REPORTS

OF

CASES AT LAW AND IN EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS,

AT THE

JANUARY AND JULY TERMS, 1854, AND JANUARY TERM, 1855.

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VOLUME XV.

LITTLE ROCK, ARK.
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Rec. Nov. 22, 1855

OFFICERS OF THE SUPREME COURT.

Hon.	George C. Watkins,	Chief Justice.*
"	Elbert H. English,	" " †
"	Christopher C. Scott,	Associate Justices.
"	David Walker.	

**Resigned 31st December*, 1854.
†Elected at the Session of 1854.

Pleasant Jordan, Esq., Attorney General.
Luke E. Barber, Clerk and Reporter.
John C. Peay, Esq., Sheriff.

JUDGES OF THE CIRCUIT COURTS:

1st	Circuit,	Hon.	Charles W. Adams.
2d.	"	"	Theodoric F. Sorrells.
3d.	"	"	Beaufort H. Neely.
4th.	"	"	Felix J. Batson.
5th.	"	"	John J. Clendenin.
6th.	"	"	Thomas Hubbard.

TRIBUTE OF RESPECT TO THE MEMORY OF J. M. CURRAN, ESQ.

IN THE SUPREME COURT,
OCTOBER 14, 1854.

The Attorney General, Hon. JOHN J. CLENDENIN, stated to the Court that JAMES M. CURRAN, Esq., a member of the Bar of this Court, had, within the last few days, departed this life; and that the members of the Bar had held a meeting to pay the respect due to his memory, and had adopted the following resolutions, which he presented, and moved that they be entered of record:

Resolved, That it is with deep regret, that the members of the Little Rock Bar have learned the death of J. M. CURRAN, late a member of that Bar, and whose death excites the sorrow, as his life obtained the admiration of all who knew him.

Resolved, That, in the life of J. M. CURRAN, we behold a union of self-denial, indefatigable industry, and personal integrity, worthy of the ambition of all. Bold and generous, scorning every thing low or mean, never stooping to chicanery or cunning to attain his ends, either private or professional, straightforward, honest, devoted to his profession, we behold in him a successful advocate, who did not pander to the passions or prejudices of men, a logical and profound reasoner, without sophistry.

Resolved, That we hold out the life and memory of JAMES M. CURRAN, to those who may hereafter follow us in our profession, as a model for their emulation—knowing no one whose example is worthier to be followed therein, than he, who fought so valiantly in the battle of life, yet fell by the way-side a victim so young:

"Still grasping in his hand of ice
The banner with its strange device."—*Excelsior*.

Resolved, That whilst we deeply sympathise with our State, who now mourns the loss of one of her brightest jewels; with his afflicted family, for the untimely death of a husband and a father, yet we can offer the consolation, sad though it may be. that he has bequeathed to them a goodly heritage indeed—a name without stain, and without reproach.

Resolved, That a copy of these resolutions be presented, by the Attorney General for the State, to the Supreme Court, with a request that they be entered on its records: and that a copy be communicated, by the secretary of this meeting, to the family of the deceased.

The Chief Justice, Hon. GEORGE C. WATKINS, responded:

The Court will receive, and order to be entered upon the record of its proceedings, the resolutions just offered on behalf of the Bar, in honor of the memory of their deceased brother.

By all the members of the Court, Mr. CURRAN was not only respected, but cordially esteemed. And, for myself, I may be excused for saying, that, having been associated with him for eight years, in the practice of law, I had opportunities of forming a just estimate of his character. I regarded him as being, intellectually, one of the most remarkable men I ever knew. We were friends: and his untimely death is to me a source of poignant grief.

The death of Mr. CURRAN is a sad event, which will be most sensibly and widely felt. The Court, the Bar, and the country, had a concern in the life of one so eminently useful. It will remain to cherish the memory of a man, who, in the brief space of life allotted to him, had made himself a distinguished lawyer, and an honor to his profession.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS,

AT THE JANUARY TERM, A. D. 1854.

CONTINUED FROM VOL. XIV.

ANDERSON VS. YELL.

The liability of an endorser, according to the law merchant, is conditional upon due presentment and notice of non-payment; and, in an action against him by the holder of a promissory note, payable to order, and at a future day, the allegation of notice of non-payment is indispensable, and the omission of it in the declaration a fatal defect, for which no valid judgment could be rendered even after verdict.

The allegation of presentment on the day of maturity, is insufficient, for, if treated as commercial paper, it is entitled to days of grace.

A prior endorser, being a party to the record, but having suffered a default, is a competent witness for the holder in a suit against a subsequent endorser.

Parol evidence is inadmissible to prove that it was the intention of the parties that one of the endorsers should become bound as maker; and, on the admission of such evidence, it was error to permit the plaintiff to change a blank endorsement, as given on oyer, into one waiving demand and notice.

Appeal from Circuit Court of Desha County.

Hon. JOHN C. MURRAY, Circuit Judge.

TRAPNALL, for the appellant.- Baird incompetent, (4 *Wend. R.* 453. 19 *Wend.* 353. 20 *John.* 142,) being a party to the record. He was interested. 2 *Verm.* 144. 4 *Taunt.* 752. 8 *Taunt.* 139.

The filling of the endorsement was error: 1st. It was done after note offered in evidence, (6 *Eng. R.* 325); and, 2d. After evidence on both sides closed, (2 *Phil. Ev.* 407); 3d. The endorsement was so filled up as to deprive appellant of his legal right to notice. See 9 *chap.*, *sec.* 1, *Dig.* 3 *Eng.* 484.

CUMMINS, for appellee. After judgment by default against him, Baird was a competent witness, he consenting to testify. *Carradine & Newman vs. Crary*, 4 *Ark. R.* 227. *Hamlin vs. Fitch*, 1 *Kirby* 174. *Storrs vs. Wetmore*, *Kirby* 203. *Jackson vs. Venderbergh*, 1 *J. R.* 159. *Jackson vs. Fountain et al.*, 2 *J. Rep.* 170. *Willings et al. vs. Consequer*, 1 *Pet. C. C. Rep.* 305. *Worden vs. Williamson*, 1 *Taunt.* 378. *Warrall vs. Jones*, 7 *Bingh.* 395.

The party agreeing to join in the note, and signing to make himself co-maker, authorized holder to fill up endorsement with an absolute guarantee or waiving demand and notice, and recover thereon. *Nelson vs. Dubois*, 13 *J. R.* 175. *Bailey et al. vs. Freeman*, 11 *J. R.* 221. *De Walf vs. Jacques et al.*, 1 *Pet. R.* 476. *Hunt vs. Adams*, 5 *Mass. R.* 358. *Pres., &c., of Oxford Bank vs. Haynes*, 8 *Pick.* 423. *Story Prom. Notes*, *secs.* 133, 148, 147. *Story on Bills*, *sec.* 215, *and notes.*

Party is bound to allege demand and notice, and, under that allegation, he can prove any thing showing demand and notice not necessary or waived. *The Pres., &c., of Taunton Bank vs. Richardson et al.*, 5 *Pick.* 436. *Norton vs. Lewis*, 2 *Conn. R.* 478. *Williams vs. Mathews*, 3 *Cow.* 252.

An endorsement may be filled up on trial. *Edwards vs. Scull*, 6 *Eng.* 325.

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

This was an action of debt, brought by the appellee, James Yell, against John T. Anderson, William R. Anderson, and Jas. R. Baird, the maker, and first and second endorsers of a promissory note, alleged to be lost or mislaid, to which the Andersons pleaded nil debet, and failure of consideration. The plaintiff took issue upon the first plea and replied to the second. He then filed an amended declaration, after which the death of John T. Anderson was suggested, and the suit ordered to be revived, and progress against his administratrix. At a subsequent day of the same term, that order was set aside, and, on the plaintiff's motion, the suit was ordered to abate as to John T., and progress against the surviving defendants. The plaintiff then, by leave of the court, filed a second amended declaration, which is as follows:

"ARKANSAS, SCT.

In Desha Circuit Court, October Term, A. D. 1852.

James Yell, plaintiff, complains of John T. Anderson, William R. Anderson, and James R. Baird, of a plea of debt. For that, whereas, heretofore, to wit: on the 15th day of April, 1851, to wit, at the county aforesaid, the said John T. Anderson, under his style of John T. Anderson, made his certain promissory note in writing, bearing date the day and year last aforesaid, and now here to the court shown, and thereby there promised, on or before the first day of January next, after the date thereof, to pay said James R. Baird, or order, the sum of four hundred and eighty-five dollars, for value received, with interest at the rate of ten per centum per annum from due until paid, and then and there said James R. Baird endorsed and delivered the same to the said William R. Anderson, and when said note remained wholly unpaid, and then and there said William R. Anderson, when said note remained wholly unpaid, endorsed and delivered the same

to said plaintiff, which endorsements are now shown to the court here, and the said plaintiff, in fact, says that afterwards, when said note became due and payable, to wit: on the first day of January, A. D. 1852, at the county aforesaid, said plaintiff presented, and showed said promissory note to the said John T. Anderson for payment, and payment was then and there demanded, but no part thereof was then, or before, or afterwards, paid. By means whereof, said defendants became liable to pay said plaintiff said sum in said note specified, with interest thereon accruing to the tenor and effect thereof. Yet said defendants, or any of them, or any one else, has since paid the said sum in said note specified, or the interest thereon, or any part of either, either before or after said respective assignments to the parties entitled, or to the said plaintiff. To the damage of said plaintiff of five hundred dollars, therefore he sues," &c.

William R. Anderson, after having oyer of the instrument sued on, pleaded nil debet, and two special traverses, both in effect denying that he had any legal or sufficient notice of the non-payment of the note by the maker. The grant of oyer is as follows:

$485. 13TH APRIL, 1851.

On or before the first day of January next, I promise to pay James R. Baird, or order, four hundred and eighty-five dollars for value received, with interest at the rate of ten per cent. per annum from due until paid.

(Signed,) JOHN T. ANDERSON.

(Endorsed,) Pay William R. Anderson.

JAMES R. BAIRD.

Pay to James Yell,

WM. R. ANDERSON."

A default was noted against Baird, failing to appear, and issues being formed upon the pleas of Wm. R. Anderson to the amended declaration, they were tried by a jury. It appears, from the bill of exceptions, that the plaintiff offered, as a witness, the defendant, Baird, and was permitted to prove by him, against the

objection of his co-defendant, Anderson, that the note sued upon was written by Wm. R. Anderson, and when it was written, he (Baird) objected to it, upon the ground that it was to have been a joint note of Wm. R. and John T. Anderson, but Wm. R. said it made no difference, and would answer as well, as he would endorse it, and that was the proper form for him to join in the note: whereupon, it was endorsed in blank by him (the witness) and William R., and delivered to the plaintiff. That afterwards, (but he could not say when it was, whether it was before or after the note became due and payable,) the plaintiff told the witness and Wm. R., that John T. Anderson had told him that he would not pay the note, and that he (the plaintiff) should hold them responsible for the full amount. Which was all the evidence in the cause, and thereupon the court permitted the plaintiff, against the objection of Wm. R. Anderson, to fill up the endorsement on the note so as to read: "Pay the within to James Yell, waiving demand and notice. Wm. R. Anderson." The court then, on motion of the plaintiff, instructed the jury, that the note and endorsements were conclusive evidence of the debt in the absence of proof of payment, and there was no necessity of proof of dedemand and notice, to which also the defendant excepted. The jury found the issues for the plaintiff, and thereupon a joint judgment against the two defendants, Baird and Anderson, was rendered in his favor.

Without noticing the form of the declaration being in debt instead of assumpsit, or the joinder of one of the original defendants, whose death had been suggested by the plaintiff, or the variance in the date of the instrument which appears in the transcript brought here, though it may be a clerical misprision, the judgment must be reversed, because the declaration contains no averment of notice of non-payment to the endorsers, and without which, they could not be charged. The plaintiff dose not sue as assignee, under the statute of assignments, which would require him to exhaust his remedies against the maker, or his estate, before proceeding against the assignor, but his claim is against the

endorsers, whose liability, according to the law merchant, is conditional upon due presentment and notice of non-payment. (*Walker vs. Johnson*, 13 *Ark.* 530.) An averment of notice was indispensable to the title of the plaintiff to recover, and the omission of it was a fatal defect in the declaration, upon which no valid judgment could have been rendered, even after verdict. (*Sevier vs. Holliday*, 2 *Ark.* 512.) So, the declaration is defective in the allegation of presentment. Notwithstanding the seeming misconstruction, in the report of the case, of what the court said in *Ruddle & McGuire vs. Walker*, (2 *Eng.* 462,) there can be no doubt that the note in question, if treated as commercial paper, was entitled to days of grace. What the court there meant to decide, was, that as the statute made writings obligatory for the payment of money equally negotiable with bills and notes, and enable the holder, at his option, to make the assignors primarily liable upon the condition precedent of demand and notice, by analogy the rule would be the same in regard to the time of demanding payment of a writing under seal, in order to fix the liability of the endorser. See, also, *Levy vs. Drew*, decided at the present term, as to the propriety and policy of adhering to the settled rules of the law merchant, to the extent that it is introduced or recognized by statute.

The abstract question whether Baird, the prior endorser, being a party to the record, but having suffered a default, would be for any purpose a competent witness for the plaintiff against a codefendant, on the ground of being called to testify against his interest, is a very curious one, considered with reference to the statute making all obligations several as well as joint, and another general provision enabling any plaintiff, having a cause of action against two or more persons, to sue all or as many of them as he may think proper, so he have but one actual satisfaction; and more particularly the statute making all endorsers, upon receiving due notice of non-payment, equally liable with the maker, and providing that the holder may sue them at the same time with the maker or separately. Though the liability of the defen-

dants is not necessarily joint, the case presents another aspect of the same enquiry, which occasioned so much doubt in *Frazier v. The State Bank*, (4 *Ark. R.* 510,) and *Beebe vs. The Real Estate Bank*, (*ib.* 553,) whether the plaintiff, having elected to sue all jointly, was not bound by the consequences of his election, so that a successful defence to the merits by one would operate as a defence for all. In the case of *Pipe vs. Steel and Harvey*, (2 *Ad. & El. N. S.* 733,) the court of Queen's Bench held that, in a suit upon a joint liability of one defendant, who had suffered a default, thereby admitting a cause of action against himself, and thus becoming severed from the action, would be a competent witness for the plaintiff against a co-defendant, notwithstanding his objection, because, though the witness be interested in procuring contribution from his co-defendant—he had a greater interest in defeating the action altogether by testifying in support of a defence, which if successful, would enure to his own discharge. In a separate suit, by the holder against endorser, a prior endorser would be a competent witness for the plaintiff upon the ground of his liability to one or either of them in any event, and there appears to be no good reason for excluding him because made a party to the record. Though all the prior parties to a bill or note be sued at the same time in this statutory mode, there is nothing in the nature of a joint liability in their successive undertakings, and it would seem that the plaintiff might well succeed as to one defendant, though he fail as against the other.

But the court below erred in admitting the testimony of Baird; and, for the like reason, all the subsequent proceedings depending upon its admission, were equally erroneous, not merely because it changed the order of the liability of the parties on the note, which might possibly make no difference in a subsequent suit, as between themselves, for contribution or recourse, but because it was an attempt to explain, or vary by parol, the terms of a written contract deliberately entered into. If there was any mistake or fraud in its execution, that might have been put in issue, and corrected in a suit to reform the instrument. But when

it is considered that the plaintiff was permitted to prove that one of the defendants intended to become bound as maker, when in fact he refused to join in the note, but signed only as second endorser, and upon such proof was permitted to change the endorsement into one waiving demand and notice, which went to the jury as conclusive proof of liability, at variance with the instrument which the plaintiff had produced for oyer, and in the face of the allegations in the declaration, the whole proceeding was a remarkable violation of the rules of law, though the intention, and, for aught this court can know, the result of it may have been to attain substantial justice. Reversed.

DANLEY ET AL. VS. THE STATE BANK.

The act of the Legislature, exempting the debtors of the State Bank from process of garnishment, declared constitutional; and the decision in *The State et al. vs. Curran*, (7 *Eng.* 322,) as to this point, re-affirmed.

Appeal from Pulaski Circuit Court.

Hon. WILLIAM H. FEILD, Circuit Judge.

PIKE & CUMMINS contended: That, as the chancery cause, set up in the plea, was first instituted, and the subject matter drawn in controversy there; and that the plaintiff was bound to defend in the chancery suit successfully before she could harrass the defendants at law by a second suit for the same cause of action; that the court which first obtains or assumes jurisdiction over the parties and subject matter, can alone judge of that jurisdiction; that, although this court has decided the principle here involved,

in the case of *State et al. vs. Curran*, (7 *Eng.* 364,) the chancery court having the case before it, should be permitted to decide it.

S. H. HEMPSTEAD, for the Bank. The only question in this case is, whether a debtor of the State Bank is subject to garnishment by a creditor, and this is decided in favor of the bank, in the case of *The State vs. Curran*, 7 *Eng.* 322.

Mr. Justice SCOTT delivered the opinion of the Court.

This was an action of debt, upon a promissory note, payable to the Bank. Martin made default, but Danley interposed two pleas, (to which the Bank demurred,) setting up, in substance, that Curran had filed his bill in chancery against the Bank, the said defendant Danley, and others, before the institution of this suit, in which he had alleged that he had obtained certain judgments at law against the Bank upon her issues for circulation, and for their satisfaction had in vain exhausted all his remedies at law. That the Bank had certain equitable assets, which he specified, and, among them, the debt in this declaration mentioned, which he prayed the court to cause to be discovered and made subject to the satisfaction of his judgments. That, in obedience to the subpœna, said defendant Danley had appeared, and by his answer had admitted his alleged indebtedness to the Bank, but had set up that he was not subject to be garnisheed as the debtor of the Bank, and that said chancery court had not authority or jurisdiction to grant the relief sought in the premises, and that said chancery cause was still pending and undetermined, and prayed judgment of said writ and declaration, that the same might be quashed. Which pleas were verified by affidavit.

The court sustained the demurrer, and gave judgment in favor of the Bank, to which both defendants sued out a writ of error to this court.

The only question which, as we think, is properly raised by the demurrer, is as to the constitutionality of the act of the Legislature, 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, it appearing perfectly manifest that it was the design of the Legislature, as this court has heretofore said, in the case of *The State et al. vs. Curran*, (7 *Eng.* 364,) to embrace, by that enactment, not only proceedings at law, but in chancery, the same being clearly within the mischief, and therefore embraced within the equity of the statute. There can be no pretence that the enactment in question denies *all* remedy; and, admitting that "the obligation of a contract, in the sense in which those words are used in the constitution, is that duty of performing it which is recognized and enforced by the laws;" and that if "the law be so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same," the act of the Legislature in question is by no means obnoxious to such an objection; because it can be a matter of no moment to the complainant below whether he subjects the money due by Danley to the Bank, to the payment of his debt in the hands of Danley, the debtor, or of Ross, the Financial Receiver of the Bank, or of a trustee, who might be appointed by the court, in a proper case, to collect the debts in the name of the Bank for the benefit of her creditors. So that his remedies are not substantially impaired or materially burthened: he has no cause to complain; while a sovereign State would be in humiliating vassalage to the Federal Judiciary, if unable to protect the debtors of a public institution of her own from the harrassing suits and needless annoyance of every accidental bill-holder, who might choose to take his "pound of flesh" from where his caprice might dictate. So that the courts of justice are open to him upon terms that do not deny his right, or unreasonably burthen or delay his remedy, it does not lay in his mouth to object that other creditors of other debtors are allowed privileges that are denied to him. Matters of grace and favor to one, are no ground for a claim of right for another, nor is it inconsistent with the principles of a free government to extend her grace and favor to par-

ticular classes of her citizens only, when it may be necessary to ameliorate calamity or promote public policy.

In no view presented to our minds is the act of the Legislature in question unconstitutional; and when taken as valid, and as comprehensive as we have considered it, the pleas in question set up no defence to this action; and, in our opinion, were property held bad. Judgment affirmed.

WATKINS, C. J., not sitting.

ALLIS ET AL. VS. STATE BANK.

Mr. Justice SCOTT delivered the opinion of the court, affirming the judgment, upon the same state of facts as presented in the case of *Danley et al. vs. State Bank.*

WATKINS, C. J., not sitting.

KREBS ET AL. VS. STATE BANK.

Mr. Justice SCOTT delivered the opinion of the Court.

This case, in its facts material to the point of law involved, differs from that of *Danley et al. vs. State Bank*, and *Allis et al. vs. State Bank*, only in this, that a decree was rendered against him and his co-defendants, from which the latter appealed to this

court, where the whole decree was reversed, from which the cause by writ of error was taken to the Supreme Court of the United States, where it is alleged in the plea to be still pending. In our opinion, the plea was equally bad. Judgment affirmed.

WATKINS, C. J., not sitting.

THE STATE ET AL. VS. CURRAN.

Appeal from Pulaski Circuit Court in Chancery.

This cause was decided at the July Term, 1851, (7 *Eng. Rep.* 321,) and, by writ of error, carried up to the Supreme Court of the United States, where, at the December Term, 1853, it was decided: "That so much of the laws of the State of Arkansas (Act of 31st of January, 1843; act of 10th January, 1845; act of 23d December, 1846; act of 9th January, 1849,) as authorized and required the cancellation of the bonds of the State, given for money borrowed of the Bank by the State of Arkansas, or authorized and required the withdrawal of any part of the specie or other property of that Bank, and the appropriation thereof to the use of the State, or authorized and required the application of any part of the assets or property of that Bank, to pay bonds issued by the State, and sold to raise capital for the Bank of the State of Arkansas, or for the Real Estate Bank of the State of Arkansas, or authorized and required real property, purchased for the Bank of the State of Arkansas, or taken in payment of debts due to the Bank of the State of Arkansas, to be conveyed to, and the title thereof, vested in the State of Arkansas, impaired the obligation of contracts made with the complainant as the lawful holder and bearer of the bills of the Bank of the State of Ar-

kansas, and so were inoperative and invalid;" and said Supreme Court reversed the judgment of this court, and remanded the cause to be proceeded in, as the Constitution of the United States requires.

The appellee filed the mandate of the Supreme Court of the United States, and moved for an affirmance of the decree of the Circuit Court.

Mr. Justice SCOTT delivered the opinion of the Court.

The appellee, having filed in this court the mandate of the Supreme Court of the United States for the reversal of the decree rendered here in this cause at the July Term, 1851, (7 *Eng.* 321,) moves for an affirmance of the decree of the Pulaski Circuit Court, made the 20th February, 1850, and for an award of execution thereof, or for such order as may be necessary for its proper execution.

The substance of the decree now moved to be affirmed and executed, is:

1st. That Krebs pay to the appellee the amount of his indebtedness to the Bank, when due, according to the terms of his contract—that the same be transferred, and set over to the appellee —that, after it falls due, the appellee have execution thereof against him, and that upon payment, Krebs be released from liability to the Bank.

2d. That, unless, by the 1st day of May, 1851, the Bank should pay to the appellee the residue of the debt, damages and costs, after deducting the amount decreed to be paid by Krebs, that the lots and tracts of land described in the bill, (not including the lots sold to Krebs,) or so much thereof as should be necessary, should be sold on that day at a place specified, by a commissioner appointed by the court for that purpose, and after a specified notice: and that the commissioner execute and deliver deeds to the purchasers thereof conveying to them all right, and estate of the several defendants therein, on the 13th day of August, 1849, or at any time since.

3d. That, should the proceeds of such sale fail to produce the

aforesaid satisfaction, then, that Ross, the Financial Receiver of the Bank, should deliver to said commissioner, forthwith, all the bills and notes for circulation issued by the Real Estate Bank, (or so many thereof as might be necessary to satisfy the residue of said debt, damages and costs, and interest,) belonging to the State Bank, that were in his custody on said 13th day of August, 1849, or had come to his custody at any time thereafter, to be sold by said commissioner, at said place, on the 3d day of June, 1851, after a notice of sale of two weeks, in the newspaper specified before.

4th. That the said commissioner should have before said Circuit Court, on the second day of the June Term, 1851, of that court, the moneys realized by said sale or sales, and that the same be first applied to the payment of the costs of this suit and the expenses of executing the decree, and the residue to the satisfaction of the debt, damages and interest.

5th. That the right should be reserved to the appellee, in case the money so realized should not suffice for such satisfaction, to apply by supplemental bill or other appropriate remedy for the discovery sought by the appellee in his bill, and to pursue such satisfaction out of any other equitable assets of the State Bank.

6th. That the commissioner report his proceedings to said Circuit Court on the second day of the June Term, 1851, and that for that purpose the cause be continued until then.

We have thus set out the substance of this decree, as of six different parts, for convenience and distinctness of remark upon it. As to the *first*, it is erroneous as to Krebs, because under our statute, which we hold to be constitutional, and to embrace proceedings in equity as well as at law, no person indebted to the Bank is subject to be garnisheed by any person having a claim or debt against the Bank. And had Krebs appealed, the decree would have been reversed for that error. But he did not appeal from the decision in the Circuit Court, and was not a party to any of the subsequent proceedings. Whether or not he has slept too long upon his rights to be now released by the courts, and has no other hope than in such as it may be within the power of the Legisla-

ture to afford him upon the undoubted justice of his case, are questions that we are not called upon to solve, because he has no case before us. But although erroneous as to Krebs, this part of the decree is in no sense injurious to either of his co-defendants, whose case only upon their appeal, is before us, and was before the Supreme Court at Washington.

