affect the contract of purchase and consequently he could not exact the price of his labor bestowed upon it without first showing that such contract of purchase, had been cancelled, that he had been relieved from its obligations, and that in consideration of such improvements, the appellant had undertaken to pay. The declaration contains no count, which purports to be based upon the special promise that the evidence tended to establish. The only proof going to show a legal liability, and which was admissible under the form of the counts, was that detailed by the witness Davis. This was wholly incompetent, and would doubtless have been excluded by the court below had a motion for that purpose been made in proper time; yet as it was permitted to go to the jury, and that too without objection, it is not for this Court now to say how far it may have gone to convince the jury of the existence of the fact attempted to be established by it. We do not design to intimate that all the testimony of Davis was inadmissible, but confine the remark to the understanding or hearsay of the witness and the declarations of the plaintiff below as stated by the witness. It is contended, by the appellant, that the Circuit Court erred in refusing him permission to interrogate the witness in relation to the value of the wood and timber which the appellee had sold upon the land. The counsel for the appellee controverts this position upon two distinct grounds. First, that no set-off or bill of particulars was filed as a basis for the introduction of such evidence,

nor notice in any manner whatever that the defendant below intended to rely upon the value of the wood and timber which had been taken from the land. And secondly, that the defendant, having accepted a higher security for any loss that he might sustain from that source, was bound to resort to such security, and could not avail himself of the same matter of defence in this action.

The court below correctly refused to permit the witness to testify as to to the value of the wood and timber, which had been sold by the appellee, at the time it was called for by the appellant, as no foundation had been previously laid for the introduction of testimony to establish that fact. The action is assumpsit based on contract, and it is clear that any damages, which might have accrued to the appellant, resulting from the sale of wood and timber by the appellee, could not have been set up by way of set-off or in mitigation of the amount claimed in this action, unless it had been made to appear that such was a part and parcel of the contract entered into by the parties. No such showing had been made at the time the court ruled out the testimony, and consequently there was no error in that respect. True it is that, at a subsequent period in the progress of the trial there was some evidence adduced which tended to show that, so far as the appellant's admissions were concerned, if taken against him to establish a promise to pay for the improvements, were also admissible for him to explain the character and extent of such promise, and if after the basis thus laid by the appellee by the introduction of the appellant's own admissions, the court had been called upon to receive other evidence corroborative of such admission in relation to the value of the wood and timber disposed of by the appellee, there can be no question but that it would have been error. We have not been able therefore to discover any error in the rulings of the court during the progress of the trial.

The question now to be determined is, whether any error intervened in overruling the motion for a new trial for any of the causes therein specified.

The first cause assigned is, that the finding of the jury was contrary to the evidence: second, that the court excluded from the

jury evidence offered by the defendant which ought to have been admitted, and thirdly, that the court permitted illegal evidence to go to the jury. In respect to the first, we cannot say that the jury found contrary to the evidence. It is conceded that the testimony going to show a promise by the appellant to pay for the improvements, was rather slight and doubtless would have been rejected altogether as illegal, if an objection had been interposed in proper time, yet it was silently permitted to go to the jury, and, for aught that we can know, was fully sufficient to convince their minds of the existence of the facts for which it was introduced. Neither can we say that the court excluded from the jury evidence offered by the defendant, which ought to have been admitted. The evidence sought by the appellant in relation to the value of the wood and timber sold by the appellee, was clearly incompetent at the time it was called for, and consequently the court cannot properly be charged with error in not receiving it. If the appellant desired the evidence of other witnesses to corroborate and sustain his own statement, which had been introduced by his adversary, and thereby made evidence in his own favor, he should have renewed his application after he had been thus permitted to lay a foundation for it, and if the court had then refused, it would have been most clearly error. The third is that the court permitted illegal evidence to go to the jury. That this is true in point of fact, will not be denied, but although strictly true, it is not a matter which can avail the party upon a motion for a new trial, as he has stood by in silence and made no objection during the whole trial. If he considered any part of the evidence offered against him, inadmissible for any reason whatever, it was his duty to lay his finger upon it and to make his objection at the time, and having failed to do so whilst the matter was passing before the lower court, it is now too late to avail himself of such objection.

We are therefore of opinion, from a full and careful view of the whole record, that there is no error for which the judgment ought to be reversed. The judgment of the Crawford Circuit Court herein rendered, is, therefore, in all things affirmed.

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KELLY ET AL. VS. NEELY, JUDGE, &C.

The husband of the aunt is related to the husband of her niece within the fourth degree of affinity.

Writ of Mandamus.

The facts in this case appear in the opinion of the Court.

WATKINS & CURRAN, for the plaintiff. Consanguinity is the having the blood of some common ancestor. 2 *Bl. Com.*, *ch.* 13, *p.* 203. Affinity arises from the marriage of one of the parties so related, as the husband is related by affinity to all the *consanguinei* of his wife, and *vice versa*. But the *consanguinei* of the husband are not at all related to the *consanguinei* of the wife. 1 *Bl. Com.*, *ch.* 15, *p.* 435, *note* 5. And in this case, the defendant is related by *affinity* to his wife's aunt, but in no way to the husband of his wife's aunt, the party to the suit; as that would be to create an affinity upon an affinity, and is not therefore related to Egner in any manner whatever. The distinction is recognized in the case of *Blodgett v. Brinsmaid, ad.*, 9 *Verm.* 36. See also *Higbe v. Leonard*, 1 *Denio* 187. The cases of *Port v. Black*, 5 *Denio* 66. *Foot v. Morgan*, 1 *Hill* 654. *Edward v. Russell*, 21 *Wend.* 63, and *Cain v. Ingham*, 7 *Cow.* 478, seemingly contra, turn upon a statute of New York.

FOWLER, for the defendant. That the husband is related to the kindred of the wife by affinity, and stands in the same degree to them that she does. *Carman v. Newell*, 1 *Denio* 26. *Higbe v. Leonard*, *ib.* 187. And as in this case the defendant is related to Egner within the fourth degree of affinity, whether the computation be made according to the civil law, (2 *Bl. Com.* 207, 4 *Kent's Com.* 1*st Ed.* 408,) or the canon law, (4 *Kent's Com.* 408

409. 2 *Bl. Com.* 206, 207, 224, 504,) he is disqualified by the constitution and laws. *Const. Ark.*, *Art.* 6, *sec.* 12. *Dig.*, *p.* 316, *sec.* 16.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

This was an application to this court for an alternative writ of Mandamus to be directed to the Hon. Beaufort H. Neely, judge of the Independence Circuit Court, commanding him to take cognizance of, and proceed to hear and determine a certain cause therein pending, or to show cause why he would not do so. The writ was issued in accordance with the prayer of the petition, and returned with the judge's answer endorsed thereon, and in which he shows for cause why he had not, and why he still refuses to take cognizance thereof, that Joseph H. Egner, who is one of the defendants in said cause, is the husband of Euphemia Egner, and that said Euphemia is the maternal aunt of Margaret F. Neeley, who is the wife of the respondent. From these facts, he insists that he is related to Egner by affinity within the prohibited degrees, and that therefore he is legally disqualified to preside upon the trial.

The 12th sec. of the 6th Article of the Constitution, declares that, "No judge shall preside on the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by affinity or consanguinity within such degrees as may be prescribed by law, or in which he may have been of counsel, or have presided in any inferior court except by consent of all the parties." The 16th sec. of chapter 50, of the Digest, declares that "No judge of the circuit court, justice of the county court, or judge of the court of probate, shall sit on the determination of any cause or proceeding in which he is interested, or related to either party within the fourth degree of consanguinity or affinity, or shall have been of counsel without consent of parties." The method of computing the degrees of consanguinity in the canon has been adopted by the common law, and is as follows: We begin at the common ancestor, and reckon downwards, and in whatsoever degree the two persons or

the most remote of them is distant from the common ancestor, that is the degree in which they are related to each other. Thus, Titius and his brother are related in the first degree, for from the father to each of them is counted only one. Titius and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor; viz. his own grand father, the father of Titius. (See *Co. Litt.* 23, and *Bl. Com.*, *vol.* 2, 207.) This rule, applied to Mrs. Egner and Mrs. Neely, the latter being the niece of the former, will necessarily place them in the second degree of consanguinity to each other.

Affinity is a connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relations of the wife, as that in which she herself stands towards them, and gives to the wife the same reciprocal connection with the relations of the husband. It is used in contradistinction to consanguinity. (G. V.) It is no real kindred. A person cannot by legal succession receive an inheritance from a relation by affinity, neither does it extend to the nearest relations of husband and wife, so as to create a mutual relation between them. The degrees of affinity are computed in the same way as those of consanguinity. (See Bouvier's Law Dictionary, page 89, and the cases there cited.) The degrees of affinity being computed in the same way as those of consanguinity, it follows, as a necessary consequence, that in case there is any affinity whatever as between Neeley and Egner, it must be of the second degree, as that is the relation of their wives by consanguinity. The question then is whether there is any affinity whatever as between the husbands of the aunt and neice. The counsel on both sides have referred us to several cases, which we will now proceed to notice.

The case of *Blodgett v. Brinsmaid ad.*, (9 *Vermont* 30,) does not come fully up to the facts as disclosed in this. There, the objection taken was founded upon an affinity arising out of a marriage between the party who was alleged to have performed a judicial function, and the sister of the real defendant in the execution, whose property he had appraised. The appraiser having

intermarried with the sister of the party, there could be no doubt of the existence of an affinity so long as the marriage continued, and consequeetly the only question for the court to determine in that case, was whether such marriage was undissolved at the time of the performance of the judicial act. The rule, as applicable to the facts of that case, was there correctly laid down, and under it there could be no doubt of the affinity, in case the marriage still subsisted. It is there said that, "consanguinity is the having the blood of some common ancestor. Affinity arises from marriage only, by which each party becomes related to all the consanguinei of the other party to the marriage, but in such case these respective consanguinei do not become related by affinity to each other. In this respect, these modes of relationship are dissimilar. 1 *Bl. Com.*, *ch.* 15, *p.* 434, *Christian's Notes to do.* 15 *Viner's Abr.* 256. The relationship by consanguinity is in its nature incapable of dissolution, but the relationship by affinity ceases with the dissolution of the marriage which produced it. Therefore though a man is by affinity brother to his wife's sister, yet upon the death of his wife, he may lawfully marry her sister."

In the case of *Higbe v. Leonard*, (1 *Denio* 187,) the objection to the acts of the justice was, that his two brothers had married two sisters of the plaintiff, and it was also alleged that such marriage had taken place before the commencement of the suit before the justice, and that the persons so connected were still living. The Supreme Court sustained the action of the justice upon the ground that, although he was related by affinity to the two sisters of Higbe, the plaintiff, yet there was no such relation between him and Higbe. The court in that case laid down the same rule that was stated in the case already referred to in 9 *Vermont*, and as a matter of course, under that rule, there could exist no relationship whatever between the party and the justice.

In the case of *Edwards v. Russell*, the proof was that the justice and the plaintiff were cousins, (21 *Wend.* 63.) There no doubt could exist as to the disqualification, as they were related by consanguinity, and that within the prohibited degrees.

In the case of *Cain v. Ingham*, the substance of the decision

is, that the marriage having been dissolved by death, there was no principal cause of challenge, but that under the circumstances actual favor or influence might have been shown by evidence, and if so shown, might have rendered the juror incompetent.

The case of *Foot v. Morgan*, (1 *Hill* 654,) would seem to throw more light upon the question before us than any that has yet been brought to our view. In that case, a motion was made to set off a judgment in favor of the defendant obtained in the name of H. M. in a justice's court, against a judgment rendered in favor of the plaintiff in that (Supreme) court. The motion was opposed on the ground that the justice's judgment was void for want of jurisdiction, and an affidavit was produced showing that Morgan, the then defendant, was the real plaintiff before the justice, and was related to the justice; the said Morgan and the justice having married sisters, and both their wives being alive at the time of the commencement of the suit before the justice and the rendition of the judgment therein. It appeared that Morgan recovered the judgment before a justice in the name of H. M., his brother, but that the brother had no interest in it. The court in that case, by COWEN J., said, "It was said by counsel in behalf of the motion, that a party and juror having married sisters would be no cause of challenge, but, I presume, hastily, for it is put among the commonest cases in the books, as an instance of affinity which disqualifies. It was holden very early, on writ of error to parliament, that the sheriff's wife, being a sister to the plaintiff's wife, was good cause of principal challenge to the array, (*Markham v. Lee*, cited in *Mounson and West's case*, 1 *Leon*. 89.) We are free to confess that the question involved is somewhat subtle, far from being clear of difficulty, and the only means by which we have been enabled to solve it, as we think, has been by keeping steadily in view the principle as held in most of the cases referred to, and by looking entirely beyond and outside of it for the real merits of the question. The proposition is that "Affinity arises from marriage only, by which each party becomes related to all the consanguinei of the other party to the marriage, but in such case these respective consanguinei do not become re-

lated by affinity to each other." It is said in *Higbe v. Leonard*, (1 *Denio* 186,) that, "A husband is related by affinity to all the consanguinei of his wife, and *vice versa* the wife to the husband's consanguinei; for the husband and wife being considered one flesh, those who are related to the one by blood are related to the other by affinity. But the consanguinei of the husband are not at all related to the consanguinei of the wife. It is contended that according to this rule, the respondent cannot be in any manner related to the defendant, Egner, inasmuch as his wife is only related to him by affinity, and that consequently to hold that an affinity exists as between them, would be in effect to put one affinity upon another, and that the law does not sanction such a process. This, it must be conceded, is plausible, and the rule itself, if strictly confined to its letter, and at the same time so construed as to exclude the idea of a further extension, would strongly incline to such a result. But in holding that the consanguinei of the respective parties to the marriage do not become related to each other either by consanguinity or affinity, it does not follow that the immediate parties themselves may not become related, not only to the consanguinei of each other, but also to all such of their relations as may arise from the tie of affinity. If the tie of affinity exists at all between the husbands of the aunt and neice, and that it does would seem to be established by the case in 1 *Leonard* 88, then it is that it must arise out of the rule as laid down in respect to the consanguinei of the respective parties to the marriage, when thus extended so as to embrace the relations contracted by the parties themselves. That the immediate parties to the marriage, by the very act of entering into that relation, impart properties to each other, which simultaneously run through all the ramifications of each other, would seem necessarily to result from the origin and nature of the institution of marriage itself, and also from the theory which the common law has entertained in reference to it from the earliest period of Bible history down to the present day. When the woman, which was made of one of the ribs of Adam was brought and presented to him in Paradise, he said, "This is now bone of my bone and

flesh of my flesh; she shall be called woman, because she was taken out of man." (See *Genesis, ch.* 2, *ver.* 23.) The same notion of identity or unity is kept up and carried out by my Lord COKE, (*Co. Litt.* 112,) when he says that "By marriage the husband and wife are one person in law, that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of her husband, under whose wing, protection and cover she performs every thing, and is therefore called in our law French a *feme covert, fœmina viro co-operta,* is said to be covert baron, or under the protection and influence of her husband, her baron or lord, and her condition, during her marriage, is called her coverture. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties and disabilities that either of them acquires by the marriage. For this reason, a man cannot grant any thing to his wife, or enter into covenant with her; for the grant would be to suppose her separate existence, and to covenant with her would be to covenant with himself. (See *Co. Litt.* 112, and *Bl. Com.*, 1*st vol.* 442.) It is upon the principle of a complete merger or incorporation of the very being and existence of the wife in that of her husband, and upon that alone that the relationship contended for, can be conceded. The act of marriage therefore, though creating a private relation, cannot be said in strictness to create any relationship either by consanguinity or affinity; because those relations pre-suppose a separate legal existence between the parties thus related, which, as we have shown, is not the case in respect to husband and wife. We think therefore, that, by the marriage of the respondent with the niece of the defendant's wife, he placed himself in the same degree of propinquity to all the relations of his wife, in which she actually stood towards them, and that consequently he falls within the fourth degree of affinity to the defendant, Egner. If we are correct in this, and that we are we feel satisfied, then it is that the respondent is incompetent to preside in the cause, and consequently acted correctly in refusing to do so. The demurrer to the answer is therefore overruled, and the rule discharged.

ALSTON VS. BALLS AND ADAMS.

On a special contract to pay hire for a slave and return him at the end of the term, the party hiring is liable for the hire and value of the slave if he runs away and escapes, though without cause or fault on the part of the hirer: otherwise, perhaps, as to his liability for the value of the slave, if there is no special contract to return him.

Appeal from Johnson Circuit Court.

This was an action for the hire and value of a slave. The declaration sets out a hiring by the plaintiff to the defendants of a negro slave for the year 1849, and alleges that the defendants, on the first day of January, A. D. 1849, at &c., "did make and deliver to the plaintiff their certain promise in writing, which bears date," &c., whereby they promised to pay a specified hire, to furnish clothes, &c., "and return said boy to the said Alston, at Clarksville, Arkansas, on the first day of January, 1850:" the breach is, that the defendants neither paid hire, furnished the clothes, nor returned the boy.

The defendants filed four pleas: the second and third, are, in substance, that the negro slave, in the month of April, without cause, or any fault on the part of the hirer, ran away and escaped; that the plaintiff had immediate notice thereof, and that the defendants exerted all reasonable means for the recovery of the slave, &c., whereby they were unable to deliver him at the expiration of the term.

The plaintiff demurred to the second and third pleas, and the court overruled his demurrer, and he appealed.

WALKER & GREEN, for the appellant. Where one hires a slave for a year and he is sick or runs away, the hirer must pay the hire. (*George v. Elliott*, 2 *Hen. & Munf. R.* 6. 5 *Mon. R.* 359.

1 *Bibb's Rep.* 536.) And under the general promise or obligation to return a slave at the termination of the hiring, a party may be excused from doing so if the slave run away without his fault. (*Keas v. Yewell*, 2 *Dana* 348.) But where there is a special covenant to return him, without providing for such contingency, the hirer would not be excused. (*Ch. on Con.* 735. 8 *T. R.* 267. 10 *East* 533. 6 *T. R.* 650.

F. W. & P. TRAPNALL, for the appellant. Contracts implied by operation of law, admit of a liberal construction, and a party may be excused by inevitable accident, (5 *Conn.* 381,) but express covenants are strictly construed, and the person covenanting not only assumes to do the matter stipulated, but takes on on himself the risk of performance. (*Warren v. Powers*, 5 *Conn.* 381. *Chesterfield v. Balton, Com. Rep.* 627. *Hetley's Rep.* 54. *Aleyn R.* 26. 10 *East* 533. 6 *T. R.* 750.,) and is bound to make his contract good, notwithstanding inevitable accident. (1 *Selw. N. P.* 381. *Ch. Con.* 273. 3 *John. R.* 45. 17 *Ves.* 116. 3 *Bos. & Pull.* 300. 1 *Dallas* 210,) unless he guard against the contingency, (*Ch. Con.* 15, 131, 273. 2 *Str.* 763. 2 *Vern.* 280. 1 *Ch. Cas.* 83. 3 *Burr.* 1637. 2 *Hen & Munf.* 6.) The defendants were therefore bound to return the slave according to their express covenant to do so.

ENGLISH, for appellee, Adams. This was a case of bailment of the *fifth* class, called a *locatum* or hiring for a reward, (2 *Kent* 585, 6,) and in such cases the hirer is bound to use ordinary care and diligence, and answerable only for ordinary neglect, (2 *Kent* 586, 7,) and when called upon he must re-deliver it, or account for his default by showing a loss of it by violence, theft or accident. (2 *Kent* 587, 8)

The hirers did not expressly bind themselves to return the slave at all events, but, in general terms, to return the slave at the end of the year: which was simply what the law required, unless prevented by accident, &c. That the law recognizes the running away of slaves, who have the power of will and motion

and who cannot in all cases be restrained without harsh and cruel means, as a sufficient excuse for a failure to deliver them, when the hirer is free of blame or negligence, is settled in the cases of *Young v. Thompson*, 3 *S. & M.* 129. *De Fonclear v. Shattenkirk*, 3 *J. R.* 170. *Beverly v. Brooke*, 2 *Wheat.* 100. *Singleton v. Carroll et al.*, 6 *J. J. Marsh.* 527. *Keas et al. v. Yewell*, 3 *Dana* 248. *Chase v. Mayer et al.*, 9 *L. R.* 247. See also *Story on Bail.*, *sec.* 216. *Perry v. Hewlett*, 5 *Porter* 318. *Boyer v. Anderson*, 2 *Peters* 150. *Story on Bail.*, *secs.* 217, 408, 577. 4 *Martin R.* 65. 4 *McCord* 223.

The hirer who covenants to deliver the slave at the end of the term, does not insure against all accidents, and is excused for non-delivery, if, without his default, the slave die, run away, &c. *Harris v. Nichols*, 5 *Munf.* 483. *Graham v. Swearingen*, 9 *Yerg.* 276. 3 *Hayw.* 224. 4 *Ib.* 10. 7 *Yerg.* 474. 10 *Ib.* 48. And the owner, in case of death, will not only lose his slave, but the hire also for the unexpired term. *Collins et al. v. Woodruff*, 4 *Eng.* 463.

FOWLER, also for appellee, Adams. A man who hires a slave is only bound to use ordinary diligence and care, and does not insure the slave against all accidents, such as death, running away, &c. *Graham v. Swearingen*, 9 *Yerg. Rep.* 277. *Wheeler's Law of Slavery* 154. *Young v. Bruce et al.*, 5 *Litt. Rep.* 324. *Harris v. Nicholas*, 5 *Munf. Rep.* 489. Where he covenants to deliver the slave at the end of the term and the slave dies, it excuses him for the non-delivery. *Wheel. L. of Slav.* 154. 5 *Litt. Rep.* 324. So if the slave run away without his fault. 9 *Yerg.* 276. *Wheel. L. of Slav.* 154. *Singleton v. Carroll et. al.*, 6 *J. J. Marsh. Rep.* 528. *Keas v. Yewell*, 2 *Dana Rep.* 248.

Mr. Justice WALKER delivered the opinion of the Court.

Alston hired to Balls a negro boy for twelve months, and Balls with Adams as his security, entered into a written agreement with Alston to pay for the services of the boy and return him to Alston at the end of the year. Upon this contract, Alston sued

Balls and Adams, and alleged, as a breach thereof, the non-payment of the hire and the failure to return the slave. The defence interposed (and out of which the only question of importance arises) was, that the slave, without the fault of the hirer, had absconded to parts unknown, so that he could not deliver him to the owner.

In the absence of a special contract to return the slave, the defence might have prevailed, but where the parties contract to do an act which it is lawful and possible for them to perform at the time the contract is made, nothing but the act of God or the public enemy of the country will excuse its performance. Thus, it has been held, that if a party covenant to do an act, nothing short of showing that it cannot, by any means be done, will relieve him from his obligation. *Beebe v. Johnson*, 19 *Wend.* 500. Where one incurs an obligation by his own act, he will be bound to the extent of his engagement, and will not be excused for its non-performance by accident from inevitable necessity. *Clancy v. Overman*, 1 *Dev. & Bat.* 402. A party who covenants to perform acts not on their face impossible, illegal or immoral, and not shown to have become so, will be held to performance, notwithstanding the difficulty attending those acts, or the hardships of the particular case. *Stone v. Dennis*, 3 *Porter* 231. And Chief Justice MARSHALL, in the case of *Pollard v. Shaaffer*, 1 *Dallas* 210, where the British army, a public enemy, had destroyed a tenement which the lessee covenanted to keep in repair, held the tenant to be excused from keeping his covenant, saying, "That a covenant to do this against an act of God, or an enemy, ought to be so specific and express, and so clear, that no other meaning could be put upon it."

There can be no doubt of the correctness of the principle settled in these cases. Indeed, their correctness, even by the decisions that have, by construction extended the defence, so as to embrace the case under consideration, seems to be conceded. In the case of *Singleton v. Carroll et al.*, 6 *J. J. Mar.* 529, which is mainly relied upon as a case in every respect in point, after substantially recognizing the rule as we have stated it above, the Court said, "The true ground however, generally, upon which,

in such cases, to rest the defence of the covenanter, is that the loss is not to be considered as provided against by a general covenant:" and the case of *Pollard v. Shaaffer*, decided by Chief Justich MARSHALL, is cited; and 2 *Selwin Nisi Prius* 412, is also cited; in each of which, it was the act of an alien enemy that excused the covenanter from the performance of his covenant, and not the mere absconding of a slave, or the casual loss of property.

In the case of *Keas v. Yewell*, 2 *Dana* 249, the other Kentucky case cited by the counsel, and relied upon as in point, the Court say, "Tested by the literal import of the covenant, there could be but little dispute that this plea furnishes no sufficient excuse for not having the slave to surrender in obedience to the decree. Her running away was not guarded against by any stipulation in the covenant, nor is it, properly speaking, that description of casuality which would be termed inevitable, so as to relieve the parties from the effect of their covenant by the principles of the common law. But still, in our estimation, it constitutes a valid defence to the action:" and the reason assigned by the Court for so holding it a valid defence is, in their own language, "That the casualty by which the slave was lost, is a peril incident to the nature of such property, and therefore, in contracts or covenants concerning such property, that peril should ever be presumed to have been intended to be guarded against, unless so expressly stipulated." To sustain this course of reasoning, the Kentucky courts cite no authority whatever, where a similar question has occurred. The case in 5 *Littell* was a case in which the hirer was excused from paying the hire of a slave that died during the time for which he was hired, without the fault of the hirer: and the case in 5 *Littell* was decided on the authority of the case of *Harris v. Nicholas*, 5 *Munf.* 487, which was also a case where the excuse for not keeping the covenant was the death of the slave. The covenanters were excused from performing their covenants, in each of these cases, upon the ground that they were prevented by the act of God, against which, no man is presumed to covenant, because no human agency can arrest it. Not so in

the case before us. It is true that there was a risk to run. The slave might abscond. And so, upon a covenant to deliver stock, or to pasture a horse and return him, the cattle or the horse might escape and never be reclaimed. All these casualties are incident to such undertakings; and if the party contracting was unwilling to run the risk or hazard attending them, he should have excepted them in his contract. This covenant is a security to the owner of the slave for his property, and may have materially influenced him in making the hire upon the terms agreed upon. We cannot say how this was, but find an unqualified covenant to return the slave. If the terms are responsible, they are such as the party voluntarily assumed, or if it be doubtful whether he intended to assume this much, the well established rule of construction is, that it shall be construed most strongly against the party making it.

Another rule, equally clear is, that the contract should be so construed, if possible, as to give force and effect to all of its parts, so that no part of it shall be rejected as useless or unmeaning, if they can be reconciled so as to give each effect and force. It will at once be seen, that under the construction given to this clause in the covenant, it is rendered wholly unmeaning and nugatory, for the obligation of the law, in the absence of any contract to return the slave, impose obligations upon the hirer precisely similar, and to the same extent that the Kentucky and Tennessee courts construe this contract as imposing. So far from this, the parties are presumed to know the law; and unless they intended to bind the hirer beyond his mere legal liability, it is to be presumed they would have made no covenant on the subject. The Kentucky court, and also the Tennnssee court, have cited 5 *Munf.*, as a leading authority for the decisions they have made, and have fallen into the same train of reasoning, and have wholly overlooked, and, in effect, discarded the several familiar and well established rules for construing contracts to which we have referred.

The question is one of interest in a State like ours, where slaves are held as property, and contracts of hire are of common

occurrence. The covenant to return the slave to the owner when his term of service has expired, is an important feature in the contract: and when it is considered that he at once parts with the possession and control of his slave, and confides him to the care of one who, for the time being, absolutely commands his time and directs his movements, it is but reasonable to suppose that he intended to impose an obligation upon the hirer to return him at the expiration of the time, whilst, on the other hand, the hirer, aware of the risk he might run by thus covenanting, if he had doubts upon the subject, could either except this contingency out of his covenant, or modify the contract in other respects to suit himself before entering into it.

In the case before us, we find an unqualified undertaking on the part of the hirer to return the slave to the owner at the end of the year. These terms, onerous or not, were voluntarily assumed by the hirer. It was a subject matter which the party is presumed to have been capable of performing, and which, at law, he is bound to perform unless excused from so doing by the act of God or the public enemy of the country.

The Circuit Court erred, therefore, in overruling the demurrer of the plaintiff to the third and fourth pleas of the defendant. And for this error, the judgment must be reversed, and the cause remanded, to be proceeded in according to law.

ADAMS ET AL. VS. THOMPSON, USE., &C.

Where a justice of the peace fails to render a judgment upon the verdict of a jury, in a case tried before him, at the time when the verdict is returned, he or his successor in office may render such judgment at any subsequent time, *nunc pro tunc*, and until the judgment is rendered no appeal lies to the Circuit Court.

Appeal from Searcy Circuit Court.

CONWAY B., for the appellants.

BYERS & PATTERSON, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

These proceedings were regularly instituted before Shaw, a justice of the peace, on the 13th July, 1848, and progressed regularly until a jury rendered a verdict in favor of the original plaintiff on the fifth of August of the same year. But no judgment was in point of fact ever entered up upon this verdict until the 5th day of November, 1849, when, in obedience to an order of the Circuit Court, Parks, a justice and the successor of Shaw, entered up a judgment as of the date of the 5th of August, 1848. From this judgment so entered up. an appeal was regularly taken to the Circuit Court, on the 17th November, 1849, where both parties appeared at the April term, 1850, and after having the transcript of the justices' proceedings corrected, the cause was regularly tried and a verdict and judgment given for the original plaintiff; from which an appeal was taken to this Court.

There was no motion for a new trial or in arrest of judgment, and no exceptions taken to the proceedings of the Circuit Court touching the appeal.

It is perfectly clear that the Circuit Court had rightful jurisdiction of the cause, and there is nothing in the record to indicate any thing else than that this jurisdiction was properly exercised.

It was competent for the justice, Shaw, to have entered up the judgment *nunc pro tunc*, on motion, at any time after the verdict and before he went out of office, and it was equally competent for his successor, without having been stimulated to do so, as he was by the Circuit Court. Uutil the rendition of the judgment, no appeal lay to the Circuit Court.

Finding no error in the record, the judgment of the Circuit Court must be affirmed with costs.

JOHNSON VS. COCKS, USE, &C.

The printed statutes of the other States of the Union, purporting to have been published by authority, may be read in evidence in our courts, and the burthen of discrediting such books is upon the party against whom they are offered, as held in *Clarke v. The Bank of Miss.*, 5 *Eng. R.* 516: approved *May v. Jamison*, 6 *Eng. Rep.* 377.

Depositions taken before a commissioner of deeds, &c., appointed by the Governor of this State, to act in another State, under the 32d chap. Digest, may be read in evidence without other pooof of the appointment and authority of such commissioner than his own certificate and official seal.

A notarial protest is evidence of demand, &c., and may be read in evidence, although there is a variance between it and the bill sued on, in order to permit the plaintiff to connect the bill sued on with the protest by other evidence, and thus identify it as the same that was protested.

For such purpose of identifying the bill, the deposition of a legally appointed deputy of the notary, and an authenticated copy of the notarial register, were properly admitted as evidence.

Where a deputy of the notary swears that a paper, offered in evidence, is a correct copy of the original entry in the notarial register, it may be read in evidence, though he does not state in express terms, that he has compared it with the original, as it is the duty of the opposite party to ascertain the source of his knowledge by cross-examination, if he desires it.

As to the authentication of a transcript of the register of one notary by another acting for him, in his absence, under a statute of Louisiana, and as to proof of the official character of the notary so acting in the place of the other.

Writ of Error to Pulaski Circuit Court.

Assumpsit, on a bill of exchange, brought by John G. Cocks, use of Samuel D. Walker, against Robert W. Johnson, and determined in Pulaski Circuit Court, at December term, 1849, before the HON. WM. H. FIELD, judge.

There are two counts in the declaration on the bill, and the common counts.

The first count alleges that on the 15*th June*, 1848, at Wash-

ington City, Ambrose H. Sevier, drew a bill of that date, upon Messrs. Hill, McLane & Co., of New Orleans, in favor of the defendant Johnson, for $2,446, payable 22d November, of that year. That Johnson endorsed the bill to plaintiff, who presented it for payment at maturity, which was refused, and the bill duly protested for non-payment, and the parties notified, &c.

The second count on the bill is similar to the first, except that it describes the bill as drawn, and bearing date 15*th July*, 1848.

The cause was submitted to the court, sitting as a jury, on the plea of non-assumpsit, and a finding for the plaintiff. The defendant moved for a new trial, which was refused, and he excepted. From his bill of exceptions, it appears that upon the trial, plaintiff read in evidence a certified copy of an act of the General Assembly of Louisiana, "*relative to protest of Bills of Exchange*," as follows:

"No. 49. *Be it enacted, &c.* That it shall be lawful for each and every Notary Public in New Orleans to appoint one or more deputies to assist him in making protests and delivery of notices of protests of Bills of Exchange and promissory notes: *Provided*, That each notary shall be personally responsible for the acts of each deputy employed by him, and provided that each deputy shall take an oath faithfully to perform his duties as such before the judge of the parish in which he may be appointed, and *provided* the certificate of notice of protest shall state by whom made or served." *Approved* 1844, *by the Gov.*

2d. The plaintiff then offered to read in evidence a certain printed act of the General Assembly of Louisana, contained in a printed book or pamphlet, at page 94, and which book or pamphlet appeared to have the following printed title page—"Acts passed at the second session of the thirteenth Legislature of the State of Louisiana, begun and held in the city of New Orleans, the eleventh day of December, eighteen hundred and thirty-seven: published by authority, New Orleans, Jerome Bayou, State printer, 1838."

Which act is as follows:

"*No.* 91. *An act authorizing the Governor to grant leave of absence to Notaries Public, and for other purposes.*

Sec. 1. *Be it further enacted, &c.*, That from and after the passage of this act, the governor be, and he is hereby authorized, to grant leave of absence to notaries public for a period not exceeding eight months, to date from the day of the permission granted by the Governor.

Sec. 2. *Be it further enacted, &c.*, That notaries public thus permitted to absent themselves, shall be, and they are hereby required to name and designate another notary public to represent them in their absence." Signed by the Speaker of the House, President of the Senate, and approved by the Governor, 12th March, 1838.

To the reading of which act in evidence, defendant objected on the grounds : 1st. That there was no proof of the authenticity of said act, and that it purported to be a copy of a copy. 2d, That the court could not judicially notice a law of the State of Louisiana, and that to make it evidence, a copy must be procured under the seal of the Secretary of State. But the court overruled the objections, and permitted the act to be read as evidence, &c., to which defendant excepted.

3d. The plaintiff proved by several witnesses, that the defendant resided in Little Rock, and considered it his place of residence, and that he generally received letters and communications at the post-office in Little Rock.

4th. The plaintiff then offerred to read in evidence the depositions of William J. Clements and George Rareshide, and the papers and documents referred to by them, [*copied below*] to the reading of which as evidence the defendant objected on the following grounds. "1st. Said depositions purport to have been taken by one A. C. Ainsworth, commissioner of deeds, &c., for the State of Arkansas," and that his appointment and authority to act as such is not shown, otherwise than by his own certificate and seal, &c. 2d. That it is not shown that said William J. Clements was appointed or qualified as the deputy of said Ricardo according to said law, *No.* 49, (*above copied,*) or that he was such

deputy at all, other than by his own oath. 3d. That the paper marked B., referred to in the deposition of said Clements, is incompetent, and cannot be read as evidence, because the said Ricardo does not certify the same under his notarial seal to be a true and exact copy of his notarial record, he appearing to be alive and the proper person to certify the same. It is not shown that J. R. Beard had any authority or lawful right to certify said copy from the notarial records of the said Ricardo. It is not shown in any legal manner that said Beard is a notary public at all, nor when said Ricardo obtained leave from the governor of Lousiana, to be absent, nor is such leave or a copy produced, and such leave may have expired for aught the court may know. 4th. That there is no proof that said paper marked B., is an examined copy of the notarial record of the said Ricardo; and if the said Beard had a procuration from said Ricardo as spoken of by said Rareshide, such procuration should have been produced, and secondary evidence is not admissible. 5th. The said depositions and papers therein referred to, are in other respects incompetent."

But the court overruled the said objections, and permitted said depositions and papers to be read in evidence, which are as follows:

William J. Clements, deposes: "I am employed as a clerk in the office of Daniel Israel Ricardo, notary public in New Orleans. I act when circumstances require as his deputy. I have been appointed by Mr. Ricardo as such, under the authority of a law of Louisiana, a certified copy of which marked A. is annexed, &c. [*Same as copied above.*] In my capacity as deputy, I presented a draft described in paper B., hereto annexed, to Mr. McLean, one of the firm in this city of Hill, McLean & Co., the drawees of said draft, and demanded payment thereof; I was answered that the said draft could not be paid for want of funds of the drawer. Thereupon, the said draft was protested in the usual form, and the parties were notified thereof in the following manner: By letters to them written by D. J. Ricardo, and addressed to them: to A. H. Sevier and R. W. Johnson, respectively, at Little Rock, Arkansas. Both these letters were deposited, on the same date of

protest, in the post-office in New Orleans. A copy of the original record as it stands in the register of Mr. Ricardo's office is annexed, marked B. Mr. Ricardo is absent from the city by leave from the Governor of Louisiana, and is legally represented by J. R. Beard, a duly authorized notary public."

George Rareshide, deposes: "I am clerk in the office of D. J. Ricardo, Esq., notary public in New Orleans. The protest of the draft named in paper B. was made in usual form. I signed my name to it as one of the witnesses. The copy B. is a correct transcript from Mr. Ricardo's original records. The notices to drawer and endorser were made and served as therein described. Mr. Ricardo is now absent from the State. He got leave so to do from the Governor of Lousiana. All his acts, as notary, are, in his absence, certified to by Mr. J. R. Beard, who has his procuration for that purpose."

The following is the paper marked B., referred to in said depositions:

"*United States of America,*
State of Louisiana.

By this public instrument of protest, be it known, that on the 25th day of November, A. D. 1848, at the request of Mr. John G. Cocks, holder of the original draft, whereof a true copy is on the reverse hereof written, I, Daniel Israel Ricardo, a notary public in and for the City of and Parish of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, presented said draft to Mr. McLean, one of the members of the firm of Hill, McLean & Co., the drawees, at their counting-house in this city, by my deputy, Wm. J. Clements, who demanded payment thereof, and who was answered that the same could not be paid for want of funds of the drawer. Whereupon, I, the said notary, at the request aforesaid, did *protest,* and by these presents do publicly and solemnly protest, as well against the drawer or maker of the draft as against all others whom it doth or may concern, for all exchange, or re-exchange, damages, costs, charges and interest suffered, or to be suffered for want of payment of the said draft.

This done and protested in the presence of George Rareshide and William J. Clements, witnesses. Original signed

G. RARESHIRE.

WM. J. CLEMENTS.

In testimony whereof, I grant these presents under my signature and the impress of my seal of office, at the city of New Orleans, on the day and year first above written.

D. J. RICARDO.

Notary Public.

WASHINGTON CITY, *June 15th*, 1848.

Messrs Hill, McLean & Co:

GENTLEMEN—On the 22d day of November next, please pay to the order of R. W. Johnson, at your counting-house, in New Orleans, the sum of twenty-four hundred and forty-six dollars, and oblige your ob't serv't.

$2,446. A. H. SEVIER.

Endorsed: R. W. JOHNSON.

I, the undersigned notary do hereby certify that the parties to the draft, whereof a true copy is above written, have been duly notified of the protest thereof, by letters to them, by me written and addressed, dated on the day of the said protest, and served on them respectively in the manner following: By directing them for A. H. Sevier and R. W. Johnson to them respectively, at Little Rock, Arkansas, both of which I deposited in the post-office, in this city, on the same day of said protest.

In faith whereof, I have hereunto signed my name, together with George Rareshide and Wm. J. Clements, witnesses, at New Orleans, this twenty-fifth day of November, 1848.

Original signed D. I. RICARDO.

G. RARESHIDE,

WM. J. CLEMENTS.

I, Joseph R. Beard, a notary public of New Orleans, herein representing Daniel Israel Ricardo, also a notary public of this city, at present absent from this State, by consent of the Gover-

nor thereof, do certify the foregoing to be a true copy of the original protest, draft and memorandum of the manner in which the notices were served.

In testimony whereof, I grant these presents under my [L. S.] signature, and seal of office, at the city of New Orleans, on this 8th day of September, 1849.

J. R. BEARD,
Not. Public."

The above depositions were taken under a rule, and commission directed to any judge or justice of the peace of any of the United States, &c., or any commissioner appointed by the Governor of the State of Arkansas to take depositions, &c., and were taken by A. C. Ainsworth, in the city of New Orleans, who states in his certificate that he was a commissioner of deeds, &c., for the State of Arkansas, duly appointed by the governor thereof, to act in the State of Louisiana, &c.

5th. The plaintiff then read in evidence the bill sued on, which is the same as copied in the above paper marked B. He then offered to read in evidence a protest similar to the one copied above as part of paper B., except that that the bill copied on the reverse thereof bears date 15*th July*, 1848, instead of 15*th June;* to the reading of which bill and protest in evidence the defendant objected on the grounds of the variance aforesaid; and because payment of a bill could not be demanded by a deputy, &c., but the Court overruled the objections.

S. H. HEMPSTEAD, for the plaintiff. The laws of other States are foreign laws, and must be proved like any other fact, and cannot be judicially noticed. 1 *Phill. on Ev., by Cowen & Hill,* 401. 1 *Stark. Ev.*, 248. 1 *Greenl. on Ev.* 488. The proper mode of proving the written law of another State is by an exemplification under the great seal of State, or by an examined and sworn copy. *Church v. Hubbard*, 2 *Cranch* 187. *United States v. Jolins*, 4 *Dallas* 413. *Robinson v. Clifford*, 2 *Wash. C. C.* 1. *Packard v. Hill*, 2 *Wend.* 411. *Strother v. Lucas*, 6 *Pet.*

768. 1 *id.* 225. *Id.* 352. 1 *Bald. C. C. R.* 615. 2 *Wash. C. C. R.* 1, 175. 4 *id.* 531. 1 *J. C. R.* 238. *Id.* 125. 8 *J. R.* 193. 1 *id.* 394. 2 *Wend.* 69. 6 *id.* 482. 2 *id.* 412. 3 *id.* 269. 10 *id.* 78. 5 *id.* 384. 8 *Mass.* 99. 9 *Pick.* 112. 4 *Conn.* 116, 517, 520. 6 *id.* 508. 11 *id.* 388. 5 *Yerg.* 379. *Hardin* 164. 2 *A. K. Marsh.* 609. 4 *Bibb* 75. 1 *Blackf.* 71. 2 *id.* 82. 5 *Gill & John.* 508. 1 *Rawle* 386. And though the cases in 3 *Pick.* 293, 7 *Mon.* 585, 12 *Serg. & Rawle* 263, 6 *Bin.* 321, 8 *Miss.* 421, 9 *Porter* 9, 5 *Leigh* 471, 5 *Blackf.* 375, seem to establish the doctrine that printed statute books are admissible, and *prima facie* sufficient to prove such statutes, the mere weight of authority is against the admissibility of printed statute books of sister States as evidence.

The 2d section of our statute concerning evidence, *Dig.* 490, must be construed in connection with the third, and when taken together, mean that any law contained in the statute book of a sister State, purporting to have been printed by authority and deposited in the office of the Secretary of State, may be copied and certified under the seal of State, and thus be admitted in evidence.

The depositions of Clements and Rareshide should have been rejected.

The notarial record of Ricardo was illegally certified by Beard; it is not shown that Beard was a notary, the act of procuration is not exhibited; nor does the certificate show on its face that the copy was taken from the books of Ricardo.

CUMMINS, for the defendant, as to the sufficiency of the evidence to prove the laws of Louisiana, relied upon *secs.* 2, 3, *ch.* 66, *Dig.*

Mr. Justice SCOTT delivered the opinion of the Court.

The first question presented was settled in the case of *Clarke v. The Bank of Mississippi*, where it was held that the printed statute books of the other States of the Union, purporting to have been published by authority, may be read in evidence in our courts, and the burthen of discrediting such books is upon the party against whom they are offered, (5 *Eng*, 516, *Dig.*, *p.* 490,

sec. 2;) and this case was afterwards approved in the case of *May v. Jamison*, (6 *Eng.* 377.) We have, however, again looked to the statute in connexion with the argument on this point now urged, and feel clear that the law, as to the point in question, was in these cases correctly ruled.

It is next objected that the two depositions ought to have been excluded because they were not supported by any other evidence of the appointment and authority of the commissioner before whom they purported to have been taken than his own certificate and seal. We do not think this objection tenable, because the statute authorizing the appointment and commission of these functionaries, (*Dig. ch.* 32, *p.* 253,) and prescribing their duties and powers, provides, among other things, (in section 2,) that all depositions taken and certified by them "shall be as effectual in law to all intents and purposes as if done and certified by any justice of the peace, or other authorized officer within this State." And it is expressly provided by the statute of depositions, (*Dig.*, *ch.* 55, *p.* 434, *sec.* 16,) that no authentication of the official character of any judge, justice of the peace, or other judicial officer, shall be necessary when a deposition shall be taken before any such within the State.

As this is a case of a foreign bill of exchange, the notarial protest was evidence of itself in chief of the fact of demand, and the notary's acts touching the same, were legitimately official acts. The protest therefore purporting to have been made by a notary and authenticated by his seal of office was competent evidence; and as such should have been allowed to be read although it differed in some respects from the bill offered in evidence, in order to permit the plaintiff below to connect the bill sued on with the protest by other evidence, and thus identify it it as the same that was protested. (*Br. Bk. at Decatur v. Rhodes*, 11 *Ala. R.* 283. *Leigh v. Lightfoot*, 11 *Ala. R.* 935. 3 *Porter R.* 355.) And for this purpose, the testimony of Clements as to the presentation and protest of the bill was competent, accompanied as it was, by proof of the statute of the State of Louisiana, No. 49, authorizing notaries to appoint deputies to assist them in

making protest, and the further proof that the witness acted, at the time when the protest was made and touching the same, as the deputy for the notary who made the protest.

And for the same purpose an authenticated copy of the notarial register, in reference to the protest, was competent testimony, because, besides the known general usage of notaries to keep a register of their official acts, the inference from the testimony is almost irresistible that in this case one was kept, and it was not legally possible for the plaintiff below to produce the original in the courts of this State. It is objected, however, that the copy produced ought not to have been read, although authenticated by the certificate and official seal of another notary purporting to act in the stead of Mr. Ricardo during his absence, and accompanied by proof of his actual absence, and of a law of Louisiana authorizing the absence of notaries with the consent of the Governor, and in such case authorizing another notary to be designated to act in his place; because it was not also shown in proof, otherwise than by the official certificate and seal of Mr. Beard, (who officiated for Mr. Ricardo in his absence,) and the testimony of the two witnesses that he (Mr. Beard) was a notary public, and as such was in fact named and designated by Mr. Ricardo to represent him during his absence, under the provisions of the statute of Louisiana, No. 91, proven in evidence.

Although it might have been incompetent thus to show Mr. Beard's actual designation and procurement to act in Mr. Ricardo's stead, yet we are inclined to think the objection not well taken under the circumstances, because under the existing state of the proofs—the law allowing substitution having been proven —so much of this testimony as showed that he in fact officially acted in the stead of Mr. Ricardo, was competent as far as it went, and perhaps the ordinary presumptions of law as to persons who act in official stations, would apply here and fill up the hiatus. But it is unnecessary for us to decide this point, because the paper marked B. is well enough supported by the testimony of the two witnesses without any aid from Mr. Beard's certificate. Clements swears that it is "a copy of the original record as it

stands in the register of Mr. Ricardo." And Rareshide swears that it "is a correct transcript from Mr. Ricardo's original records."

It is true that neither of these witnesses swear in express terms that they have examined the original entries, and compared this carefully with it, or to other matter of like particularity in support of what they do swear, and to this extent there is consequently some ambiguity in their testimony, but all such could have been readily cleared up by cross-examination. If the opposite party had desired to know the source of the knowledge of the witnesses, he should have brought it out on cross-examination; and having failed to do so, he cannot now have their depositions rejected for uncertainty, which it was his duty to have prevented if in any way likely to operate to his prejudice. (*Old v. Powell*, 10 *Ala. R.* 393.)

And there being ample testimony in the record to sustain the verdict and judgment of the court below, we are of the opinion that the motion for a new trial was properly overruled.

Judgment affirmed with costs.

PATTERSON VS. MAYERS ET AL.

Mr. Justice SCOTT delivered the opinion of the Court.

The writ of *certiorari*, having been improvidently issued in this case, must, be dismissed. (*Crawford County v. Carnall*, 6 *Eng.* 604. *Ex parte Marr*, *Ante*. *Ex parte Allis*, *Ant.*)

FOWLER, ADM. VS. BYERS, ADM.

Mr. Justice SCOTT delivered the opinion of the Court.

The writ of *certiorari*, having been improvidently issued in this case, must be dismissed. (*Marr Ex parte, Ante.*)

EVANS VS. DAVIS.

Mr. Justice SCOTT delivered the opinion of the Court.

The writ of *certiorari* in this case, having been improvidently issued must be dismissed. (*Carnall v. Crawford County*, 6 *Eng.* 605. *Marr Ex parte, Ante, and Allis Ex parte, Ante.*)

STATE VS. BISCOE.

The grand jury of Phillips Circuit Court communicated to the judge thereof certain questions which a witness summoned before them had refused to answer, on the ground that his anawers would tend to criminate himself, and asked the opinion of the judge as to whether he was bound to answer them—the judge decided that

he was not, the attorney for the State excepted to the decision, took a bill of exceptions setting out the facts and brought error: HELD, That the record presented no *case* for the decision of this Court, but simply an abstract point of law, and the writ of error was therefore dismissed.

Writ of Error to Phillips Circuit Court.

The transcript in this case shows, that during the November term, 1849, of the Phillips Circuit Court, the grand jury, through their foreman, made a communication to the presiding judge, Hon. JOHN T. JONES, to the effect that they had propounded certain questions to James H. Neil, a witness summoned before them, as to his knowledge of Henry L. Biscoe having played and bet at certain games of cards, which the witness refused to answer on the ground that his answers might tend to criminate himself; and the grand jury asked the opinion of the court as to whether the witness was bound to answer the questions. The court decided that he could not be compelled to answer the questions submitted, having stated on oath that his answers thereto would tend to criminate himself—to which decision of the court, the attorney for the State excepted, took a bill of exceptions setting out the facts, and brought error.

CLENDENIN, Attorney General for the State.

Mr. Justice SCOTT delivered the opinion of the Court.

This record presents no case for the decision of this court, but simply a dry abstract point of law.

The writ of error must be dismissed.

PALMER VS. SHEPHERD.

Where the plaintiff, in accordance with the statute, and practice, was granted leave to file an amended declaration by a certain time, and accordingly filed it within the time, the court erred in striking it out, dismissing the suit, &c.

Appeal from Lawrence Circuit Court.

On the 15th January, 1850, Joseph H. Palmer filed a declaration in debt, by attachment, against James M. Shepherd, in Lawrence Circuit Court, on a promissory note, and a writ issued returnable to May term, 1850.

At the return term, defendant pleaded the general issue, and the plaintiff took issue, in short on the record, and the case being called for trial, the plaintiff moved the court for leave to file an amended declaration, at or before a time to be named by the court; which leave the court granted, upon terms that the plaintiff be taxed with the costs of the amendment; and the court ordered the amended declaration to be filed on or before the next day. On the next day, the plaintiff, in pursuance of such leave filed his amended declaration, and the cause stood continued. At the next term, on motion of the defendant, the court struck out the amended declaration, dismissed the case, and discharged the defendant, to which plaintiff excepted, &c.

The cause was determined in the court below, before the Hon. W. C. SCOTT, Judge. Plaintiff appealed.

BYERS & PATTERSON, for the appellant. The court correctly permitted the plaintiff to file his amended declaration, and afterwards erroneously ordered it to be stricken from the files. 1st. Because it was filed in the time and in accordance with the leave

granted and terms of the court. 2d. The amendment conformed strictly to the "nature of the action" described in the original declaration, and was founded upon the same *identical note intended* to have been described in the original declaration: 3d. The amended declaration was not a mere nullity, and could not legally be stricken out. See *sec.* 113, *ch.* 126, *Dig. Anthony v. Beebe*, 2 *Eng.* 448. *Brinkley v. Mooney*, 4 *Eng.* 448. 2 *Ark.* 115, *ib.* 133; 4 *ib.* 624. *McLarren v. Thurman*, 3 *Eng.* 313. *Anthony v. Humphrey*, 4 *Eng.* 171. *King & Houston v. State Bank*, 4 *Eng.* 185.

FAIRCHILD, contra. It is admitted that formal and substantial amendments of declarations are permitted and favored; but this rule is subject to important qualifications:

I. That to refuse or allow an amendment, is a matter of discretion with the inferior court. *Chirac v. Reineckee*, 6 *Cond. Rep.* 317. *Pain v. Parker, ib.* 329. *Smith v. Smith, B. Mon.* 296. 15 *John. Rep.* 318. 8 *Mo. R.* 334. 5 *Ark.* 208.

II. No amendment will be allowed that unjustly prejudices or delays the opposite party. *Anthony v. Beebe*, 2 *Eng.* 447. 7 *U. States Dig.* 36. *Bogart v. McDonald*, 2 *John. Cases*, 219 *note.*

III. No amendment will be allowed that introduces a new, substantative and independent cause of action from that exehibited in the original declaration. *Sackett v. Thompson*, 2 *J. R.* 206. *Sevier v. Smith*, 18 *J. R.* 310. *Elliott v. Bohannon*, 5 *Mon.* 442. 5 *Litt.* 308. 1 *A. K. Marsh.* 450. 17 *J. R.* 111. *The Post Master General v. Ridgway, Gilpin's Rep.* 135. *Bogert v. McDonald*, 2 *John. Cas.* 219—*note*, 3 *sec.*

The court allows amendments only for the furtherance of justice; the amended declaration must not show a *similar* cause of action, but the same identical cause of action, otherwise the court should strike it out on motion.

Mr. Justice SCOTT delivered the opinion of the Court.

Our statute, as well as the whole current of our decisions, fully authorized the action of the court below in granting the motion made in this case to file an amended declaration. The record

shows that one was filed in pursuance of that leave and within the time allowed. And we think it entirely clear, in view of this statute, of the powers of the court otherwise, and of those decisions, that the court below erred in granting the motion at the succeeding term to strike this amended declaration from the files, and in rendering a judgment against the plaintiff.

The judgment must for this error be reversed, and the cause remanded, to be proceeded with.

JONES VS. MASON.

Before judgment of forfeiture of a gun found in the hands of a slave, under *chapter* 153, *section* 52, *Digest*, the owner of the property should have actual or constructive notice of the proceedings.

But in trover for a gun, where the defendant claims title under such judgment of forfeiture, the question of want of notice to the owner could not properly arise. It could only be raised in a direct proceeding by *certiorari* from the Circuit Court to quash the judgment of the justice, &c.

Where in such action, defendant sets up title to the gun by such judgment of forfeiture, the plea should state all the facts necessary to show jurisdiction on the part of the justice, there being no intendment in favor of such jurisdiction. Hence, such plea failing to show that the judgment of forfeiture was rendered within the territorial jurisdiction of the justice, &c., is bad.

The plea should also state, in express terms, the names of the parties, that plaint was made before the justice, &c., the judgment of forfeiture, &c.

Writ of Error to Ouachita Circuit Court.

This was an action of trover for a rifle gun, bought by Thomas

Jones, against Peter Mason, and another, in the Ouachita Circuit Court.

Defendant, Mason, pleaded the general issue, and a special plea as follows:

Defendant says *actionem non*, "because he says that he did, at, &c., find the said rifle gun mentioned in the said plaintiff's declaration in the possession of a certain negro slave named *Spencer*, on or about the 1st December, 1849, and at that time in the employ of the said plaintiff, belonging to the estate of John Hardin, and at that time hired to the said plaintiff, without the said negro slave named as aforesaid having the written permission of his said owner, or him the said plaintiff, according to the statute in such case made and provided; whereupon, the said defendant did, in pursuance of the statute aforesaid, seize the said rifle gun in the possession of the said slave, (without the written permission aforesaid,) and having proved the fact of such seizure before one Ralph E. Dickson, a duly constituted and acting justice of the peace, in and for the county of Ouachita, &c., the said Ralph E. Dickson, as justice aforesaid, did thereupon, in pursuance of the statute in such case made and provided, adjudge the said rifle gun mentioned in the said plaintiff's declaration belonging and forfeited to the said seizor of the same, the said defendant, for his own use; all of which proceedings and decision of said justice, the said defendant hereby offers to prove by the record of the said justice as aforesaid—and this said defendant is ready to verify, wherefore," &c.

The plaintiff demurred to the plea on the following grounds: "1st. The plea purports to set up title in defendant to the gun, but does not show that his title was prior to the institution of this suit: 2d. Said plea sets up title in the defendant without denying the title of plaintiff: 3d. Said plea shows no title in the defendant, which is valid, or warranted by the laws of the land: 4th. Said plea is no answer to the plaintiff's action: 5th. Said proceedings before the said justice of the peace are null and void."

The court overruled the demurrer, plaintiff rested, and suffered judgment to go for defendant.

STITH, for the defendant. The defendant's plea does not confess and avoid or deny the plaintiff's title. Pleas in confession and avoidance must admit that the plaintiff would have had good cause of action if it were not for the new matter which the defendant brings into the case. 1 *Ch. Pl.* 528.

As the plea sets up a title derived from the plaintiff by operation of law, it should have set out every fact necessary to show a good title in the defendant; and as the justice's court is a court of limited jurisdiction, every fact necessary to give it jurisdiction should appear. *More v. Woodruff*, 5 *Ark. Rep.* 214. And it appears that the proceedings were *ex parte*, and without notice to the plaintiff.

The section under which the proceedings before the justice were had, *section* 52, *chapter* 153, *Digest*, is a mere police regulation, and only intended to prohibit slaves from owning or carrying arms without the permission of the master, and the only forfeiture contemplated is, of all right which the slave may have in the gun.

Mr. Justice SCOTT delivered the opinion of the Court.

We have to determine in this case whether or not the demurrer to the defendant's special plea was properly overruled. The first objection to the plea was not well taken, because the defendant set up new matter in avoidance of the plaintiff's case as made in the declaration, and tendering an issue as this must be taken as confessing otherwise, as to this plea, the cause of action. The second objection involves a more important inquiry, and seems to be founded in principle upon the common law rule of the necessity of a proceeding *in personam* and a conviction of the offender before the crown could acquire any title to the goods forfeited, and to urge from this that until such conviction the informer under the statute, (who under its provision substantially succeeds to the title of the crown) could acquire none.

This doubtless was the true rule as to many cases of felony, and some other cases where the forfeiture was a part, or was the con-

sequence of the judgment of conviction and did not, strictly speaking, attach in any sort *in rem*. But when the forfeiture attached primarily *in rem* as in cases of seizures and forfeitures created by statute and cognizable in the revenue side of the Exchequer, the rule requiring the conviction of the offender did not apply. In these cases, the thing was considered as primarily the offender or rather the offence was attached primarily to the thing, and a principle applied similar to that which governs proceedings *in rem* on seizures in the admiralty courts, where, although the proceedings are in form *in rem*, and the owner of the goods proceeded against is not in the first instance *eo nomine* a party defendant, yet, before judgment of condemnation an opportunity is afforded him to come in and make himself a party and defend against the proceedings.

Although our statute (*Dig.*, *ch.* 153, *p.* 951, *sec.* 52,) is a police regulation designed to augment the personal security of the citizen by creating the forfeiture provided for, and is within the undoubted powers of the legislature, its provisions are neverthless to have effect like those of almost every other statute, in reference to the other laws of the land. It is true that under the provisions of this statute the law does not, in the first place, stop to enquire as to the ownership of a gun, or other offensive or defensive weapon found in the possession of a slave without the written permission of his master, but at once, by the hands of any citizen, seizes upon any such weapon and authorizes a proceeding against the thing for a judgment of forfeiture to the seizor for his own use: but from this it does not necessarily follow that the judgment of forfeiture or condemnation provided for shall be rendered before the original owner shall have first had some reasonable opportunity to come in and make himself a party to the proceedings *in rem*, and contest the judgment of forfeiture.

Such owner might not in fact be known or might reside beyond the limits of the State, as in cases where such weapons might have been taken from the hands of a runaway slave, who might have brought them from a neighboring State, and thus actual personal notice previous to judgment of forfeiture might not be

practicable; nevertheless constructive notice might at least be given and would seem to be demanded by analogous proceedings, especially when it may be remembered that forfeiture of the right of private property, whereby one citizen is to lose his property and another is to acquire it, is not to be created arbitrarily by the legislature, but can only be rightfully done for the advancement of the public weal as a punishment annexed by law to some illegal or culpably negligent act of the owner. If by private theft or open robbery, without any fault or negligence on the part of the owner, a slave should invade his property in a gun, shall the law punish him by a forfeiture of this gun without first giving him an opportunity, actual or constructive, to defend against the proceeding *in rem* for judgment of forfeiture?

We think it could never have been the design of the legislature to have created a forfeiture when there was no fault or negligence on the part of the owner, and his right of property had been thus unlawfully invaded. Hence the necessity of notice, either express or implied, to afford the owner an opportunity to repel the presumption against him arising from the fact that his property has been found in the hands of a slave without the written permission of the master of such slave. If no such notice and opportunity be given to come in and defend, error must necessarily intervene in a judgment of forfeiture. Because although this particular statute does not provide for such proceedings, the general law of the land does, of which this statute is a part. But that error, although so much discussed by the counsel, is not properly presented to us on this record, and if it in fact exists, can be reached only be *certiorari* from the Circuit Court on a direct proceeding to quash the judgment of forfeiture that it may be determined anew by the justice.

The vital question before us being as to the sufficiency of the plea in showing the jurisdiction of the justice, the statute, under which it is alleged in general terms that the justice took cognizance of the alleged forfeiture, is a public act of which we take judicial notice; but still the plea is insufficient unless all the facts are stated in it that are necessary to show jurisdiction in

the justice, because nothing must be intended in favor of his jurisdiction that is not set forth in the record. When tested by this rule, the plea is wholly insufficient, because it is not stated therein that the alleged judgment of forfeiture was rendered within the territorial jurisdiction of the justice. No time or place whatever having been alleged when and where the proof of seizure was made and the supposed judgment was rendered. And it is clear that the justice had no authority to hear such proof, and render such judgment any where else than in his county.

The plea is also otherwise inartificially drawn in failing to set out the parties in express terms, and in failing to allege that plaint was made and thereupon afterwards, &c., such and such acts were done before and by the justiee according to the facts.

The plea then, in failing to show jurisdiction, was radically defective, and the court below erred in overruling the demurrer that was interposed, and for this error the judgment must be reversed, and the cause remanded to be proceeded with.

WOODS VS. STATE BANK.

Suit by the Bank of the State, commenced 18th February, 1848, on a note due 1st April, 1844. Defendant plead the limitation act of three years; plaintiff replied a payment on the day of the maturity of the note; and insisted that the effect of such payment, under the Liquidation Act of 31st Jan'y, 1843, was to renew the note for twelve months, and that the statute would not commence to run until the expiration of that period—But HELD, that in the absence of special allegations in the plaintiff's replication to bring the case within the provision of the Liquidation Act referred to, the general law must govern; that the statute run from the date of the payment, and the note was barred.

The Bank could not properly prove the contents of a receipt executed by the Financial Receiver to defendant for a payment on the note, without notice to him to produce it, &c.

The plaintiff having obtained judgment, the cause is reversed, and a re-pleader awarded, to enable the Bank to amend her replication, &c.

Writ of Error to Pulaski Circuit Court.

On the 18th February, 1848, the Bank of the State brought suit, in Pulaski Circuit Court, against Moses R. Woods, on the following note:

STATE OF ARKANSAS,
$650. County ———, 1 April, 1843.

Twelve months after date, we, Moses R. Woods, as principal, and Reuben Raynes and B. J. Mc Henry, jointly and severally, promise to pay to the Bank of the State of Arkansas, or order, six hundred and fifty dollars, negotiable and payable at the principal Bank in the city of Little Rock, without defalcation for value received. Witness our hands, (and the Financial Receiver of said Bank is hereby authorized to cause the date of renewal to be inserted.)

MOSES R. WOODS,
R. RAYNES,
B. J. McHENRY."

"Endorsed credit:
For curtail on 1st April, '44, $70;
Interest on $580 to 1st April, '45, $40 60."

The declaration is in the usual form in debt, describing the note, and alleging non-payment.

The defendant plead 1st, payment: 2d, *nil debet:* and 3d, that the cause of action did not accrue to plaintiff at any time within three years next before the commencement of the action.

The plaintiff took issue to the 1st and 2d pleas, and replied specially to the third, "That the said defendant, previous to the institution of this suit, *to wit:* on the 1st day of April, 1844, made a certain payment on said promissory note, amounting to the sum of one hundred and ten dollars and sixty cents, and that said cause of action did accrue within three years previous to the institution of this suit," &c.

To which replication the defendant rejoined "that the said

cause of action did not accrue to the plaintiff within three years next before the commencement of this suit," &c.; to which plaintiff took issue.

The issues were submitted to the court, setting as a jury, the court found for the plaintiff, and gave judgment for balance of debt, $580, with interest, &c.

The defendant moved for a new trial on the grounds that the finding was contrary to law and evidence, and that the court admitted irrelevant and incompetent evidence on the trial: the motion was overruled, and defendant took a bill of exceptions setting out the evidence.

From the bill of exceptions, it appears that, on the trial, the plaintiff read in evidence the note, and payment endorsed, as above copied; and then introduced John H. Crease, as a witness, who testified that on the 1st April, 1844, the note sued on was in his care and control as Financial Receiver of the Bank, and as such Receiver, acting under the Liquidation Act of 31st Jan'y, 1843, he received, on the 1st April, 1844, from Edward Woods, the brother and agent of defendant, Moses R. Woods, the sum of $110 60, being for curtail required on said note, and for twelve months interest on renewal of said note up to the 1st April, 1845, and gave a receipt to said Woods for the money; and that it was in renewal of his note, as above stated, up to 1st April, 1844.

On cross-examination, witness stated that he did not know whether Edward Woods was the agent of Moses R. Woods, or not: nor did he know that he was authorized to make payment—that it was enough for him that the money was paid. Neither the principal, nor his securities in the note, was present when said payment was made, nor did he know that either of them authorized said Edward to make such payment, nor did he know whether said securities assented to the payment, and arrangement made by said Edward as aforesaid. Witness executed a receipt for the aforesaid sum of money, in the name of Moses R. Woods, and handed it to Edward, as his agent, and at the same time entered said credit in a book kept for that purpose in Bank. Said Edward was in the habit of doing the banking business of said

Moses R. Woods. Witness was asked if he ever knew the said Edward did attend to any other banking business of the said Moses R., than the transaction above spoken of? He answered he did not, but he presumed he attended to the former transaction in bank, when the note in question was given.

The defendant objected to the testimony of the witness as to the contents of the said receipt, and moved the court to exclude and disregard the same, on the ground that the receipt would be the best evidence, and that no call had been made on him for its production, and that he had no knowledge of any such receipt being given, which motion the court overruled.

Defendant brought error.

The first point stated in the opinion of the court in this case, was argued at length by JORDAN, and PIKE & CUMMINS, for the plaintiff.

LINCOLN, CARROLL, and S. H. HEMPSTEAD, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

We have considered the main question discussed in this case, as to when the statute of limitations begins to run upon notes executed to the State Bank under the provisions of the 9th, 10th and 11th sections of Liquidation Act, approved the 31st Jan'y, A. D. 1843, (*Pamph. Acts, p.* 80,) and are prepared to decide it; but, upon a more careful examination of the transcript, find that that question does not arise upon this record.

The declaration is in the usual form, upon a note bearing date the 1st April, 1843, payable twelve months after date. To this, the bar of the statute of limitations was interposed by plea, and to remove it the Bank replied specially that the defendant made a payment on the note in question on the 1st day of April, 1844, but alleged no other facts.

Now, if to this replication a demurrer had been interposed, it is perfectly clear that the law would have been for the defendant. Because the promise alleged in the declaration being to pay

twelve months after the first day of April, 1843, the note matured at that time, and the cause of action accrued under the general law, immediately upon default of payment, in accordance with the alleged promise. And as the payment set up in the replication was alleged to have been made on the day of the maturity of the note, under the general law, its effect could not under that law, defer the time when the statute would begin to run, and consequently the bar was perfect on the 1st day of April, A. D. 1847, more than ten months before this action was commenced.

Nor could this result have been avoided by any obligation upon the court to apply the provisions of the three sections cited of the liquidation statute to the state of facts as shown by the pleadings. Because it is manifest that these provisions of law are applicable only to a particular class of debtors, and never did apply to every person, who might, after the day when that statute took effect, execute a note to another person at twelve months with satisfactory security; nor to every person who might execute such a note to any bank; nor indeed did they ever apply to every person who might execute such a note to the State Bank itself after that day, as is apparent by the further provisions of the twelfth (§ 12) section of the statute for the sale of "property purchased for the use and benefit of the bank," and of certain "contingent interests" of the bank and branches "for cash in hand or upon a credit not to exceed one year, upon the purchaser executing a note to said bank with good and sufficient security, to be approved by said Receivers." Therefore, there could not have been any place for the court to have applied the provisions of the three first cited sections of the statute, unless in addition to the fact of payment it had been also alleged in the pleadings, that the note in question was one of those that were executed under these provisions.

And this is clear, when it is remembered that for any thing that appears to the contrary in the pleadings, the note in question may have been, in fact, one of those that were executed under the provisions of the twelfth section on a sale of property, or of

some contingent interest of the bank or one of its branches; and, if so, stood upon a different footing as to the question of law mooted.

It is true, however, that in the case at bar, a demurrer was not interposed, and that issue of fact was taken on the special replication. Nevertheless upon the trial the defendant below excepted to a part of the testimony, and was overruled, and moved for a new trial, as well upon this ground as upon that, that the finding of the court was contrary to law and evidence.

As no foundation was laid for verbal testimony touching the receipt, the witness ought not to have been permitted to speak of it. But if this objection was waived, and it was considered that the Bank had made out, by proof, every allegation both of the declaration and the replication, still a case for a judgment against the defendant below, was not made out to displace the statute bar interposed by him. The court below erred, therefore, in refusing the motion for a new trial, and for this error the judgment must be reversed, and the cause remanded, not that a judgment *non obstante veredicto* shall be rendered for the defendant below, but that a repleader shall be awarded on the application of the Bank, so that that party may have an opportunity to file an amended new special replication, and displace the statute bar if she can by allegations and proof. 1 *Chitty Pl.*, 10 *Amer. Ed.* 583, *marg.* 3 *Call R.* 1, *Bogle et al. Conway, ex.* 4 *Leigh R.* 480, 483, *Rice v. White.*

STATE BANK VS. PRYOR ET AL.

See Woods vs. State Bank, ante.

Writ of Error to Pulaski Circuit Court.

CARROLL and S. H. HEMPSTEAD, for plaintiff.

WATKINS & CURRAN, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

The pleadings in this case are, in substance like those in the case of *Moses R. Woods v. The State Bank*, just decided, and the only evidence adduced on the trial, as shown by the bill of exceptions, was a payment on the 1st September, 1849, more than two months after the judgment was rendered; and the judgment in the court below was for the defendant. Even if the date of the payment be a clerical error, and was in fact made on the 1st of September, 1844, as is stated in the brief of the attorney for the Bank, instead of 1849, as is shown in the bill of exceptions, still there would be no ground for reversal upon this record, the Bank not having alleged and proven sufficient matter to displace the statute bar interposed by the defendant.

Finding no error in the record, the judgment must be affirmed with costs.

NOTE. *State Bank v. Dodd et al.*, went off under the above decision, the facts being substantially similar.

WHEAT, USE, &C. VS. DOTSON.

A partial failure of consideration as to real estate is the subject of recoupment, when the partial failure is in the quantity or quality of the subject: otherwise when there is a partial failure in the title.

This defence may be set up, by special sworn plea under our statute, as well when the action is on any instrument or note in writing under seal, as in other actions.

The correct practice on a plea of partial failure of consideration is to take a default for the sum confessed subject to but one final judgment.

Appeal from Madison Circuit Court.

This was an action of debt brought by Joseph Wheat (use of John Wharton) against Stephen Dotson, on a writing obligatory for $200, due first March, 1848.

The defendant filed a plea of partial failure of consideration, in substance as follows:

Defendant says *actio. non*, "because he says that the said writing obligatory, in said declaration mentioned, together with a certain other obligatory for $150, were made, executed and delivered, by him to the said Wheat, for and in consideration of the following described tract or parcel of land, situate, &c., to-wit: [*here the tract of land is described*,] and also for and in consideration of a certain improvement upon public lands situate in the county aforesaid, consisting of one field of eleven acres and a half inclosed by a good fence, which said improvement was of great value, to-wit: of the value of $200; and the said defendant avers that at the date of making said writings obligatory, *to-wit:* on the 3d day of July, A. D. 1847, that said plaintiff was legally entitled to, and was possessed of said improvement, and the said defendant further avers that although the said plaintiff undertook and promised to deliver him, the said defendant, the possession of said improvement, as a portion of the consideration for the making,

execution and delivery of the writing obligatory aforesaid, on the first day of January, 1847, nevertheless the said plaintiff wholly failed and refused to deliver the possession of the same to said defendant, and still fails and refuses, and so the said defendant in fact says that the consideration for which said writing obligatory was given has in part faild, and this he is ready to verify," &c.

The plaintiff demurred to the plea, the court overruled the demurrer, the plaintiff rested, and permitted final judgment to go for defendant.

FOWLER, for the appellant. A failure of consideration can avail as a defence at law, only where it is total, a partial failure never. *Greenleaf v. Cook*, 4 *Cond. R.* 9. *Wallace, &c. v. Barlow's ad'm.*, 3 *Bibb Rep.* 191. *Montgomery v. Tipton*, 1 *Mo. Rep.* 317, 447. *Head v. Taylor et al.*, 2 *Marsh. Rep.* 148. *Wise v. Kelly*, *ib.* 546. 2 *Stark. Ev.*, (5 *Am. Ed.*) 170. *Foreau v. Bowen*, 7 *Mon. Rep.* 412. *Brown v. Wilson*, 1 *Litt. Rep.* 233. *Owsley v. Beasely*, 4 *Bibb* 277. *Willett v. Forman*, 3 *J. J. Marsh.* 293. *Peebles v. Stephens*, 1 *Bibb R.* 500. *Ferguson v. Oliver*, 3 *Smed. & Marsh. Rep.* 337. 1 *Camp. R.* 40, *note;* 3 *ib.* 38. 14 *East Rep.* 486.

ENGLISH, contra. A partial failure of consideration is a good defence to an action on a promissory note. *McMillion v. Pigg & Marr*, 3 *Stew. R.* 165. *Peden v. More*, 1 *Stew. & Porter* 71. 2 *Greenl. Ev.* 124, 5. *Perly v. Balch*, 23 *Pick.* 283. *Harrington v. Stratton*, 22 *Pick.* 510. *Spalding v. Vandercook*, 2 *Wend.* 431. *Barton v. Stewart*, 3 *Wend.* 236. *McAlister v. Reab*, 4 *Wend.* 483. It follows that such defence is also good in an action on a bond, under *sec.* 75, *ch.* 126, *Digest.*

Mr. Justice SCOTT delivered the opinion of the Court.

To this action of debt on a sealed instrument—a single bill for $200, payable the first day of March, 1848, the defendant below interposed a special plea of partial failure of its consideration, which, as he alleged, was the sale and purchase of some lands

and of an improvement upon the public lands. To this plea a demurrer was overruled, and the plaintiff below refusing to answer further, judgment was rendered accordingly.

The main question presented is a new one in this court in its present aspect, and is by no means free from difficulty. We think however, it may be solved in the light of general princples and of the adjudged cases as satisfactorily to the professional mind as any that can come up, although it is undeniably embarrassed by some highly respectable decisions. The greater number of these, however, will be found to have departed from the true principles and spirit of the legal doctrine in question only in restricting two much the field of its legitimate operation. As we must, in order to arrive at a clear comprehension of the main question before us, look somewhat radically at the doctrines of the law involved, we shall prefer to postpone the consideration of several minor questions until after we shall have examined the general question of the validity of the defence in the common law courts, of partial failure of consideration, in general reference to pleading and the interpretation of contracts beyond the sphere of merely local jurisprudence, as affected by our statutory regulations.

When a defendant, in a suit upon a contract in a common law court, comes in and asks to be permitted to interpose a defence founded upon a partial failure of its consideration, he certainly applies for a kind of relief that would have been refused him there peremptorily at one period in the history of those courts, and which at that period could have been obtained only in the equity courts. And it was during that period that the rule obtained as to this doctrine, which is now so often spoken of in our books, as the "old rule." Hence, the doctrine in queston is in its nature and essence an equity doctrine; although now administered in the common law courts. And this no less so, although in truth and in fact it might have been originally a doctrine of the ancient common law, stifled by artificial technical rules and driven for refuge into the equity courts. It is far more probable, however, from its essential properties and appropriate adaptation to a condition of advanced civilization, that it is a pure equity doctrine

derived by these courts from the civil law. And this probability is strengthened by the circumstance that no common law term expresses with exactness the true legal idea of this doctrine, while one derived from the civil law, in its present received signification, does so with great clearness.

The almost obsolete word "defalk," falls far short, and although "discount" and "mitigation of damages" approach more nearly, still the one does not fully express the idea, and the other does somewhat more. And like the term "equitable off-set," fails to present to the mind the essential, that the matter that is to be the foundation of the mitigation or the off-set, to be within the doctrine, must arise out of the transaction only on which the suit is founded, and cannot come out of a different affair. "Recoupment," however, as it is now understood, expresses all this, as it is the keeping back of something that is due, because there is an equitable reason to withhold it, and is now uniformly applied where a man brings an action for a breach of a contract between him and the defendant, and the latter can show that some stipulation in the same contract was made by the plaintiff which he has violated; when the defendant may, if he choose, instead of suing in his turn, recoup his damages arising from the breach committed by the plaintiff whether they be liquidated or not. And thus the law will cut off so much of the plaintiff's claims as the cross damages will come to, and in effect hold that cross claims arising out of the same transactions shall compensate each other, and the balance only be recoverable by the plaintiff. (*Toml. Law Dic.*, RECOUP. *Ives v. Van Epps*, 22 *Wend. Rep. p.* 156.)

With this understanding of the essence and nature of the doctrine of recoupment, we will proceed to trace rapidly its recognition and gradually development in the common law courts, both in England and in this country, premising first, however, two particulars worthy to be kept in mind, as tending to aid materially in the elucidation of the subject:

1st. That this doctrine has not grown up in the common law courts, upon the ground that the express contract upon which the

suit is brought is to be considered void, and that the recovery is allowed as upon a *quantum meruit* or *quantum valebat* upon an implied contract: or that such express contract has been rescinded, and thus a return or an offer to return or its equivalent must be required as a pre-requisite to the admission of the defence. On the contrary, it has grown up under the auspices of quite another and distinct principle of the common law, that has been always operative and of late years has not only been a great favorite of the courts both of law and equity, but of the legislature—that of the law's abhorance of multiplicity and circuity of action, which can never legitimately tolerate a second litigation on the same matter, where a fair opportunity can be afforded by the first to do final and complete justice between the parties. (*McAlister v. Reab*, 4 *Wend.*, *at p.* 492. *Caswell v. Coare*, 1 *Taunt.* 566 *p.*, *Mansfield.*

2d. That recoupment differs from off-set in two essential particulars, that is to say, in being confined to matters only arising out of and connected with the contract upon which the suit is brought, and in having no regard to whether or not such matters be liquidated or unliquidated.

There can be no doubt but that by the ancient common law, it was a fixed principle that if a contract was shown to be tainted with fraud, it could not be made the foundation of a recovery to any extent whatever. And it was also a principle equally well established that if a party was injured by partial failure of the consideration for the contract, or by the non-fulfillment of any of its stipulations, or of a warranty touching its subject matter, the injured party could not defend himself in an action on the contract by proving those facts, but could obtain redress only by a cross action. So, it was a like fixed principle that if one contracted to employ one for a certain time, at a specified price for the whole time, and discharged him without sufficient cause before the expiration of the time, he was bound to pay the whole amount of wages for the full time.

Nevertheless, it is equally well known that all these rigid rules of the common law courts have materially yielded by a gradual

process to the influence of common justice, common sense and common convenience. Thus, the last mentioned rule is now held to have more especial reference to the sustaining of the action than to the admeasurement of the damages to be recovered thereby, and it has become settled that although the whole wages is *prima facie* the measure, yet the true rule of damages in such cases is the actual loss or injury sustained by the party ready and willing to perform. (*Walworth v. Pool*, 4 *Eng*. 394.

And so of the first rule, the technical notion that the contract was entire, and that therefore it could not be apportioned and made a ground of recovery in any case where it was tainted with fraud, has long ago been abandoned as a universal rule, although in some cases it may be still insisted on, as where the transaction present ingredients so grossly offensive, or so complicated and connected as to be incapable of clear and definite separation, on the ground that, in such cases, the parties have so much offended against good morals, or have so intricately woven a web of fraud as to exonerate the courts of justice from the duty of "unraveling the threads so as to separate the sound from the unsound." And it is in cases where fraud entered into, but did not equitably go to the entire prevention of a recovery by the plaintiff, that we find the first traces of the defence in question by the common law courts of England. (The cases of *Ledger v. Erver*, *Peak's cases* 206. *Fleming v. Simpson*, 1 *Camp*. 40, *note*, are cases of this description.) And the cases both English and American, where the defence was allowed when there was a warranty *mala fides*, and refused when the warranty was *bona fides*, rest upon the same foundation, the courts seeming, for a while, not to be willing to allow it except only in cases where fraud was an ingredient.

This distinction and consequent limitation upon the defence, although it had been before challenged and in several cases disallowed, was not effectually exploded in this country until the case of *McAlister v. Reab*, (4 *Wend*. 483,) came up before the Supreme Court of New York, in the year 1831, in which Judge MARCY (in one of those clear judicial judgments, for which he was *sometimes* so remarkable when upon that bench) reviewed the

more prominent English and American authorities, and having shown the falacy of the idea that recoupment proceeded either upon the ground of set-off, or of the nullity of the original contract and exhibited its true ground—the prevention of multiplicity and circuity of action—refused emphatically to restrict its operation to cases merely where fraud was an ingredient. That case was taken to the court of errors in the ensuing year, and the judgment was affirmed by a vote of 18 to 3. (18 *Wend. R.* 111.) After learned opinions in favor of the doctrines it inculcates by the Chancellor and Senator Allen, who cite various authorities in its support, not noticed by Judge Marcy. The dissenting senators having been evidently mystified as to the general doctrine in placing it upon the ground of set-off.

The Chancellor, in his opinion, incidently alludes to a further distinction as "taken by the English Judges between a suit upon the original contract of sale and a suit upon a note or other security taken for the contract price of such sale," and remarks as to the latter class of cases, "it has been held that the whole amount of the note or other security may be there recovered where there is no fraud, unless the warranty goes to the whole consideration." We have looked into the English cases for this distinction, but have not been able to find that it is clearly marked. On the contrary, the cases, when closely scrutinized, seem generally to turn, not upon whether or not the suit was upon the original contract, or a bill or note taken for the contract price of the sale, but upon the question whether or not there was fraud. The case of *King v. Boster*, (7 *East* 481,) was upon a note given for a horse, and the cases of *Barber v. Backhorn*, (*Peak's Cases* 61,) and of *Ledger v. Erver*, (*ib.* 216,) were upon bills of exchange; and in those cases, certainly, fraud was the ground on which the defence was admitted.

But be this as it may, inasmuch as the defence that was once admitted only in cases of fraud, and in such cases was admitted as well against a bill or note as when the suit was on the original contract of sale, is now extended to cases where fraud is not an ingredient, by a parity of reasoning, it should be admitted in such

additional cases, as well in the one predicament as in the other of the contract. And such seems to have been the universal understanding of the American courts. The cases of *Frisbe v. Hoffnagle*, (11 *John. R.* 50), *Becker v. Vroman*, (13 *ib.* 302), *Spalding v. Vandercook*, (2 *Wend. R.* 431), and *Barton v. Steward*, (3 *id.* 236), as remarked by the Chancellor, having disregarded the distinction; and all the subsequent cases in this country have followed this lead, as far as they have come under our observation.

The case of *Peden v. Moore*, (1 *Steward & Porter R.* 71), was also an action upon a promissory note. This case was decided by the Supreme Court of Alabama in July, 1831, and without the light thrown upon the subject by the case of *Mc Alister v. Reab*, which, although previously passed upon by the Supreme Court of New York, was then pending in the Court of Errors of that State. From the truly learned and able opinion of Chief Justice COLLIER delivered in this case, the Supreme Court of the United States, in the recent case of *Withers v. Greene*, (9 *Howard R.* 226), has made some very copious extracts, "on account of the intrinsic force of the reasoning they contain." And the entire opinion commends itself to the profession in an eminent degree, as containing a discriminating review of the authorities, and a body of reasoning that throws a flood of light upon the general doctrine of partial failure of consideration. The result was that the Supreme Court of Alabama was "of opinion that whenever a defendant can maintain a cross action for damages on account of a defect in personal property purchased by him, or for a non-compliance by the plaintiff with his part of the contract, he may in a defence to an action upon his note made in consequence of such purchase or contract, claim a deduction corresponding with the injury he has sustained. When real estate is the consideration, the law perhaps is different, and a partial defect in title, so long as the contract is unrescinded, could not be alleged as a defence to an action for the purchase money, and this difference is to be attributed to the extensive jurisdiction exercised by chancery over the title to real estate by causing it to be perfected; and to the additional cause that the vendee sus-

tains no injury by a defect of title so long as he retains possession." Thus the boundary of mere cases of fraud, as a limitation for the toleration of the defence, was passed, as in New York; and in both States it was allowed in the common law courts, as will be found by an examination of the authorities cited, upon co-incident grounds of reason and exposition of authority; and it will be borne in mind, that each State had her equity courts of general jurisdiction.

The defence is also allowed in Mississippi, where there are also like equity courts, upon the same limitation as in New York, *Williams v. Harris, Ferguson &c.*, 2 *Howard R.* 627, *Brewer v. Harris et al.*, 2 *Sm. Mar.* 85, *Harmon v. Sanderson*, 6 *Sm. & Mar.* 41: and the case cited by the counsel from 8 *Sm. & Mar.* 336, (*Ferguson v. Oliver*), to show the contrary, is only an enforcement of the New York rule, that nothing short of total failure or want of consideration will be allowed to be set up under the plea of the general issue, unless previous notice be given of an intention to rely upon a special defence amounting to only a partial failure.

Without any remark, therefore, upon the more recent elementary writers, who in general, now all lay down the doctrine to be that, "The objection to a note or bill of exchange may be that there is a total want of consideration to support it, or that there is only a partial want of consideration. In the first case, it goes to the entire validity of the note, and avoids it. In the latter case, it affects the note with nullity only *pro tanto*. The same rule applies to cases where there was originally no want of consideration, but there has since been a subsequent failure thereof, either in whole or in part." (*Story on Prom. Notes, p.* 204,5, *sec.* 187, citing two Editions of Bailey on bills and other authorities; (*Story on Bills* (2 *ed.*) *p.* 214, *sec.* 184. *Story on Cont. p.* 99, *sec.* 153, 154. 2 *Green. Ev., p.* 124, 125, *sec.* 136, *& notes*, 2 *ed.*); or any observations on the various cases decided in State or Federal courts, in the States where there were no equity courts, (14 *Pick. R.* 198, 22 *Pick. R.* 510, 23 *Pick. R.* 283, 1 *Mason R.* 437, *ib.* 93), we will conclude this array of authority in favor of the validity of the defence in question, in the general view in

which we have been considering it, by citing the case of *Withers v. Greene*, before alluded to, decided by the Supreme Court of the United States at the January Term, 1850, which was, like the case at bar, an action of debt upon a single bill under seal. And in this case, the defence in question was allowed under pleas of fraud, praying a general discharge from the debt, although they were held bad, as pleas going to the entire discharge, because they omitted a disclaimer of the contract, and a proffer to return the property; but was held good, however, in substance (though bad in form) as pleas under which partial failure of the consideration could be set up in evidence.

After an examination of some of the American, and most of the English authorities, that court say, and we think that such is clearly established, "It would seem then to be fairly deducible from the reasoning of the English Judges, from the case of *Boston v. Butler*, in 7 *East* decided in 1806, to that of *Poulton v. Lattimore*, 9 *Barn. & Cres.*, ruled in 1829, that this defence would, by those judges themselves, be deemed permissible, whenever it could be alleged, without danger of surprise and consistently with safety to the rights of the parties; and it appears to be a deduction equally regular, that where notice of the defence was given either by pleading or by any other effectual proceeding, neither surprise nor any other invasion of the rights of the parties could occur or be reasonably apprehended. But however the rule laid down by the English courts should be understood, it has been repeatedly decided, by learned and able judges in our own country, when acting too, not in virtue of a statutory license or provision, but upon principles of justice and convenience and with a view of preventing litigation and expense, that where fraud has occurred in obtaining, or in the performance of contracts, or where there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied on in defence by a party when sued upon such contract; and that he shall not be driven to assert them either for protection or as a ground for compensation in a cross action."

In holding the law thus, we have not failed to examine the decisions of some of the other States where it is held otherwise. The Kentucky decisions, mainly relied upon by the counsel in this case, present but little reasoning on the subject, and no authorities are cited. Kentucky probably received the law as her courts enforce it from her mother, Virginia, where in 1830, it was provided by statute that a defendant might allege by plea, not only fraud in the consideration or procurement of any contract, but any such failure in the consideration thereof, or any breach of warranty of the title or soundness of personal property, as would entitle him in any form of action to recover damages at law or relief in equity.

But although we have found the defence in question admissible as to contracts respecting personal property, the case before us makes it necessary that we should go further and determine as to its validity in a court of law when real estate is the consideration of the contract.

Upon one branch of this latter inquiry, the authorities are so nearly uniform, and the reasoning by which they are sustained is so cogent that there can be no great difficulty in arriving at a satisfactory conclusion. We mean that predicament of this question where the partial failure relates to title merely. In this class of cases, both upon principle and authority, no defect of title that does not amount to a total failure of consideration can be set up as a defence to the suit for the purchase money. (*Greenleaf v. Cook*, 2 *Wheat. R.* 13. *Peden v. Moore*, 1 *Stew. & Port. R.* 81. *Frisbee v. Hoffnagle*, 11 *John. R.* 50. *Kemp. v. Lee*, 3 *Pick. R.* 452.) And perhaps not even then without eviction. (*Bumpass v. Platner*, 1 *John. Ch. R.* 213.) And the denial of the defence in cases where there is but a partial defect of title, is predicated upon the exclusive and peculiar jurisdiction of equity over the title to real estate in causing it to be perfected, and upon the further consideration that the vendee in general sustains no injury by a partial defect of title so long as he retains possession, as also because it would be without the principle upon which recoupment is allowed at all in the common law courts; inasmuch as for

want of that peculiar jurisdiction of the equity courts, to cause defective titles to be perfected, they could not do final and complete justice in the premises and terminate all possible further litigation touching the contract.

When, however, the partial failure of consideration arises not from a defect of title, but from a defect in the quantity or quality of the land sold, the authorities are not so harmonius. Chancellor KENT, in his commentaries, (2 *Kent's Com.*, 3 *Ed. part* 5, *lect.* 39, *p.* 470, 471,) after alluding to the want of harmony among authorities, then existing on the point as to the defect of title, says, "The principles which govern (the contract) as to defects in the quality or quantiy of the thing sold, are the same in their application to sales of lands or chattels." And in this he is fully sustained by the New York decisions, and also, in principle, by the South Carolina and Pennsylvania decisions cited by him. And although the question does not seem to have been expressly raised or decided in Mississippi, yet there are several cases there where the New York doctrine, as to this, seems to be taken for granted or countenanced. (*Brewer v. Harris et al.*, 2 *Sm. & Mar.* 84. *Ellis v. Martin, use, &c., ib.* 187.) In Alabama, although the New York doctrine was recognized in the case of *Wilson v. Jordan*, (3 *Stew. & Porter*, 72), it was afterwards repudiated in the case of *Dun, use, &c. v. White & Mc Clardy*, 1 *Ala.* (*N. S.*) 645,) where it was held that a partial failure of consideration would not be allowed to be set up by a purchaser of land in possession, with warranty when sued for the purchase money, and that decision has been ever since followed in that State. This case, however, is not based upon authority, and the reasoning by which it is sustained, is any thing but satisfactory. It is true the Alabama court cited 5 *Cow. R.* 195, where the New York court held that an action could not be maintained upon a promissory note executed by Watson, on the following foundation, that is to say, Watson had sold lands to Miller, and conveyed with covenants of general warranty. Afterwards Watson, admitting that the title had failed, executed the note in question to Miller for the amount settled between them as the sum due Miller because of

the failure of title. The court put the point upon the ground that the promissory note was in judgment of law, but a promise to pay a subsisting covenant of warranty, which was technically a security of a higher grade, and therefore the action could be sustained only upon that higher security, and for that reason would not lay upon the note. From these premises, the Alabama court concluded that recoupment could not be allowed when there was a subsisting covenant of warranty, because such was a higher security than the note sued on.

Now, without placing any stress upon the several statutory regulations of Alabama, which, for most purposes, in effect place promissory notes and covenants and other writings under seal upon the same level as to technical priority, dignity and impeachability as to consideration, it will be sufficient answer to this conclusion to say that if this reasoning is good for the conclusion arrived at, it is equally good to overturn a most important part of the doctrine of their previous leading case of *Pedan v. Moore*, because it will equally exclude recoupment in all cases of personal property where the warranty was in writing under seal. The Alabama court also cited the leading case of *Bumpers v. Platner*, (1 *John. Ch. R.* 213,) and upon this foundation argued that inasmuch as even a total failure of consideration cannot be allowed before eviction from land, *ergo*, a partial failure cannot be thought of for a moment. But in thus reasoning, they fail to remember that the case related to a failure of title, and that the reason of its rule utterly fails when the rule itself is attempted to be applied to a failure of consideration either total or partial of quantity or quality (not title) of the subject mattere of the sale and warranty.

When the failure relates to title merely, so long as the vendee holds possesion, he has a title growing up daily, which by mere efflux of time may ultimately ripen, and cannot, therefore, in his conscience say that he has received no advantage from the vendor under whom he came into the possession, and makes it difficult to say that the consideration has indeed totally failed. And we have seen that partial failure of title as to land is not within

the principle of the common law, under the auspices of which recoupment has been recognized and grown up in her courts for want of power in the common law courts to compel the perfection of title which alone exists in the equity courts. When, however, the failure of consideration either total or partial relates to quantity or quality, efflux of time, however great, cannot repair it, and consequently the case cited had no application to any other than cases of failure in the title.

If the reasoning of the Alabama court be correct, and the doctrine thereupon establisued as to land, when the partial failure is of quantiy or quality, be sound, then must not only their own case of *Pedan v. Moore*, be overturned in its greater scope, but also almost all the English and other cases. Because the same reasoning will apply to all cases whatsoever as well when the warranty is *mala fides* as when *bona fides*, provided it be a warranty under seal. We have seen that recoupment does not proceed upon the ground that the contract is a nullity and the recovery is upon a *quantum meruit* or *quantum valebat*, but that the contract stands and the recovery is mitigated to the extent, and because of the fraud or failure. Such a distinction as that developed by the Alabama, court was never taken in England or elsewhere, so far as we have discovered. In England, the objection was not that the warranty was under seal and therefore a security higher in grade than a bill or a promissory note, but simply that it was a subsisting cause of action, on which an independent cross action could be maintained, and that for this reason to admit it as a defence under the general issue was not only obnoxious to the objection that the plaintiff might be surprised; but also to the further one that the record would not, in such case, exhibit that this matter had been once adjudicated by way of recoupment, and thus enable the party to show this former recovery in bar of an after action on the warranty. And no court has gone further to obviate both of these objections than the Alabama court, (see the cases of *Robinson v. Windam*, 9 *Porter R.* 397, where the court hold a special plea good which sits up "that the matter complained of had been enquired into as a defence

to the note, and judgment rendered accordingly, which remains unreversed.")

We cannot therefore adopt so much of the doctrine of the Alabama courts as disallows recoupment in all cases where the subject of the sale and purchase is real estate; but shall follow principle, vindicated as it is by the New York decisions as to this point, (*Van Epps v. Harrison*, 5 *Hill's R.* 63;) and hold that as to real estate, when the partial failure is in quantity or quality of the subject, recoupment is allowable just as it would be for any partial failure in the sale and purchase of personal property.

Upon the next question involved in the case before us; we are clear that, under our statute, recoupment is as well allowable when the action is upon "any instrument or note in writing under the seal of the party charged therewith," as when it is upon a *quantum meruit* or *quantum valebat*, or upon a promissory note, or bill of exchange. (*Dig. p.* 808, *sec.* 75. The case of *Van Epps v. Harrison*, 6 *Hill*, at page 66, decides a like point as to the New York statute.)

The remaining question relates to the sufficiency of the plea filed in this case, which we think is good. It is not even obnoxious to the technical objection that the plea must answer the whole declaration as the failure set up is averred to be to an amount equal to the amount sought to be recovered—one other writing obligatory in addition to this having been (as it appears by the plea) executed on one entire consideration. If, however, it had been otherwise, and had been in form somewhat like this, "And the said defendant as to all said sum of money in the declaration mentioned except as to the sum of one hundred dollars, says *actio non*," *&c.*, we should have still held it good under the operation of our statute requiring all pleas "impeaching the consideration of any instrument or note in writing, whether sealed or not," (*Dig. p.* 808, *sec.* 76,) to be supported by affidavit, and the preceding section authorizing a defendant, when sued on a sealed instrument "by special plea to impeach or go into the consideration of such writing in the same manner as if such writing had not been sealed." (*Sec.* 75, *ib.*) The one provision was to enable a

defendant to have the same defence against a sealed instrument, so far as it could be founded upon its consideration, or want, or failure, as he already had against an instrument not under seal; and this was granted upon condition that he would present such defence by "special" sworn plea. The other provision restricted the right of the defendant in so far as to take from him any defence of this character against any instrument or note in writing not under seal, unless presented by "special" sworn plea. Thus removing the objection of surprise so long urged against recoupment, when allowed under the plea of the general issue; to obviate which the courts have required previous notice to be given to the plaintiff. And leaving in this State, as under the latter rule, such contracts only as have not been reduced to writing, all others being within the statute requiring the special sworn plea, which dispenses with notice.

As a plea of partial failure of consideration would, in legal effect, confess so much as it did not deny, the correct practice doubtless would be to take a default as to this plea, for the sum confessed, subject to but one final judgment on the whole case at the cost of the losing party as usual: And this, although the general issue might be also filed along with this special plea, because of the general rule that the several distinct pleas in bar authorized under our statute, stand independent of one another. (*Williams v. Harris, Ferguson & Co.*, 2 *How. Miss. R.* 634.

As the plea, in the case before us, does not set up a defect in the title of the subject sold and purchased, but a defect in quantity, it is within the rule that we have adopted for the allowance of recoupment in the law courts. The plea does not set up any want of title in the plaintiff to the improvement in question: on the contrary, it alleges that he was legally entitled to it and in possession of it, by way of showing him to be without excuse for not passing over the possession of it, of which failure the defendant complains, because he has not received this part of the thing he purchased, and for which he executed the note sued on as well as another note.

The first cause of demurrer is that the defendant, by his plea,

set up an independent contract. This objection is certainly not sustained by the record; because the plea emphatically alleges that the note sued on, as well as another note was executed not only in consideration of certain lands specified, but "also for and in consideration of a certain improvement," &c.

The other cause of demurrer is that as the plea must be taken strongest against the pleader, it must be intended that the promise to deliver the possession of the improvement on the public lands alleged in the plea was a verbal promise, and being such and a "contract" for an interest concerning lands, was void under the statute, (*Dig. p.* 540, *sec.* 1,) and consequently could not be the ground of a cross action, so as to bring it within the rule of recoupment. To admit all this would avail the plaintiff nothing at all, because a cross action would still lay to recover back such portion of the consideration as was made void by law and not against public morals: and besides, we have seen, in the case of *Withers v. Green*, (9 *How. R.* 230,) that in a proper case a party may recoupe as well for protection as for compensation.

The record shows that Whorton was present in court, prayed an appeal, and filed his affidavit.

Finding no error in the record, the judgment must be affirmed.

STATE BANK VS. MINIKIN.

The right of a defendant to file several pleas, under the 69*th sec., chap.* 126, *Dig.*, is unconditional, and, if within the time prescribed by the statute for pleading, may be done without leave of the court; but under the 77th sec. of the same chap., the right to file more than one replication or rejoinder depends upon leave granted for that purpose, upon motion, and consideration as to whether such additional pleading is necessary to the attainment of justice.

In order to enable the court to exercise its discretion, the facts should be presented by motion on petition, and perhaps the more regular practice would be to present with it the pleadings intended to be filed, that the court might, upon examination of the issues formed, and the nature of the action, as well as the additional pleading presented, determine whether such leave should, or not, be granted; and such application, and the decision of the court upon it, should appear upon the record.

As to the proper mode of putting in issue the identity of names and causes of action, where a former judgment is pleaded, &c., and herein, as to the effect of *nul tiel record.*

Where a defendant files four rejoinders, without special leave of the court, a motion to strike all of them out but one, might be sustained, but where the motion is to strike them all out, it should be overruled, because the defendant has the right to file one, and the motion to strike them all out should be determined without division.

Writ of Error to Independence Circuit Court.

On the 22d March, 1849, the Bank of the State of Arkansas brought an action of debt, by petition, against Peter Engles and John Minikin, in the Independence Circuit Court, on a note due 25th October, 1844, executed by them, and one William D. Engles to the Bank. At the return term, September, 1849, oyer of the note sued on was prayed and granted. At the March term, 1850, the death of Peter Engles was suggested, and the suit abated as to him. Defendant Minikin filed three pleas in abatement, alleging, in different forms, that the writ issued without the seal of the court; to which the plaintiff replied that the writ was sealed when it issued, but the impression had become dim, indistinct, &c. The Court determined the issue for plaintiff.

On the 7th August, 1850, at an adjourned term of the court, the defendant filed three pleas: 1st, *nil debet;* 2d, payment: and 3d, the statute of limitations—three years.

At the September term, 1850, on the 2d September, plaintiff took issue to the 1st and 2d pleas of defendant, and filed a special replication to the third, alleging that within the bar, she brought suit on the same cause of action, against defendant and the other makers of the note, suffered a non-suit therein, and commenced the present action within one year thereafter.

On the 3d day of September, the defendant filed five rejoinders to said replication:

1. That the plaintiff did not, within three years, next after the cause of action accrued, on, &c., commence her action against this defendant, nor did she suffer a non-suit, on, &c., nor did she re-commence her action against defendant on the identical cause of action, on, &c., in manner and form as alleged, &c.

2. That the cause of action in the first suit, mentioned in said replication, did not accrue to the said plaintiff within three years next before the commencement of said first suit.

3. That the cause of action in the first suit in said replication mentioned, is not the identical same cause of action as that in the plaintiff's petition in this suit mentioned.

4. That defendant is not the same identical John Minikin named in the first suit in said replication mentioned.

5. That there are no such records in the Circuit Court of Independence county, as the said plaintiff, by her said replication hath alleged.

On the 4th September, the plaintiff filed a motion to strike out the 1st, 2d, 3d, and 4th of said rejoinders, stating several objections to the form and substance of them, and that they were filed without leave of the court, &c.

On the 9th day of September, the defendant withdrew the 5th rejoinder, and thereupon the motion of the plaintiff to strike out the other four was submitted, and overruled by the court, and plaintiff excepted.

The plaintiff declined to answer said rejoinders, and judgment was rendered for defendant.

The case was determined in the court below before the Hon. WM. C. SCOTT, Judge. Plaintiff brought error.

BEVENS and HEMPSTEAD, for the plaintiff.

BYERS & PATTERSON contra. Nothing can properly be stricken from the files, if filed in apt time, except where the pleading filed

is a mere nullity, (4 *Ark.* 454, 5 *id.* 141, 1 *Eng.* 196); but in this case, each rejoinder was a full answer to the replication.

Mr. Justice WALKER delivered the opinion of the Court.

Whether the court below erred or not in overruling the plaintiff's motion to strike from the files the four rejoinders of the defendant to the plaintiff's replication, must depend upon the right which the defendant had to file them under the statute, or in point of order, or time; or because by no form of pleading could the subject matter be made a legal response to the replication.

In regard to the first class of objections, it may be remarked that whilst our statute, like that of Ann, gives to the defendant a right to file as many pleas as he may deem necessary for his defence, these statutes have uniformly been held to extend to pleas only, and left the parties to be governed by the common law rule in regard to other pleading, under which but one plea, replication or rejoinder, was allowable to a count, plea or replication. 2 *Strange* 908. *Gray's ad. v. White*, 5 *Ala. Rep.* 492. Our statute has, however, conferred upon the courts, when in their opinion it shall become necessary to attain the ends of justice, upon application for that purpose, to allow more than one replication or rejoinder. *Sec.* 77, *Dig.*, *ch.* 126,

If such application was made and leave granted in this case, the record should show it, and as no such application or order appears of record, it is only by inference, from the fact that the court refused to strike them out, that we may infer they were filed with its consent. The state of the pleadings in this, as well as in several other cases before us, induces the belief that the circuit courts overlooked the 77th section of the statute, and, acting under the provisions of the 69th, considered the right to file several replications or rejoinders, as co-extensive with pleas. Such is clearly not the case. The defendant's right to file several pleas under the 69th section, is unconditional, and, if within the time prescribed by the statute for pleading, may be done without leave of the court; whilst the right to file more than one replication or rejoinder depends upon leave granted for that purpose, upon

motion and consideration, as to whether such additional pleading is necessary to the attainment of justice.

In order to enable the court to exercise its discretion, the facts should be presented by motion or petition, and perhaps the more regular practice would be to present with it the pleading intended to be filed, that the court might, upon examination of the issues formed and the nature of the action, as well as the additional pleading presented, determine whether such leave should or not be granted. And such application and the decision of the court upon it, as in all other matters determined by the court, should appear of record. A glance at the rejoinder on file in the case under consideration, will suffice to show that the circuit court either overlooked or disregarded the 77th sec., or it never would have suffered these rejoinders to have been filed. Taken all together, they do, at most, but amount to *nul tiel record*, and traverse the material facts of the replication.

We are aware that something more than this seems to have been contemplated by the defendants. He no doubt intended to put in issue the identity of the defendant and of the cause of action in the two suits. This he wholly failed to do. The records (the only competent evidence under the issue), in which like names and causes of action were disclosed, was amply sufficient to sustain the issue on the part of the plaintiff. He who would question these matters, must do so by affirmative pleading; when the existence of the record is denied, or when any material fact therein is denied, the record is the only evidence permissible. *May v. Jamison*, 6 *Eng. Rep.* 368. The case of *Barkman v. Hopkins & Co.*, 6 *Eng. Rep.* 157, may to some extent show the proper mode of interposing a defence of this kind. In that case, the record showed a judgment *prima facie* valid and binding upon the defendant: *nul tiel record* would not have availed him as a defence, yet a special plea was allowed, setting up new matter consistent with facts set forth in the record, and yet a valid defence.

There are two other decisions of this court which may be thought to bear upon this question. The first is the *State v. Murphy*, indicted for an escape. That was a criminal proceeding where the

general issue put the State to strict proof of the material facts in the indictment, and even in that case it is not altogether clear that the rule was not extended too far. The other was the case of *White v. Yell*, decided at the July Term, 1851. A plea in abatement averring a former action pending between the same parties on the same cause of action, was interposed without affidavit. The question was whether the averments should be verified by affidavit. It was held that they should, but expressly upon the ground that in abatement greater certainty of pleading was required, and that although the rule might be different in ordinary pleading, yet the facts, although *prima facie* of record, should be verified by affidavit.

We are not however called upon to decide, nor do we intend to be understood as deciding, what the practice in such cases should be. The question is not before us upon demurrer.

Turning to the more immediate subject before us, there can be no doubt of the right of the defendant to file one rejoinder. This he could have done without leave of the court; and if the plaintifi's motion had been to strike out all but one of them, it should have been sustained. His motion was, however, general and embraced all of the rejoinders, and as the motion came as an entire proposition to strike them all out, unless no one of them presented matter which, if well pleaded, would have been a legal response to the replication, it was correctly overruled. The court was not bound to separate an entire proposition, and sustain the motion as to part and overrule it as to the balance. *State v. Jennings, use, &c.*, 5 *Eng. Rep.* 428.

The judgment of the circuit court must be affirmed.

STATE, USE OF CHICOT COUNTY VS. RIVES ET AL.

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The breaches assigned in an action on a penal bond, are, in effect, so many distinct counts in a declaration—they are the gravamen and foundation of a recovery—and it is as much error to embrace two or more breaches in one assignment, as it would be to embrace so many distinct causes of action in one count in a declaration; but such error, being duplicity, is only ground of special demurrer.

This being an action on a collector's bond, the first assignment alleged that defendant failed to return a delinquent list as required by law, that he failed to make a proper settlement with the court at the time required by law, and that he was indebted to the county, as such collector, a sum specified, and failed to pay the same over. Defendant pleaded that he was not so indebted, payment, &c. HELD, that the pleas, professing to answer the whole assignment, but answering in fact but one breach, were bad on demurrer, and that the demurrer to the pleas would not reach back to the duplicity in the assignment, that not being grounds of general demurrer, and being amendable, would be treated, under the statute, as amended, and the breaches regarded as if separately assigned.

County warrants issued under a statute providing for their issuance, and making them receivable in payment of county taxes, &c., are a legal tender, by a collector, in payment of county revenue—such tender does not fall within the provision of the constitution, declaring that nothing but gold and silver coin shall be made a legal tender, &c.—And the case of *Gaines v. Rives*, 3 *Eng. R.* 220, is overruled.

Writ of Error to Chicot Circuit Court.

This was an action on the bond of Rives, as collector of Chicot county. The first breach alleged that the tax book was placed in his hands on the 1st day of June, A. D. 1847, for which he gave receipt, the county tax thereon being $3,608 46. That he returned no delinquent list to the term of the county court next after November 1st, 1847, nor made settlement of the county revenue collected by him, nor paid it over, and was then indebted therefor $2,878 87.

The 2d breach alleged that at January term, 1848, of the county court, Rives having neglected to make settlement, the county court adjusted his accounts, and found that he was in-

debted $3,479 40, and at April term, 1848, he appearing in court, the same was re-adjusted and $2,878 87 found due, which is unpaid, and Rives in debt in that amount.

The 3d breach avers the same settlement at April term, 1848, and that he was indebted in the same sum.

The securities filed six pleas, and Rives pleaded separately.

The 1st plea of the secureties was that they did not owe the sum of money demanded by the several breaches.

The 2d was that Rives did not owe the sums demanded in the breaches.

The 3d was payment after suit commenced by Rives, to the treasurer of the county, of all the moneys collected by him for 1847, with all interest due.

The 4th, that the county court had indulged Rives for thirty days.

The 5th, that the county extended time to Rives, in January, 1848, without the consent of the securities, from January 5th to March 6th, 1848.

The 6th, payment by Rives after commencement of the suit.

Rives' separate pleas were, 1st, 2d and 3d to the respective breaches, that he never was indebted in the sum mentioned in each.

4th, *actionem non*, as to all of the breaches, except as to costs, because he paid the whole amount adjudged against him, on the 3d October, 1848, with all interest.

5th, that on the 6th day of October, 1848, there was due to the county on the judgment of the county court, for principal sum, penalty and interest $3,809 30, which amount he then tendered to the county, "in warrants drawn by the clerk of said county court, upon the Treasurer of said county, and by said county issued out, and paid to divers persons in payment of debts due to them by said county, in accordance with law, and by order of said county court, under and by virtue of the 28th section of chapter 41 of the Revised Statutes, adopted and in force in the year 1839, all which warrants were issued in the year 1843, were duly presented for payment to the Treasurer of said county, and payment refused, and still remain wholly unpaid by said county and

are by law required to be received by said county in payment of said amount so adjudged against the said defendant," and offered to pay all the costs of the suit: which tender the county refused —with profert of the costs and of the warrants so tendered.

Rives also, by motion, averring the sum of $3,967 62 only to be then due, brought the amount in warrants into court, and paid the costs.

The plaintiff demurred to each plea. The court sustained the demurrers to the 4th and 5th pleas of the securities, and overruled them as to the residue of their pleas, and all of Rives'. Judgment went on the demurrers.

The suit was commenced 4th October, 1848, and determined at the following November term, before Hon. WM. H. SUTTON, then one of the circuit judges.

F. W. & P. TRAPNALL, for the plaintiff. The first four pleas of Rives, and the pleas of the securities, are not comprehensive enough to answer the assignment of breaches in the declaration, and the demurrers to them were therefore improperly overruled.

The 5th plea of Rives is without precedent. The warrants tendered, under some circumstances might have been good as a set-off, but nothing is good as a tender but gold or silver. A defendant has the right to pay money into court, but nothing else than money. He certainly cannot pay into court the obligations of the plaintiff and claim as a payment what could have been good only as a set-off.

The question does not arise in this case whether the county would be compelled to receive the warrants issued by her in discharge of the county revenue; and if it did it has already been settled in the case of *Gaines v. Rives*, 3 *Eng*. 220.

PIKE, contra. The only question in this case is whether the county of Chicot can be compelled to receive her warrants isssued in payment of debts due by her in discharge of debts due to her, as directed in *section* 47, *chap*. 13, *Digest*, which is decided by this court, in the case of *Gaines v. Rives*, 3 *Eng*. 220, to be in viola-

tion of the constitution of the United States, prescribing that gold and silver only shall be a legal tender.

That the section in question is not a violation of the constitution, is apparent from the commentaries of Judge STORY, (3 *Story on Const. sec.* 1,365, 6, 7,) and the several opinions of the judges in the case of *Ogden v. Saunders*, (12 *Wheat.* 274, 289, 269, 306, 323.) It is perfectly obvious that to deny to a legislature the power of providing by law that corporations shall receive their own issues in payment of debts, so far from carrying out the principles of the constitution, is diametrically in opposition to them. And this power has been clearly recognized in the case of banking corporations. *Bank of Niagara v. McCracken*, 18 *J. R.* 493. *Bank of Niagara v. Rosevelt*, 9 *Cowen* 409. *Union Bank of Tennessee v. Elliott*, 6 *Gill & John.* 364. *Bank of Maryland v. Ruff*, 7 *Gill & John.* 460. *United States v. Robertson*, 5 *Peters* 641, *Planters Bank v. Sharp*, 6 *How.* 329.

Mr. Justice WALKER delivered the opinion of the Court.

In this case it is assigned as error that the circuit court improperly overruled the plaintiff's demurrer to the defendant's pleas. The ground of objection to part of them is, that they answer less than they purport in the outset to answer. It therefore becomes necessary to examine the breachers in order to ascertain the truth of the objection.

The action is debt on a collector's bond, with the usual covenants to collect, pay over, &c. There are three breaches assigned. In the first, it is alleged that the collector failed to return a delinquent list as required by law: that he failed to make a proper settlement with the court at the time required by law: and that he was indebted to the county as such collector $2,868 87, and failed to pay the same over. Thare can be no doubt but that this breach is objectionable for duplicity. This court has repeatedly held that the breaches assigned in an action on a penal bond, are, in effect, so may distinct counts in a declaration. They are the gravamen and foundation of a recovery. And it is as much error to embrace two or more breaches in one assignment as it

wuold so many distinct causes of action in one count in a declaration. *Lyon v. Evans*, 1 *Ark.* 367. *Phillips & Martin v. Gov. use, &c.*, 2 *Ark. R.* 386. There were then in this assignment three distinct breaches, upon either of which (if true) a recovery may be had. When therefore the pleas professed to answer the whole of the first assignment, it was not a sufficient answer to deny the indebtedness simply, leaving the breaches for having failed to return the delinquent list and to make a settlement with the court unanswered.

The defendants contend that this defect in their plea should not prejudice them because they were led into it by the previous error on the part of the plaintiff, and that judgment should be rendered against the sufficiency of the declaration. In most instances, this would certainly be true; but in this case the ground of objection is duplicity, which can only be taken advantage of by special demurrer at common law, (1 *Ch. Pl.* 228,) and our statute expressly forbids that matter which is only cause for special demurrer at common law, shall be assigned as cause for demurrer, and that defects not assigned shall be amended by the court. Under this state of case, it is evident that the demurrer to the pleas did not relate back to the declaration, because if a demurrer could not have been interposed to the declaration, for additional reasons it could not by relation affect it. The statute requires that it shall be considered as amended. Thus considered, it presents three distinct assignments, which the pleas assume to answer, and forasmuch as they fail to do this, we must adjudge them insufficient and the demurrer, so far as the pleas were objectionable in this respect, should have been sustained, and upon examination of the several pleas it will be found that in this respect they are all objectionable, except the second and third pleas of defendant Rives. The objection to them is not good. There is no allegation in either of the breaches that damages or costs were adjudged against defendant, nor that by law he was bound for either.

We have now reached the main question at issue in this case. The defendant in the fifth plea sets up a tender of Chicot county

warrants, for the whole amount due said county for principal, penalty and interest. Which warrants, it is averred, were issued in 1843, under and by virtue of an act of the General Assembly, adopted and in force in 1839. The breach of covenant as alleged was for failing to collect, account for and pay over the county revenue for the year 1847.

Upon this state of case, it is objected, on the part of the plaintiff, that notwithstanding the express act of the Legislature to that effect, that warrants were not a legal tender in payment of the county revenue for the reason, as she alleges, that said act is in violation of that clause of the constitution of the United States which ordains that "no State shall make any thing but gold and silver coin a tender in payment of debts." This question has repeatedly been discussed in the United States court, by several of our most distinguished jurists, and believing that no investigation which we could give the subject would free it from doubts, which their profound reasoning could not remove, we shall content ourselves by referring briefly to the positions which several of them assume, and apply the principles deduced from these and other authorities to the case before us.

In the case of *Ogden v. Saunders*, 12 *Wheaton* 384, Chief Justice MARSHALL, and several other judges held, that the act of the Legislature, which is in force at the time the contract is made, does not enter into it, but that the contract derives its obligation from the act of the parties. Mr. Justice WASHINGTON, Mr. Justice TRIMBLE and Mr. Justice THOMPSON held, in the same case, that the law of the State in which the contract is made, attaches to the contract the moment it is made a qualification which becomes inseparable from it and travels with it, through all its stages of existence. In the case of *Champanque v. Burnell*, 1 *Wash. C. C. Rep.* 341, it was held that "laws which in any manner affect the contract, its construction, the mode of discharging it, or which control the obligation which the law imposes, are essentially incorporated in the contract itself.

So, in the case of *Burner v. Bank of Columbia*, 9 *Wheat.* 586, the language of the court is, in effect, the same, and decides that

we may look out of the contract to any known law or custom with reference to which the parties may be presumed to have contracted, in order to ascertain their intention and the legal and binding force and obligation of their contract. And to the correctness of the latter decisions, this court has heretofore, to a limited extent at least, subscribed.

Be this rule however as it may, when applied to ordinay contracts, there is a class of contracts to which the rule will apply with increased force. They are such as are made and sanctioned under particular statutes: such as acts of incorporation, for instance, where the power to contract, the subject about which the contract may be made and the manner of discharging it, are all prescribed by law. In such cases, the contract is in many respects limited and controlled by the provisions of the act itself. Thus, where a bank is empowered to contract debts, to discount notes, &c., and the act also provides that the notes so discounted may be discharged by the bills issued by the bank, although the notes so discounted may purport upon their face to be payable in cash, yet, we apprehend, under the act authorizing the debtors of the Bank to pay their debts in bills issued by such bank, that a tender of such bills would be good in payment.

In support of this position, even Chief Justice MARSHALL, who denied the correctness of the rule when applied to contracts generally, has given his assent. In the case of *The United States v. Robinson*, 5 *Peters* 659, the Bank of Summerset assigned to the United States certain of her notes, and the question arose as to whether (although the State of Maryland declared the bills issued by the Bank a good tender in payment of the debts due to the bank) as the notes had been assigned, the United States as assignee was bound to receive them. The Chief Justice said, "on this question the court are divided. Three judges are of opinion that by the nature of the contract, and by the operation of the act of Maryland upon it, an original right existed to discharge the debt in the notes of the bank, which original right remains in full force against the United States who comes in as assignee in law, not in fact, and who must therefore stand in place of the bank.