Nor is there any error in the *second*, *third*, or *fourth* parts of the decree, for which it should be reversed. There is, it is true, no decree of costs against Krebs, nor against the State of Arkansas, upon the overruling of their respective demurrers, as in such cases is directed by the statute, (*Digest, p.* 230, *sec.* 29;) and that it is directed in the last named part of the decree, that the money realized from the sales, shall be first applied to the payment of the costs of this suit; but this can only be injurious to the Bank in case the costs of overruling these two demurrers should be taxed against her in the bill of costs: and, in that case, the Circuit Court would be bound to relieve her from these items on a motion to re-tax.

The *fifth* part is but a reservation to prevent any conclusion against the appellee of his original right to such discovery of, and to subject to the payment of his judgment, such other or further equitable assets of the Bank as may be necessary for full satisfaction, according to his original right to subject any such assets, and in the manner allowed by law; and is no adjudication or decree in advance, that any such assets be now so subjected, and by this, or any other means, lay hold on debts due to the Bank in the hands of the debtors, contrary to the statute which, as we have already said, forbids it. This part of the decree, therefore, is not erroneous.

The *sixth* part, specifying a time for the report of the commissioner, which has now elapsed, like the second, third and fourth, as to the time allowed to the Bank to make payment and in default thereof, the times for the sales, return of the money into court, &c., render it impossible that the decree can be executed accord-

ing to its literal terms as to time. But these matters relate to the execution of the decree only, and do not affect it as for error.

Finding then no error in the decree of the Circuit Court as against the parties before this court, when tested by the opinion of the Supreme Court of the United States in this cause, and that it is proper to make an order here to obviate the difficulties in the way of its execution that have arisen by lapse of time, the motion will be granted in this aspect: the order to be certified to the Circuit Court along with the affirmance that the decree of that court may be executed.

Mr. Chief Justice WATKINS not sitting.

SAUNDERS VS. WOOD.

One partner files his bill after the expiration of the term of partnership against his co-partner for a settlement and share of the profits; the defendant, in his answer, denies that there were any profits, and alleges that the complainant is indebted to him on the partnership account: HELD, that a court of chancery, having acquired jurisdiction of the cause and parties, will dispose of the whole case and decree for the one or for the other, as the account may stand; for the defendant, if the balance be due him, without driving him to a separate suit.

Appeal from Ashley Circuit Court in Chancery.

PIKE & CUMMINS, for the appellant.

YELL, for the appellee.

Mr. Justice WALKER delivered the opinion of the Court.

It appears that Sanders and Wood, bought of Pervis, Wood &

Co., $629, worth of groceries on credit, and entered into partnership for the sale of them; by the terms of which it was expressly agreed that Wood should take charge of the groceries, act as sales man and keep the accounts and books of the firm. He was also to pay, out of the proceeds of the sale, their debts to Pervis, Wood & Co., and defray all expenses. The profits were to be equally divided between them: the partnership to be limited in time to the sale of the stock of groceries then on hand.

To close this partnership transaction, this suit was brought.

The bill is carelessly drawn, and no doubt demurrable, but as no exception was taken to it, we will consider it sufficient to bring the parties to an account with each other, and for a final settlement and decree.

It does not appear, either from the evidence, exhibits, or the answer, for what sum the groceries were sold. The defendant, however, denies that there were any profits whatever realized; but on the contrary that there is a balance due on account of the firm debt. He offered to hold the books of the firm subject to inspection, but the complainant seems to have taken no steps to bring them before the court, or to compel a more full and distinct answer. The evidence is vague and uncertain upon this point; so that it is difficult to say, with any degree of certainty, what the true state of accounts is between them. From the answer (which is responsive to the discovery sought in that particular) there were certainly no profits to be divided; and, therefore, no decree could properly be renderd for the complainant, and from the weight of the evidence (giving the complainant credit for the small advances made by him) it is most probable that there is a balance due to the defendant fully equal to that decreed in his favor. The facts appear to have been twice submitted to the master to take an account; and finally to have been settled by the court upon examination of the evidence. The sum last found due the defendant by the master, and that found due by the court and decreed, are of, very nearly, the same amount, that decreed being most favorable to the complainant.

The only question of doubt that could arise is as to whether the defendant, under the issue formed, was entitled to a decree in his favor. As a general rule, he would not: as for instance, where his right to a degree depends upon affirmative matter, cross demands or set off, a cross bill should be filed; but where as in the present case, the whole matter grows out of a partnership transaction, and one partner calls the other to account, each claiming a balance in his favor, upon ascertaining such balance, whether for the one or the other, a decree should be rendered accordingly. The complainant is not taken by surprise. His defence upon a suit against him for such balance, must be predicated upon the case made by himself here as complainant; and for this reason, as well as upon the general principle, that where a court of chancery has acquired jurisdiction of the person and the subject matter, it will, if it can equitably do so, dispose of the whole case, and not drive the defendant to a separate suit to obtain redress. Decree affirmed.

DIAMOND, EXR., VS. SHELL ET AL.

A will, though fully proven and established, confers no other power on the executor than for the burial of the deceased, and the preservation of his estate: the authority of the executor to act as such, is derived from the letters testamentary, and his appointment must be confirmed by the Probate Court:

On grant of oyer, the letters testamentary, or a certified copy of them, without the proof establishing the will, is sufficient *prima facie* evidence of the authority of the executor to sue.

Writ of Error to Phillips Circuit Court.

PIKE & CUMMINS, for the plaintiff. The certificate of the clerk

of the Probate Court that the will and other papers, including the letters testamentary, had been recorded, was sufficient. The law does not require a separate certificate to each paper recorded.

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

The plaintiff sued as the executor of the last will and testament of Dennis Griffin, deceased. The defendant craved oyer of the letters testamentary, of which profert was made in the declaration. The plaintiff granted oyer, by producing what purported to be a copy of the letters testamentary, with a copy of the will annexed, which had been granted to him by the Probate Court of Phillips county, authenticated by the official certificate and seal of the clerk of that court, to be a true and correct copy of the last will and testament of Dennis Grifin, deceased, and the letters testamentary granted to Eli T. Diamond, upon the estate of said Dennis, by the Probate Court of the county of Phillips, "as the same now appears upon the records of my office." As part of the grant of oyer, and included in the same certificate, there was also produced a copy of the proof *in extenso* which had been taken at the probate of the will, and of the bond given by the plaintiff when he qualified as executor. The defendants demurred for a variance between the declaration and the instrument exhibited on oyer, though the special cause assigned, appears to have been for insufficiency, because it did not appear, from the certificate of the clerk, that the letters testamentary ever had been recorded in his office, so as to entitle a certified copy of them to be used in lieu of the original.

Though the ground of demurrer may be frivolous at the first blush, it seems to be proper to notice the statutory provisions on the subject. We apprehend that the primary object of probating a will, is, that it may be established and authenticated before the Probate Court having jurisdiction. All wills, when proven, together with the proofs and examinations taken in support of them, are required to be recorded by the clerk of the Probate Court, and the originals filed and preserved in his office; so that the ex-

ecutor is not entitled to, or chargeable with, the custody of them. But the will itself, though fully proven and established, confers no more power upon the executor to act as such, than he would have to a limited extent, provided by the statute, before probate: that is, for the burial of the deceased in a manner suitable to his condition, and the preservation of the estate: because, one or more of the executors may refuse to act; and, in case all renounce, the will would have to be executed by a special administrator. The Probate Court must judge, whether the executor named be a suitable person, of full age, of sound mind, and otherwise qualified to be charged with such a duty. So, though the testator should direct that his executor might not give security, the court would still have a discretion to require it from him, if necessary, (*Bankhead, Exr., vs. Hubbard*, at July Term, 1853.) It would, therefore, be correct to say that the appointment of an executor by the will, has to be confirmed by the Court of Probate, or the clerk in vacation, subject to its confirmation or rejection, and who is thus presumed to be acting always under its direction.

If the testator's appointment be confirmed, the person, who is about to become executor, is required to make an affidavit and enter into bond with security, which are to remain of record in the clerk's office, and being thus qualified, his appointment and authority to act, are to be completed by the issuance to him of letters testamentary, according to the form prescribed by the statute, and to which a copy of the will is annexed. Before the original letters are given out, it is made the duty of the clerk, under a penalty, to record them, and authenticated copies of them may be read in evidence in the same manner as the originals.

Hence it is, that after these successive steps, the executor always makes out a prima facie case of authority to sue by producing the letters issued to him, or a certified copy of them. A copy of the will accompanies the letters; but as the granting of them presupposes the establishment of the will by the adjudication of the proper court, the proofs and examinations which may have been taken in support of it, do not necessarily form any part

of the letters. In like manner, we understand the intimation in *Newton, Ex. vs. Cocke, Ex.*, (5 *Eng.* 176,) to be, that though the oath and bond are essential to the executor's right to act, they need not be produced or proven when his authority is collaterally called in question; because the statute makes them prerequisites to the final issuance of the letters, and it is not to be presumed that the Probate Court, to whom belongs the appointment and removal of executors, has been derelict in exercising its jurisdiction.

Judgment reversed and cause remanded, with instructions to overrule the demurrer.

HILL & CO. VS. CAWTHON & CO.

The defendants in a suit at law, seeking discovery in aid of their defence, must, at least, use such reasonable diligence as would be required in procuring the testimony of an ordinary witness, who was known to them as such, and of the materiality of whose testimony they were apprized: and the petition comes too late, when filed at the third term, and it appears that the plaintiffs are non-residents, and the defendants were aware of the existance of the facts, as to which the discovery is sought, before the institution of the suit. And where the discovery is sought in aid of a defence as to part of the demand sued for, no order for the discovery and injunction of the proceedings ought to be granted, unless the defendants bring into court so much of the debt as is admitted to be due.

A petition for discovery, must show, not only that the discovery is material, that the defence would be difficult or doubtful without it, but that the material facts relied upon are not susceptible of proof by witnesses, or the ordinary sources of defence in suits at law.

Appeal from Ouachita Circuit Court.

Before Hon. SHELTON WATSON, Circuit Judge.

PIKE & CUMMINS, for the appellant.

CURRAN, for the appellee.

The petition was filed too late. It was not presented until after the cause had been pending for three terms, and when it had been called and stood for trial, and there was no pretence that any diligence had been used, or effort made to procure testimony.

A petition under the statute is governed by precisely the same rules governing bills for discovery in equity. *Digest, chap.* 126, *sec.* 93, 95, 96, 97. *Field vs. Pope*, 5 *Ark.* 66. The statute requires the court to make an order staying the proceedings. *Digest, chap.* 126, *sec.* 95.

This bill fails to show that the discovery was material. *Mitf. Pl.* 192. *Newkirk vs. Willett*, 2 *Caine's Cas. in Eq.* 296.

It does not appear that the matters sought to be discovered could not be established by witnesses. Where a party asks a court to stay proceedings at law, on the ground that discovery is necessary to aid him in his defence, he must not only show that the facts, as to which discovery is sought, are material, but he must also show that the defence cannot be established by the testimony of witnesses. *Leggett vs. Porley*, 2 *Paige* 601. 2 *Hoff. Ch. P.* 109. *Seymour vs. Seymour*, 4 *J. C. R.* 409. *Bullock vs. Boyd*, 2 *J. J. Marsh.* 323. *Bass vs. Bass*, 4 *Hen. & Munf.* 478. *Reese vs. Parish*, 1 *McCord's Ch.* 60. 7 *Cranch*, 89.

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

The appellees commenced an action of law against the appellants, as the acceptors of a protested bill of exchange. The process, returnable to the April Term, 1852, of the Ouachita Circuit Court, was served upon the defendants on the 24th of February, in that year; and, at the return term, they appeared and craved oyer of the instrument sued on. At the October Term following, they pleaded non assumpsit, and set off. At the April Term,

1853, they interposed a further defence, which, without now questioning its sufficiency, may be considered as a plea of partial failure of the consideration, for which they had accepted the bill in suit, and which was drawn by the plaintiffs, payable to their own order. During the same term, the defendants presented their petition for discovery, in which, after alleging the same facts set out in the plea, conducing to show a partial failure of consideration, the petitioners state that "they are advised they cannot safely proceed in defending the said action, without having such discovery as aforesaid of the circumstances hereinbefore stated from the said defendants." The bill prayed for an order requiring the defendants thereto to answer certain interrogatories propounded to them, and for an order restraining or staying further proceedings in the suit until the discovery could be obtained. The transactions disclosed in the petition, showed that the plaintiffs to the suit at law, resided abroad, so that an order requiring them to answer the interrogatories, would necessarily have delayed the trial of the cause until a succeding term. It further appears, from the nature of the facts alleged, and in relation to which a discovery was sought, that the petitioners must have been personally cognizant of their existence as a defence, before or at the time of the institution of the suit at law. The petition was verified by affidavit, in conformity with the statute, commented upon in *Field vs. Pope*, (5 *Ark.* 66;) and *Conway & Reyburn vs. Turner & Woodruff*, (3 *Eng.* 356,) which gives to common law courts the same powers, in relation to discovery, that belong to courts of equity, and makes the answer evidence on the trial, in the same manner as an answer to a bill in equity for discovery. If the common law court, or judge, is of opinion that the interrogatories, or any of them, ought to be answered, it is his duty (*Rev. Stat., Title, Practice at Law, sec.* 95,) to make an order requiring the party, from whom the discovery is sought, to answer the same, or show good cause why he should not do so, and that the trial of the suit be stayed until such order be complied with, or vacated.

Upon demurrer, the petition was adjudged insufficient, and the action at law then progressing, the plaintiffs had judgment.

It requires no extended examination of authorities to demonstrate that the decision of the court below was right. Supposing that the petitioners were entitled to the discovery as evidence, no excuse is pretended, why they had not endeavored to avail themselves of it at an earlier period, and with at least such reasonable diligence as would be required in procuring the testimony of an ordinary witness, who was known to them to be such, and of the materiality of whose testimony they must have been apprized. Moreover, we do not see how the petitioners could have been entitled to the order for discovery, and injunction of the proceedings at law, without bringing into court so much of the debt, as the petition and plea admitted to be justly due upon the bill of exchange. In *Field vs. Pope*, the law is broadly stated to be, that "the discovery is generally granted upon the principle that the party cannot prove the facts sought to be discovered, without resorting to the conscience of the opposite party; and this is of the essence of the right." And though that was a strong case, where the party calling for the discovery thought proper to read the answer, though not obliged to do so, and after making a witness of his adversary, by reading the answer, undertook to impeach it by other testimony, we are not prepared to say that the rule is laid down too broadly, with reference to the allegations which ought to appear on the face of the petition. We do not wish to be understood as saying that the suitor at law cannot have a discovery in aid of his suit or defence, in any case where, though he may have some evidence, the proof of the claim or defence relied upon would be doubtful or difficult without the aid of the discovery, in respect of which, there may be debatable ground in theory as well as in practice. It is sufficient to say that this petition does not represent any such state of doubt or difficulty, and for aught that appears, it might be inferred that every material fact relied upon for the defence, was susceptible of proof by witnesses, and the ordinary sources of evidence in suits

at law. In *Marsh. vs. Davidson*, (9 *Paige* 584,) Chancellor WALWORTH makes what seems to be a reasonable distinction, that, to sustain a bill of discovery in aid of a defence at law, the complainant must show that the discovery sought is material to his defence; not that it is absolutely necessary. But where the complainant also seeks relief in chancery, upon the ground that the discovery is necessary, the bill must allege affirmatively that he cannot establish such defence at law without the aid of the discovery sought; and the relief may be demurred to, if in such case the bill does not show that the discovery is necessary, as well as material and convenient. And he proceeds to say: "A similar averment of the necessity of a discovery in aid of the defence at law, must be made and sworn to, where the complainant in a bill of discovery asks for an injunction to stay the defendant's proceedings there, until he has answered the bill." Such was the case here; and, seeing no probable grounds for the appeal to this court, and which the appellants have caused to operate as a supersedeas, the judgment will be affirmed, with damages for delay.

WALKER, AS COM. VS. BYRD ET AL.

A justice of the peace has jurisdiction to render judgment for each installment of interest, as it falls due, or any number of installments not exceeding a hundred dollars, in any one suit for the interest payable semi-annually on a bond due at a future day.

Appeal from Pulaski Circuit Court.

Hon. WM. H. FEILD, Circuit Judge.

CURRAN & GALLAGHER, for the appellant, contend, that if the justice of the peace had jurisdiction, the writ of prohibition would not lie, although there was an erroneous proceeding before the magistrate, (*Williams, Ex parte*, 4 *Ark. R.* 539); that an action of debt may be brought before a justice of the peace for the arrearages of interest, not amounting to one hundred dollars, upon a bond payable after the time the suit was brought, but bearing interest from date payable semi-annually in advance. 1 *Ch. Pl.* 125. *Com. Dig.*, DEBT, *A.* 1. *McClel. & Y.* 457. *Sparks vs. Garigues*, 1 *Binn.* 152, cited in 1 *Chit. Pl.*, *p.* 129, (*Marg.*) *note* 297. *Hories vs. Jamison*, 5 *T. R.* 557. So, an action of covenant would lie in such case. *The State vs. Scoggin*, 5 *Eng.* 327. *Rev. Stat.*, *p.* 640., *sec.* 3. *Act of* 21*st Dec.*, 1846.

PIKE & CUMMINS, for the appellees. Debt would not lie on these installments for interest. It will not lie to recover money due by installments on a bond, until all the days are past. *Reedder vs. Price*, 1 *H. Bla.* 547. *Co. Litt.*, 47 *b.* If a bond be with a penalty, and conditioned for the payment of the installments, debt will lie on failure to pay the first installment. *Hallet vs. Hodges*, *Sayer* 29. *Sparks vs. Garrigues*, 1 *Binn.* 152. *Gladman vs. Hinckman*, 2 *Vern.* 135. 1 *Stra.* 515. 2 *ib.* 957. 3 *Burr.* 1379. It is well settled that debt will not lie for money payable by installments, until all become due, unless the payment be secured by a penalty; but where that is the case, debt may be brought for the penalty. *Fontaine vs. Aresta*, 2 *McLean* 127. *Farnham vs. Hay*, 3 *Black.* 167; 2 *Overt.* 231. 2 *Halst.* 165. *The State vs. Scogin*, 10 *Ark.* 331.

The installments of interest in this case, are not *debts.* They are in the nature of interest upon the principal sum secured by the bond. If not debts, but merely damages, debt will not lie for them. Covenant, in this case, is the only action that will lie; and of that, a justice has no jurisdiction.

Tucker vs. Randall, 2 *Mass.* 283. *Greenleaf vs. Kellogg*, *ib.*

568; *Cooley vs. Rise*, 3 *ib.* 221, and *Hastings vs. Niswall*, 8 *ib.* 455, show that assumpsit is maintainable for interest, stipulated to be paid by a promissory note, before the principal falls due. And so may covenant, if the note is under seal; because, it, like assumpsit, sounds in damages: and though debt will lie where indebitatus assumpsit will, yet it does not lie where covenant will.

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

The appellant, Walker, as successor of Roswell Beebe, brought suit before a justice of the peace, against the appellees and one William J. Byrd, since deceased, to recover certain installments of interest due upon a writing obligatory, of which, the following is a copy:

"STATE OF ARKANSAS, }
COUNTY OF PULASKI. }

Know all men, by these presents, that we, R. C. Byrd, Wm. J. Byrd, John Robins, and Albert Pike, acknowledge to owe, and be indebted, for value received, to Boswell Beebe, as commissioner for township one north of range twelve west of the fifth principal meridian, in Pulaski county, appointed under the act of the General Assembly of the State of Arkansas, to establish a system of common schools in the State of Arkansas, approved February 3d, 1843, and his successors in office, in the just and full sum of one hundred and seventy-five dollars, good and lawful money of the United States, payable within ten years from the date hereof, with interest on said sum at the rate of eight per cent. per annum, payable semi-annually in advance, to which payments well and truly to be made, we jointly and severally bind ourselves," &c. "Signed and sealed, at Little Rock, the 23d day of December, A. D. 1843," &c.

On the 12th of September, 1851, when the suit was commenced, the justice of the peace, after stating the names of the parties and style of the cause, made the following entry on his docket: "This action is founded on interest due on bond given to Roswell

Beebe, as commissioner of the 16th section, T. 1 N. R. 12 W., by the defendants, Richard C. Byrd, Wm. J. Byrd, John Robins, and Albert Pike, and is brought to recover five years and six months interest on said bond, amounting to the sum of $98 00. Summons made returnable 27th September, 1851. Bond filed before summons issued, and afterwards deposited with the clerk of the county court, for safe keeping." The defendant, Richard C. Byrd, appeared before the justice, and objected to his jurisdiction over the subject matter of the suit. The objection was overruled, and the defendants having been duly served with process, judgment was rendered against all of them for the sum of $98 00, the amount claimed, with cost of suit. The defendants then petitioned the judge of the Pulaski Circuit Court, suggesting the recovery of such judgment against them, and exhibiting a transcript of the proceedings had before the justice, and prayed for a writ of prohibition directed to the justice, prohibiting him from issuing process of execution, or attempting to enforce the judgment, or proceed any further in the premises. The judge of that court granted an order for a rule to issue, requiring the plaintiff to show cause why the writ of prohibition should not be granted in accordance with the suggestion, and that the service of the same upon the plaintiff and the justice should, in the mean time, operate as a stay of proceedings upon the judgment. The final determination of the suit for prohibition, resulted in the decision of the Circuit Court, that the justice of the peace had not, by the constitution and law of the land, any jurisdiction to render such judgment as he had given in the premises, and making the rule for prohibition absolute: from which decision, the commissioner has appealed.

The position contended for by the appellees, is based upon the distinction between the forms of actions at law, affording appropriate remedies for a breach of contract according as it may be in parol or under seal, and according as the recovery sought is of a sum certain or for unliquidated damages. The argument is, that if the contract be by parol, or in writing, not under seal, in-

terest accruing in advance of the principal, would be recoverable before justices of the peace, and they have jurisdiction because assumpsit would lie to recover the interest. But that interest, being a mere incident to the debt, is not itself recoverable as a debt, and when the contract is evidenced by a writing obligatory, covenant is the only action, and there is no concurrent remedy which can be maintained to recover the arrears of interest; whereby, the jurisdiction of justices of the peace is excluded under the decision in *Crabtree vs. Moore*, (2 *Eng.* 72,) which held that the exception contained in the constitution, as originally framed, of actions of covenant from their jurisdiction, applied only to those causes of action where covenant was the peculiar remedy.

It is to be observed that, under the system of pleading and practice adopted for the Circuit Courts, the distinctions between the common law forms of action are retained, while they are disregarded in suits before justices of the peace, the criterion of whose jurisdiction being the amount in controversy, may be understood to have reference to causes rather than to forms of action. But whatever force there may be in the argument, is obviated by the act of December 21st, 1846, passed in pursuance of the 3d amendment to the constitution, which had been ratified by the General Assembly, during the same session, extending the jurisdiction of justices of the peace over all actions of covenant where the amount claimed does not exceed one hundred dollars. This change in the law, consequent upon the amendment, in no wise affected the rights of the obligors, or increased their liability upon the contract in question, though pre-existing. It only provided a different mode of enforcing it before another tribunal, affording a new remedy which the obligee was not only at liberty, but compelled, to pursue.

The statute prescribes a legal rate of interest upon judgments, debts due, and accounts stated; where by the terms of the contract the parties have not agreed upon any rate, and in such case, it might be proper to say that the interest is an incident to the debt; and so, though the interest be stipulated, we continue to

recover it along with the principal in the shape of damages, the judgment following the stipulation. (*Henry vs. Ward*, 4 *Ark.* 150.) But whenever the parties do stipulate for interest, though according to the legal rate, as well as where it is under or over, it must always be regarded as conventional, entering into and forming a part of the contract itself. *Sumner vs. Ford*, 3 *Ark.* 404.

Where the payment of the principal is postponed, and the contract stipulates for intermediate payments of interest, at stated periods, as the court said in *Inglish vs. Watkins*, (4 *Ark.* 201,) "the legal presumption is, that the parties contemplated its performance, according to the terms stipulated; that is, that the principal debt would be paid at the end of twelve months, and the interest accruing thereon at the end of every three months from the date of the contract." The design of the law establishing a system of common schools, was to make the proceeds, arising from the sale of the 16th section, a fund for their support. The sales were upon extended credits, and the obligation here sued upon was drawn in conformity with the provisions of the statute, so that there must be a clear liability upon the obligors to pay each semi-annual installment of interest as it fell due; and it is equally clear that one jurisdiction or the other must have cognizance of that liability. It may not be technically considered a debt; but it is an obligation to pay, at stated periods, a certain sum of money liquidated and ascertainable by computation according to the terms of the contract, and we think it in harmony with the spirit of the constitutional provision to hold that in such case a justice of the peace has jurisdiction to render judgment for each installment of interest as it falls due; or, as in the case before us, for any number of installments not exceeding a hundred dollars, in one suit: the complaint being founded upon the obligation itself, though properly accompanied with an accurate specification or notice to the defendant of the particular installments, of which payment is demanded.

The intention of the provisions in the constitution, must have been to afford, for the benefit of both plaintiff and defendant, a

cheap, convenient, and expeditious remedy for the recovery of small debts, which neither should be allowed to evade. It would be a flimsy distinction to make the jurisdiction depend upon the mere form of the instrument, without looking to the real effect of the contract, and the object the parties had in view. If the obligors had given so many separate obligations or distinct undertakings in the same instrument, to pay each installment of interest, running through a term of years, it must be admitted that justices of the peace would have jurisdiction. It is not necessary to express any opinion whether interest could, by that mode of contracting, be lawfully compounded; it being sufficient, for the consideration of this case, that installments, like those in question, do not bear interest after they severally become due, though when merged in a judgment, that would bear interest by virtue of the general law applicable to all judgments.

The judgment of the circuit court will be reversed, and the cause remanded, with instructions to sustain the demurrer to the declaration filed by the suggestors, and discharge the rule for prohibition.