Three other judges are of opinion that the right to pay the debt in the notes of the bank does not enter into the contract. A note given to pay money generally is a note to pay in legal currency, and the right to discharge it with a particular paper is an extrinsic circumstance depending on its being due to the person or body corporate responsible for that paper, which right is determined by the transfer of the debt." It will be readily perceived in the case just cited, that the only matter of difference between the judges was as to the effect of the assignment, it being a conceded point by all of them that, as between the corporation and the debtor, the tender in paper would have been good. And such also was the decision of the Supreme Court of New York, in the case of *Bank of Niagara v. McCracken*, 18 *John. R.* 493. And in a very recent case from this State, *Woodruff v. Trapnall*, the Supreme Court of the United States held the pledge of the State to redeem the notes of the bank in payment of debts, was a standing guarantee, which embraced all the paper issued by the bank until the guarantee was repealed.

The decisions in these latter cases, we apprehend, are made upon principles which must govern the case under consideration. The plaintiff in this suit is by the 1*st sec.*, *chap.* 41, *Dig.*, declared to be a corporation with power to contract, sue, &c. From the 1*st* to the 4*th sec.*, *ch.* 138, power is conferred to levy and collect taxes, fines, &c.; from the 42d to the 47th section, same chapter, power is conferred to issue Treasury warrants; and by the last mentioned section it is declared "that all warrants drawn on the treasurer shall be paid out of any money in the treasury not otherwise appropriated, or out of the particular fund expressed therein, and shall be received in payment of all taxes, debts, fines, penalties and forfeitures accruing to the county." Under this corporate power, the county levied a tax and issued her warrants, which the sheriff was bound by law to receive in payment of the county revenue. Having received them, shall we say that the county is not bound to redeem them in payment of her revenue? If we declare that provision of the statute unconstitutional, which requires her to redeem her warrants, can we uphold that clause

of the statute which empowered her to issue them? or shall we not rather, in the language of Mr. Justice THOMPSON, say, that the law in force, when the contract was made, attached to it, when made, a qualification, which became inseparable from it, or, in the language of the court, in the case of *Trapnall v. Woodruff*, that the law is a standing guarantee that the corporation will receive her warrants in payment of all debts due her?

The case of *Gaines v. Rives*, 3 *Eng*. 220, is not reconcilable with the conclusion at which we have arrived. The court, in that case, in our opinion, failed to distinguish between a statute declaring warrants receivable in payment of debts generally and the particular case before it and then under consideration. Whatever may be the true rule in regard to general statutes upon this subject, we are decidedly of opinion that this statute is not in violation of that clause of the constitution, and was never intended to affect the subject of currency, but to affect a particular class of contracts made under authority of the act and in direct reference to this feature in it. There is no question but that if A. contract with B. to receive wheat of him in payment of a debt, wheat would be a good tender. So far from impairing the contract to require him to do so, it would be a gross violation of it to refuse to receive it in payment. This contract, though not made by an individual, is made by a corporation with definite prescribed powers, and when acting under or in reference to those powers, the corporation must be presumed to have adopted and acquiesced in all its provisions. We think the tender a good one.

The judgment and decision of the Chicot Circuit Court, must therefore be reversed, and the cause remanded, with instructions to permit the parties to amend their pleadings, and for further proceedings to be had therein according to law.

BADGETT VS. MARTIN.

On a bond executed by a deputy sheriff to his principal, conditioned that he would well and truly do and perform all the duties appertaining to the office of sheriff, during the time he continued the lawful deputy—an action accrues, and the statute of limitation commences running in respect thereof, whenever the deputy fails, at the return, to pay over money collected by him on execution. It is not a mere bond of indemnity against actual loss or damage to the principal—consequently, a cause of action accrued thereon whenever the principal's liability became fixed by the failure of the deputy to pay over money according to the mandate of the writ by virtue of which it was collected, and the statute commenced running from that time.

In an action on such a bond, dated in 1837, and the breach thereof accruing in 1838, the limitation is five years—consequently pleas setting up the lapse of two and four years are insufficient; but such pleas should not be struck out on motion—they should be met by demurrer.

In order to render a plea the proper subject of a motion to strike out, it must not only fail to present a material issue, but it must also be wholly unadapted to the nature of the action—therefore, as lapse of time might in this action constitute a valid defence, it is error to strike out a plea merely because it does not show that sufficient time has elapsed to constitute a bar—such a plea should be met by demurrer, and not by motion to strike out.

In an action of this kind it was error to *strike out* a plea setting up that the deputy was not, at the time of the commission or omission of the acts charged as a breach of the bond, the lawful deputy of the sheriff—such a plea sets up matter which is appropriate in its nature as a defence to the action, though the subject matter thus presented is defectively stated, and must have been held bad on demurrer.

The deputy was estopped by his bond from denying his appointment, but he might deny its continuance at the time of the commission of the act charged against him—bnt such denial could not be in general terms, but must be made by setting up special matter by way of avoidance.

Error to Pulaski Circuit Court.

Debt on a penal bond determined in the Pulaski Circuit Court, in February, 1850, before Hon. WM. H. FEILD, Judge. The declaration set out a bond executed by Royster as principal, and Crutchfield, Sprague, Ashley, and Badgett, securities, to Martin

for $50,000, dated the 5th June, 1837; which bond was subject to a condition underwritten, whereby, after reciting that Martin was sheriff of Pulaski county, and had appointed Royster his deputy to do and perform all the duties appertaining to the office of sheriff of said county; the condition was declared to be such that if Royster should well and truly do and perform all the duties appertaining to the office of sheriff of Pulaski county aforesaid, during the time he continued the lawful deputy of said Martin, sheriff of said county, then the bond was to be void, else to remain in force.

Two special breaches were assigned. The first, after setting out the recovery of a judgment in the Pulaski Circuit Court, and the issuance of a writ of *fi. fa.* thereon, which came to the hands of Royster on the 12th day of February, 1838, and whilst he was the lawful deputy of Martin, by virtue of the appointment and deputation in the condition of the bond mentioned, proceeded as follows: "And afterwards, to wit: on the day and year last aforesaid, at the county aforesaid, the said David Royster, acting as such deputy sheriff for the plaintiff, under and by virtue of the appointment and deputation aforesaid, and whilst said plaintiff was sheriff as aforesaid, then and there collected and received on that execution, before the return day thereof, by virtue of the authority therein contained and his deputation aforesaid, of and from the defendants in that execution, the said sum of two hundred and nine dollars and fourteen cents, and the interest which had accrued thereon, as well as said costs, and that he, the said Royster, both at, before and after the return day of said writ, and at all other times, utterly failed and refused to pay over or account for the said moneys so collected and received by him, as such deputy as aforesaid, to said Jacob Reider, (the plaintiff in the execution,) or any person for him, or to the plaintiff in this suit, or any person for him, although often requested so to do, and utterly failed and refused to have such moneys with said writ before the Judge of said court according to the exigency of said writ, to be rendered to said Jacob Reider or accounted for according to law. By means of which premises the condition

of said writing obligatory was broken, and the writing obligatory itself forfeited. And said plaintiff avers that at time past, to wit: before the institution of this suit, he became liable to pay, and was forced and obliged and did pay to said Jacob Reider, the said sum of two hundred and nine dollars and fourteen cents, specified in said execution, and interest which had accrued thereon, and damages which had accrued in that behalf in consequence of the breach of duty of said Royster, and the costs aforesaid—all of which payments made by the plaintiff amounted to a large sum of money, to wit: to the sum of five hundred dollars, and which has not, nor has any part thereof, been repaid at any time to the plaintiff by said Royster, or any other person, and that the same is in arrear and now due to the said plaintiff. By means of which premises, an action has accrued to the plaintiff to demand and have of and from the said defendant in this suit, the said sum of fifty thousand dollars above demanded."

The second breach was the same as the first, except that it set out a different judgment and execution.

The suit was commenced on the 3d April, 1849. The defendant pleaded six pleas in bar: 1st, the statute of limitation of 2 years; 2d, the statute of 4 years; 3d, the statute of 5 years; 4th, that before the execution of the writing obligatory mentioned, to wit: on, &c., at, &c., without the knowledge or consent of defendant, it was corruptly and unlawfully agreed by and between plaintiff and Royster, (the plaintiff then and there being sheriff of said county, and said Royster then being his deputy in such office,) that said plaintiff should grant, sell and transfer said office of sheriff and the emoluments thereof and therefrom arising to said Royster from thence until the first day of October, 1838, and that said Royster, in consideration of said transfer and sale of said office, and the emoluments thereof, as aforesaid, should pay to said plaintiff the gross sum of $450, for the use, emoluments, and profits of said office, up till the first day of October, 1837, and for the use, and the emoluments and profits thereof, up to and until the first day of October, 1838, the additional gross sum of $250, and also that said Royster, for the

same consideration, and for the purpose of indemnifying said plaintiff against loss or damage in respect of any misfeasance or malfeasance on the part of said Royster, as such deputy, should, with sufficient security execute and deliver to said plaintiff such bond, as, in said declaration, is described. And said defendant avers that the writing obligatory, in the declaration in this behalf mentioned, was executed and delivered for the consideration aforesaid, and not for or upon any other, or different consideration whatever, and the same bond was accepted and received by said plaintiff, in pursuance of the corrupt and unlawful agreement aforesaid, and not otherwise or differently, or under any other or different circumstances, or in pursuance of any other agreement. 5th, the 5th plea after alleging the same facts stated in the 4th, avers, "that afterwards, to wit: on the 14th day of June, 1837, in further pursuance, and in confirmation and completion of such corrupt and unlawful agreement, said plaintiff executed and delivered to said Royster, a certain instrument of writing, sealed with his seal, and here to the court shown, bearing date the day and year last aforesaid, whereby said plaintiff sold and transferred said office of sheriff to said Royster, so being such deputy, for the consideration of the gross sum of $450, for the use of the said office of sheriff up till the first day of October, 1837, and for the use of said office up to the first day of October, 1838, the additional gross sum of $250, to be paid by the said deputy to said sheriff therefor—the said gross sums so to be paid by said deputy to said sheriff, being in lieu of all the fees accruing and arising from said office during the period for which the same was so granted and transferred; and the said Royster, by said last mentioned instrument of writing, became entitled to such fees and emoluments, and was thereby authorized and empowered to collect and receive the same; and said defendant avers that the bond declared upon by said plaintiff in this behalf, and the said instrument of writing, whereby the said office, and the fees and emoluments thereof, were sold, granted and transferred, were and are dependent obligations—were and are part and parcel of the same transaction, and were both exe-

cuted and delivered in pursuance, furtherance, and confirmation of the corrupt and unlawful agreement aforesaid, and not otherwise or differently—the said sale and transfer of said office in manner aforesaid, being the consideration of and upon which the bond in the declaration in this behalf mentioned was executed and delivered."

6th, That Royster was not, at the time of the commission or omission of either of the acts charged in the declaration as breaches of the condition of said bond, the lawful deputy of said plaintiff in said office of sheriff, in manner and form as alleged.

The 4th and 5th pleas were verified by affidavit. The plaintiff filed a motion to strike out all the pleas, and the motion was sustained as to the 1st, 2d, and 6th, and overruled as to the others. The defendant excepted, and made the pleas stricken out, part of the record. To the 3d plea, the plaintiff replied that the cause of action did accrue within five years; and filed three replications, putting in issue all the facts alleged in the 4th and 5th pleas. The cause was tried by a jury, and a verdict rendered for the plaintiff for $282 damages.

On the trial, the plaintiff proved, that part of the money collected by Royster, was paid by the sheriff to the plaintiff in the executions mentioned in the breaches, on 23d January, 1846—part on 26th May, 1846, and the residue on the 17th March, 1849.

Badgett excepted to the charge given by the court to the jury, and brought error. The instructions given and refused appear in the opinion of the court.

WATKINS & CURRAN, for the plaintiff. Upon the main question presented in this case, the plaintiff in error relies upon the case of *Martin v. Royster et al.*, 3 *Eng.* 74, and the authorities there cited. It follows from the decision in that case that, if the sheriff's cause of action was complete on the bond of the under sheriff from the time he collected the money and failed to pay it over, the cause of action against the present plaintiff in error is barred by limitation.

S. H. HEMPSTEAD contra. There can be no doubt that the bond in suit was, in fact, a pure and simple bond of indemnity against damage; and that the well established doctrine is that actual loss must be shown; or, in other words, although there may be a right of action for nominal damages, the party cannot recover beyond that without proving actual injury. 1 *Saund.* 116, *n.* 1. 9 *Cow.* 693. *Douglass v. Clark*, 14 *J. R.* 177. *Aberdeen v. Blackmar*, 6 *Hill* 324. *Churchill v. Hunt*, 3 *Denio* 321. *Sedgwick on Dam.*, 311 *et seq.* *Gilbert v. Wiman*, 1 *Coms.* 550. *Chase v. Hinman*, 8 *Wend.* 456.

On bonds of indemnity against damage or where that is obviously the intention of the parties, actual injury by payment of something equivalent must be shown before the party can recover anything beyond nominal damages. The criterion is payment, and it is this which gives a right to substantial damages. 5 *Co.* 28. 8 *East* 593. 6 *Cow.* 225. 9 *Cow.* 693. 4 *J. J. Marsh.* 123. 5 *J. J. Marsh.* 404. 12 *Leigh* 383, 565. As where a bond is given to a sheriff for "the liberties." 2 *J. C.* 208. 10 *J. R.* 563, 573. *Woods v. Roman*, 5 *John.* 42. 20 *John.* 164.

The case of *Martin v. Royster*, 3 *Eng.* 79, relied upon by the plaintiff, was between different parties, though on the same bond, and presented a different question from the one now before the court; and is not therefore conclusive of this case.

It is a settled rule that, on all promises of indemnity, or on contracts where indemnity is the object of the parties, the statute of limitations begins to run from the time when the promisee or obligee actually pays the money or damages, and not from the time when he is liable to pay it. *Angell on Lim.* 116. *Calvin v. Buckle*, 8 *Mees. & Wells.* 680. *Platt v. Smith*, 14 *John.* 368. 10 *Wend.* 500. *Hale v. Andrees*, 6 *Cowen* 230. *Reynolds v. Doyle*, 1 *M. & Granger* 753. *Powell v. Smith*, 8 *J. R.* 249. *Collenge v. Haywood*, 1 *P. & Dav.* 502. *Andrews v. Waring*, 20 *John.* 153. *Ransom v. Keyes*, 9 *Cowen* 128.

It is manifest that the court did not err in giving or refusing to give the instructions asked.

The court correctly struck out the first and second pleas, be-

cause they presented irrelevant issues—the bond in the suit not being an official bond: The sixth plea was properly stricken out, as it sought to impeach the deputation.

The payment made by Martin being after the passage of the act of limitations of December 14th, 1844, and the cause of action accruing at the time of such payments, this case is governed by that act, and consequently sufficient time has not elapsed to bar the plaintiff's remedy.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The great and indeed the controlling question involved in this cause relates to the precise period of time at which the cause of action accrued, as upon this point hangs the fate of the defence of the statute bar. The decision of this question will necessarily turn upon the construction which shall be placed upon the obligation executed by Royster and his sureties to Martin.

The same instrument was before this court in the case of *Martin v. Royster et al.*, reported in 3*d Eng.*, *at page* 79 *et seq.*, and its legal character was there settled. If the legal operation of the instrument, as settled in that case, be the true and legitimate one, it is conclusive upon the question here, and there is no longer any room for controversy in relation to it. We will therefore proceed to examine the doctrine of that case upon that subject, and see whether it is sustained by the authorities.

It is contended that, in contemplation of law, the instrument declared upon is nothing more nor less than a pure and simple bond of indemnity against damage, and that consequently nothing short of actual damage incurred by the payment of money or its equivalent, can authorize a recovery against Royster or his sureties. It is conceded by the counsel for the defendant that if the cause of action accrued to Martin when Royster, as deputy, failed to pay over the money to Reider, and when Martin as sheriff became legally liable for the same, the present action is barred, and that the plaintiff should have the benefit of the statute. This court, in the case already referred to, where the same instrument was under examination, said, "The ground as-

sumed by Ashley, one of the defendants, is, that the bond executed by Royster to Martin, is merely a bond of indemnity, and that in order to entitle him to a recovery against Royster or his securities, he is bound to show that he has sustained actual damage. The condition of the bond is that Royster, the defendant, will well and truly do and perform all the duties appertaining to the office of sheriff of Pulaski county, during the time he should continue the lawful deputy of Martin. In looking through the cases cited at the bar, we have not been able to find any one where the condition was precisely the same as the that contained in the instrument upon which this suit is founded.

In the case of *Hughes v. Smith & Miller*, reported in *5th Johnson, p.* 167, the bond was conditioned that the under sheriff should execute the office during his continuance therein, according to law, and without fraud or oppression, so that the sheriff should not be made liable for the payment of any damages or money in consequence of any act or thing, which the under sheriff should do by virtue of the office. In that case, the court held that a breach in general terms averring that Smith had collected moneys as under sheriff to the amount of $1,000, which he had refused to account for and pay, was sufficient, and that it was admitted in order to avoid a cumbersome prolixity upon the record.

The same rule was acknowledged and applied by that court in the case of *The Post Master General v. Lackran*, 2 *John. R.* 413, and a reference was there made to the English authorities, of which *Thurm v. Farrington*, and *Barton v. Webb*, (1 *Bos. & Pul.* 646, 8 *Term Rep.* 493,) are the latest and most pointed on the subject. The language used in the instrument now under discussion, though not so specific, yet, in its legal import, it clearly covers as much ground as that in the case referred to. Royster covenants to do and perform all the duties appertaining to the office of sheriff. It will certainly be conceded that no one of the duties of the sheriff is more plain and positive than that which requires him to pay over money to the party entitled to it, when collected under an execution. There can be no doubt but that, if the facts charged in the declaration are true, and that

they are, stands admitted by the demurrer, the condition is broken and the plaintiff's cause of action is complete."

The Supreme Court of the State of New York, in the matter of *Negus*, (7 *Wend.* 502,) said, "The first objection urged against the decision of the trustees is, that the bond executed by Negus to Sinnott is simply a bond of indemnity, and that therefore Sinnott must show that he has been damnified by payment of the debts which Negus assumed to pay, or that he has been damnified in some other way. From the whole transaction taken together, it is plain that the bond was intended as a bond of indemnity. Had Negus completed the job, and paid the debts which Sinnott was liable to pay, Sinnott would have had no further claims upon him or the job: the object of taking the bond was therefore to indemnify Sinnott; but it does not therefore follow that no action lies until actual damages have accrued. Whether an action lies or not, depends upon the true intent and meaning of the covenant; if it is simply to indemnify and nothing more, then damages must be shown before the plaintiff can recover; but if there is an affirmative covenant to do a certain act, or to pay certain sums of money, then it is no defence in such an action to say that the plaintiff has not been damnified. In such case, it is the duty of the defendant to perform his own contract; if he does not, an action lies for the breach, and the measure of damage is the amount of the sums agreed to be paid, or the injury sustained by the plaintiff, arising either from liability incurred, or advantages which would have accrued from the performance of the acts which the defendant had covenanted to perform."

The same court, in the case of *Chace v. Hinman*, (8 *Wend.* 456,) said, "There is no doubt as to the general proposition that in order to recover upon a mere bond of indemnity, actual damage must be shown. If the indemnity be against the payment of money, the plaintiff must, in general, prove actual payment; or that which the law considers equivalent to actual payment. A mere legal liability to pay is not in such case sufficient; but if the indemnity be not only against actual damage or expense, but also against any liability for damages or expenses, then the

party need not wait until he has actually paid such damages, but his right of action is complete, when he becomes legally liable for them."

In the matter of *Negus*, already referred to, the court further said that, "Where indemnity alone is expressed, it has always been held that damage must be sustained before a recovery can be had; but where there is a positive agreement to do the act which is to prevent damage to the plaintiff, there an action lies, if the defendant neglects or refuses to do such act; and where the covenant is both to do the act and to indemnify, we must resort to the intention of the parties. Whatever may be said of the case of *Douglas v. Clark*, it is sufficient that this is distinguishable: and it is difficult for me to conceive of a case where one assumes to do what was before the duty of another, where it is not the intention of the parties that the party, contracting to perform, shall perform, in the first instance according to his agreement. I presume to say that it never was the intention of the parties in such a case, that the party to be indemnified is first to be damnified."

We have looked extensively and carefully into the authorities cited by the counsel of the defendant in error, and we think that it may be safely said that no one of them calls in question the doctrine of the cases above quoted. The distinction running through all the books to which we had access, and we have given the subject a thorough examination, is between conditions for mere indemnity against actual loss or damage, and such as guard against the mere liability of damage. The true question is, what was the intention of the parties? Was it that Martin should first pay over to the plaintiffs in execution, such moneys as Royster should collect, and then to seek a re-imbursement from Royster, or was it that Royster should pay the money himself, and thereby prevent even the liability of a suit against Martin? The latter would seem to be the most reasonable construction of the covenant. Royster did not merely engage to save Martin harmless against damages, but he positively and emphatically undertook to perform a certain act, the performance of

which would not only have saved him harmless from actual damage, but it would have also prevented the slightest liability from resting upon him. He engaged well and truly to do and perform all the duties appertaining to the office of sheriff of Pulaski county, during the time he should continue the lawful deputy of Martin. By reference to the statute by which the duties of the sheriff are prescribed and enumerated, it will be seen that among the first and most prominent is that which enjoins the payment of such moneys as shall be collected upon execution. When Royster covenanted to do and perform all the duties appertaining to the office of sheriff, he most unquestionably, in contemplation of law and to all intents and purposes, engaged that he would pay over to the rightful owner, all such moneys as should come into his hands by virtue of legal process, and according to the command of the writ. If this is a legitimate interpretation of the undertaking, and that it is, we think no one will seriously dispute, we consider it perfectly clear that it is not a matter of consequence whether Martin has been damnified or not, provided he can show that Royster has failed to perform the act which he has stipulated to do. We are therefore satisfied that the construtction given to this covenant, in the case referred to in 3d English, is well sustained by the principles applicable to such contracts, and that consequently the cause of action which is now sought to be enforced, did not arise at the time of the actual payment of the money by Martin, but that, on the contrary, it accrued and became perfect the moment that Martin's legal liability became fixed by Royster's failure to pay it over according to the command of the writ.

If Royster had engaged, in so many words, to pay over on the return day of the execution, and according to the command of the writ, all such moneys as he should collect from time to time by virtue of his office of deputy sheriff, it is presumed that, in the face of the authorities cited, no one would seriously insist that it was a covenant for mere indemnity against actual damage; and if so, we consider it equally clear that the bond in suit cannot be so regarded, as its legal operation and effect are pre-

cisely the same as it would have been in case the exact words of the statute touching that official duty had been adopted. We feel perfectly satisfied therefore, both upon principle and authority, that the undertaking of Royster was not merely to re-imburse Martin such damages as he might be compelled to pay in consequence of his acts or omissions, whilst acting in the capacity of deputy, but that, on the contrary, it was to pay over all such moneys as he should collect, and thereby prevent even the possibility of loss or damage resulting to Martin.

The instrument under consideration being a joint and several obligation, it is manifest that the right of action accrued against Royster and his sureties at the same time, and that consequently Badgett, as one of those sureties, stands upon the same ground as his principal in respect to the benefit of the statute bar. It appears from the testimony that the money was collected by Royster in 1838, upon excutions returnable to the April term of that year, and that the present suit was not instituted until April, 1849, showing a lapse of more than ten years.

The plaintiff interposed in the court below his three several pleas of the statute of limitations, setting up in the first a lapse of two, in the second four, and in the third five years after the accrual of the cause of action, and before the institution of the suit. The court sustained a motion to strike out the first two and overruled it as to the third. The act of the court in thus sustaining the defendant's motion to strike out the first two pleas as also the sixth, constitute one of the assignments of error. The correctness of this assignment we will now proceed to determine.

We have made a strict examination of all the statutes as well of the territorial, as the State government, touching the limitation of actions, and we have not been able to find any one which can be construed to embrace the instrument before us until the 20th of March, 1839. Prior to the passage of this act, there was no statute in force as to limitations upon such instruments. The bond declared upon, though executed by a deputy sheriff to his principal for his indemnity and security, cannot be said to be in any sense official in its character, but simply and purely private

and an individual obligation. This being the case, it cannot fall within the description of any of the several official bonds enumerated in the statute, and it is equally clear that it cannot legitimately come within any of the specified contracts or liabilities therein set forth. The eleventh section of the act referred to is the one which applies to the cause of action in question, and that declares that "all actions not included in the foregoing provisions shall be commenced within five years after the cause of action shall have accrued."

This Court in the case of *Baldwin v. Cross*, 5 *Ark. Rep.* 512, when passing upon the legal effect and operation of this act, said, "the statute of limitations took effect on the 20th of March, 1839, and this suit was brought upon the 15th of June, 1843. Prior to the passage of this act, there was no statute in force, in the territorial government, as to limitations upon foreign judgments. The operation of the act upon demands existing at the time of its passage is the same as it would be upon those accruing upon the day it took effect. All the demands existing when the act went into operation, must be sued for within the time prescribed, or they will be barred." The statute creates a new rule upon the subject, and the essence of a new rule is its application to future cases that may arise under it. In *The People v. The Supervisors of the Columbia College*, 10 *Wend.* 365, the court said, the statute of limitations like all other acts, are prospective, and so ought to be construed unless otherwise expressed, or that they cannot have the intended operation by any other than a retrospective construction. The general rule is, that no statute is to have a retrospective operation beyond its commencement. *Sayre v. Wisner*, 8 *Wend.* 663. And in *Dash v. Van Kleek*, 7 *J. R.*, it is held that no statute can be construed retrospectively when it takes away subsisting vested rights. It cannot cut off all remedy and deprive a party of his right of action. Our revised statutes apply to limitations of actions or causes of action accruing or existing subsequent to their taking effect. The rule relates to future contracts, which would be barred according to its provisions, or to existing demands, as if they had accrued at the time

the statute commenced its operation. The demurrer to the plea relates back to the declaration, and the record shows that five years have not elapsed since the passage of the act of limitations." The instrument in suit falling within the same statute, of course the rule of construction there laid down is strictly applicable to it and, consequently, the 20th of March, 1839, is the day from which the statute commenced running, and a lapse of five years from that time will form a complete bar.

In this view of the law, it is obvious that the first and second pleas tendered issues which were wholly immaterial, and that consequently they were defective as a defence to the action, yet they were not so utterly frivolous as to be struck out upon mere motion, but should have been met by demurrer. (See *Crayry v. Ashley and Beebe*, 4 *Ark. R.* 206, *and* 6 *Eng. R.* 480, *Wayland et al. v. Coulter et al.*) This court in the first case said, "the rule upon the subject we take to be this, that if the pleas are informal, but still go to the substance of the action, that the plaintiff will not be allowed to sign judgment, but must demur: and the reason given for the demurrer is that the defendant might obtain leave to amend, but if they are without color of truth to support them, or where they are intended as mere instruments of delay, they ought to be stricken out. (12 *Wend.* 196, 223; 10 *ib.* 624, 672,) and in the last, the following language was held, viz: "The plea interposed was very different from one that might set up one year as a bar to an action bound by the lapse of five, because in such a case, inasmuch as lapse of time properly presented would have been a bar, that plea although defective, would have been of a nature appropriate to present a defence to the action, and would therefore be properly met by a demurrer. But inasmuch as our statute of limitations does not apply to proceedings like those in the case at bar, as was settled in the case we have cited, the plea setting up that bar was totally inappropriate, and therefore might have been as well met by motion as by demurrer." The rule to be extracted from those cases is, that in order to render a plea a proper subject of a motion to stike out, it must not only fail to tender a material issue, but it must also be wholly

unadapted to the nature of the action. Lapse of time, as has already been shown, might constitute a full and valid defence to this action if well pleaded, and consequently the first and second pleas, though defective in not settling up the requisite time, were still appropriate pleas, and consequntly could only be met by demurrer. The court below consequently erred in sustaining the motion to strike out the first and second pleas of the plaintiff in error.

The only remaining question relates to the propriety of striking out the sixth plea. This is a general denial of the existence of the deputyship of Royster, at the time of the alleged default. It is contended that this plea was properly stricken out, as the same matter of defence had been previously set up in other pleas. This is not true in point of fact, as neither the fourth nor the fifth pleas deny the existence of the deputyship; but, on the contrary, they both expressy admit it, but seek to defeat the action by impeaching the consideration of the bond as being against the policy of the law. It did not lie in his mouth to deny the original appointment of deputy as recited in the bond. From this, he was most clearly estopped by his deed. (See *Outlaw et al. v. Yell, Governor, &c.*, 3 *Eng.* 351, and *Sullivan v. Pierce et al.*, 5 *Eng.* 502.) But he is not so estopped to deny its continuance down to the time of the failure of duty which is now charged upon him, and upon the truth or falsity of which his liability is made to depend. According to the terms of the bond, Royster is only to be held responsible to Martin under it for the acts or omissions of the former whilst he acts under the authority of the deputyship conferred by the latter. It is therefore clear that, although Royster could not deny the original appointment in consequence of the legal estoppel, yet either he or his sureties could show that such authority had ceased before the commission of the act charged against him. That Royster acted during the continuance of his authority as deputy and by virtue of it, is of the very essence of the charge, and as a matter of course to show that the falsity of such charge must be of the essence of the defence. This plea therefore sets up matter which is appropriate in its nature as a

defence to the action, though it must be admitted the subject matter thus presented is defectively stated, and would have been held bad upon demurrer. He having admitted the original appointment, or which is tantamount to the same thing, being estopped to deny it, he could not in general terms deny its continuance, but could only do so by setting up special matter by way of avoidance. This plea, therefore, though defective in form, is of a nature appropriate to present a defence to the action, and consequently could not be stricken out upon mere motion, but could only be met by demurrer. The court below consequently erred also in striking out the sixth plea.

We come now to consider of the instructions, given and refused by the court. The first one asked by the plaintiff in error was, "that the plaintiff's cause of action in this behalf accrued to him, whenever Royster as his deputy committed default, or in other words, whenever Martin as sheriff became legally liable for damages or expenses occasioned by the neglect of duty on the part of Royster, as his deputy." This instruction was clearly right, and consequently the court erred in refusing to give it in charge. The second is "that so soon as Royster, as Martin's deputy, collected money on execution Martin became liable to the party entitled to the money, and at the same time his cause of action on the bond here sued on, would be complete, and the statute of limitations would commence running from that period. This was properly overruled for two reasons. In the first place, Martin's legal liability was not fixed the instant the money was collected by Royster, but his failure to pay it over on the return day of the execution, and according to the command of the writ fixed his liability to a suit; and secondly, the statute did not commence running from that time as there was none in existence that could operate upon it, but from the 20th March, 1839, the day that the act went into operation. The third is that, "if the jury are satisfied from the evidence that Royster received the money and failed to account for it, and that Martin became liable to the party entitled to the money collected by Royster, as his deputy, more than five years next before the institution of the suit,

they are bound to find for the defendant Badgett on the issue to his third plea." This was properly overruled as it looked to the time that fixed the liability of Martin, and not to the passage of the act of the 20th March, 1839, as forming the period from which the statute commenced running. The court then instructed the jury on the motion of the plaintiff below that "although the plaintiff might have had a right of action for nominal damages, yet that the causes of action in the declaration did not accrue, nor did the statute of limitations commence running until the payment of the money by the plaintiff to the said Jacob Reider. This was manifestly wrong, as the cause of action did commence running long before the actual payment of the money by Martin to Reider.

We are satisfied then that there is error in the judgment of the circuit court in this case rendered, and that therefore the same ought to be and the same is hereby reversed, annulled and set aside with cost, and it is ordered that this cause be remanded to to said circuit court, to be proceeded in according to law and not inconsistent with this opinion, and also that both parties have leave to amend their pleading or file additional pleas, if they shall desire to do so.

CALDWELL EXR. VS. MCVICAR.

McVicar sued Caldwell's executor, on an obligatiou for the payment of money, made to the plaintiff by Byrd, as principal, and Caldwell and others, securities; the defendant plead usury, and that his testator was discharged by failure of the plaintiff to sue Byrd, the principal, on notice to do so, &c., giving him day of payment, &c.; defendant proved that in a separate suit against Byrd, plaintiff had obtained judgment for the amount of the obligation; and read in evidence an instrument by which he released Byrd from all liability to the estate of his testator

from all debt, interest, and constructively, of any costs that he might have to pay for Byrd, on account of his testator being his security on said obligation, and then offerred Byrd as a witness to prove his pleas: HELD, That Byrd was a competent witness under the circumstances—that he was not a party to the suit, and in no way interested in its event.

HELD, further, that though the executor might have laid himself liable for devastavit by executing the release in question, he nevertheless had the power to execute it, and that it was valid.

If it be law that a party to a negotiable instrument is an incompetent witnes to invalidate it, the rule does not apply as between the original parties to the instrument but only in cases where the instrument has been transferred on the faith of the signature of the party offered as a witness.

Appeal from Pulaski Circuit Court.

DEBT, by James McVicar against James H. Caldwell, as executor of Charles Caldwell, deceased, in Pulaski Circuit Court, on a writing obligatory, executed to plaintiff on the 16th November, 1841, by R. C. Byrd, as principal, and Wm. J. Byrd, William Field, and defendant's testator, as securities, for $1,200, due 1st June, 1843.

Defendant filed three pleas: 1st, Usury: 2d, That when the obligation sued on became due, Byrd, the principal therein, was solvent; defendant's testator gave plaintiff notice to sue thereon, and he neglected so to do until Byrd became insolvent:

3d, That the plaintiff gave day of payment to the principal, on a valuable consideration, without the consent of defendant's intestate.

Plaintiff took issue to the first and second pleas, and demurred to the third, which demurrer the court sustained. Plaintiff obtained final judgment, and defendant brought error; this court reversed the judgment, deciding the third plea to be good, &c., and remanded the case. See *Caldwell's ex'r. v. McVicar*, 4 *Eng. Rep.* 418.

After the cause was remanded, (in January, 1850,) the plaintiff filed three replications to defendant's third plea: 1st, a denial of the matter of the plea: 2d, that the money alleged in the plea to have been paid by Byrd for day of payment, was merely a pay-

ment on the obligation: and 3d, that the agreement for giving day of payment was not in writing. To which replications issues were taken, and the case submitted to the court sitting as a jury.

Plaintiff read in evidence the obligation sued on.

Defendant, to sustain the issues on his part, proved by the record, that plaintiff, on the 28th May, 1845, in the same court, recovered a judgment against R. C. Byrd, the principal in said obligation, upon and for the full amount thereof, in a separate suit against him, which remained in full force; and in connection therewith defendant read in evidence the following release, executed by the plaintiff to said R. C. Byrd:

"I, James H. Caldwell, as executor of the last will and testament of Charles Caldwell, late of the county of Saline, deceased, do hereby acquit, release, and forever discharge Richard C. Byrd, now of the county of Jefferson, of from and against all and every suit, claim, or demand of any, and every sort, nature or description, of, for or in respect of a certain writing obligatory made by the said Richard C. Byrd, as principal, and William J. Byrd, Charles Caldwell, and William Field, as securities, in favor of James McVicar; bearing date the 16th day of November, 1841, for the sum of twelve hundred dollars, payable on or before the first day of June then next ensuing, bearing interest at the rate of ten per cent. per annum from date until paid, and expressed to be for value received, and from and against all recourse by or in favor of said estate of said Charles Caldwell, deceased, for said sum of money and intererest or any part thereof, upon and against Richard C. Byrd, his heirs, executors, or administrators, now or at any time hereafter. As witness my hand and seal, at said county of Jefferson, this 16th day of March, A. D. 1846.

J. H. CALDWELL, [SEAL.]
Executor of Charles Caldwell, deceased.

The defendant then introduced Richard C. Byrd as a witness in his behalf, who testified in support of the pleas, but the plaintiff moved to exclude his testimony on the grounds, 1st, that it was not in the power of defendant to release the said Byrd so as

to remove his interest in the event of the suit; and 2d, that being the principal maker of the obligation, he was not a competent witness to invalidate it. The court sustained the motion, and excluded Byrd's testimony, and defendant excepted. Finding and judgment for plaintiff, and appeal by defendant.

WATKINS & CURRAN, for the appellant. The rule excluding a party to negotiable paper from giving evidence to invalidate it, never did apply, as between original parties. 3 *Wash. C. C. Rep.* 7. 4 *Serg. & Rawle* 397. 3. *Cranch* 283. 1 *Serg. & Rawle* 102. 11 *Mass.* 498. 2 *Hawks* 235. 5 *Pet. R.* 51. 11 *Pet. R.* 86. This question is settled by this court in the case of *Tucker v. Wilamowicz*, (3 *Eng. R.* 157,) recognizing the case of *Jordaine v. Ashbrook*, which overruled the case of *Walton v. Shelby*.

That an executor has the right or power to execute such a release, see, 3 *Phill. Ev.* 1,560. *Seymours ad. v. Beach*, 4 *Vermont Rep.* 493, 501. *Murray v. Blackford*, 1 *Wend. Rep.* 583.

S. H. HEMPSTEAD, contra. The executor had no power to release Byrd; consequently the release was void. At common law an executor cannot release or cancel a bond due to the testator, nor release a cause of action which accrued before or after the testator's death without committing a *devastavit*. (*Toller on Executors* 424. *Cro. Eliz.* 43. *Hobart* 266. The powers given to executors under our statute, (*ch.* 4, *Digest*,) do not embrace the power attempted to be exercised in this case.

It is a rule of law founded in public policy, that no party who has signed a paper or deed shall ever be permitted to give testimony to invalidate that instrument. *Walton v. Shelby*, 1 *Term Rep.* 300. *United States v. Dunn*, 6 *Peters* 51. *Bank of Metropolis v. Jones*, 8 *Peters* 12. *Henderson v. Anderson*, 3 *How. S. C. R.* 73. *Parker v. Lovejoy*, 3 *Mass.* 565. *Churchill v. Sutter*, 4 *Mass.* 156. *Putnam v. Churchill*, 4 *Mass.* 516. *Thayer v. Crossman*, 1 *Met.* 416. *Allen v. Halkins*, 1 *Day* 17. 2 *Hayw.* 127; *id.* 298. *Canty v. Sumpter*, 2 *Bay* 93. 2 *Phill. Ev. by Cowen & Hill, note* 78, *p.* 71.

This question does not seem to be conclusively settled in the case of *Tucker v. Wilamowicz*, which is overruled, in principle, by the cases of *Humphries v. McCraw*, (4 *Eng.* 107,) and *The State v. Jennings*, (5 *Eng.* 447,) where the admissions of a vendor or an assignor are declared to be incompetent.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The question of Byrd's competency as a witness is the only matter presented by the record in this case. The counsel for the appellee relies upon the case of *Walton et al. v. Shelby*, 1 *Term Rep.*, and others subsequently decided but based upon the authority of that case. The Supreme Court of the United States, said in the case of *The United States v. Leffler*. (11 *Pet. R.* 93,) "The first (objection) is that the witness should not have been received because his evidence went to prove his own turpitude. And in support of this objection, we were referred, in the first place, to the case of *Walton et al. v. Shelby*, 1 *Term Rep.* 296. It was indeed decided in that case that a party who had signed any instrument or security (without limitation as to the character of the instrument) should not be permitted to give evidence to invalidate it. It was said that every man who is a party to an instrument gives credit to it; that it was of consequence to mankind that no person should hang out false colors to deceive them, by first affixing his signature to a paper and then giving testimony to invalidate it. And the civil law maxim, *nemo allegans suam turpitudinem audiendus est*, was relied on. This case was followed a few years after by that of *Bent v. Baker*, 3 *Term R.* 27, in which it was said that the rule must be confined to negotiable instruments, and in 1798, the case of *Jordaine v. Ashbrook*, 7 *Term Rep.* 661, overruled the case of *Walton v. Shelby*, even in regard to them by deciding that in an action by an indorsee of a bill of exchange against the acceptor, the latter may call the payee as a witness to prove that the bill was void in its creation. And such is the doctrine which has since been held in England. In this court in the case of *Bank of the United States v. Dunn*, 6 *Pet.* 51, it was decided that no man who was a party to a negotiable

instrument, should be permitted by his own testimony to invalidate it. The principle thus settled by this court goes to the exclusion of such evidence only in regard to negotiable instruments, upon the ground of the currency given to them by the name of the witness called to impeach their validity; and does not extend to any other cases, to which that reasoning does not apply; the case of *The Bank v. Dunn*, then would be sufficient to defeat the objection which has been made to the witness although he executed the bond, and although it was the bond of a public officer. The second objection is that the witness was directly interested in the event of the suit. This objection may be viewed in two aspects: 1st, as it respects the interest of the witness arising from his liability to his co-obligors, who were his sureties. 2dly, As it respects his interest as being, as it is contended, a party upon the record, and as such liable to a joint judgment with the other defendants, Jacob and Isaac Leffler. In relation to the first of these aspects, it is certainly true, that in general a principal obligor cannot be a witness for his co-obligors, who are his sureties in the bond sued upon even although he be not a party; this is well settled both upon principle and authority: amongst other cases it was so decided by this court in the case of *Riddle v. Moss*, 7 *Cranch* 200; upon the plain ground that he is liable to his sureties for costs in case judgment should be rendered against him. Now although that was once the position of this witness, yet it was not such at the time he was examined; for it appears by the bill of exceptions that, before his examination, his sureties had executed a release in the most ample form, of all claim against him arising out of their relation to him as sureties upon the bond, embracing every thing which could be recovered against them, including costs. There is then no interest in the witness in the event of the cause arising from his supposed liability over to his sureties, the defendants."

This court, in the case of *Tucker v. Wilamowicz*, 3 *Eng. Rep.* 166, said, "without going into a discussion of the authorities cited by counsel, from a careful examination of them, we are prepared to adopt the rule as laid down by the Supreme Court of New

York, in the case of the *Bank of Utica v. Hillard*, 5 *Cow.* 153, "that every person not interested in the event of the suit, nor incapacitated by his religious tenets, nor by the commission of an infamous crime, is a competent witness. All other circumstances affect his credit only." We may say with the Supreme Judicial Court of Massachusetts, in the case of *Fox et al., ad. v. Whitney's admrs.*, 16 *Mass. Rep.* 120, that even admitting the doctrine of *Walton v. Shelby*, as narrowed down by later decisions, to be still received as sound law, yet the principles, on which that decision rests, do not apply to the present case, because the instrument in suit, although negotiable in form, was not in fact negotiated, but remains in the hands of the original promisee, and the suit is now brought by him. No currency has been given to the bond, and there is no innocent indorsee to be prejudiced. The contest is between the original parties to the illegal bargain; and the competency of the witness must depend altogether upon the question, whether he is interested in the event of the suit or not. There can be no pretence that the witness, Byrd, is a party to this suit and that upon that ground he is *incompetent*. He is not named as a party in any part of the pleadings. He could not have made a motion in the cause. He had no day in court. The suit was simply one against the appellant as executor of Charles Caldwell; one of the sureties in the bond. He cannot be excluded therefore as a party of record.

The next question, is, whether he is incompetent on account of interest in the event of the suit. It is in proof that the appellee had a regular and valid judgment against Byrd for the full amount of the bond now in suit, that said judgment was recovered in a separate suit against him, and that the same was in full force and unreversed at the time he was introduced as a witness, and it further appeared, that the appellant as executor of the said Charles Caldwell, had executed and delivered to said Byrd a full release and discharge from and against all and every suit, claim or demand, of any and every sort, nature or description, of, for, and in respect of the said bond, and from and against, all recourse by or in favor of said estate of said Charles Caldwell, deceased,

for the sum of money therein expressed, and interest or any part thereof upon and against said Byrd, his heirs or administrators, then or at any time thereafter. We consider it clear that under the circumstances, Byrd could not be said to be in any manner concerned or interested in any judgment that the appellee might recover against the appellant, so far as the principal and interest of the bond were involved as in case of such recovery against his security and payment by him, he could only be required to refund, and he could be required to do the same thing in effect without such judgment, by payment of the judgment against himself, in case that he possessed the means of such payment. To him it would not be a matter of consequence whether he should be bound for a judgment to the appellee or to one of his sureties in case the amount of each should be the same. The case would be altogether different as to the costs that might be recovered against the surety. This amount could not have been included in the judgment against Byrd, and consequently must be regarded as a separate and distinct matter from it. In that sum, whatever it might be, the witness would consequently have an interest, and as a matter of course, he would to that extent desire a failure of the suit.

But it is objected that the appellant, in his capacity of executor, had no power to make the release so as to remove the interest of the principle obligor. This defect of power is said to rest upon the fact that such an act would subject the executor to an action for a devastavit. Suppose it to be conceded that the legal effect would be to subject the executor to an action for the full amount released, how could this affect the question of power? If he should feel disposed to do an act which would subject him to damages, it would most unquestionably be his right to do so, and having taken the responsibility, he could not reasonably complain if the law should be meted out upon him. But how this could operate to affect his power to do the act, it would be difficult to conceive. We entertain no doubt therefore that, whether the consequence of the act be to subject him to an action for a devastavit or not, is not at all material so far as as the question

of power is concerned, and that consequently the release, if sufficient in other respects, cannot be disregarded because of such defect of power. This brings us to the last point in the case, and that is as to the legal sufficiency of the release. We have already seen that under the circumstances of this case, that the witness was interested in the event of the suit against Caldwell so far as the matter of costs was concerned, and as a matter of course, if the release is not sufficiently comprehensive to embrace such costs, his interest to that extent still remains, and whether great or small would render him incompetent to testify in behalf of his surety. (See *United States v. Leffler*, 11 *Peters* 94, and *Riddle v. Moss*, 7 *Cranch* 200.) The release in the case of *The United States v. Leffler*, was "of all claim against him, (witness,) for any money or thing which he might be liable to pay them or either of them, by reason of any recovery or judgment that might be had against them, or either of them on said bond, and also for any costs incurred or to be incurred by them or either of them, by reason of any suit upon said bond." The release in this case is, "from and against all and every suit, claim or demand of any and every sort, nature or description, of, for, or in respect of a certain writing obligatory, made by the said Richard C. Byrd, as principal and William J. Byrd and said Charles Caldwell and William Field, as securities, in favor of James McVicar, bearing date the 16th day of November, 1841, for the sum of twelve hundred dollars, payable on or before the first day of June then next ensuing, bearing, interest at the rate of ten per cent. per annum from date until paid, and expressed to be for value received, and from and against all recourse by or in favor of said estate of said Charles Caldwell, deceased, for said sum of money and interest or any part thereof, upon and against Richard C. Byrd, his heirs, executors or administrators, now or at any time hereafter." The release is not very technically drawn, yet it is believed, in its legal effect, to embrace not only the principal and interest of the bond, but also any thing that could flow incidentally from it. The security not only releases the witness from and against all and every suit, claim or demand of any and every sort, nature or

description of, and for the bond in question, but he also releases all such suits, claims or demands which he might have the right te bring or make in respect to said bond. The point now to be determined is whether a suit by the surety against Byrd for the costs of this suit, could be considered as a suit brought or a claim made in respect of the bond now in suit. We think there can be no doubt but that such would be the construction given to the words of the release. The subject matter of such suit being incidental to the suit upon the bond, we think it clear that it would fall within the expression "in respect of," and would consequently be embraced within the scope of the release. We are therefore satisfied that the executor possessed the power to execute the release, and that the release itself is sufficiently comprehensive to embrace every matter or thing that could in any manner show an interest in the witness, and consequently he, having no interest in the event of the suit, was perfectly competent to testify in behalf of the appellant. This being the only question raised by the record, there is an end of the investigation.

From the view which he have taken of this case, it is manifest that the court below erred in excluding Byrd, as a witness. The judgment of the Pulaski Circuit Court herein rendered, is consequently reversed, set aside, and held for nought, and the cause remanded, to be proceeded in according to law, and not inconsistent with the opinion herein delivered.

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HENSLEY VS. FORCE & CO.

Nil debet cannot be pleaded to debt on a judgement of a sister State.

Nor can the defendant plead that the court which rendered the judgment, had no jurisdiction of the subject matter of the suit. Both the indebtedness and jurisdiction of the subject matter are subjects of inquiry before the judgement is rendered, and not after.

Writ of Error to Saline Circuit Court.

Force & Co. brought an action of debt against Wm. Hensley, in Saline Circuit Court, on a judgment of the Circuit Court for Cherokee county, in the State of Alabama.

Defendant filed four pleas: 1st, *Nil debet:* 2d, *Nul tiel* record: 3rd, That the said judgment was rendered without notice to defendant, or appearance in his behalf by any authorized attorney: 4th, That said circuit court, of Cherokee county, Alabama, had not jurisdiction of the subject matter of the suit, and said judgment was *coram non judice* and void.

The court struck out the first and fourth pleas, and the plaintiff took issue to the 2d and 3rd. The issues were submitted to the court, the plaintiff's read in evidence a transcript of the judgment sued on, and the court found for plaintiffs. It appears from the transcript, that the defendant was not only served with process in the original action, but that he appeared by attorney, and contested the suit; the subject matter of which was a guarantee of his to pay for goods bought of the plaintiffs' by third persons.

S. H. HEMPSTEAD, for the plaintiff. The jurisdiction of a court rendering judgment may at all times be questioned either as to

the person or subject matter. *Borden v. Fitch*, 15 *J. Rep.* 141. *Kilburn v. Woodworth*, 5 *J. R.* 41. *Shumway v. Stillman*, 4 *Cow.* 194. *Hall v. Williams*, 6 *Pick.* 232. Full faith and credit will be given to the judgments of other States: but not where the court had no jurisdiction. *Bissell v. Briggs*, 9 *Mass.* 467. *Andrews v. Montgomery*, 19 *J. R.* 162. And the want of jurisdiction may be taken advantage of by plea or collaterally. *Lincoln v. Tower*, 2 *McLean* 473. *Rangely v. Webster*, 11 *N. H.* 299. A defendant is allowed by special plea to deny the jurisdiction of the court in a suit brought upon a judgment rendered in another State. *Fullerton v. Horton*, 11 *Verm.* 425. *Pritchett v. Clark*, 3 *Harring* 517. 4 *Scam.* 536. 4 *Cow.* 294. *Holt v. Alloway*, 2 *Blackf.* 108.

The plea is sufficiently specific, and could not in the nature of things be more positive. It come up to the rule of pleading that no greater particularity is required than the nature of the thing pleaded will conveniently admit. (*Stephen's Pl.* 367, 8 *T. R.* 130.) The facts showing that the court had no jurisdiction is matter of evidence and not of pleading. *Stephen* 342.

WATKINS & CURRAN, contra. The pleading of *nil debet* is bad as it is an attempt to go behind the judgment declared upon, and is in violation of the act of Congress giving to judgments in one State the same force and effect in every other State that they have in the State where rendered.

The plea denying the jurisdiction of the court in Alabama, is defective in not setting out the facts showing the want of jurisdiction. If the court had no jurisdiction of the person of the defendant, that fact must be made to appear by plea. (*Barkman v. Hopkins & McMechen*, 6 *Eng.*) Every presumption will be indulged in favor of the jurisdicton, and if the defendant alleges a want of jurisdiction, he must do so by special plea in bar, setting out the facts from which such want of jurisdiction may appear. *Shumway v. Stillman*, 4 *Cow.* 294. *Hunt v. Mayfield*, 2 *Stew.* 127. *Lucas v. Bank of Darien*, *ib.* 306, 311. *Miller v. Pennington*, *ib.* 399. *Biddle v. Wilkins*, 1 *Peters* 691.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The first plea interposed by the defendant below, was manifestly bad, and wholly inadmissible under the circumstances of the case. The question of indebtedness was not enquirable into in the face of the judgment, which was absolutely conclusive as to that matter. The plea of *nil debet* would, without a doubt, be inadmissible as a defence to a domestic judgment, and if so, it would be equally so when tendered as a defence to a judgment of a sister State. This court, in the case of *Barkman v. Hopkins et al.*, (6 *Eng. Rep.* 166,) when expounding the act of Congress, in relation to the force and effect of the judgments of one State, when made the subject of judicial consideration in another, said: "The object of the act of Congress was to conclude the parties every where from re-investigating facts which had been submitted by them to a competent tribunal to decide, when once decided, not to bind them to abide a decision and adjudication to which one of the parties had never submitted. It was intended to put a stop to investigation and re-investigation, by denying to the parties, who had once litigated their claims, the privilege of of opening the issues thus made and closed by solemn adjudication." If the defendant was not indebted to the plaintiff's at the time of the rendition of the judgment against them, it was then his undoubted right to have interposed such a defence as to have called for proof of that fact from his adversary, and to have entitled him to a judgment in his favor in case of a failure of such proof. This being a matter fit and proper to be litigated in the course of that proceeding, the legal presumption is that he then and there availed himself of all his legal rights, and as a necessary result of this presumption, he is now estopped to present it here for re-investigation. This plea does not question the jurisdiction of the court that rendered the judgment, but virtually admits it. It is therefore wholly inadmissible as a defence to the present action, and consequently was properly stricken out.

The fourth plea is that the court, which rendered the judgment, had no jurisdiction of the subject matter of the suit. This, for a

like reason was properly stricken out. This plea does not deny that the defendant was served with process, or that he was present at the trial in the court of Alabama, when and where the judgment was rendered against him; but, on the contrary, it is a virtual admission of both. This being the legal presumption, at least so far as this plea goes, the question then recurs as to the conclusiveness of the judgment in respect to the jurisdiction over the subject matter. If the matter set up here by this plea, was fit and proper to be litigated, and settled by that court before the rendition of the judgment upon the merits, it is clear from the doctrine of the case already referred to that it cannot be presented here for re-adjudication. That such a defence might have been interposed to the action in that court, in case the defendant had desired to do so cannot admit of a doubt, and consequently whether he actually availed himself of his right in that respect or not, cannot now be a matter material, as he is concluded by the judgment. The matter set up in this plea is a defence of common occurrence before judgment, but cannot be admitted afterwards in a suit upon the judgment, as that would be to bring the same matter in litigation a second time, which is positively forbidden by an inflexible rule of law.

It is also assigned for error that the circuit court found that there was such a record as the one declared upon. We have examined the transcript carefully, and have not been able to perceive any material variance.

There being no error in the judgment of the court below, the same is in all things affirmed.

STATE BANK VS. GRAY.

The rule in regard to variance is not so strict where a record is offered in evidence collaterally, as it is where the record is the foundation of the suit.

This was an action against one of several makers of a note; defendant pleaded limitation; plaintiff replied a suit against defendant within the bar, non-suit, and new suit within a year thereafter; defendant rejoined *nul tiel record*: HELD, That a record of a former suit against all the makers of the note sued on, was not variant from the replication of former suit "against defendant," and might be read in evidence.

A variance between the declaration and the writ, in the former *suit, in the* description of the cause of action, though so great as to be ground for quashing the writ, would not prevent the writ, in connexion with the declaration, from being evidence to establish the commencement of such former suit.

A non-suit taken before the clerk in vacation, on payment of costs, is authorized by the statute.

Writ of Error to Jackson Circuit Court.

The facts are stated in the opinion of the Court.

HEMPSTEAD and CARROLL, for the plaintiff, cited sec. 134, chap. 126, Digest, to show that the clerk legally entered the judgment of non-suit in vacation, and sec. 24, chap. 99, to show that the statute of limitations was no bar to this action, and contended that the court erred in rejecting the record of the first suit as evidence.

BYERS & PATETRSON, contra. The petition filed in the first suit against John Gray, Isaac Gray, and Jesse Gray, was properly rejected for variance—the replication simply setting forth a former suit against the *defendant*. No allegation descriptive of the identity of that which is legally essential to the claim, can be rejected. 1 *Greenl. Ev. sec.* 56, 58. 1 *Stark Ev.* 386, 388.

The writ offered to be read as evidence was properly excluded, because the former suit was in debt, and the writ in assumpsit;

and there was no evidence to prove that the writ was issued on the petition in that suit.

Mr. Justice WALKER delivered the opinion of the Court.

This is an action of debt, to which the defendant plead the statute of limitations. The plaintiff replied a former action commenced within the statute bar, a non-suit, and a second action within twelve months thereafter. To this replication, the defendant interposed five rejoinders, which, although defective, as issue was taken upon them, will be considered as a rejoinder of *nul tiel record;* for, although they were intended to put in issue distinct facts, which could alone be evidenced by the record, the whole of them present no other question than must arise under *nul tiel record.*

To sustain the issue on her part, the plaintiff offered in evidence a note, a writ, a petition in debt, and a record entry of judgment of non suit in vacation: which evidence was objected to by the defendant, and on his motion excluded by the court. The note, writ and petition literally correspond with and sustain the pleading, with the single exception that the first suit which was discontinued, was commenced against all of the makers of the note, whilst the present suit was commenced against one of them alone. This can make no possible difference. The question was whether a former suit had been commenced against the same party defendant in the first and second suit. The record proved this. It was not the foundation of a suit where other parties in interest were disclosed, but a link in the chain of evidence to defeat the statute bar. The rule with regard to variance in cases where the record is the foundation of the action, is very different from that where it comes in collaterally as evidence. *State Bank v. Magness et al.*, 6 *Eng. Rep.* 344.

The variance between the petition and the writ in the description of the cause of action, amounted to nothing. Even admit the variance to have been ground for quashing the writ, still it was sufficient evidence in connexion with the petition to estab-

lish the commencement of the first suit. *State Bank v. Sherrill*, 6 *Eng. Rep.* 336.

The statute authorized the clerk to enter judgment of non-suit upon payment of cost. The record was competent evidence, and should have been admitted in evidence. The judgment of the circuit court must be reversed, and the cause remanded, to be proceeded in according to law, and not inconsistent with the opinion herein delivered.

GRANT AD. VS. ASHLEY ET AL.

A written acknowledgment to take a debt out of the statute of limitations, must be an unequivocal acknowledgment of the debt, as a debt then due, or an express promise to pay the debt which pre-supposes such acknowledgment.

In this case, one of the makers of a note became public administrator of an estate to which the note was due, and afterwards made a settlement with the Probate Court, with the view of surrendering the administration, in which he returned, as part of the effects of the estate in his hands, the note in question, and claimed a credit therefor: HELD, that being chargeable with the note, he was bound to return it that he might obtain credit therefor in his settlement, and that this was no such acknowledgment in writing, as would take the debt out of the statute of limitations.

An acknowledgment by one joint and several maker of a note, made after the bar, does not take the case out of the statute as to the others.

Proof of acknowledgment by one maker, does not sustain a replication that all the makers of a note made such acknowledgment.

Writ of Error to Ouachita Circuit Court.

On the 31st day of August, 1849, Green L. Grant, as public administrator on the estate of Albert Reynolds, deceased, brought an action of assumpsit against Hugh W. Ashley and Sterling C. Buchanan, in the Ouachita Circuit Court, on a promissory note,

executed by the defendants to W. B. Shepherd, as administrator of said Albert Reynolds, bearing date March 9th, 1844, and due nine months after date.

Defendants pleaded the general issue, and the statute of limitations. Plaintiff filed a general replication to the second plea, and several special replications setting up a new promise and acknowledgment in writing, on the part of defendants; to which they took issue.

The cause was submitted to the Court, sitting as a jury, and the plaintiff produced and read in evidence, the records of the Probate Court of Ouachita county, by which it appeared that defendant, Ashley, in January, 1845, became public administrator of the estate of said Albert Reynolds, and so continued until November, 1848, when he returned the effects of the estate to the Probate Court, the note sued on being part of the effects, and was discharged from the administration, and Grant, the plaintiff, appointed in his stead. In his settlement, Ashley claims a credit for the note sued on, amongst others, returned as effects, &c. On this evidence, the court found for defendants, and plaintiff excepted, and brought error.

HUIE & CASE, for the plaintiff. The statute of limitations did not run during the time that Ashley, one of the defendants, was administrator, as all remedy on the note was thereby suspended. 2 *Will. on Exrs.*, 940, 1335. *Toller on Exrs.* 347, 348. *Hudson v. Hudson*, 1 *Atk. Rep.* 461. 2 *Wheat's Selw.* 811.

But if the statute was a good plea, yet the plaintiff was entitled to judgment, on his special replication, against Ashley. The return of the note by Ashley to the Probate Court, as assets, was a written acknowlegdment sufficient to avoid the statute; and under the pleadings, there might well have been judgment against Ashley, and in favor of his co-defendant. 1 *Chitty Pl.* 45. 19 *Wend.* 643. *Sec.* 20, *ch.* 99, *Dig.*, *p.* 699.