THE STATE BANK VS. TUCKER, AD.

Although no affidavit is required for the legal exhibition of a claim against the estate of a deceased person, upon which an action was pending at the time of his death; yet such action must be revived against the administrator, or executor within two years from the grant of letters, or the claim will be barred, like any other not legally exhibited.

Appeal from Jackson Circuit Court.

Hon. B. H. NEELY, Circuit Judge.

S. H. HEMPSTEAD, for the appellant. The pleas to the scire facias were improper, and the demurrer to them should have been sustained. *Dig.*, 126, 5 *Eng.* 584, *Byers vs. Walker*, *July Term*, 1853.

BYERS & PATTERSON, for appellee. Upon the principles declared by this court, in the case of *Walker, ad. of Pope vs. Byers*, decided at the last July Term, the judgement of the Circuit Court must be affirmed.

Mr. Justice SCOTT delivered the opinion of the Court.

The Bank sued Stith Tucker in his life time. Pending this suit, it was suggested that the latter had departed this life, and that Gideon Tucker had been appointed his administrator, and, with the view to revive against the latter as such administrator, sci. fa. was sued out and executed. In response, Gideon Tucker set up, by one plea, that letters of administration on the estate were granted to him on the 10th day of October, 1849, and the sci. fa. was not executed upon him until the 14th of October, 1851; and, by another plea, that more than two years had expired since the grant of administration, and that the claim had not been exhibited to him in any mode provided by the statute within that period. The Bank interposed demurrer, which was overruled and electing to stand on it, final judgment was given for Tucker, and the Bank appealed.

Although actions pending against any person at the time of his death, which by law survive against the administrator or executor, are without the rule requiring the authenticating affidavit when exhibition of the claim is sought by a revival of the action against such representative, it by no means follows that such claims are without the rule requiring imperatively the exhibition of all claims within the two years, in some one of the modes provided by the statute. When such actions are revived, the statute declares that "they shall be considered demands legally ex-

hibited against the estate from the time such actions shall be revived and shall be classed accordingly." (*Dig.*, *p.* 126, *sec.* 86.) But if such revival should not be had until after the expiration of the two years, like exhibition in any other mode after the expiration of the two years, it would be too late. (*Walker ad. vs. Byers*, 14 *Ark. R.*) Judgment affirmed.

McPAXTON, AD. VS. DICKSON ET AL.

An executor is not entitled to a credit in the annual settlement of his accounts for payments, without order of court, to legatees or distributees: such payments are at the peril of the executor; and though valid as between him and the legatee or distributee, not so as to others, having paramount rights in the estate.

Appeal from Sevier Circuit Court.

Hon. SHELTON WATSON, Circuit Judge.

S. H. HEMPSTEAD and B. F. HEMPSTEAD, for the appellants, cited the 107*th* and 109*th secs.*, *ch.* 4, *Digest.*

CURRAN & GALLAGHER, for appellees, cited the 130*th*, 131*st*, 132*d*, 135*th secs.*, *ch.* 4, *Revised Statutes.*

Mr. Justice SCOTT delivered the opinion of the Court.

The executor, at an annual settlement, claimed credit for several sums of money, which he had, without an order of court for any distribution of the estate, paid out to some two or three of the heirs, in anticipation of, and as a part of their probable dis-

tributive shares, respectively, in the ultimate residue of the estate. Other heirs excepted to these items in his account; but the Probate Court overruled their exceptions, and allowed the executor thus to credit himself. Upon bill of exception, and appeal to the Circuit Court, the ruling of the Probate Court on this point, was held erroneous, and the Circuit Court, thereupon restating the account, excluded these items from the credits allowed the executor; and he, in his turn, has appealed to this court.

Although an executor or administrator may pay out legacies or distributive shares, before an order of court for that purpose, it is at his own peril. He has no right to make creditors of the estate, or some of the heirs or distributees, when he has paid out only to others of them, share this responsibility with him against their consent. The several provisions of the statute, relating to the payment of legacies and distributive shares, are not for his protection alone, (*Digest, p.* 134, *secs.* 130, 131, 132, 135); but for that of all persons interested; and especially for the protection of creditors whose rights are paramount to those of heirs or distributees. The assets are in the custody of the law, primarily for the benefit of creditors; and it is presumed, by the law, that they remain in the hands of the executor or administrator, subject to the claims of creditors only; until ordered by the court to be paid out, or distributed to legatees or distributees. Such orders of court, in the progress of the administration, are easily obtained under the provisions of our statute in cases where the rights of creditors are not jeopardised; and are always to be encouraged, when this is not the case: and the voluntary payment of legacies or distributive shares by executors or administrators, without an order of court, are sufficiently encouraged by holding the payment or distribution valid as between him and the legatee or distributee to whom it is made; although not so as to others having paramount rights in the premises.

We think there was no error in the action of the Circuit Court. Judgment affirmed.

WATKINS, C. J., not sitting.

ROBERTS VS. WILLIAMS ET AL.

15 43
57 368

15 43
51 608

15 43
f78 20
78 21

Where the owner of land, through which a road is located, objects to the proceedings of the commissioners appointed to view and mark out the road, it is immaterial whether he was the owner of the land at the time of the view, or succeeded subsequently to the estate of the then owner: it is sufficient that he became the owner before the final action of the county court, and presented a sufficient objection to the establishment of the road.

And where the county court proceeds to make a final order establishing the road, after such owner of land has become a party to the proceeding, he has the right, upon showing that the final order of the county court is erroneous, and that he has lost his right of appeal in the mode provided by the statute, without any fault or negligence on his part, to a writ of certiorari, to bring the proceedings before the Circuit Court for revision.

Without the consent of the owner, private property cannot be taken for private use, even under the authority of the Legislature; nor can it be taken for the public use without providing for just compensation, to be first made to the owner. (*Martin, Ex parte*, 13 *Ark.* 198.)

It is by virtue alone of the right of eminent domain, that private property is taken for the purpose of being used for a road, and whether the road be a public or private one, it is equally for the public use.

No valid and binding order could be made by the county court, establishing a private road where the report of the commissioners failed to advise the county court, in pursuance of the statute, of the ownership of the lands, and of the damages to be sustained by each owner, through whose lands the road was laid out.

Appeal from Phillips Circuit Court.

Hon. CHARLES W. ADAMS, Circuit Judge.

PALMER, for the appellant. That the petition of Williams should have accurately described the *termini* of the proposed private road, See *Digest, ch.* 140, *sec.* 62.

That Williams should have deposited "a sufficient sum of mo-

ney," before the court could appoint viewers, See *Digest, chap.* 140, *sec.* 63.

That the viewers should have been sworn before entering upon their duties; and that the record should show that fact, See *Digest, chap.* 140, *sec.* 63, 47. *Breckenridge vs. Ward,* 1 *Mon.* 57. *Pollard vs. Ferguson,* 1 *Litt.* 196. *Elliott vs. Lewis,* 1 *A. K. Marsh.* 143. *Hudson, as ad. vs. Breeding et al.,* 2 *Eng.* 445.

That the viewers should have stated the names of the owners of the particular lands, if known, and if unknown, should have stated that fact, and should have particularly described each tract of land. *Digest, chap.* 140, *sec.* 64.

That the viewers should have assessed damages as to all of the lands over which the road passed. *Dig., chap.* 140, *sec.* 64, 67, 53. *Martin et al. Ex parte,* 8 *Eng.*

That there was error, for which the proceedings should be quashed. See *Roberts vs. Williams et al.,* 8 *Eng.*

PIKE & CUMMINS, for appellees. The county courts have general jurisdiction over the matter of public and private roads in this State. See 9 *Art. Con. Chap.* 49 *and* 140, *Rev. Stat.*

The counties are quasi corporations, whose active agents are the courts. Their powers and acts, should be liberally construed. *Ang. & Am. on Corp.* 17, 18.

The only judgment which can be given on certiorari, is one of quashal or affirmance of the proceedings. 4 *Ark. R.* 473; 5 *ib.* 358. 6 *Eng.* 613.

Nothing outside of the record returned, can be assigned for error, pleaded or adjudicated upon. 6 *Eng.* 613.

The county courts are not *inferior.* They have in their favor the presumptions which attach to the proceedings of superior courts of general jurisdiction. It is not necessary that the facts conferring jurisdiction should appear of record, or a strict compliance be shown with the statute under which they act. 6 *Eng.* 519, 604. 4 *Cow.* 292. 6 *Wend.* 447. 6 *Eng.* 157.

No objection here raised affects the jurisdiction of the court,

so that at most, if the matter appeared of record, it would only be a mere irregularity, not rendering the proceeding void. 1 *Hill* (*N. Y.*) 130.

The *last* proceedings being void and quashed, any thing stated or appearing therein, cannot be used to defeat the *first* proceeding.

All citizens were parties to the first proceedings, and as no objection was then raised, or damages demanded, every supposed objection is now waived. *Sec.* 67, *ch.* 140, *Rev. Stat.* 15 *Wend.* 374, 610. 3 *Mon.* 266.

Mr. Justice SCOTT delivered the opinion of the Court.

This is an appeal from the Circuit Court of Phillips county, in a case where a portion only of certain proceedings in the county court of that county, touching a private road, was quashed, the whole proceedings having been brought into the former court by certiorari to the latter. It appears, from the transcript of the certified proceedings of the county court, that, on the 15th of April, 1850, Williams filed his petition representing that he labored under great disadvantage, by reason of not having a road from his plantation to the Mississippi river, and asking that commissioners might be appointed to view and mark out a route for a private road, and assess the damages, which, in their judgment, would be done to the lands through which the proposed road might run. The county court, on the same day, granted the prayer of the petitioner, and appointed three commissioners, requiring them to meet at a specified time and place, "to view and lay out the route of the proposed road, and assess the damages which might be done to the land through which the same should pass," and to report their proceedings at the next term. It does not appear whether or not these commissioners were house-holders, or whether any sum of money was deposited.

On the 10th July following, two of these commissioners reported that, on the day appointed, they viewed and marked out a route, "commencing at the crossing of Old Town Lake, at John

R. Williams', allowed twenty-five feet on the top of the south bank of said Lake, passing through sections 21, 22, 27, and 26, in township 3, south of range 3 east, one hundred and eighty poles, or thereabouts, from the north-west corner of section 26, and two poles east of two red or black oak trees, which stand two or three feet apart, and under the bank of the Lake with the letter R, cut on each, the road takes a turn to the s. s. east, and runs on a ridge of land, on which old Mr. Owen and Boston D. Owen now live, in section 25. On the top of this ridge, or slue bank, we allow twenty-five feet from Old Town Lake to the mouth of the slue, where it enters into the overflow of Long Lake and Old Town, between the farms of B. D. Owen and John Reader, except in passing through the farms of old Mr. Owen, we remove, or set in his fence sixteen feet along his entire line, and allow him, at the rate of fifty dollars per acre damages for the land thus appropriated. From the mouth of the slue, through the overflow, the route will pass in a direct line to the nearest point on Long Lake, twenty-five feet wide, then down that lake to the Mississippi river." It would seem, from this report, that the commissioners failed to describe so much of the land through which the route passed, as lay between the point where the route turned near the oak trees, and the Mississippi river. They also failed to name the owners of the land that they did describe; nor did they state that the owners were not known, if such was the case, and failed to give their opinion of the damages to be sustained by each land owner, through whose land the route passed. Nor does it, in any way, appear whether or not the commissioners were ever sworn to discharge their duties faithfully and impartially, or whether they were of opinion that the road was necessary and proper, otherwise than as an inference from their having laid it out.

The report, however, having been "read and examined by the court," was, on the day of its presentation, "approved and confirmed, and ordered to be spread upon the record." It does not appear whether or not the court was of "opinion that the road

was necessary," nor was any order then made establishing the route reported "as a private road," as is directed by the statute in case the court should be of that opinion after the coming in of the report." (*Digest, page* 908, *sec.* 66.) No further proceedings seem to have been taken in the cause, which, by operation of law, was continued from term to term, until in the April term, 1852, when the appellant Roberts appeared in court, and presented a petition, signed by a number of citizens of the township, who seem to have supposed that the route reviewed had been already established as a private road, representing that the supposed road ran directly through the lands of Roberts and R. Owen, Sr.; that their said land was in cultivation and under fence, and they desired to cultivate it; that the supposed road materially injured and damaged the farms of both of them, and that another route could be laid out that would be nearer, and on equally as good and high ground, and as convenient for Smith and Williams, for whose convenience the road was laid out, and which would in no way damage the farms of Roberts and Owens; and they prayed that the route should be so changed, and that commissioners be appointed to review, &c.

The court, on this application of Roberts, granted the prayer of the petitioners in his behalf, and, appointing three commissioners, ordered them to meet at the house of Roberts, on the first Monday of July after, for the discharge of their duties specially pointed out, and to report their doings at the next term (July.) The April term, however, having continued into the month of June, it appears that, on the 22d day of this month, a report "was received, approved, confirmed, and ordered to be spread of record," by the court, purporting to be made and signed by two of the three commissioners, that is to say, by Daniel McMahon and John Rogers, whose signatures are attested as follows: "Signed by John Rogers, in presence of J. W. Smith," then endorsed, "This day, appeared before me, John Rogers, legally *orthor* to subscribe Daniel McMahon's name to within instrument. Sworn to before me. Berry Talby, J.P." This report set out that the commis-

sioners had viewed all the proposed routes, and finding no suitable ground—all being subject to overflow—they "decline making any change," and that the road must "remain as previously laid out, through the lands of Roberts and others, passing to the right of Owens' farm." Thereupon, on the same day, the court order that the road recommended by the report of the commissioners, at the July term, 1850, shall be "confirmed as a private road to said John R. Williams and the said James W. Smith, and that a private road be established, in accordance with said report, not exceeding twenty-five feet in width," and that Roberts pay all the costs. It in no way appears that Roberts was present, either in proper person or by attorney, when this final action was had in the cause; and upon the ground of having lost his right of appeal by surprise, from this premature final action of the county court, and of the errors of that court in these proceedings in which he had thus shown his interest, and had become a party, and been adjudged to pay costs, and had been adjudged no compensation for the injury to his land that had been made known to the court previously to its final action in the premises, he was awarded the certiorari. But, upon the hearing in the circuit court, that court found error only in the petition for re-view presented by Roberts, at the April term, 1852, and in the proceedings thereon; and quashed these only, leaving untouched all the proceedings establishing the private road in question: from which judgment of the circuit court, Roberts appealed to this court.

In the view we take of this case, it is immaterial whether or not Roberts was the owner of the land at the time of the original review, or succeeded subsequently to the estate of Erwin, who was then the owner, as is stated in his petition for the certiorari. It is sufficient that he became owner before the final action of the county court, showed his interest to that court, suggested that his land would be injured, and objected to the proceedings, it is immaterial in what form.

And to sustain his right to bring these proceedings in question by this mode of proceeding, it is sufficient that he has thus in-

tervened, was recognized as a party, as he unquestionably was, in the rendition of a general judgment of costs against him upon the making of the final order establishing the road, if not otherwise, showed that these proceedings were erroneous, and that he had lost his right of appeal in the mode provided by the statute, without any fault or negligence on his part.

Without the consent of the owner, private property cannot be taken for private use, even under the authority of the Legislature; nor can it be taken for the public use without providing for just compensation to be first made to the owner. (*Martin, Ex parte*, 13 *Ark.* 198.) And when rightfully taken for the purpose of being used for a road—whether a public or a private one—it is in virtue alone of the right of eminent domain, and is equally for the public use in either case; although in the one the compensation to the owner of the land and the burthen of keeping the road in repair, may be assessed and imposed upon one citizen only, or upon a few, or a company, who may be more immediately interested in it; and in the other case, upon a municipality, or upon the public at large. Upon no other ground can the constitutionality of the private road law be sustained; and it can well rest here in view of the obligation upon the sovereign power, so to provide as to give each individual of the community a reasonable opportunity to enjoy the privileges secured; and to discharge the various duties imposed upon him as a citizen.

In response to the objection of Roberts, in the county court, to these proceedings, there is no pretence that any vendor of his had either granted such an easement to Smith and Williams, or to the public at large, and no sufficient time had elapsed from which such a grant could be presumed. So far from this being the case, there is no response at all in the record to his objection, as affecting him through any previous owner of the land, even if it be conceded that another owned the land when the route was marked out in 1850; because the original report of the commissioners failed to advise the county court in pursuance of the statute of the ownership of the lands, and of the damage to be sus-

tained by each owner through whose lands the road was laid out. And hence, no foundation is laid upon which any presumption can be rested that the county court, although it did not appear upon its record, had in fact, by virtue of its general jurisdiction over the subject, called in the land owners, who were likely to be damaged by the proposed road as marked out, and either adjudicated upon their right to compensation and its quantum, if claimed; or by their default had obtained their implied consent to the proposed public use of their property. There being no foundation upon which to presume, in the special proceedings for the establishment of a private road upon the petition of the party desiring it, as provided by our statute, that these land-owners had implied notice, as in the general proceedings for the establishment of new roads upon the petition of at least twelve householders of the township, in which the statute provides that, previously to any intended application to the county court, notice must be given by advertisement set up at two or more public places in each township through which the proposed road is to pass, for at least twenty days prior to such application. And hence, although no objection had been interposed—and waiving all other questions as to the other objections pointed out—the approval of a report so substantially and radically defective as this is in these two particulars, and also any subsequent action of the county court in ordering, in pursuance of the statute, the establishment of the road upon the basis of such a report, had no other irregularity intervened, would have been clearly erroneous, and could have concluded the rights of no land owner, until after a sufficient time had first elapsed, when from acquiescence a grant or dedication might be presumed to have been made, either by himself or by those from whom he derived his title. Much more then was such action erroneous after Roberts had intervened and affirmatively suggested his ownership and the damage to his land; and, by thus interposing his constitutional right of private property, had paralised the power of the county court until his rights should be first judicially ascertained and provided for, by

just compensation to him, in case the court should find his suggestions true; and determine, nevertheless, that his property should be taken for the public use.

We think, therefore, that the Circuit Court erred in its judgment, and that the entire proceedings of the county court ought to have been quashed. The judgment of the Circuit Court of Phillips county, in this cause, must therefore be reversed, and the cause remanded to that court, with instructions to quash the entire proceedings accordingly.

CAMPBELL ET AL. VS. HOPKINS ET AL.

A testator devised real estate and negroes to be divided between the defendant and his other children: upon a settlement and division between the defendant and one of the devisees, acting for himself and as agent and guardian for the others, the defendant claimed two of the negroes as a gift from the testator: the proof as to the gift, was in direct conflict: and, to settle the matter, it was proposed and agreed to, that a negro belonging to the defendant should be substituted in place of the two negroes in dispute: HELD, That the chancellor correctly decided that the settlement and division ought not to be disturbed.

In such case, *without proof to the contrary, the court might well presume that the* negro of the defendant, thus substituted, was equivalent in value to the two negroes in dispute. But if not of equal value, it was of some value, and the bill for a division of the two negroes was properly dismissed, because the complainants made no offer to restore to the defendant the value of his negro substituted in the former division.

Appeal from Sevier Circuit Court in Chancery.

Hon. SHELTON WATSON, Circuit Judge.

CURRAN & GALLAGHER, for the appellants.

PIKE & CUMMINS, for the appellees.

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

The controversy in this suit, arises out of the will of William Cook, of Virginia, and may be sufficiently understood without any detail of the pleadings. The testator directed a portion of his estate, including a number of negroes on a plantation in Arkansas, to be equally divided among his six youngest children, Frances A., Mildred E., (wife of Francis Hopkins,) Sarah E., (wife of William F. Campbell,) Edwin R., James O., and Laura J. Cook; the two last named being minors when the suit was instituted, subject, however, to certain deductions specified by the testator; that is to say, deducting eighteen hundred dollars from Mildred E. Hopkins' share, expressed to be for advances heretofore made to her, including the negro woman given her in March, 1845," and similar deductions, applicable to some of the other legatees, were also specified. The farm and negroes in this State, were in charge of the defendant, Hopkins; and, among these slaves, were two negro children, *Jim* and *Bet*, who are the subjects of the present litigation. It is admitted that Jim and Bet are mentioned or referred to in the testator's will, as being among those negroes whom he wished to be brought into the division before mentioned, but they were claimed by Hopkins, upon the ground that the testator had given them to his daughter Mildred, the wife of Hopkins, in order to make her advancement equal to what he had given to some of his other children. There is, throughout the entire record of this case, a singular omission of the dates of material transactions relied on by the parties, and which ought to conduce to explain them. It appears, however, that the will was probated in Virginia, in May, 1847, and the executors renouncing, Edwin R. Cook became administrator with the will annexed; and some time afterwards, in that capacity, and acting also for himself; and as guardian for the minors, and having authority from Campbell and

wife, he came out to Arkansas, in order to have a settlement with Hopkins, and make division of the property. A division was accordingly made, by three disinterested persons in the neighborhood, with the fairness of which Edwin R. Cook expressed himself satisfied. He now says that he was only content with the division so far as it went, and that while he had authority to act for the heirs named in making the division, he was not authorized to relinquish any part of their just claims. He insisted, at the time, that Jim and Bet were part of the property to be divided; and the sole object of the present suit, brought by five of the legatees against Hopkins, is to have a division of those two negroes. Upon the whole case, it may be considered doubtful whether Hopkins succeeded in establishing a gift of Jim and Bet, to his wife by her father, as alleged in their answers. The testimony on that point, is in direct conflict; and supposing that he had failed in proving a clear title to these negroes, independent of the will, the law, as contended for the appellants, might be conceded, that he could not claim under, and at the same time in opposition, to the will.

But it does clearly appear, that pending the negotiation about the division, Hopkins asserted his right to Jim and Bet as part of the property which had been given to his wife by way of advancement from her father, and it is also proved that Hopkins finally agreed that Nice, a negro woman of his own, should be brought into the division, and she was accordingly allotted to him for what we must suppose was her estimated value, as part of the share coming to him. No question is made but that Nice was the property of Hopkins, she having been given by William Cook to his daughter Mildred, and included in the advancement of eighteen hundred dollars, which was to be deducted from her share. Hopkins and wife say, in their answer, that Nice was substituted as one of the slaves to be apportioned among the legatees in lieu of Jim and Bet, at the suggestion of Edwin R. Cook, that it would be fair and equitable, to all concerned, for them to do so, and that they consented to this arrangement for the sake of peace and harmony. This statement is also supported

by the preponderance of the competent evidence in the cause: and even if it were not, and Edwin R. Cook had no authority to agree to the substitution so as to bind the others for whom he was acting, what he did, was certainly binding on himself as one of the parties complainant. The value of Nice is no where alleged or shown, and the reasonable presumption might be that she was equivalent in value to Jim and Bet. But if not equal, she must have been of some value, and which the bill makes no offer to restore to Hopkins. For this reason alone, the complaint must have been dismissed, though perhaps without prejudice to any right of an infant, upon the like principle adjudged in *Fenno vs. Coulter*, at July Term, 1853, where an attempt was made to set aside a judicial sale for mistake and irregularity, without refunding to the purchaser the money paid by him, and of which the defendant, in the execution, had received the benefit.

It is evident from the will, that the testator had an earnest desire that there should be no controversy or litigation about the property among his children. He directed that, in the event of any disagreement, it should be settled by the determination of three disinterested lawyers, to be selected by his executors; and he undertook to declare a forfeiture of his share by any legatee who would refuse to abide such award. In another clause, he says, "I will, and desire, that my executors should not be trammeled or confined strictly to my said will in any small matter or particular, where it is obviously the best interest of my children to deviate therefrom in a small degree in the exercise of a sound discretion." It may have been in obedience to these wishes of the testator, that James O. Cook, who came of age pending the suit, appeared in court and disclaimed all interest, declaring that his name had been used as a complainant, without his knowledge or consent. While this may not be clearly a case of a family arrangement, and compromise to be adhered to for the suppression of disreputable strife, there is enough of bitterness and contradiction in the record to justify the sensible conclusion of the chancellor who heard the cause, that the settlement and division as made, ought not to be disturbed. Decree affirmed.

PETTIT ET AL. VS. JOHNSON ET AL.

It is definitely settled that, until a subsisting levy, whether upon real or personal estate, is discharged, it is erroneous to make a second levy; and, if it be made, it may be set aside; but if no objection be made for such irregularity, and a sale take place under the second levy, the title of a bona fide purchaser will not be divested.

The case of *Trapnall vs. Richardson, Waterman & Co.*, (13 *Ark.* 543,) deciding that a levy upon land, within three years from the date of the judgment, will not continue the lien of the judgment, approved; and a deed of trust executed subsequent to a judgment, but before a levy within, and a sale after the expiration of, three years, held good against the purchaser at such sale.

A deed of trust, for the benefit of creditors, conveying to the trustees the legal and equitable estate of the grantor, having been given, no estate remains in the grantor which can be levied upon and sold upon execution at law.

Where a party, having title to land, neither misrepresents nor suppresses any fact connected with his title, but, under a misapprehension of his legal rights, supposes that another has a prior lien to his own, and expresses such opinion, he is not estopped from setting up his title against a purchaser, under the supposed prior lien, having a full knowledge of all the facts.

A vendor's lien will not be enforced against a purchaser without notice.

Appeal from Chicot Circuit Court in Chancery.

Hon. JOSIAH GOULD, Circuit Judge.

PIKE & CUMMINS, for the appellants. If the levy on these lands under the execution of Johnson was regular, the lien of the judgment was wholly independent of the levy. As long as the lien lasted, there was no need of a levy, and, by allowing the judgment lien to expire, the lien of Johnson was entirely gone. The lien of the judgment continued only three years from the date of the judgment; and was not continued in force by the levy of the execution. *Trapnall vs. Richardson, Waterman & Co.*, 13 *Ark.* 543.