Mr. Justice WALKER delivered the opinion of the Court.

This suit was commenced on the 31st August, 1849. The note

sued on was due the 9th December, 1844; so that the action was barred by limitation. To this defence it was replied, that the statute bar had been removed by a written acknowledgment of the debt, upon which issue was taken.

The question presented for consideration is, did the proof sustain the issue? In such cases, it requires thatt he acknowledgment should be an unqualified acknowledgment of the debt as a debt then due, or an express promise to pay the debt, which pre-supposes such acknowledgment. *Brown v. State Bank*, 5 *Eng*. 134. Such was not the character of the evidence in this case. It was the record of a settlement made by the defendant, Ashley, as public administrator, with the Probate Court, in which the note in suit was set forth. Due or not due he was chargeable with the note, and upon his settlement with the court, he was bound to render an account of it in order to get credit for that amount in settlement. This act was neither an admission nor a denial of indebtedness, nor of a willingness or unwillingness to pay. That debt stood upon the same footing that all other claims did in this repect, and was turned over to the court to be received by his successor, who might or might not put him to an issue of indebtedness.

Suppose, however, the acknowledgment to have been direct and positive on the part of Ashley, if made after the statute bar had attached to the debt, it was not sufficient to remove the statute bar as to Buchanan. *Biscoe et al. v. Jenkins et al.*, 5 *Eng*. 108. And by reference to the date of settlement with the probate court, such is found to be the case. The replication would, in any event, have been bad as to Buchanan, and as the replication sets up a joint acknowledgment, the defence would fail as to one, and, being joint, it must also fail as to both. But it is wholly unnecessary to press the inquiry even thus far, because it is evident that no sufficient written acknowledgment was offered in evidence to charge either of the defendants

We are therefore of opinion that the circuit court did not err in deciding the issues for the defendant, and rendering judgment thereon. Let the judgment be in all things affirmed.

BISCOE ET AL., TRUSTEES, &C. VS. MADDIN, ADR.

On appeals from the Probate to the Circuit Court, appellant is not required to give bond for costs. (*Digest ,chap. 4, secs.* 176, 183.)

The 3d section of the act of 4th January, 1849, (*Pamp. Acts p.* 59,) applies to appeals from the county courts authorized by the second section of that act, and in no respect applies to appeals from the Probate Court.

Morrow v. Walker and wife, 5 *Eng. Rep.* 569, *contra,* is overruled.

Appeal from Pope Circuit Court.

At the October term, 1849, of the Probate Court of the county of Pope, that court refused to allow a claim presented by the Trustees of the Real Estate Bank, against the estate of James Maddin, dismissed the case and adjudged the costs against the Trustees. They appealed to the circuit, where, in March, 1850, on motion of the administrator, the case was dismissed for want of bond for costs—and the Trustees appealed to this court.

There are three cases standing on precisely the same ground.

PIKE & CUMMINS, for the appellants, contended that under the act of 4th January, 1849, the only restrictions on the appeals therein provided for from the Probate Court, were those prescribed in *chap.* 14, *Dig.;* that the 3d section of the act of 1849, requiring a bond for costs, applied only to the appeal, allowed by the 2d section, from the county court; and cited *King v. Gwenop,* 3 *T. R.* 135. *King v. Marks,* 3 *East* 157. *Morris v. Mellin,* 6 *B. & C.* 446. *Bennett v. Daniell,* 10 *B. & C.* 500. *The State v. Lawson,* 5 *Ark.* 665, as settling the proper construction of the act.

F. W. & P. TRAPNALL, contra, relied upon the case of *Morrow v. Walker and wife,* 5 *Eng.* 570.

Mr. Justice SCOTT delivered the opinion of the Court.

The appeal in this case was taken in pursuance of the statute. No bond for costs was necessary, (*Dig.* 142, *sec.* 176, *and p.* 143, *sec.* 183.) The 3d section of the act approved the 4th January, 1849, (*Pamphalet Acts, p.* 59,) applies to appeals from the county courts authorized by the second section of that act, and in no respect applies to appeals from the Probate court, the case of *Morrow v. Walker and wife*, (5 *Eng.* 569,) to the contrary notwithstanding, which case is hereby overruled.

Judgment reversed, and cause remanded to be proceeded with.

STATE BANK VS. RODDY ET AL.

Action against two of three makers of a promissory note, plea limitation; replication that plaintiff commenced a former suit on same note against defendants, within the bar, suffered a non suit, and brought the present action within a year thereafter. Under an issue to this replication, plaintiff offered in evidence a record of a former suit against all the makers of the note, which the court below ruled out for variance: HELD, That the variance was immarerial, that it was sufficient to support the replication that the former suit was against defendants, as held in the *Bank v. Gray, Ante.*

Writ of Error to Jackson Circuit Court.

This was an action of debt by the Bank of the State, against Thomas A. Roddy and George J. Hatch, on a note executed to the Bank by the defendants and one John Roddy, not sued.

The pleadings, and result of the case below, are stated in the opinion of this court.

HEMPSTEAD AND BEVINS for the plaintiff. That there was no variance between the record offered in evidence and that set out in

the replication, because in the former it appeared that others also were sued at the same time with the defendants in the former suit. See *Bro. Abr. Pl.* 4. 2 *Esp. N. P. top page* 435, 748.—*Leach C. L.* 179 1 *Stark. Ev.* 417. *Rex v. Powell, Ryan & Wood* 101. 2 *Phil. Ev.* 500. *Rex v. Benson,* 2 *Camp.* 508. 1 *Stark. Ev.* 418, 415, 424. 7 *Greenl. Rep.* 131. The replication averred a former suit against the defendants—the record proved the truth of the averment. It was certainly immaterial how many others were sued at the same time.

BYERS & PATTERSON, contra.

Mr. Justice WALKER, delivered the opinion of the Court.

To the plea of the statute of limitations, the plaintiff replied a former action commenced within the statute bar, a non-suit and the commencement of the present action, upon which issue was taken.

Upon the trial, the plaintiff offered as evidence of the commencement of her first action, the petition and summons issued upon it: but the defendant objected to its introduction for varirance, and the circuit court sustained his objection. The only perceivable ground of objection to the record is, that the first action was commenced against other makers of the same note which are not sued in the present action. The defendants in this suit, were, however, parties also to the first suit. As we have repeatedly decided, the question is not whether a joint liability exists against the makers of the note, but whether a former suit was commenced against the defendants in this suit on the same cause of action. In such case, it has been decided that it is no variance that other parties appear to have been sued in the first action not declared against in the second. *State Bank v. Magness et al.*, 6 *Eng.* 344. *State Bank v. Sherrill*, 6 *Eng.* 334. *State Bank v. Isaac Gray*, decided at the present term. (*Ante.*)

The circuit court erred in excludlng the record as evidence; and for this error the judgment must be reversed, and the cause remanded to be proceeded, in according to law.

STATE BANK v. DAVIS.

See State Bank v. Roddy et al., *ante*.

Appeal from Independence Circuit Court.

S. H. HEMPSTEAD, for appellant.

BYERS & PATTERSON, contra.

Mr Justice WALKER delivered the opinion of the Court.

The issue in this case is like that of the *State Bank v. Roddy et al;* and upon motion of the defendant the record was excluded from the jury because in the commencement of the order of court in which a non-suit was entered, in stating the names of the parties to the action, there is an omission of the name of one of the defendants, and because other parties, who executed the note in suit, appear to have been sued in the first action, which are not embraced in the last. These are the only grounds of variance which exist in point of fact, so far as we have been able to discover. And these we have heretofore held to be immaterial. *State Bank v. Roddy et al*, and the cases there cited.

The circuit court erred in excluding the record as evidence, and for this error the judgment must be reversed, and the cause remanded, to be proceeded in according to law.

GAINES ET AL. VS. BANK OF MISSISSIPPI.

This court is inclined to the opinion that *nul tiel corporation* may be pleaded either in abatement or in bar.

Under the plea of *nul tiel corporation*, to an action by a foreign corporation, the plaintiff must prove the act of incorporation, and that the corporation went into operation under the act.

To show that a corporation (a Bank) went into operation under its charter, it is not necessary to show a compliance with the conditions of the charter under which it assumed to act, but that the corporation acted and transacted business as such; and for this purpose, proof of one or more such acts is sufficient.

The execution of a note, by the defendant, to a Bank as a corporation, is sufficient to show that the Bank went into operation under its charter.

This was an action of assumpsit on a note by the Bank of Mississippi; defendant pleaded non-assumpsit and nul tiel corporation, to which plaintiff took issue: HELD, That under the issues, the execution of the note, by the defendant to the Bank, as a corporation, was competent evidence to prove that the Bank went into operation under its charter; but that it was erroneous for the court to charge the jury, under the issues, that defendant was estopped by the note from denying the existence of the Bank, inasmuch as, if the execution of the note was an estoppel at all, plaintiff should have replied it as such; and that the effect of the charge of the court to the jury, was to withdraw from them the consideration of the issue of nul tiel corporation.

An estoppel must be pleaded.

Appeal from the Chicot Circuit Court.

This was an action of assumpsit on a promissory note given to the Bank, on 1st January, 1841, payable nine years after date, for $2,500.

Defendants pleaded non-assumpsit, and that there is no such corporation as the plaintiff, and no such corporation exists, in manner and form as alleged in said declaration.

Issues were joined on both pleas.

The case was tried by jury, and verdict for plaintiff.

Defendants objected to the reading in evidence an act of the Legislature of the State contained in a pamphlet.

Defendants asked the court to instruct the jury, that under the pleadings in the cause, the plaintiff was bound to prove her corporate existence under the laws of Mississippi; and that she was authorized to make such contracts as that in the declaration.

That in order to prove her corporate existence, she must show a compliance with all conditions precedent prescribed to her in the charter; and that she was actually organized and went into existence as prescribed by the charter.

That where the existence of the corporation is put in issue, the contract sued on could not be taken as evidence of the existence of the corporation—as that would be taking for granted the very fact in issue.

That an act of the Legislature of another State is no evidence of facts.

The court refused all these instructions, except the first.

The court then on its own motion instructed:

That it is not necessary for the Bank to prove a compliance on her part with any conditions imposed on her by charter.

That by executing the note sued on, the defendants recognized the existence of the Bank, and under the pleadings could not deny it.

PIKE & CUMMINS, for the appellants. By the instructions given, the court directly took from the jury all consideration of the issue in respect to the existence of the corporation.

The note, not being under seal, could not have been replied, as an estoppel, to defendant's plea. 18 *J. R.* 490. The court therefore clearly erred in the last instruction.

When the existence of the corporation is put in issue by special plea, the plaintiff is bound to reply, and set out specially how she acquired her corporate existence, and show a compliance with all conditions precedent. *Bank of Auburn v. Aiken et al.*, 18 *J. R.* 137.

Although, when an act of incorporation is produced, it is not necessary to prove a compliance with every pre-requisite, yet it

is indispensable to produce the charter, and show continuous acts of user. *United States v. Stearns*, 15 *Wend.* 314. Something more than the mere existence of a note must be proven. *Williams v. The Bank of Michigan*, 7 *Wend.* 539.

The court by its instruction nullified the last issue, and released the plaintiff from the proof which she took upon herself.

MEANY, contra. The plea *nul tiel corporation* should have been plead in abatement. *Conard v. Atlantic Ins. Co.*, 1 *Pet.* 450. *Society &c. v. Town of Pawlet*, 4 *ib.* 480. 5 *Eng.* 423. *Ib.* 516.

User is sufficient evidence of compliance with conditions precedent, except as against the sovereign. *Ang. & Ames on Corp.*, *ch.* 2, *sec.* 3. And if not complied with they may, as in this case, be waived by subsequent legislation. *People v. Man. Co.*, 9 *Wend.* 351.

The act of incorporation was properly authenticated. 5 *Eng. Rep.* 516.

The execution of a note payable to a corporation estops the party to deny that there existed such a corporation, at the date of the note: and if there has been a forfeiture, the debtor cannot set it up as a defence. 8 *B. Mon.* 122. 1 *J. J. Marsh.* 380. 6 *B. Mon.* 601. 5 *Litt.* 47.

Mr. Justice WALKER delivered the opinion of the Court.

This was an action of assumpsit on a promissory note executed by the plaintiff in error to the Bank, to which they plead *non assumpsit*, and *nul tiel corporation;* on which pleas issues were formed, and a trial by jury, verdict and judgment for plaintiff in the court below.

The errors assigned and which we are called upon to decide, arise out of the instructions given by the circuit court to the jury. As the propriety of giving or refusing the instructions given or refused, must depend upon the nature of the issue and the amount of evidence necessary to sustain it, these become preliminary considerations, and will first be determined. Under the general issue, the contract was the only subject of consideration, and the

note was sufficient evidence to sustain the issue on the part of the plaintiff.

It is a question not altogether free from doubt whether *nul tiel corporation* should be plead in abatement or in bar of the action. For, although it relates to the disability of the plaintiff to sue, and in that respect partakes of the nature of abatement, yet as it is a perpetual, not a temporary disability, it is in that respect like a plea in bar, and we are inclined to believe comes within that class of defences which Chitty says may be plead either in abatement or in bar. 1 *Chitty Pl.* 446. At all events, it was in this case treated as a defence in bar by the parties in the court below and will be so considered here. Unlike the case of *Alderman and Council of Washington v. Finley*, 5 *Eng.* 423, this suit was commenced by a foreign corporation, and its corporate existence and powers put directly in issue by special plea.

As the court could not take judicial notice of the act of incorporation of a sister State, or that the Bank had gone into operation under it, it became necessary under this issue for the plaintiff to establish these facts by proof. The duly authenticated act of the General Assembly of Mississippi, read in evidence by the plaintiff, was certainly sufficient evidence to prove the grant of corporate power and its extent, but not that it actually went into existence as a coaporation. To establish this latter fact, it was not necessary to show a compliance with the conditions of the charter under which it assumed to act, but that the corporation acted and transacted business as such, and for this purpose proof of one or more such acts was sufficient. The execution of the note in this instance by the defendants to the Bank as such corporation, which was the only evidence of user, was in our opinion sufficient to sustain the issue, so far as proof that the Bank went into operation was concerned. In support of this position, we find several decisions directly in point. In Kentucky, it has been held that by executing a note to a corporation, the defendants were estopped from denying its existence at that time. *Jones v. Bank of Tennessee*, 8 *B. Mon.* 123. 1 *J. J. Marsh.* 380. 6 *B. Mon.* 601.

In New York, it has been held that transactions of business with a Bank by the defendant was an admission that it had capacity to transact business as a corporation. *Bank United States v. Stevens*, 15 *Wend.* 316.

And in Alabama, where like issues were formed as in this case, the court in delivering its opinion said, "The plea of *nul tiel corporation* did doubtless put in issue the corporate existence of the plaintiff. But the notes themselves being executed to the corporation by its corporate name, was an admission by the defendant of the fact and prima facie evidence of the charter of the company, and user under it." *Montgomery Rail Rood Company, use, &c., v. Hunt*, 9 *Ala. Rep.* 516.

From the view which we have taken of the issues and the evidence adduced to sustain it, we are of opinion that the only error committed by the circuit court in giving and refusing instructions to the jury, was in giving the last instruction given on the court's own motion. The effect of that instruction was to withdraw from the jury the consideration of the issue of *nul tiel corporation*. The instruction was, that by executing the note in suit, the defendants could not deny the existence of the Bank. It is true that the Kentucky decisions would, under the rule of estoppel, seem to sustain the circuit court to the full extent to which the instruction went; and even the Alabama courts give countenance to some extent to this rule, yet we cannot, in view of the decision in that case, taken all together, consider it as going that far. But allowing the execution of the note to be an estoppel, it is evident that the plaintiff should have replied setting it up. An estoppel cannot be taken by inference, but must be relied on in pleading. *Co. Litt.* 227, *a* 352. And STARKIE says an estoppel should be pleaded, and if not done, the court and jury are not bound by it: but the jury may find the matter according to the fact, and the court will give judgment accordingly. 1 *Stark. Ev.* 303. There is but little doubt that the note was competent, though, perhaps, not conclusive evidence of user under the charter, and in connection with the other evidence, was no doubt, sufficient to warrant a verdict in favor of the plaintiff; but of the

sufficiency of this evidence, the jury were the judges, and to tell the jury that a material fact in issue could not be denied, did in effect withdraw that fact from their consideration, or was an instruction that no proof was required upon it. In this there was error.

Because, therefore, the court erred in giving this instruction, the judgment must be reversed, and the cause remanded, to be proceeded in according to law.

STATE BANK v. HENDERSON ET AL., EXR'S.

See State Bank v. Roddy et al., and Same v. Davis, *ante.*

Appeal from Independence Circuit Court.

S. H. HEMPSTEAD, for appellant.

BYERS & PATTERSON, contra.

Mr. Justice WALKER delivered the opinion of the Court.

The same state of case is presented in this case as that in the case of the *Bank v. William Davis*, decided at the present term.

Let the judgment be reversed, and the cause be remanded.

STATE BANK VS. BARBER ET AL.

Action by the State Bank on a note executed to her by defendants; plea, limitation; replication of part payment by one of the makers of the note, and issue: HELD, That an entry made by the Financial Receiver in a book of the Bank kept for the purpose of entering part payments on notes due the Bank, was not competent evidence to establish the part payment relied upon by the Bank, to take the note sued on out of the statute of limitations, although it was shown that the Financial Receiver, who made the entry, had left the State, and gone to parts unknown

Writ of Error to Pulaski Circuit Court.

On the 26th day of February, 1848, the Bank of the State of Arkansas commenced an action of debt, in Pulaski Circuit Court, against Luke E. Barber and Wm. Trimble, on a note executed to the Bank by Barton Richmond, as principal, Thomas J. Lacy, G. W. Causin, and defendants, as securities, on a promissory note dated January 29, 1843, due at twelve months, for $525.

Defendant Barber pleaded *nil debet*, payment, and the statute of limitations of three years. Plaintiff took issue to the first two pleas, and replied to the third, that Thomas J. Lacy, one of the makers of said note, on the 23d September, 1845, paid to the plaintiff, on said note, $102 70, to which replication issue was made up.

Trimble pleaded payment and limitation, plaintiff replied to the latter plea part payment by Lacy, to which Trimble demurred, the court overruled the demurrer, and he rested.

The issues to Barber's pleas were submitted to the court sitting as a jury, and the plaintiff, to prove the part payment relied upon by her to take the case out of the statute of limitation, offered to introduce as evidence of such payment an entry made by Abner E. Thornton, in one of the regular books of the Bank, kept by said Bank expressly for such entries, showing that on the 23d day of September, 1845, Thomas J. Lacy, one of the makers of

the note sued on, paid on said note the sum of $102 70, which was credited to Barton Richmond as a payment on said note, as appeared by said entry, which entry is as follows:

"Sept. 23d, 1845.

Cr. BARTON RICHMOND.

Received per T. J. Lacy, for curtail and interest for renewal,	$102 70
No. 61, Amount $465, due 29th Jan'y, 1845, call	$55 00
12 months interest on $410	28 70
Interest from Jan'y to Sept., '46,	19 00
Paid as above	$102 70"

It appeared to the satisfaction of the court that said Abner E. Thornton was the Financial Receiver of the said Bank at the time the said entry was made; and it was shown to the court, after the judgment refusing to admit the entry as evidence, that he had been subpenæd to appear at the June term, A. D. 1849, to testify in this case, and that the subpenæ was regularly served; that said Thornton resided in Pulaski county up to 1st November, 1849, and that since that time it was generally understood that said Thornton had left the State and gone to parts unknown. The hand-writing of said Thornton was fully proven. Yet notwithstanding, the court refused to admit the said book, and the entry aforesaid as evidence of such payment, and the plaintiff thereupon excepted to the opinion of the court, and having no other evidence to produce in the case, judgment was rendered against said plaintiff.

The case was determined in February, 1850, before Hon. WM. H. FEILD, judge.

S. H. HEMPSTEAD, for the plaintiff.

FOWLER, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

The question to be determined in this case is, whether or not the court below erred in refusing to allow an entry to be read in evidence from one of the regular books of the bank, under the state of facts presented in the bill of exceptions. To comprehend clearly the force of the objection urged against the competency of this proposed testimony, it will be well to remember that even when part payment, and its appropriation is directly proven, that even then, the main fact necessary to be established, to wit, the continued existence of the debt, notwithstanding the lapse of time since its creation, is but a presumption upon which the law implies a promise to pay it. When, then, this part payment, and its appropriation by the debtor is sought to be established to this end, by an endorsement upon the security, to be sustained on the basis of proof, aliunde, that this endorsement was in fact made at a period of time when it would be against the interest of the holder of the security to make it or have it made, still another link is added to this chain of successive presumptions.

In such case, on the primitive foundation so fixed that the endorsement was in fact made at a time when against the interest of the holder of the security, the following presumptions are successively made:

1st, The purport of the endorsement is presumed true:

2d, That the part payment was made:

3d, That it was appropriated by the debtor:

4th, That he promised to pay the residue; each of course liable to be repelled.

In the case of *Alston v. The State Bank*, (4 *Eng*. 455,) it was submitted to us that the law allowed still another link to this chain of presumptions, forged by English judges, before they fully comprehended the true character of the statute of limitations, and that was supposed to be that where the endorsement purported upon its face to have been made at a time when to make it would be against the interest of the holder of the security, that

the law would, upon this foundation, as a primitive one, presume the date true, and then that the other presumptions would follow in succession, and several English authorities were cited to sustain this position. Upon a careful examination of them, however, we found that all of them, except perhaps one or two, were cases where the evidence had been offered by the defendant, and not by the plaintiff, and that those of the other class had been distinctly and emphatically repudiated by Lord Ellenborough in the case of *Rose v. Byant*, (3 *Cam.* 321,) whom, on this point, the English courts have followed to the present day, as well as the American courts which we cited. And we held therefore, that the date of the endorsement must be proven as a starting point.

In the case at bar, however, it is submitted that we should allow even greater latitude than was asked in *The State Bank v. Alston:* because here we are asked to presume, upon the foundaion that the book from which the entry was proposed to be read, was "a regular book of the bank, kept by her expressly for such entries:" 1st, That the book was correctly and honestly kept; 2d, From this, presume the truthfulness of the purport of the entry, and then go on in succession. It is manifest, therefore, without further observation that the testimony proposed was clearly incompetent for the purpose offered.

And certainly the necessity of the case did not demand it because it was not shown that by the death of Thornton, it was impossible to obtain his testimony; nor did it appear alike improbable to obtain discovery from the defendants, and had both been shown, we know of no principle of law which makes the proposed testimony admissible to prove a part payment, the rules of law as to which having already gone to the extreme confines of law and equity: and we certainly have no statute providing for such a case. *Burr v. Byers, admr.*, 5 *Eng.* 402, 403.

Finding no error in the record, the judgment must be affirmed with costs.

HOOPER v. LEE.

In case for malicious prosecution, the affidavit and warrant under which plaintiff was arrested, must be introduced as evidence, unless a showing is made for the introduction of secondary evidence—in this case the court below erroneously excluded them as evidence when offered by the plaintiff.

Appeal from Scott Circuit Court.

This was an action on the case for malicious prosecution, brought by Obadiah C. Hooper against James F. Lee, in the Scott circuit court.

The gravamen of the charge in the declaration is, that on the 24th April, 1849, defendant falsely and maliciously made an affidavit before Seth Spangler, a justice of the peace of said county, that plaintiff was guilty of perjury in posting a certain cow, &c., whereupon the justice issued a warrant for the apprehension of the plaintiff, under which he was arrested, imprisoned, and afterwards tried and acquitted.

Defendant pleaded not guilty, upon which plea the parties went to trial. The plaintiff offered in evidence, the affidavit, warrant and return thereon, under which he was arrested, &c., after having proven by the justice Spangler, (whose official character was admitted) that said warrant was sworn to and subscribed by the defendant, before him, and that he issued said warrant, as such justice, and that said plaintiff was arrested thereunder, tried and acquitted before him, &c., to the introduction of which, as evidence, defendant objected, and the court sustained the objection. Verdict for defendant, bill of exceptions, and appeal by plaintiff.

F. W. & P. TRAPNALL, for the appellant. The apprehension and imprisonment of the plaintiff, the affidavit, writ and return

thereon, afforded the highest evidence, and were therefore competent. 4 *Met.* 421. 7 *Watts* 189. 7 *Porter* 437. 1 *Brevard* 173. 5 *Watts & Serg.* 438. The plaintiff was bound to prove the affidavit made by the defendant, either by the affidavit itself or an examined copy. 4 *Stark. Ev.* 919. *Peake's Ev.* 330. 1 *B. & P.* 281; also the writ and return—the return of the sheriff is evidence for either party. 4 *Starkie* 919. 11 *East.* 297. 1 *Starkie* 284.

Mr. Justice SCOTT delivered the opinion of the Court.

The testimony rejected was clearly competent: indeed no other evidence was competent, unless a foundation had been laid for secondary evidence by proof of the loss of this that the court rejected. Those proceedings before the justice were the very foundation of the complaint, and by these the plaintiff proposed to make out the first point in his case, to wit: his prosecution and acquittal. (2 *Greenl. Ev., p.* 427, § 449. 4 *Phil. Ev., p.* 253. *Beebe v. De Baun*, 3 *Eng., p.* 570.)

Let the judgment be reversed, and the cause remanded.

WOODDY ET AL. VS. STATE BANK.

A new promise in writing by one joint maker of a note, does not take the debt out of the statute of limitations as to other makers. *Digest, p.* 698, *sec.* 19.

Where several makers of a note are sued, and the debt is barred as to some, but a new promise proven as to others, plaintiff is entitled to judgment against the defendants making the new promise, (*Digest, p.* 699, *sec.* 20,) but not against the others.

Appeal from Benton Circuit Court.

On the 30th July, 1847, the Bank of the State sued Wm. B.

Wooddy and *A*. Whinnery, before a justice of the peace of Benton county, on a note executed to the Bank, payable at the branch at Fayetteville, by the defendant Wooddy, as principal, and Whinnery and another, as securities, for $87 39, dated 6th December, 1841, and due at six months. Judgment for defendants before the justice, and appeal by the Bank to the Circuit Court. The defendants interposed as a defence the statute of limitations; the case was submitted to the court, sitting as a jury, and the plaintiff read in evidence the note sued on, and the following letters, after proving them to be in the hand-writing of defendant Wooddy:

"*Maysville, March 23d*, 1846.

SIR: I have just received your note informing me that my last note in Bank was not received. I will just say to you that I will be to see you about the 15th May, and will fetch a new note with good security, and about five hundred dollars in money. Your letter lay in the office a week before I got it; I was away from home at the time. Please not to put my notes out for collection, as it will put me to a great deal of trouble and expense, and I intend to pay the last cent; and will draw money in a few days, I expect. You will please to not sue, if you can avoid it.

In haste, your friend,

WM. B. WOODDY.

To R. P. PULLIAM, Esq.,
Fayetteville.

Bentonville, March 15, 1844.

To COL. JAS. MCKISSICK:

Dr. Sir—I now have to inform you that I have been able to make a *rise* of money, to renew my notes in Bank, except about $40, which I will have shortly, and as soon as I can get it, I will be in. I want you, if you please, not to put them in suit, as I am determined to pay all as soon as possible.

In haste, your friend,

W. B. WOODDY.

The above being all the evidence introduced, the court found

for the plaintiff; defendants moved for a new trial, which was refused, and they excepted, and appealed.

S. H. HEMPSTEAD, for the plaintiffs, contended that the letters read in evidence, were too vague and indefinite to constitute a written acknowledgment—there being no evidence that they were written to the plaintiff or her officers; (*Brown v. State Bank*, 5 *Eng*. 137,) and if sufficient to constitute an acknowledgment by Wooddy, yet the judgment was erroneous, as there was no evidence to avoid the statute as to Whinnery.

CARROLL, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

The record presents no testimony whatever upon which the verdict and judgment can rest, as against Whinnery. (*Digest*, *p*. 698, *sec*. 19.) And although we would not disturb it as to Wooddy, against whom the testimony is by no means conclusive, if it was not against both. (*Dig*., *p*. 699, *sec*. 20,) yet being joint and clearly without testimony, as to one, it must be reversed, and the cause remanded.

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12 782
180 591

CORNELIUS v. THE STATE.

As to the caption of an indictment showing that the grand jurors are good and lawful men of the county, &c.

Under sec. 155, chap. 52 Digest, a member of a grand jury by which an indictment is found, &c., cannot serve as a juror on the trial thereof; and under section 163, of the same chapter, if the disqualification of the juror is discovered after he is sworn, but before any of the evidence is introduced, the court may, in its discretion, discharge him, notwithstanding the contrary provision of section 20 of

chapter 94 of the Digest, because the former section having been passed after the latter, controls it under the rule of construction, as given in the 6th section of the 156th chapter of the Digest.

Where the defendant was permitted, without objection, to ask a witness if he was not prejudiced against defendant, and he answered that he was, it was erroneous for the court, against the objection of defendant, to permit the State to draw from the witness a statement of the reasons why he was so prejudiced; and the witness having, in giving his reasons for such prejudice, detailed matters prejudicial to the character of defendant, the court could not counteract the effect of erroneously admitting them, by telling the jury not to regard them as evidence.

But it is not proper to ask a witness, in general terms, if he is not prejudiced against defendant. He may be interrogated as to any particular acts or expressions in reference to the accused from which the jury may infer unfriendly feeling or prejudice.

General rules as to what declarations of a party constitute part of the *res gestæ* stated, and cases illustrative of them referred to.

In this case the defendant was indicted for the larceny of a cow, belonging to one of his neighbors; the State proved by two witnesses, that on a certain night they secreted themielves near the cow-pen of defendant, having heard that the cow in question had been penned with his cattle on that evening, and that between midnight and day, the defendant, and his negro boy, came to the pen, with a torch-light, killed the cow, and were about to commence skinning her, when witnesses arrested defendant. The defendant then offered to prove that on the night the cow was killed, after his cattle were turned into the pen, and before the family and others at his house went to bed, he declared openly in his family, and in the presence of visitors, that he was going to kill the cow before day, and take her to the neighboring town to market; and declared, at the same time, that he had received a message from the owner of the cow, which authorized him to kill the cow and pay for her—that these declarations were made to some three or four grown white persons, who were at his house at the time, as well as directions given to the negroes in referrence to the matter: HELD that under all the circumstances, these declarations of defendant constituted part of the *res gestæ*, and were competent evidence to show the intention of defendant in killing the cow.

The defendant further proposed to prove by *S.*, that a short time before the cow was killed, she heard *W.*, who was then living with defendant, tell him that he had been down to the residence of the owner of the cow, and that the owner had told him to tell defendant that the cow had been running about his, defendant's place, the winter before, and that if she returned he was at liberty to kill her and pay him two cents a pound for her; and that after receiving this message, the defendant openly declared his intention of killing the cow. It was further shown that defendant had been unable to procure the attendance of *W.* as a witness: HELD that *S.* was a competent witness to prove the delivery of the message to defendant—that it was immaterial whether the message was true or false, if defendant acted on it in good faith, and that a person who heard the message

delivered to defendant, was as competent to prove its delivery to him, as the person who delivered it.

Defendant proved by *M.*, a resident of the neighboring town, that on the day before the cow was killed, he had engaged to deliver to him beef on the next morning, and then proposed to prove by *M.* that he told him that he had no beef of his own, but that there was one at his house belonging to one of his neighbors, which he would kill, and pay for, and that he had permission from the owner to do so: HELD that under all the circumstances in proof, these declarations of defendant to *M.* should go to the jury as part of the *res gestæ* explaining the intention and motives of defendant in killing the cow.

The husband having been examined for the State, the wife was a competent witness, on the other side, to show that her husband testified under a bias or prejudice against the defendant. Had she been offered to contradict her husband directly, there might have been doubts as to her competency.

Where defendant shows that after the cause was submitted to the jury, part of them separated from their fellows, without consent of the parties, or order of court, and were exposed to undue influences, it will be grounds of new trial, unless the State affirmatively show that no improper influences were exerted upon them.

An affidavit that some of the jurors were seen passing about the streets, without naming them, is insufficient—the names of the jurors should be stated, to give the State an opportunity of showing that no improper influences were exerted upon them, &c.

Writ of Error to Saline Circuit Court.

ELIHU CORNELIUS was indicted, in the Saline Circuit Court, for larceny, tried, convicted, and brought error.

The following is the caption to the indictment:

"STATE OF ARKANSAS, }
COUNTY OF SALINE. }

At a Circuit Court begun and held in and for the county of Saline, in the State of Arkansas, on the 2d Monday after the 4th Monday of March, A. D. 1849, present the Hon. Wm. H. Field, Judge, &c., amongst other proceedings were the following:

APRIL 9th, 1849.

GRAND JURY:—The following named persons were returned by the Sheriff as summoned to serve as Grand Jurors for the present term, *to wit:* David Dodd, &c., [*naming them*] sixteen in number; David Dodd was sworn as foreman of the Grand Jury, and the

others as members thereof, and they, after receiving the charge of the court, retired to consider of the duties of their station."

The transcript shows that, on the next day, the Grand Jury returned an indictment, in the usual form, against Cornelius, charging him with the larceny of a cow belonging to one Joseph Clift, to which he pleaded not guilty. The indictment commences thus: "The Grand Jurors of the State of Arkansas duly returned, empanneled, sworn, and charged to enquire in and for the county of Saline, upon their oaths, present," &c.

The cause was continued twice on the application of defendant, on a showing that his witnesses were not in attendance. The trial came on at the April term, 1850, and the defendant was convicted, and sentenced to the Penitentiary for one year. During the trial, he took various exceptions to decisions of the court; made them grounds of a motion for a new trial, which being overruled, he took a bill of exceptions setting out the facts, which are as follows:

A venire having been returned, and the cause being called for trial, Tillford Terry and six other persons were called to the stand, elected and sworn as jurors. Afterwards it was discovered that said Terry was a member of the Grand Jury that found the indictment, whereupon the court discharged said juror, against the objection of defendant, and he excepted.

After the jury were sworn, and the indictment submitted to them, *George Keesee* was sworn on behalf of the State, and testified as follows:—"We went down to old Mr. Cornelius', and went into a small patch place on the south of his cow-pen. We stood there until we saw a light—the light came from the house, and came into the cow-pen—a negro boy holding the light, the old man had a rope or lariet. They tried to catch this cow with the rope—they failed—returned back to the house and got a gun. They brought the gun into the pen. They tried to shoot for some time in there, and failed. They let down a cross fence betwixt that pen and another, drove the cow through into the other pen, and put up the cross fence. He shot the cow then, and killed her. We were upon him just as the cow was lying trembling.

I asked him if he intended to resist, or would he submit? He said he would submit, if it put him in the Penitentiary. He also said it was the first time that he had been guilty of the like. He proposed that we might name our own price, he would pay it to us, and he would leave the State in one month. Nothing more, only I continued at the place until the other witnesses came—they were Harlan Cliff, and Mr. Kinlho—they were persons that knew the cow. I sent for them. It was betwixt three and four o'clock in the morning when defendant and the negro brought the light into the cow-pen. The cow was killed betwixt three and four o'clock. The old man shot off the gun. The pen they drove her into was smaller than the one she was first in—cross-pen between them. This took place in this county. The time was the 30th October, 1848. The cow was red and white; worth $20."

Cross-Examined by defendant.—"It was some two or three hours after supper when I started from home to go to Cornelius' house; was on horseback, and it took me about half an hour to get there. It was dark and raining when I got there, and I went into a patch on the south side of the pen; got off my horse, and part of the time I stood, and part of the time I sat. It must have been three or four hours from the time I got there, to the time the light came out. Wm. Whitley went with me to Cornelius'. He came to my house for the purpose of getting me to go with him to Cornelius' house. When we got to the patch near the cow-pen, Whitley and I stood together. I had a rifle gun loaded, which I took with me, but Whitley was not armed that I know of. I am prejudiced against Cornelius at this time, and think it likely Whitley was. When we got near the pen, I saw cattle in the pen, but it was so dark I could not see the cow in question. When the cow was shot down, both Whitley and myself jumped over into the pen—I with my gun in my hand, and spoke to the old man in a low and determined tone of voice, and told him to hold on, and asked him if he would submit or not. I had the gun in my hand when I jumped over the fence and accosted him. Defendant is *about sixty-five* or *seventy years of age*, and a man of feeble frame. I am a much larger and stouter man than defend-

ant. Whitley is a middle aged man, and also a stouter man than defendant. When Whitley and myself got to the patch, we tied our horses some two or three hundred yards from the place near the pen where we took our stations to watch. I think when we jumped over the fence with the gun, and accosted the old man, it was calculated to shock and alarm him. We stayed there until 10 o'clock next morning. The negro boy that came to the pen was named *Peter*, and belonged to defendant. I had told Whitley before that time, if ever I found out there was a cow in the pen, I would go and watch it. On the night of the above occurrence, Whitley came to my house, and hallooed to me, and said *it was a good night to catch wolves*. I understood what he meant, and got up, and went with him to defendant's as above stated. I don't remember that I ever said if I could not put defendant in the Penitentiary, I would leave the State. Don't remember that I ever said that if I could get the least hold on defendant, I would put him in the Penitentiary, because a little hold won't do, I discover. I do not recollect of saying that I would keep a close watch on defendant, and if I could get the least hold on him, I would put him in the Penitentiary or break him up. But I have kept a pretty close watch on him, and could give my reasons for it. I have never sent persons to watch defendant's premises—never sent any person but myself. Defendant lives four or five miles from Benton.

When myself and Whitley arrived at Cornelius' patch, all was quiet at his house. Saw no light. It was about 150 yards from the place where we took our station to defendant's house. There is a public road running in a few steps of defendant's cow-pen that people frequently travel."

Re-examined by the State.—"The State's Attorney asked the witness to state to the jury the reasons why he was prejudiced against defendant. The defendant objected to his doing so. The witness said he wished to do so. And the court decided that he might do so; to which decision of the court defendant excepted. Whereupon the witness stated as follows:—For the last ten years past we have lost a great deal of stock in our county. It was

believed that he killed them. I tried for some five or six years to catch him in the woods; at length there came a man to me, and told me that he did not kill them in the woods; that he would drive his own stock through the bottom, close upon some other person's stock, and turn out a good fat one from among somebody's else among his own; he would drive them home, pen up in his cow-pen; he would go in the night and kill the fat one; turn out his own stock then, and butcher that one in the night. That man told me that he had killed more than a hundred in that way, and skinned them, and sunk their heads and hides in that big lake—that man told me all these things. To all which testimony defendant objected, but the court permitted it to go to the jury. But the court then told the jury that the above statement was no evidence in the case, further than to enable them to determine whether the prejudice of the witness was proper; and the defendant excepted to the opinion and decision of the court in permitting said statement to go to the jury for that purpose or any other."

Re-Cross examined by defendant.—"It was John Robinson that told me the above story about defendants killing so many cattle, and hiding their heads and skins in the lake. Robinson told me the above tale a few months before the cow in question was killed. Have not seen Robinson since a short time after that, and do not know any thing about him. He was working in the county awhile, but did not stay long in Cornelius' neighborhood. Never heard he was deranged about that time."

WM. WHITLEY, sworn on behalf of the State, testified as follows: "Some time about the last of Nov., 1848, on Sunday night, Keesee and myself went together to Cornelius'. We tied our horses some 150 yards from his cow-lot, and went around and got in behind the lot, in a little field. When we got there it was between 10 and 12 o'clock at night. We stayed there until some time near 3 o'clock, may be before, and may be a little after. We heard somebody splitting pine—a short time after that we saw a light coming toward the cow-pen—the old man Cornelius and a negro boy was along. The boy had the light and Corne-

lius a rope. They went into the cow-pen—there they tried to catch the cow—they failed. They went off to the branch, got a pole, and came back to the pen—the old man put the rope on the end of the pole, the boy would run the cow round, and he would try to fling the rope over her head, but failed in this—then went to the house, got his gun, returned to the pen, tried to shoot the cow in that pen, and failed—then run her into another little pen, hemmed her up, and shot—all the pens were joining. When he shot the cow, he drew his knife, and Mr. Keesee hallooed, hold on! By that time we were both over the fence—I got over a little first, as I had nothing to hinder me, and he had his gun. We walked up to the old man, and observed that we had watched him along time, but caught him at last. The old man observed it was the first act of the kind that ever had been done about his house. We observed, not by thousands, from his motions. The old gentleman then proposed, could there be any way provided that he could satisfy us, and him quit the State, or something to that amount, in a month. The old man then sat down or squatted down by the pen, and cried, and said Lord have mercy upon him. He then proposed again that he would not be insulted at any proposals we would make to him to let him go, and he would quit the State in one month. We told him we could not do it, it would be him stealing and us concealing, and the law might take its course. It was then raining, and we were cold. We took him to the house; his negro made a fire for us. It was four o'clock when we went to the house. We stayed until it was broad day light—good day light—then took the old man out near to where the cow was shot, and there I left him and Mr. Keesee, and went on to Mr. Keesee's, Judge Calvert's, Mr. Clift's, and got the neighbors, returned again, and took the old gentleman to town. This is about all. Took place in Saline county. I speak of Elihu Cornelius. The cow was a pale red and white *plaid* cow. She was very fat."

Cross-Examined.—"I left Mr. Wayland's to go to the house of Keesee a few minutes before 9 o'clock of the night referred to, to get him to go with me to Cornelius'. We had an understand-

ing to watch the old man before. *Question:* 'How did you know the cow was at Cornelius'?' I got it from three different sources: first, my little boys had seen the cow that day in the bottom, back of the lake; next, I understood that defendant's son had seen him pen the cow in the evening before she was killed about sun down; and the next information I got was from a negro boy belonging to Cornelius. I did not get information that she came up with defendant's cattle, but that defendant drove her up. I got the information from the old man's negro boy, Peter, that defendant drove the cow up, and heard that defendant's son in passing the house about sun down saw her in the lot. I never offered the negro a bribe to give me information of any kind on his master, but told the negro I would not begrudge $10 or $20 if I could find out when there was a cow in the pen; but I never paid the negro any thing; he never called on me for the money. I can't say that I was prejudiced against defendant. *Question:* Did you ever send defendant word that if he would give you $300, or any other sum, you would quit the country, and not appear against him as a witness? No sir, I never did. Might have said sometimes, if the old man would give me so and so, I had better leave, but said it in a joke; but can't say I ever named any sum of money. I had been watching the old man a long time, and this was the first time I ever caught him.

When we jumped over the fence, where the old man shot the cow, Keesee walked *up with his gun on his shoulder*, and the old man advanced towards him, after he had been accosted, and said 'I want to talk to you,' when Keesee jerked his gun off hi shoulder, and held the muzzel before him, and said, stand back, I would not risk you a moment—the old man had the beef knife in his hand. Previous to that time, I do not recollect of saying that I intended to break Cornelius up, or cause it to be done. I had suspected the old man, but I know that innocent persons are sometimes suspected, for some persons have said I stole hogs. I have said probably, in speaking of the matter, that it took a rogue to catch a rogue. We lay and watched the old man all the time he was in after the cow, but never said a word to him

until he shot the cow. *Question:* Did you not on the day after defendant was arrested, when you found out he had got bail, ride up and down the lane at Judge Hughes' with your gun on your shoulder, and threaten to kill defendant, because you were disappointed in not getting him put in jail? *Answer:* I did not—but if I did, I was in liquor, and do not recollect it. I got drunk about that time. We did not have any liquor when we watched the old man, but after we went to the house, the old man treated us very kindly. I do not recollect that the old man said to Keesee and myself, when we were talking to him at the cow, that he had not killed the cow with any dishonest intention, but he did say he had killed her and could pay for her. There was a road running close to Cornelius' cow-pen, upon which persons were frequently traveling."

HARLAN CLIFT, sworn for the State, testified as follows: "I went to Cornelius' in the morning after the cow was killed—found Keesee and other persons there. They were sitting out in front of the cow-pen. We went to where the cow was—the cow was lying there dead. She was a red and white cow, and belonged to my father, Joseph Clift. Cornelius walked with me to where the cow was, and on the way remarked that he expected I knew the cow—cow worth $10—good large fat cow—lying dead in the small pen.

Cross Examined.—When defendant observed to me, as we started to where the cow was, that no doubt I knew the cow; he also said he did not kill the cow with the intention of stealing The road that leads by Cornelius' cow-pen is a wagon road, and frequently traveled. I do not think this cow run with defendant's cattle the winter before—if she did, I did not know it."

Here the State closed.

"The defendant then offered to read to the jury the following certificate, not as evidence on the merits of the case, but for the purpose of counteracting any prejudice that might have been made on the minds of the jury by the court permitting the witness, Keesee, to detail to the jury certain statements which one Robinson had made to him about Mr. Cornelius killing cattle—

the Robinson whose name is appended to this certificate being the same man spoken of by Keesee, but the court excluded the certificate, and defendant excepted: Here follows the certificate:

"STATE OF ARKANSAS.
COUNTY OF PULASKI.

John H. Robinson, late of Saline, but now of Pulaski county, states that some time in the spring of 1847, and while he was not in his right mind, two or three persons in Saline county, whose names he does not think it necessary to mention, induced him by promises to compensate him, to make incorrect statements about Elihu Cornelius, of said county of Saline; the substance of these statements was, that said Cornelius was a dishonest man—that he had taken property that did not belong to him, and used it as his own, and other statements of a similar character, impeaching the honesty of said Cornelius. The said Robinson, now sane, and in his right mind, without any solicitation on the part of said Cornelius, deems it an act of justice to declare most solemnly that he never did, and does not know any thing whatever against the honesty of said Elihu Cornelius—that he never knew him to take or use any property, or thing, or chattel, which did not belong to him the said Cornelius. That the said Robinson, if he had been in his right mind, could not have been induced to make any statement of the character alluded to, or any prejudicial to said Elihu Cornelius, because the said Robinson never did know any fact upon which said statements could be predicated. JOHN H. ROBINSON."

Sworn to and subscribed before me, this
16th day of Oct., 1847.
WM. S. HUTT, *J. P.*

MRS. SEYMORE, witness for defendant, testified as follows:—"I was at the house of defendant at the time the cow was killed. I knew the cow in question. She ran with the cattle of defendant for some two winters before she was killed. On the evening before she was killed, I do not know whether she came up with his other cattle, or was driven up with them by some of the family. She was with the cattle on that evening. She had come

up with them once before during that fall. I think some of the black ones found the cattle on the evening before the cow was killed, and the cow in question with them."

"The defendant then proposed to prove, by the witness, that on the night the cow was killed, after the cattle of defendant were turned into the pen, and before the family, and others at his house went to bed, he, the defendant, declared openly in his family, and in the presence of visitors, that he was going to kill the cow in question before day, and take her to Benton to market; and declared at the same time that he had received a message from Clift, the owner of the cow, which authorized him to kill the cow and pay for her. That these declarations were made to some three or four grown white persons who were at his house at the time, as well as directions given to the negroes in reference to the matter. To the introduction of which declarations of defendant, the Attorney for the State objected, the court excluded them, and defendant excepted."

"The defendant's counsel then offered to prove by the witness, that, a short time before the cow in question was killed, she heard Marion Williams, who at the time was living at the defendant's, tell the defendant that he had been down to Clift's, the owner of the cow, and that Clift told him to tell defendant that the cow in question had been using about his, defendant's place, the winter before, and if she returned, he was at liberty to kill her, and pay him two cents a pound for her; and that after getting said message, defendant openly declared his intention of killing the cow; but the court excluded said evidence, on the objection of the State, and defendant excepted."

"Defendant then showed that Marion Williams had been subpœnaed; that the cause had been twice continued on account of his absence, among other witnesses; that he lives twelve or fourteen milles from Benton, in Hot Spring county, and that at the commencement of this court he was said to be very sick; and upon this showing, defendant again offered to prove by the witness that she heard said Williams deliver the message

aforesaid, to defendant as aforesaid, but the court again excluded it, and defendant excepted."

"It was proven that Joseph Clift, the owner of the cow, died on the 4th January, 1849."

JAMES PELTON, sworn for defendant, testified as follows: "That about the last of December, 1848, the State's witness, Wm. Whitley, told him if old Cornelius would give him $300, he would not appear against him at court, and that he would be glad the old man knew it. That witness lives near defendant. Whitley made the same remark twice to defendant. Said Whitley has been arrested since his examination in this case, on a charge of hog-stealing, and is now in jail. At the time Whitley said if Cornelius would give him $300, he would leave the State, and not appear against him, he, Whitley, was talking of going to Texas. Did not exactly know whether he was in earnest or not."

WM. CORNELIUS, sworn for defendant, testified as follows: "I passed the house of defendant the evening before the cow in question was killed, about an hour or an hour and a half by sun. Don't remember whether the cattle were up at that time or not. I stopped at the house about a quarter of an hour, and had a conversation with defendant."

"The defendant then offered to prove, by the witness, that, in that conversation, defendant told him there was a cow of Clift's at his house, weich he intended to kill, and pay Clift for—that he felt authorized to do so from a message he had received from Clift, but the court excluded the evidence, and defendant excepted."

"Witness further stated that on the night the cow was killed, a gentleman by the name of John Seymore, and Mrs. Seymore, stayed all night at Cornelius'. Witness does not know whether other persons came in after he left or not. Defendant, at the time, had a pretty extensive stock of his own—was very well off as to property."

Cross-examined: "I am certain I did not see Whitley that even-

ing, and did not tell him the cow was up in the pen, or that old man Cornelius drove her up. I am defendadt's son."

MRS. WHITLEY, sworn for defendant, states: "That she is the wife of witness, Wm. Whitley—that she has separated from him; living apart from him, but is not divorced—have been separated three weeks last Thursday."

"Defendant then proposed to prove by witness that she knew Wm. Whitley to be greatly prejudiced against defendant, and had frequently heard him threaten to ruin and break up the old man—to which evidence, the State's counsel objected, on the grounds that she could not testify to any thing that would go to discredit the testimony of her husband, or impeach his statements, and the Court excluded the evidence, and defendant excepted."

"Defendant then offered to prove by said witness, that said Wm. Whitley, her husband, had bribed defendant's boy, *Peter*, and paid him part of the money, for carrying the information that defendant was going to kill the cow in question, or had her up in his lot with his other cattle, which evidence the Court excluded for reasons above stated, and defandant excepted."

BRADFORD MORRIS, sworn for defendant, testifies as follows: "Mr. Cornelius was at my house, in Benton, the day before the cow in question was killed, and come to get me to fill a wagon wheel. He wanted it done next day, so he could use it the day after in going to Little Rock. He told defendant if he wanted the wheel done in a day, he must bring it soon in the morning; and told him that he wanted some beef, and if he would bring the wheel soon in the morning, and bring him some beef, he would fill the wheel. Defendant told him he had no beef killed, but he would get up long enough before day to kill one, and get into Benton by sun up, if he could get the beef up. It is six miles from Benton, where witness lives, to defendant's. Defendant then proposed to prove by the witness that, in this same conversation, defendant told him he had no beef up of his own, but there was one at his house belonging to one of his neighbors which he would kill and pay for; that he had the liberty from

the owner to do so. To the introduction of which evidence, the State's Attorney objected, the Court excluded it, and defendant excepted."

Here the defendant closed.

The jury found the defendant guilty, and fixed his punishment to one year in the Penitentiary. He moved for a new trial, reserving and making all the above exceptions grounds thereof, the Court refused a new trial, and he excepted.

Affidavits were filed in support of the motion for a new trial by defendant, and counter affidavits filed by the State's Attorney, in reference to the separation of the jury during the trial, without leave of the Court or consent of the parties, the substance of which will appear in the opinion of the Court.

Defendant brought error, but died before the mandate of this court was sent down.

E. H. ENGLISH, and WATKINS & CURRAN, for the plaintiff. The indictment is defective in not stating in the caption, or otherwise, that the grand jurors were from the body of Saline county. 1 *Ch. Cr. Law Marg. p.* 333. *Woodsides v. State*, 2 *How. Miss. R.* 655. *Tipton v. State, Peck. (Tenn.) Rep.* 165.

The Court erred in discharging Terry after he was sworn as a juror; *Sec.* 20, *chap.* 94 *Dig.*, *p.* 630, (which went into operation 20th March, 1839,) and therefore superseded *sec.* 163, *ch.* 52 *Dig.*, which took effect on the 1st March, 1838. *State v. Williams*, 3 *Stew. Rep.* 454.

The Court erred in permitting the witness, Keesee, to state the reasons of his prejudice against the defendant. The fact of prejudice is legal testimony, as it affected the credibility of the witness, (*Phill. Ev. Cowen & Hill's notes*, 2 *vol. p.* 729, 2 *Ed.*,) but the particular reasons of the prejudice should not have been stated. *Id.* 730. *Swift's Ev.* 148.

The declarations of the defendant at the time of doing the act charged as a criminal offence, being part of the *res gestæ*, were competent as evidence to show the *quo animo*. *Roscoe's Crim. Ev.* 23, 25. *Sessions v. Little*, 9 *N. H.* 271. 1 *Phill. Ev.* 233.

1 *Stark. Ev.* 34, 35 36: *note at page* 35. 2 *Phill. Ev., Cowen & Hill's notes, p.* 589 *to* 606, *note* 452

The fact that the defendant had been informed that the owner of the cow said he might kill and pay for it, might be proved as well by any one who heard the message, as by him who delivered it. The real question was, did the defendant receive such a message, and believe it was sent? If so, the act of appropriating the property could not have been larceny.

The husband of Mrs. Whitley was no party to the suit, had no interest in the result, nor could the verdict be used ugainst him in any event; and the only effect of her testimony would have been to affect his credibility, by showing prejudice, and should have been received. *Roscoe's Cr. Ev. p.* 148–9, and cases cited.

The separation of the jury, without the consent of parties, is cause for a new trial, unless the record affirmatively shows that no improper influence was the result. *McCann v. The State of Miss.*, 9 *Sm. & Marsh.* 465.

CLENDENIN, *Attorney General*, contra, contended that the Circuit Court properly exercised its discretion under *secs.* 155 and 163, *ch.* 52, *Dig.*, in discharging the juror; that, as the Court instructed the jury that the facts stated by the witness as the reasons of his prejudice were not evidence, the defendant was not prejudiced; that the declarations of the defendant were not evidence; that hearsay testimony will not be permitted. (*Arch. Cr. Law* 155.) That the wife cannot be permitted to give testimony contradicting her husband—the husband and wife cannot be witnesses for or against each other. *Arch. Cr. Law*, 148 *Gill. Ev.* 133, 134. *Roecoe's Cr. Ev.* 112, 113; that as no conversation with other persons, or improper conduct is shown, the mere separation of the jury does not affect the verdict.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The first point made, relates to the legal sufficiency of the indictment. It is objected that it is no where shown in the caption of the indictment, that the grand jurors were from the body of

the county of Saline. Precisely the same question was presented and decided in 1 *Howard's Miss. Rep.* at *p.* 171, in the case of *Byrd v. The State.* The Court in that case said: "The second question is, does the caption of the indictment show with sufficient certainty that the grand jurors, who found the indictment, were of the county of Warren? By the common law, every man was entitled to a trial by his peers, which peers were good and lawful men of the county where the offence was charged. This principle of the common law is recognized and established by the Constitution of this State; and the right thus secured should be beyond legislative action. It should appear, then, with reasonable certainty, in the caption of the indictment, that the grand jurors empanneled and sworn to inquire of and presentment make of the guilt or innocence of the party charged, were of the proper county. The caption of the indictment in this case is in the following words, to wit: "The grand jurors of the State of Mississippi, empanneled and sworn in and for the county of Warren," &c. The grand jury is constituted to inquire on the part of the Stnte, in the commission of felonies, &c., in their county. The grand jury of any county may therefore, with strict legal correctness, be styled the grand jurors of the State of Mississippi. And when the words are added, that they "were empanneled and sworn in and for the body of the county," it appears with that degree of certainty required in indictments, that they were of the county for which they are sworn. This legal certainty, so far at least as the prisoner's safety is involved, is strengthened by the presumption that the court could not issue a *venire* to any other county in the State; and that it could have issued to summon only the house-holders and free-holders of the county.

Courts of Justice are disposed to release the rigor of the ancient forms, when no injury can possibly result to the liabilities or rights of the accused. Under the process of summoning and drawing the grand jury, the accused can always ascertain whether the jurors drawn are good and lawful men of the county, by referring to the list which the clerk is required to keep of those from whom the grand jury must be drawn. See *Acts* of November

session, 1830, *page* 25. I am therefore of opinion that in this respect there is no error." The phraseology of the indictment in the case before us, is the same in substance with the one before the court in that, and every facility for ascertaining all the facts in regard to the residence, and other requisite qualifications of grand jurors, that can be desired, are afforded by our Statute in reference to that subject. See *chap.* 94 of the *Digest.* The remarks of the Court, in that case, are strickly applicable to this, and perfectly conclusive of the question. There is no error therefore, in this respect.

We will now proceed to dispose of the several other objections made to the judgment of the court below, in the order in which they are presented and discussed in the argument of the defendant's counsel.

The first relates to the action of the court in discharging a juror after he had been sworn in chief. The 155th and 163d sections of chapter 52, of the Digest, declare that "No person who was a member of the grand jury or inquest by which any indictment was found in any cause, or who was a member of a jury of inquisition held by the coroner or other officer, shall serve as a juror in the trial of such cause." And that, "If the cause of challenge be discovered after a juror is sworn and before any part of the evidence is delivered, he may be discharged or not in the discretion of the court." These two sections were approved February 13th, and went into operation from and after the 1st of March, 1838. The 20th sec. of chap. 94 of the Digest, also declares that "No exception against any juror on account of his citizenship, non-residence, age or other legal disability, shall be allowed after the jury are sworn." This section was approved Dec. 18th, 1837, but not put into operation until by the proclamation of the Governor, on the 20th March, 1839. The 6th sec. of chap. 156 of the Digest, provides that, "For the purpose of construction, the revised statutes, passed at the present session of the General Assembly, shall be deemed to have been passed on the same day, notwithstanding they may have been passed at different times; but if any provisions of different statutes are re-

pugnant to each other, that which shall have been last passed shall prevail; and so much of any prior provisions as may be inconsistent with such last provisions shall be deemed repealed thereby. This section was approved and put in force March 5th, 1838. Under this last provision, in case there is any repugnancy in the several statutes above quoted, the one approved 13th February, 1838, must prevail as the statute settling the construction of the Revised Statutes, looks alone to the time of the passage, and not to that of their going into operation. The juror who was discharged after he was sworn, having been a member of the grand jury that found the indictment, was clearly laboring under a legal disability and the court had a discretion whether to discharge him or not before any part of the evidence was delivered. 'Tis true that the bill of exceptions is silent as to whether any evidence had been delivered or not, yet the legal presumption is that such was not the case, as but six persons had been sworn besides the one discharged, and for the further reason that such presumption tends to support the action of the inferior court. There is no error, therefore, in this respect.