By the deed to Petit & Ford, no interest was left in Ware, but a mere uncertain, contingent, resulting trust. Petit & Ford became seized in fee-simple, and the lands could no longer be seized on execution against Ware, except where the judgment has a prior lien. So long as the judgment lien lasted, the levy was good. As soon as it was suffered to expire, the levy fell with it, and became a nullity *ab initio*.

The claim of Johnson to a vendor's lien, could not prevail against the deed of trust; because a vendor's lien does not hold against a subsequent sale for a valid consideration; and this deed of trust was no mortgage, but a sale and conveyance to creditors. *Cole vs. Scott*, 2 *Wash.* 141; 2 *Story Eq.* 1225, 1228 *to* 1232; 1 *Bro. C. C.* 302; 15 *Ves.* 336; 6 *J. C. R.* 432.

The deed of trust was made on the 4th May, 1843; after that, Ware had no interest in the land subject to execution, and, consequently, none to which a judgment lien could attach. Nothing, therefore, passed by the sale under execution. It is not a case of estoppel. The purchaser does not allege that he was ignorant of the existence of the deed of trust. It was of record. He is charged with constructive notice, and the silence of Petit neither misled nor injured him. He had other means of information, and therefore the conduct of Petit, or of Ford, did not induce him to do what otherwise he would not have done. Where the purchaser or other actor, was, or ought to have been, acquainted with the subject of his action, or even had the means of knowledge, and neglected to avail himself of them, there is no fraud or estoppel. *Hepburn vs. McDowell*, 17 *S. & R.* 383; *Com. vs. Moltz*, 10 *Barr* 531. The rule is, that to constitute an estoppel, the actor, *having no means of information*, must have been, by the conduct of the other, induced to do what otherwise he would not have done. *Com. vs. Moltz, up sup.* See also, *Casey's Lessee vs. Suldes*, 1 *Gill* 502; *Gray vs. Bartlett*, 20 *Pick.* 186; *Magee vs. Gregg*, 11 *Sm. & Marsh.* 75.

S. H. HEMPSTEAD, for the appellees. J. M. & S. CRAIG, con-

ceding the deed of trust to have been valid and unimpeachable, the first and main question in the case is, whether the *fi. fa.* clause in the *vend. ex.* was a nullity, and the levy under it void; or whether it was merely an irregularity in the process, voidable at the election of the party in a direct proceeding. If voidable, then the levy was good until avoided, and the title of the purchaser is unassailable in this proceeding. (*Willbraham v Snow*, 2 *Saund.* 47, *note* 2; *Watson on Shff.* 199; 1 *Bos. & Pul.* 359.) But if the *fi. fa.* clause was irregular, the title of the purchaser was not affected, Ware was the only person who could object to the irregularity. *Blaine vs. The Charles Carter*, 4 *Cranch* 328; 10 *Peters* 468; 2 *McLean* 59; 13 *J. R.* 550; *Ib.* 102; *Whiting & Slark vs. Beebe*, 7 *Eng.* 550.

The complainants were present at the sale under the execution of Johnson; and neither of them forbid the sale: one of them proclaimed that the lands were liable to be sold for the satisfaction of that judgment, and bid for the land when offered: and if the complainants can now claim the land, it is a fraud upon Craig, the purchaser. The doctrine is, that a man, having title to an estate, which is offered for sale, and knowing his title, stands by and encourages the sale, or does not forbid it; and thereby another person is induced to purchase, under the belief that the title is good, the former will be bound by the sale, and will not be at liberty to dispute the validity of the purchase. 1 *Story's Eq. sec.* 385, 386, 387; *Wendell vs. Van Rensselaer*, 1 *J. Ch. R.* 354; *Storrs vs. Barker*, 6 *J. C. R.* 166; 7 *Ves. jr.* 235; 13 *Peters* 119; 3 *Rawle* 492; 6 *Barb.* 590.

Mr. Justice WALKER delivered the opinion of the Court.

The material facts, upon which the equity of this case rests, are, that Thomas Ware, who owned several tracts of land and lots in the county of Chicot, in which he then resided, was indebted to a number of persons. Amongst others, he owed Abner Johnson $1,344 36, who, on the 10th of December, 1841, obtained judgment thereon; and to Silas Craig a debt of $2,677, in

State bonds; to secure the payment of which, he executed to Craig a deed of mortgage on several of the tracts of land so owned, duly acknowledged and recorded on the 24th of March, 1843. And to William H. Sutton, and divers other persons, he was largely indebted; to secure the payment whereof, he, on the 4th of May, 1843, executed to the complainants a deed of trust on said lands and lots of land, including the tracts conveyed to Craig. He was also indebted to Benjamin Bailey, who, on the 9th of November, 1843, obtained judgment for $1,340 00. These several judgments and deeds, by force of the statute, became liens on said real estate, having priority according to their respective dates of record. After several writs of *fi. fa.* and *vend. ex.*, issued upon Johnson's judgment, had been returned unsatisfied, on the 20th of March, 1844, a writ of *vend. ex.* was issued with a *fi. fa.* clause, which was levied on the lands conveyed to the complainants by deed of trust, but no sale was made until May, 1845, at which time they were exposed to sale by virtue of a writ of *vend. ex.* issued 12th of March, 1845, and bought by the defendant, Joshua M. Craig, for the price of $3,031, which he paid, and took from the sheriff a regular deed of conveyance for the same.

Upon this state of case, the complainants filed their bill; the prayer of which was, that the sheriff's sale and deed, if any, might be cancelled, and the lien of the deed of trust to them confirmed and enforced; and the land sold, first, to pay Silas Craig's mortgage debt, and the residue to complainants. Johnson, Bailey, Ware, and the Craigs, are made defendants.

Johnson, in his answer, insists, first, upon his lien and the validity of the sale under it; and, second, that if there were irregularities, such as might have been fatal to his prior lien rights, if asserted, that the complainants declined taking advantage of them, and by their presence and conduct acquiesced in the sale of the land.

Joshua M. Craig relies upon the same defence, and claims, as a *bona fide* purchaser, who was encouraged to bid and pay his

money by the acts and declarations of the complainants. He subsequently filed a cross bill, but from the view which we take of the case, it will be unnecessary to notice it; because, unless the sale under Johnson's judgment lien can be upheld, the rights of the purchaser must necessarily fall.

It has been repeatedly decided, by this Court, and may now be considered as definitely settled, that until a subsisting levy, whether upon lands or personal property, is discharged, it is erroneous to make a second or further levy; and that, upon application for that purpose, such process and levy may be set aside; but it has also been decided that if no objection is made to such irregularity, and a sale is made under such erroneous process, that a *bona fide* purchaser, who pays for the property and gets his deed, will not be divested of his title thus acquired, on account of such erroneous proceeding.

But the main ground of objection to the validity of the sale under Johnson's judgment lien is, that notwithstanding his was the prior lien, and that the levy was made before his lien expired by limitation, he lost the benefit of such lien, because the sale was postponed until after the three years had elapsed, the period fixed by law for its termination. This precise point came up for consideration in the case of *Trapnall vs. Richardson, Waterman & Co.*, 13 *Ark.* 543, and it was there held, that a levy upon lands within three years from the date of the judgment, will not continue the lien of the judgment beyond the three years. Adhering to this opinion, it follows, that the purchaser acquired no right whatever under the judgment lien, but took only such interest or estate as existed in the defendant at the time of the sale.

We will, therefore, proceed to enquire what that estate was. We have seen that the judgment lien had expired by limitation, before the sale, and that although the levy was made before the expiration of the three years, its effect was not to continue the judgment lien, but to create a new lien from the date of the levy, and we have also seen that before the levy was made, and consequently before the lien attached, the land so levied upon had been

conveyed by deed to the complainants; the effect of which was, to vest in them the legal estate in the lands, charged, it is true, with a specific trust,—the payment of Ware's creditors,— and it is also true that if, upon the sale of the property, there should be found to be more than sufficient money for that purpose, the residue of the property remaining undisposed of should be reconveyed to Ware; or if, upon the sale of the whole estate, there should be found a balance in cash, after the payment of the entire trust, such sum should be paid to Ware. Upon this contingency, and to this extent, he may be said to have an equitable interest in the lands conveyed, and although in some respects this interest is much like that of a mortgager's equity of redemption, it certainly differs in this, that the equity of redemption, as well as the legal estate, is conveyed by deed, or if reserved, is dependant upon a contingency, which never happens until after the trust sale. And it is for this reason, that a sale by a trustee vests in the purchaser an absolute estate in the lands purchased, free from all equity of redemption. The legal title and the equity must be conveyed, or he could never convey such title to the purchaser, because no one can convey a more perfect title than he possesses. This view of the legal effect of a deed of trust, is fully sustained by a former decision of this Court. (*Crittenden vs. Johnson*, 11 *Ark. Rep.*) And in *Morris vs. Way*, 16 *Ohio Rep.* 469, the precise question before us was presented, and it was held that a deed of trust passes the legal title, and though given to secure a debt, and so drawn as for most purposes to be treated as a mortgage, yet, as between the grantor and the grantee, the estate passes, so that nothing remains in the grantor, which can be levied upon and sold upon execution at law.

An equitable interest in an estate was not, at common law, subject to sale under common law process; and our statute which subjects equitable estates to sale, although general in its terms, when properly considered, could never have been intended to embrace such equities as those in this case reserved in the grantor. No one acquainted with the condition of the land titles in this

State, at the time the act passed subjecting equitable estates to sale, doubts but that the main object in view was to subject to sale such equitable interests or estates as were acquired by entry and purchase from the United States. For, it is a matter of public history, common to all newly settled countries, in the United States, that a large amount, perhaps half the lands in the State then purchased, were held by such equitable titles, and although paid for and unencumbered, remained unpatented, for a greater or less time dependent upon the press of business in the land office department. The effect of this was to greatly embarrass and delay the collection of debts; to remedy which, was the leading object of the passage of the act, and so we find the expressions, "all real estate, whether patented or not, whereof the defendant was seized in law or equity, shall be liable to be levied upon and sold," &c., showing that the Legislature had directly in view unpatented lands. Without therefore restricting the act to such equitable estates as are held by certificate of purchase from the United States before the patent issues, or drawing a line of distinction between such equitable interests as are or are not within the spirit and meaning of the act, it will suffice for the present to consider whether equities of this and like kind are, under the statute, subject to be levied upon and sold under execution. And that they are not, is evident, as well from the fair construction of the act, under the circumstances under which it was passed, as from the consequences likely to result from such sales, because a sale of an interest so uncertain, as well to the nature and extent of the interest, as the time when the purchaser could take the benefit of his purchare, would, in most instances, be attended with great lost to the debtor, and of very little benefit to the creditor, which are the prominent considerations to be considered and guarded against in judicial sales. We must presume that the Legislature did not lose sight of this. They must have known that no one would be inclined to bid the value of interests so doubtful, and to enjoy which the purchaser would

have to resort to a court of equity to ascertain his true interest and affirm his title.

In all such cases, where the debtor is possessed of an equitable estate, in which there are conflicting interests, upon the determination of which the debtor's real interest must depend, and the creditor seeks to subject it to the payment of his debt, his best and in most cases his only remedy is in chancery, where all the parties interested can be heard, and the real interest of the debtor ascertained, and where a sale may be had under process so guarded as to protect the interest of the debtor and give assurance to the purchaser of an unencumbered title.

The second ground of defence is, that the complainants, by their acts and declarations, encouraged the purchaser to bid for the property, and are for that reason estopped from questioning the validity of his title. There can be no doubt, from the evidence, but that the complainants, as well as the purchaser and others present, believed that Johnson, by virtue of his judgment lien, had a prior right to satisfaction, and acted under this belief; but there is not a particle of evidence to prove that the complainants either misrepresented or suppressed any fact connected with their own title, or that of Johnson. On the contrary, they made their title known, as well by the records of the country, as by declarations at the time, and insisted upon their rights under it; not as a title superior to Johnson's, for under a misapprehension of their legal rights, they supposed Johnson's superior to theirs, but as a title which they would assert fully. There is, therefore, not the slightest ground for charging fraud upon the complainants. The defendant, Craig, has no cause of complaint against the complainants. He was not deceived with regard to the facts, for they were well known to him, and as to his mistake in the legal rights of the parties, he must abide the consequences.

So far as regards the title set up under Johnson, as holding a vendor's lien, for the purchase money, it may suffice to say that, waiving all consideration of the merits of the defence in other re-

spects, it cannot prevail for want of notice to the complainants before the sale to them.

The determination of these several grounds of defence, in effect, disposes of the whole case, because if Ware had no such estate in the lands, legal or equitable, as was subject to sale under execution, Craig, the purchaser, acquired no title whatever to the property sold; and the same remains now subject to be sold in satisfaction of the trust debts, as fully as if no such sale had been made.

Part of the money paid by Craig to the sheriff, has passed into the hands of Johnson, and beyond the control of the Court in this case, as there is no issue between Johnson and Craig in regard to the sum so paid. The residue of the money is in the hands of the receiver, and as Craig has lost the benefit of his purchase, it is but just that this sum should be restored to him.

The defendant Bailey has not contested the complainant's title to the property, and was most probably only made a party, because his execution against Ware was also levied upon the lands in controversy. Under these circumstances no decree, should be taken against him.

The cross-bill of Joshua M. Craig depended for its support upon the validity of the sheriff's sale to him; that question having been settled, the bill must be dismissed at complainant's costs.

Having thus disposed of the several questions presented for our consideration, it only remains for us to direct that the decree of the Chicot Circuit Court be reversed, and that the appellee, Joshua M. Craig, pay the costs in this Court, and that the cause be remanded to said Circuit Court, that a decree may be there entered, declaring the sale, made by the sheriff to Joshua M. Craig, void, and that the same be set aside, and the deed to Craig canceled. That the cross-bill be dismissed, at the complainant Craig's cost; that the title of the trustees to the property in controversy be affirmed, and the lands sold at such time, and upon such terms as may appear to the chancellor equitable; and that the proceeds of the sale be applied, first, to the payment of all

costs not otherwise directed to be paid; second, to the payment of the mortgage debt, due to Silas Craig; third, to the debts set forth in the deed of trust, in the order therein directed; and, lastly, the residue, if any, to the defendant Ware.

Hon. Chief Justice WATKINS not sitting.

GILLIAM VS. TOWLES.

Where by the express terms of a contract for the purchase of timber, lying in the swamp, where cut, it was not to be paid for until after delivery, the delivery was a condition precedent to the vendor's right of action; and nothing short of an acceptance would make the vendee liable upon the common counts for goods sold and delivered.

If the vendee was bound by his contract to accept the timber by merely having it shown to him in the swamp, he might have become liable under such a contract for refusing to accept it when offered to be so delivered: but he cannot be held accountable for the value of the timber, if by reason of a sudden rise of water, not anticipated nor provided for in the contract, or the adverse possession of other persons, it became equally impossible for the vendor to make, or the vendee to accept, a delivery.

Appeal from the Circuit Court of Desha County.

The Hon. J. C. MURRAY, Circuit Judge.

JORDAN, for the appellant. When the contract was entered into, it was the mutual understanding of the parties that the timber should be delivered to Gilliam, in a condition that he could take immediate possession of it, or obtain the power and control over it, and not while in the actual possession of those who claimed the right to it and refused to surrender possession. 2 *Kent*

Com. 552, 554; *Chit. on Con.* (5 *Amer. Ed.*) 73, *and authority cited; Story's Con. Laws* 225: *Gunnison vs. Bancroft*, 11 *Verm.* 493; *Wilson vs. Troupe*, 2 *Cow.* 195.

There was no delivery of the timber according to the terms of the contract. The delivery must always be according to the subject matter of the contract, and the property must be placed under the control and power of the vendee. 2 *Kent Com.* 502; *Chit. on Con.* 390; *Bailey & Bogart vs. Ogdens*, 3 *J. R.* 421; 17 *Mass.* 110; 3 *Stark Ev.*, 1222; 15 *J. R.* 349.

Reasonable diligence was all that the law required of the vendee to obtain possession of the timber. *Story's Con. Laws, p.* 318, *note* 1, and authorities cited.

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

The judgment here appealed from must be reversed, for various causes. The declaration was indebitatus assumpsit, to recover the value of a quantity of cypress timber, alleged to have been sold and delivered by Towles, the plaintiff below, to the appellant. The witnesses, introduced on behalf of the plaintiff, proved conclusively that the contract between him and the defendant, respecting the timber, was a special one, subsisting and not rescinded or varied by any after agreement. The substance of it was, that the defendant bargained with the plaintiff for all the cypress and ash timber that had been cut by certain raftsmen on a tract of land claimed by the plaintiff, at fifty cents a tier, payable when the defendant should have run the timber or disposed of it. By agreement, a witness to the contract, acting as the plaintiff's agent, was to deliver the timber in question to the defendant, by going to and showing him the land, lying at some distance off in the swamp, on which it had been cut. The defendant was to raft the timber on the first rise of water, and after having ascertained the number of tiers, when collected together for that purpose, was to account to the plaintiff for the whole quantity, according to the price stipulated.

The witness attempted to make a delivery of the timber by going with the defendant to the land referred to, the greater part of which was overflowed, and some of the timber floating about in the water, which was rapidly rising at the time; and the whole evidence conduced to prove that it was doubtful, under all the circumstances, whether the defendant, by the exercise of ordinary or reasonable diligence, could have obtained or secured any benefit from the timber, even if there had been no other impediment. But the evidence also conduced to prove that the timber was in the adverse possession of the raftsmen, and the hands employed by them, who were then engaged in collecting it together for rafting; who refused to surrender it, and finally succeeded in running the whole of it off, and selling it as their own.

Without detailing the several instructions asked for by the defendant, one of which was given and the others refused, and supposing the declaration had been so framed as to let in proof of the special contract, the motion for new trial ought to have been granted; because, though the court charged the jury that, in order to enable the plaintiff to recover in this action, he must have proved to their satisfaction, that he sold and delivered the timber in question to the defendant, certainly two of the other instructions asked for by the defendant should have been given, to the effect, that if, at the time, the plaintiff, by his agent, showed the timber to defendant, it was impossible for him, after using reasonable diligence to get possession of it on account of the overflow, it was no delivery, and no property in the timber passed from the plaintiff to defendant; and further, that if, after the timber was shown to defendant, it was removed and carried off against his will, so that he could not, by reasonable diligence, have obtained possession of it, he is not liable to the plaintiff for its value.

Without reference to the statute of frauds, under which the the defendant might have refused to accept any delivery, there could be no obligation upon him, by the express terms of the contract, to pay for the timber until a delivery, which was a con-

dition precedent to the plaintiff's right of action in any form; and, under the contract as proved, nothing short of an acceptance of the timber would make him liable upon the common count for goods sold and delivered. If the defendant had become bound, by a valid contract, to accept the timber by having it merely shown to him in the swamp, where it lay upon the land claimed by the plaintiff, he might have become liable under the contract for refusing to accept it, when offered to be so delivered; but he ought not to have been held accountable for the value of the timber, if by reason of the sudden rise of water, a contingency not anticipated or provided for by the contracting parties, or the adverse possession of it by other persons, it became equally impossible for the plaintiff to make, or the defendant to accept, a delivery. Judgment reversed.

RUTZELL VS. THE STATE.

The act of the Legislature, approved January 11, 1853, conferring upon the corporation of Fort Smith jurisdiction over criminal cases, and providing for a grand jury, is not contrary to the spirit of the bill of rights; but the 34th section of the act must be so restricted that the grand jurors can serve as an inquest for only so much of the county of Sebastian as may be included within the corporate limits of the city.

Appeal from the Mayor's Court of Fort Smith.

S. H. HEMPSTEAD, for the appellant. The act of the Legislature, as to a grand jury for Fort Smith, is contrary to the spirit

of the bill of rights, and void: and from which it follows that there was no legal conviction in the case. *Acts* 1852, *sec.* 34; 1 *Eng.* 187.

J. J. CLENDENIN, Att'y Gen'l, for the State.

Mr. Chief Justice WATKINS delivered the opinion of the court.

The appellant was convicted, in the Mayor's Court of Fort Smith, of the offence of keeping a grocery open on Sunday. The indictment, upon which the conviction was had, was preferred by a grand jury, which appears to have been organized pursuant to the provisions contained in the Act for the incorporation of the city of Fort Smith, approved January 11, 1853. The only question argued here for the appellant is, whether the act of the Legislature, providing for a grand jury for Fort Smith, is not contrary to the spirit of the bill of rights, and the conviction appealed from consequently illegal and void.

There can be no doubt of the power of the Legislature to confer jurisdiction upon corporation courts over all criminal cases less than felony, at the common law. (*Graham vs. The State*, 1 *Ark.* 79; *Ib.* 180; *Slattery Ex. parte*, 3, *Ib.* 384; *Rector vs. The State*, 1 *Eng.* 187.) But, it is also to be conceded that the jurisdiction must be conferred and exercised in such manner as not to conflict with other provisions of the constitution, and in subordination to the Bill of Rights, as was adjudged in *Eason vs. The State*, 6 *Eng.* 481, involving a similar question.

The 14th section of the Declaration of Rights ordains that no man shall be put to answer any criminal charge but by presentment or indictment; which has been always understood to mean the action of a grand jury. (*The State vs. Cox*, 3 *Eng.* 436.) The 11th section guaranties to an accused, in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the county or district in which the crime shall have been committed. The act incorporating the city of Fort Smith, (*Sec.*

28,) vests in the Mayor's Court original jurisdiction, concurrent with the Circuit Court of Sebastian county, of all offences against the general laws of the State, lower than the grade of felony, committed within the corporate limits of the city, subject only to the appellate jurisdiction of the Supreme Court. Section 33 enacts, that all prosecutions in the Mayor's Court, for offences against the general laws of the State, shall be by presentment or indictment of a grand jury, as thereinafter provided. One of the requirements of the 34th section is, that the constable of the city shall summon, before each term, a panel of sixteen persons, "to serve as grand jurors for the body of the county of Sebastian, and particularly for and in behalf of the body of the corporation of Fort Smith." The appellants contend that this feature is obnoxious to the declarations contained in the Bill of Rights, which are to be construed with reference to the common law.

All of the cases, deciding that an indictment or presentment is necessary, in order to put an accused upon trial for any offence against the general law of the land, proceed upon the idea of a substantial, instead of a literal, compliance with the provisions of the constitution, which might sometimes defeat the operation of them, according to their spirit and intention. However cumbrous and inconvenient may be the machinery of a grand jury, for the trial of misdemeanors, before corporation courts, or justices' courts, under the 3d amendment, adopted in 1846, it cannot be dispensed with, unless by nullifying other provisions of the constitution, the declared intention of which was to throw around an accused, in every case, the safe-guard of a preliminary investigation, and a formal accusation by indictment. "Grand juries," it was said by an eminent judge, "are high public functionaries standing between the accuser and the accused. They are the great security to the citizen against vindictive prosecutions, either by government, or political partisans, or by private enemies."

The policy of that constitutional provision is to be maintained without impediment from minor considerations, and so far as it can be done in harmony with other provisions of the constitution.

In *McElroy vs. the State*, 13 *Ark.* 710, the opinion of this Court was, that the General Assembly might well exercise the power of establishing new counties, without any infringement of the right of an accused to a trial in the county or district in which the offence may have been committed; because, otherwise, the effect would be to make the lines of counties unalterable. So, we think it clear that, to the extent the General Assembly have power to vest criminal jurisdiction in corporation courts, it may, and ought to be practically adapted to the object in view. The accused has a right to demand that the charge against him be preferred by indictment, and the right is amply secured to him, though for this purpose the territorial limits of the corporation constitute, as it were, the county or district out of which the grand jurors are to come. The utmost limit of the duty of the grand jury, to be summoned in accordance with the act of incorporation, which appears to have been framed with an anxious desire to conform, in conferring the jurisdiction, to the provisions of the constitution and the interpretation of them by this court, is to enquire of offences committed in the city of Fort Smith, though the prosecutions are conducted in the name of the State: and so far as the language quoted from section 34, of the charter, seems to contemplate that the persons summoned are to serve as grand jurors for the body of the county of Sebastian, it must be regarded as inoperative, except in connection with their particular duty to serve as an inquest for so much of the county as may be included within the corporate limits of the city. Judgment affirmed.

ROGERS VS. THE STATE.

Appeal from the Mayor's Court of Fort Smith.

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

The appellant was convicted in the Mayor's Court of Fort Smith, upon an indictment for keeping a gaming house. The only question argued is that decided in *Rutzell vs. The State;* and though the proceedings appear to have been, in some respects, informal, no substantial ground is presented by the other errors assigned for reversing the conviction for a mere misdemeanor. Affirmed.

NORTON VS. THE STATE.

15b 71'
58 82'

15 71
Case 2
81 122
81 123

An indictment, charging that the defendant, with others, "bet the sum of twenty-five dollars, upon a certain unlawful gambling device, commonly called a raffle," does not describe an offence, within the meaning of any statute heretofore enacted against gaming.

Appeal from the Mayor's Court of Fort Smith.

S. H. HEMPSTEAD, for the appellant.

J. J. CLENDENIN, Att'y Gen'l, for the State.

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

The indictment, upon which the appellant was convicted,

charged that he, together with certain other persons named, "bet the sum of twenty-five dollars, each, upon a certain unlawful gambling device, commonly called a raffle, which, said gambling device, was then and there adapted, devised and designed for the purpose of playing a game of chance, at which money or property may be lost or won," &c. The evidence was, that Sutton, one of the defendants, owned a buggy, and divided the value of it into ten shares, and denominated these shares chances. The defendant, Norton, together with the other defendants, purchased all of those shares or chances, except one, which was retained by Sutton; each paying therefor the sum of $25 00. The buggy then belonged to all of the defendants, in equal proportions, and they proceeded to raffle for it by casting lots with dice, in the manner described, and one of the defendants, who cast the highest number, won it.

The act complained of may be within the mischief, but it is not within the meaning of any statute heretofore enacted against gaming; and if the practice grow to be an evil, it will require further legislation for the suppression of it. The construction put upon the first section of the statute, has uniformly been that it relates exclusively to what are known as banking games, which offer a challenge to betters, and are usually kept or exhibited by persons whose occupation it is to prey upon the community. Hence, such gaming-tables, devices, or banks, are peculiarly obnoxious to the law, and the offence of betting against them is also severely punished by the 3d section. (*Stith vs. the State*, 13 *Ark.* 682.) The offence created by the 8th section, is for betting on games at cards. At the common law, gaming-houses were indictable as a public nuisance, (*Vanderworker vs. The State*, 13 *Ark.* 700); but unless restrained by some express statute, ordinary wagers or betting were tolerated as being for amusement or recreation. 1 *Ch. Cr. Law* 677.

If the raffle is classed with lotteries, to which it may be assimilated, the case is not reached by the constitutional inhibition. Under it, the Legislature cannot authorize any lottery, and con-

tracts for the sale of tickets, or shares, in a lottery, might be illegal, but, without some statute giving it a penal sanction, there is no authority for punishing criminally the persons concerned in any scheme or device of the kind.

The judgment will be arrested, and the defendant discharged from prosecution.

WATKINS AND TRAPNALL VS. WASSELL.

15 73
56 123

The lien of a judgment on real estate is not displaced in favor of subsequent liens or contracts by the mere delay of the judgment creditor to sue out execution: nor by an order of the plaintiff, to return the execution without a levy, or without a sale of the property levied upon.

Where a minor executes a deed of conveyance of real estate, and, upon arriving at age, jointly with his grantee, executes a deed of mortgage, to secure a debt of the grantee: such act is an affirmance of the deed of conveyance.

The owner of a house and lot, being in possession, contracts with a mechanic for repairs, and grants the rents and profits to accrue, in payment thereof: the attorney of a judgment creditor, whose lien is prior to the contract for repairs, with full knowledge of all the facts, sues out execution, while the work is in progress, and purchases the house and lot: *Held* That he must pay for such repairs as were put upon the house, after his purchase, until he gave notice to the contractor that he would not be responsible or pay for the work.

A contract with a mechanic for the repair of a house, that he shall receive the rents until he is fully paid, is not a mere security for the payment, but a transfer or grant of the rents and profits.

If one sells and conveys real estate, to which he has no title, or an imperfect title, at the time of the sale, and subsequently acquires a perfect title, it enures to the benefit of the grantee; and, if between the date of the conveyance and the acquisition of the perfect title, a judgment is rendered against the grantor, the title of the grantee is prior to the lien of the judgment.

The interest of a judgment creditor, under his lien, in the real estate of the debtor, is limited to the actual interest of the debtor at the time the lien attaches, and he holds it free from subsequent alienations or incumbrances, but subject to all prior alienations or incumbrances.

Appeal from Pulaski Circuit Court in Chancery.

Hon. WILLIAM H. FEILD, Circuit Judge.

This cause was argued and submitted at the January term, 1851.

On the 13th February, 1854, the Court, the Hon. C. C. SCOTT, and Hon. DAVID WALKER, Judges, and Hon. ISAAC STRAIN, Special Judge, rendered a decree reversing that of the Circuit Court. Opinions were delivered by the Hon. DAVID WALKER, in which Mr. Justice SCOTT concurred, and by the Hon. ISAAC STRAIN.

The Court having adjourned over until April, at which time Judge STRAIN was not present, a petition for reconsideration was filed and granted: and an opinion delivered on the 4th of May, differing materially, as to one point, from the previous opinion of the majority of the Court. The opinion of Judge STRAIN contains a substantial statement of the facts of the case.

WATKINS & CURRAN. The judgment of Jones, Woodward & Co., under which Watkins purchased, was rendered on the 24th June , 1840, and revived by scire facias, sued out before the expiration of the lien, and his title is free from any incumbrance of Wassell's contract, entered into in November, 1843. (*Secs.* 8, 13, *Ch.* 93, *Dig.; Bolls et. al. vs. Hubbard*, 2 *Eng.* 442.) And so under the judgment of Pitman & Co., rendered the 10th November, 1840, and revived by scire facias.

The judgment lien on land, unlike that of the lien on personal estate, or where the judgment is not a lien per se, is unaffected by the circumstance of the plaintiff not proceeding to enforce it until a subsequent lien has been obtained. *Rankin vs. Scott*, 12 *Wheat.* 177; *Trapnall vs. Waterman*, 13 *Ark;* 1 *Brock.* 168; 2 *Wash. C. C. R.* 280.

Judgments rendered against a minor are voidable merely, not void; and if not avoided by him, after he comes of age, they re-

main valid and binding. 1 *Am. Lead. Cas.* 86 *et. seq.;* 3 *Bacon* 596; *Cro. Jac.* 465; 2 *Bibb Rep.* 101; 3 *Marsh. R.* 354; 14 *J. R.* 422.

The Bank having purchased the lots upon which she held a mortgage, the latter was merged, (11 *Mass.* 50; 7 *Mon.* 101; 1 *Wend.* 478;) and by the sale, under the judgment of the United States against the Bank, the purchaser acquired title discharged from the mortgage.

Wassell's claim must either be a mortgage lien, or a mechanic's lien: it is not good as a mortgage, because his contract was never recorded, (*Dig., Ch.* 110, *Secs.* 1, 2; *Main et. al. vs. Alexander*, 4 *Eng.* 112;) nor as a mechanic's lien, because he did not complete the repairs, so as to put the house in a condition to be rented, and a lien commences only from the completion of the work, (*McCullough vs. Caldwell*, 3 *Eng.* 231;) and because he took a distinct security, a lien upon the rents, and in such cases, a mechanic's lien does not attach. 14 *Wend.* 201; 2 *Kent Com.* 500; 16 *Ves.* 4, 275; 9 *Cow.* 52; 1 *Mason* 191; 4 *Wheat* 255.

No fraud can be imputed to the plaintiffs in the judgments, nor their attorneys, for not preventing the repair of the buildings. The lien of their judgments was of record; Wassell had notice of it; and they had no right or power to prevent the repairs by Byrd, or any one whom he might employ.

TRAPNALL insisted that, at the date of the judgment of Trapnall & Cocke, which was prior to the contract of Wassell, William J. Byrd was the owner in fee of the lots sold under that judgment: that, by the purchase under the execution, Trapnall became the owner of the lots, free from all subsequent encumbrances: that, by the sale of the lots to the Bank, the fee simple vested in the Bank, and the prior mortgage was merged: that, no party can convey any estate in land during the existence of a judgment lien, so as to defeat the lien: that, the contract between Wassell and Byrd and the Bank, are personal obligations, not importing the grant or conveyance of the land, or of any interest in it, and

would not affect a purchaser with or without notice: that, as against Trapnall, no equity is shown by the bill on its face.

PIKE, for the appellee. The interest of Wassell was not "a lien upon rents," but an assignment or grant of rents, (*Woodfall, Land. & Ten.* 102; 1 *Hill, ab.* 154, 159, 162; 2 *Ib.* 309;) and the grant carried with it the right of possession.

The lien of a judgment is displaced by the lien of a levy under *fi. fa.*, (8 *Ark.* 389; 4 *Cow.* 417; 8 *Yerg.* 460;) and the lien of the judgment cannot be revived until the levy is disposed of.

The lien of the several judgments, under which the appellant's claim, was postponed to the Bank mortgage and to Wassell's claim, by the neglect of the plaintiffs to enforce their liens. *Bliss vs. Ball*, 9 *J. R.* 132; *Kellog vs. Griffin*, 17 *J. R.* 274; 3 *Cow.* 272; 5 *Ib.* 390; 7 *Ib.* 560; 21 *Wend.* 222; 4 *How. Miss. R.* 130; 7 *Ib.* 377; 11 *Sm. & Mar.* 249; 2 *Dev.* 354; 4 *Ib.* 128.

But, admitting all the judgment liens to have been prior, still for these parties to defend against Wassell's claim, is most inequitable. The judgments were permitted to lie dormant: the parties stand by and permit the mortgage to the Bank to be made, and Wassell to make his contract, and go on and expend his work upon the buildings, and when, by his labor, they are rendered of value, they assert their judgment lien, upon which they had rested until a *sci. fa.* was necessary to revive them. 11 *N. Hamp.* 201; 17 *Verm.* 449; 8 *Shep.* 130; 19 *Wend.* 557; 21 *Ib.* 172; 2 *Dev.* 179; 4 *Ib.* 172; 1 *Story's Eq., Sec.* 385; 1 *J. C. R.* 344; 6 *J. C. R.* 168.

Opinion of Hon. ISAAC STRAIN, Special Judge.

This is an appeal from the decree of the Chancellor of the Pulaski Circuit Court.

The facts embraced in the case, are these: Richard C. Byrd purchased at public sale, and paid $401 00 for lots Nos. 4, 5 and 6, in Block No. 2, situate in the city of Little Rock, East of the Quapaw line, in the county of Pulaski, known as Gov. Pope's

addition to said city, and received therefor a certificate of purchase dated 19th November, 1833. This certificate of purchase he assigned and transferred to his son, Wm. J. Byrd, and requested the deed should be made to him. On 3d of March, 1835, in accordance with the assignment of the certificate, Gov. Pope executed a deed to these lots to Wm. J., being then a minor. Afterwards, Wm. J. Byrd, being the undisputed owner of lots Nos. 1, 2, and 3, in the same block, Richard C. Byrd erected thereon a large tavern-house; also a large two story brick warehouse, on lot 4, and the east part of lot 5, worth at least $8,000. He also erected a large three story brick building for stores, on lot 6, and twelve feet on the west part of lot No. 5. On the 23d of February, 1838, Wm. J., still a minor, conveyed, by deed, to R. C. Byrd lot 6, and twelve feet off the west part of lot 5, for the consideration of $8,000, expended in building the ware-house and tavern. In the spring of 1843, Wm. J. arrived to the age of 21 years, and on the 13th of November, 1844, he confirmed, by deed, the deed of 1838.

On the 24th of June, 1840, Jones, Woodward & Co., obtained judgment against R. C. Byrd for the sum of $5,661 65, in the United States Circuit Court, upon which they sued out a writ of *fi. fa.*, dated 21st June, 1841, and it was levied by the marshal on lot 6, and 12 feet of the west part of lot 5, and it was offered for sale 27th November, 1841, and not sold for want of bidders. A writ of *sci. fi.*, to continue the lien of judgment, was sued out and served on R. C. Byrd, alone, on the 19th of May, 1843, and the judgment was revived on the 19th April, 1844. *Fi. fa.* issued 16th May, 1844, on which nothing was done. On the 2d Nov., 1844, a *ven. ex.* issued, and on 25th Nov., 1844, lot 6, and 12 feet of the west part of lot 5, was sold by the marshal, and purchased by Geo. C. Watkins, plaintiffs' attorney, for ten dollars, to whom the marshal executed deed therefor, properly acknowledged and recorded.

On the 10th of November, 1840, E. Pitman & Co., obtained two judgments against R. C. Byrd, amounting in the aggregate to about $5,000, in the Pulaski Circuit Court. On the first judg-

ment, stay of execution was entered of record for six months, and on the second judgment, for eighteen months. On the first, *fi. fa.*, issued 9th June, 1841, and levied on lot 6, and 12 feet of lot 5, which was appraised at $19,500, and not bringing two thirds of its value, was not sold. On the 31st December, 1842, a writ of ven. ex. issued, returnable March term, 1843, and which was returned 28th March, 1843, with the following endorsements thereon, "The sheriff of Pulaski county, is authorized to return this execution *unsatisfied*, as by agreement between plaintiff and defendant, Ashley and Watkins, attorneys for plaintiffs." "This execution is returned unsatified, as per order of plaintiff's attorney, hereon endorsed, James Lawson, jr., sheriff, by N. B. Thommasson, deputy." "Returned and filed, May 10th, 1843. H. Haralson, Clerk."

On the second judgment, execution issued 7th February, 1843, returnable May, 1843, and was ordered by the attorney to be returned unsatisfied, the same day it issued, endorsed as the first, and was returned and filed, 10th of May, 1843. On the 19th of October, 1843, writs of *sci. fa.*, to continue the liens, were sued out, on both judgments, and served on R. C. Byrd, alone, and the judgments were revived on 10th of January, 1844. On the 1st November, 1844, *fi. fa.* issued on both judgments, and levied on lot 6, and 12 feet on the west part of lot 5, and sold 21st April, 1845, and bought by Geo. C. Watkins, the attorney, for $1001 00, for the use and benefit of the judgment creditors of said Byrd. For which he obtained the sheriff's deed, properly acknowledged and recorded.

On the 20th May, 1842, Trapnall & Cocke obtained two judgments against Wm. J. Byrd, then a minor, for about $800 00. On the 25th June, 1842, *fi. fa.* issued on each, and returned *nulla bona*. *Fi. fa.* again issued, 25th February, 1845, and was levied on lot 4, and the east half of lot 5 and lot 6, and they were sold the 25th April, 1845, and purchased by F. W. Trapnall, for $225 00. For which he has the deed of the sheriff, properly acknowledged and recorded.

On the 20th of June, 1845, Trapnall and wife conveyed lot 4, and the east half of lot 5, to the Bank of the State of Arkansas. The United States recovered judgment against the Bank, in the United States Circuit Court, on the 25th of April, 1845, on which *fi. fa.* issued 1st November, 1845, and was levied on lots 4, 5, and 6, and they were sold 26th of April, 1846, and purchased by F. W. Trapnall, who received a deed from the Marshal therefor, properly acknowledged and recorded. Since the commencement of this suit, Trapnall has conveyed his interest to lot 6, and west part of lot 5, to Geo. C. Watkins.

On the 26th October, 1844, Watkins, as the attorney for Jones, Woodward & Co., E. Pitman & Co., Johnson & Duplain, and T. H. Hyde & Co., entered into an agreement with R. C. Byrd, by which he allowed or agreed to give $10,000 on their judgments, amounting in the aggregate to $17,000, for lot 6, and 12 feet off lot 5, provided Byrd would put the buildings thereon in good repair.

On the 5th of October, 1843, T. D. Merrick & Fenno moved into these buildings, having rented them from the Byrds. Two days after (7th October, 1843,) the buildings fell down. It was immediately repaired in part by Merrick & Fenno, and they continued to occupy the buildings under the Byrds.

On the 22d November, 1843, R. C. Byrd and William J. Byrd executed jointly a deed of trust, by which they mortgaged, to the Bank of the State of Arkansas, lots Nos. 1, 2, and 3, in said block No. 2, upon which said tavern is situated, the property of Wm. J. Byrd; also the said lots Nos. 4, 5, and 6, embracing the brick ware-house, and the three story brick store-house, to secure their joint note for about $13,000, executed for a debt originally contracted by R. C. Byrd, excepting about $1200 by Wm. J. The mortgage deed authorized the Bank to control, receive, and apply all the rents of said property, to the payment of this debt, due in nine annual installments, until full payment or sale of the mortgaged property, excepting seven or eight hundred dollars, to be applied in repairing the buildings.

On the 29th November, 1843, R. C. Byrd contracted in writing with the complainant Wassell, a carpenter, to cut the three story store-houses down to two storys, and completely repair them, for which he was to be paid the Cincinnati prices of 1819, with 20 per cent. added. The complainant, Wassell, was to be paid $200 on the 1st of December, and $100 on the 20th of December, 1843. The old materials to be worked in when it could. When new materials were necessary, R. C. Byrd was to furnish them. When the work was completed, it was to be measured by some one chosen by Byrd and the complainant, or some one chosen by him. And when the repairs were done, according to the agreement, the rents, arising from said houses, were to be applied to the payment of said Wassell for the residue of his work, and to be considered as money belonging to said Wassell until his claim was settled. This contract was signed by Wassell and R. C. Byrd, but never recorded.

The Bank and William J. Byrd agreed, in writing, that the above contract between Wassell and R. C. Byrd, should be fully carried out, and that the rents arising from said store-houses should be applied in paying Wassell for said repairs according to their agreement. Which is signed by the agents of the Bank and Wm. J. Byrd, but not recorded.

On the 30th December, 1843, similar articles of agreement were entered into between Wassell and Wm. J. Byrd, to repair the ware-house on lot 4, and east part of lot 5, which was signed and sealed by Wassell and Wm. J., but not recorded. To which contract the Bank and R. C. Byrd agreed, in writing, and that, when completed, the rents arising from said ware-house, to the amount of $500, should be applied to the payment of said Wassell, for repairing it, which was signed by the agents of the Bank and R. C. Byrd, but not recorded.

Soon after this, Wassell commenced and continued repairing these houses, under these contracts, till July, 1845, being frequently hindered and delayed in the mean time for want of suitable materials, the Byrds having failed to furnish materials, as

they had contracted. On the 15th July, 1845, Wassell notified the Bank that he was ready to complete the contracts of repairing, according to the agreements, and requesting and requiring the Bank to furnish the necessary materials. The Bank immediately refused and denied being bound by the contracts. Whereupon, Wassell abandoned the contracts, and applied to the Byrds to appoint some person to measure the work he had done. The Byrds appointed one Shaw, a carpenter, who, together with the complainant, measured the work done on the store-houses, and found it to amount to the sum of $2,043 71, and the repairs on the ware-house to $569 82. A large number of other judgments were obtained against R. C. Byrd, in 1839, 1840, and 1841, amounting in the aggregate to more than $20,000, under some of which the store-houses on lot 6 and part of lot 5 were sold, and purchased by F. W. Trapnall, but they are not necessary to the decision in the case, and are omitted. On the 9th October, 1845, Wassell filed his lien on the property, in accordance with the statutes, crediting R. C. Byrd with $28 00, and Wm. J. Byrd with $50 00.

Wassell filed his bill on — August, 1846, to recover the rents of the property sufficient to satisfy his claim for repairs from Watkins and Trapnall, who were in the possession of the property. The Court decreed that the rents, sufficient to satisfy Wassell's claim for repairs, were a charge upon the property in the hands of Watkins and Trapnall, and that the complainant recover from Geo. C. Watkins $2,015 21, the amount then due for repairs on the brick store-house on lot 6 and 12 feet on lot 5. And further decreed that the complainant recover from F. W. Trapnall $500 on the amount then due, according to contract, for repairs on the brick ware-house, on lot 4 and the east part of lot 5.

In the investigation of this case, we have encountered many questions exceedingly intricate and perplexing. We shall not attempt to decide all the questions which may be raised by the facts, but such only as we think are necessarily involved in the correct determination of the case.

In the beginning, the legal question presents itself, whether the mortgage to the Bank, executed by R. C. Byrd and Wm. J. Byrd, the 22d November, 1843, after Wm. J. arrived to the age of 21 years, was an affirmance or disaffirmance of the deed of 1838.

The execution of the mortgage by Wm. J. Byrd *alone*, would, without doubt have been a disaffirmance of the deed of 1838. This would have been a *complete* assumption of ownership; a claim totally inconsistent and irreconcilable with the deed of 1838. But we think the mortgage in this case is *no* disaffirmance of the deed of 1838. The mortgage is *joint*—executed by R. C. and Wm. J. Byrd, and not Wm. J. alone. They *jointly* assumed the ownership of the lots mortgaged. They *jointly* entered into covenants of warranty and seizure. The instrument itself shows a *joint* responsibility. It is sufficient that if *all* the property mortgaged be vested in Wm. J. and R. C. Byrd to save them harmless from their covenants. It is not contended that R. C. Byrd had any title or claim to any of the property mortgaged, excepting that embraced in the deed of 1838. If he *intended* to disaffirm, why did he not execute the mortgage alone? Why did R. C. Byrd also execute the mortgage, and what is the legal effect as to him? Did he thereby assume the *complete* ownership of *all* the property? The instrument should be so construed, if possible, as to give it effect in all its parts, and as to all parties concerned, and carry out the true intentions of the parties. The legal effect of this mortgage does not imply an assumption of ownership of all the property by Wm. J. Byrd. This construction of the instrument accords with the assumption of ownership by R. C. Byrd of the property, in contracting with complainant for repairs, a few days after, which was assented to, and endorsed by Wm. J. Byrd, thereby admitting the ownership of his father; also with his subsequent deed of confirmation in 1844.

We are next led to inquire, what lien Wassell secured by his contract. It may be true that the *possession* of land, by virtue of a contract entitling to the immediate possession and rents,

would give a good lien, without being registered, against after acquired judgment liens and subsequent purchasers. Upon this, we are not now required to decide. It appears, from the record, Wassell never had the possession of this property. It is not even *contended* that he had a right to the possession and accruing rents by the terms of the contract, until he had abandoned it, on the 15th July, 1845, nearly two years after he entered into the contract with the Byrds. We think the contract between Wassell, the Byrds, and the Bank, clearly a mortgage upon the rents, to secure the debt for repairing the buildings, and comes within the registry act, and must be recorded to give a lien against a judgment creditor, who has acquired a *specific lien* by execution and levy, without notice of the mortgage. *Dig. of Ark., p.* 745, *S.* 2, *Atwater vs. Mower*, 10 *Verm. R.* 75.

Wassell's contract with Wm. J. Byrd and the Bank, was executed on the 30th Dec., 1843. Trapnall & Cocke obtained their judgments against Wm. J. Byrd the 20th May, 1842. Execution issued, and was levied on the property on the 25th February, 1845, and it was sold on the 25th April, 1845, and Trapnall became the purchaser. The judgment liens being prior to Wassell's contract, and the judgments, executions, levy and sale being all within the three years, Trapnall, without doubt, obtained a good title to the property, unaffected by Wassell's claim. But the facts embraced in this branch of the case, present other questions more difficult and perplexing.

On 23d of April, 1845, the United States obtained judgment against the Bank. On 20th June, 1845, Trapnall and wife conveyed this property to the bank. On 1st November, 1845, *fi. fa.* issued and was levied on the same property, and it was sold 20th April, 1846, and Trapnall again became the purchaser. Did Trapnall's purchase and title under the prior judgment liens of Trapnall & Cocke, extinguish Wassell's lien on the property? Did the conveyance of this property to the Bank, by Trapnall and wife, revive the lien against the property, the Bank having notice and being a party to the contracted lien? Or what effect did they have, if any?

Again, it appears the United States had no notice of Wassell's unregistered mortgage or contract. Did the United States, by her judgment, *fi. fa.*, levy and sale of this property, acquire precedence over Wassell's unregistered lien? If so, did Trapnall, the purchaser at the marshal's sale, stand in the place of the United States, and get a good title, though he had notice of Wassell's contract? We do not now propose to decide all these questions, but such only as appear to be material and necessary to this case.

The doctrine seems to be well settled in New York and South Carolina, that the judgment lien is subject to every equity which existed against the land in the hands of the judgment debtor, at the time of the docketing of the judgment, though the judgment creditor *had no* notice at that time. That a court of chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor has in the estate, and this is placed on the ground "that a judgment is *not* a *specific* lien on the land of the debtor, but a general lien on all the lands of the debtor." 1 *Paige R.* 128, *in the matter of Howe;* 4 *Paige R.* 15, *Keirsted vs. Avery.*

This case does not come within the principle here laid down. The *levy* of the *fi. fa.* gave the United States a *specific* lien on the property. The title of the Bank was thereby divested, and the United States became the legal owner *bona fide.* (*Cushing vs. Hurd*, 4 *Pick. R.* 255.) The lien of Wassell is therefore void as against the United States, because it was not recorded. If then Wassell's lien is void as against the United States, the doctrine of notice will not apply to Trapnall, for notice of that which is no lien, amounts to nothing. It seems further, if the United States were entitled to precedence, she has a right to the full benefit of her lien, without detriment from Wassell's unregistered mortgage, and Trapnall, by his purchase, is entitled to the benefits of the judgment lien.

But a different rule prevails in Pennsylvania and Ohio, and some of the other States. There, the judgment creditors are

placed on the same ground with *bona fide* purchasers, and the rule is, that every incumbrance, whether it be a registered deed or mortgage, or docketed judgment, should, in cases free from fraud, be satisfied according to priority of lien upon the record, which is open for public inspection."

4 *Kents Com., p.* 173; *Cleveland Bank vs. Sterges*, 2 *McLean's R.* 341; *Cushing vs. Hard*, 4 *Pick. R.* 255; *Warden vs. Adams*, 15 *Mass. R.* 226; *Sigourney vs. Larned*, 10 *Pick. R.* 73; *Kanfelt vs. Bower*, 7 *Sergt. & Rawl. R.* 64; *Adams appeal*, 1 *Pa. R.* 448; *Bowers vs. Oyster*, 3 *Pa. R.* 240; *Coffin vs. Ray*, 1 *Met. R.* 212; *Johnson vs. Cawthorn*, 1 *Dev. & Battle R.* 32, 35, also 379; *Roberts vs. Rose*, 2 *Humph. R.* 145, 147; *Gunn vs. Chester*, 5 *Yerger R.* 205, 209. This seems to be the doctrine established by our Legislature in relation to the same subject. *The Dig. of Ark., p.* 623, *S.* 5, regulating judgment liens, declares that liens shall commence on the day of the rendition "of the judgment and shall continue for three years." And the act concerning the registry of mortgages, *Dig. Arks.* 745, *S.* 2, provides that "every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage." Here, we find the lien commences on the day of the rendition of the judgment, and the mortgage is a lien from the time it is filed in the recorder's office for record and not before. Priority must then be determined, from the time they were placed on the record. It is clear to our mind that, in the *absence of fraud*, the party first obtaining a record lien, in accordance with the statutes, obtains priority over unregistered mortgages, and entitled to prior satisfaction, according to the plain meaning of these provisions. Such is declared to be the law in Mississippi, under a similar statute to ours. *Benjamin vs. Hyatt*, 1 *Smedes & Marsh. Ch. R.* 437.