The next objection is that the court below permitted Keesee to state in detail, the grounds of his prejudice against the accused. He stated on cross-examination that he was prejudiced against accused, and on re-examination by the State, he was asked to state the reasons why he was thus prejudiced, the defendant objected to this question, but the court overruled the objection, and permitted him to go on in detail and state the grounds of his prejudice. In this the court most clearly erred. A witness may be asked, in cross-examination, for the purpose of contradicting him, whether he has not had a controversy with the party against whom he is called, and threatened to be revenged on him. (*Atwood v. Welton*, 7 *Conn. Rep.* 66, 67.) The witness' state of mind and interest in respect to the party are always pertinent inquiries, for they go to his credit. (16 *Mass. Rep.* 185. *Swift's Ev.* 148. 1 *Starkie's Ev.* 135.) Personal controversy with the party may always be shewn, though the particulars shall not be inquired into. (*Swift's Ev.* 148.) The witness in this case does

not state any particular act that he has done, or any expression that he has made in reference to the accused, from which the jury might infer a bias or prejudice against him, but he has said in broad terms that he is prejudiced against him. The question submitted to the witness which led to the answer that he was prejudiced, if submitted at all, was clearly illegal, as was the answer, and would have been overruled by the court in case that objection had been interposed in proper time. The witness could have been interrogated as to any particular acts or expressions in reference to the accused from which the jury might have inferred unfriendly feeling or prejudice, but it was clearly illegal to have proposed the question in general terms as the answer did not involve a mere matter of fact, but a matter of legal inference to be drawn by the jury from a certain fact or facts. A witness may be asked whether, in consequence of his having been charged with robbing the prisoner, he has not said that he would be revenged upon him, and in case of denial he may be contradicted. In such a case, the inquiry is not collateral, but most important in order to show the motives and temper of the witness in the particular transaction. A long and tedious detail by the witness of the numerous charges which he has heard against the accused, could not aid the jury in the least possible degree in their deliberations, as they could not thereby ascertain the extent of his prejudice, and consequently could not determine how far such charges should be permitted to go to throw discredit upon his testimony. This is the only possible use that they could have of a knowledge of such charges, and to what extent they could affect the mind of the witness it could not be within their power or province to decide. The consequences of the opposite doctrine would at once demonstrate its utter futility and absurdity. The question for the jury to determine is not what it is that constitutes the basis or foundation of the feeling or prejudice that may be entertained by the witness towards the accused, but on the contrary it is as to the existence of such prejudice, and that too to be derived as a matter of legal inference from particular acts or expressions of the witness. An answer of a witness that

he is prejudiced against a party might prove much or even nothing at all, depending entirely upon the peculiar notions of the jury and the force and effect that they might put upon such expression. And it must be admitted that if the general question and answer should be conceded to be admissable, it would necessarily follow that the witness upon re-examination might be permitted to go through a long and elaborate detail of the grounds of his prejudice, in order that the State might have an opportunity of showing that no such grounds existed in fact; and that, therefore, he was necessarily free from all bias or prejudice, or, in some instances, that, in consequence of the witness' ignorance of the force and meaning of language, he really did not mean to convey the idea that his expressions would ordinarily import. The effect of such a procedure would be to do indirectly that which the law will not permit to be done directly. When a party is put upon his trial for a particular offence, it is not permitted to the State to show that he has been guilty, or suspected of having been guilty of divers others, unless he shall first throw the gauntlet. In this case, the defendant had not thrown himself upon his general character, and the effect of the re-examination was to disclose his general character and that too by particular acts. We are satisfied therefore that the court erred in overruling the objection of the defendant and permitting the witness to state the specific grounds of his prejudice. The court, it is true, after the witness declared the grounds of his prejudice, informed the jury that the statement was not evidence in the case further than to enable them to determine whether the prejudice of the witness was proper or not. The exclusion of the statement altogether, for every purpose, would not have relieved the defendant from its previous effects upon the minds of the jury. The defendant made his objection at the earliest moment in his power, and it was his right to prevent all irrelevant and illegal matter from going to the ears of the jury, and thereby to insure a fair and impartial trial. The court therefore, in permitting the witness to state illegal matter to the jury, against the objection of the defendant, clearly compromitted his rights and consequently erred.

The next ground of objection is, that the court excluded the declarations of the defendant, which, it is contended, constituted a part of the *resgestæ*. The defendant offered to prove, by a Mrs. Seymore, "that, on the night the cow in question was killed, after the cattle of the defendant were turned into the pen, and before the family and others at his house went to bed, he, the defendant, declared openly before his family and in the presence of visitors, that he was going to kill the cow in question, before day and take her to Benton to market, and declared at the same time that he had received a message from Clift, the owner of the cow, which authorized him to kill the cow, and pay for her; that the declarations were made to some three or four grown white persons who were at his house at the time, as well as directions given to the negroes in reference to the matter." This the court excluded from the jury. The defendant then proposed to prove, by the same witness, that a short time before the cow was killed, she heard Marion Williams, who at the time was living with the defendant, tell the defendant that he had been down to Clift's, the owner of the cow, and that he, Clift, told him to tell the defendant that the cow in question had been running about his, defendant's, place, the winter before, and that if she returned he was at liberty to kill her and pay him two cents a pound for her, and that, after receiving said message, the defendant openly declared his intention of killing the cow. This the court also excluded. The defendant then showed that Marion Williams had been subpenæd, that the cause had been twice continued on account of his absence amongst other witnesses; that he lived twelve or fourteen miles from the court house in Hot Spring county, and that at the commencement of the court he was said to have been very sick, and upon this showing the defendant again offered to prove by the same witness that she heard Williams deliver the message aforesaid to the defendant, but the court still refused to permit her to testify to the delivery of the message. The defendant excepted to the decision of the court in thus excluding the evidence offered by him, and saved the several points by a bill of exceptions in the usual form. The ques-

tion now to be determined is, whether the matter proposed to be thus introduced to the jury, was mere hearsay, or such matter as constituted a part of the *res gestæ*. Evidence of facts with which the witness is not acquainted of his own knowledge, but which he merely states from the relation of others, is inadmissible upon two grounds: First, that the party originally stating the facts does not make the statement under the sanctity of an oath; and secondly, that the party against whom the evidence is offered, would lose the opportunity of examining into the means of knowledge of the party making the statement. Where, however, the particular circumstances of the case are such as to afford a presumption that the hearsay evidence is true, it is then admissible. Where the enquiry is into the nature and character of a certain transaction, not only what was done, but also what was said by both parties during the continuance of the transaction, is admissible: for, to exclude this would be to exclude the most important and exceptionable evidence. In this case it is not the relation of third persons unconnected with the fact, which is received, but the declarations of the parties to the facts themselves or others connected with them in the transaction which are admitted for the purpose of illustrating its peculiar character and circumstances. Where evidence of an act done by a party is admissible, his declarations made at the time having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself are also admissible as part of the *res gestæ*. (See *Sissions v. Little*, 9 *N. H.* 271.) There are some cases, in which the declarations of a prisoner are admitted in his favor, mainly upon the principle of being part of the *res gestæ;* as to account for his silence when that silence would operate against him. *U. S. v. Craig*, 4 *W. C. C. Rep.* 729. So, to explain and reconcile his conduct. *State v. Ridgely*, 2 *Har, & McHen.* 120. In the case of the *United States v. Craig*, WASHINGTON, J., who delivered the charge to the jury, stated that the materiality of his (the prisoner's) declarations to a witness, that he was going to Johnson's house for the purpose of obtaining bail for his brother-in-law, Gleeson, which, contrary to his

first impressions, he was now satisfied was proper evidence for the consideration of the jury, (1 *Stark. Ev.* 46, 47 and 48 and cases cited;) depended very much, if not entirely, upon the accordance of his subsequent conduct with these declarations. From that conduct the jury were to judge whether the prisoner was sincere in the avowal of his purpose in going or merely intended to serve a purpose and to provide testimony in his favor in case of need. If in the opinion of the jury the latter was intended, then the prisoner's declarations of the motive which took him to Johnson's ought to be entirely disregarded." The prisoner was found, in that case, by the officer and arrested at the house of a certain Bernard Johnson, and at the time of his arrest he was surrounded by circumstances of the most suspicions character, and in order to rebut the presumption arising from his situation he was permitted to introduce evidence of his own declarations previously made as to the motives that induced him to be at that place. These previous declarations were a part of the *res gestæ*, as they tended to explain the prisoner's motive for going to Johnson's. When the state of mind, sentiment or disposition of a person at a given period, become pertinent topics of inquiry, his declarations and conversations, being part of the *res gestæ*, may be resorted to. (See *Bartholemy v. The People*, 2 *Hill* 248.) It is laid down by Starkie, in his first volume at pages 46 and 47, that whenever the declaration or entry is in itself a fact and is part of the *res gestæ* the objection ceases. The distinction between a mere recital, which is not evidence, and a declaration or entry, which is to be considered as a fact in the transaction, and therefore is evidence, frequently occasions much discussion, although the test by which the admissibility is to be tried seems to be simple. If the declaration or entry has no tendency to illustrate the question, except as a mere abstract statement, detached from any particular fact in dispute and depending for its effect entirely on the credit of the person who makes it, it is not admissible in evidence: but if, on the contrary, any importance can be attached to it as a circumstance which is part of the transaction itself and deriving a degree of credit from

its connection with the circumstances, independently of any credit to be attached to the speaker or writer, then the declaration or entry is admissible in evidence. Hence it is, that when the nature of a particular act is questioned, a contemporary declaration by the party, who does the act, is evidence to explain it. Where, for instance, in cases of bankruptcy, the question is with what intent the party absented himself from his house, his declaration contemporary with the fact of departure is evidence to explain that intention. (See *Thompkins v. Saltmarsh*, 14 *Serg. & Rawle* 275.) In Lord George Gordon's case, it was held that the cry of the mob might be received in evidence as part of the transaction. 21*st Howell's St. Tr.* 542. In the case of *Digby v. Steadman and others*, where the question was, whether the defendants had delivered to Sir J. M. a gold watch which the plaintiff had sent to them to be repaired, and which he had directed them to deliver to Sir J. M.: a witness having sworn that he saw the watch delivered by one of the defendants to Sir J. M., an entry, made by one of the defendants in the usual course of business, of the delivery of the watch to Sir J. M., which entry the witness had seen soon after it was made, was allowed to be read in evidence in confirmation of the testimony of the witness. It is to be observed, in such cases, the declaration does not depend so much on the credit due to the party who makes it, as to its connection with the circumstances. In the case of the bankrupt, the declaration which he makes at the time of leaving his house, if his intention of so doing is founded not upon his character for veracity but on the presumption arising from experience, that where a man does an act his cotemporary declaration accords with his real intention, unless there be some reason for misrepresenting his real intention; its connection with the act gives the declaration greater importance than that which is due to a mere assertion of a fact by a stranger, or a declaration by the party himself at another time. Such evidence does not rest upon the credit due to the declarant, but might be admissible even although the declarant, in ordinary cases would not be believed upon his oath. (*See Pool v. Bridges*, 4 *Pick.* 378.)

In order to convict the defendant in the case at bar, two distinct facts were necessary to be found by the jury. First, that he took the cow; and secondly, that he did so take her with a felonious intent. Here he made declarations previously to, and almost in immediate connexion with the act of killing, calculated to explain itself and to reconcile itself with common honesty. The declarations were just such as the experience of every one, acquainted with human transactions, fully attests to be the natural and ordinary result of honest and upright intentions. The defendant was aware that the cow belonged to Clift, and he also knew that this fact was well known to his family, and those by whom he was surrounded. Therefore, it was natural that he, when he formed his design to kill her, and take her to market, in order to explain his conduct in so doing, and to avoid even a suspicion of having done wrong, to make known such determination in advance and proclaim the fact. This course, therefore, in thus declaring the fact openly, and without restraint, was perfectly natural and just, such an one as a man conscious of the entire honesty of his motive would pursue under like circumstances. This being true, the declarations of the defendant as to his intention or object in killing the cow, do not depend in the slightest degree upon the credit that might be awarded to him as a man, but solely and exclusively upon the presumption arising from experience, that his contemporary declarations accord with his real intentions. We are fully satisfied, therefore, that the declarations referred to, and which were excluded by the Court, cannot be regareded as mere hearsay evidence, technically so called, but on the contrary, they constitute facts in themselves as forming a part of the transaction under investigation, and as such were clearly admissible, and should have been placed before the jury for what they were worth as tending to elucidate or explain the conduct of the defendant.

The Court also erred in refusing permission to the witness, to testify in relation to the message which the defendant claimed to have received from the owner of the cow, and by which he insisted he was authorized to do what he had done. The rejection

of this testimony cannot be justified either upon the ground of hearsay, or upon that principle of the law which requires the best evidence of which the nature of the case is susceptible. The evidence itself was clearly competent as tending to negative a felonious intent, and the party who bore the message to the defendant would have been no better witness, than one who was present and heard it delivered, as it was wholly immaterial whether the message was true or false, in case the defendant acted in good faith, and under a belief that it was true. If the truth of the message had been involved, the aspect of the case might have been somewhat different; but when it is considered that the defendant was authorized to act upon it, whether true or false, it is obvious that the fact of its delivery was the only material matter, and that consequently, it could be proven by the person who was present and heard it delivered, as well as by him who actually bore and delivered it.

We think that the same doctrine which we have already held in relation to the defendant's declarations to his family, and others at his house, immediately preceding the act of killing, would clearly admit those which he made to Morris a short time before,, since they were made with direct reference to the transaction involved, and tend more or less to explain the nature of it, and to negative the idea of a felonious intent arising from its having been in the night time. After having proved by Morris that the defendant had engaged to bring him beef on a particular morning, he offered to prove by him, that he told him (witness) that he had no beef of his own, but that there was one at his house belonging to one of his neighbors, which he would kill and pay for, and that he had permission from the owner to do so. Here was a declaration made by the defendant the day before the cow was killed, and directly in reference to that matter, and thereby announcing his intention to kill the cow openly and without the least reserve. This, therefore, formed a fact in itself, which formed a part of the very transaction, and consequently, was competent to go to the jury, to weigh more or less according as it should accord with the subsequent conduct of the defendant

These declarations should have been received, not as testimony going to disprove a felonious intent in the killing of the cow, but merely as a fact to rebut such a presumption arising from silence and secrecy in the movements of the defendant.

The next objection relates to the admissibility of the evidence of Mrs. Whitley. She was introduced to show that her husband testified under a bias or prejudice against the defendant. This evidence was ruled out by the court. It is stated in *Roscoe's Cr. Ev.*, at *p.* 148, that "It is not in every case in which the husband or wife may be concerned, that the other is precluded from giving evidence. It was indeed in one case laid down as a rule, founded upon a principle of public policy, that a husband and wife are not permitted to give evidence which may tend to criminate each other. Per ASHURST, J., *R. v. Clinger*, 2 *T. R.* 268. But in a subsequent case, the court of King's Bench, after much argument, held that the rule, as above stated, was too large, and that where the evidence of the wife did not directly criminate the husband and never could be used against him, and where the judgment founded upon such evidence could not affect him, the evidence of the wife was admissible. *R. v. All Saints Worcester*, K. B. Easter Term, 1817. If the wife in this case had been introduced to contradict her husband under oath, a doubt might have arisen, as it would have been virtually to charge him with perjury, but such would not have been the effect in case she had been permitted to testify. He did not state positively whether he had ever threatend the ruin of the defendant or not, but simply that he did not recollect what he had said upon that subject. If therefore, she had sworn in the most positive and unequivocal terms, that she had heard him make the threat, it would not have contradicted him, and consequently would not have criminated him. We think therefore, that, under the state of case here presented, she might have been permitted to answer the question propounded by the counsel for the defendant.

The next and last ground of objection is, that the jury who sat upon the trial separated without leave of the court or consent of the parties. The High Court of Errors and Appeals of the State

of Mississippi, in the case of *McCann v. The State*, after referring to the authorities, said, "Thus some modern authorities can be found of instances where juries have separated without authority of court, or jurors have separated from their fellows, or persons have intruded upon juries in their retirement, in which the irregularity has been held not to impair the verdict. 1 *Dev. & Bat.* 500. 1 *Black.* 25. 12 *Pick.* 496. But these are mostly cases where evidence excluded the presumption that there was either influence, partiality, or undue excitement on the part of the jury —cases of a mere exposure to undue influence, but in which that exposure has been affirmatively shown to have produced no consequences of any kind. The effect of such an exposure, however, of which no explanation is given as to the extent of its influence, presents a subject of different consideration. Under such circumstances the jealousy with which the purity of verdicts is watched becomes immediately aroused, for the latest authorities hold, that if the irregularity has a tendency to affect the rights of the party, it is sufficient to warrant its being set aside. Such a conclusion may be legitimately deduced from the opinion in the case of the *Commonwealth v. Roby*, 12 *Pick.* Nor is this a new doctrine, for it was said by all the judges in Lord Delamere's case, 4 *Harg. St. T.* 232, that "an officer is sworn to keep the jury, without permitting them to separate, or any one to converse with them, for no man knows what may happen; although the law requires honest men should be returned upon juries and without a known objection, they are presumed to be *probi et legales homines*, yet they are weak men, and perhaps may be wrought upon by undue applications." The evil to be guarded against is improper influence, and when an exposure to such an influence is shown, and it is not shown that it failed of effect, then the presumption is against the purity of the verdict. In the case before us, one of the jurors, Silas McMurran, is shown to have been separated for a short time from his fellows, but as to him it is shown affirmatively that no improper or undue influence could have been exercised. It seems that others also were seen passing in the street, but it is not shown who they were, or that

any influence was exercised over them. It should at least have appeared who they were, as without that fact it would have been impossible for the State to have negatived the legal presumption of undue influence. This objection, therefore, was not well taken.

We are satisfied, from a full view of the whole case, that there are divers errors in the judgment of the Circuit Court, and that consequently the same ought to be, and is hereby reversed, annulled and set aside, and it is ordered that this cause be remanded to said Circuit Court, to be proceeded in according to law, and not inconsistent with this opinion.

WILLIAM E. WOODRUFF, PLAINTIFF IN ERROR v. FREDERIC W. TRAPNALL. (*a.*)

In 1836, the Legislature of Arkansas chartered a bank, the whole of the capital of which belonged to the State, and the president and directors of which were appointed by the General Assembly.

The twenty eighth section provided "that the bills and notes of said institution shall be received in all payments of debts due to the State of Arkansas."

In January, 1845, this twenty-eighth section was repealed.

The notes of the bank which were in circulation at the time of this repeal, were not affected by it.

The undertaking of the State to receive the notes of the bank constituted a contract between the State and the holders of these notes, which the State was not at liberty to break, although notes issued by the bank after the repeal were not within the contract, and might be refused by the State.

Therefore, a tender, made in 1847, of notes issued by the bank prior to the repealing law of 1845, was good to satisfy a judgment obtained against the debtor by the State; and it makes no difference whether or not the debtor had the notes in his possession at the time when the repealing act was passed.

NOTE (*a.*)—See *Woodruff v. Trapnall* 3 English Reports. 236.

THIS case was brought up, by writ of error, from the Supreme Court of the State of Arkansas.

On the 2d of November, 1836, the State of Arkansas passed an act to incorporate the Bank of the State of Arkansas. The capital was one million of dollars, which was raised by a sale of the bonds of the State, or by loans founded upon those bonds. The President and Directors were appointed by a joint vote of the General Assembly. All dividends upon the capital stock were declared to belong to the State, subject to the control and disposal of the legislature.

The twenty-eighth section was as follows, viz:—"That the bills and notes of said institution shall be received in all payments of debts due to the State of Arkansas." The other sections of the act were in the usual form of conferring general banking powers.

In 1836, William E. Woodruff was elected, by the General Assembly of Arkansas, Treasurer of the State, and on the 27th of October, 1836, executed a bond to James S. Conway, Governor of the State, in the penal sum of three hundred thousand dollars, conditioned for the faithful performance of his duties as treasurer. There were seven sureties, whose names it is not necessary to mention. The time for which Woodruff was to serve was two years, "and until his successor shall be elected and qualified." His term of office was thus from the 27th of October, 1836, to the 25th of December, 1838.

On the 23d of March, 1840, the State of Arkansas brought a suit upon this official bond against the principal and sureties in the Pulaski Circuit Court. The breach alleged was, that Woodruff had not paid over to his successor the sum of $2,395 18. It is not neceesary to trace the history of this suit; suffice it to say, that it eventuated in a judgment against Woodruff for $3,359 22 and costs.

On the 10th of January, 1845, the legislature passed an act relating to the revenue of the State, the nineteenth section of which provided that, "from and after the 4th of March, 1845, nothing shall be received in payment of taxes or revenue due the State, but par funds."

In the progress of the suit, Frederic W. Trapnall had become regularly substituted in place of the Attorney-General, to conduct the suit.

In 1847, Trapnall ordered an execution upon the judgment which the State had obtained against Woodruff, who, on the 24th of February, 1847, tendered and offered to pay to Trapnall the sum of $3,755 in the notes issued by the Bank of the State of Arkansas, which Trapnall refused to receive.

On the 25th of February, 1847, Woodruff filed a petition in the Supreme Court of the State, praying for an alternative writ of mandamus, commanding Trapnall to "receive and accept, in payment of the judgment, the notes of the Bank, or to show cause why he shall refuse to do so." The writ was issued accordingly.

To this writ the following answer was filed:

"The answer of Frederic W. Trapnall, attorney for the State *pro tem.*, to an alternative mandamus hereto annexed, issued by the Supreme Court on the petition of William E. Woodruff.

"This respondent admits the judgment and tender as set out in said petition, but alleges that he was not authorized to receive the said Arkansas State Bank notes; because the twenty-eighth section of the bank charter, under which alone the said Woodruff could claim a right to satisfy the said judgment, was repealed by an act of the legislature of the State of Arkansas, approved January 10, 1845, and entitled, "An Act making appropriations for the years 1845, 1846, and a part of the year 1844, and for balances due from the State, and for other purposes," and by the nineteenth section of said act.

"And this respondent submits to the court, if the repeal of the said section does not deprive him of all authority to receive the said bank notes from the said Woodruff in satisfaction of the said judgment in favor of the State of Arkansas against him and others. Respectfully,

"FREDERIC W. TRAPNALL."

To this answer, Woodruff demurred, and there was a joinder in demurrer.

Before the argument, the following agreement was filed by the counsel of the respective parties:

"Be it remembered, that the following matters are agreed upon by the counsel for the petitioner and respondent in this cause, to the end that the same may be filed and become a part of the record herein.

"1st. The record and proceedings in the case of William E. Woodruff, and the said persons named in said petition as his securities, against the State of Arkansas, upon the first and second writs of error remaining in this court, and which are referred to in said petition, shall form a part thereof by such reference, as fully as though the same were incorporated therein at full length.

"2d. That said respondent, as attorney of record for said State in the suit aforesaid, is the proper officer by law to receive and acknowledge satisfaction of said judgment.

"3d. That the notes of the Bank of the State of Arkansas, referred to in said petition and response, and tendered in this case, were issued by said bank, pursuant to the charter thereof, prior to the year 1840.

"4th. That after the creation of said bank, down to the year 1845, the notes of said bank were received and paid out by said State in discharge of all public dues to and from said State.

"5th. That said bank continues to exist, with all its corporate functions, and that in the consideration of this case all the acts of the General Assembly of said State, affecting said bank, shall be deemed to be public laws, as they have been heretofore decided by this court to be, and whereof this court will judicially take notice; but to the end thereof, and for greater certainty, the act of said General Assembly, entitled 'An act to incoroporate the Bank of the State of Arkansas,' approved November 2d, 1836, is here inserted at full length, and made part of the record in this cause, and which act of incorporation is in the words following." (Then followed the charter of the bank *in extenso*.)

One of the grounds of the demurrer was the following:—

"1st. That the nineteenth section of said act, entitled 'An Act

making appropriations for the years 1845, 1846, and part of the year 1844, and for balances due from the State, and for other purposes,' approved January 10th, 1845, is a law impairing the obligation of contracts, and is repugnant to the Constitution of this State and of the United States, and therefore void."

On the 28th of July, 1847, the Supreme Court of Arkansas overruled the demurrer, and on the 30th of July, Woodruff sued out a writ of error to bring the case up to this court.

It was argued by *Mr. Lawrence* and *Mr. Reverdy Johnson*, for the plaintiff in error, and by *Mr. Sebastian*, for the defendant.

Mr. Justice McLEAN delivered the opinion of the Court.

This case is before us on a writ of error to the Supreme Court of Arkansas.

An action was brought by the State of Arkansas in the Pulaski Circuit Court, against the plaintiff in error, and his sureties, Chester Ashley and others, upon his official bond as late Treasurer of State, for the recovery of a certain sum of money alleged to have been received by him, as treasurer, between the 27th day of October, 1836, and the 26th day of December, 1838. And a judgment was recovered against him and his securities, on the 13th of June, 1845, for $3,359 22 and costs. An execution having been issued on the judgment, on the 24th of February, 1847, the plaintiff tendered to the defendant in error, who prosecuted the suit as Attorney General, the full amount of the judgment, interest, and costs, in the notes of the Bank of the State of Arkansas, which were refused.

The above facts being stated in a petition to the Supreme Court of Arkansas on the 25th of February, 1847, an alternative mandamus was issued to Trapnall, the defendant in error, to receive the bank notes in satisfaction of the judgment, or show cause why he shall refuse to do so.

On the return of the mandamus, the defendant admitted the judgment and tender of the notes; but alleged that he was not authorized to receive them in satisfaction of the judgment, because the twenty-eighth section of the bank charter, under which

alone the plaintiff could claim a right so to satisfy the judgment, was repealed by an act of the Legislature, approved January 10th, 1845.

It was agreed by the parties, that the record of the judgment should be made a part of the proceeding; that the defendant was the proper officer by law to receive satisfaction of the judgment; that the notes tendered were issued by the bank prior to the year 1840, and that down to the year 1845 the notes of the bank were received and paid out by the State, in discharge of all public dues; that the bank continues to exist with all its corporate functions.

The court were of opinion, that the return of the defendant showed a sufficient cause for a refusal to obey the mandate of the writ, and gave judgment accordingly.

The twenty-eighth section of the bank charter, which was repealed by the act of 1845, provided "that the bills and notes of said institution shall be received in all payments of debts due to the State of Arkansas." And the question raised for consideration and decision is, whether the repeal of this section brings the case within the Constitution of the United States, which prohibits a State from impairing the obligations of a contract.

The bank charter was passed on the 2d of November, 1836, "with a capital of one million of dollars, to be raised by a sale of the bonds of the State, loans, or negotiations, together with such other funds as may now or hereafter belong to, or be placed under the control and direction of, the State;" the principal bank to be located at the city of Little Rock, and its concerns to be conducted by a president and twelve directors, to be appointed by a joint vote of the General Assembly. Branches were required to be established, the presidents and directors whereof were to be elected in the same manner.

The president and directors were to have a common seal, were authorized to deal in bullion, gold, silver, &c., purchase real property, erect buildings, &c., issue notes, make loans at eight per cent. on endorsed paper, or on mortgages, within the State; a general board was constituted, who were to make report of the condition of the bank annually, to the legislature, and perform

other duties; and any debtor to the bank, "as maker or indorser of any note, bill or bond, expressly made negotiable and payable at the bank, who delays payment," should have a judgment entered against him on a notice of thirty days.

Some doubt has been suggested, whether the notes of this bank were not bills of credit within the prohibition of the Constitution.

We think they cannot be so held, consistently with the view taken by this court in the case of *Biscoe v. The Bank of the Commonwealth of Kentucky*, 11 *Peters* 311. It was there said, that, "to constitute a bill of credit within the Constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State, and is so received and used in the ordinary business of life.

The bills of this bank are not made payable by the State. A capital is provided for their redemption, and the general management of the bank, under the charter is committed to the president and directors, as in ordinary banking associations. They may in a summary manner obtain judgments against their debtors. And although the directors are not expressly made liable to be sued, yet it is not doubted they may be held legally responsible for an abuse of the trust confided to them.

The entire stock of the bank is owned by the State. It furnished the capital and receives the profits. And in addition to the credit given to the notes of the bank by the capital provided, the State declares in the charter, they shall be received in all payments of debts due to it. Is this a contract? A contract is defined to be an agreement between competent persons, to do or not to do a certain thing. The undertaking on the part of the State is, to receive the notes of the bank in payment from its debtors. This comes within the definition of a contract. It is a contract founded upon a good and valuable consideration; a consideration beneficial to the State, as its profits are increased by sustaining the credit, and consequently extending the circulation, of the paper of the bank.

With whom was this contract made? We answer, with the

holders of the paper of the bank. The notes are made payable to bearer; consequently every *bona-fide* holder has a right, under the twenty-eighth section, to pay to the State any debt he may owe it, in the paper of the bank. It is a continuing guaranty by the State, that the notes shall be so received. Such a contract would be binding on an individual, and it is not less so on a State.

That the State had the right to repeal the above section, may be admitted. And the emissions of the bank subsequently are without the guaranty. But the notes in circulation at the time of the repeal are not affected by it. The holder may still claim the right, by the force of the contract, to discharge any debt he may owe to the State in the notes thus issued.

It is argued that there could have been violated or impaired no contract with the plaintiff in error, as it does not appear he had the notes tendered by him in his possession at the time the twenty-eighth section was repealed.

It is admitted that he had the notes in his possession at the time he made the tender, and that they were issued by the bank before the repeal of the section; and nothing more than this could be required.

The guaranty of the State, that the notes of the bank should be received in discharge of public dues, embraced all the bills issued by it; the repeal of the guaranty was intended, no doubt, to exclude all the notes of the bank then in circulation. Until the repeal of the twenty-eighth section, the State continued to receive and pay out these notes. Up to that time, no one doubted the obligation of the State to receive them. The law was absolute and imperative on the officers of the State. The holder of the paper claimed the benefit of this obligation, and it is supposed his right could never have been questioned. The notes were payable to bearer, and the bearer was the only person who had a right to demand payment of the bank, or to pay them into the State treasury in discharge of a debt. The guaranty included all the notes of the bank in circulation as clearly as if on the face of every note the words had been engraved, "This note shall be received by the State in paymeny of debts." And that the legis-

lature could not withdraw this obligation from the notes in circulation at the time the guaranty was repealed, is a position which can require no argument. Any one had a right to receive them, and to test the constitutionality of the repeal.

Suppose a State legislature should pass a law authorizing the drawers of promisory notes, payable to bearer, to discharge the same by the payment of produce. Would such a law affect the rights of the bearer? The contract would stand, and the law would be declared void. A standing guaranty by a mercantile house, to receive in payment of its debts all notes drawn by a certain other house, is valid, on the ground that the notes were taken on the credit of such guaranty. It may be terminated by a notice; but when so terminated, are not all the notes good against the guarantors, which were executed and circulated prior to the notice? Who could commend the justice of guarantors, who should endeavor to avoid responsibility, on so clear a principle? *Louisville Man. Co. v. Welch, post*, 461.

A State can no more impair, by legislation, the obligation of its own contracts, than it can impair the obligation of the contrcts of individuals. We naturally look to the action of a sovereign State, to be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals. The obligation of the State of Arkansas to receive the notes of the bank, in payment of its debts, is much stronger than in the above case of individual guaranty.

The bank belonged to the State, and it realized the profits of its operations. It was conducted by the agents of the State, under the supervision of the legislature. By the guaranty, the notes of the bank, for the payment of debts to the State, were equal to gold and silver. This, to some extent, sustained their credit, and gave them currency. Loans were made by the Bank on satisfactory security. The debts of the bank, or a large proportion of them, may fairly be presumed to have been collected. But the means of the bank, thus under the control of the State, became exhausted. Whether this was the result of withdrawing the capital from the bank, by the State, does not appear upon

the record. We only know the fact, that its funds have disappeared, leaving, it is said, a large amount of its paper, issued before the repeal of the guaranty, worthless, in the hands of the citizens of the State.

The obligation of the State to receive these notes is denied, on the ground that the twenty-eighth section was a general provision, liable to be repealed, at any time, by the legislature. And it is compared to a general provision to receive, for public dues, the paper of banks generally, unconnected with the State. There is no analogy in the two cases. One is a question of public policy, influenced by considerations of general convenience, which every one knows may be changed at the discretion of the legisture. But the other arises out of a contract incorporated into the charter, imposing an obligation on the State to receive, in payment of all debts due to it, the paper of a bank owned by the State, and whose notes are circulated for its benefit. The power of the legislature to repeal the section, the stock of the bank being owned by the State, is not controverted; but that act cannot affect the notes in circulation at the time of the repeal.

It is objected, that this view trenches upon the sovereignty of the State, in the exercise of its taxing power and in the regulation of its currency. We are not aware that a State has power over the currency further than the right to establish banks, to regulate or prohibit the circulation, within the State, of foreign notes, and to determine in what the public dues shall be paid.

It is a principle controverted by no one, that, on general questions of policy, one legislature cannot bind those which shall succeed it; but it is equally true and undoubted, that a legislature may make a contract which shall bind those that shall come after it.

The notes of the bank in circulation at the repeal of the twenty-eighth section, if made receivable by the Sate in discharge of public dues, may so far resuscitate them, as that, in the course of time, they will find their way into the treasury of the State, where in justice and by contract they belong. It is presumed

there will be no complaint, as there will be no ground for any, by the citizens of the State, if these notes, now dead and worthless, should be so far revived as to reach their appropriate destination. And if, as a consequence, some increase of taxation should be required by the State, it will be nothing more than is common to all other States that perform their contracts. It would be a most unwise policy for a State to improve its currency through a violation of its contracts. In such a course, the loss of the State would be incomparably greater than its gain. Any argument in commendatinn of such an action by a State cannot be otherwise considered than as exceedingly infelicitous and unjust.

If these notes be receivable in payment of public dues by the State, having been in circulation at the time of the repeal of the above section, as we think they clearly are, no doubt can exist as to the sufficiency of the tender. The law of tender which avoids future interests and costs, has no application in this case. The right to make payment to the State in this paper arises out of a continuing contract, which is limited in time by circulation of the notes to be received. They may be offered in payment of debts due to the State, in its own right, before or after judgment, and without regard to the cause of indebtedness.

Whatever may be the demerits of the plaintiff in error, they do not affect the nature and extent of the obligation of the State. And that obligation cannot be withdrawn from this paper. Into whosoever hands it shall come, it carries with it the pledge of the State to receive it in payment of its debts. In this case the payment is made by the securities of Woodruff, and exacted by the State, to whose organization and management of the bank may be attributed its insolvency. In procuring the notes of the bank, these securities had a right to rely, and no doubt did rely, upon the guaranty of the State to receive them in payment of debts.

In sustaining the application for a mandamus, the Supreme Court of the State exercised jurisdiction in the case. To that court exclusively belongs the question of its own jurisdiction.

For the reasons stated, the judgment of the Supreme Court is reversed, and the cause is remanded for further proceedings to that court, as it may have jurisdiction, in conformity to the opinion of this court.

Mr. Justice CATRON, Mr. Justice DANIEL, Mr. Justice NELSON, and Mr. Justice GRIER, dissented.

Taken from 10 Howard's U. S. Sup. C. R. 190.

PILLOW v. ROBERTS. (a.)

12 822 / 73 353
12 822 / 71 393
12 822 / 81 261

Where a deed, executed in Wisconsin, and attested by the seal of the court, stamped upon the paper, instead of wax or a wafer, was offered in evidence upon a trial in Arkansas, it was properly received.

Where a deed from the sheriff, for land sold at a tax sale, recited an assessment for taxes which remained unpaid; the advertisement of the land, and offering it for sale; its being struck down to the highest bidder, who paid the purchase money and received a certificate; this deed ought to have been received in evidence. The law of Arkansas says, that the deed shall be evidence of the regularity and legality of the sale.

But, even if this deed had been insufficient as a proof title, it ought to have been received in connection with prooof of possession, to establish a defence under the statute of limitations.

Possession under this deed would have been sufficient proof for adverse possession.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Arkansas.

The circumstances of the case, and the points of law upon which it came up to this court, are fully stated in its opinion.

It was argued by Mr. LAWRENCE and Mr. PIKE, for the plaintiff in error, and Mr. CRITTENDEN, for the defendant in error.

NOTE—(a.) This case is taken from 13 How. U. S. Sup. C. R., 472, and is published for the convenience of the bar.—REPORTER.

Mr. Justice GRIER delivered the opinion of the Court.

Roberts, the defendant in error, was plaintiff below, in an action of ejectment for 160 acres of land. Pillow, the defendant below, pleaded the general issue, and two special pleas: The first, setting forth a sale of the land in dispute, for taxes more than five years before suit brought: The second, pleading the statute of limitation of ten years. These pleas were overruled on special demurrer, as informal and insufficient; and the judgment of the court on this subject is here alleged as error. But as the same matters of defence were afterwards offered to be laid before the jury on the trial of the general issue and overruled by the court, it will be unnecessary to further notice the pleas; as the defence set up by them, if valid and legal, should have been received and submitted to the jury on the trial. In the action of ejectment, (with the exception, perhaps, of a plea to the jurisdiction,) any and every defence to the plaintiff's recovery may be given in evidence under the general issue. And as the decision of the court on the bills of exception will reach every question appertaining to the merits of the case, it will be unnecessary to decide whether those merits were sufficiently set forth in the special pleas, to which the defendant was not bound to resort for the purpose of having the benefit of his defence.

On the trial, the plaintiff below gave in evidence a patent for the land in dispute, from the United States to Zimri V. Henry, dated 7th May, 1835; and then offered a deed from said Henry to himself, dated 10th November, 1849. This deed purported to be acknowledged before the Clerk of the Circuit Court of Walworth county, in the State of Wisconsin, and was objected to, 1st. Because there was no proof of the identity of the grantor with the patentee other than the certificate contained in the acknowledgment. 2dly. Because the certificate of acknowledgment was not on the same piece of paper that contained the deed, but on a paper attached to it by wafers. And 3dly. Because the seal of the Circuit Court authenticating the acknow-

ledgment was an impression stamped on paper, and not "on wax, wafer, or any other adhesive or tenacious substance."

The first two of these grounds of objection have not been urged in this court, and very properly abandoned as untenable. The third has been insisted on, and deserves some more attention. Formerly, wax was the most convenient, and the only material used to receive and retain the impression of a seal. Hence it was said: "*Sigillum est cera impressa; quia cera, sine impressione, non est sigillum.*" But this is not an allegation, that an impression without wax is not a seal. And for this reason, courts have held, that an impression made on wafers or other adhesive substance capable of receiving an impression, will come within the definition of "*cera impressa.*" If, then, wax be construed to be merely a general term including within it any substance capable of receiving and retaining the impression of a seal, we cannot perceive why paper, if it have that capacity, should not as well be included in the category. The simple and powerful machine, now used to impress public seals, does not require any soft or adhesive substance to receive or retain their impression. The impression made by such a power on paper is as well defined, as durable, and less likely to be destroyed or defaced by vermin, accident, or intention, than that made on wax. It is the seal which authenticates, and not the substance on which it is impressed; and where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it. In Arkansas, the presence of wax is not necessary to give validity to a seal; and the fact that the public officer in Wisconsin had not thought proper to use it, was sufficient to raise the presumption that such was the law or custom in Wisconsin, till the contrary was proved. It is time that such objections to the validity of seals should cease. The court did not err, therefore, in overruling the objections to the deed offered by the plaintiff.

After the plaintiff had closed his testimony, the defendant offered in evidence two certain deeds from Miller Irwin, sheriff

of Phillips county, and assessor and collector of taxes therein, to Richard Davidson, dated on the 22d of October, 1841; one for the north-half, and the other for the south-half of the quarter section of land now in dispute. On objection, the court refused to permit these deeds to be received, and sealed a bill of exceptions. The defendant then offered the same deeds to Davidson, and in connection therewith, a deed from Davidson to Armstrong, and also a deed from Armstrong to the defendant; and to accompany them with proof of possession by himself and those under whom he claims, for more than ten years, as to the south-half of said land, and more than five years as to the whole of it. The plaintiff objected to this evidence. "And it was by the court ruled, that the possession of such deeds, accompanied by possession of the land, was not sufficient to prove such possession of the land to be adverse to the plaintiff and his grantor without further proof that the defendant or his grantors claimed adversely; so the Court refused to permit any deeds to be read in evidence to the jury."

These bills of exception may be considered together. They present two questions, 1st. Whether by the law of Arkansas, the deeds offered in evidence (and which were regularly acknowledged and recorded according to law) should have been permitted to go to the jury as evidence of a regular sale of the land mentioned therein for taxes. And 2dly. Whether, without regard to their validity as elements of a good legal title *per se*, they should not have been received for the purpose of showing color of title, in connection with possession by the persons claiming under them, for a length of time sufficient by law to bar the entry of plaintiff.

I. In considering these questions, it will not be necessary to set forth at length all the provisions of the revenue laws of Arkansas for compelling the payment of taxes assessed on land. A brief recapitulation of their most prominent provisions will suffice. The laws make it the duty of the collector, on or before the 15th of September of each year, to make a list of lands assessed to persons non-resident, and the tax due thereon, with a

penalty or addition of 25 per cent., and to file this list with the county clerk. He is directed, also, to set up a copy of the same at the court-house, and to publish it in a newspaper at least four weeks before the first Monday of November, giving notice that unless the taxes shall be paid on or before that day, the land will be sold. On that day, the collector is authorized to offer for sale, at public auction, such tracts or lots of land or so much of them as will be sufficient to raise the taxes and penalty assessed and unpaid, and to continue the sales from day to day. The purchaser to pay down forthwith the amount of taxes, &c., and receive a certificate describing the land purchased, directing, if necessary, the public surveyor to lay off the part purchased by metes and bounds after one year allowed for redemption. This certificate, which is made assignable, may be presented to the collector, who is authorized to execute and deliver a deed to the holder of it for the land described therein. Then follows the 96th section of the act, which is as follows:

"The deed so made by the collector shall be acknowledged and recorded as other conveyances of lands, and shall vest in the grantee, his heirs, or assigns, a good and valid title both in law and equity, and shall be received in evidence in all courts of this State as a good and valid title in such grantee, his heirs, or assigns, and shall be evidence of the regularity and legality of the sale of such lands."

The deeds offered in evidence were regularly acknowledged and recorded. It is not denied that Irwin, the grantor therein, was sheriff, assessor, and collector, of taxes in the county of Phillips, as he is described in the deed. The deed for the south-half recites an assesment for the same for taxes in 1839, according to law; that the taxes remained unpaid; that the land was regularly advertised and offered for sale on the 5th of November, 1839, by auction; struck down to William Vales, who paid the purchase-money and received a certificate; that the time for redemption having long expired, and Richard Davidson become the assignee or holder of the certificate; therefore the said col-

lector granted, &c., the said south-half to said Davidson, his heirs, &c.

The deed for the north-half has similar recitals, showing a tax assessed in 1840, a sale in 1841, to John Powell, and a certificate transferred by him to Davidson.

These deeds come within the description of the 96th section. They are made by a collector of the revenue; they are acknowledged and recorded according to law; they purport to be for land assessed for taxes, and regularly sold according to law; and the law enacts that deeds, so made, shall be evidence not only of the grant by the collector, but of the regularity and legality of the sale of the land described therein.

It is easy, by very ingenuous and astute construction, to evade the force of almost any statute, where a court is so disposed. We might say that the expression, "deeds *so made* by the collector," mean deeds made strictly according to the requirements of all the preceding sections of the revenus law, and decide that only deeds first proved to be completely regular and legal can be received in evidence; and thus, by qualifying the whole section by such an enlarged construction of these two words, and disregarding all the others, evade the obvious meaning and intention of the law. For if you must first prove the sale to be regular and legal before the deed can be received, what becomes of the provision that the deed itself shall be evidence of these facts? Such a construction annuls this provision of the law, and renders it superfluous and useless. The evil plainly intended to be remedied by this section of the act, was the extreme difficulty and almost impossibility of proving that all the very numerous directions of the revenue act, were fully complied with, antecedent to the sale and conveyance by the collector. Experience had shown, that where such conditions were enforced, a purchaser at tax-sales, who had paid his money to the government, and expended his labor on the faith of such titles in improving the land, usually became the victim of his own credulity, and was evicted by the recusant owner or some shrewd speculator. The power of the legislature to make a deed of a public officer

prima facie evidence of the regularity of the previous proceedings, cannot be doubted. And the owner who neglects or refuses to pay his taxes or redeem his land, has no right to complain of its injustice. If he has paid his taxes, or redeemed his land, he is, no doubt, at liberty to prove it, and thus annul the sale. If he has not, he has no right to complain if he suffers the legal consequences of his own neglect.

The plain and obvious intention of the legislature is clearly expressed in this 96th section, that the deed made by a collector of taxes, as authorized in the preceding section, when acknowledged and recorded, should be received in evidence as a good and valid title, and that the recitals of the deed showing that it was made in pursuance of a sale for taxes, should be evidence of the regularity and legality of the sale under and by virtue of that act. The deed being thus made, *per se*, *prima facie* evidence of a legal sale and a good title, the court were bound to receive it as such. There is nothing on the face of these deeds showing them to be irregular or void. They are each for a different portion of the tract or quarter section of land, having known boundaries, according to the plan of the public surveys; one being for the south-half and the other for the north-half of the quarter section, it required no surveyor to ascertain their respective figure, boundaries, or location.

II. But assuming these deeds to be irregular and worthless, the court erred in refusing to receive them in evidence, in connection with proof of possession in order to establish a defence under the statutes of limitation.

The first section of the act of limitations of Arkansas bars the entry of the owner after ten years. And the thirty-fifth section enacts that "all actions against the purchaser, his heirs, or assigns, for the recovery of lands sold by any collector of the judicial sales, shall be brought within five years after the date of such sales, and not after."

Statutes of limitation are founded on sound policy. They are statutes of repose, and should not be evaded by a forced construction. The possession which is protected by them must be

adverse and hostile to that of the true owner. It is not necessary that he who claims their protection should have a good title, or any title but possession. A wrongful possession, obtained by a forcible ouster of the lawful owner, will amount to a disseisin, and the statute will protect the disseizor. One who enters upon a vacant possession, claiming for himself upon any pretence or color of title, is equally protected with the forcible disseizor. Statutes of limitation would be of little use if they protected those only who could otherwise show an indefeasible title to the land. Hence, color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and of course, adversely to all the world. A person in possession of land, clearing, improving, and building on it, and receiving the profits to his own use, under a claim of title, is not bound to show a forcible ouster of the true owner in order to evade the presumption that his possession is not hostile or adverse to him. Color of title is received in evidence for the purpose of showing the possession to be adverse; and it is difficult to apprehend, why evidence offered and competent to prove that fact, should be rejected till the fact is otherwise proven.

With regard to the five years limitation, we need not inquire whether the legislature intended that the action should be barred, where the purchaser at the tax-sale was not in possession. In this case, possession of more than five years by the purchaser from the collector and those claiming under him, was proved. In order to entitle the defendant to set up the bar of this statute, after five years adverse possession, he had only to show that he and those under whom he claimed, held under a deed from a collector of the revenue, of lands sold for the non-payment of taxes. He was not bound to show that all the requisitions of the law had been complied with in order to make the deed a valid and indefeasible conveyance of the title. If the Court should require such proof, before a defendant should have the benefit of this law, it would require him to show that he had no need of the protection of the Statute, before he could be entitled

to it. Such a construction would annul the act altogether, which was evidently intended to save the defendant from the difficulty, after such a length of time, of showing the validity of his tax-title. The case of *Moore v. Brown*, 11 *How.* 424, had reference to a deed void on its face, and the consequence of this fact, under the peculiar statutes of Illinois; it furnishes no authority for the decision of the court below in the present case.

The judgment of the Circuit Court is therefore reversed, and a *venire de novo* ordered.

INDEX.

ABATEMENT.

1. A plea in abatement of former suit pending in the same court, must, under our statute, be verified by affidavit, as the truth of the allegation that the cause of action and the parties were the same in both suits could not appear of record; though similarity in amount, date, &c., and in names might raise a strong presumption of the truth of such allegation. *White v. Yell*, 139.
2. In a criminal case, after plea of not guilty, and verdict, defendant cannot interpose the objection that the grand jury by whom the indictment was found was composed of a greater number than that prescribed by law: the objection should be reached by plea in abatement. Such objection, however, does not exist, in point of fact, in this case. *Shropshire v. The State*, 190.
3. A plea of former suit pending, is a plea in abatement. *Moss v. Ashbrooks et al.*, 369.
4. Pleas in abatement should be framed with the greatest accuracy and precision. They should be certain to every intent; without any repugnancy, and direct and positive in their allegations, and not argumentative. *Ib.*
5. A plea to a bill in Chancery that a former bill had been brought for the same matters, a demurrer sustained thereto, an appeal to the Supreme Court prayed and granted, by which the jurisdiction of the case was transferred to the Supreme Court where the matters arising upon the bill had not been adjudicated or determined, is not a good plea of former suit pending. The plea should allege specifically that the appeal had been regularly certified to the Supreme Court, and was still therein pending. *Ib.*
6. To constitute a decree in Chancery, dismissing the cause, a bar to a subsequent bill for the same matter, between the same parties, there should be a decision upon the merits. *Ib.*
7. In this case a demurrer was sustained to the first bill, and complainant declining to amend, the bill was dismissed: HELD, that such a decree could not be pleaded as a bar to a second bill for the same matter. *Ib.*
8. A disqualification of a grand juror is good cause for challenge before an idictment is found; or a plea in abatement before the trial; but it is too late to make such objection after verdict. *Fenalty v. The State*, 630.

ACCORD AND SATISFACTION.

1. A sealed executory contract cannot be released or rescinded by a parol executory contract; but after breach of a sealed contract, a right of action may be waived or released by a new parol contract in relation to the same subject matter, or by any valid parol executed contract. *Levy v. Very*, 148.
2. To constitute a new contract, a valid accord and satisfaction of a previous one, it must be based upon some consideration—some inducement to the creditor, to accept it: for example, the shortening of the time of payment. *Ib.*
3. Where a covenant had several years to run before maturing, and the debtor, by agreement with the creditor, made a part payment in jewelry, and contracted to pay the balance of the debt in the same way within a year: HELD, That the part payment down, and the shortening of the time for the payment of the remainder of the debt, constituted such consideration as made the new contract a valid accord and satisfaction of the original covenant. *Ib.*
4. But to a bond, accord and satisfaction can be pleaded by deed only, for an obligation under seal cannot be discharged but by an instrument of as high a nature as the obligation itself. *Ib.*

ACTION.

1. A person selling goods simply as agent or clerk for the owner, cannot bring an action in his own name for the price. *Hearshy et al v. Hichox*, 125.
2. The general rule is, that the action on a contract whether express or implied, by parol or under seal, or of record, must be brought in the name of the party holding the legal interest in the contract. *Ib.*
3. But when an agent has any beneficial interest in the performance of the contract for commission, &c., as in the case of a factor and a broker, an auctioneer, a policy broker whose name is in the policy, or where the contract is in terms made with him, he may sustain an action in his own name; in each of which cases, however, the principal or owner might sue, unless there is an express contract under seal with the agent to pay him, when he alone can sue. *Ib.*

ADMINISTRATION.

1. Where application is made by an administrator to the Probate Court for an order to sell real estate of his intestate, any person interested in the subject matter may, on proper showing to the Probate Court, make himself a party to the proceedings, put upon record, by bill of exceptions, the evidence and facts upon which the order of sale is made, and appeal therefrom to the Circuit Court. *Digest, page* 142, *ch.* 4, *sec* 176, and *Pamph. Acts* 1849, p. 59. *Wm. J, Marr Ex-parte*, 84.
2. The allowance and classification of a claim against an estate, in favor of a creditor by the Probate Court, is not a ministerial but a judicial act, has the force and effect of a judgment, and the court has no power to set aside such classification after the lapse of the term at whith it is made, and place the claim in a

different class on the application of other creditors. *Cossett et al. v. Biscoe*, 95.
3. Such second classification of the claim being void for want of power over the subject matter, no appeal could lie therefrom, but it should be quashed on certiorari from the Circuit Court. *Ib.*

AFFINITY.

1. The husband of the aunt is related to the husband of her niece within the fourth degree of affinity. *Kelly et al v. Neely, Judge, &c.* 657.

AGENCY.

1. A person selling goods simply as agent or clerk for the owner, cannot bring an action in his own name for the price. *Hershy et al. v. Hichox*, 125.
2. The general rule is, that an action on a contrrct, whether express or implied, by parol or under seal, or of record, must be brought in the name of the party holding the legal interest in the contract. *Ib.*
3. But when an agent has any beneficial interest in the performance of the contract for commission, &c., as in the case of a factor and a broker, an auctioneer, a policy broker whose name is in the policy, or where the contract is in terms made with him, he may sustain an action in his own name; in each of which cases, however, the principal or owner might sue, unless there is an express contract under seal with the agent to pay him, when he alone can sue. *Ib.*

AMENDMENTS.

1. This court has repeatedly held *original* writs void for want of the signature of the clerk, and like defects, but the courts generally have held such defects in *judicial* process to be amendable. *Whiting & Slark v. Beebe et. al.*, 421.
2. Adhering to the former decisions of this court as to such defects in *original* writs, yet in view of the enlarged powers of courts in amending *judicial* process, the court holds that although such writ, without the signature of the clerk, as required by the constitution, is erroneous, yet it is not necessarily void, and the court from which it issued, upon application for that purpose, might either quash or amend it as the circumstances of the case might require. *Ib.*
3. Some of the former decisions of this court have been made under an erroneous impression with regard to the effect which the constitution had upon the validity of process—that as the constitution required the signing, &c., it could not be dispensed with, and where a constitutional defect existed, the writ was void. *Ib.*
4. But a directory enactment of the constitution is of no more validity as a law, than a like enactment by statute—both are laws, though emanating from different law-making powers. *Ib.*
5. Instead, therefore, of looking to these, the true inquiry is, is the writ so totally defective as not to perform the offices of a writ, and what will be the effect of the amendment upon the rights of the parties? *Ib.*

6. Where a writ is defective in a matter that is amendable, it will be considered as amended when collaterally questioned. *Ib.*

7. A *fi. fa.* wanting the signature of the clerk is not void, but amendable. *Ib.*

APPEAL.

1. This case originated before a justice of the peace, was tried de novo on appeal, in the Circuit Court, and brought up by writ of error. It was assigned, for error, that the Circuit Court did not acquire jurisdiction of the case, because there was no entry made upon the justice's docket that an appeal was allowed from his judgment: HELD, That since the passage of act act of 1846, (*Dig., p.* 668, *sec.* 182,) this was no valid objection to the jurisdiction of the Circuit Court, it appearing that the party appealing had, on his part, complied with all the requirements of the law to entitle him to an appeal. *Rapley v. Brown,* 80.

2. No appeal lies from a void judgment. *Cossett et al. v. Biscoe,* 95.

3. An appeal lies from the judgment of a justice of the peace to the Circuit Court in a case of garnishment. *Patterson v. Harland,* 158.

4. On appeals from the Probate to the Circuit Court, appellant is not required to give bond for costs. (*Digest, chap.* 4, *secs.* 176, 183.) *Biscoe et al. Trustees, &c., v. Maddin, ad.,* 765.

5. The 3d section of the act of 4th January, 1849, (*Pamph. Acts, p.* 59.,) applies to appeals from the county courts authorized by the second section of that act, and in no respect applies to appeals from the Probate Court. *Ib.*

6. *Morrow v. Walker and wife,* 5 *Eng. Rep.* 569, *contra,* is overruled. *Ib.*

ASSIGNMENT.

1. The legal title to a note, executed to the original Trustees of the Real Estate Bank, did not pass, by virtue of the provisions of the deed of assignment, to the Residuary Trustees therein provided for—the equitable interest only passed—and a suit upon such a note is properly brought in the name of the original trustees, for the use of the Residuary Trustees. *Biscoe et al. v. Sneed et al.,* 6 *Eng R.* 106. *Roane et al., use, &c., v. Williams et al.,* 74.

ATTORNEYS AT LAW.

1. An attorney was employed by a woman to prosecute a bill against her husband for divorce, alimony, &c. After interlocutory decree, by default, on the application of the husband, and by consent of the wife, the decree was set aside, and the bill dismissed; but on a showing by the attorney that he had a claim for fees and expenses incurred in prosecuting the suit, the Court referred his claim to the Master, and ordered that a portion of defendant's property be placed in the hands of a receiver, to be held subject to the final order of the Court on the coming in of the report of the Master, &c: HELD, That the Court having power over the subject matter, the order so made could not be superseded by this Court, but that the final decree of the Court, in the matter, would be subject to review on appeal. *Warner v. Burton,* 144.

2. *A case pending from term to term under an agreement that it is to be settled out of court—the plaintiff's attorney, before term, informs the* defendant's attoney that *he must come and pay up:* at the term when the case is *called* the plaintiff and defendant's attorneys, after *some reference* to the agreement, submit the case to the *court by consent. This is no such surprise upon the defendant, who is absent, as will entitle him to relief in a court of equity. Lawson v. Bettison,* 401.
3. *When a person employs an attorney,* he is concluded by his acts or omissions, where no fraud or unfairness is made to appear. *Ib.*
4. But if fraud or unfairness, affecting the trial at law, is shown, a party appealing to a court of equity must show that injury to him was the result—a general allegation of injury is not sufficient, as for instance, that he had a good defence of which he was deprived—he must state what the defence was, and it must appear sufficient. *Ib.*
5. A party seeking relief in equity on the ground of surprise in obtaining judgment at law against him, must show that the surprise was not in consequence of negligence on his part. *Ib.*
6. An attorney is not authorized to receive depreciated paper, at its real value, or other property in payment of his client's judgment, unless by his express authority: and if he receives such, may issue execution without regarding it as a payment. *Ib.*

BAILMENTS.

1. On a special contract to pay hire for a slave, and return him at the end of a term, the party hiring, is liable for the hire and the value of the slave if he run away and escapes, though without cause or fault on the part of the hirer: otherwise, perhaps, as to his liability for the value of the slave, if there is no special contract to return him. *Alston v. Balls & Adams,* 664.

BANKS.

1. The legal title to a note, executed to the original Trustees of the Real Estate Bank, did not pass, by virtue of the provisions of the deed of assignment, to the Residuary Trustees therein provided for—the equitable interest only passed—and a suit upon such note is properly brought in the name of the original trustees, for the use of the Residuary Trustees. *Biscoe et al. v. Sneed et al.,* 6 *Eng. R.* 106. *Roane et al. use, &c. v. Williams et al.,* 74.
2. A law in force when a contract is made, cannot, by its legitimate operation, impair its obligation in the sense of the Constitution of the United States, for the reason that the existing laws are to be regarded as entering into, and forming a part of any contract or stipulation between the parties. *State et al. v. Curran,* 321.
3. Where an act of incorporation is a grant of political power: where it creates a civil institution to be employed in the administration of Government, or where its whole funds belong to the public, the charter is completely within legislative control. Such corporations are created by the mere will of the Legislature, and

are in no way the result of contract; while those through which the Legislature seeks to accomplish some public purpose, by the instrumentality of a second party, who is to advance some money, labor or property, are the direct result of contract. The one is within legislative control, while the other cannot be dissolved, under the provision of the Federal Constitution, otherwise than in pursuance of a power to do so reserved by the State, to be exercised upon the happening of some contingency, and is therefore one of the stipulations out of which the incorporation sprung. *Ib.*

4. This classification of corporations obviates the difficulty and disputation arising from the ordinary division of corporations into public and private. *Ib.*

5. The Bank of the State of Arkansas was of the class of corporations that are within the legislative control, and the Legislature possessed the power to repeal its entire charter, or any of its provisions, when, in the exercise of constitutional discretion, the public interest might seem to require it. *Ib.*

6. Had the Legislature simply repealed the charter of the Bank previous to 11th January, 1843, when the common law as to the effect of the expiration of corporations, &c., was repealed and other provisions made, (*Digest, ch.* 39, *sec.* 16,) all its real estate would have reverted to the original grantor or his heirs, its personal property would have vested in the State, and the debts due to and from the bank would have been extinguished. In such case the bill-holder would have had no remedy except that growing out of the 28th section of the charter, whereby the State contracted with the bill-holders that the bills should be receivable in payment of all debts due the State. *Ib.*

7. Where the Legislature possesses the power to repeal the charter of a corporation, and exercises it, the courts will not presume that such power was improperly or unconsciously exercised. *Ib.*

8. The Legislature possessing the power to repeal the charter of the Bank of the State, and the acts placing the bank in liquidation, being but a partial exercise of that power, on the failure of the Bank, in the judgment of the Legislature to accomplish the objects of its creation, are all declared to be constitutional and valid acts. *Ib.*

9. The Legislature possessing the power to place the Bank in liquidation, husband its assets, and provide for the appropriation of them to the discharge of the liabilities of the Bank as it might deem just and expedient, the acts exempting the debtors of the Bank from the process of garnishment, making provision for the disposition of the bills of the Real Estate Bank on hand, and for the transfer of the real estate of the Bank to the State are valid acts, and a judgment creditor of the Bank cannot, by Bill in Chancery, subject such assets to the satisfaction of his demand, though his judgment be obtained on the bills of the Bank. *Ib.*

10. The notes of the Bank of the State of Arkansas issued previous to the 10th January, 1845, are a legal tender in payment of all debts then due to the State. *Decision of the Supreme Court of the United States* reversing the case of *Woodruff v. Attorney General pro tem., in* 3 *Eng.* 236. *Woodruff v. Trapnall, Att. &c.*, 640.

11. Judgment and execution thereon; a tender to the attorney, of the full amount in Bank notes; refusal to accept the money tendered; mandamus to compel the

acceptance of the tender: HELD, That interest on the judgment ceased at the time of tender. *Ib.*

12. *Quære,* should the defendant have brought the money into court with his application for a *mandamus?* If so, the omission to object for the failure to bring the money into Court, was a waiver of it. *Ib.*

13. In 1836, the Legislature of Arkansas chartered a bank, the whole of the capital of which belonged to the State, and the president and directors of which were appointed by the General Assembly. *Woodruff v. Trapnall,* 811.

14. The twenty-eighth section provided "that the bills and notes of said institution shall be received in all payments of debts due to the State of Arkansas." *Ib.*

15. In January, 1845, this twenty-eighth section was repealed. *Ib.*

16. The notes of the bank which were in circulation at the time of this repeal, were not affected by it. *Ib.*

17. The undertaking of the State to receive the notes of the bank constituted a contract between the State and the holders of these notes, which the State was not at liberty to break, although notes issued by the bank after the repeal were not within the contract, and might be refused by the State. *Ib.*

18. Therefore, a tender, made in 1847, of notes issued by the bank prior to the repealing law of 1845, was good to satisfy a judgment obtained against the debtor by the State; and it makes no difference whether or not the debtor had the notes in his possession at the time when the repealing act was passed. *Ib.*

BILLS OF EXCHANGE.

1. Notice to the acceptor, or prior endorser to a protested bill of exchange, will be sufficient, if deposited in the postoffice in season to go by the first mail that departs after the commencement of the ordinary mercantile business hours of the day, next succeeding that in which the notice came to hand. *Davis & Co. v. Hanly, use, &c.* 645.

2. This court will take notice of "the general custom and usages of merchants," as well as of the "general customs of our own country," as matters that are generally known. *Ib.*

BONDS, BILLS AND NOTES.

1. There was a stipulation that a note sued on might be discharged in Arkansas Bank paper at its value: HELD, That defendant could only avail himself of this stipulation, as a defence, by averring a tender of Arkansas Bank paper, equal in value to the amount of the note, made in apt time. *Biscoe v. Moore et al., ad., use, &c.* 77.

BOND FOR COSTS.

1. A *scire facias* to revive a judgment is not such an action as requires a bond for costs where the plaintiff is a non-resident, under *sec.* 1, *chap* 40, *Dig. Johnson & Tilden v. Hoskins et al.,* 635.

2. The motion and affidavit to dismiss a cause for failure to file a bond for cost,

must not only state the non-residence of the plaintiff, but that no bond has been filed. *Ib.*

3. On appeals from the Probate to the Circuit Court, appellant is not required to give bond for costs. (*Digest, chap.* 4, *secs.* 176, 183.) *Biscoe et al., Trustees &c. v. Maddin ad.* 765.
4. The 3d section of the act of 4th January, 1849, (*Pamp. Acts, p.* 59,) applies to appeals from the county courts authorized by the second section of that act, and in no respect applies to appeals from the Probate Court. *Ib.*
5. *Morrow v. Walker and wife,* 5 *Eng. Rep.* 569, *contra,* is overruled. *Ib.*

BREACH.

See PENAL BONDS.

CAPTION OF IMDICTMENT.

See INDICTMENT, 10.

CASES OVERRULED.

1. So much of *Webb & Estill v. Hanger & Winston,* 1 *Ark. R.* 122, and of cases based upon it, as held, in substance, that a party aggrieved by the decision of a county, probate, or justice's court, might apply directly to this court without having first made application to a circuit court, or showing any reason for not having done so. *Wm. J. Marr, Ex parte,* 84.
2. The case of *Carlock v. Spencer and wife,* 2 *Eng. R.* 12, overruled. *Mc Gough v. Rhodes,* 625.
3. The case of *Gaines v. Rives,* 3 *Eng. R.* 220, overruled. *State, use Chicot Co. v. Rives et al.* 721.
4. *Morrow v. Walker & wife,* 5 *Eng. R.* 569, overruled. *Biscoe et al., Trustees, &c. v. Maddin adr.* 765.
5. *Woodruff v. Trapnall,* 3 *Eng. R.* 236, reversed by the Supreme Court of the United States. *Woodruff v. Trapnall,* 811.

CERTIORARI.

1. This court, (as held in *Wm. J. Marr, Ex parte,*) will not award a writ of certiorari to bring up a judgment of the probate court for quashal, until the party aggrieved first applies to the circuit court for redress, or shows that court to be incompetent to act in the premises, either in consequence of some inherent defect in the tribunal, or of the incompetency of its incumbent. *Marr, Ex parte,* 87.
2. Certiorari having been improvidently issued, dismissed. *Patterson v. Mayers et al.* 682. Also *Fowler ad. v. Byers ad.* 383, *and Evans v. Davis* 683.

CHANCERY.

1. Where property is sold under execution, and purchased by a party for the use and benefit of the defendant in the execution, and in fraud of the rights of credi-

tors, it remains subject to the claims of creditors, and the vendee of such party, purchasing with a knowledge of such fraud, will not be protected in his title against judgments of such creditors or persons purchasing under them. *Byers & Mc Donald v. Fowler et al.* 218.

2. But, on the contrary, a *bona fide* purchaser, for a valuable consideration, without notice of such fraud, will be protected in his title. *Ib.*
3. The answer of a party claiming to be such innocent purchaser, must state the deed of purchase, the date, parties and contents, that the vendor was seized in fee and in possession; the consideration must be stated, with a direct averment that it was *bona fide*, and truly paid, independently of the recital in the deed. Notice of the fraud must be denied previous to, and down to the time of paying the money and the delivery of the deed, &c. *Ib.*
4. A general replication to the answer in such case will not cure the defect of a failure on the part of defendant to aver notice of such fraud down to the delivery of the deed to him by his vendor; and without such averment, the party must fail to sustain his title regardless of the sufficiency of his proof that he was an innocent purchaser. *Ib.*
5. In this case, the lands of Tully were sold in August, 1841, by the marshal, and bought by Grollman, for the use and benefit of Tully, in fraud of creditors; and Grollman sold the lands to McDonald: afterwards, F. & D. purchased the lands under execution against Tully on a judgment junior to the one under which Grollman purchased, but founded on a debt existing at the time Grollman purchased. F. & D. brought this bill to quiet their title; defendant McDonald claimed to be an innocent purchaser of Grollman for a valuable consideration, without notice of the fraud between Tully and Grollman, but failing to aver want of notice of such fraud down to the time of the delivery of the deed from Grollman to him: HELD, That his defence was insufficient; that the lands in his hands were subject to the judgment under which F. & D. purchased, and they were entitled to all the equities of the plaintiffs in the judgment. *Ib.*
6. A party cannot complain that the court struck out a portion of his answer calling on complainants for discovery, when it appears, upon the whole case, that the discovery sought, if obtained, could have been of no avail. *Ib.*
7. It is the right of an innocent purchaser, for a valuable consideration, without notice, to have the value of permanent and useful improvements, made by him before suit brought by the rightful owner, set off against the rents and profits. *Ib.*
8. McDonald having failed in his defence, by not averring in his answer that he was without notice of the fraud down to the time of the delivery of the deed to him by his vendor, yet, inasmuch as it appears, from the evidence in the cause, that he was an innocent purchaser, for a valuable consideration, without notice: HELD, That, in equity and good conscience, he should not be charged with more costs than he may have incurred in defending the suit. *Ib.*
9. A complainant in equity, as at law, can only recover on the strength of his own title, and he is not in a condition to assail the title of the defendant, unless he shows a right in himself to the land in controversy. Where the bill alleges fraud in procuring the patent from the Government, to the defendant, the chancellor will not interpose to relieve the complainant, until he shows that the fraud

if it exists, has operated to his injury, and, unless the fraud and injury concur, the court will not inquire into the alleged fraud. *Cunningham v. Ashley & Beebe* 296.

10. A plea to a bill in Chancery that a former bill had been brought for the same matters, a demurrer sustained thereto, an appeal to the Supreme Court prayed and granted, by which the jurisdiction of the case was transferred to the Supreme Court where the matters arising upon the bill had not been adjudicated or determined, is not a good plea of former suit pending. The plea should allege specifically that the appeal had been regularly certified to the Supreme Court, and was still therein pending. *Moss v. Ashbrooks et al.* 369.

11. To constitute a decree in Chancery, dismissing the cause, a bar to a subsequent bill for the same matter, between the same parties, there should be a decision upon the merits. *Ib.*

12. In this case, a demurrer was sustained to the first bill, and complainant declining to amend, the bill was dismissed: HELD, That such a decree could not be pleaded as a bar to a second bill for the same matter. *Ib.*

13. Where the allegations of the bill are denied by the answer, they must be supported by two witnesses, or one with corroborating circumstances. *Aikin v. Harrington et al,* 391.

14. Where there is an interlocutory judgment, by default, against one of several defendants in chancery, it must abide the result of the final decree, and if another defendant succeeds on an answer going to the entire equity of the bill, the bill should be dismissed as to all the parties, and costs adjudged to the party in default as well as to the defendant answering. *Ib.*

15. Part of the matters in controversy between the parties remaining undetermined, and the cause continued by the court, there is no final decree from which an appeal will lie. *Haynie v. McLemore* 397.

16. *A case pending from term to term under an agreement that it is to be settled out of court—the plaintiff's attorney, before term, informs the* defendant's attorney that *he must come and pay up:* at the term when the case is *called* the plaintiff and defendant's attorneys, after *some reference* to the agreement, submit the cause to the *court by consent. This is no such surprise upon the defendant, who is absent, as will entitle him to relief in a court of equity. Lawson v. Bettison* 401.

17. *When a person employs an attorney,* he is concluded by his acts or omissions, where no fraud or unfairness is made to appear. *Ib.*

18. But if fraud or unfairness, affecting the trial at law, is shown, a party appealing to a court of equity must show that injury to him was the result—a general allegation of injury is not sufficient, as for instance that he had a good defence of which he was deprived—he must state what the defence was, and it must appear sufficient. *Ib.*

19. A party seeking relief in equity on the ground of surprise in obtaining a judgment at law against him, must show that the surprise was not in consequence of negligence on his part. *Ib.*

20. An attorney is not authorized to receive depreciated paper, at its real value, or other property in payment of his client's judgment, unless by his express au-

thority; and if he receives such may issue execution without regarding it as a payment. *Ib.*

21. As a general rule, the answer of one defendant to a bill cannot be used against another; but to this rule there are exceptions, one of which is (2 *Dan. Ch. Pl. & Prac.* 982,) that in case where the rights of the plaintiff, as against one defendant are only prevented from being complete by some question between the plaintiff and a second defendant, the plaintiff is permitted to read the answer of such second defendant for the purpose of completing his claim against the first. *Whiting & Slark v. Bebee et al.*, 421.

22. In this case, Gray & Bouton and Beach held judgments against De Baun which were a lien on all his lands; Whiting & Slark held a mortgage subsequent to the said judgments on part of said lands; executions being sued out upon said judgments (which had been assigned to Beebe), Whiting & Slark filed a bill to compel the judgment creditors to resort for satisfaction first to the lands not embraced in their mortgage, to foreclose, &c. The lands were all sold, under the executions, and Whiting & Slark purchased the mortgaged premises—the sales were set aside, other executions issued on said judgments, the lands again sold, and Beebe purchased the mortgaged premises. Whiting & Slark filed a supplemental bill, setting out their purchase, and the subsequent purchase of Beebe, alleging that the lien of said judgments was discharged by payment of the judgments, &c., making said judgment creditors, Trapnall, their attorney, and Beebe defendants: HELD, That the answer of Trapnall, who was cognizant of all the facts, had control of the judgment, &c., as to payments upon the judgment of Gray & Bouton, was evidence against his co-defendant Beebe, under the rule above stated. *Ib.*

23. HELD, further, that the answer of Trapnall was evidence against his co-defendant Beebe, on the grounds that Beebe was a purchaser *pendente lite*, and was bound by evidence taken against his vendor, &c. *Ib.*

24. The authorities establish the following positions: *First*, that the institution of the suit (particularly where it relates to the title or disposition of property,) is constructive notice to all purchasers after suit commenced: *Second*, that a purchaser *pendente lite* acquires no title by his purchase, which he can set up or assert to the prejudice of the rights of the parties litigant, and that the suit will be heard and determined upon the merits as it stood between the parties litigant, perfectly irrespective of any rights which he may have acquired by such purchase, which, if valid for any purpose, can only be so as between himself and his vendor, to enable him, upon the determination of the suit to succeed to the rights of such vendor, or perhaps if a party to the suit, to enable the court, after determining the rights of his vendor favorably, to decree them to him. *Ib.*

25. HELD, That Beebe was not the less a purchaser *pendente lite*, under the circumstances, because he purchased the judgment of Gray & Bouton before the filing of the original bill of Whiting & Slark—that Beebe could not occupy a stronger position than Gray & Bouton would have done had they been the purchasers under their own judgment—that before the sale, the original bill having been filed, alleging that the Gray & Bouton judgment had been satisfied by a prior levy, which was undisposed of, that there was also other sufficient estate out of which

to satisfy their senior judgment lien without coming upon the property embraced in the complainants' mortgage, and that a large portion of their judgment had been paid, but not credited, &c., they could not have caused the mortgaged premises to be sold under their judgment, and purchased them, pending the original bill, without being subject to the rules applicable to purchasers *pendente lite;* and that Beebe, as their assignee, could acquire no greater rights than they possessed. *Ib.*

26. That Gray & Bouton having failed to answer, but Trapnall, their attorney, who had control of the judgment, and was cognizant of the payments, &c., having answered, his answer was in effect their answer, and was, under the circumstances, evidence against Beebe. *Ib.*

27. Where payments have been made on a senior judgment, a junior creditor has a right to demand that the payments be credited, before sale of the property under the senior judgment, because he has a right to pay off the senior incumbrance, and thereby disencumber his junior lien, which he could not do, nor could he be prepared to elect whether he would or not, until the credits were entered. *Ib.*

28. In this case, it appearing that a large portion of the Gray & Bouton judgment had been paid, that Beebe, the assignee of the judgment, and also T. the attorney of G. & B., knew of such payment, but, failing to enter the credit upon the judgment, proceeded to sue out execution and sell property as though the whole face of the judgment were due: HELD, That such procedure was unjust to junior creditors, if not grossly fraudulent. *Ib.*

29. A judgment lien is a security against subsequent purchasers and incumbrancers, which denies to the debtor the right to alien or incumber his property, to the prejudice of the rights of the judgment creditor for a given period (in most instances fixed by statute.) *Ib.*

30. It is also a right springing out of, and dependent upon the judgment for its existence, and follows the condition of the judgment. *Ib.*

31. If the judgment is reversed or set aside, the lien is *eo instanti* discharged; if paid, it is merged in the payment; if suspended by injunction or supersedeas, the lien is also suspended; and therefore as a levy operates as a *prima facie* satisfaction, and whilst undischarged satisfies and suspends the judgment, the lien must also be suspended with it; and should the levy prove insufficient to satisfy the judgment, as by the discharge of the levy, the judgment is restored to its full effect upon the estate of the debtor; so, also, does the lien, unless in the meantime it has expired by limitation, or has been discharged by the act of the creditor, upon the return of the creditor for further satisfaction, maintain its grasp upon the whole estate of the debtor to the full extent that it did when first created; and intermediate sales of property by junior lien creditors, or by the debtor between the first levy and the discharge thereof, if such discharge takes place before the statute limitation, will be held subject to such lien. *Ib.*

32. The lien is not an intrinsic quality of the judgment itself, but is a quality added to it—an effect of the mere existence of the judgment, which can have no independent existence, but is dependent upon the judgment, and follows it as a shadow does a substance; hence if it is cut off from it, either by the act of the

party, the satisfaction or extinguishment of the judgment, or by limitation of time, upon general principles, it is lost, for there ceases to be anything to which it can be attached. *Ib*

33. A lien being a mere contingency, or right dependent upon a subsisting thing, of course cannot rest upon a contingency, no more than a presumption can rest upon a presumption, or one contingency upon another, or a shadow exist without a substance. *Ib.*

34. The lien on the Gray & Bouton judgment expired on the 23d March, 1843: on the 20th March, three days before the lien expired, a *sci. fa.* issued to revive the lien, and it was revived on the 16th January, 1846. In June, 1843, the property in dispute (upon which Whiting & Slark held a junior mortgage) was levied on, sold at the November term, 1843, and purchased by Beebe, (assignee of the judgment) by virtue of an execution issued upon said judgment, the levy and sale both being after the issuance of the *sci. fa.* but before the revival of the judgment: HELD, That the revival of the judgment did not relate back to Beebe's purchase, so as to constitute him a purchaser under a senior lien, and thereby cut off the "intervening equities of junior lien creditors." *Ib.*

35. The statute makes the judgment, from its date, a lien on all the lands of the debtor situate in the county, in which it is rendered, for the term of three years from its date. It also confers a right upon the creditor to revive his judgment lien by suing out *sci. fa.* at any time before the lien expires; and then in the 13th section, provides, that if the *sci. fa.* be sued out before the lien expires, the lien of the judgment revived shall have relation to the day on which the *sci. fa.* issued, &c.: HELD, That when the legislature declared that the judgment lien, when revived, should relate back to the date of the *sci. fa.*, it was intended that the lien, when revived, should act upon the whole estate of the debtor, to the same extent that it did prior to its suspension by limitation, in an unqualified sense, as related to the debtor; and that it also revived all the secondary rights of the senior creditor as between himself and the junior creditor; subject, however, to such intervening equities as might have arisen between the time of the suspension and the revival of the judgment, for these might have accrued to him, even under the first lien. *Ib.*

36. In addition to Beebe's purchase under the Gray & Bouton judgment, he claims that De Baun & Thorn were joint owners of the premises in dispute, prior to the mortgage of Whiting & Slark; that Thorn sold his interest to De Baun in the premises, for which De Baun paid so much money, and agreed to pay the debts of a partnership which had existed between them; and Thorn executed a bond to De Baun binding himself to make title to his half of the premises on payment of all such debts, which was duly recorded, but which did not specify the debts. That Ringo held a note on said partnership, afterwards obtained judgment thereon, under which Beebe (who bought the judgment) purchased Thorn's interest in the premises, and insists that the debt of Ringo constituted a specific lien upon Thorn's interest in the property, paramount to the mortgage of Whiting & Slark, which was executed by De Baun upon the whole property after said sale from Thorn to De Baun. A transcript of the record of the suit of *Ringo v. DeBaun & Thorn*, is exhibited by Beebe, into which is copied the firm note on

which the judgment purports to have been founded, but it is not made a part of the record by oyer or otherwise. Whiting & Slark deny that the judgment of Ringo was founded on such firm debt: HELD, That the Court erred in permitting Beebe to produce, on the hearing the original note, prove, *viva voce*, its execution, that it was marked filed among the papers of the suit of *Ringo v. De Baun & Thorn*, and read it in evidence, inasmuch as it was not an exhibit in the case. That unless a paper is made an exhibit, *viva voce* evidence is not admissible to prove its execution on the hearing—that even when exhibits are thus proven on the trial, the evidence is, in most instances, limited to the mere execution of the instrument—that when any additional fact is to be established in order to make the exhibits evidence, as in this case, the identifying it as the note sued on, the proof is inadmissible, &c. *Ib.*

37. HELD, further, that whether the interest of Thorn in the premises, reserved by his said bond to De Baun, was a trust or mortgoage interest (and it could not extend beyond that) it was questionable whether it was subject to sale by execution or not, under our statute, which subjects the real estate of the defendant, whether held by patent, or by a third person for his use, of which he is seized in law or equity, to sale. *Ib.*

38. HELD, further, that in an equitable point of view, the security afforded in a deed of trust or mortgage, only extends to those debts set forth and recorded in the deed, or perhaps where notice is brought home to the purchaser of the estate thus pledged. That in order to affect the rights of Whiting & Slark as junior lein creditors, it was necessary to have brought notice home to them, not alone of the existence of the transfer of Thorn to De Baun, and reservation in favor of creditors, (of which the registry of the bond was notice) but it was necessary to have set forth the identical debt upon which this prior equity was to be founded, so that the junior purchaser might take notice at his peril what he purchased—that such not having been the case in the bond of Thorn, the prior equity of Beebe, who held under Ringo, must fail. *Ib.*

39. Beebe entered the premises, *pendente lite*, under the claims in litigation, and held subject to the final disposition of the suit, In that position, having purchased the premises at tax sale: HELD, That he necessarily purchased in trust, and that the purchase enured to the benefit of the *cestui que trust*, when the suit should determine who he really was. Taxes paid under such circumstances, are a charge upon the rents, &c. *Ib.*

40. Where an answer admits the receipt of money at one time, and sets up that at another time, and in another adjustment, it was repaid, the repayment is the affirmance of a new act, and must be proved. *Ib.*

41. De Baun filed a cross-bill against all his mortgage and judgment creditors and purchasers of his property at execution and trust sales, setting out all incumbrances upon his property, his indebtedness, &c., alleging that owing to impending circumstances, and the acts of some of his creditors in their contest with each other for priority of right to the proceeds of the sale of his property, &c., &c., a most shameful sacrifice and waste of the property was made, &c., &c., alike prejudicial to the interest of other creditors and to himself, &c., and praying that all the sales be set aside, that the property and securities be marshaled, the pro-

perty resold and proceeds applied according to equity, &c.: HELD, That he was not entitled to the relief prayed, because, 1st, it appeared that he not only acquiesced in, but was an active agent in producing the very acts of which he complained, and 2d, because he fraudulently removed a large portion of his property upon which some of his creditors held a trust deed, and did not, like an honest debtor, surrender up his property for the benefit of his creditors, &c., &c. *Ib.*

COMMENCEMENT.

1. A suit is commenced by the filing of the declaration, and the voluntary appearance of defendant, or the issuance of the writ—filing the declaration is not the commencement of an action. *State Bank v. Brown*, 94.
2. The court below erroneously dismissed this case under a mistaken opinion that a loose paper, in the form of declaration, which had, without authority, "straggled" into the case, was the commencement of a new suit. *State Bank v. Whiting et al.*, 119.

COMMISSIONERS OF DEEDS, &c.

See DEPOSITIONS, 1.

CONSIDERATION.

1. A partial failure of consideration as to real estate is the subject of recoupment, when the partial failure is in the quantity or quality of the subject: otherwise when there is partial failure in the title. *Wheat, use, &c. v. Dotson*, 699.
2. This defence may be set up, by special sworn plea under our statute, as well when the action is on any instrument or note in writing under seal, as in other actions. *Ib.*
3. The correct practice on a plea of partial failure of consideration is to take a default for the sum confessed subject to but one final judgment. *Ib.*

CONSTITUTIONAL LAW.

1. Where application is made by an administrator to the Probate Court for an order to sell real estate of his intestate, any person interested in the subject matter may, on proper showing to the Probate Court, make himself a party to the proceedings, put upon record, by bill of exceptions, the evidence and facts upon which the order of sale is made, and appeal therefrom to the Circuit Court. *Digest, page* 142, *ch.* 4, *sec* 176, and *Pamph. Acts* 1849, p. 59. *Wm. J. Marr Ex parte*, 84.
2. Such order of sale is a proceeding *in rem.* by a superior court having jurisdiction of the subject-matter, (*Adamson et al. v. Cummins, ad.*, 5 *Eng.* 549,) and cannot be regarded as a nullity, (*Borden et al. v. State, use, &c.*, 6 *Eng.*,) and consequently all reasonable presumptions of law are in favor of the regularity of the proceedings. *Ib.*

3. This court, in the case of *Carnall v. Crawford Co.*, (6 *Eng.*,) expressed its views as to the true nature and character of the powers of superintendency and control entrusted to it by the constitution over all inferior tribunals; and to the circuit courts over county courts, probate courts and justices of the peace; overruling so much of *Ex parte Anthony* (5 *Ark.* 363–4) and *Levy v. Lychinski*, (3 *Eng.* 113,) as conflicted with these views; and approving so much of the doctrine of the dissenting opinion in *Amour Hunt Ex parte* (5 *Eng.* 288) as sustained them; and now this court adopt the residue of the doctrines of that opinion, and especially those relating to the contingency on which this court will exercise those powers. *Ib.*

4. In doing so, the court overrule the doctrine of *Webb & Estell v. Hanger & Winston*, (1 *Ark.* 122,) and of the cases based upon it, where it is held, in substance, that a party aggrieved by the decision of a County, Probate, or Justice's Court, may apply directly to this court without having first made application to a Circuit Court, or showing any reason for not having done so. *Ib.*

5. A party has no right to apply to this court to supersede a judgment of the Probate Court, until he has first sought a remedy at the hands of the Circuit Court, or can show that that court is incompetent to act in the premises, either in consequence of some inherent defect in the tribunal, or of incompetency of its incumbent. *Ib.*

6. Construing the provisions of the constitution together, it is manifest that it was not the intention of its framers that causes should be brought directly into this court from the County, Probate, and Justices Courts, for supervision, except in cases where it might be absolutely necessary to prevent a failure of justice. *Marr Ex parte*, 87.

7. This court (as held in *Wm. J. Marr, ante,*) will not award a writ of certiorari to bring up a judgment of the probate court for quashal, until the party aggrieved first applies to the circuit court for redress, or shows that court to be incompetent to act in the premises, either in consequence of some inherent defect in the tribunal, or of the incompetency of its incumbent. *Ib.*

8. The manner in which this court exercises its superintending control over inferior tribunals, discussed. *Ib.*

9. The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted, but does not create that cause. *Allis Ex parte*, 101.

10. The intention of the framers of the Constitution is to be derived by considering the subject-matter, and the language, in connection with known political truths, and established common law institutions obviously in the minds eye of these law-givers; otherwise, provisions, that in this light, might be of the most clear and exact conception, might justly present the most ample ground for discussion and legitimate foundation for contrariety of opinion, if considered by the most enlightened minds. *Ib.*

11. Nor can any single portion of the constitution be safely considered, even in this manner, to determine its functions, otherwise than in connexion with every other part, because all these were designed to constitute one practical harmonious whole, not only when in united, but when in separate, action. Thus,

when determining upon the nature and limits of the judicial functions, those of the executive and legislative departments should be also considered, not only to guard against conflict from the extension of either beyond its proper confines; but also that the aggregate of the three shall be made to cover the entire field of the government designed to be set on foot. *Ib.*

12. And when, in the light of known political truths, it might be distinctly seen that it was designed that each of those departments should operate in different portions of the field, and in entire and perfect harmony with each other, no power which was expressly delegated to any one of them could ever be derived to another by implication, even upon any basis of supposed necessity, much less of convenience. *Ib.*

13. Although this rule may not apply so strong to the parceling out of the whole powers of a single department among different functionaries, as it does to the parceling out of the whole powers of government among its three departments, simply because the division of power, as a known political truth, is of more importance to the citizen in the one case than in the other; yet it has a just application in ratio corresponding to this descending scale of importance. *Ib.*

14. Hence it cannot be said that this rule has no application at all to the parceling out of the powers of the judicial department, because these powers, no less than those of the executive and legislative, have relation, not only to private rights and private security, but to civil and political liberty, and to public safety, and were designed no less to be exerted in reference to known political and legal truths. Hence, when construction is necessary as is warranted, judicial powers should be construed in like reference to such legal truths as were in the minds eye of the framers of the constitution relative to them. *Ib.*

15. Among the general politico-legal truths, manifestly in the view of the framers of the constitution, was that justice can be best administered in a system embracing numerous courts, among which the judicial powers should be so parceled out that every citizen should have convenient access to justice, and every dissatisfied suitor a reasonable opportunity for a revival of his case by appellate power. *Ib.*

17. The citizen's right to appeal may be bequeathed by law, and it may be enlarged, as has been done, by provisions of law for intermediate appeals to the circuit courts, but it cannot be cut off by sending him in the first place to this court; nor can he be authorized by an act of the legislature to come here for justice in the first instance. *Ib.*

18. In determining whether or not any one court in our system can rightfully exercise a given power, reference must be had not only to all the powers of such court, but to those of all other courts as one system, framed within a department of the government whose entire powers have limitations, qualifications, and restrictions placed upon them by Bill of Rights. Nor is this all: we must, at the same time, let the lights from without shine in. *Ib.*

19. It is true that, when in search of a particular power, if the meaning of the framers of the constitution is evident, and is expressed in clear and precise terms, and leads to no absurd conclusion, there is no warrant in the law to interpret what has no need of interpretation; but, even waiving all absurd conclusions,

the expression that this court "shall have power to issue writs, &c., and hear and determine the same," does not, in *express* terms, grant to this court jurisdiction of the cause to which the writs may be made to apply, but leaves that grant of jurisdiction as a principal judicial power to be *implied* from the language used. Because writs are but the emination from judicial power—its mere instrument: and to hear and determine a writ is but to exert the function of a judicial power—its faculty. Therefore, although the grant of the power to exert the function may imply a grant to the functionary of the principal power itself whose function he is to exert, it does not, in express terms, grant that power, but leaves it to be implied. *Ib.*

20. Nor is there any necessity to derive the jurisdiction in question by such an implication; nor is it the necessary result of these expressions, because two great principal powers of jurisdiction are, in express terms, granted to this court, to wit: appellate powers purely, and general powers of superintendency and control—to which all that is granted in the language of the constitution in question, is but appropriate adjuncts. *Ib.*

21. And when it is considered that the result of deriving the jurisdiction in question by implication from the language in question, is to grant this court an almost illimitable original jurisdiction co-extensive with the State—is to desecrate the right of the dissatisfied suitor to a revision of his cause—is to exclude the State from all benefit of revisal in matters of the greatest moment to the people—is to thwart essentially the dispensation of justice in localities convenient to the residence of the parties, and that, by the express provisions of the constitution, the Circuit Courts have ample jurisdiction to hear and determine all writs applicable to causes of that character, the derivation of the jurisdiction in question for this court, is not only cogently but absolutely inhibited. *Ib.*

22. It is, therefore, held that this court has no original jurisdiction other than such as may be necessary to exercise a general superintendency and control over all the courts of this State, and as part and parcel of those powers of control. *Ib.*

23. In the light of these views, this court refuses to grant a *mandamus* to compel the Inspectors of the Penitentiary to certify to the Auditor the quarterly compensation of the Contractor for building a wall around the Penitentiary, &c., the Circuit Court of Pulaski county being competent to hear and determine the application. *Ib.*

CONTRACTS.

1. B. executed his note to I., and I. bound himself, by an instrument of the same date of the note, to apply the proceeds of the note to the payment of a certain claim, which the State Bank held, upon an estate of which I. was the admistrator: HELD, That the payment of the note by B. was necessarily a condition precedent to the application of the proceeds of the note to the payment of the claim of the Bank, and therefore the agreement of I. so to apply the proceeds of the note, could in no way be interposed as a bar to a recovery upon the note against B. by I. *Biscoe v. Moore et al., ad., use, &c.*, 77.

2. There was a stipulation that a note sued on might be discharged in Arkansas

CONTRACTS—CONTINUED.

Bank paper at its value: HELD, That defendant could only avail himself of this stipulation, as a defence, by averring a tender of Arkansas Bank paper, equal in value to the amount of the note, made in apt time. *Ib.* 77.

3. An administrator may take a note for a debt due his intestate either in his individual or representative right. If he take it to himself, he is liable over to the estate as for a devastavit, but the contract is nevertheless valid between the parties; and the maker of the note cannot set off, against it, a claim purchased by him against the estate of the intestate. *Ib.*

4. A sealed executory contract cannot be released or rescinded by a parol executory contract; but after breach of a sealed contract, a right of action may be waived or released by a new parol contract in relation to the same subject matter, or by any valid parol executed contract. *Levy v. Very*, 148.

5. To constitute a new contract, a valid accord and satisfaction of a previous one, it must be based upon some consideration—some inducement to the creditor, to accept it: for example, the shortening of the time of payment. *Ib.*

6. Where a covenant had several years to run before maturing, and the debtor, by agreement with the creditor, made a part payment in jewelry, and contracted to pay the balance of the debt in the same way within a year: HELD, That the part payment down, and the shortening of the time for the payment of the remainder of the debt, constituted such consideration as made the new contract a valid accord and satisfaction of the original covenant. *Ib.*

7. But to a bond, accord and satisfaction can be pleaded by deed only, for an obligation under seal cannot be discharged but by an instrument of as high a nature as the obligation itself. *Ib.*

8. It is the settled construction of the statute of Frauds, that every collateral undertaking or promise to answer for the debt, default, or miscarriage, of another, is within the statute, and void if not in writing, but that original undertakings are not within the statute, and need not be in writing. *Kurtz v. Adams et al.* 174.

9. Where there is a pre-existing debt, or other liability, a promise by a third person having immediate respect to, and founded upon, the original liability, without any new consideration moving him to pay or answer for such debt or liability, is a collateral undertaking. *Ib.*

10. But where, distinct from the original liability, there is a new and superadded consideration for the promise moving between the party promising and him to whom the promise is made, in such case it is an original undertaking. *Ib.*

11. Again, where there is no previously existing debt, or other liability, but the promise of one is the inducement to and ground of the credit given to another, by which a debt or liability is created, such a promise is a collateral undertaking. The general rule being that, wherever the party undertaken for is originally liable upon the same contract, the promise to answer for that liability is a collateral undertaking, and must be in writing. *Ib.*

12. But where the party undertaken for is under no original liability, the promise is an original undertaking, and binding upon the party promising without being in writing. *Ib.*

CONTRACTS—CONTINUED.

13. In this case, Y. having applied to plaintiff's store for credit, and, being refused, defendants said to the plaintiffs' clerk that if he would let Y. have goods and he did not pay for them, they would do so. Thereupon, Y. obtained the goods upon the faith of the solvency of defendants, but the goods were charged to Y. in the books of the plaintiffs: HELD, That this was a collateral undertaking on the part of defendants, and, not being in writing, they were not responsible for the price of the goods. *Ib.*

CORPORATIONS.

1. A law in force when a contract is made, cannot, by its legitimate operation, impair its obligation in the sense of the Constitution of the United States, for the reason that the existing laws are to be regarded as entering into, and forming a part of any contract or stipulation between the parties. *State et al. v. Curran*, 322.
2. Where an act of incorporation is a grant of political power: where it creates a civil institution to be employed in the administration of Government, or where its whole funds belong to the public, the charter is completely within legislative control. Such corporations are created by the mere will of the Legislature, and are in no way the result of contract; while those through which the Legislature seeks to accomplish some public purpose, by the instrumentality of a second party, who is to advance some money, labor or property, are the direct result of contract. The one is within legislative control, while the other cannot be dissolved, under the provision of the Federal Constitution, otherwise than in pursuance of a power to do so reserved by the State, to be exercised upon the happening of some contingency, and is therefore one of the stipulations out of which the incorporation sprung. *Ib.*
3. This classification of corporations obviates the difficulty and disputation arising from the ordinary division of corporations into public and private. *Ib.*
4. The Bank of the State of Arkansas was of the class of corporations that are within the legislative control, and the Legislature possessed the power to repeal its entire charter, or any of its provisions, when, in the exercise of constitutional discretion, the public interest might seem to require it. *Ib.*
5. Had the Legislature simply repealed the charter of the Bank previous to 11th January, 1843, when the common law as to the effect of the expiration of corporations, &c., was repealed and other provisions made, (*Digest, ch.* 39, *sec.* 16,) all its real estate would have reverted to the original grantor or his heirs, its personal property would have vested in the State, and the debts due to and from the bank would have been extinguished. In such case the bill-holder would have had no remedy except that growing out of the 28th section of the charter, whereby the State contracted with the bill-holders that the bills should be receivable in payment of all debts due the State. *Ib.*
6. Where the Legislature possesses the power to repeal the charter of a corporation, and exercises it, the courts will not presume that such power was improperly or unconsciously exercised. *Ib.*

CORPORATIONS—CONTINUED.

7. The Legislature possessing the power to repeal the charter of the Bank of the State, and the acts placing the bank in liquidation, being but a partial exercise of that power, on the failure of the Bank, in the judgment of the Legislature to accomplish the objects of its creation, are all declared to be constitutional and valid acts. *Ib.*
8. The Legislature possessing the power to place the Bank in liquidation, husband its assets, and provide for the appropriation of them to the discharge of the liabilities of the Bank as it might deem just and expedient, the acts exempting the debtors of the Bank from the process of garnishment, making provision for the disposition of the bills of the Real Estate Bank on hand, and for the transfer of the real estate of the Bank to the State are valid acts, and a judgment creditor of the Bank cannot, by Bill in Chancery, subject such assets to the satisfaction of his demand, though his judgment be obtained on the bills of the Bank. *Ib.*
9. Foreign corporations are not within the saving clause of the statute of limitation put in operation on the 20th March, 1839: but are embraced in the act of 14th December, 1844. *Clarke v. Bank Miss.*, 5 *Eng.* 525. *Bank of Tenn. v. Armstrong et al.* 602.
10. This court is inclined to the opinion that *nul tiel corporation* may be pleaded either in abatement or in bar. *Gaines et al. v. Bank of Miss.* 769.
11. Under the plea of *nul tiel corporation,* to an action by a foreign corporation, the plaintiff must prove the act of incorporation, and that the corporation went into operation under the act. *Ib.*
12. To show that a corporation (a Bank) went into operation under its charter, it is not necessary to show a compliance with the conditions of the charter under which it assumed to act, but that the corporation acted and transacted business as such; and for this purpose, proof of one or more such acts is sufficient. *Ib.*
13. The execution of a note, by the defendant, to a Bank as a corporation, is sufficient to show that the Bank went into operation under its charter. *Ib.*
14. This was an action of assumpsit on a note by the Bank of Mississippi; defendant pleaded non-assumpsit and nul tiel corporation, to which plaintiff took issue: HELD, that under the issues, the execution of the note, by the defendant to the Bank, as a corporation, was competent evidence to prove that the Bank went into operation under its charter; but that it was erroneous for the court to charge the jury, under the issues, that defendant was estopped by the note from denying the existence of the Bank, inasmuch as, if the execution of the note was an estoppel at all, plaintiff should have replied it as such; and that the effect of the charge of the court to the jury, was to withdraw from them the consideration of the issue of nul tiel corporation. *Ib.*
15. An estoppel must be pleaded. *Ib.*

COSTS.

1. Where a writ of error is sent to the clerk of a circuit court, commanding him to send up to this court a transcript, &c., he has no right to withhold the same until

COSTS—CONTINUED.

his fees for making it out are paid, but must obey the writ. *Thorn v. Clendenin et al.* 60.

2. The law of costs and fees is statutory, and no provision is made for paying the clerk his fees in advance of his return in such case. *Ib.*
3. A general pardon, by the Governor, of a person convicted of a crime, does not discharge him from the costs of prosecution. *Edwards v. State* 122.
4. McDonald having failed in his defence, by not averring in his answer that he was without notice of the fraud down to the time of the delivery of the deed to him by his vendor, yet, inasmuch as it appears, from the evidence in the cause, that he was an innocent purchaser, for a valuable consideration, without notice: HELD, That, in equity and good conscience, he should not be charged with more costs than he may have incurred in defending the suit. *Byers & McDonald vs. Fowler et al.*, 218.
5. Where there is an interlocutory judgment, by default, against one of several defendants in chancery, it must abide the result of the final decree, and if another defendant succeeds on an answer going to the entire equity of the bill, the bill should be dismissed as to all the parties, and costs adjudged to the party in default as well as to the defendant answering. *Aiken v. Harrington, et al.*, 391.
6. A general judgment for costs means such costs as are incurred by the Plaintiff in that case against the defendant. *Beverly Brown v, State*, 623.

COUNTY SCRIP.

See TENDER, 4.

COVENANT.

1. A covenant for the payment of money to a person "or his heirs or legal representatives" goes to the executor or administrator, upon his death and not to the heirs. *Johnson v. Peirce, et al.*, 599.
2. A default, after legal service, is an admission of all the allegations contained in the declaration; but not that the facts alleged entitled the plaintiff to recover. *Ib.*
3. The court cannot, where default is made by the defendant assess the damages in an action of covenant. *Ib.*

CRIMINAL LAW.

1. On an indictment for false imprisonment, the State is only required to prove the imprisonment, and then it devolves upon the defendant to prove that he was justied in what he did, and that the imprisonment was lawful. *Floyd v. State*, 43.
2. Every confinement of the person is an imprisonment, whether it be in a common prison, in a private house, in the stocks, or even by forcibly detaining one in the public streets. *Ib.*
3. The defendant must either prove that he did not imprison the party, or he must justify the imprisonment. *Ib.*

CRIMINAL LAW—CONTINUED

4. Defendant may justify, by showing that he procured the arrest to be made under and by virtue of a regular and valid warrant. *Ib.*

5. Under our statute (*Digest, chap.* 52, *sec.* 21,) the offence charged against the party arrested, should be set out in the warrant, though this was not required by the common law. Where the defendant relies upon proof of its contents, instead of producing the warrant, the State not objecting to secondary evidence, he should show that it was a legal and valid warrant—at least that it ran in the name of the State. *Ib.*

6. Though defendant may not be present when the arrest is made, yet if it be done upon his procurement, he is answerable therefor. *Ib.*

7. Where there is a conflict of evidence as to whether the party was imprisoned against his will, it is the province of the jury to determine the weight of evidence, and their verdict is conclusive. *Ib.*

8. On an indictment for false imprisonment, the person aiding an officer must show that the arrest was made under a legal and valid warrant; as to the proof of such warrant, see *Floyd v. the State, ante. Mitchell v. the State,* 50.

9. A person acting as guard of one in custody on a criminal charge, or aiding an officer in the safe-keeping of a prisoner, is entitled to the same protection as the officer, and no more. When called upon by the officer, he aids him at his peril; he is bound to know whether the officer acts under a legal and valid warrant. *Ib*

10. Where an indictment is returned into court by a grand jury, and filed, but the clerk neglects to endorse the filing, the omission may be supplied at any time, *nunc pro tunc,* by order of the court, on the proper showing. *State v. Gowen,* 62.

11. It is erroneous to quash an indictment for such omission, where the attorney of the State moves to have it supplied, and proves that the indictment was in fact returned by the grand jury, and filed. *Ib.*

12. In an indictment for false pretences, it is not sufficient to charge false pretences in general terms; but it is necessary to set them out specifically and with strict certainty. *Burrow v. State,* 65.

13. False pretences, within the meaning of the statute, must be of some existing fact, and not of future transactions, as held in *McKenzie v. The State,* (6 *Eng.* 594.) Hence, an indictment, charging that defendant obtained the property of A. by falsely pretending to him that his goods and chattels were about to be attached, is bad. *Ib.*

14. A count in the indictment charged that defendant falsely pretended to A. that divers persons had conspired to seize and unjustly deprive him of a slave, by means of which false pretences defendant induced A. to convey to him said negro: HELD, That the pretences here charged were of too vague and indefinite a character to deceive a person of ordinary prudence and understanding; and therefore not within the purview of the statute. *Ib.*

15. In criminal cases, the jury should be sworn to try the issue according to law and the evidence. *Ib.*

16. An indictment charging defendant with maliciously and contemptuously disturbing and disquieting a congregation assembled for religious worship, without alleging the manner of disturbance, is insufficient. *State v. Minyard,* 156,

CRIMINAL LAW—CONTINUED.

17. It is not necessary, however, to charge the manner of disturbance in any language more explicit than that used in the statute, (*Digest, p.* 70, *sec.* 1,) as "by profanely swearing," or, "by using indecent gestures," &c., as the case may be. *Ib.*

18. An indictment for disturbing a religious congregation, charging that defendant "maliciously and contemptuously did disturb and disquiet a certain congregation assembled for religious worship," without alleging the manner of disturbance, is bad in substance, (*State v. Minyard, ante,*) and will not support a judgment on a plea of guilty. *Fletcher et al. v. The State,* 169.

19. By the plea of guilty, defendant but confesses himself guilty in manner and form as charged in the indictment, and if the indictment charges no offence against the law, none is confessed. *Ib.*

20. In a criminal case, after plea of not guilty, and verdict, defendant cannot interpose the objection that the grand jury by whom the indictment was found was composed of a greater number than that prescribed by law: the objection should be reached by plea in abatement. Such objection, however, does not exist, in point of fact, in this case. *Shropshire v. The State,* 190.

21. In this case, the record shows that, at the term at which the indictment purports to have been found, sundry indictments were returned into court by the grand jury and filed, but there is no record entry showing that this particular indictment was so returned, and the defendant, being convicted, urges this as a ground of error: HELD, that, inasmuch as our statute, (*sec.* 86, *ch.* 52, *Dig.*) forbids such an entry, except in case where the defendant is in custody, or on bail, the objection was untenable here. *Ib.*

22. The record shows that, at the time the indictment was found, *A. B. Greenwood* was prosecuting attorney, and that when the case was tried, *A. B. Greenwood* presided as judge, but the record does not show that any objection was made to the competency of the judge, nor is there any proof of record that Judge *Greenwood,* and the prosecuting attorney *Greenwood,* were the same person. It was urged, on appeal, by the defendant, as grounds of reversal, that the judge was incompetent to try the case, having acted as prosecuting attorney when the indictment was preferred—and that this Court judicially knew that the same person filled said offices respectively at the times referred to. But this objection is overruled, on the grounds that though this Court might take judicial notice that *A. B. Greenwood* was prosecuting attorney when the indictment was found, and that *A. B. Greenwood* was Circuit Judge when the case was tried, yet it could have no judicial knowledge that the prosecuting attorney and the judge were the same person—and, it is further held, that defendant, in some mode, should have objected to the competency of the judge at the trial, and put the evidence of his incompetency of record. *Ib.*

23. The defendant was convicted of murder in the first degree, and claimed a new trial, on the grounds that the verdict was contrary to law and evidence. This Court, after reviewing, and duly considering the evidence, refuses to disturb the verdict, holding it to be well warranted by the evidence. *Ib.*

CRIMINAL LAW—CONTINUED.

24. It is a general rule that a criminal charge must be laid in the indictment so as to bring the case within the offence as given in the statute, alleging distinctly all the essential requisites that constitute it. *State v. Eldridge*, 608.

25. In all cases where a felonious intent is an element of the crime, constitutitug an essential ingredient of the offence and descriptive of it, such intent must be charged in the indictment: otherwise where it is no part of the crime, that being complete under the statute without it, and is simply descriptive of the punishment: in such case, it is sufficient to charge the offence in the words of the statute. *Ib.*

26. This court will presume that the court below assigned counsel for a prisoner indicted for felony, if he was without counsel and unable to employ any, and requested counsel to be assigned. *Beverly Brown v. State*, 623.

27. Any irregularity in the issuance or direction of the *venire* to summon the petit jury, must be excepted to before the jurors are sworn; not after the verdict is returned. *Ib.*

28. A general judgment for costs means such costs as are incurred by the plaintiff in that case against the defendant. *Ib.*

29. A disqualification of a grand juror is good cause for challenge before an idictment is found; or a plea in abatement before the trial; but it is too late to make such objection after verdict. *Fenalty v. The State*, 630.

30. As to the caption of an indictment showing that the Grand jurors are good and lawful men of the country, &c. *Cornelius v. The State*, 782.

31. Under sec. 155, chap. 52 Digest, a member of a grand jury by which an indictment is found, &c., cannot serve as a juror on the trial thereof; and under section 163, of the same chapter, if the disqualification of the juror is discovered after he is sworn, but before any of the evidence is introduced, the court may, in its discretion, discharge him, notwithstanding the contrary provision of section 20 of chapter 94 of the Digest, because the former section having been passed after the latter, controls it under the rule of construction, as given in the 6th section of the 156th chapter of the Digest. *Ib.*

32. Where the defendant was permitted, without objection, to ask a witness if he was not prejudiced against defendant, and he answered that he was, it was erroneous for the court, against the objection of defendant, to permit the State to draw from the witness a statement of the reasons why he was so prejudiced; and the witness having, in giving his reasons for such prejudice, detailed matters prejudicial to the character of defendant, the court could not counteract the effect of erroneously admitting them, by telling the jury not to regard them as evidence. *Ib.*

33. But it is not proper to ask a witness, in general terms, if he is not prejudiced against defendant. He may be interrogated as to any particular acts or expressions in reference to the accused from which the jury may infer unfriendly feeling or prejudice. *Ib.*

34. General rules as to what declarations of a party constitute part of the *res gestæ* stated, and cases illustrative of them referred to. *Ib.*

CRIMINAL LAW—CONTINUED.

35. In this case the defendant was indicted for the larceny of a cow, belonging to one of his neighbors; the State proved by two witenssses, that on a certain night they secreted themselves near the cow-pen of defendant, having heard that the cow in question had been penned with his cattle on that evening, and that between midnight and day, the defendant, and his negro boy, came to the pen, with a torch-light, killed the cow, and were about to commence skinning her, when witnesses arrested defendant. The defendant then offered to prove that on the night the cow was killed, after his cattle were turned into the pen, and before the family and others at his house went to bed, he declared openly in his family, and in the presence of visitors, that he was going to kill the cow before day, and take her to the neighboring town to market; and declared at the same time, that he had received a message from the owner of the cow, which authorized him to kill the cow and pay for her—that these declarations were made to some three or four grown white persons, who were at his house at the time, as well as directions given to the negroes in reference to the matter: HELD, that under all the circumstances, these declarations of defendant constituted part of the *res gestæ*, and were competent evidence to show the intention of defendant in killing the cow. *Ib.*

36. The defendant further proposed to prove by *S.*, that a short time before the cow was killed, she heard *W.*, who was then living with defendant, tell him that he had been down to the residence of the owner of the cow, and that the owner had told him to tell defendant that the cow had been running about his, defendant's place, the winter before, and that if she returned he was at liberty to kill her and pay him two cents a pound for her; and, that after receiving this message, the defendant openly declared his intention of killing the cow. It was further shown that defendant had been unable to procure the attendance of *W.* as a witness: HELD that *S.* was a competent witness to prove the delivery of the message to defendant—that it was immaterial whether the message was true or false, if defendant acted on it in good faith, and that a person who heard the message delivered to defendant, was as competent to prove its delivery to him, as the person who delivered it. *Ib.*

37. Defendant proved by M., a resident of the neighboring town, that on the day before the cow was killed, he had engaged to deliver to him beef on the next morning, and then proposed to prove by M. that he told him that he had no beef of his own, but that there was one at his house belonging to one of his neighbors, which he would kill, and pay for, and that he had permission from the owner to do so: HELD, That under all the circumstances in proof these declarations of defendant to M. should go to the jury as part of the *res gestæ* explaining the intention and motives of defendant in killing the cow. *Ib.*

DAMAGES.

1. No plausible ground appearing for the appeal, damages awarded to appellee under Digest, ch. 127, sec. 40. *Magruder v. Slater*, 171.

DECLARATION.

1. Declaration radically defective in form and substance, and judgment thereon by default reversed. *Fullerton v. Houpt*, 399.
2. Where the plaintiff, in accordance with the statute and practice was granted leave to file an amended declaration by a certain time, and accordingly filed it within the time, the court erred in striking it out, dismissing the suit, &c. *Palmer v. Shepherd*, 685.

DECLARATIONS OF A PARTY.
See EVIDENCE. 25, 26, 27, 28.

DEFAULT.

1. A default, after legal service, is an admission of all the allegations contained in the declaration; but not that the facts alleged entitled the plaintiff to recover. *Johnson v. Pierce et al.*, 599.
2. The court cannot, where default is made by the defendant, assess the damages in an action of covenant. *Ib.*

DELIVERY BOND.

1. Where a levy is made and delivery bond (which by statute, has the force and effect of a judgment when forfeited) is taken and forfeited, the levy is discharged, and the bond so forfeited held to be a satisfaction of the former judgment. Yet should the bond be quashed, the effect thereof would be to revive the former judgment. *Whiting & Slark v. Beebe et al.* 421.
2. A levy and a delivery bond given and forfeited, constitute an extinguishment of the judgment; and the bond becomes a new judgment. *Kelly et al. v. Garvin, Carson & Co.* 613.
3. In a suit on a recognizance in appeal, the defendants plead that after the affirmance of the judgment, a *fi. fa.* issued and a levy made: the plaintiffs reply that—the property not bringing two-thirds of the value, the defendants gave bond to deliver the property at the expiration of twelve months, that the property was returned to them, and not delivered, and the judgment is still unpaid: HELD, That the original judgment is discharged. *Ib.*
4. And this, though the bond was not returned forfeited by the sheriff: though the writ and bond were returned before the expiration of the stay, and no writ or other process was subsequently issued. *Ib.*
5. The bond becomes a judgment in such case at the term when the condition is broken, without any return of the sheriff as to the fact of non-delivery or forfeiture of the bond. *Ib.*
6. Such bond, when broken, is a full discharge of the whole original judgment, though the penalty of the bond be for a much less sum. *Ib.*
7. The principle decided in *Berry v. Singer*, 5 *Eng.* 487, re-affirmed. *Ib.*

DEPOSITIONS.

1. Depositions taken before a commissioner of deeds, &c., appointed by the Governor of this State, to act in another State, under the 32d chap. Digest, may be read in evidence without other proof of the appointment and authority of such commissioner than his own certificate and official seal. *Johnson v. Cocks, use, &c.*, 672.

EPUTY SHERIFFS.

. On a bond executed by a deputy sheriff to his principal, conditioned that he would well and truly do and perform all the duties appertaining to the office of sheriff, during the time he continued the lawful deputy—an action accrues, and the statute of limitation commences running in respect thereof, whenever the deputy fails, at the return, to pay over money collected by him on execution. It is not a mere bond of indemnity against actual loss or damage to the principal—consequently, a cause of action accrued thereon whenever the principal's liability became fixed by the failure of the deputy to pay over money according to the mandate of the writ by virtue of which it was collected, and the statute commenced running from that time. *Badgett v. Martin*, 730.
2. In an action on such a bond, dated in 1837, and the breach thereof accruing in 1838, the limitation is five years—consequently pleas setting up the lapse of two and four years are insufficient; but such pleas should not be struck out on motion—they should be met by demurrer. *Ib.*
3. In order to render a plea the proper subject of a motion to strike out, it must not only fail to present a material issue, but it must also be wholly unadapted to the nature of the action—therefore, as lapse of time might in this action constitute a valid defence, it is error to strike out a plea merely because it does not show that sufficient time has elapsed to constitute a bar—such a plea should be met by demurrer, and not by motion to strike out. *Ib.*
4. In an action of this kind it was error to *strike out* a plea setting up that the deputy was not, at the time of the commission or omission of the acts charged as a breach of the bond, the lawful deputy of the sheriff—such a plea sets up matter which is appropriate in its nature as a defence to the action, though the subject matter thus presented is defectively stated, and must have been held bad on demurrer. *Ib.*
5. The deputy was estopped by his bond from denying his appointment, but he might deny its continuance at the time of the commission of the act charged against him—but such denial could not be in general terms, but must be made by setting up special matter by way of avoidance. *Ib.*

DISTURBING RELIGIOUS CONGREGATION.

1. An indictment charging defendant with maliciously and contemptuously disturbing and disquieting a congregation assembled for religious worship, without alleging the manner of disturbance, is insufficient. *State v. Minyard*, 156.

DISTURBING RELIGIOUS CONGREGATION—CONTINUED.

2. It is not necessary, however, to charge the manner of disturbance in any language more explicit than that used in the statute, (*Digest, p.* 370, *sec.* 1,) as "by profanely swearing," or, "by using indecent gestures," &c., as the case may be. *Ib.*
3. An indictment for disturbing a religious congregation, charging that defendant "maliciously and contemptuously did disturb and disquiet a certain congregation assembled for religious worship," without alleging the manner of disturbance, is bad in substance, (*State v. Minyard, ante,*) and will not support a judgment on a plea of guilty. *Fletcher et al. v. The State,* 169.
4. By the plea of guilty, defendant but confesses himself guilty in manner and form as charged in the indictment, and if the indictment charges no offence against the law, none is confessed. *Ib.*

DOWER.

1. In this case a number of slaves came to the husband by marriage, and he afterwards conveyed them by deed of gift, to his children by a former wife, reserving to himself the use of the slaves during his life. After his death, the wife filed a bill to set aside the deed of gift to his children, and for dower in the slaves, alleging that the deed was made by connivance of the parties, to defraud her of dower in the slaves: HELD, that by the marriage, the husband acquired an absolute title to the slaves, with full power to dispose of them; that the dower right of the wife did not attach until the death of the husband, and hence she having no vested right in the slaves at the time the conveyance was made, was not in a condition to take advantage of the alleged fraud for the purpose of setting it aside, and obtaining dower in the slaves. *Cook v. Cook. et al.* 381.
2. One who would set aside a deed as fraudulent, must show that he has legal existing rights, that they are affected by such fraudulent contract, and that the contract is in fact fraudulent. *Ib.*
3. HELD, however, upon all the facts of the case, that it did not appear that the husband conveyed the slaves to his children to defraud the wife of dower, her dower being ample in his other property. *Ib.*

EJECTMENT.

1. Where a deed, executed in Wisconsin, and attested by the seal of the court, stamped upon the paper, instead of wax or a wafer, was offered in evidence upon a trial in Arkansas, it was properly received. *Pillow v. Roberts,* 822.
2. Where a deed from the sheriff, for land sold at a tax sale, recited an assessment for taxes which remained unpaid; the advertisement of the land, and offering it for sale; its being struck down to the highest bidder, who paid the purchase money and received a certificate; this deed ought to have been received in evidence. The law of Arkansas says, that the deed shall be evidence of the regularity and legality of the sale. *Ib.*
3. But, even if this deed had been insufficient as a proof title, it ought to have been

EJECTMENT—CONTINUED.

received in connection with proof of possession, to establish a defence under the statute of limitations. *Ib.*

4. Possession under this deed would have been sufficient proof for adverse possession. *Ib.*

EQUITY.

See CHANCERY.

ESTOPPEL.

See DEPUTY SHERIFF, 4, 5.

Also CORPORATIONS, 14.

EVIDENCE.

1. Under a general replication to a plea of limitation, plaintiff cannot avail himself of the provision of *section* 24, *ch.* 99, *Dig.*, by introducing in evidence a record to show that he had commenced a former suit within the bar, suffered a non-suit, and instituted the present suit within a year thereafter, but he must specially reply such former suit, &c., to the plea. *McClellan v. State Bank*, 141.

2. And when specially replied, the record offered in evidence must show a former suit between the same parties; a declaration, writ and judgment of non-suit against *Ewing* W. McClellan, is not, of itself, evidence of a suit against *Evan* W. McClellan, and whether other evidence could be introduced to explain the discrepancy, this court does not now decide. *Ib.*

3. Action of debt on a note: plea, limitation: replication, that before the bar attached, plaintiff brought suit on the same cause of action, against defendant, in the same court, afterwards suffered a non-suit, and commenced the present action within a year thereafter: rejoinder, *nul tiel* record of such former suit, issue thereto submitted to the court, and finding for the defendant; bill of exceptions setting out the record read in evidence on the trial, which is substantially as alleged in the replication: HELD, That this court could not presume in favor of the judgment of the court below, and for the purpose of sustaining it, that other evidence than the record set out in the bill of exceptions was introduced on the trial, because the bill of exceptions did expressly negative the introduction of other evidence, inasmuch as under the issue none other could be introduced. *State Bank v. Arnold et al.*, 180.

4. Under such issue, the defendant could not have proven *aliunde*, that the parties or the cause of action in the two suits were not the same—the only question raised by the issue being, was there such a record of such former suit, &c., as alleged in the replication. *Ib.*

5. Debt, on a note executed by defendant and two others: plea, limitation: replication, that plaintiff brought an action on the note within the bar, suffered a non-suit, and commenced the present action within a year thereafter: Replication held bad, on demurrer, because it did not allege that the former action was brought against defendant in the present suit. *State Bank v. Sherrill*, 183.

EVIDENCE—CONTINUED.

6. Where a party pleads matter of record, if the record be set out imperfectly or partially, it is sufficient if enough appear to prove the matter in dispute; as if the plaintiff replies a former suit against defendant within the bar, non-suit, and new action within a year, to avoid the plea of limitation, and the record shows a suit against defendant and two others, joint-makers of the note sued on, the record is sufficient to support the replication under the issue of *nul tiel record*. *Ib.*

7. Under such issue, no evidence is admissible, but the record, or a transcript of it—plaintiff need not prove *aliunde* that the parties and cause of action in the two suits are the same: the issue is tried alone by the record. *Ib.*

8. Neither party has a right to complain that an issue remains undisposed of, where the same matter is determined under other issues. *Ib.*

9. Where plaintiff replies a former suit, &c., to the plea of limitation, defendant rejoins *nul tiel record;* and issue thereto is found for defendant, he is entitled to final judgment; and it is not necessary to submit to a jury other issues made up in the case; but if such issues are submitted to a jury, and found against plaintiff, it being an extrajudicial act, is no waiver of his right to a future trial of the issues, on reversal of the judgment on the issue of *nul tiel record*. *Ib.*

10. A party, who permits illegal testimony to be given to the jury without objection, cannot, after verdict, avail himself of the error on a motion for a new trial. *Main v. Gordon*, 651.