And they fully sustain the position above laid down, that liens on land, whether by judgment or mortgage, in the absence of

fraud, are to be discharged according to the order of time in which they respectively attached. And this is further evident from our statutes regulating conveyancing of real estate, (*Dig. of Ark., p.* 269, *S.* 31,) which provides that "no deed, bond, or instrument of writing for the conveyance of any real estate, or by which the title thereto may be affected in law or equity hereafter made or executed, shall be good and valid against a subsequent purchaser of such real estate for a valuable consideration without actual notice thereof; or against any creditor of the person, executing such deed, bond or instrument, obtaining a judgment or decree, (which by law may be a lien upon such real estate,) unless such deed, bond, or instrument, duly executed and acknowledged, or proved, as is or may be required by law, shall be filed for record in the office of the clerk, and ex-officio recorder of the county, where such real estate may be situated." Here, it is evident that creditors obtaining a judgment or decree, which by law is a lien upon the real estate, is placed on the same advantage ground with "subsequent purchasers for a valuable consideration without actual notice." Then, it being established that the judgment lien of the United States is entitled to priority over Wassell's lien, it clearly follows that Trapnall, the purchaser at sheriff's sale, under this judgment, cannot *be affected* by *notice* of the mortgage. "For, if he could, it would render the judgment unavailable." "It would give the mortgage priority over the judgment, and take away the value of the judgment to the amount of the mortgage." (*Jacques vs. Weeks*, 7 *Watts R.* 261.) And in *Bayley vs. Grienleaf*, 7 *Wheaton R.* 46, Chief Justice MARSHALL says, "to the world, the vendor appears to hold the estate, divested of any trust whatever, and credit is given to him in the confidence the property is his own in equity as well as law. A vendor, relying upon this lien, ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is in some degree accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate, on which he claims a secret lien. It would

seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a a court of chancery to the exclusion of *bona fide* creditors. The lien of the vendor, if in the nature of a trust, is a secret trust, and although to be preferred to any other subsequent equal equity, unconnected with a legal advantage, or equitable advantage, which gives a superior claim to the legal estate, will be postponed to a subsequent equal equity, connected with such advantage. In the United States, the claims of creditors stand on high ground. There is not perhaps a State in the Union, the laws of which do not make all conveyances, not recorded, and all secret trusts, void as to creditors, as well as subsequent purchasers, without notice."

We might well place this branch of the case on another ground. Admitting that Trapnall once knew of Wassell's mortgage on the rents of this property, he had no right to presume it remained unsatisfied. The circumstances of Wm. J. Byrd, the two subsisting unsatisfied judgment liens of Trapnall & Cocke, against him at the time of the contract, were sufficient, we think, to prompt Wassell to diligence in securing his lien, by having it registered. More than a year after the contract, Trapnall & Cocke sells the property, under their judgment liens, and more than two years after, the United States sells it again, as the property of the Bank. In the meantime, Wassell sets up no claim, interposes no objections to the sales, has taken no steps to have his mortgage lien recorded, as required by the statutes, nor assigned any reason for not doing so. We think, therefore, that Trapnall might well presume, from these circumstances, and from the length of time the mortgage remained unrecorded, and still being unrecorded, that it had been *satisfied* or *cancelled*, and *other security* taken, or that he had *waived* his lien. (*Farnsworth vs. Childs*, 4 *Mass. R.* 640.) If Wassell, in consequence, has to suffer, it is owing to his own *negligence*. He can blame no one but himself.

As to the other branch of this case, it depends somewhat upon

different principles. On the judgments of Jones, Woodward & Co., and E. Pitman & Co., *sci. fas.* to continue the liens issued within the three years, but the judgments of revival were not rendered until after the expiration of the three years. In the meantime, between the issuing of the *sci. fas.* and the revivals of the judgments, Byrd mortgaged the property to the Bank, and made this contract with Wassell for repairs, giving a lien upon the rents of the property. The question is, was there a *lapse* in the lien, so as to admit of the intervening equities of Wassell and the Bank. The principle involved in this question, we think, is well settled in *Trapnall vs. Richardson, Waterman & Co.*, 13 *Ark. R.* Where *sci. fa.* is issued before the expiration of the three years, and the judgment of revival is not entered until after, the judgment relates back to the date of the *sci. fa.* and the lien is continued unbroken. After the revival, the judgment creditor can sell and have the full benefit of his lien, without *lapse.* The case of *Whiting & Slark vs. Beebe,* is not inconsistent with the doctrine here laid down. In that case, the judgment creditor sold the property pending the sci. fa. before the judgment of revival was entered. His lien was incomplete without judgment of revival, and in that case the purchaser could not avail himself of its benefits.

The cases cited of *dormant* executions against personal property, do not, we think, apply. By our statutes, the liens in this case are attached to the judgments. They commenced with the judgments, and by *sci. fas.*, and judgments of revival are made to continue three years more from the dates of the *sci. fas.* "In those cases cited, the lien is not created by the judgment, or any matter of record." "A statutory lien is as binding as a mortgage, and has the same capacity to hold the land, so long as the statute preserves it in force." *Rankin & Schatzell vs. Scott*, 12 *Wheaton R.* 177; 6 *Condensed R. S. C. U. S.* 506.

There is no such delay, under the circumstances, in the case of Jones, Woodward & Co., as will postpone them, either in law or equity, and in view of all the circumstances in this case, we do

not attach much importance to the endorsements on the two executions of E. Pitman & Co., directing the sheriff to return the executions *unsatisfied.* These executions, with these endorsements, were returned, filed and made a matter of record, 10th May, 1843. And on the 19th October, 1843, *sci. fas.* to continue the liens, were sued out on both these judgments. There is no evidence that any agreement for delay existed at the time Wassell took the mortgage upon the rents of this property. We, therefore, think the complainant could not have been misled or defrauded, or in any way injured, by these endorsements or agreements. It is a general rule that "equity follows the law," and the special circumstances in this case are not such as to make this an exception. We think Wassell is entitled to the rents of so much of the brick ware-house as is or may be situated on the 13 feet lying between the east half and the 12 feet on the west part of lot 5, which still remains unsold. But, as the case now stands, there is no evidence on the record showing what part of said buildings, if any, are on the 13 feet, nor what amount of rents has been received thereon.

And if Watkins, after he purchased the property and obtained title thereto, stood by and silently permitted the complainant to bestow his labor upon the buildings, in ignorance of his superior title to the property, or upon the faith that Watkins would pay him for his labor, in that case Wassell is entitled to recover for all the labor he did upon the buildings *after* that period until he abandoned the works, or Watkins notified him of his superior title, and that he would not pay him. But, as the record now exists, there is no satisfactory evidence before us on these points, neither as to the amount of labor done on the buildings after this period, nor as to the value of such labor.

Mr. Justice WALKER delivered the opinion of the Court.

The grounds for equitable relief against the defendants, are in many respects essentially different, and for that reason will be considered separately.

And first, as regards the complaint against the defendant Watkins. It is predicated upon a contract made between the complainant of the one part, Byrd and the State Bank of the other, by which they granted to the complainant the rents and profits of certain buildings, for repairs to be made by Wassell (the complainant) on said buildings. The precise terms of this agreement, as between these parties, it is not important to examine, because the defendant, Watkins, claims the property by purchase, under a judgment lien, prior in point of time to the contract with Byrd and the Bank, to whom the property had been mortgaged, which is apparent upon the record, and admitted by the complainant, who contends that by the acts and conduct of the judgment creditor, his judgment lien had been, before the sale of the property, displaced. After a careful examination of the record, and the evidence, we are led to a different conclusion. The statute continues the lien of the judgment creditor for three years, unless displaced by some act of the party. Mere delay to sue out process within the time, would not of itself be sufficient for that purpose; nor would the levying of process, and an order by the creditor, or his attorney, to return the process, without selling the property, or to return process before it had been levied, necessarily discharge the judgment lien. Such acts do not amount to an abandonment of the lien, a release of property taken in execution, or a new or additional security. It is very true that in this case there was an apparent unnecessary delay in the sale of the property, and some vacillation in ordering process to issue, and thereafter to be returned. But upon looking to the peculiar circumstances of this case, it is evident that no sale of the property could have been made at an earlier day than that on which the sale took place, without hazarding the loss of the debt; because, as the defendant held the property by deed from a minor, until such minor became of age and affirmed the title so made, no one would have been safe in buying the property; and that this was the true cause of the delay, may be fairly inferred from the fact that the affirmance was procured to be made

by the plaintiff's attorney, and the sale of the property thereafter made with the least possible delay. It is also true that Wassell was, during the time of this delay, bestowing his labor upon the property, and thereby enhancing its value, and he may have been induced to prosecute his labors, under the impression that he could realize, out of the rents, a sum sufficient to pay for the repairs, before the property was disposed of. But there is no evidence that Watkins held out any inducements or assurance, to Wassell, that he would pay for the work, or that his (Wassell's) was the better claim, and although he knew Wassell was at work on the building, and had information with regard to the nature of the contract under which it was done, to put him upon inquiry, yet it must be remembered that Watkins, although the attorney for the plaintiffs, was not then the owner of the property, nor had he any control of it whatever, and was not, therefore, compelled to give notice to Wassell that he would not pay for improvements. In view of all the facts of the case, there can be no doubt of the superior title of Watkins to the property, free from all incumbrance, up to the time of purchase. But, after the purchase of Watkins, the property being his, a silent acquiescence, on his part, in the continuance of the work, by Wassell, upon the building, raised an implied assumpsit on his part to pay for the work so done. If he did not intend to pay Wassell for the work done on the building after his purchase, it was his duty at once to have apprized him of the facts; having failed to do so for a considerable length of time, the work done between the date of the purchase and the time when Wassell was notified, that Watkins would not be held responsible for the payment of the work, should be accounted for by Watkins.

Trapnall, like Watkins, in the first instance, purchased under a judgment lien, prior in time to Wassell's contract with Wm. J. Byrd and the bank, for repairs to the property, purchased by him, but, as he subsequently parted with his title to the Bank, he must rely for title solely upon his subsequent purchase, made under a judgment in favor of the United States against the Bank,

which was rendered subsequent to Wassell's contract, and consequently the lien created thereby laid hold of the lots as the property of the Bank, subject to all prior incumbrances.

It is a matter of some difficulty to determine satisfactorily the nature of this incumbrance. Wm. J. Byrd, prior to his contract with Wassell, conveyed the lots to the Bank, to secure the payment of certain debts. Upon the lots was situated a ware-house, that had partly fallen down, and was in a ruinous condition, and no doubt, with a view to having them repaired, made a reservation, that part of the rents and profits of the ware-house might be applied to the payment for repairs. This reservation, in view of the insolvent circumstances of Byrd, and the nature of the deed executed to the Bank, seems to have been a means of payment, for repairs, provided by the parties for their mutual benefit; because, by the terms of the deed of mortgage, there was not only a lien created upon the realty, but by express terms, a grant of the rents and profits, arising therefrom, to be applied to the payment of Byrd's debt to the Bank. The Bank was, therefore, interested in having the repairs made, that the property might be put in a condition to rent, and Byrd, for the same reason, and that it might be preserved from utter loss and ruin.

The contract for repairs was made by and between Wm. J. Byrd and Wassell, and on the same day approved, adopted and affirmed by the Bank, whereby it became the contract of both Byrd and the Bank; by the terms of which, it was agreed that five hundred dollars of the rents and profits arising from the use and occupation of the buildings, should be applied to the purpose of securing to Wassell his pay for repairs to the buildings.

In view of all the circumstances connected with this transaction, it is evident that Wassell, to the extent of five hundred dollars, contracted for these rents, as the consideration for the repairs. Byrd was not to pay this sum in any event, because the amount to be paid by him was expressly agreed upon; to that extent, the contract was made on the personal responsibility of Byrd, but it was the interest in the property granted, which was set apart by

Byrd and the Bank, and contracted to Wassell, and accepted by him as a payment for the work to be done. It was not, therefore, a mere security for the payment of Byrd's contracts, but upon the adoption of the contract, by the Bank, it was, in effect, a transfer to Wassell of the rents and profits in payment for his services, and when it is considered that Byrd had, in express terms limited his personal liability, and apart from such liability, had contracted the rents which had, by the terms of the deed of mortgage, been reserved for the express purpose of paying for the repairs, which contract was affirmed by the Bank, it is equally clear that the Bank was only fulfilling her agreement with Byrd by joining him in making the transfer, and was not liable as a corporation in any event upon the contract. It was then a grant of rents, an incorporeal hereditament, which, as incident to the purchase, he might demand and receive, and, for the purpose of enabling himself to do so, if necessary, might enter upon the realty, because the grant of the rents carried with it every incidental right necessary to enable the purchaser to get the benefit of his purchase.

We have seen that, by the express terms of the deed of mortgage, the rents were conveyed to the Bank, with the reservation that part thereof should be applied to paying for repairs, or, if not, as Byrd and the Bank both executed the contract with Wassell, he certainly acquired the title to the rents, whether in either or both of them. If, however, the title or interest in the Bank was imperfect, for the reason that there was an equity of redemption as to the realty, and, therefore, that she did not communicate or pass to Wassell a perfect title to the rents by reason thereof; still, her subsequent purchase of the property from Trapnall was, in effect, an affirmance of a perfect title in Wassell, under his purchase of the Bank, as fully and to the same extent that it came to her from Trapnall, for it is a familiar and well established rule in this State, that if one sells real estate to which he has no title, or an imperfect title, at the time of the sale, and subsequently acquires such perfect title, that such title enures to the benefit of

his vendee as fully as if the after acquired title had existed in the vendor at the time of his conveyance in the first instance.

At the time the United States obtained judgment against the Bank, she evidently had no estate or interest in the realty or in the rents and profits arising therefrom; because, before that time, the property had been sold to Trapnall, under process, to satisfy a judgment against Byrd, who held the equity of redemption, and as the judgment lien was older than the deed of mortgage, the whole legal estate vested in the purchaser. But upon the transfer made subsequently to the Bank, the judgment lien did attach, and held the estate as perfectly and to the same extent, that it remained in the Bank after her purchase.

We have seen that the rents and profits had been, by the Bank, conveyed to Wassell, and that her purchase of Trapnall, to the extent of her former transfer to Wassell, passed immediately to him. So that the title, which the Bank really acquired by her purchase of Trapnall, was, at the time the lien took effect, encumbered with this prior conveyance.

The office of a lien is not to create an estate, nor in the slightest degree to affect or interfere with prior incumbrances, but to prevent subsequent alienations or incumbrances. So, it was said, in *Kersland vs. Avery*, 4 *Paige* 14, "The lien of the judgment is subject to every equity that existed against the land in the hands of the debtor, at the time of docketing the judgment, and the court of chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor has in the estate." In *Mooney vs. Dorsey*, 7 *Sm. & Mar. R.*, *p.* 22, the court of appeals of Mississippi say, "The lien of the judgment can only operate upon the interest which the debtor had at the time of its rendition." In Adams' Doctrine of Equity, page 311, it is said, "The judgment creditor is entitled to the debtor's real interest, alone subject to his equities as they existed at the date of the judgments." And Chancellor Kent, 4 *Kent's Com.* 437, says, "After all, the lien amounts to but a security against subsequent purcha-

sers and incumbrancers." In *White & Tudor's Equity Cases, vol.* 2, *p.* 107, numerous adjudged cases are cited to the effect "that a judgment lien is not to be regarded in the light of a purchase, or as entitling the creditor to the preference over prior equities, and unrecorded deeds." We think these authorities will sustain the position assumed, that the interests of the creditor in the real estate of the debtor, is limited to the actual interest of the debtor at the time the lien attaches, and he holds it free from subsequent alienations or incumbrances, but subject to prior alienations or incumbrances.

Turning to the facts of the case, there can be no doubt but that Trapnall was, even prior to his first purchase, under the Trapnall & Cocke judgment, informed of the nature of Wassell's interest in this property, and the terms of his contract with Byrd and the Bank; he admits, in his answer, that he had notice sufficient to put him upon inquiry, and he well knew at the time of his purchase, under the United States judgment, that Wassell had nearly or quite completed the work on the ware-house. Trapnall was the owner of the property whilst the work was progressing from the time of his prior purchase until his sale to the Bank, and must have been well acquainted with all that related to Wassell's claim; for, during the time, Wassell was engaged in making the repairs, he had been judgment creditor, attorney, purchaser, vendor and purchaser again; he resided in the same city, where the property was situated, and the work was done. From all these considerations, as well as from the evidence, and his own admissions, he well knew all the facts of the case, and being an eminent attorney, he also knew the nature of the incumbrance on the property when he bought it. There can be no hardship then in holding his purchase subject to Wassell's prior equity; because we must presume that, with a knowledge of the facts and of the law, he bought the property with an eye to Wassell's claim, and bid for it, less than he would otherwise have done, by the amount due Wassell, so that in fact he loses

nothing by paying this sum. Or, if otherwise, knowing the facts, he bought at his peril, and must be held to account.

The report of the master, sustained by the evidence, shows that, clear of all expenses for repairs since he took possession of the property, he has received exceeding $500, the sum due Wassel, which sum was, by the Circuit Court, decreed to the complainant; and, under all the circumstances of the case, we think the claim of the complainant of a highly equitable character, well sustained by the evidence, and, so far as regards the claim against Trapnall, the decree ought to be affirmed.

But, so far as the decree goes to charge Watkins with the value of the repairs made upon the buildings, purchased by him, prior to his purchase, we think the Circuit Court erred, and, for this error the decree, as to him, must be set aside; and, as Watkins is properly chargeable with the value of the work done upon the buildings, after he purchased the same, and before Wassell was notified by him that he would not be responsible for repairs, and inasmuch as we cannot readily ascertain from the evidence what amount of work was done, after such purchase and before such notice, the case must be remanded, with instructions to the Circuit Court, by reference to the Master or otherwise, according to the practice in said Court, to ascertain the amount of work so done, and the actual value thereof, and to render a decree in favor of the complainant for the same.

Hon. Chief Justice WATKINS not sitting.

McPaxton, Ex. vs. Dickson et al.

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Where a portion of the heirs and distributees of an estate employ an attorney, to contest the settlement of the executor, the Probate Court has no power to direct the payment of the attorney's fee, by the executor, out of the residuary fund of the estate: if it be a proper case for contribution, by all interested in the estate, the remedy is in chancery only.

Appeal from Sevier Circuit Court.

Hon. SHELTON WATSON, Circuit Judge.

S. H. HEMPSTEAD, and B. F. HEMPSTEAD, for the appellant. To reverse these proceedings, and set aside this allowance, the appellant relies on the following points:

First—Because a court of probate is not invested with chancery jurisdiction; and that, without such ample and discriminating powers, it could not legally make the allowance in question.

Second—That, even admitting chancery jurisdiction, still the Court erred, because they had not, by process, or any other mode known to the law, acquired jurisdiction over the parties in interest.

Third—Even conceding jurisdiction, and that all persons in interest had been before the Court; still the finding was not warranted under the authority found in 1 *J. Ch. Rep.* 22, as there was no evidence to authorize any such summary interference of the Court in favor of counsel, or the persons employing such counsel.

Fourth—The decision is wrong, not only on the ground of public policy, but against one of the prominent principles which govern courts of equity; for, if affirmed, it will produce instead of prevent litigation.

Fifth—Because the decision is in no way final, as to the matters the exceptions filed pretend to settle, as the same matters may be renewed and re-investigated in a court of chancery.

CURRAN & GALLAGHER, for the appellees. The question we shall present in this case is, whether where a distributee incurred a necessary expense, either for costs or solicitor's fees in and about an estate, whereby all the distributees are benefitted, whether he is not entitled to a *pro rata* contribution from the rest of his co-distributees, and whether a solicitor has not a general lien for his costs on the duty recovered by his diligence, and if it is a fund in court, whether the solicitor's lien does not attach to said fund? We think such to be undoubtedly the case. A solicitor has a general lien for his costs on the duty recovered by his diligence. If that is a fund in court, his lien attaches to it, and it will not be paid out without providing for them. 1 *Hoffman's Chancery Practice, page* 34; *Irving vs. Viana*, 2 *Young & Jarvis* 70.

If costs are decreed to be paid by defendants generally, each defendant may be called upon to pay the whole, and the court will enforce contribution among them. 2 *Hoffman's Chancery Practice, p.* 72; 2 *Fowler's Exch. Pr., and case cited, Jones vs. Cawthorne.*

Even a decree or judgment arising upon a matter distinct from them in litigation, cannot be set off to the prejudice of solicitor's lien. *Ib.* 76; *Dunkin vs. Vandenleigh*, 1 *Paige* 624.

The doctrine of contribution is not so much founded on contract, as on the principle of equity and justice, that where the interest is common, the burden also should be common, and the principle that equality of right requires equality of burden. *Campbell vs. Messier*, 4 *John Ch. Rep.* 334.

"In a recent case where, in a creditor's suit, a fund had been realized by the diligence of the plaintiffs, and the assets were more than sufficient for the payment of the debts, the costs of

the plaintiff as between party and party, were ordered to be paid out of the general fund. 2 *Williams on Ex'rs, p.* 1459; *Stanton vs. Halfield*, 1 *Keen* 358.

Mr. Justice SCOTT delivered the opinion of the Court.

The case presented by this record is, that there being several heirs of John Paxton, deceased, two of them, the appellees herein, feeling dissatisfied with the course of conduct pursued by the executor in the settlement and management of the estate, and desirous to stimulate him to a more strict performance of his duties, to which they allege him derelict, employed counsel who rendered the professional services they required, made out his bill against the parties who employed him, and upon their application the Probate Court ordered it to be paid, by the executor, out of the residuary funds of the estate, and that he credit himself for the sum so paid out, that Court being of the opinion that although these counsel and atttorney's fees had been incurred at the instance of two only of the several distributees, the burthen of their payment ought to be borne in equal proportion by all of them. The nature of the professional services rendered, and so ordered to be paid for out of the estate, will appear, by their specification, in the account made out by the counsellor and attorney, which is as follows:

HANNAH L. DICKSON, BY JOHN DICKSON, HER GUARDIAN, AND JOHN DICKSON, A MUTE, BY JOHN DICKSON, HIS NEXT FRIEND,

To Thomas Hubbard, *Dr.*

1850. For retainer and arguing motion to quash settlement of Jesse McPaxton, as ex'r of the last will and testament of John Paxton, deceased, in the Sevier county court of probate, at the January term, 1850,..... $ 50 00

For drawing exceptions to the settlement of the said Jesse McPaxton, as such ex'r, and arguing the same in said court of probate, and obtaining order of said court referring said settlement to an auditor,..... 100 00

For drawing complaint, affidavit, and motion against said Jesse McPaxton, as such ex'r, and arguing the same in the court of probate of Sevier county, and obtaining rule on said Jesse, as such ex'r, to perfect his bond as such ex'r,.....	100 00
For attending and arguing exceptions of said Jesse, as such ex'r, to report of auditor and settlement of account,.....	50 00
For atttending court, and arguing matter of reference before jury, arising upon exceptions to auditor's report and settlement of accounts,.....	50 00
	$ 350 00

From this decision of the Probate Court, the executor appealed to the Circuit Court, all the parties waiving upon the record the affidavit, and all technicalities and formalities relating to the appeal. The cause was heard there "upon the transcript and bill of exceptions certified from the Court of Probate," as is stated in the record of the Circuit Court; no error being found in the proceedings, opinion and judgment of the Probate Court, they were in all things affirmed; and the executor appealed to this Court.

No question was made below, nor is made here, as to whether or not the professional services in question were rendered, or as to the reasonableness of the charges made for them; but only as to whether they were a proper charge upon the residuary fund of the estate in the hands of the executor undistributed.

Although it might be held that the solicitor has a lien for his reasonable charges on the duty recovered by his diligence, and if it be a fund in court, that his lien would attach to the fund, that would not determine the question involved; because it is not pretended that the solicitor in this case was retained by all the persons interested in the fund. The proposition could therefore establish nothing more than that his lien would attach to the interest of his client only.

The true question is one of contribution simply between parties,

resting not upon contract but upon principles of pure equity; that where the interest is common, the burden should also be common; and that equality of right requires equality of burden. *Campbell vs. Messier*, 4 *John. C. R.* 334.

The probate courts, as regulated in our system, in the main proceed *in rem*, not *inter partes*, otherwise than indirectly in general, although, in particular cases, means are provided by statute, whereby persons interested may come in and become direct and active parties. And consequently, although in its legitimate operations *in rem*, in winding up the estates of deceased persons, and incidentally allowing proper charges against the subject matter of its cognizance, it does, indirectly, work contribution, it does so, not as a principal matter of jurisdiction, but simply as an incidental consequence of its jurisdiction *in rem* in matters of administration. It is mainly in the chancery court that contribution is administered, as a principal head of jurisdiction, after the parties are called in and heard upon the merits of their case. It cannot be pretended that the Legislature has, any where, in express terms, invested such a jurisdiction concurrently in the probate courts: and it is by no means clear that such an act would be constitutional if passed. And it would be but a slight ground upon which to imply such concurrent jurisdiction, that the fund, out of which jurisdiction is sought, is committed by law to the custody, for the time being, of the Probate Court. As well might an individual claim such a jurisdiction because he happened to be the custodian of a like fund, and was authorized to preserve and administer it in a specific manner for the benefit of the parties interested.

In this case, where the Probate Court has attempted to perform the functions of the chancery court, without first calling the parties to be affected before it, that they might be heard, there is no pretence that the burden, which the contribution sought is to lighten, was taken on, either in the ordinary course of administration, or by any party which the law recognizes as a custodian of the estate alleged to have been preserved, or as an agent in

its administration; and hence the claim for contribution rests solely upon grounds of pure equity, and not upon strict law.

Under what provision of the law were these parties authorized to employ attorneys and counsellors, to aid in the administration of the estate? None can be pretended. If employed at the suggestion of their own interests, and the result was favorable not only for themselves, but for others, whose interest was inseparably united with their own, it might be a case to submit to the chancellor to be determined by him upon an equitable claim for contribution; but it made no case for the cognizance of the Probate Court.

We think, therefore, that the judgment of the Circuit Court was erroneous, and it must be reversed, and the cause remanded, with instructions to that Court to sustain the exceptions taken in the Probate Court, and make such decision as that Court ought to have made, in conformity with this opinion.

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CLEMM VS. WILCOX, AS AD.

A tenant, who enters under the title of his landlord, cannot continue to hold over, and yet contest his landlord's title to the premises, or to the rents, by setting up an adverse after acquired title to the premises in himself, though he had given notice to the landlord of that fact, and that he would no longer hold under him or pay him rent.

Writ of Error to Crawford Circuit Court.

The Hon. A. B. GREENWOOD, Circuit Judge.

CURRAN, for the plaintiff. A tenant may dispute the title of his landlord, when he disclaims the tenure, and claims the fee in his own right, and the landlord has notice thereof, and the relation of landlord and tenant theretofore existing is put an end to. *Walden et al. vs. Bodly*, 14 *Peters S. C. Rep.* 156; *Jackson vs. Davis*, 5 *Cow.* 123; *Jackson vs. Rowland*, 6 *Wend.* 666; *Jackson ex. dem., Waldron & Eltie, his wife vs. Welden*, 3 *J. R.* 283.

Mr. Justice WALKER delivered the opinion of the Court.

This was an action of assumpsit, tried in the Crawford Circuit Court, and, by consent of parties, submitted, upon the general issue, to the Court sitting as a jury, upon the following agreed state of facts: That the plaintiff's intestate, in his life-time, entered into an agreement with John Drennen for the purchase of two town lots, and thereafter intestate erected a two-story brick house, and other buildings, upon the lots; that intestate resided upon the lots until his death, without having paid the purchase money for them; that Wilcox, as administrator, rented the premises to the defendant, Clemm, for $7 per month, and that defendant entered upon the premises as tenant under Wilcox, and paid to him the rents for six months, when Drennen conveyed the lots by deed in fee simple to the defendant; whereupon defendant informed Wilcox, the plaintiff, of his thus acquired title to the premises, and that he would no longer pay him rent for the same; that Drennen, at the time of making the agreement with the intestate, was seized in fee of the premises; that intestate entered, under a parol agreement, and erected the buildings on the lots, with the knowledge and consent of Drennen; all of which facts were well known to the defendant, who has ever since had possession.

It was further agreed between the parties, that if the plaintiff, under the above state of facts, was entitled to recover the rents from the defendant, that he is entitled to the sum of $144 20, with interest from the 8th of October, 1849, up to the rendition of the judgment.

Upon this state of facts, the Court, sitting as a jury, found a verdict for the plaintiff, and rendered judgment accordingly. The defendant moved the Court to set aside the verdict, and grant a new trial, but the motion was overruled. The defendant excepted and brought the whole case before this Court for consideration.

The contest between the parties is narrowed to a single point. Did the deed from Drennen (the legal owner of the premises) to Clemm, conceding that he thereby acquired a legal title to the premises, and his notice to the plaintiff of that fact, and that he would no longer hold under him or pay rent, so change the relation of landlord and tenant between the parties, as to exempt the defendant from further liability to the plaintiff as his tenant. Or, in other words, can the tenant, who enters under the title of the landlord, continue to hold over and yet contest his landlord's title to the premises, or to the rents, by setting up an adverse after acquired title to the premises in himself?

The general rule is certainly well established that he cannot; and it rests not alone upon technical grounds, but is founded in convenience and sound policy; for although the landlord may not hold by a superior title to some other, yet he had the possessory title, which was of value to him and to the tenant, who by entering under him admitted his right to the premises, and it is a breach of good faith to retain the possession of the premises and set up an adverse title to that of his landlord, acquired during his tenancy. The rule in such cases is, that if he wishes to contest with his landlord the right of property, he must first surrender to him his rightful possession thereof. (*Read vs. Shepley*, 6 *Verm. Rep.* 602; *Galney vs. Ogle*, 2 *Binney* 468; 3 *Barb. Ch. Rep.* 528, *Bank of Utica vs. Mereau.*) By setting up such adverse title, he so far violates his contract as tenant, as to make it discretionary with the landlord to dissolve the relation of landlord and tenant between them, and to proceed at once to evict him or not, but the tenant can avail himself of no such advantage. The only benefit which may result to the tenant is, that it fixes a period, from which his adverse possession dates, and

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which, if permitted to continue, may eventually enable him to plead the statute bar of limitation against his landlord. The case of *Jackson vs. Rowland*, 6 *Wend.* 666, is the most favorable to the position assumed by the counsel for the plaintiff in error; but upon examination of that case, it will be seen the relative position of landlord and tenant, did not, in strictness, exist between the parties, as conceded by the Court, when commenting on the facts of the case. In addition to that case, and the other cases cited by counsel, is that of *Calhoun vs. Perrin*, 2 *Brevard's Rep.* 247, which would seem to hold that an adverse title, acquired by the tenant after his entry upon the premises, might be pleaded in bar of a recovery by the landlord in a suit against him for possession. But the current of decisions would seem to establish a different rule, and one which we think best sustained in reason and justice. There was, therefore, no error in the decision and judgment of the Circuit Court in denying the defendant the benefit of this defence. Let the judgment be affirmed.

Mr. Chief Justice WATKINS said:

1. The case was submitted upon an agreed statement of facts, a practice greatly to be encouraged. The submission was necessarily to the Court, not to a jury, or the Court sitting as a jury; nothing remained but for the Court to declare the law, with reference to the pleadings, arising upon the facts admitted, when made a part of the record, either by the agreement of parties with leave of the Court, or by means of a bill of exceptions. In such case, a motion for new trial and bill of exceptions to the decision of the Court overruling it, involve a manifest inconsistency, though resorted to, as it no doubt was, in this case, out of abundant caution.

2. There is no place here for the application of the principle recognized in *Crittenden vs. Woodruff*, 6 *Eng.* 82; that the grantee is not estopped, by the acceptance of an estate, from denying that he acquired any estate from the grantor, and may, therefore, dispute his widow's right to dower dependant upon the

estate of her husband. The relation of landlord and tenant, with or without deed, creates an equitable estoppel, mutual in its operation. It arises wherever one person has obtained possession of the land of another under an obligation, express or implied, to restore it, or to perform some further debt or duty, growing out of the contract, by virtue of which he obtained the possession. Such is the case of a vendee in possession, under an agreement that he shall acquire title on payment of the purchase money, and the rule applies between mortgager and mortgagee. The obligation of the tenant to restore the possession, and to pay a reasonable compensation for the use and occupation, while he remains in possession, though no rent has been reserved, (*Digest, title, Landlord and Tenant, sec.* 13,) is implied from the relation of landlord and tenant: an obligation resting upon sound policy and essential for the preservation of good faith.

3. The tenant may show that the title of the landlord has ceased or become extinguished, since the creation of the tenancy. But this is not for the gain or advantage of the tenant, but for his protection, and presupposes the inability of the landlord to assure him the further continuance of the possession derived under the lease. The tenant may acquire, or accept and hold under a paramount outstanding title, whenever he has no alternative but to attorn or be turned out of possession. In this case, the intestate of the plaintiff below, according to *Keatts vs. Rector*, 1 *Ark.* 418, following the course of decisions upon the statute of frauds, by entering upon the land in question, and proceeding to build a house, upon the faith of a parol agreement of purchase, acquired an equitable estate, by reason of his part performance, which took the case out of the statute, and entitled him to a decree for full and specific performance on payment of the purchase money, or the performance of such other condition as may have been imposed on him by the terms of the contract, the time of payment not appearing to be of the essence of it. This equitable estate descended to his heirs, was assets for the payment of his debts, and by statute, concerning administration, the right of

possession and authority to lease it became vested in the plaintiff as his representative. Drennen, the vendor, might have prosecuted his demand for the purchase money against the estate of the intestate, or he might have recovered the possession by ejectment, if the time of payment had elapsed, or he might have proceeded by bill in chancery to assert his lien, and subject the land to the payment of the purchase money. If the vendor, by the assertion of his superior title, in any legitimate mode, had placed the tenant in a position, where he was liable to be ejected by process of law, he would then have been at liberty to renounce the tenancy, and acquire the better title. But here the intestate had, and for aught that appears, his heirs or representatives have yet a continuing right to perfect his equitable estate into a legal one, and acquire the title by performance of the conditions. The conveyance to the defendant, by Drennen, was a declaration of intention, on his part, to cancel the original contract of sale, or to treat it as having been forfeited by the intestate. Such power to declare a forfeiture, does not appear to have been reserved to the vendor; and though it might be acquiesced in, the conveyance to the defendant could not, of itself, operate to divest the equitable estate of the intestate, an incident to which was the right of possession. That right of possession had been confided to the defendant under an agreement of lease. The defendant stands in the attitude of having voluntarily acquired the naked legal title; the effect of which may be to subrogate him to all of the vendor's rights, including his lien for the purchase money, his right to foreclose or bring ejectment; but, on principle, according to the doctrine of equitable estoppel, in order to avail himself of any benefit derived from the acquisition of a hostile claim, he must first have placed himself in the position of the vendor, by surrendering the possession to the landlord. The tenant, who disclaims, or holds adversely, ought not to be allowed to deprive the landlord of his election to determine the lease and bring ejectment, and so, under the statute, to be restored by the summary proceeding of unlawful detainer, or to hold him ac-

countable for the accruing rents, by sheltering himself under an outstanding better title, unless the acquisition of that title, or his submission to it, become essential to his continued enjoyment of the possession. His renunciation, to be lawful, must be compulsory: until then, his possession is that of the landlord, and which, as against an adverse claim remaining dormant or unasserted, may ripen into a perfect estate, and so become an important muniment of title. But, even if the attempt of the tenant to couple his present possession with an outstanding title, acquired during the tenancy, were not a breach of his fidelity and duty, according to the view I take of this case, the title of the landlord did not cease or determine by the conveyance to the tenant, whereby he acquired such title as Drennen had to convey and no more, which was, in equity, a lien upon the land, until enforced by suit, not inconsistent with the equitable estate and right of possession which the intestate had acquired.

For these reasons, I concur in the conclusion that the judgment of the Court below ought to be affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS,

AT THE JULY TERM, A. D. 1854.

JOHNSON & GRIMES VS. MCDANIEL.

An action on the case for deceit in falsely warranting a chattel to be sound, is maintainable, though assumpsit or covenant on the express contract of warranty would, at this day, be the more appropriate remedy.

When the declaration in case sets out a contract of warranty, though alleged to have been falsely and deceitfully made, the issue is upon the breach of the special contract, as it would be in assumpsit or covenant: the *scienter* of the defendant need not be proved, nor is it necessary that the plaintiff should have returned the chattel, or offered to do so, and rescind the contract.

In either form of action, the rules governing and the results to be obtained, are substantially similar; so that, in the action on the case, it is necessary, in setting out the contract, to describe it correctly, and prove it is alleged.

Appeal from Crawford Circuit Court.

Hon. A. B. GREENWOOD, Circuit Judge.

WALKER & GREEN, for the appellants. We maintain, *first*, That to support an action on the case for deceit in the sale of personal property, it is essentially necessary to prove the *scienter*. *Chandelor vs. Lopus*, *Smith's Leading Cases*, *Am. Ed.*, notes and authorities collected; *Ormond vs. Huth et al.*, 14 *Mees. & Wels.* 651.

Secondly, That the principal is not liable for the acts of a *special* agent, where he transcends the limits of his authority. *Stainer vs. Tysen*, 3 *Hill's Rep.* 279; *North River Bank vs. Aymar*, *Ib.* 262; *Bank of the U. S. vs. Davis*, 2 *Ib.* 451; 2 *Stark. Ev.*, 1240; 3 *T. R.* 760; 1 *Esp.* 112.

Thirdly, That there is a material and fatal variance between the allegation and proof respecting the price paid for the slave—the allegation being that $600 was the consideration, and the proof being that $1200 were paid for this slave and others. *Penn vs. Stewart*, 6 *Eng.* 41; *Buckman vs. Haney*, *Ib.*; 1 *Ch. Pl.* 299, 384; 1 *Selw. N. P.* 104; 5 *T. R.* 496; *Bristow vs. Wright*, 1 *Smith's Lead. Cas.* 547, *and cases cited.*

Fourthly, That, even admitting the plaintiff's right to recover, under the state of facts, he was entitled only to nominal damages—it does not appear what was the price paid, nor what was the value of the slave, nor that he has been returned, nor what disposition has been made of him—as to the rule and measure of damages upon a breach of warranty. 1 *Taunt.* 566; 2 *Camp.* 82; *Cary vs. Gruman*, 4 *Hill* 625; *Voorhees vs. Earl*, 2 *Ib.* 288; *Cothers vs. Keever*, 4 *Barr's Rep.* 168; *Willis vs. Dudley*, 10 *Ala. Rep.* 933; *Millin vs. Rowland*, 11 *Ib.* 732.

S. H. HEMPSTEAD, for appellee. The action was in proper form, (2 *Ch. Pl.* 680, 681,) and the proof fully established the falsity

of the warranty. Both counts are according to the form laid down in Chitty, at page 680 of 7 Amer. Edition. 2 *Chitty's Precedents*, 528; 6 *J. R.* 142; 1 *Com. Dig.*, *action on the case for deceit*, (*A.* 11.)

In an action for deceit upon an express warranty, the *scienter* need not be alleged, nor if stated, need it be proved. 2 *East* 446; 2 *Chitty* 680, *note d.*; 2 *Ch. Prec.* 528, *note q.*; 4 *Bingham* 66, 73; 1 *Ch. Pl.* 157; 1 *J. J. Marsh.* 440.

If an express warranty turns out untrue, it is immaterial whether the party making it knew it to be false or not. 1 *Story's Eq.* 193; *Hardin* 50; 1 *Bibb.* 244; *Cooke* 266; 3 *Cranch* 270.

In the case of the breach of an express warranty, the party may sue upon it for damages, without returning the goods, or offering to return them. 2 *Kent* 480; *Sedgwick on Damages*, 296; *Campbell vs. Fleming*, 1 *Ad. & El.* 40; *Voorhees vs. Earl*, 2 *Hill* 288; *Borrskins vs. Bevan*, 3 *Rawle* 23; 3 *Stew. & Porter* 322; *Story on Con.*, 551.

A plaintiff may recover for breach of warranty, in the sale of personal property, in an action on the case for damages, without returning or offering to return the property sold. *Boorman vs. Jenkins*, 12 *Wend.* 566; 1 *Term Rep.* 136; *Curtis vs. Hannay*, 3 *Esp.* 82; *Long on Sales*, 126; 1 *J. J. Marsh.* 437

As to the rule of damages, *Sedg. on Dam.* 290, 295, 401, 402, 564, *and cases cited*; 5 *Mason* 1; 2 *Hill* 288; 4 *Ib.* 626; 8 *Porter* 429; 8 *Johns.* 446; 7 *Wend.* 354.

Mr. Chief Justice WATKINS delivered the opinion of the Court

This was an action on the case, brought by McDaniel against the appellants, for deceit in falsely and fraudulently warranting a slave, whom they had sold to the plaintiff, to be sound. The declaration contained two counts. The first alleged, that, whereas on, &c., at, &c., the plaintiff, at their special instance and request, bargained with the defendants to buy of them a certain negro boy, slave, named *Elijah*, aged about twenty-two years, for a certain price, to wit: the sum of six hundred dollars,

and they, by then and there falsely and fraudently warranting said slave Elijah to be sound in body and mind, then and there sold said slave to the plaintiff, for the said sum of six hundred dollars, which was then and there paid by the plaintiff to the defendants, all of which fully appears, by a certain instrument of writing, commonly called a bill of sale, then and there executed by the defendants to the plaintiff, and which he showed to the court, in the words and figures following, to wit: "Know all men by these presents that we, Charles B. Johnson and Marshall Grimes, of Fort Smith, county of Crawford, State of Arkansas, for and in consideration of the sum of twelve hundred dollars, to me in hand paid, the receipt whereof is hereby acknowledged, do, by these presents, bargain, sell, and dispose of, unto James McDaniel, one negro boy, Elijah, aged twenty-two, one negro girl, named Betsey, and child, aged, the first, twenty, and the child ten months, all slaves for life, whom we warrant to be sound in body and mind; and furthermore do warrant the title to said slaves unto James McDaniel, his heirs and executors, against all claims of whatsoever kind. In witness whereof, we have hereunto subscribed our names, by our legal attorney, this 5th day of April, 1849.

[Signed.] CHARLES B. JOHNSON,
MARSHALL GRIMES,
By E. B. BRIGHT, *Attorney.*

[Witnessed.] J. M. SMITH,
WM. B. CRABTREE."

The declaration then proceeds to aver that in fact said slave Elijah, at the time of such said sale and warranty, was unsound in body and mind, and thenceforward continued to be unsound, and that the defendants by means of the premises, on, &c., at, &c., falsely and fraudulently deceived the plaintiff in the sale of said slave, whereby such slave afterwards, to wit, &c., not only became of no use or value to the plaintiff, but he was also put to great expense, amounting to a large sum, to wit: three hundred

dollars, for boarding, clothing, taking care of the slave, for medical attention bestowed upon him, &c.

The second count contains no allusion to the bill of sale, but sets out a parol contract of warranty, in all other respects similar to the first, with general conclusion to the plaintiff's damage, &c.

The issue upon the plea of not guilty, was submitted to the Court, sitting as a jury, for trial. The Court found for the plaintiff, assessing his damages to $703 50. The defendant moved for a new trial, because the verdict of the Court was contrary to the evidence, and not warranted by the law or facts of the case; and to the overruling of this motion, he excepted, setting out a mass of testimony adduced on the trial, all of which, including the bill of sale, set out in the first count of the declaration, was admitted without objection, and no question of law was raised during the progress of the trial. As usual in cases of this description, there was much conflicting testimony, as to the fact of the unsoundness of the slave, and the nature of his disease, but there is ample testimony to uphold the verdict, upon what we might suppose to be the substantial merits of the case. The evidence conduced to prove that the defendants below sent a number of negroes to the south in charge of Bright, as their agent, for sale. On the way, he exchanged some of the negroes for *Elijah* and the woman Betsey and child, and not long afterwards he sold them to the plaintiff below for $1200, and executed the bill of sale with warranty of soundness, as set out in the first count of the declaration. That the negro *Elijah* was unsound, and radically diseased, at the time of the sale to the plaintiff, and continued to be so, and proved to be of no value to him, and that a negro of his age, &c., would have been worth, at the time of the sale, from five to seven hundred dollars. That, though the agent of defendants had no authority to exchange, but only to sell, the negroes sent by him for sale; yet that, on his return to Fort Smith, he reported to his principals how he had disposed of the negroes, and accounted to them for the proceeds, including what he had received of the plaintiff for Elijah, and Betsey and child, which

the defendants received, and did not disapprove of what their agent had done.

Upon such testimony, a jury, or the Court in their stead, might well have found that the defendants were liable for the acts of Bright, as their agent, upon the principle that a subsequent ratification is equivalent to a prior authority. Nor would there be any cause to complain of the verdict for excess of damages, if we look only to the evidence as to the value of the slave, or of one answering his description.

The plaintiff had his election to sue in assumpsit, for a breach of the contract of warranty, or by action on the case, for a false warranty. It is true that the action of assumpsit is the more appropriate remedy where there is an express warranty, which may be said to negative the idea of fraud or deceit, upon which the ancient form of the remedy by action on the case was founded. The written contract of warranty merges any contemporaneous verbal representation, by which the plaintiff may have been induced to accept it, and it is, at the same time, a substantial pledge, on the part of the defendant, of his sincerity and his belief in the truth of the representation embodied in the warranty. And so, in this case, there is no evidence, tending to show actual fraud or unfair concealment, either on the part of the defendants, or the agent, who acted for them, even supposing they could be responsible, in any form of action, for a false and deceitful representation of their agent, not shewn to have been made by their direction or within the scope of his authority. But notwithstanding the marked distinctions, at this day, between case and assumpsit, there may yet be substantial reasons for admitting the authority of established precedents allowing the form of action in case for a false warranty; as if it be doubtful whether the representation to be proved will amount to a warranty in the particular case, and where none is implied by law; so that a count may be joined for the deceit, without warranty, and though there be an express warranty, a case may be supposed where the vendee would prefer to repudiate the contract altogether and sue for the fraud, or

would have to resort to the action on the case for deceit, in consequence of a representation concerning a patent defect, to which it may not extend.

But the leading case of *Williamson vs. Allison*, 2 *East* 446, also establishes that in the action on the case in tort for a breach of warranty in the sale of chattels, the deceit consists, or rather is implied, in the falsehood of the warranty, which being established, the defendant's knowledge of it is immaterial, and though averred, need not be proven. Whether we regard the warranty as a contract, or as the means of practising a deceit, whereby, if false, the purchaser may be induced to buy without due examination, it is the breach of it which is the gist of the action, and it may now be considered as well settled that the action on the case for a breach of warranty is governed by like rules, and is the same in its results as assumpsit upon the contract, or covenant, where it is under seal. Where there is an express warranty of soundness of a chattel, the measure of damages for a breach of it, in either form of action, is the difference between the value of the chattel, supposing it to be sound, and its actual value, according as it is proved to have been unsound, with interest on the amount so ascertained, and in the absence of any proof to the contrary, the price paid for a chattel, warranted to be sound, is the best evidence of its value as fixed by the parties to the contract: and in either form, the action, proceeding upon the contract, is an affirmance of it. When there is deceit without warranty, or a warranty accompanied by fraud, the vendee may disapprove the sale, and return the chattel or offer to do so, and recover such direct consequential damages, for the injury, as he may have sustained, in an action strictly on the case, the gravamen of which is not merely the falsity of the representation, but that it was false within the knowledge of the party making it. We apprehend that whenever the declaration, conceding that it may be framed in case, sets out a contract of warranty, though alleged to have been falsely and deceitfully made, the issue is upon the breach of the special contract, as it would be in assumpsit. If treated

as an action on the case for deceit, or breach of the general duty of fairness required of men in their dealings, which would avoid the contract, it is obvious that the plaintiff here must have failed for want of proof of the *scienter* in the defendants, or of any effort on his part to return the slave. The contract not being mere inducement to the fraud, but the foundation of the action, the plaintiff, in setting it out in his declaration, was bound to describe it correctly, and prove it as laid. If indeed the repugnancy does not appear on the face of the declaration, there can be no doubt (*Penn vs. Stewart*, 6 *Eng.* 41; *Turner vs. Huggins*, *Ib.* 337; *Buckman vs. Haney*, *Ib.* 340,) that there was a material variance between the allegations and proof respecting the contract, for which the bill of sale should have been excluded, if the objection had been made. The bill of sale being for three negroes for an entire consideration of twelve hundred dollars, it was incumbent on the plaintiff, suing for a partial breach of it in consequence of the unsoundness of one of the negroes, to describe the contract correctly, and then show by appropriate averments, the partial breach for which he claims to recover damages. If, after verdict, the term "price" may sometimes be considered as synonymous with value, or as meaning, in this instance, the parties at the time of agreeing upon the gross price to be paid for the three slaves, estimated Elijah being one of them, at six hundred dollars, still we do not find any evidence to that effect reported in the bill of exceptions. If the plaintiff in stating the breach, had thought proper to aver that the slave in question, supposing him to be sound as warranted, was of the value of six hundred dollars, whereas in his actual unsound condition he was of no value, the proof might have varied either way, the extent of the recovery depending upon the evidence; but according to the construction which seems unavoidable, the allegations of price, as made in the declaration, must be regarded as descriptive of the article, and therefore ought to have been proved.

A difficulty consists in determining the effect of the motion for new trial, with reference to the practice heretofore sanctioned by

this Court. We have held the motion for new trial to be an application to the sound equitable discretion of the Court below, and a waiver of all previous exceptions for error in matters of law reserved during the progress of the trial, yet they may be reserved by incorporating them as part of the grounds assigned of the motion for new trial. Here no such exceptions appear to have been taken or reserved, and the only ground of the motion for new trial was one addressed to the discretion of the Court below, and which elsewhere could not be reviewed on appeal or error. But while a judgment will not be reversed upon a question as to the weight of evidence, according to the settled practice of this Court, a new trial may be awarded where there is a defect or failure of evidence as to any material fact necessary to uphold the verdict. Even supposing the declaration here discloses a sufficient cause of action, upon which a valid judgment could be rendered, a good title defectively stated so as to be aided by the verdict, though the first count to which the evidence applies sets out two distinct and inconsistent contracts, the judgment would have to be reversed, because of the want of any evidence conducing to prove the allegation as to the price at which the plaintiff purchased the unsound slave. Upon the remanding of the cause, the plaintiff will have leave to amend his declaration, adhering to the form of action adopted in case.

DUGGINS VS. WATSON ET AL.

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If instructions asked by either party be refused, and he excepts, it devolves upon him to set forth, in his exception, all or so much of the evidence with reference to which it may have been asked, as will present the question of law designed to be made; else the appellate court would have to presume in favor of the judgment that the instruction was properly refused: unless the instruction contradicts or is inconsistent with the pleadings.