11. Testimony illegal at one period of the trial because no foundation has been laid for its introduction, may, at a subsequent period, become legal and competent, but in such case the party must again offer it in evidence. *Ib.*

12. The printed statutes of the other States of the Union, purporting to have been published by authority, may be read in evidence in our courts, and the burthen of discrediting such books is upon the party against whom they are offered, as held in *Clarke v. The Bank of Miss.*, 5 *Eng.* 516, approved in *May v. Jamison*, 6 *Eng. Rep.* 377. *Johnson v. Cocks, use, &c.*, 672.

13. Depositions taken before a commissioner of deeds, &c., appointed by the Governor of this State, to act in another State, under the 32d chap. Digest. may be read in evidence without other proof of the appointment and authority of such commissioner, than his own certificate and official seal. *Ib.*

14. A notarial protest is evidence of demand, &c., and may be read in evidence, although there is a variance between it and the bill sued on, in order to permit the plaintiff to connect the bill sued on with the protest by other evidence, and thus identify it as the same that was protested. *Ib.*

15. For such purpose of identifying the bill, the deposition of a legally appointed deputy of the notary, and an authenticated copy of the notarial register, were properly admitted as evidence. *Ib.*

16. Where a deputy of the notary swears that a paper, offered in evidence, is a correct copy of the original entry in the notarial register, it may be read in evidence, though he does not state in express terms, that he has compared it with the original, as it is the duty of the opposite party to ascertain the source of his knowledge by cross-examination, if he desires it. *Ib.*

EVIDENCE—CONTINUED.

17. As to the authentication of a transsript of the register of one notary by another acting for him, in his absence, under a statute of Lousiana, and as to proof of the official character of the notary so acting in the place of the other. *Ib.*

18. Under the plea *nul tiel corporation*, to an action by a foreign corporation, the plaintiff must prove the act of incorporation, and that the corporation went into operation under the act. *Gaines et al., v. Bank Miss.*, 769.

19. To show that a corporation (a Bank) went into operation under its charter, it is not necessary to show a compliance with the conditions of the charter under which it assumed to act, but that the corporation acted and transacted business as such; and for this purpose, proof of one or more such acts is sufficient. *Ib.*

20. The execution of a note, by the defendant, to a Bank as a corporation, is sufficient to show that the Bank went into operation under its charter.

21. This was an action of assumpsit on a note by the Bank of Mississippi; defendant pleaded non-assumpsit and nul tiel corporation, to which plaintiff took issue: HELD, That under the issues, the execution of the note, by the defendant to the Bank, as a corporation, was competent evidence to prove that the Bank went into operation under its charter: but that it was erroneous for the court to charge the jury, under the issues, that defendant was estopped by the note from denying the existence of the Bank, inasmuch as, if the execution of the note was an estoppel at all, plaintiff should have replied it as such; and that the effect of the charge of the court to the jury, was to withdraw from them the consideration of the issue of nul tiel corporation. *Ib.*

22. An estoppel must be pleaded *Ib.*

23. Where the defendant was permitted, without objection, to ask a witness if he was not prejudiced against defendant, and he answered that he was, it was erroneous for the court, against the objection of defendant, to permit the State to draw from the witness a statement of the reasons why he was so prejudiced; and the witness having, in giving his reasons for such prejudice, detailed matters prejudicial to the character of defendant, the court could not counteract the effect of erroneously admitting them, by telling the jury not to regard them as evidence. *Cornelius v. State*, 782.

24. But it is not proper to ask a witness, in general terms, if he is not prejudiced against defendant. He may be interrogated as to any particular acts or expressions in reference to the accused from which the jury may infer unfriendly feeling or prejudice. *Ib.*

25. General rules as to what declarations of a party constitute part of the *res gestæ* stated, and cases illustrative of them referred to. *Ib.*

26. In this case the defendant was indicted for the larceny of a cow, belonging to one of his neighbors; the State proved by two witnesses, that on a certain night they secreted themselves near the cow-pen of defendant, having heard that the cow in question had been penned with his cattle on that evening, and that between midnight and day, the defendant, and his negro boy, came to the pen, with a torch-light, killed the cow, and were about to commence skinning her, when witnesses arrested defendant. The defendant then offered to prove that on the night the cow was killed, after his cattle were turned into the pen, and before

EVIDENCE—CONTINUED.

the family and others at his house went to bed, he declared openly in his family, and in the presence of visitors, that he was going to kill the cow before day, and take her to the neighboring town to market; and declared at the same time, that he had received a message from the owner of the cow, which authorized him to kill the cow and pay for her—that these declarations were made to some three or four grown white persons, who were at his house at the time, as well as directions given to the negroes in reference to the matter: HELD, that under all the circumstances, these declarations of defendant constituted part of the *res gestæ*, and were competent evidence to show the intention of defendant in killing the cow. *Ib.*

27. The defendant further proposed to prove by *S.*, that a short time before the cow was killed, she heard *W.*, who was then living with defendant, tell him that he had been down to the residence of the owner of the cow, and that the owner had told him to tell defendant that the cow had been running about his, defendant's place, the winter before, and that if she returned he was at liberty to kill her and pay him two cents a pound for her; and, that after receiving this message, the defendant openly declared his intention of killing the cow. It was further shown that defendant had been unable to procure the attendance of *W.* as a witness: HELD that *S.* was a competent witness to prove the delivery of the message to defendant—that it was immaterial whether the message was true or false, if defendant acted on it in good faith, and that a person who heard the message delivered to defendant, was as competent to prove its delivery to him, as the person who delivered it. *Ib.*

28. Defendant proved by M., a resident of the neighboring town, that on the day before the cow was killed, he had engaged to deliver to him beef on the next morning, and then proposed to prove by M. that he told him that he had no beef of his own, but that there was one at his house belonging to one of his neighbors, which he would kill, and pay for, and that he had permission from the owner to do so: HELD, That under all the circumstances in proof these declarations of defendant to M. should go to the jury as part of the *res gestæ* explaining the intention and motives of defendant in killing the cow. *Ib.*

EXECUTION.

1. To a *scire facias* to revive a judgment, where defendant pleads, as a satisfaction, a subsisting, undisposed of levy on lands, a replication that the land levied upon is not the property of the defendant, is not of sufficient value to satisfy the debt, or has been discharged by a sale of the property since the commencement of the action, is not good. *Humphries ad., use, &c., v. Anthony*, 136.

2. The replication should traverse the fact as to whether there was or was not a subsisting levy at the time of the commencement of the action. *Ib.*

3. In this case, the marshal returned that he served the writ by leaving a copy with a member of the family, but did not state that he left it at defendant's usual place of abode, as required by statute; judgment was rendered on default, execution issued, and defendant's lands sold; the purchasers filed a bill to quiet their

EXECUTION—CONTINUED.

title, and it was objected that they purchased under a void judgment: HELD, As above, that the judgment might, possibly, be reversed, but was sufficient to uphold complainants' title when questioned collaterally. *Byers & Mc Donald v. Fowler et al.* 218.

4. The failure of a sheriff or marshal to advertise lands for sale under execution in the mode prescribed by statute, will not invalidate the title of the purchaser —such statutes are directory to the officer, and whilst a failure on his part to comply with their provisions, will make him responsible to the injured party, it cannot affect the title of the purchaser, unless it be affirmatively shown that he was cognizant of the irregularity. *Ib.*

5. In this case, the marshal did not advertise the lands in the mode, or sell at the time, prescribed by our statute, but followed a rule of the Circuit Court of the United States for the District of Arkansas, adopted 10th October, 1842, and after the passage of the act of Congress, (of August 1, 1842,) adopting the law of the State regulating proceedings under executions—the defendants contended that the Circuit Court of the United States had no power to make the said rule, and that the title of complainants was not valid, inasmuch as the lands were not advertised in the mode, and sold at the time, prescribed by our statute: HELD, That, even if the Circut Court of the United States had not the power to make the rule in question, (which point is waived,) and the marshal should have followed the statute of the State, as to the mode of advertising, and time of selling the lands, still, as it was not averred in the pleadings, and proven that complainants were cognizant of such irregularities, their title was valid. *Ib.*

6. A judgment of the Circuit Court of the United States for the District of Arkansas, operates as a lien upon all the lands of defendant throughout the State; and this, too, independent of the act of Congress (of August, 1842,) adopting the laws of the State in regard to judgments and executions, such lien being the result of previous legislation by Congress. *Ib.*

7. Under act of Congress, (May 7, 1800, sec. 3,) where a marshal sells lands, and goes out of office before making the purchaser a deed, the court, out of which the execution issued, on proper application setting forth the facts, may order his successor in office to make the deed, and a deed so made is valid. *Ib.*

8. A deed to lands sold by the marshal, and acknowledged by him before the Circuit Court of the United States of the District of Arkansas, may, upon the certificate of such acknowledgment, be admitted to record in the office of the Recorder of the county where the lands are situate; this is clearly the law since the adoption of our statute on the subject of executions, &c., by act of Congress (of August, 1842,) if not before. *Ib.*

9. Where a marshal is removed from office after a *fi. fa.* has come to his hands, he has nevertheless, power to execute it, and may levy upon and sell lands under it; but after he has levied upon the lands, it is irregular for his successor in office to take charge of the process and make the sale, and a sale so made may be set set aside as irregular by direct application, but will not be held void when called in question in a collateral proceeding. *Ib.*

10. In this case, after the *fi. fa.* came to the hands of Rector, as marshal of the

EXECUTION—CONTINUED.

United States of the District of Arkansas, he was removed from office; after his removal, his deputy levied the writ on lands; and a deputy of Newton, the successor of Rector, made the sale under the same *fi. fa.*: HELD, As above, that the sale was irregular, and might have been set aside on a direct application; but being questioned in a collateral proceeding, the title of purchaser was good, the sale not being absolutely void. *Ib.*

11. In this case, a *fi. fa.* was issued in the usual form, but *wanting* the *signature* of the *clerk*, and levied on lands, but returned without sale; under an alias *ven ex.* issued thereon, complainants purchased, and seek confirmation of title, and it is objected that the original *fi. fa.* was void: HELD, That said *fi. fa.* being valid and formal, in all other respects, was not void but amendable, and being called in question collaterally, would be considered as amended. *Whiting & Slark v. Beebe et al.*, 421.

12. By the common law, there are but two writs given the creditor to enforce satisfaction of his judgment, that of a *fi. fa.* against the goods, and *levare facias* against the goods, and also issues and profits of lands. By statute he was allowed also the writ of *ca. sa.* against the body of the debtor, and the writ of *eliget* against his lands; and the levy on goods, the arrest of the body of the debtor, and the delivery of a moity of the land, were each held an unqualified satisfaction of the judgment. *Ib.*

13. The above rule as to the effect of a levy upon goods, (as laid down in *Clark v. Withers*, 2 *Ld. Ray.* 1072,) was recognized by most of the American courts, until a change in the rule was announced in the *People v. Hopson*, 1 *Denio* 574, which change in the rule has been generally acquiesced in by the courts of the United States. *Ib.*

14. The rule so modified is, that a mere levy on sufficient personal property, without anything more, never amounts to a satisfaction of the judgment. But so long as the property remains in legal custody, the other remedies of the creditor will be suspended. He cannot have a new execution against the person or property of the debtor, nor maintain an action on the judgment, &c.; and this rule may be regarded as settled by authority. *Ib.*

15. And after a full review of decisions, this rule is held to apply to a levy upon lands: and the case of *Anderson v. Fowler*, 3 *Eng. R.* 388, is adhered to and confirmed. *Ib.*

16. The law gives to the creditor the right to select which of the several means of enforcing satisfaction he will avail himself of, but when he has made such selection, will never permit him to abandon it capriciously. *Ib.*

17. He may prefer to take his debtor in custody on *ca. sa.* [*in cases provided by statute,*] and whilst so held, all other satisfaction is denied him. But if the debtor escape, the creditor may resort to other process for satisfaction. *Ib.*

18. So the creditor may elect to take goods by *fi. fa.* in satisfaction, and when he has done so, the satisfaction is precisely the same in principle as if he had taken the body of defendant—whilst he holds them in execution, the law gives him no other indemnity. But should they, by acts not the fault of the creditor, be lost to the debtor, or appropriated according to law, and found insufficient,

EXECUTION—CONTINUED.

then, on the same principle that the escape of the debtor entitles the creditor to further process, he may sue out an *alias fi. fa.*; yet like a voluntary discharge of the debtor from custody, if the goods are appropriated or wasted by the acts of the creditor, or his accredited agent, the satisfaction would become complete, at least to the amount of the value of the goods so wasted. *Ib.*

19. So, also, where a levy is made and a delivery bond (which, by statute, has the force of a judgment when forfeited) is taken and forfeited, the levy is discharged, and the bond so forfeited held to be a satisfaction of the former judgment. Yet should the bond be quashed, the effect thereof would be to revive the former judgment. *Ib.*

20. The law gives but one satisfaction, and where the party takes it, he must abide it if sufficient—it must however be sufficient—if partial, it is not a good bar. The law presumes the debtor able to pay his debts, and commands the officer to take property of sufficient value to make him a full satisfaction. The court will presume that he has done this, and therefore, until the levy is legally discharged, it must be considered and held as such. The creditor, until it is shown to be otherwise, *can make no step backward.* *Ib.*

21. Such being the effect of a levy upon lands, as well as upon goods, it necessarily follows, that where a *fi. fa.* has been levied upon lands, and returned without sale, a *ven. ex.* with a *fi. fa.* clause cannot properly issue thereon. A simple *ven. ex.* directing the sale of the property, which by the return of the sheriff upon the original *fi. fa.* appears to be in his lands unsold, is the appropriate writ. *Ib.*

22. The Court is not of the opinion, however, that such writs of *ven. ex.* with *fi. fa.* clause are absolutely void, or that a sale made of property levied upon under the *fi. fa.* clause thereof, whilst the first levy remains in force, should, in all cases, be set aside. The satisfaction by such original levy is contingent, and not like an actual payment and satisfaction of the judgment. *Ib.*

23. Such writ of *ven. ex.* with a *fi. fa.* clause is analagous to the execution that issued in *Dixon v. Watkins et al.*, 4 *Eng. R.* 139, after stay by recognizance on appeal, which this court held to be *voidable* because it issued against a legal prohibition, but not absolutely *void.* *Ib.*

24. So a levy upon sufficient property to satisfy the judgment, imposes a legal prohibition upon the creditor to forego all further process of satisfaction until, upon appropriation of the property levied, it is found to be insufficient in value to satisfy the judgment. Hence such writs of *ven. ex.* with *fi. fa.* clauses, though not absolutely void, being issued whilst a legal prohibition rests on the creditor from pursuing his remedy upon the judgment, are voidable, and should be, on proper application for that purpose, set aside. *Ib.*

25. But where such writs are not set aside, but property is levied on and sold under such *fi. fa.* clause, and the purchaser is cognizant of such legal prohibition, and irregularity of the process, Chancery will not decree to him a confirmation of the title under the purchase, though it might be otherwise with an innocent purchaser, purchasing in good faith without knowledge of such prohibition and irregularity in the process. *Ib.*

EXECUTION—CONTINUED.

26. It has been held, upon high authority, that the only questions which can arise between an individual claiming a right under the acts done, and one denying their validity, are power in the officer, and fraud in the party. *Ib.*

27. The sheriff derives his power to sell lands not from the statute, but from the judgment and execution. The judgment is evidence of the liability of the property, and the execution is evidence of the sheriff's general power. *Ib.*

28. The sheriff cannot sell by virtue of the lien of the judgment, without an execution. *Ib.*

29. A sheriff does not acquire such an interest in land as to enable him to sell without a writ after the return day thereof, though this may be the rule as to goods. *Ib.*

30. The office of the writ of *ven. ex.* is not, in case of the sale of lands, a mere command to hasten the action of the sheriff, to require him to do that which he had the power to do independent of the writ of *ven. ex.*, but it confers upon him the power to sell, as well as commands him to proceed to do so. *Ib.*

31. The *fi. fa.* when levied and returned, is *functus officio.* The *ven. ex.* relates back to the *fi. fa.* and the levy and return upon it, and the power of the officer commences under the *ven. ex.*, just where the sheriff under the *fi. fia.* stopped. He had levied whilst the *fi. fa.* was in force, but the power was revoked by limitation before sale. The *ven. ex.* does not, therefore, confer power to levy, but to sell. These two writs are in fact but one writ, the latter being designed to complete what has been commenced. *Ib.*

32. In this case, a *fi. fa.* was levied on lands, and returned without sale; a *ven. ex.* with a *fi. fa.* clause issued, which was levied upon additional property, and returned without sale. An alias *ven. ex.* issued, commanding the sheriff to sell the property originally levied on under the *fi. fa.*: HELD. That the sheriff could neither levy on, nor sell under this writ, any other property than that which was originally levied on, and which he was commanded by the writ to sell. *Ib.*

33. A levy or sale of other property than that described in this writ, were acts beyond his authority—not an erroneous exercise of power granted, but an assumption of power not granted; and is for that reason void: and a purchaser under such sale could acquire no title. *Ib.*

34. An execution must issue within a year and a day of the rendition of the judgment; and be regularly continued within a year and a day; or the judgment revived by *scire facias.* *Bracken v. Wood*, 605.

35. An execution by the Justice of the Peace and a return of *nulla bona*, are prerequisites to the filing the transcript of a judgment of a justice in the Circuit Court and the issuance of execution therefrom. *Mussy v. Gardenhire*, 608.

36. But it is not necessary that the execution from the Circuit Court on such judgment, should recite the fact of such issuance and return of execution. *Ib.*

EXECUTORS AND ADMINISTRATORS.

1. An administrator may take a note for a debt due his intestate, either in his individual or representative right. If he take it to himself, he is liable over to

EXECUTORS AND ADMINISTRATORS—CONTINUED.

the estate for a devastavit, but the contract is nevertheless valid between the parties: and the maker of the note cannot set-off against it, a claim purchased by him against the estate of the intestate. *Biscoe v. Moore et al., ad., use, &c.*, 77.

FALSE IMPRISONMENT.

1. On an indictment for false imprisonment, the State is only required to prove the imprisonment, and then it devolves upon the defendant to prove that he was justied in what he did, and that the imprisonment was lawful. *Floyd v. State*, 43.
2. Every confinement of the person is an imprisonment, whether it be in a common prison, in a private house, in the stocks, or even by forcibly detaining one in the public streets. *Ib.*
3. The defendant must either prove that he did not imprison the party, or he must justify the imprisonment. *Ib.*
4. Defendant may justify, by showing that he procured the arrest to be made under and by virtue of a regular and valid warrant. *Ib.*
5. Under our statute, (*Digest, chap.* 52, *sec.* 21,) the offence charged against the party arrested, should be set out in the warrant, though this was not required by the common law. Where the defendant relies upon proof of its contents, instead of producing the warrant, the State not objecting to secondary evidence, he should show that it was a legal and valid warrant—at least that it ran in the name of the State. *Ib.*
6. Though defendant may not be present when the arrest is made, yet if it be done upon his procurement, he is answerable therefor. *Ib.*
7. Where there is a conflict of evidence as to whether the party was imprisoned against his will, it is the province of the jury to determine the weight of evidence, and their verdict is conclusive. *Ib.*
8. On an indictment for false imprisonment, the person aiding an officer must show that the arrest was made under a legal and valid warrant; as to the proof of such warrant, see *Floyd v. The State, ante. Mitchell v. The State*, 50.
9. A person acting as guard of one in custody on a criminal charge, or aiding an officer in the safe-keeping of a prisoner, is entitled to the same protection as the officer, and no more. When called upon by the officer, he aids him at his peril; he is bound to know whether the officer acts under a legal and valid warrant. *Ib.*

FALSE PRETENCES.

1. In an indictment for false pretences, it is not sufficient to charge false pretences in general terms; but it is necessary to set them out specifically and with strict certainty. *Burrow v. State*, 65.
2. False pretences, within the meaning of the statute, must be of some existing fact, and not of future transactions, as held in *McKenzie v. The State*, (6 *Eng.* 594.) Hence, an indictment, charging that defendant obtained the property of A. by falsely pretending to him that his goods and chattels were about to be attached, is bad. *Ib.*

FALSE PRETENCES—CONTINUED.

3. A count in the indictment charged that defendant falsely pretended to A. that divers persons had conspired to seize and unjustly deprive him of a slave, by means of which false pretences defendant induced A. to convey to him said negro: HELD, That the pretences here charged were of too vague and indefinite a character to deceive a person of ordinary prudence and understanding, and therefore not within the purview of the statute. *Ib.*
4. In criminal cases, the jury should be sworn to try the issue according to law and the evidence. *Ib.*

FEES.

1. Where a writ of error is sent to the clerk of a Circuit Court, commanding him to send up to this court a transcript, &c., he has no right to withhold the same until his fees for making it out are paid, but must obey the writ. *Thorn v. Clendenin et al.*, 60.
2. The law of costs and fees is statutory, and no provision is made for paying the clerk his fees in advance of his return in such case. *Ib.*
3. An attorney was employed by a woman to prosecute a bill against her husband for divorce, alimony, &c. After interlocutory decree, by default, on the application of the husband, and by consent of the wife, the decree was set aside, and the bill dismissed; but on a showing by the attorney that he had a claim for fees and expenses incurred in prosecuting the suit, the Court referred his claim to the Master, and ordered that a portion of defendant's property be placed in the hands of a receiver, to be held subject to the final order of the Court on the coming in of the report of the Master, &c: HELD, That the Court having power over the subject matter, the order so made cannot be superseded by this Court but that the final decree of the Court, in the matter, would be subject to review on appeal. *Warner v. Burton*, 144.

FINAL DECREE.

See CHANCERY, 15.

FORFEITURE.

1. Before judgment of forfeiture of a gun found in the hands of a slave, under *chapter* 153, *section* 52, *Digest*, the owner of the property should have actual or constructive notice of the proceedings. *Jones v. Mason*, 687.
2. But in trover for a gun, where the defendant claims title under soch judgment of forfeiture, the question of want of notice to the owner could not properly arise. It could only be raised in a direct proceeding by *certiorari* from the Circuit Court to quash the judgment of the justice, &c. *Ib.*
3. Where, in such action, defendant sets up title to the gun by such judgment of forfeiture, the plea should state all the facts necessary to show jurisdiction on the part of the justice, there being no intendment in favor of such jurisdiction.

FORFEITURE—CONTINUED.

Hence, such plea failing to show that the judgment of forfeiture was rendered within the territorial jurisdiction of the justice, &c., is bad. *Ib.*

4. The plea should also state, in express terms, the names of the parties, that plaint was made before the justice, &c., the judgment of forfeiture, &c.

FORMER RECOVERY.

1. Joint trespassers may be sued separately, and recovery had against each; and judgment against one cannot be pleaded in bar of a recovery against another, unless the judgment has been satisfied, or at least an execution issued. *McGee v. Overby et al.*, 164.
2. To constitute a good plea of former recovery, it is not necessary to show that the same action, in form, has been previously prosecuted against the party, but it is essential, in order to constitute a bar, that the recovery set up should be founded upon the identical cause of action. *Ib.*
3. This was trespass against defendants for taking and converting the mule of plaintiff. Defendants pleaded that they took the mule, and sold it to one J., against whom plaintiff brought replevin, in the detinet, and recovered judgment for the mule, and damages for its detention: HELD, On demurrer, that the plea was not good; that the original taking of the mule by defendants, and its detention by J., to whom defendants sold it, and who was not a joint trespasser with them, were separate and distinct causes of action. *Ib.*
4. To constitute a decree in Chancery, dismissing the cause, a bar to a subsequent bill for the same matter, between the same parties, there should be a decision on the merits. *Moss v. Ashbrooks et al.*, 369.
5. In this case, a demurrer was sustained to the first bill, and complainant declining to amend, the bill was dismissed: HELD, That such decree could not be pleaded as a bar to a second bill for the same matter. *Ib.*

FORMER SUIT PENDING.

1. A plea in abatement of former suit pending in the same court, must, under our statute, be verified by affidavit, as the truth of the allegation that the cause of action and the parties were the same in both suits could not appear of record; though similarity in amount, date, &c., and in names might raise a strong presumption of the truth of such allegation. *White v. Yell*, 139.
2. A plea to a bill in Chancery that a former bill had been brought for the same matters, a demurrer sustained thereto, an appeal to the Supreme Court prayed and granted, by which the jurisdiction of the case was transferred to the Supreme Court where the matters arising upon the bill had not been adjudicated or determined, is not a good plea of former suit pending. The plea should allege specifically that the appeal had been regularly certified to the Supreme Court, and was still therein pending. *Moss v. Ashbrooks et al.*, 369.

FRAUD.

1. Where property is sold under execution, and purchased by a party for the use and benefit of the defendant in the execution, and in fraud of the rights of creditors, it remains subject to the claims of creditors, and the vendee of such party, purchasing with a knowledge of such fraud, will not be protected in his title against judgments of such creditors or persons purchasing under them. *Byers & Mc Donald v. Fowler et al.*, 218.
2. But, on the contrary, a *bona fide* purchaser, for a valuable consideration, without notice of such fraud, will be protected in his title. *Ib.*
3. The answer of a party claiming to be such innocent purchaser, must state the deed of purchase, the date, parties and contents, that the vendor was seized in fee and in possession; the consideration must be stated, with a direct averment that it was *bona fide,* and truly paid, independently of the recital in the deed. Notice of the fraud must be denied previous to, and down to the time of paying the money and the delivery of the deed, &c. *Ib.*
4. A general replication to the answer in such case, will not cure the defect of a failure on the part of defendant to aver notice of such fraud down to the delivery of the deed to him by his vendor; and without such averment, the party must fail to sustain his title regardless of the sufficiency of his proof that he was an innocent purchaser. *Ib.*
5. In this case, the lands of Tully were sold in August, 1841, by the marshal, and bought by Grollman, for the use and benefit of Tully, in fraud of creditors; and Grollman sold the lands to McDonald: afterwards, F. & D. purchased the lands under execution against Tully on a judgment junior to the one under which Grollman purchased, but founded on a debt existing at the time Grollman purchased. F. & D. brought this bill to quiet their title; defendant McDonald claimed to be an innocent purchaser of Grollman for a valuable consideration, without notice of the fraud between Tully and Grollman, but failing to aver want of notice of such fraud down to the time of the delivery of the deed from Grollman to him: HELD, That his defence was insufficient; that the lands in his hands were subject to the judgment under which F. & D. purchased, and they were entitled to all the equities of the plaintiffs in the judgment. *Ib.*
6. A party cannot complain that the court struck out a portion of his answer calling on complainants for discovery, when it appears, upon the whole case, that the discovery sought, if obtained, could have been of no avail. *Ib.*
7. It is the right of an innocent purchaser, for a valuable consideration, without notice, to have the value of permanent and useful improvements, made by him before suit brought by the rightful owner, set off against the rents and profits. *Ib.*
8. McDonald having failed in his defence, by not averring in his answer that he was without notice of the fraud down to the time of the delivery of the deed to him by his vendor, yet, inasmuch as it appears, from the evidence in the cause, that he was an innocent purchaser, for a valuable consideration, without notice: HELD, That, in equity and good conscience, he should not be charged with more costs than he may have incurred in defending the suit. *Ib.*

GARNISHMENT.

1. An appeal lies from the judgment of a justice of the peace to the Circuit Court in a case of garnishment. *Patterson v. Harland,* 158.
2. On the trial, in a case of judicial garnishment, the original judgment must be produced and read in evidence before any testimony can be introduced to establish the indebtedness of the garnishee. But if the garnishee permits the plaintiff to proceed with other testimony without requiring the production of the judgment, the objection is waived, and cannot be raised on motion for new trial. *Ib.*
3. The garnishee answered, that he had in his possession corn belonging to the judgment debtor, but held it by agreement with him as a security for labor which the judgment debtor was to perform for him, and had not done so: HELD, That the answer was defective in not showing that the judgment debtor was under legal obligation to perform the work. *Ib.*
4. Under the provisions of *ch.* 78, *Digest,* where a garnishee has goods and chattels in his hands belonging to the judgment debtor, he may surrender them to the plaintiff on the return day of the writ, and discharge himself thereby, but if he neglects or refuses to do so, judgment may be rendered against him for the value of the goods found in his hands, subject to the garnishment, in money. *Ib.*
5. Where property is placed in the hands of a person as a pledge for a debt, it cannot be taken by garnishment until the debt is paid. *Ib.*

GOLD AND SILVER.

See TENDER.

GRAND JURY.

1. A disqualification of a juror is good cause for challange before an indictment is found; or of a plea in abatement before the trial, but it is too late to make such objection after verdict. *Fenalty v. State,* 630.
2. The grand jury of Phillips Circuit Court communicated to the judge thereof certain questions which a witness summoned before them had refused to answer, on the ground that his answers would tend to criminate himself, and asked the opinion of the judge as to whether he was bound to answer them—the judge decided that he was not, the attorney for the State excepted to the decision, took a bill of exceptions setting out the facts and brought error: HELD, That the record presented no *case* for the decision of this Court, but simply an abstract point of law, and the writ of error was therefore dismissed. *State v. Biscoe.* 683.

GUNS.

1. Before judgment of forfeiture of a gun found in the hands of a slave, under *chapter* 153, *section* 52, *Digest,* the owner of the property should have actual or constructive notice of the proceedings. *Jones v. Mason,* 687.

GUNS—CONTINUED.

2. But in trover for a gun, where the defendant claims title under such judgment of forfeiture, the question of want of notice to the owner could not properly arise. It could only be raised in a direct proceeding by *certiorari* from the Circuit Court, to quash the judgment of the justice, &c. *Ib.*
3. Where in such action, defendant sets up title to the gun by such judgment of forfeiture, the plea should state all the facts necessary to show jurisdiction on the part of the justice, there being no intendment in favor of such jurisdiction. Hence, such plea failing to show that the judgment of forfeiture was rendered within the territorial jurisdiction of the justice, &c., is bad. *Ib.*
4. The plea should also state, in express terms, the names of the parties, that plaint was made before the justice, &c., the judgment of forfeiture, &c. *Ib.*

HUSBAND AND WIFE.

See WITNESS, 5.

HIRING.

1. On a special contract to pay hire for a slave and return him at the end of the term, the party hiring is liable for the hire and value of the slave if he runs away and escapes, though without cause or fault on the part of the hirer: otherwise, perhaps, as to his liability for the value of the slave, if there is no special contract to return him. *Alston v. Balls & Adams,* 664.

INDICTMENT.

1. Where an indictment is returned into court by a grand jury, but the clerk neglects to endorse the filing, the omission may be supplied at any time, *nunc pro tunc,* by order of the court, on the proper showing. *State v. Gowan,* 62.
2. It is erroneous to quash an indictment for such omission, where the attorney of the State moves to have it supplied, and proves that the indictment was in fact returned by the grand jury and filed. *Ib.*
3. An indictment charging defendant with maliciously and contemptuously disturbing and disquieting a congregation assembled for religious worship, without alleging the manner of disturbance, is insufficient. *State v. Minyard,* 156.
4. It is not necessary, however, to charge the manner of disturbance in any language more explicit than that used in the statute, (*Digest, p.* 370, *sec.* 1,) as "by profanely swearing," or, "by using indecent gestures," &c., as the case may be. *Ib.*
5. An indictment for disturbing a religious congregation, charging that defendant "maliciously and contemptuously did disturb and disquiet a certain congregation assembled for religious worship," without alleging the manner of disturbance, is bad in substance, (*State v. Minyard, ante,*) and will not support a judgment on a plea of guilty. *Fletcher et al. v. The State,* 169.
6. By the plea of guilty, defendant but confesses himself guilty in manner and

INDICTMENT—CONTINUED.

form as charged in the indictment, and if the indictment charges no offence against the law, none is confessed. *Ib.*

7. In this case, the record shows that, at the term at which the indictment purports to have been found, sundry indictments were returned into court by the grand jury and filed, but there is no record entry showing that this particular indictment was so returned, and the defendant, being convicted, urges this as a grounds of error: HELD, That, inasmuch, as our statute, (*sec.* 86, *ch.* 52, *Dig.*,) forbids such an entry, except in case where the defendant is in custody, or on bail, the objection was untenable here. *Shropshire v. The State,* 190.

8. It is a general rule that a criminal charge must be laid in the indictment so as to bring the case within the offence as given in the statute, alleging distinctly all the essential requisites that constitute it. *State v. Eldridge,* 608.

9. In all cases where a felonious intent is an element of the crime, constituting an essential ingredient of the offence and descriptive of it, such intent must be charged in the indictment: otherwise where it is no part of the crime, that being complete under the statute without it, and is simply descriptive of the punishment: in such case, it is sufficient to charge the offence in the words of the statute. *Ib.*

10. As to the caption of an indictment showing that the grand jurors are good and lawful men of the county, &c. *Cornelius v. State,* 782.

IMPROVEMENTS.

1. It is the right of an innocent purchaser, for a valuable consideration, without notice, to have the value of permanent and useful improvements, made by him before suit brought by the rightful owner, set off against the rents and profits. *Byers & Mc Donald v. Fowler et al.,* 218.

2. The law does not raise a promise on the part of the vendor of land, upon the cancellation of the contract of sale, to pay for the improvements made by the vendee while in possession: there must be a special promise to pay for such improvements at the time of vacating the sale. *Main v. Gordon,* 651.

3. In an action to recover the value of such improvements, the defendant cannot set-off, as damages, the value of wood and timber cut off the land by the vendee in violation of his contract of purchase. *Ib.*

JUDICIAL KNOWLEDGE.

1. The records shows that, at the time the indictment was found, *A. B. Greenwood* was prosecuting attorney, and that when the case was tried, *A. B. Greenwood* presided as judge, but the record does not show that any objection was made to the competency of the judge, nor is there any proof of record that Judge *Greenwood* and the prosecuting attorney, *Greenwood,* were the same person. It was urged, on appeal by the defendant, as ground of reversal, that the judge was incompetent to try the case, having acted as prosecuting attorney, when the indictment was preferred—and that this Court judicially knew that the same

JUDICIAL KNOWLEDGE—CONTINUED.

person filled said offices respectively at the times referred to. But this objection is overruled, on the grounds that though this Court might take judicial notice that *A. B. Greenwood* was prosecuting attorney when the indictment was found, and that *A. B. Greenwood* was Circuit Judge when the case was tried, yet it could have no judicial knowledge that the prosecuting attorney and the judge were the same person—and, it is further held, that defendant, in some mode, should have bjected to the competency of the judge at the trial, and put the evidence of his incompetency of record. *Shropshire v. State*, 190.

2. This court will take notice of "the general custom and usages of merchants" as well as the "general customs of our own country," as matters that are generally known. *Davis & Co. v. Hanly, use, &c.*, 645.

JUDGES.

1. The record shows that, at the time the indictment was found, *A. B. Greenwood* was prosecuting attorney, and that when the case was tried, *A. B. Greenwood* presided as judge, but the record does not show that any objection was made to the competency of the judge, nor is there any proof that Judge *Greenwood*, and the prosecuting attorney, *Greenwood*, were the same person. It was urged, on appeal, by the defendant, as grounds of reversal, that the judge was incompetent to try the case, having acted as prosecuting attorney when the indictment was preferred—and that this Court judicially knew that the same person filled said offices respectively at the times referred to. But this objection is overruled, on the grounds that though this Court might take judicial notice that *A. B. Greenwood* was prosecuting attorney when the indictment was found, and that *A. B. Greenwood* was Circuit Juge when the case was tried, yet it could have no judicial knowledge that the prosecuting attorney and the judge were the same person—and, it is further held, that defendant, in some mode, should have objected to the incompetency of the judge at the trial, and put the evidence of his incompetency of record. *Shropshire v. State*, 190.
See also AFFINITY.

JUDGMENTS.

1. The allowance and classification of a claim against an estate, in favor of a creditor, by the probate court, is not a ministerial but a judicial act, has the force and effect of a judgment, and the court has no power to set aside such classification after the lapse of the term at which it is made, and place the claim in a different class, on the application of other creditors. *Cossitt et al v. Biscoe*, 95.
2. Such second classification of the claim being void for want of power over the subject-matter, no appeal could lie therefrom, but it should be quashed on certiorari from the circuit court. *Ib.*
3. A judgment of a Circuit Court of the United States, rendered, by default, upon a return of the marshal showing a defective service of the writ upon defendant,

JUDGMENTS—CONTINUED.

might be reversed, on error, but cannot be treated as a nullity when questioned in a collateral proceeding. *Byers & McDonald v. Fowler et al.*, 218.

4. The Circuit Courts of the United States are endowed with such general jurisdiction as to entitle their judgments to the benefit of all legal intendments necessary to support and uphold them until reversed or annulled by a superior tribunal. *Borden et al. v. State, use, &c.* 6 *Eng.* 519, *cited.* *Ib.*

5. In this case, the marshal returned that he served the writ by leaving a copy with a member of the family, but did not state that he left it at defendants's usual place of abode, as required by statute; judgment was rendered on default, execution issued, and defendant's lands sold; the purchasers filed a bill to quiet their title, and it was objected that they purchased under a void judgment: HELD, As above, that the judgment might, possibly, be reversed, but was sufficient to uphold complainant's title when questioned collaterally. *Ib.*

6. As to evidence of payment of a judgment. *Shouse et al. v. Newton exr.*, 367.

7. Beach having a judgment against De Baun & Thorn, the following entry of satisfaction was made of record. by the attorneys of Beach: "The said defendant, Thorn, having arranged and secured to the satisfaction of the attorneys of said plaintiff, (Trapnall & Cocke) the judgment in this case, they do hereby, and with the consent and agreement of the said De Baun, acknowledge full satisfaction of the said judgment so far as the said Thorn is concerned, without prejudice to the rights of the said plaintiff to sue out executions and recover the said judgment and costs of the said De Baun"—Signed by said attorneys. To which, De Baun added:—"I, James De Baun, do consent to the above satisfaction in the manner and form as therein provided"—Signed by De Baun: HELD, That if this discharge had been made by the plaintiff in person, it would, beyond doubt, have been, in law, a full satisfaction and discharge as to both defendants, upon the principle that as the creditor is entitled to but one satisfaction, though made by one, it enures to the benefit of all. That even where it is expressly understood, and is made part of the terms of release and satisfaction, that such shall not be its effect as against other defendants, it has been held to extend to all. *Whiting & Slark v. Beebe et al.*, 421.

8. HELD, further, that it was a matter of doubt whether the attorneys, for the consideration expressed in the face of the above entry, could make a release which would bind their client: but as it appears that Beebe, who succeeded to the rights of the plaintiff in the judgment by assignment, fully recognizes and affirms this act of the attorneys, and asserts and sets up in his answer that it is a full and complete satisfaction as to Thorn, it follows, that being a satisfaction as to him, it is by operation of law, a satisfaction also, as to De Baun. That De Baun had probably estopped himself from setting up this satisfaction. Yet the satisfaction was not the less complete: estoppel is not the denial of the existence of a fact, but a denial of the right to interpose it. *Ib.*

9. HELD, further, that the said judgment, so far as third persons, lien creditors, were concerned, should be considered as satisfied, and its lien upon lands of defendants discharged, and that a person purchasing under an execution upon said judgment could acquire no vald title. *Ib.*

JUDGMENTS—CONTINUED.

10. A judgment lien is a security against subsequent purchasers and incumbrancers, which denies to the debtor the right to alien or incumber his property, to the prejudice of the rights of the judgment creditor for a given period (in most instances fixed by statute.) *Ib.*

11. It is also a right springing out of, and dependent upon the judgment for its existence, and follows the condition of the judgment. *Ib.*

12. If the judgment is reversed or set aside, the lien is *eo instanti* discharged; if paid, it is merged in payment; if suspended by injunction or supersedeas, the lien is also suspended; and therefore as a levy operates as a *prima facie* satisfaction, and whilst undischarged satisfies and suspends the judgment, the lien must also be suspended with it; and should the levy prove insufficient to satisfy the judgment, as by the discharge of the levy, the judgment is restored to its full effect upon the estate of the debtor; so, also, does the lien, unless in the mean time it has expired by limitation, or has been discharged by the act of the creditor, upon the return of the creditor for further satisfaction, maintain its grasp upon the whole estate of the debtor to the full extent that it did when first created; and intermediate sales of property by junior lien creditors, or by the debtor between the first levy and the discharge thereof, if such discharge takes place before the statute limitation, will be held subject to such lien. *Ib.*

13. The lien is not an intrinsic quality of the judgment itself, but is a quality added to it—an effect of the mere existence of the judgment, which can have no independent existence, but is dependent upon the judgment, and follows it as a shadow does a substance; hence if it is cut off from it, either by the act of the party, the satisfaction or extinguishment of the judgment, or by limitation of time, upon general principles, it is lost, for there ceases to be anything to which it can be attached. *Ib.*

14. A lien being a mere contingency, or right dependent upon a subsisting thing, of course cannot rest upon a contingency, no more than a presumption can rest upon a presumption, or one contingency upon another, or a shadow exist without a substauce. *Ib.*

15. The lien on the Gray & Bouton judgment expired on the 23d March, 1843: on the 20th March, three days before the lien expired, a *sci. fa.* issued to revive the lien, and it was revived on the 16th January, 1846. In June, 1843, the property in dispute (upon which Whiting & Slark held a junior mortgage) was levied on, sold at the November term, 1843, and purchased by Beebe (assignee of the judgment) by virtue of an execution issued upon said judgment, the levy and sale both being after the issuance of the *sci. fa.* but before the revival of the judgment: HELD, That the revival of the judgment did not relate back to Beebe's purchase, so as to constitute him a purchaser under a senior lien, and thereby cut off the "intervening equities of junior lien creditors." *Ib.*

16. The statute makes the judgment, from its date, a lien on all the lands of the debtor, situate in the county in which it is rendered, for the term of three years from its date. It also confers a right upon the creditor to revive his judgment lien by suing out *sci. fa.* at any time before the lien expires; and then in the 13th section, provides, that if the *sci. fa.* be sued out before the lien expires, the lien

JUDGMENTS—CONTINUED.

of the judgment revived shall have relation to the day on which the *sci. fa.* issued, &c: HELD, That when the legislature declared that the judgment lien, when revived, should relate back to the date of the *sci. fa.*, it was intended that the lien, when revived, should act upon the whole estate of the debtor, to the same extent that it did prior to its suspension by limitation, in an unqualified sense, as related to the debtor; and that it also revived all the secondary rights of the senior creditor as between himself and the junior creditor; subject, however, to such intervening equities as might have arisen between the time of the suspension and the revival of the judgment, for these might have accrued to him even under the first lien. *Ib.*

17. Upon the death of one of several defendants in a judgment, the plaintiff has a right to a separate revival against the representative of the deceased. *Finn as ad. v. Crabtree as ad.*, 497.

18. It is error to render judgment against a defendant without disposing of all his pleas. *Ib.*

19. An execution must issue within a year and a day of the rendition of the judgment; and be regularly continued within a year and a day; or the judgment revived by *scire facias*. *Bracken v. Wood*, 605.

20. *Nil debet* cannot be pleaded to debt on a judgment of a sister State. *Hensley v. Force & Co.*, 756.

21. Nor can the defendant plead that the court which rendered the judgment, had no jurisdiction of the subject matter of the suit. Both the indebtedness and the jtrisdiction of the subject matter are subjects of inquiry before the judgment is rendered, and not after. *Ib.*

JURISDICTION.

1. Where application is made by an administrator to the Probate Court for an order to sell real estate of his intestate, any person interested in the subject matter may, on proper showing to the Probate Court, make himself a party to the proceedings, put upon record, by bill of exceptions, the evidence and facts upon which the order of sale is made, and appeal therefrom to the Circuit Court. *Digest, page* 142, *ch.* 4, *sec.* 176, and *Pamph. Acts* 1849, *p.* 59. *Wm. J. Marr Ex parte*, 84.

2. Such order of sale is a proceeding *in rem*, by a superior court having jurisdiction of the subject matter, (*Adamson et al. v. Cummins, ad.*, 5 *Eng.* 549,) and cannot be regarded as a nullity, (*Borden et al. v. State, use, &c.*, 6 *Eng.*,) and consequently, all reasonable presumptions of law are in favor of the regularity of the proceedings. *Ib.*

3. This court, in the case of *Carnall v. Crawford Co.*, (6 *Eng.*,) expressed its views as to the true nature of the character and powers of superintendency and control entrusted to it by the constitution over all inferior tribunals; and to the Circuit Courts over County Courts, Probate Courts and Justices of the Peace; overruling so much of *Ex parte Anthony* (5 *Ark.* 363–4) and *Levy v. Lychinski*, (3 *Eng.* 113,) as conflicted with these views; and approving so much of the doc-

JURISDICTION—CONTINUED.

trine of the dissenting opinion in *Amour Hunt Ex parte* (5 *Eng.* 288) as sustained them; and now this court adopts the residue of the doctrines of that opinion, and especially those relating to the contingency on which this court will exercise these powers. *Ib.*

4. In doing so, the court overrules the doctrine of *Webb & Estell v. Hanger & Winston,* (1 *Ark.* 122,) and of the cases based upon it, where it is held, in substance, that a party aggrieved by the decision of a County, Probate, or Justice's court, may apply directly to this court without having first made application to a Circuit Court, or showing any reason for not having done so. *Ib.*

5. A party has no right to apply to this court to supersede a judgment of the Probate Court, until he has first sought a remedy at the hands of the Circuit Court, or can show that that court is incompetent to act in the premises, either in consequence of some inherent defect in the tribunal, or of incompetency of its incumbent. *Ib.*

6. Construing the provisions of the constitution together, it is manifest that it was not the intention of its framers that causes should be brought directly into this court from the County, Probate, and Justice's Courts, for supervision, except in cases where it might be absolutely necessary to prevent a failure of justice. *Marr Ex parte,* 87.

7. This court (as held in *Wm. J. Marr, ante*) will not award a writ of certiorari to bring up a judgment of the Probate Court for quashal, until the party aggrieved first applies to the Circuit Court for redress, or shows that court to be incompetent to act in the premises, either in consequence of some inherent defect in the tribunal, or of incompetency of its incumbent. *Ib.*

8. The manner in which this court exercises its superintending control over inferior tribunals, discussed. *Ib.*

9. The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted, but does not create that cause. *Allis Ex parte,* 101.

10. The intention of the framers of the constitution, is to be derived by considering the subject matter, and the langunge, in connection with known political truths and established common law institutions obviously in the minds eye of these law givers; otherwise, provisions, that in this light, might be of the most clear and exact conception, might justly present the most ample ground for discussion, and legitimate foundation for a contrariety of opinion, if considered by the most enlightened minds. *Ib.*

11. Nor can any single portion of the constitution be safely considered, even in this manner, to determine its functions, otherwise than in connexion with every other part; because all these were designed to constitute but one practical harmonious whole, not only when in united, but when in separate, action. Thus, when determining upon the nature and limits of the judicial functions, those of the executive and legislative departments should be also considered, not only to guard against conflict from the extension of either beyond its proper confines; but also that the aggregate of the three shall be made to cover the entire field of government designed to be set on foot. *Ib.*

JURISDICTION—CONTINUED.

12. And when, in the light of known political truths, it might be distinctly seen that it was designed that each of these departments should operate in different portions of the field, and in entire and perfect harmony with each other, no power which was expressly delegated to any one of them could ever be derived to another by implication, even upon any basis of supposed necessity, much less of convenience. *Ib.*

13. Although this rule may not apply so strongly to the parceling out of the whole powers of a single department among different functionaries, as it does to the parceling out of the whole powers of government among its three departments, simply because the division of power, as a known political truth is of more importance to the citizen in the one case than in the other; yet it has a just application in ratio corresponding to this descending scale of importance. *Ib.*

14. Hence it cannot be said that this rule has no application at all to the parceling out of the powers of the judicial department, because these powers, no less than those of the executive and legislative, have relation, not only to private rights, and private security, but to civil and political liberty, and to public safety, and were designed no less to be exerted in reference to known political and legal truths. Hence, when construction is necessary, as is warranted, judicial powers should be construed in like reference to such legal truths as were in the minds eye of the framers of the constitution relative to them. *Ib.*

15. Among the general politico-legal truths manifestly in the view of the framers of the constitution, was that justice can be best administered in a system embracing numerous courts, among which the judicial powers should be so parceled out that every citizen should have convenient access to justice; and every dissatisfied suitor a reasonable opportunity for a revisal of his case by appellate power. *Ib.*

16. The citizen's right to appeal may be regulated by law, and it may be enlarged, as has been done, by provisions of law for intermediate appeals to the Circuit Courts, but it cannot be cut off by sending him in the first place to this court; nor can he be authorized by an act of the legislature to come here for justice in the first instance. *Ib.*

17. In determining whether or not any one court in our system can rightfully exercise a given power, reference must be had not only to all the powers of such court, but to those of all the other courts as one system, framed within a department of the government whose entire powers have limitations, qualifications, and restrictions placed upon them by the Bill of Rights. Nor is this all: we must, at the same time, let the lights from without shine in. *Ib.*

18. It is true that, when in search of a particular power, if the meaning of the framers of the constitution is evident, and is expressed in clear and precise terms, and leads to no absurd conclusion, there is no warrant in the law to interpret what has no need of interpretation; but, even waiving all absurd conclusions, the expression that this court "shall have power to issue writs, &c., and hear and determine the same," does not, in *express* terms, grant to this court jurisdiction of the causes to which the writs may be made to apply, but leaves that grant of jurisdiction as a principal judicial power to be *implied* from the

JURISDICTION—CONTINUED.

language used. Because writs are but the emanation from judicial power—its mere instrument: and to hear and determine a writ is but to exert the function of a judicial power—its faculty. Therefore, although the grant of the power to exert the function may imply a grant to the functionary of the principal power itself whose function he is to exert; it does not; in express terms, grant that power, but leaves it to be implied. *Ib.*

19. Nor is there any necessity to derive the jurisdiction in question by such an implication; nor is it the necessary result of these expressions, because two great principal powers of jurisdiction are, in express terms, granted to this court, to wit: appellate powers purely, and general powers of superintendency and control—to which all that is granted in the language of the constitution in question, is but appropriate adjuncts. *Ib.*

20. And when it is considered that the result of deriving the jurisdiction in question by implication from the language in question, is to grant this court an almost illimitable original jurisdiction co-extensive with the State—is to desecrate the right of the dissatisfied suitor to a revision of his cause—is to exclude the State from all benefit of revisal in matters of the greatest moment to the people—is to thwart essentially the dispensation of justice in localities convenient to the residences of the parties, and that, by the express provisions of the constitution, the circuit courts have ample jurisdiction to hear and determine all writs applicable to causes of that character, the derivation of the jurisdiction in question for this court, is not only cogently but absolutely inhibited. *Ib.*

21. It is, therefore, held that this court has no original jurisdiction other than such as may be necessary to exercise a general superintendency and control over all the courts of this State, and as part and parcel of those powers of control. *Ib.*

22. In the light of these views, this court refuses to grant a *mandamus* to compel the Inspectors of the Penitentiary to certify to the Auditor the quarterly compensation of the Contractor for building a wall around the Penitentiary, &c., the Circuit Court of Pulaski county being competent to hear and determine the application. *Ib.*

JURORS.

1. As to the caption of an indictment showing that the grand jurors are good and lawful men of the county, &c. *Cornelius v. State*, 782.

2. Under sec. 155, chap. 52, Digest, a member of a grand jury by which an indictment is found, &c., cannot serve as a juror on the trial thereof; and under section 163, of the same chapter, if the disqualification of the juror is discovered after he is sworn, but before any of the evidence is introduced, the court may, in its discretion, discharge him, notwithstanding the contrary provision of section 20, of chapter 94, of the Digest, because the former section having been passed after the latter, controls it, under the rule of construction, as given in the 6th section of the 156th chapter of the Digest. *Ib.*

See also NEW TRIAL, 4, 5.

JUSTICES OF THE PEACE.

1. Where a justice of the peace fails to render a judgment upon the verdict of a jury, in a case tried before him, at the time when the verdict is returned, he or his successor in office may render such judgment at any subsequent time *nunc pro tunc*, and until the judgment is rendered, no appeal lies to the Circuit Court. *Adams et al. v. Thompson, use, &c.*, 670.

LEVY.

1. To a *scire facias* to revive a judgment, where defendant pleads, as a satisfaction, a subsisting, undisposed-of levy on lands, a replication that the land levied upon is not the property of the defendant—is not of sufficient value to satisfy the debt, or has been discharged by a sale of the property since the commencement of the action, is not good. *Humphries ad., use, &c. v. Anthony*, 136.
2. The replication should traverse the fact as to whether there was or was not a subsisting levy at the time of the commencement of the action. *Ib.*
3. The rule so modified is, that a mere levy on sufficient personal property, without anything more, never amounts to a satisfaction of the judgment. But so long as the property remains in legal custody, the other remedies of the creditor will be suspended. He cannot have a new execution against the person or property of the debtor, nor maintain an action on the judgment, &c.; and this rule may be regarded as settled by authority. *Whiting & Slark v. Beebe et al.*, 421.
4. And after a full review of decisions, this rule is held to apply to a levy upon lands: and the case of *Anderson v. Fowler*, 3 *Eng. R.* 388, is adhered to and confirmed. *Ib.*
5. The law gives to the creditor the right to select which of the several means of enforcing satisfaction he will avail himself of, but when he has made such selection, will never permit him to abandon it capriciously. *Ib.*
6. Where a levy is made and a delivery bond (which, by statute, has the force of a judgment when forfeited) is taken and forfeited, the levy is discharged, and the bond so forfeited held to be a satisfaction of the former judgment. Yet should the bond be quashed, the effect thereof would be to revive the former judgment. *Ib.*

LIEN.

1. A judgment of the Circut Court of the United States for the district of Arkansas, operates as a lien upon all the lands of the defendant throughout the State, and this, too, independent of the act of Congress (of August, 1842,) adopting the laws of the State in regard to judgments and executions, such lien being the result of previous legislation by Congress. *Byers & McDonald v. Fowler et al.*, 218.
2. A judgment lien is a security against subsequent purchasers and incumbrancers, which denies to the debtor the right to alien or incumber his property, to the

LIEN—CONTINUED.

prejudice of the rights of the judgment creditor for a given period (in most instances fixed by statute.) *Whiting & Slark v. Beebe et al.*, 421.

3. It is also a right springing out of, and dependent upon the judgment for its existence, and follows the condition of the judgment. *Ib.*
4. If the judgment is reversed or set aside, the lien is *eo instanti* discharged; if paid, it is merged in the payment; if suspended by injunction or supersedeas, the lien is also suspended; and therefore as a levy operates as a *prima facie* satisfaction, and whilst undischarged satisfies and suspends the judgment, the lien must also be suspended with it; and should the levy prove insufficient to satisfy the judgment, as by the discharge of the levy, the judgment is restored to its full effect upon the estate of the debtor; so, also, does the lien, unless in the mean time it has expired by limitation, or has been discharged by the act of the creditor, upon the return of the creditor for further satisfaction, maintain its grasp upon the whole estate of the debtor to the full extent that it did when first created; and intermediate sales of property by junior lien creditors, or by the debtor between the first levy and the discharge thereof, if such discharge takes place before the statute limitation, will be held subject to such lien. *Ib.*
5. The lien is not an intrinsic quality of the judgment itself, but is a quality added to it—an effect of the mere existence of the judgment, which can have no independent existence, but is dependent upon the judgment, and follows it as a shadow does a substance; hence if it is cut off from it, either by the act of the party, the satisfaction or extinguishment of the judgment, or by limitation of time, upon general principles, it is lost, for there ceases to be anything to which it can be attached. *Ib.*
6. A lien being a mere contingency, or right dependent upon a subsisting thing, of course cannot rest upon a contingency, no more than a presumption can rest upon a presumption, or one contingency upon another, or a shadow exist without a substance. *Ib.*
7. The lien on the Gray & Bouton judgment expired on the 23d March, 1843: on the 20th March, three days before the lien expired, a *sci. fa.* issued to revive the lien, and it was revived on the 16th January, 1846. In June, 1843, the property in dispute (upon which Whiting & Slark held a junior mortgage) was levied on, sold at the November term, 1843, and purchased by Beebe (assignee of the judgment) by virtue of an execution issued upon said judgment, the levy and sale both being after the issuance of the *sci. fa.* but before the revival of the judgment: HELD, That the revival of the judgment did not relate back to Beebe's purchase, so as to constitute him a purchaser under a senior lien, and thereby cut off the "intervening equities of junior lien creditors." *Ib.*
8. The statute makes the judgment, from its date, a lien on all the lands of the debtor, situate in the county in which it is rendered, for the term of three years from its date. It also confers a right upon the creditor to revive his judgment lien by suing out *sci. fa.* at any time before the lien expires; and then in the 13th section, provides, that if the *sci. fa.* be sued out before the lien expires, the lien of the judgment revived shall have relation to the day on which the *sci. fa.* issued, &c: HELD, That when the legislature declared that the judgment lien, when re-

LIEN—CONTINUED.

vived, should relate back to the date of the *sci. fa.*, it was intended that the lien, when revived, should act upon the whole estate of the debtor, to the same extent that it did prior to its suspension by limitation, in an unqualified sense, as related to the debtor; and that it also revived all the secondary rights of the senior creditor as between himself and the junior creditor; subject, however, to such intervening equities as might have arisen between the time of the suspension and the revival of the judgment, for these might have accrued to him even under the first lien. *Ib.*

LIMITATION.

1. A suit is commenced by the filing of the declaration and the voluntary appearance of defendant, or the issuance of the writ—filing the declaration alone is not the commencement of an action. *State Bank v. Brown*, 94.
2. It is no answer to a plea of limitation that plaintiff filed his declaration before the cause of action was barred, and instructed the clerk to issue a writ immediately, but the clerk did not do so until the limitation expired, as held in *State Bank v. Carson et al.*, 5 *Eng.* 479. *Ib.*
3. The statute of limitation is not a good plea to a *scire facias* to revive a judgment. *Brown, Robb & Co. v. Byrd*, 5 *Eng. R.* 534. *Evans v. White et al.*, 133.
4. The legal effect of part payment is not to take the case out of the limitation act of 1839, and place it within the act of 1834. *Biscoe et al. v. Stone et al.*, 6 *Eng.* 39, and *Durritt v. Trammell, Ib.* 183. *State v. Terry*, 133.
5. Under a general replication to a plea of limitation, plaintiff cannot avail himself of the provisions of *sec.* 24, *ch.* 99, *Dig.*, by introducing in evidence a record to show that he had commenced a former suit within the bar, suffered a non-suit, and instituted the present suit within a year thereafter, but he must specially reply such former suit, &c., to the plea. *McClellan v. State Bank*, 141.
6. And when specially replied, the record offered in evidence must show a former suit between the same parties; a declaration, writ and judgment of non-suit against *Ewing* W. McClellan, is not, of itself, evidence of a suit against *Evan* W. McClellan, and whether other evidence could be introduced to explain the discrepancy, this court does not now decide. *Ib.*
7. Action of debt on a note: plea, limitation: replication, that before the bar attached, plaintiff brought suit on the same cause of action, against defandants, in the same court, afterwards suffered a non-suit, and commenced the present action within a year thereafter: rejoinder, *nul tiel* record of such former suit, issue thereto submitted to the court, and finding for the defendants; bill of exceptions setting out the record read in evidence on the trial, which is substantially as alleged in the replication: HELD, That this court could not presume in favor of the judgment of the court below, and for the purpose of sustaining it, that other evidence than the record set out in the bill of exceptions was introduced on the trial, because the bill of exceptions did expressly negative the introduction of other evidence, inasmuch as under the issue none other could be introduced. *State Bank v. Arnold et al.*, 180.

LIMITATIOM—CONTINUED.

8. Under such issue, the defendant could not have proven *aliunde*, that the parties or the cause of action in the two suits were not the same—the only question raised by the issue being, was there such a record of such former suit, &c., as alleged in the replication. *Ib.*

9. Debt, on a note executed by defendant and two others: plea, limitation: replication, that plaintiff brought an action on the note within the bar, suffered a non-suit, and commenced the present action within a year thereafter: Replication held bad, on demurrer, because it did not allege that the former action was brought against defendant in the present suit. *State Bank v. Sherrill*, 183.

10. Where a party pleads matter of record, if the record be set out imperfectly or partially, it is sufficient if enough appear to prove the matter in dispute; as if the plaintiff replies a former suit against defendant within the bar, non-suit, and new action within a year, to avoid the plea of limitation, and the record shows a suit against defendant and two others, joint-makers of the note sued on, the record is sufficient to support the replication under the issue of *nul tiel record*. *Ib.*

11. Under such issue, no evidence is admissible, but the record, or a transcript of it—plaintiff need not prove *aliunde* that the parties and cause of action in the two suits are the same: the issue is tried alone by the record. *Ib.*

12 Neither party has a right to complain that an issue remains undisposed of, where the same matter is determined under other issues. *Ib.*

13. Where plaintiff replies a former suit, &c., to the plea of limitation, defendant rejoins *nul tiel record;* and issue thereto is found for defendant, he is entitled to final judgment; and it is not necessary to submit to a jury other issues made up in the case; but if such issues are submitted to a jury, and found against plaintiff, it being an extrajudicial act, is no waiver of his right to a future trial of the issues, on reversal of the judgment on the issue of *nul tiel record*. *Ib.*

14. The period of two years, within which a claim against a deceased debtor must be presented to his representative, commences to run from the accrual of the cause of action: so that, a security paying the debt of the deceased, has two years from the time of payment to present the claim. *Allen v. Byers, ad.*, 592.

15. The principle decided in *Brown v. State Bank*, 5 *Eng. Rep.* 134, as to the sufficiency of a promise to avoid the statute of limitations, re-affirmed. *Beebe v. Block*, 595.

16. Foreign corporations are not within the saving clause of the statute of limitation put in operation on the 20th March, 1839; but are embraced in the act of 14th December, 1844. *Clarke v. Bk. Miss.*, 5 *Eng.* 525. *Bank of Tennessee v. Armstrong et al.*, 602.

17. The statute, allowing claims against the estate of a deceased debtor to be presented to the executor or administrator within two years, does not extend the period of limitation, where the claim would be barred before the two years had expired. *Etter v. Finn as ad.*, 632.

18. When the statute of limitations commences running, it continues to run: except that the time intervening between the death of the debtor and grant of letters of administration, is not counted. *Ib.*

LIMITATION—CONTINUED

19. Suit by the Bank of the State, commenced 18th February, 1848, on a note due 1st April, 1844. Defendant plead the limitation act of three years; plaintiff replied a payment on the day of the maturity of the note; and insisted that the effect of such payment, under the Liquidation Act of 31st January, 1843, was to renew the note for twelve months, and that the statute would not commence to run until the expiration of that period—But HELD, that in the absence of special allegations in the plaintiff's replication to bring the case within the provisions of the Liquidation Act referred to, the general law must govern; that the statute run from the date of the payment, and the note was barred. *Woods v. State Bank*, 692.

20. The Bank could not properly prove the contents of a receipt executed by the Financial Receiver to defendant for a payment on the note, without notice to him to produce it, &c. *Ib.*

21. The paintiff having obtained judgment, the cause is reversed, and a re-pleader awarded, to enable the Bank to amend her replication, &c. *Ib.*

22. Facts and decision same as in Woods v. State Bank, *ub sup. State Bank v, Pryor et. al.*, 698.

23. On a bond executed by a deputy sheriff to his principal, conditioned that he would well and truly do and perform all the duties appertaining to the office of sheriff, during the time he continued the lawful deputy—an action accrues, and the statute of limitation commences running in respect thereof, whenever the deputy fails, at the return, to pay over money collected by him on execution. It is not a mere bond of indemnity against actual loss or damage to the principal—consequently, a cause of action accrued thereon whenever the principal's liability became fixed by the failure of the deputy to pay over money according to the mandante of the writ by virtue of which it was collected, and the statute commenced running from that time. *Badgett v. Martin*, 730.

24. In an action on such a bond, dated in 1837, and the breach thereof accruing in 1838, the limitation is five years—consequently pleas setting up the lapse of two and four years are insufficient; but such pleas should not be struck out on motion—they should be met by demurrer. *Ib.*

25. The rule in regard to variance is not so strict where a record is offered in evidence collaterally, as it is where the record is the foundation of the suit. *State Bank v. Gray*, 760.

26. This was an action against one of several makers of a note, defendant pleaded limitation; plaintiff replied a suit against defendant within the bar; non-suit, and new suit within a year thereafter; defendant rejoined *nul tiel record:* HELD, That a record of a former suit against all the makers of the note sued on, was not variant from the replication of former suit "against defendant," and might be read in evidence. *Ib.*

27. A variance between the declaration and the writ, in the former suit, in the description of the cause of action, though so great as to be ground for quashing the writ, would not prevent the writ, in connexion with the declaration, from being evidence to establish the commencement of such former suit. *Ib.*

LIMITATIONS—CONTINUED.

28. A non-suit taken before the clerk in vacation, on payment of costs, is authorized by the statute. *Ib.*

29. A written acknowledgment to take a debt out of the statute of limitations, must be an unequivocal acknowledgment of the debt, as a debt then due, or an express promise to pay the debt which pre-supposes such acknowledgment. *Grant ad. v. Ashley et al.*, 762.

30. In this case, one of the makers of a note became public administrator of an estate to which the note was due, and afterwards made a settlement with the Probate Court, with the view of surrendering the administration, in which he returned, as part of the effects of the estate in his hands, the note in question, and claimed a credit therefor: HELD, that being chargeable with the note, he was bound to return it that he might obtain credit therefor in his settlement, and that this was no such acknowledgment in writing, as would take the debt out of the statute of limitations. *Ib.*

31. An acknowledgment by one joint and several maker of a note, made after the bar, does not take the case out of the statute as to the others. *Ib.*

32. Proof of acknowledgment by one maker, does not sustain a replication that all the makers of a note made such acknowledgment. *Ib.*

33. Action against two of three makers of a promissory note, plea limitation; replication that plaintiff commenced a former suit on same note against defendants, within the bar, suffered a non-suit, and brought the present action within a year thereafter. Under an issue to this replication, plaintiff offered in evidence a record of a former suit against all the makers of the note, which the court below ruled out for variance: HELD, that the variance was immaterial, that it was sufficient to support the replication that the former suit was against defendants, as held in the *Bank v. Gray, ante. State Bank v. Roddy et al.*, 766. *Also State Bank v. Davis*, 768.

34. Action by the State Bank on a note executed to her by defendants; plea, limitation; replication of part payment by one of the makers of the note, and issue: HELD, that an entry made by the Financial Receiver in a book of the Bank kept for the purpose of entering part payments on notes due the Bank, was not competent evidence to establish the part payment relied upon by the Bank, to take the note sued on out of the statute of limitations, although it was shown that the Financial Receiver, who made the entry, had left the State, and gone to parts unknown. *State Bank v. Barber et al.*, 775.

35. A new promise in writing by one joint maker of a note, does not take the debt out of the statute of limitations as to other makers. *Digest, p.* 698, *sec.* 19. *Woody et al. v. State Bank*, 780.

36. Where several makers of a note are sued, and the debt is barred as to some, but a new promise proven as to others, plaintiff is entitled to judgment against the defendants making the new promise, (*Digest, p.* 699, *sec.* 20,) but not against the others. *Ib.*

See also TAX TITLE.

MALICIOUS PROSECUTION.

1. In case for malicious prosecution, the affidavit and warrant under which plaintiff was arrested, must be introduced as evidence, unless a showing is made for the introduction of secondary evidence—in this case the court below erroneously excluded them as evidence when offered by the plaintiff. *Hooper v. Lee*, 779. *See also* CONSTITUTIONAL LAW.

MANDAMUS.

1. Mandamus refused, by this court, to compel the Secretary of State to turn over to the Supreme Court Librarian certain State Reports appropriated to the Supreme Court Library by act of Assembly, on the grounds that the Circuit Court of Pulaski county was competent, and the proper tribunal, to grant relief in the premises. *Barber, Librarian, &c., Ex parte*, 155.

MARSHAL.

1. The failure of a sheriff, or marshal, to advertise lands for sale under execution, in the mode, or sell at the time, prescribed by statute, will not invalidate the title of the purchaser—such statutes are directory to the officer, and whilst a failure on his part to comply with their provisions, will make him responsible to the injured party, it cannot effect the title of the purchaser, unless it be affirmatively shown that he was cognizant of the irregularity. *Byers & Mc Donald v. Fowler et al.*, 218.
2. Under act of Congress (May 7th, 1800, sec. 3,) where a marshal sells lands, and goes out of office before making the purchaser a deed, the court, out of which the execution issued, on proper application, setting forth the facts, may order his successor in office to make the deed, and a deed so made is vliad. *Ib.*
3. A deed to lands sold by the marshal, and acknowledged by him before the United States Circuit Court for the District of Arkansas, may, upon the certificate of such acknowledgement, be admitted to record in the office of the recorder of the county where the lands are situate; this is clearly the law since the adoption of our statute on the subject of executions, &c., by act of Congress (of August, 1842,) if not before. *Ib.*
4. Where a marshal is removed from office after a *fi. fa.* has come to his hands, he has nevertheless, power to execute it, and may levy upon and sell lands under it; but after he has levied upon the lands, it is irregular for his successor in office to take charge of the process and make the sale, and a sale so made may be set aside as irregular by direct application, but will not be held void when called in question in a collateral proceeding. *Ib.*

MISNOMER.

1. The law knows of but one christian name, and it is no misnomer to improperly include or exclude the initial of a middle name. *The State v. Smith*, 622.

MORTGAGES.

1. In addition to Beebe's purchase under the Gray & Bouton judgment, he claims that De Baun & Thorn were joint owners of the premises in dispute, prior to the mortgage of Whiting & Slark; that Thorn sold his interest to De Baun in the premises, for which De Baun paid so much money, and agreed to pay the debts of a partnership which had existed between them; and Thorn executed a bond to De Baun binding himself to make title to his half of the premises on payment of all such debts which was duly recorded, but which did not specify the debts. That Ringo held a note on said partnership, afterwards obtained judgment thereon, under which Beebe (who bought the judgment) purchased Thorn's interest in the premises, and insists that the debt of Ringo constituted a specific lien upon Thorn's interest in the property, paramount to the mortgage of Whiting & Slark, which was executed by De Baun upon the whole property after said sale from Thorn to De Baun. A transcript of the record of the suit of *Ringo v. De Baun & Thorn* is exhibited by Beebe, into which is copied the firm note on which the judgment purports to have been founded, but it is not made part of the record by oyer or otherwise. Whiting & Slark deny that the judgment of Ringo was founded on such firm debt: HELD, That the Court erred in permitting Beebe to produce, on the hearing the original note, prove, *viva voce*, its execution, that it was marked filed among the papers of the suit of *Ringo v. De Baun & Thorn*, and read it in evidence, inasmuch as it was not an exhibit in the case. That unless a paper is made an exhibit, *viva voce* evidence is not admissible to prove its execution on the hearing—that even when exhibits are thus proven on the trial, the evidence is, in most instances, limited to the mere execution of the instrument—that when any additional fact is to be established in order to make the exhibit evidence, as in this case, the identifying it as the note sued on, the proof is inadmissible, &c. *Whiting & Slark v. Beebe et al.*, 421.

2. HELD, further, that whether the interest of Thorn in the premises, reserved by his said bond to De Baun, was a trust or mortgage interest (and it could not extend beyond that) it was questionable whether it was subject to sale by execution or not, under our statute, which subjects the real estate of the defendant, whether held by patent, or by a third person for his use, of which he is seized in law or equity, to sale. *Ib*

3. HELD, further, that in an equitable point of view, the security afforded in a deed of trust or mortgage, only extends to those debts set forth and recorded in the deed, or perhaps where notice is brought home to the purchaser of the estate thus pledged. That in order to effect the rights of Whiting & Slark as junior lien creditors, it was necessary to have brought notice home to them, not alone of the existence of the transfer of Thorn to De Baun, and reservation in favor of creditors, (of which the registry of the bond was notice) but it was necessary to have set forth the identical debt upon which this prior equity was to be founded, so that the junior purchaser might take notice at his peril what he purchased—that such not having been the case in the bond of Thorn, the prior equity of Beebe, who held under Ringo, must fail. *Ib.*

MURDER.

1. The defendant was convicted of murder in the first degree, and claimed a new trial, on the grounds that the verdict was contrary to law and evidence. This Court, after reviewing, and duly considering the evidence, refuses to disturb the verdict, holding it to be well warranted by the evidence. *Shropshire v. State,* 190.

NEW TRIAL.

1. By moving for a new trial, a party waives previous exceptions, unless made grounds of the motion, and preserved by bill of exceptions to the decision of the court overruling the motion. *Ford v. Clark,* 99.
2. A party, who permits illegal testimony to be given to the jury without objection, cannot, after verdict, avail himself of the error on a motion for a new trial. *Main v. Gordon,* 651.
3. Testimony illegal at one period of the trial because no foundation has been laid for its introduction, may, at a subsequent period, become legal and competent, but in such case the party must again offer it in evidence. *Ib.*
4. Where defendant shows that after the cause was submitted to the jury, part of them separated from their fellows, without consent of the parties, or order of court, and were exposed to undue influences, it will be grounds of new trial, unless the State affirmatively show that no improper influences were exerted upon them. *Cornelius v. State,* 782.
5. An affidavit that some of the jurors were seen passing about the streets, without naming them, is insufficient—the names of the jurors should be stated, to give the State an opportunity of showing that no improper influences were exerted upon them., &c. *Ib.*

NON-CLAIM.

1. The period of two years, within which a claim against a deceased debtor must be presented to his representative, commences to run from the accrual of the cause of action: so that, a security paying the debt of the deceased, has two years from the time of payment to present his claim. *Allen v. Byers, as ad.,* 598.
2. The statute, allowing claims against the estate of a deceased debtor to be presented to the executor or administrator within two years, does not extend the period of limitation, where the claim would be barred before the two years had expired. *Etter v. Finn, as ad.,* 632.
3. When the statute of limitations commences running, it continues to run; except that the time intervening between the death of the debtor and grant of letters of administration, is not counted. *Ib.*

NOTARIES PUBLIC.

1. A notarial protest is evidence of demand, &c., and may be read in evidence, although there is a variance between it and the bill sued on, in order to permit the

NOTARIES PUBLIC—CONTINUED.

plaintiff to connect the bill sued on with the protest by other evidence, and thus identify it as the same that was protested. *Johnson v. Cocks, use, &c.*, 672.

2. For such purpose of identifying the bill, the deposition of a legally appointed deputy of the notary, and an authenticated copy of the notarial register, were properly admitted as evidence. *Ib.*
3. Where a deputy of the notary swears that a paper, offered in evidence, is a correct copy of the original entry in the notarial register, it may be read in evidence, though he does not state, in express terms, that he has compared it with the original, as it is the duty of the opposite party to ascertain the source of his knowledge by cross-examination, if he desires it. *Ib.*
4. As to the authentication of a transcript of the register of one notary by another acting for him, in his absence, under a statute of Louisiana, and as to proof of the official character of the notary so acting in the place of the other. *Ib.*

NOTICE.

1. Notice to the acceptor, or prior endorser of a protested bill of exchange, will be sufficient, if deposited in the postoffice in season to go by the first mail that departs after the commencement of the ordinary mercantile business hours of the day, next succeeding that in which the notice came to hand. *Davis & Co. v. Hanly, use, &c.*, 645.
2. This court will take notice of "the general custom and usages of merchants," as well as of the "general customs of our own country," as matters that are generally known. *Ib.*

OBLIGATION OF CONTRACTS.

1. A law in force when a contract is made, cannot, by its legitimate operation, impair its obligation in the sense of the constitution of the United States, for the reason that the existing laws are to be regarded as entering into, and forming a part of any contract or stipulation between the parties. *State et al. v. Curran*, 323.
2. Where an act of incorporation is a grant of political power; where it creates a civil institution to be employed in the administration of Government, or where its whole funds belong to the public, the charter is completely within legislative control. Such corporations are created by the mere will of the Legislature, and are in no way the result of contract; while those through which the Legislature seeks to accomplish some public purpose, by the instrumentality of a second party, who is to advance some money, labor or property, are the direct result of contract. The one is within legislative control, while the other cannot be dissolved, under the provision of the Federal Constitution, otherwise than in pursuance of a power to do so reserved by the State, to be exercised upon the happening of some contingency, and is therefore one of the stipulations out of which the incorporation sprung. *Ib.*
3. This classification of corporations obviates the difficulty and disputation arising from the ordinary division of corporations into public and private. *Ib.*

OBLIGATION OF CONTRACTS—CONTINUED.

4. The Bank of the State of Arkansas was of the class of corporations that are within the legislative control, and the Legislature possessed the power to repeal its entire charter, or any of its provisions, when, in the exercise of constitutional discretion, the public interest might seem to require it. *Ib.*

OFF-SET.

1. An administrator may take a note for a debt due his intestate either in his individual or representative right. If he take it to himself, he is liable over to the estate as for a devastavit, but the contract is nevertheless valid between the parties; and the maker of the note cannot set-off, against it, a claim purchased by him against the estate of the intestate. *Biscoe v. Moore et al., ad., use, &c.*, 77.
2. To authorize a set-off, the debts must be mutual, and due to and from the same persons, in the same capacity. *Bizzel et al. v. Stinnet et al.*, 378.
3. A debt contracted by an intestate cannot be set-off against one contracted with his administrator in favor of the estate, because it interferes with the course of administration. *Ib.*
4. And this rule obtains in equity, whether the estate be regarded as solvent or insolvent, except on a proper showing of equitable circumstances requiring a departure from the rule. *Ib.*
5. The law does not raise a promise on the part of the vendor of land, upon the cancellation of the contract of sale, to pay for the improvements made by the vendee while in possession: there must be a special promise to pay for such improvements at the time of vacating the sale. *Main v. Gordon*, 651.
6. In an action to recover the value of such improvements, the defendant cannot set-off, as damages, the value of wood and timber cut off the land by the vendee in violation of his contract of purchase. *Ib.*

PARDON.

1. A general pardon, by the Governor, of a person convicted of a crime, does not discharge him from the costs of prosecution. *Edwards v. The State*, 122.

PARTIAL FAILURE OF CONSIDERATION.

1. A partial failure of consideration as to real estate is the subject of recoupment, when the partial failure is in the quantity or quality of the subject: otherwise when there is a partial failure in the title. *Wheat use, &c. v. Dotson*, 699.
2. This defence may be set up, by special sworn plea under our statute, as well when the action is on any instrument or note in writing under seal, as in other actions. *Ib.*
3. The correct practice on a plea of partial failure of consideration is to take a default for the sum confessed, subject to but one final judgment. *Ib.*

PAYMENT.

1. As to evidence of payment of a judgment. *Shouse et al. v. Newton ex'r.*, 367.

PENAL BONDS.

1. The breaches assigned in an action on a penal bond, are, in effect, so many distinct counts in a declaration—they are the gravamen and foundation of a recovery—and it is as much error to embrace two or more breaches in one assignment, as it would be to embrace so many distinct causes of action in one count in a declaration; but such error, being duplicity, is only ground for special demurrer. *State, use Chicot Co. v. Rives et al.*, 721.
2. This being an action on a collector's bond, the first assignment alleged that defendant failed to return a delinquent list as required by law, that he failed to make a proper settlement with the court at the time required by law, and that he was indebted to the county, as such collector, a sum specified, and failed to pay the same over. Defendant pleaded that he was not so indebted, payment, &c. HELD, that the pleas, professing to answer the whole assignment, but answering in fact but one breach, were bad on demurrer, and that the demurrer to the plea would not reach back to the duplicity in the assignment, that not being grounds of general demurrer, and being amendable, would be treated, under the statute, as amended, and the breaches regarded as if separately assigned. *Ib.*

PENDENTE LITE.

1. The authorities establish the following positions: *First*, that the institution of the suit (particularly where it relates to the title or disposition of property,) is constructive notice to all purchasers after suit commenced: *Second*, that a purchaser *pendente lite* acquires no title by his purchase, which he can set up or assert to the prejudice of the rights of the parties litigant, and that the suit will be heard and determined upon the merits as it stood between the parties litigant, perfectly irrespective of any rights which he may have acquired by such purchase, which, if valid for any purpose, can only be so as between himself and his vendor, to enable him, upon the determination of the suit to succeed to the rights of such vendor, or perhaps if a party to the suit, to enable the court, after determining the rights of his vendor favorably, to decree them to him. *Whiting & Slark v. Beebe et al.*, 421.

PETITION AND SUMMONS.

1. Debt, by petition, on a *bond*, setting out the instrument, but calling it a *note:* HELD, That calling it a *note*, was no ground for demurrer, when taken in connexion with the instrument itself set forth in the petition, and appearing to be a bond. *Magruder v. Slater*, 171.

PETITION AND SUMMONS—CONTINUED.

2. In setting out a bond, in debt by petition, it is not necessary to copy the dollar-mark and numerals representing the amount of the bond, in the margin; they constitute no part of the contract. *Ib.*
3. No plausible ground appearing for the appeal, damages awarded to appellee under *Digest, ch.* 127, *sec.* 40. *Ib.*

PLEAS AND PLEADING.

1. A bond signed "*H. M.* Rector," held to support an allegation that it was executed by *Henry M.* Rector, there being no attempt in the declaration to set out the peculiar maner in which defendant signed the instrument. *Rector v. Taylor, Gardiner &.Co.*, 128.
2. "Gardiner" and "Gardner" held not materially variant in sound. *Ib.*
3. The declaration alleged that the bond sued on was made at "*The City* of Little Rock, Arks.," and the one granted on oyer was dated "Little Rock, Arks." HELD, That the variance was immaterial. *Ib.*
4. Plaintiff declared against *Matthew S.* Miller, as maker of the obligation sued on: the bond granted on oyer is signed "*M S.*. Miller:" demurrer for variance: HELD, No variance, inasmuch as the declaration did not undertake to set out the particular manner in which defendant signed the bond, &c., as held in *Rector v. Taylor & Gardiner, ante. Millar v. Bell, use, &c.*, 135.
5. A plea in abatement of former suit pending in the same court, must, under our statute, be verified by affidavit, as the truth of the allegation that the cause of action and the parties were the same in both suits could not appear of record; though similarity in amount, date, &c., and in names might raise a strong presumption of the truth of such allegation. *White v. Yell*, 139.
6. A replication must tender an issue of fact, not of law. *Bank of Tennessee v. Armstrong et al.*, 602.
7. The right of a defendant to file several pleas, under the 69*th sec., chap.* 126, *Dig.*, is unconditional, and, if within the time prescribed by the statute for pleading, may be done without leave of the court; but under the 77th sec. of the same chap., the right to file more than one replication or rejoinder depends upon leave granted for that purpose, upon motion, and consideration as to whether such additional pleading is necessary to the attainment of justice. *State Bank v. Minikin*, 715.
8. In order to enable the court to exercise its discretion, the facts should be presented by motion on petition, and perhaps the more regular practice would be to present with it the pleadings intended to be filed, that the court might, upon examination of the issues formed, and the nature of the action, as well as the additional pleading presented, determine whether such leave should, or not, be granted; and such application, and the decision of the court upon it, should appear upon the record. *Ib.*
9. As to the proper mode of putting in issue the identity of names and causes of action, where a former judgment is pleaded, &c., and herein, as to the effect of *nul tiel record* *Ib.*

PLEAS AND PLEADING—CONTINUED.

10. Where a defendant files four rejoinders, without special leave of the court, a motion to strike all of them out but one, might be sustained, but where the motion is to strike them all out, it should be overruled, because the defendant has the right to file one, and the motion to strike them all out should be determined without division. *Ib.*
11. In order to render a plea the proper subject of a motion to strike out, it must not only fail to present a material issue, but it must also be wholly unadapted to the nature of the action—therefore, as lapse of time, might in this action constitute a valid defence, it is error to strike out a plea merely because it does not show that sufficient time has elapsed to constitute a bar—such a plea should be met by demurrer, and not by motion to strike out. *Badgett v. Martin,* 730.
12. In an action of this kind, it was error to *strike out* a plea setting up that the deputy was not, at the time of the commission or omission of the acts charged as a breach of the bond, the lawful deputy of the sheriff—such a plea sets up matter which is appropriate in its nature as a defence to the action, though the subject matter thus presented is defectively stated, and must have been held bad on demurrer. *Ib.*
13. The deputy was estopped by his bond from denying his appointment, but he might deny its continuance at the time of the commission of the act charged against him—but such denial could not be, in general terms, but must be made by setting up special matter by way of avoidance. *Ib.*
14. This court is inclined to the opinion that *nul tiel corporation* may be pleaded either in abatement or in bar. *Gaines et al. v. Bank Miss.,* 769.

POWER OF A COURT OVER ITS JUDGMENTS.

1. The allowance and classification of a claim against an estate, in favor of a creditor by the Probate Court, is not a ministerial but a judicial act; has the force and effect of a judgment, and the court has no power to set aside such classification after the lapse of the term at which it is made, and place the claim in a different class, on the application of other creditors. *Cossitt et al. v. Biscoe,* 95.
2. Such second classification of the claim being void for want of power over the subject matter, no appeal could lie therefrom, but it should be quashed on certiorari from the Circuit Court. *Ib.*

PRACTICE.

1. By moving for a new trial, a party waives prevsous exceptions, unless made grounds of the motion, and presented by bill of exceptions to the decision of the court overruling the motion. *Ford v. Clark,* 99.
2. It is error to render judgment against a defendant without disposing of all his pleas. *Finn as ad. v. Crabtree as ad.,* 597.
3. The court cannot, when default is made by defendant, assess the damages in an action of covenant. *Johnson v. Pierce et al.,* 599.

PRACTICE IN THE SUPREME COURT.

1. In error, pleas in abatement must be filed within three days after assignment of errors, (*State Bank v. Ruddell et al.*, 5 *Eng.* 123,) or if errors are assigned before a defendant is served with process, he must plead matter in abatement within the first three days of the term to which he is served with process. *State Bank v. Whiting et al.*, 119

PRE-EMPTION.

1. The pre-emption act of May 29, 1830, conferred certain rights upan settlers upon the public lands, upon proof of settlement or improvement being made to the satisfaction of the Register and Receiver, agreeably to the rules prescribed by the Commissioner of the General Land Office. *Lytle et al. v. State et al.*, 9.
2. The Commissioner directed the proof to be taken before the Register and Receiver, and afterwards directed them to file the proof where it should establish to their entire satisfaction the rights of the parties. *Ib.*
3. Where the proof was taken in the presence of the Register only, but both officers decided in favor of the claim, and the money paid by the claimant was received by the Commissioner, this was sufficient. The Commissioner had power to make the regulation, and power also to dispense with it. *Ib.*
4. The proof being filed, there was no necessity of re-opening the case when the public surveys were returned. *Ib.*
5. The circumstance that the Register would not afterwards permit the claimant to enter the section, did not invalidate the claim. *Ib.*
6. The pre-emptor had no right to go beyond the fractional section upon which his improvements were, in order to make up the one hundred and sixty acres to which settlers generally were entitled. *Ib.*
7. No selection of lands under a subsequent act of Congress could impair the right of a pre-emptioner, thus acquired. *Ib.*
8. A complainant in equity, as at law, can only recover on the strength of his own title, and he is not in a condition to assail the title of the defendant, unless he shows a right in himself to the land in controversy. Where the bill alleges fraud in procuring the patent from the Government, to the defendant, the chancellor will not interpose to relieve the complainant, until he shows that the fraud, if it exists, has operated to his injury; and, uless the fraud and injury concur, the court will not inquire into the alleged fraud. *Cunningham v. Ashley & Beebe*, 296.
9. The complainants claim the land in controversy by virtue of the location of a Cherokee pre-emption, and also by virtue of his own claim to a pre-emption under the act of 29th of May, 1830, both originating in the favor and founded upon the gratuity of the Federal Government: upon compliance with the terms and conditions of the acts of Congress granting those bounties to the settler, he could acquire a vested right, and without such compliance, he must be regarded as a mere trespasser and intruder, without any color of right at law or in equity, and unless he shows that he has so complied, or has been prevented from doing

PRE-EMPTION—CONTINUED.

so, by the agents of the Government, or the fraudulent acts of the defendants; he can have no claim to relief in equity. *Ib.*

10. The complainant claimed to enter the land in question by virtue of the Cherokee pre-emption right, as the assignee of the original claimant, under several successive assignments. The application to enter was refused by the district land officers. In the absence of any proof of the genuineness of these assignments, or showing that they were proved before the land officers, the court will presume that their refusal was predicated upon that ground. The land officers could not have allowed such entry in the name of the assignee, unless they were satisfied of the validity of the assignments. *Ib.*

11. The complainant also relies upon an equitable claim of entry in the name of Morrison, the original claimant. The only evidence of the right to a pre-emption is the certificate of the Register, issued to Wylie, assignee of Morrison. The court is of opinion that, under the act of Congress granting such pre-emption, the land proposed to be entered should be designated before the adjudication upon the claim, which was not done in this instance, and the claim if allowed and the entry permitted, the adjudication would necessarily appear as the joint act of the Register and Receiver. *Ib.*

12. The certificate in question purports to be issued by the Register alone, and does not necessarily import a joint adjudication by the Land Officers. But, independent of these objections, it no where appears on the part of the complainant, that at the time of the application to enter, or at any time before the expiration of the law, any evidence was ever produced to the land officers, that Morrison or the complainant, had made any improvement upon the land in question, or that it was unimproved, and for that reason subject to entry under the pre-emption, as contemplated by the act of Congress. *Ib.*

13. The right of the complainant to a pre-emption to the land in question, under the act of the 29th May, 1830, was adjudicated by the land officers, and rejected. Their adjudication as to the facts of cultivation and possession, if in favor of the complainant, would have been conclusive. *Ib.*

14. The proof offered by the complainant at the land office, was defective as to these facts, but that the same land officers, about the same time allowed other pre-emptions upon similar proof, affords no presumption that they intended to allow that of the complainant. There may have been other satisfactory evidence adduced before the land officers, as to these claims, of which no memorial was preserved. *Ib.*

15. The decision of the land officers rejecting the claim of the complainant, is that of a legally competent, although special tribunal, and he cannot assail the adjucation on any other ground than a want of power in the officers, or fraud in the defendants, or those under whom they claim, touching the decision. *Ib.*

PRESUMPTION.

1. This court will presume in favor of the judgment of the court below, unless the record clearly shows that the court erred. *Massey v. Gardenhire*, 636.

PROHIBITION.

1. The rule was, at common law, that no prohibition lay to an inferior court in a cause arising out of its jurisdiction, until that matter had been pleaded in the original court, and the plea refused; and it should appear, in the suggestion, that the plea was verified, and tendered in person during the sitting of the inferior court. *Williams Ex parte,* 4 *Ark.* 540, and *Blackburn Ex parte,* 5 *Ark.* 22. *McMeechen et al. Ex parte,* 70, *and Flint Ex parte,* 74.
2. A. obtained a judgment against B., in the Pulaski Circuit Court, and issued an execution to the sheriff of Independence; B. applied to the Judge of the Circuit Court of Independence, in vacation, and obtained an injunction. A. moved this court for a writ of prohibition to the Judge of the Independece court—writ refused because it is not shown in the suggestion that A. first applied to the Judge of Independence Circuit Court to dissolve the injunction, and that the application was refused. *Ib.*

REGISTER AND RECEIVER.

See PRE-EMPTION.

REGISTRATION.

1. A deed to lands sold by the marshal, and acknowledged by him before the United States Circuit Court, for the District of Arkansas, may, upon the certificate of such acknowledgement, be admitted to record, in the office of Recorder of the county where the lands are situate: this is clearly the law since the adoption of our statute on the subject of executions, &c., by act of Congress, (of August, 1842,) if not before. *Byers & McDonald v. Fowler et al.,* 218.

RELEASE.

1. A sealed executory contract cannot be released or rescinded by a parol executory contract: but after breach of a sealed contract, a right of action may be waived or released by a new parol contract in relation to the same subject matter, or by any valid parol executed contract. *Levy v. Very,* 148.
2. McVicar sued Caldwell's executor, on an obligation for the payment of money, made to plaintiff by Byrd, as principal, and Caldwell and others, securities; the defendant plead usury, and that his testator was discharged by failure of the plaintiff to sue Byrd, the principal, on notice to do so, &c., giving him day of payment, &c.; defendant proved that in a separate suit against Byrd, plaintiff had obtained judgment for the amount of the obligation; and read in evidence an instrument by which he released Byrd from all liability to the estate of his testator from all debt, interest, and constructively, of any costs that he might have to pay for Byrd, on account of his testator being his security on said obligation and then offered Byrd as a witness to prove his pleas: HELD, That Byrd was a competent witness under the circumstances—that he was not a party to the suit, and in no way interested in its event. *Caldwell's ex'r. v. McVicar,* 746.

RELEASE—CONTINUED.

3. HELD, further, that though the executor might have laid himself liable for devastavit by executing the release in question, he nevertheless had the power to execute it, and that it was valid. *Ib.*
4. If it be law that a party to a negotiable instrument is an incompetent witness to invalidate it, the rule does not apply as between the original parties to the instrument, but only in cases where the instrument has been transferred on the faith of the signature of the party offered as a witness. *Ib.*

RES GESTÆ.

See EVIDENCE, 25, 26, 27, 28.

SALES.

1. The failure of a sheriff, or marshal, to advertise lands for sale under execution, in the mode, or sell at the time, prescribed by statute, will not invalidate the title of the purchaser—such statutes are directory to the officer, and whilst a failure on his part to comply with their provisions, will make him responsible to the injured party, it cannot effect the title of the purchaser, unless it be affirmatively shown that he was cognizant of the irregularity. *Byers & Mc Donald v. Fowler et al.*, 218.
2. In this case, the marshal did not advertise the lands in the mode, or sell at the time, prescribed by our statute, but followed a rule of the Circuit Court of the United States for the District of Arkansas, adopted 10th October, 1842, and after the passage of the act of Congres (of August 1, 1842,) adopting the law of the State regulating proceedisgs under execution—the defendants contended that the Circuit Courts of the United States had no power to make the said rule, and that the title of complainants was not valid, inasmuch as the lands were not advertised in the mode, and sold at the time, prescribed in our statute: HELD, That, even if the Circuit Court of the United States had not the power to make the rule in question, (which point is waived,) and the marshal should have followed the Statute of the State, as to the mode of advertising, and time of selling the lands, still, as it was not averred in the pleadings and proven that complainants were cognizant of such irregularities, their titles was valid. *Ib.*
3. A judgment of the Circut Court of the United States for the district of Arkansas, operates as a lien upon all the lands of the defendant throughout the State, and this, too, independent of the act of Congress (of August, 1842,) adopting the laws of the State in regard to judgments and executions, such lien being the result of previous legislation by Congress. *Ib.*
4. Under act of Congress (May 7th, 1800, sec. 3,) where a marshal sells lands, and goes out of office before making the purchaser a deed, the court, out of which the execution issued, on proper application, setting forth the facts, may order his successor in office to make the deed, and a deed so made is valid. *Ib.*
5. A deed to lands sold by the marshal, and acknowledged by him before the United States Circuit Court for the District of Arkansas, may, upon the certificate of such acknowledgement, be admitted to record in the office of the recorder

SALES—CONTINUED.

of the county where the lands are situate; this is clearly the law since the adoption of our statute on the subject of executions, &c., by act of Congress (of August, 1842,) if not before. *Ib.*

6. Where a marshal is removed from office after a *fi. fa.* has come to his hands, he has nevertheless, power to execute it, and may levy upon and sell lands under it; but after he has levied upon the lands, it is irregular for his successor in office to take charge of the process and make the sale, and a sale so made may be set aside as irregular by direct application, but will not be held void when called in question in a collateral proceeding. *Ib.*
7. In this case, after the *fi. fa.* came to the hands of Rector, as marshal of the United States for the District of Arkansas, he was removed from office; after his removal, his deputy levied the writ on lands; and a deputy of Newton, the successor of Rector, made the sale under the same *fi. fa.*: HELD, As above, that the sale was irregular, and might have been set aside on a direct application; but being questioned in a collateral proceeding, the title of purchaser was good, the sale not being absolutely void. *Ib.*
8. Where property is sold under execution, and purchased by a party for the use and benefit of the defendant in the execution, and in fraud of the rights of creditors, it remains subject to the claims of creditors, and the vendee of the party, purchasing with a knowledge of such fraud, will not be protected in his title against the judgment of such creditors, or persons purchasing under them. *Ib.*
9. But, on the contrary, a *bona fide* purchaser, for a valuable consideration, without notice of such fraud, will be protected in his title. *Ib.*

SATISFACTION.

1. To a *scire facias* to revive a judgment, where defendant pleads, as a satisfaction, a subsisting, undisposed-of levy on lands, a replication that the land levied upon is not the property of the defendant—is not of sufficient value to satisfy the debt, or has been discharged by a sale of the property since the commencement of the action, is not good. *Humphries ad., use, &c. v. Anthony*, 136.
2. The replication should traverse the fact as to whether there was or was not a subsisting levy at the time of the commencement of the action. *Ib.*
3. The rule is, that a mere levy on sufficient personal property, without anything more, never amounts to a satisfaction of the judgment. But so long as the property remains in legal custody, the other remedies of the creditor will be suspended. He cannot have a new execution against the person or property of the debtor, nor maintain an action on the judgment, &c.; and this rule may be regarded as settled by authority. *Whiting & Slark v. Beebe et al.*, 421.
4. And after a full review of decisions, this rule is held to apply to a levy upon lands: and the case of *Anderson v. Fowler*, 3 *Eng. R.* 388, is adhered to and confirmed. *Ib.*
5. Where a levy is made and a delivery bond (which, by statute, has the force of a judgment when forfeited) is taken and forfeited, the levy is discharged, and the bond so forfeited held to be a satisfaction of the former judgment. Yet

SATISFACTION—CONTINUED.

should the bond be quashed, the effect thereof would be to revive the former judgment. *Ib.*

6. Beach having a judgment against De Baun & Thorn, the following entry of satisfaction was made of record. by the attorneys of Beach: "The said defendant, Thorn, having arranged and secured to the satisfaction of the attorneys of said plaintiff, (Trapnall & Cocke) the judgment in this case, they do hereby, and with the consent and agreement of the said De Baun, acknowledge full satisfaction of the said judgment so far as the said Thorn is concerned, without prejudice to the rights of the said plaintiff to sue out executions and recover the said judgment and costs of the said De Baun"—Signed by said attorneys. To which, De Baun added:—"I, James De Baun, do consent to the above satisfaction in the manner and form as therein provided"—Signed by De Baun: HELD, That if this discharge had been made by the plaintiff in person, it would, beyond doubt, have been, in law, a full satisfaction and discharge as to both defendants, upon the principle that as the creditor is entitled to but one satisfaction, though made by one, it enures to the benefit of all. That even where it is expressly understood, and is made part of the terms of release and satisfaction, that such shall not be its effect as against other defendants, it has been held to extend to all. *Ib.*

7. HELD, further, that it was a matter of doubt whether the attorneys, for the consideration expressed in the face of the above entry, could make a release which would bind their client: but as it appears that Beebe, who succeeded to the rights of the plaintiff in the judgment by assignment, fully recognizes and affirms this act of the attorneys, and asserts and sets up in his answer that it is a full and complete satisfaction as to Thorn, it follows, that being a satisfaction as to him, it is by operation of law, a satisfaction also, as to De Baun. That De Baun had probably estopped himself from setting up this satisfaction. Yet the satisfaction was not the less complete: estoppel is not the denial of the existence of a fact, but a denial of the right to interpose it. *Ib.*

8. HELD, further, that the said judgment, so far as third persons, lien creditors, were concerned, should be considered as satisfied, and its lien upon lands of defendants discharged, and that a person purchasing under an execution upon said judgment could acquire no vald title. *Ib.*

SCIRE FACIAS.

1. The statute of limitation is not a good plea to a *scire facias* to revive a judgment as held in *Brown, Robb & Co. v. Byrd,* 5 *English,* 534. *Evans v. White et al.,* 133.

2. To a *scire facias* to revive a judgment, where defendant pleads, as satisfaction, a subsisting, undisposed-of levy on lands, a replication that the land levied upon is not the property of the defendant, is not of sufficient value to satisfy the debt, or has been discharged by a sale of the property since the commencement of the action, is not good. *Humphries ad., use, &c. v Anthony,* 136.

SCIRE FACIAS—CONTINUED.

3. The replication should traverse the fact as to whether there was or was not a subsisting levy at the time of the commencement of the action. *Ib.*
4. Upon the death of one of several defendants in a judgment, the plaintiff has a right to a separate revival against the representatives of the deceased. *Finn as ad. v. Crabtree as ad.*, 597.

SEAL.

1. Where a deed, executed in Wisconsin, and attested by the seal of the court, stamped upon the paper, instead of wax or wafer, was offered in evidence upon a trial in Arkansas, it was properly received. *Pillow v. Roberts*, 822.

SLANDER.

1. A plea of justification, in an action of slander for false swearing, must not only state the circumstances under which the false swearing occurred, but must also aver that the matter sworn to was material to the matter or cause in hand. *McGough v. Rhodes*, 625.
2. The 2d *sec. of ch.* 52, *Dig.*, was not designed to embrace unauthorized or profane swearing; but to extend the action of slander to all charges of false swearing in cases where an oath is required by law. *Ib.*
3. Where the words spoken are actionable *per se*, there need be no inducement in the declaration: otherwise where the words are not actionable *per se*, or are ambiguous, and require explanation by reference to extrinsic matter, in which case such matter must be stated, and that the words were spoken of and concerning it. *Ib.*
4. The case of *Carlock v. Spencer and wife*, 2 *Eng.* 12, overruled. *Ib.*

SLAVES.

1. On a special contract to pay hire for a slave and return him at the end of the term, the party hiring is liable for the hire and value of the slave if he runs away and escapes, though without cause or fault on the part of the hirer: otherwise, perhaps, as to his liability for the value of a slave, if there is no special contract to return him. *Alston v. Balls & Adams*, 664.
2. Before judgment of forfeiture of a gun found in the hands of a slave, under *ch.* 153, *sec.* 52, *Digest*, the owner of the property should have actual or constructive notice of the proceedings. *Jones v. Mason.* 687.
3. But in trover for a gun, where the defendant claims title under such judgment of forfeiture, the question of want of notice to the owner could not properly arise. It could only be raised in a direct proceeding by *certiorari* from the Circuit Court to quash the judgment of the justice, &c.
4. Where, in such action, defendant sets up title to the gun by such judgment of forfeiture, the plea should state all the facts necessary to show jurisdiction on on the part of the justice, there being no intendment in favor of such jurisdic-

SLAVES—CONTINUED.

tion. Hence, such a plea failing to show that the judgment of forfeiture was rendered within the territorial jurisdiction of the justice, &c., is bad. *Ib.*

5. The plea should also state, in express terms, the names of the parties—that plaint was made before the justice, &c., the judgment of forfeiture, &c. *Ib.*

STATUTE OF FRAUDS.

1. It is the settled construction of the statute of Frauds, that every collateral undertaking or promise to answer for the debt, default, or mis-carriage of another, is within the statute, and void if not in writing, but that original undertakings are not within the statute, and need not be in writing. *Kurtz v. Adams et al.*, 174.
2. Where there is a pre-existing debt, or other liability, a promise by a third person having immediate respect to, and founded upon, the original liability, without any new consideration moving to him to pay or answer for such debt or liability, is a collateral undertaking. *Ib.*
3. But where, distinct from the original liability, there is a new and superadded consideration for the promise moving between the party promising and him to to whom the promise is made, in such case it is an original undertaking. *Ib.*
4. Again, where there is no previously existing debt, or other liability, but the promise of one is the inducement to and ground of the credit given to another, by which a debt or liability is created, such a promise is a collateral undertaking. The general rule being that, wherever the party undertaken for is originally liable upon the same contract, the promise to answer for that liability is a collateral undertaking, and must be in writing. *Ib.*
5. But where the party undertaken for is under no original liability, the promise is an original undertaking, and binding upon the party promising without being in writing. *Ib.*
6. In this case, Y. having applied to plaintiff's store for credit, and, being refused, defendants said to the plaintiff's clerk that if he would let Y. have goods, and he did not pay for them, they would do so. Thereupon, Y. obtained the goods upon the faith of the solvency of defendants, but the goods were charged to Y. in the books of plaintiffs: HELD, That this was a collateral undertaking on the part of defendants, and, not being in writing, they were not responsible for the price of the goods. *Ib.*

STATUTES OF OTHER STATES.

1. The printed statutes of the other States of the Union, purporting to have been published by authority, may be read in evidence in our courts, and the burthen of discrediting such books is upon the party against whom they are offered, as held in *Clarke v. The Bank of Miss.*, 5 *Eng. R.* 516: approved in *May v. Jamison*, 6 *Eng. R.* 377. *Johnson v. Cocks, use, &c.*, 672.

STAY OF EXECUTION.

1. Under the provisions of Digest, p. 659, 660, 661, on the failure of the principal

STAY OF EXECUTION—CONTINUED

to pay a justice's judgment, stayed by recognizance, before the expiration of the stay, the recognizance operates as a joint judgment against the principal and stayer, upon which execution may issue against both. *Stevenson v. McKissick*, 394.

2. On suggestion of the death of the principal, execution may be issued against the stayer alone. *Ib.*

3. The recognizance becoming a joint judgment, on the expiration of the stay, upon which the stayer is as subject to execution as the principal, he cannot injoin the judgment on the grounds that the creditor neglected to take out execution against the principal until he become insolvent, though notified to proceed against him. *Ib.*

SUITS AGAINST THE STATE.

1. It is not inconsistent with the usages even of despotic governments for a subject to sue his sovereign in his own courts of justice, and this right in the subject was unqualified in the English Government, until the usurpation of the Feudal Kings, and was afterwards always allowed in a qualified form—by petition. Our Constitution affirmatively, and not by implication, directs that provision shall be made for suits against the State. It follows that a right of a citizen to sue a State is not derogatory to common right, or subversive of the true principles of the common law, but is in harmony with both, and it cannot be supposed that the people, in convention, in directing that the Legislatare should provide in what courts, and in what manner, suits may be commenced against the State, intended that these provisions should be any other than such as would advance this right in the citizen to apply to the courts of justice for the redress of grievances. Hence, the statutes authorizing suits against the State are to be liberally construed. *State et al. v. Curran*, 321.

2. Under the provisions of *Chap.* 157, *Digest*, when so construed, the State may be sued as well in chancery as at law, and as well for property as money demands, and in this view every provision of the various statutes touching the subject will be found sensible, effective, and in harmony. *Ib.*

SUPERSEDEAS.

1. This court refuses to supersede an order of the Mayor and Aldermen of Little Rock, directing lots to be sold to pay the expense of paving the side-walk in front of them, on the ground that there was no showing that the Circuit Court of Pulaski county was incompetent to administer justice in the premises. *Barkeloo's heirs v. M. & Ald. Little Rock*, 118.

See also CONSTITUTIONAL LAW.

SURPRISE.

1. *A case pending from term to term under an agreement that it is to be settled out of court— the plaintiff's attorney, before term, informs the* defendant's attorney that *he*

SURPRISE—CONTINUED.

must come and pay up: at the term when the case is *called* the plaintiff and defendant's attorneys, after *some reference* to the agreement, submit the cause to the *court by consent. This is no such surprize upon the defendant, who is absent, as will entitle him to relief in a court of equity. Lawson v. Bettison,* 401.

2. *When a person employs an attorney,* he is concluded by his acts or omissions, where no fraud or unfairness is made to appear. *Ib.*
3. But if fraud or unfairness, affecting the trial at law, is shown, a party appealing to a court of equity must show that injury to him was the result—a general allegation of injury is not sufficient, as for instance that he had a good defence of which he was deprived—he must state what the defence was, and it must appear sufficient. *Ib.*
4. A party seeking relief in equity on the ground of surprise in obtaining a judgment at law against him, must show that the surprise was not in consequence of negligence on his part. *Ib.*
5. An attorney is not authorized to receive depreciated paper, at its real value, or other property in payment of his client's judgment, unless by his express authority; and if he receives such, may issue execution without regarding it as a payment. *Ib.*

TAX TITLE.

1. Where a deed from the sheriff, for lands sold at tax sale, recited an assessment for taxes which remained unpaid; the advertisement of the land, and offering it for sale; its being struck down to the highest bidder; who paid the purchase money and received a certificate; this deed ought to have been received in evidence. The law of Arkansas says, that the deed shall be evidence of regularity and legality of the sale. *Pillow v. Roberts,* 822.
2. But even if this deed had been insufficient as a proof of title, it ought to have been received in connection with proof of possession, to establish a defence under the statute of limitations. *Ib.*
3. Possession under this deed would have been sufficient proof for adverse possession. *Ib.*

TENDER.

1. The notes of the Bank of the State of Arkansas, issued previous to the 10th January, 1845, are a legal tender in payment of all debts then due to the State. *Decision of the Supreme Court of the United States* reversing the case of *Woodruff v. Attorney General pro. tem., in* 3 *Eng.* 236. *Woodruff v. Trapnall, att'y, &c.,* 640.
2. Judgment and execution thereon; a tender to the attorney of the full amount in bank notes; refusal to accept the money tendered; mandamus to compel the acceptance of the tender: HELD, That interest on the judgment ceased at the time of tender. *Ib.*

TENDER—CONTINUED.

3. *Quære,* should the defendant have brought the money into Court with his application for a *mandamus?* If so, the omission to object for the failure to bring the money into court, was a waiver of it. *Ib.*
4. County warrants issued under a statute providing for their issuance, and making them receivable in payment of county taxes, &c., are a legal tender, by a collector, in payment of county revenue—such tender does not fall within the provision of the constitution, declaring that nothing but gold and silver coin shall be made a legal tender, &c.—And the case of *Gaines v. Rives,* 3 *Eng. R.* 220, is overruled. *State, use Chicot County v. Rives et. al.,* 721.
5. In 1836, the legislature of Arkansas chartered a bank, the whole of the capital of which belonged to the State, and the president and directors of which were appointed by the General Assembly. *Woodruff v. Trapnall,* 811.
6. The twenty-eighth section provided "that the bills and notes of said institution shall be received in all payments of debts due to the State of Arkansas." *Ib.*
7. In January, 1845, this twenty-eighth section was repealed. *Ib.*
8. The notes of the bank which were in circulation at the time of this repeal, were not affected by it. *Ib.*
9. The undertaking of the State to receive the notes of the bank constituted a contract between the State and the holders of these notes, which the State was not at liberty to break, although notes issued by the bank after the repeal were not within the contract, and might be refused by the State. *Ib.*
10. Therefore, a tender, made in 1847, of notes issued by the bank prior to the repealing law of 1845, was good to satisfy a judgment obtained against the debtor by the State; and it makes no difference whether or not the debtor had the notes in his possession at the time when the repealing act was passed. *Ib.*

TRESPASS.

1. Joint trespassers may be sued separately, and recovery had against each; and judgment against one cannot be pleaded in bar of a recovery against another, unless the judgment has been satisfied, or at least an execution issued. *McGee v. Overby et al.,* 164.
2. To constitute a good plea of former recovery, it is not necessary to show that the same action, in form, has been previously prosecuted against the party, but it is essential, in order to constitute a bar, that the recovery set up should be founded upon the identical cause of action. *Ib.*
3. This was trespass against defendants for taking and converting the mule of plaintiff. Defendants pleaded that they took the mule, and sold it to one J., agaist whom plaintiff brought replevin, in the detinet, and recovered judgment for the mule, and damages for its detention: HELD, On demurrer, that the plea was not good; that the original taking of the mule by defendants, and its detention by J., to whom defendants sold it, and who was not a joint trespasser with them, were separate and distinct causes of action. *Ib.*

VARIANCE.

1. A bond signed "*H. M.* Rector," held to support an allegation that it was executed by *Henry M.* Rector, there being no attempt in the declaration to set out the peculiar maner in which defendant signed the instrument. *Rector v. Taylor, Gardiner & Co.*, 128.
2. "Gardiner" and "Gardner," held not materially variant in sound. *Ib.*
3. The declaration alleged that the bond sued on was made at "*The City* of Little Rock, Arks.," and the one granted on oyer was dated "Little Rock, Arks." HELD, That the variance was immaterial. *Ib.*
4. Plaintiff declared against *Matthew S.* Miller, as maker of the obligation sued on: the bond granted on oyer is signed "*M. S.* Miller:" demurrer for variance: HELD, No variance, inasmuch as the declaration did not undertake to set out the particular manner in which defendant signed the bond, &c., as held in *Rector v. Taylor, Gardiner & Co., ante. Miller v. Bell, use, &c.*, 135.
5. Debt, by petition, on a *bond*, setting out the instrument, but calling it a *note:* HELD, That calling it a *note*, was no ground for demurrer, when taken in connexion with the instrument itself set forth in the petition, and appearing to be a bond. *Magruder v. Slater*, 171.
6. In setting out a bond, in debt by petition, it is not necessary to copy the dollar-mark and numerals representing the amount of the bond, in the margin; they constitute no part of the contract. *Ib.*
7. No plausible ground appearing for the appeal, damages awarded to appellee under *Digest, ch.* 127, *sec.* 40. *Ib.*
8. The rule in regard to variance is not so strict where a record is offered in evidence collaterally, as it is where the record is the foundation of the suit. *State Bank v. Gray*, 760.
9. This was an action against one of several makers of a note, defendant pleaded limitation; plaintiff replied a suit against defendant within the bar; non-suit, and new suit within a year thereafter; defendant rejoined *nul tiel record:* HELD, That a record of a former suit against all the makers of the note sued on, was not variant from the replication of former suit "against defendant," and might be read in evidence. *Ib.*
10. A variance between the declaration and the writ, in the former suit, in the description of the cause of action, though so great as to be ground for quashing the writ, would not prevent the writ, in connexion with the declaration, from being evidence to establish the commencement of such former suit. *Ib.*
11. A non-suit taken before the clerk in vacation, on payment of costs, is authorized by the statute. *Ib.*
12. Action against two of three makers of a promissory note, plea limitation; replication that plaintiff commenced a former suit on same note against defendants, within the bar, suffered a non-suit, and brought the present action within a year thereafter. Under an issue to this replication, plaintiff offered in evidence a record of a former suit against all the makers of the note, which the court below ruled out for variance: HELD, that the variance was immaterial, that it was sufficient to support the replication that the former suit was against defendants,

VARIANCE—CONTINUED.

as held in the *Bank v. Gray, ante. State Bank v. Roddy et al.*, 766. *Also State Bank v. Davis*, 768.

VOID AND VOIDABLE.

1. The allowance and classification of a claim against an estate, in favor of a creditor by the Probate Court, is not a ministerial but a judicial act; has the force and effect of a judgment, and the court has no power to set aside such classification after the lapse of the term at which it is made, and place the claim in a different class, on the application of other creditors. *Cossitt et al. v. Biscoe*, 95.
2. Such second classification of the claim being void for want of power over the subject matter, no appeal could lie therefrom, but it should be quashed on certiorari from the Circuit Court. *Ib.*
3. A judgment of a Circuit Court of the United States, rendered, by default, upon a return of the marshal showing a defective service of the writ upon defendant, might be reversed, on error, but cannot be treated as a nullity when questioned in a collateral proceeding. *Byers & McDonald v. Fowler et al.*, 218.
4. The Circuit Courts of the United States are endowed with such general jurisdiction as to entitle their judgments to the benefit of all legal intendments necessary to support and uphold them until reversed or annulled by a superior tribunal. *Borden et al. v. State, use, &c.*, 6 *Eng.* 519, *cited. Ib.*
5. In this case, the marshal returned that he served the writ by leaving a copy with a member of the family, but did not state that he left it at defendant's usual place of abode, as required by the statute; judgment was rendered on default, execution issued, and defendant's land sold; the purchasers filed a bill to quiet their title, and it was objected that they purchased under a void judgment; HELD, As above, that the judgment might, possibly, be reversed, but was sufficient to uphold complainants' title when questioned collaterally. *Ib.*
6. Where a marshal is removed from office after a *fi. fa.* has come to his hands, he has, nevertheless, power to execute it, and may levy upon and sell lands under it, but after he has levied upon the lands, it is irregular for his successor in office to take charge of the process and make the sale, and a sale so made may be set aside as irregular by direct application, but will not be held void when called in question in a collateral proceeding. *Ib.*
7. This court has repeatedly held *original* writs void for want of the signature of the clerk, and like defects, but the courts have generally held such defects in *judicial* process to be amendable. *Whiting & Slark v. Beebe et al.*, 421.
8. Adhering to the former decisions of this court as to such defects in *original* writs, yet in view of the enlarged powers of courts in amending *judicial* process, the court holds that although such writ, without the signature of the clerk, as required by the Constitution, is erroneous, yet it is not necessarily void, and the court from which it issued, upon application for that purpose, might either quash or amend it as the circumstances of the case might require. *Ib.*
9. Some of the former decisions of this court have been made under an erroneous impression with regard to the effect which the constitution had upon the va-

VOID AND VOIDABLE—CONTINUED.

lidity of process—that as the constitution required the signing, &c., it could not be dispensed with, and where a constitutional defect existed, the writ was void. *Ib.*

10. But a directory enactment of the constitution is of no more validity as a law, than a like enactment by statute—both are laws, though emanating from different law-making powers. *Ib.*

11. Instead, therefore, of looking to these, the true inquiry is, is the writ so totally defective as not to perform the offices of a writ, and what will be the effect of the amendment upon the rights of the parties? *Ib.*

12. Where a writ is defective in a matter that is amendable, it will be considered as amended when collaterally questioned. *Ib.*

13. A *fi. fa.* wanting the signature of the clerk, is not void but voidable. *Ib.*

WITNESS.

1. Brown sued Rapley for work and labor: Ring was offered as a witness by Brown, and his competency questioned on the grounds of interest. It appeared that Rapley and Ring agreed to cultivate a farm in partnership—Rapley was to furnish a hand on his part, and, under this agreement, hired Brown, who labored upon the partnership farm of Rapley and Brown, and then sued Rapley for his wages: HELD, That there was no liability on the part of Ring for his wages, and that he was a competent witness. *Rapley v. Brown,* 80.

2. McVicar sued Caldwell's executor on an obligation for the payment of money, made to plaintiff by Byrd, as principal, and Caldwell and others, securities; the defendant plead usury, and that his testator was discharged by failure of the plaintiff to sue Byrd, the principal, on notice to do so, &c., giving him day of payment, &c.; defendant proved that in a separate suit against Byrd, plaintiff had obtained judgment for the amount of the obligation; and read in evidence an instrument by which he released Byrd from all liability to the estate of his testator from all debt, interest, and constructively, of any costs that he might have to pay for Byrd, on account of his testator being his security on said obligation, and then offered Byrd as a witness to prove his pleas: HELD, That Byrd was a competent witness under the circumstances—that he was not a party to the suit, and in no way interested in its event. *Caldwell's ex'r. v. McVicar,* 746.

3. HELD, further, that though the executor might have laid himself liable for devastavit by executing the release in question, he nevertheless had the power to execute it, and that it was valid. *Ib.*

4. If it be law that a party to a negotiable instrument is an incompetent witness to invalidate it, the rule does not apply as between the original parties to the instrument, but only in cases where the instrument has been transferred on the faith of the signature of the party offered as a witness. *Ib.*

5. The husband having been examined for the State, the wife was a competent witness, on the other side, to show that her husband testified under a bias or prejudice against the defendant. Had she been offered to contradict her husband directly, there might have been doubts as to her competency. *Cornelius v. State,* 782.

WRITS.

1. This court has repeatedly held *original* writs void for want of the signature of the clerk, and like defects, but the courts have generally held such defects in *judicial* process to be amendable. *Whiting & Slark v. Beebe et al.*, 421.
2. Adhering to the former decisions of this court as to such defects in *original* writs, yet in view of the enlarged powers of courts in amending *judicial* process, the court holds that although such writ, without the signature of the clerk, as required by the constitution, is erroneous, yet it is not necessarily void, and the court from which it issued, upon application for that purpose, might either quash or amend it as the circumstances of the case might require. *Ib.*
3. Some of the former decisions of this court have been made under an erroneous impressien with regard to the effect which the constitution had upon the validity of process—that as the constitution required the signing, &c., it could not be dispensed with, and where a constitutional defect existed, the writ was void. *Ib.*
4. But a directory enactment of the constitution is of no more validity as a law, than a like enactment by statute—both are laws, though emanating from different law-making powers. *Ib.*
5. Instead, therefore, of looking to these, the true inquiry is, is the writ so totally defective as not to perform the offices of a writ, and what will be the effect of the amendment upon the rights of the parties? *Ib.*
6. Where a writ is defective in a matter that is amendable, it will be considered as amended when collaterally questioned. *Ib.*
7. A *fi. fa.* wanting the signature of the clerk, is not void but voidable. *Ib.*