Where an instruction is given, purporting to be predicated upon the evidence, as that certain facts shall have been proven to the satisfaction of the jury, the appellate court ought to presume in favor of the court below, that such evidence, not set out in the bill of exceptions, had been adduced.

Where one steamboat is sunk by collision with another, and she contributes to such collision by her own carelessness or unskilful management, or the collision was the result of inevitable accident, and not occasioned by negligence or want of skill on the part of either boat, the owners of the other boat would not be responsible for any damage sustained by the sunken boat.

The shipper of goods on such boat, lost by the collision, is bound by the same principles of law as would be applicable to an action, by the owners of the sunken boat, for the injury done to her, and could recover in such case only as they would be entitled to recover.

But if the collision was produced by the wilful act of the officers and agents of the other boat, then engaged in the service of the owners, though without orders or against orders, the owners would be liable to the freighter for any injury to his property.

Error to Independence Circuit Court.

Hon. B. H. NEELY, Circuit Judge.

FAIRCHILD, for the plaintiff. No matter how much to blame the Cate Joyeuse might be, Duggins had a right to sue the defendants, if the Talma was in the wrong, as the injured party may sue one, some or all joint wrong doers. 1 *Ch. Pl.* (7 *Am. Ed.*) 91; *Marsh vs. Williams*, 1 *How.* (*Miss.*) 138; *Bishop vs. Ely*, 9 *J. R.* 294; *Goodrich vs. Rogers & Strader*, 5 *West. Law Journal* 20.

Because the plaintiff was a shipper and passenger on the Cate Joyeuse, to say that he cannot recover without the Cate Joyeuse could, is certainly giving greater liability to his position than his contract. (*Goodrich vs. Rogers & Strader, ub. sup.*) If such was the law, a passenger could not recover of a boat or railroad, for he would be identified with it. *Philadelphia & Reading R. R. Co. vs. Derby*, 14 *How.* 462.

The defendants are liable civilly for the consequences of the wrongful acts of their servants. 1 *Ch. Pl.* (7 *Am. Ed.*) 92; *Bussey vs. Donaldson*, 4 *Dall.* 207; 6 *Cow.* 192; *Goodrich vs. Rogers & Strader, sup.*; 14 *How.* 486.

This Court will presume that the instructions were made upon facts applicable to the law of the instructions; and whether they be law, is the only question.

BYERS & PATTERSON, contra. All legal presumptions must be indulged in support of the judgment and instructions of the Court: and this Court must presume that the instructions were correctly given, if there could be such a case made by the evidence as would support them; as the evidence upon which they were based, is not before the Court.

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

The plaintiff in error sued the defendants in an action on the case, to recover damages for the loss of some beef-cattle, belonging to him, and which had been shipped on board the Cate Joyeuse, bound for New Orleans. The declaration alleges that the Cate Joyeuse, descending the Mississippi river, met with the steamboat Talma, of which the defendants were the owners, and that, by the negligence and mismanagement of the officers, who had charge of the Talma for the defendants, she ran into and sunk the Cate Joyeuse, whereby the plaintiff's cattle were drowned and lost to him. The case being tried before a jury, on the plea of not guilty, the plaintiff excepted to three of the instructions given by the Court, at the request of the defendants,

which are as follows: "5th. If the Cate Joyeuse contributed to the accident or collision by her own carelessness or unskilful management, the defendants are not liable." "6th. The plaintiff being a passenger and shipper on the Cate Joyeuse, he is bound by the same principles of law as would the boat be, were she plaintiff in the action." "7th. If the collision was produced by the wilful act of the officers and agents of the Talma, the defendants are not liable. If the collision was the result of inevitable accident, and not produced by negligence, or want of skill, on the part of either boat, the plaintiff cannot recover, but must bear the loss himself."

The bill of exceptions taken by the plaintiff, does not set out any of the evidence adduced at the trial, nor is it made to appear upon the record, by agreement of the parties or otherwise, what the facts of the case were, or which the evidence may have conduced to prove; and it is therefore contended for the defendants in error, that no questions are presented for the consideration of this Court. The salutary rule of law is, that every judgment of a Court of competent jurisdiction is presumed to be correct, unless the party complaining that it is erroneous will make it appear by his exception, or in some other appropriate mode upon the record, wherein the alleged error consists. Hence, if instructions asked for by either party be refused, and judgment go against the party dissatified with the refusal, it devolves upon him to set forth in his exception all, or so much of the evidence, with reference to which it may have been asked, as will present the question of law designed to be made. Else the appellate court would have to presume, in favor of the judgment, that the instruction was properly refused, because there may have been no evidence upon which to predicate it. (*Collins vs. Fowler*, 2 *Ark.* 143; *Mason vs. McCampbell, Ib.* 506.) And the like result would take place where it could be inferred that the same charge in substance may have been given in other instructions. But where an instruction is given, which contradicts, or is inconsistent with the pleadings, if excepted to, the error may be apparent without

any reference to the evidence, as in *Danley vs. Edwards*, 1 *Ark.* 446, where an instruction given on behalf of the plaintiffs below exempted them from proving a material averment in their replication. Where an instruction is given, purporting to be predicated upon the evidence, and upon the hypothesis that certain facts shall have been proven to the satisfaction of the jury, the appellate court ought to presume, in favor of the court below, that such evidence, though not set out in the bill of exceptions, had been adduced; certainly it does not lie in the mouth of a party obtaining an instruction, the correctness of which is called in question, to argue that there may have been no evidence upon which to base it, but he is estopped from doing so, by his position and the undue advantage gained by the instruction, supposing it to be erroneous. In such case, if the instruction objected to be the only error complained of, no obligation devolves upon the party excepting to set out the evidence; on the contrary, it would only be a useless incumbrance of the record, if the instruction states clearly a proposition of law applicable to the case, and leaves it to the jury to say whether the evidence brings it within the principle asserted. (*Pennock and Sellers vs. Dialogue*, 2 *Peters* 15.) As there said, "the only question, then, is, whether the charge of the Court was correct in point of law." And so we doubt not, that if a party asks and obtains an abstract instruction, that is, one which enunciates a naked legal proposition not connected with any supposed state of case, according as the jury may find it, proved or not proved, or one which assumes the existence of the facts upon which it is predicated, thereby depriving the jury of their right to make the application of the evidence to the law given them in charge, he does so at his peril, and the law would presume that the opposite party, standing upon his legal exception to such a proceeding, has been injured by it. The enforcement of such a rule would discourage the practice of moving for a series of instructions, framed so as to meet every opposite, and, therefore, improbable state of case, that may be made by the evidence. In almost every case where the pleadings tend

to single and direct issues, the drift of the evidence, however tedious or contradictory, is to establish or repel the existence of a few prominent facts, and which are to be decisive of it according as the Court may charge the jury what the law is arising upon them. Thus, in the case now under consideration, we have, out of respect to the Court below, and the defendants in error, who moved for the instructions, to presume that there was evidence conducing to prove three inconsistent conclusions of fact supposed by them: 1st. That the Cate Joyeuse contributed to the collision; 2d. That it was occasioned by the wilful act of the officers of the Talma; and, 3d, That it was the result of inevitable accident. Where the instruction excepted to is abstract, or assumes facts, or, upon the facts supposed by it, is bad law, or is not applicable to the nature of the action, the error is as fully open to revision in the appellate court without the evidence, as if the instruction be one which contradicts the pleadings. But if the objection be that there has been no evidence adduced, to which an instruction given can apply, the party excepting, in order to overcome the presumption indulged in favor of the Court below, must set out the evidence, which, if it conduce, though in a slight degree, to prove the hypothesis, which, as a fact, the jury might possibly find, and which it was, therefore, proper to submit to them, and then the instruction, if not objectionable in point of law, will be sustained; but if there be no evidence on which to base it, the giving of the instruction, though good law, will be erroneous. (*Pogue vs. Joyner*, 2 *Eng.* 468; *State Bank vs. Williams*, 1 *Ib.* 162.) A practice has grown up for the Court to instruct the jury, at the instance of the defendant, to find, as in case of non-suit, or that the plaintiff has failed to make out his case in evidence, (*Hill vs. Rucker*, 14 *Ark.*,) an anomalous substitute for the peremptory non-suit, as well as a demurrer to evidence, neither turning the plaintiff out of Court against his will, nor taking the case from the jury, as upon a formal demurrer to evidence. If such an instruction be given, the plaintiff, preferring to have the benefit of the most favorable construction

that can be put upon the evidence in his favor, rather than to suffer a voluntary non-suit, may except to it and thereby elect to be concluded by the verdict, though in doing so he is required to set out all the evidence. And it is to be understood that these observations are not designed to extend to cases, where the unsuccessful party chooses to move for a new trial, and in which, according to the practice sustained by the repeated decisions of this Court, it would be the most prudent course, if not indispensable, for him to set out all the evidence.

Presuming, therefore, that the Court below would not have given the instructions complained of, unless there had been some competent evidence at the trial upon which to predicate them, it results of necessity that their correctness in point of law will have to be determined.

The plaintiff sued as a shipper on the Cate Joyeuse, and, considering the 5th and 6th instructions, and the latter clause of the 7th together, the Court below may be understood as charging the jury, that if they believed the Cate Joyeuse contributed to the collision by her own carelessness, or unskilful management, or that it was the result of inevitable accident, and not occasioned by negligence or *want of skill* on the part of either boat, the owners of the Talma would not be liable for any damage sustained by the Cate Joyeuse, and that the plaintiff is bound by the same principles of law, as would be applicable to an action by the owners of the Cate Joyeuse for the injury done to her. No fault is to be found with the tenor of this instruction. However equitable the course of decision in admiralty, which would apportion the damages, as between the vessels and the freighters or insurers of cargo in board, arising from collision, when occasioned by mutual fault or neglect, or was the result of inevitable accident, without fault on either side, may seem to be, and whatever conclusion might be proper, if the maritime law extended over the waters of the Mississippi, with courts competent to adjudicate the whole subject matter, to investigate and adjust the divers interests of all the parties interested, it seems to be well

settled that, in a common law action, a Court, proceeding according to the course of the common law, cannot exercise such powers, and the rule is, that if collisions happen, on land or on water, from unavoidable accident, as between the two vessels, or vehicles, each one injured must bear its own loss; and the rule is the same where the collision is occasioned by the mutual fault of both; not indeed that the plaintiff complaining of the injury must have been wholly free from blame, because, though in some degree in fault, or negligent, as for example by being in a wrong position, that will not excuse the defendant if there be a want of ordinary care, on his part, to avoid a collision, much less can he take advantage of it as a license to commit a wanton aggression. In such case, the injured vessel, though in fault, is not considered as having contributed to the collision. But we are not to presume that there was any evidence in the cause to render such a qualification necessary, and, according to the terms of the instruction, the Cate Joyeuse must have contributed by her own carelessness or unskilful management. Presuming in favor of the Court below, that there was no evidence conducing to show that it was in the power of the Talma to have kept clear of the Cate Joyeuse, there can be no reason to doubt the correctness of the general proposition asserted by the instruction—a number of the authorities in support of which, are collected in *Broadwell vs. Swigart*, 7 *B. Mon.* 39. Conceding that if, as between the two vessels, the Talma had been the one in fault, so that her owners would have been liable to those of the Cate Joyeuse, they would also be liable to the plaintiff in this action, yet the law seems to be that for an injury done to freight by a collision, the owner of it must share the fate of the vessel, on board of which his goods are shipped, and cannot recover unless upon the same state of case as proved, her owners would be entitled to recover. The vessel upon which his goods are shipped may be liable to him, as well for a tort by which they are injured, as upon the contract of affreightment, and we may suppose that, for an injury done, by collision, to person or property, disconnected from either boat,

where both are in fault, there might be redress for the tort by action against any of the owners of both or either of the boats; but the owner of goods, entrusted to a carrier, and who is for that employment regarded as his servant or agent, cannot, according to the common law, which admits of no enquiry as to the degree of fault, and makes no provision for apportionment of damages or contribution among tort feasors, hold another liable for the whole damage resulting from an injury, to which he, or his own bailee, may have contributed or aggravated, and consequently can have no recovery at all. In *Vanderplank vs. Miller*, 1 *Mood. & Mal.* 169, Lord TENDERDEN, without hesitation, declared that such was the law; and in *Sampson vs. Hand*, 6 *Wharton* 311, a case altogether analagous to the present one, Chief Justice GIBSON illustrated the rule, not without reason and sustained by authority, though he admitted the argument against it seemed plausible. The only case cited for the plaintiff here, asserting a different doctrine, is that of *Goodrich vs. Rogers and Strader*, 5 *West. Law Jour.* 20, in one of the courts of common pleas of Ohio, which may have been acquiesced in by the eminent counsel engaged, as we do not find any subsequent trace of it in the Ohio Reports. That was an action, for an injury to his person, by a passenger on one of two colliding boats, both of which he alleged to be in fault, against the owners of the two boats, joined as defendants. The presiding judge properly charged the jury that, as against the owners of the boat on which he was a passenger, his right to recover did not depend upon the breach of any contract to transport him, but also asserted the questionable proposition, that, "If the act was caused by the negligence of both pilots, both owners are liable, and each is liable for the whole damage." Possibly this may be the law, applicable to a passenger; because having volition and the power, whether from wilfulness or ignorance, of placing himself in the way of danger, there ought not to be the same measure of accountability for his safety as there would be for the carriage of passive or inanimate freight, wholly under the control of the carrier; and this might

have the effect to enlarge the recourse of the passenger, as one occupying an independent position, against all persons contributing to the injury. But freight is committed to the carrier as bailee. True, the freighter, or all the freighters of goods, on a vessel, have no control over the officers in charge of her, any more than they would have over the owner of the vessel or vehicle were he managing it in person. Neither does the sole charterer of a ship; the owner of which, in either case, if he retains the control, undertakes that he, or the substitutes appointed by him, will be trustworthy and competent to navigate her properly. Hence, the maxim of *respondeat superior*, does not apply to the freighter for the misconduct of those having command of the vessel, yet the carrier, being responsible for the safe carriage of freight, and held to a strict accountability, has a duty to perform about it, a right of action respecting it, and, to that extent, as against third persons, takes the place of the owner, who, if engaged in the transportation of his own goods, could not recover for an injury occasioned by his own fault.

The Court also charged the jury, that if the collision was produced by the wilful act of the officers and agents of the Talma, her owners are not liable. We understand it to be implied in the terms of this instruction, that the officers of the Talma, at the time of the collision, were engaged in the service of the defendants; being in charge of the boat, and navigating it, the presumption would be, that they were employed about the business of the owners, and acting within the scope of their authority. Obviously the fact, to which it directed the enquiry of the jury, was whether the trespass was wilfully committed by the officers of the Talma, and not whether they were at the time exercising an independent employment. In a variety of cases, according to their peculiar circumstances, it may be difficult, in view of adjudged cases, to say whether the servant or agent was or was not acting in the employ of the principal, and the determination of it has often been swayed either way by the apparent hardship of the particular case. But, conceding the premises laid down in

this instructiou, the only safe rule of law is, that the master is liable for the tortious act of his servant, engaged in his employment, though done wilfully, without orders, or even against orders. If the servant's disobedience of instructions will exonerate the master, the proof, easily made, virtually does away with the maxim of *respondeat superior*, designed for the protection of innocent third persons, and obliging the principal to be careful in the employment of agents, to whom he entrusts the means of committing an injury. In the case cited of *Philadelphia and Reading R. R. Co. vs. Derby*, 14 *Howard* 468, Mr. Justice GRIER, delivering the opinion of the Court, urges another consideration, equally applicable to the management of steam power on water as on land, and to all officers, though having different duties, engaged in its management. He says: "The entrusting such a powerful and dangerous engine as a locomotive to one who will not submit to control and render implicit obedience to orders, is, itself, an act of negligence, the *causa causans* of the mischief; while the proximate cause, or the *ipsa negligentia*, which produces it, may truly be said, in most cases, to be the disobedience of orders by the servant so entrusted."

For the error in giving so much of the 7th instruction, the judgment is reversed, and the cause remanded, to be further proceeded in according to law, and not inconsistent with this opinion.

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HERSHY VS. THE CLARKSVILLE INSTITUTE.

According to what seems the proper construction of the statute concerning attachments, the claimant of personal property, seized under the writ, and who has not been summoned as garnishee, may prosecute his claim to the property as an independent proceeding, the determination of it not affecting the right of property as between the defendant in the attachment and the claimant or third person: and so where a garnishee, in answer to the plaintiff's allegations, claims property in his hands.

Though the owner of the property, not choosing to interplead, may obtain redress, in damages, for the injury he has sustained; or may perhaps follow his property in the hands of a purchaser, if he elects to assert his claim by interplea, he, as well as the plaintiff, ought to be bound by the determination, and either may appeal from the judgment.

The trustees of the Clarksville Institute, which is a corporation for a benevolent object, having no personal or pecuniary interest in the property or assets of the corporation, were competent witnesses in a suit to which the corporation was a party.

The recognizors in an appeal bond are incompetent witnesses for the appellant, but if no objection be made in the Court below for that cause, it cannot be taken in the appellate court.

Appeal from Johnson Circuit Court.

The Hon. A. B. GREENWOOD, Circuit Judge.

FOWLER, for the appellant. The trustees of the Institute, in whom all its property vested under the charter, were incompetent as witnesses, on the ground that they were parties to the suit—parties on the record having a direct interest, to the extent of the costs at least. *Phill. Ev.* 57; 1 *Greenl. on Ev., secs.* 329, 330; *Pet. C. C. R.* 307; 4 *How. U. S. Rep.* 417; 5 *Ib.* 94.

Corporators, as such, in such cases, being the real parties to the suit, are not competent witnesses. 13 *Petersd. C. L.* 413; 1 *Greenl. Ev., sec.* 175.

Those who were bound in the recognizance for the appeal, were utterly inadmissible as witnesses. They were directly interested

in the defeat of Hershy's suit; and, in the event of his success, were liable to have judgment rendered against them, in that suit, for the whole amount in controversy, with all costs of both courts. *Scott vs. Watkins et al.*, 2 *Smedes & Marsh. Rep.* 240; 1 *Greenl. Ev.*, *secs.* 333, 392 *to* 395.

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

The appellant, Hershy, instituted suit, by attachment, before a justice of the peace, against James Champlin; and among the effects seized by the officer, under the writ of attachment, was a piano, which was claimed by the Clarksville Institute, who accordingly filed an interpleader, and the justice, before whom the process was returnable, immediately proceeded to enquire into and determine the right of property. The decision there was, that the property, claimed in the interplea, belonged to Champlin, the defendant in the attachment, and, as such, subject thereto, and costs were adjudged against the claimant. From this decision, the claimant appealed to the Circuit Court, where, upon trial of the issue upon the interplea, the piano, in question, was found to be the property of the Institute, and final judgment for costs in both courts was rendered against the plaintiff, in the attachment, who prosecuted the present appeal, upon exceptions to the decision of the Circuit Court, admitting certain persons to testify in behalf of the corporation, against his objection to their competency.

The right of property was tried before the justice, and the appeal from his decision allowed, before the return day of the writ of attachment; so that it does not appear upon this record, whether the plaintiff obtained judgment against Champlin, or that any further proceedings were had in the principal suit. According to what seems to be the proper construction of the statute concerning attachments, the claimant, other than the defendant, of personal property, seized under the writ, and who has not been summoned as garnishee, may prosecute his claim to the property as an independent proceeding, and without reference to

any controversy between other parties, the determination of it not affecting the right of property as between the defendant in the attachment, and the claimant, or third persons. Nor are the rights of the defendant or third persons affected, where a garnishee, in answer to such allegations as the plaintiff may exhibit against him, claims property in his hands. But the person summoned as garnishee retains, unless having no claim he elects to surrender them, the effects alleged to belong to the defendant in the attachment, to which suit the contest between the plaintiff and the garnishee is ancillary, so that no judgment can be entered or execution issued against the garnishee until after the plaintiff has obtained judgment against the principal defendant, and for no greater amount. Where property belonging to a third person, is seized by virtue of a writ of attachment, his claim, by way of interplea, proceeds upon the ground of a wrongful injury to his right of possession. As such wrongs are liable to be done, and the statute (*Digest, ch.* 136, *sec.* 2) forbids that any cross replevin, or replevin for property in the possession of an officer, by virtue of any legal authority, shall be brought, *Spring vs. Bourland*, (6 *Eng.* 658,) approving *Goodrich vs. Fritz*, (4 *Ark.* 325,) the trial of the right of property is allowed as a summary, though where the attachment is from a Circuit Court, not informal, substitute, (*Neal vs. Noland*, 4 *Ark.* 459,) for the remedy by replevin, thus taken away. The property seized, and to which an adverse claim is set up, is supposed to remain in the custody of the officer, ready to be delivered to the claimant, or held subject to the attachment, one or the other consequence following according as the right of property may be determined. Though the owner of the property, not choosing to interplead, or as it may happen, not having an opportunity of doing so, may obtain redress in damages, for the injury he has sustained, by action of trespass or trover, or may perhaps follow the specific property in the hands of any purchaser under the attachment, yet if he elects to assert his claim by interplea, he, as well as the plaintiff, ought to be bound by the determination. The finding does not affect the title of the pro-

perty, as between the absent defendant and the claimant, or garnishee, and the rights of third persons are in no wise affected; but as between the plaintiff and the claimant, the determination, with the collateral consequences of a judgment, is conclusive that the thing in dispute is or is not the property of the claimant. The seizure of the property, to which the claimant asserts title, is, in whole or in part, the foundation of the jurisdiction in attachment, and the source from which the plaintiff is to obtain satisfaction of his demand; and, on the other hand, unless the proceedings be a nugatory one, the claimant is estopped by the decision, from any after assertion of his title, as against the plaintiff, or any person acquiring title by sale under the attachment. From such a judgment, either party to the issue, not only the claimant, as held in *Mitchell vs. Woods*, (6 *Eng.* 180,) but the plaintiff, also may appeal.

The plaintiff moved for a new trial of the issue upon the interplea, upon the ground that the Court had admitted illegal or incompetent testimony to go to the jury, and it appears from the bill of exceptions, taken to the overruling of the motion, that he had objected at the trial to the competency of certain witnesses to testify in behalf of the corporation, of which they were trustees, and therefore interested in the event of the suit. The charter, granted by act of the General Assembly, approved January 1st, 1849, being in evidence on the part of the claimant, and brought upon the record by the bill of exceptions, it is clear that the Court below properly overruled the objection. The Institute was incorporated for the education of the blind. The corporators have no personal or pecuniary interest whatever in the property and assets belonging to it, of which they are mere trustees in aid of a benevolent object. The corporation being the party to the record, and liable for the costs of suit, there was no reason for excluding, on the score of interest, the individuals composing it.

But it is assigned, for error, that some of those witnesses had entered into recognizance for the corporation upon appeal from the

justice of the peace to the Circuit Court, and consequently had a direct pecuniary interest in the event of the suit.

If this objection had been taken in the Court below, it must have prevailed. But it seems to have been overlooked by the parties, and the witnesses themselves, if we may judge from their statements, on *voir dire*. The objection, not having been made there, cannot be entertained in the appellate court; more especially as it was one which, if taken at the trial, might have been obviated by the substitution, with leave of the Court, of other persons as recognizors, in lieu of those offered as witnesses; or the claimant may have been able to dispense with their testimony by adducing other evidence. Affirmed.

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CUMMINS AND FENNO VS. GARRETSON.

The failure of the obligee or payee to sue the principal debtor, within the time prescribed by the statute, will not release the security where the notice to sue, given by the security, under the statute, is served, not upon the obligee or payee himself, but upon his attorney at law, who has the note for collection.

Appeal from Pulaski Circuit Court.

Hon. WM. H. FEILD, Circuit Judge.

PIKE & CUMMINS, for the appellants.

S. H. HEMPSTEAD, contra.

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

This was an action of debt, by an assignee, against two of the makers of a promissory note of the tenor following:

"LITTLE ROCK, ARK., February 12th, 1851.

Ninety days after date, we promise to pay John H. Hammock, the sum of two hundred and fifty dollars, for value received, with ten per cent. interest, after due, until paid.

[Signed,] C. TROUSDALE.
E. CUMMINS.
JOSEPH FENNO.

(Endorsed,) Pay John W. Garretson, or order.
JOHN H. HAMMOCK."

The action was commenced on the 21st day of February, 1852, and the defendants, pleading *nil debet*, upon the trial of the cause at December term, 1852, it was submitted to the Court upon an agreed statement of facts, ordered to remain on file and constitute a part of the record; and, as we understand the terms of the submission, it was stipulated that, under the general issue, either party was to have the benefit of any legal conclusion from the facts stated, with like effect as if such matter had been specially pleaded or replied. The Court below decided that the defendants were liable, and gave judgment accordingly, to which they excepted.

It appears that in the inception of the note sued upon, the defendants were the securities of Trousdale. He was insolvent, having no means except his salary as Swamp Land Commissioner, which was payable at the Treasury, in scrip, not subject to execution, or process of garnishment. Upon his appointment, he had gone to reside at Helena, but the duties of his office called him to different parts of the State; so that he frequently came to Little Rock. The plaintiff resided in another county, 120 miles from Little Rock.

On the 1st March, 1852, eight days after the institution of the suit, the defendants gave a notice in writing, addressed in the

alternative, to the plaintiff or his attorney, Mr. Hempstead, informing him that they were merely bound as the securities of Trousdale in the note in question, and requiring him forthwith to commence suit against the principal debtor and other parties liable; and which notice was served upon Mr. Hempstead, the plaintiff's attorney, in whose hands the claim had been placed for collection. On the 20th of March, the plaintiff came within the county of Pulaski, and, being at Little Rock, was informed, by his attorney, that such notice had been served upon him. Suit might have been instituted in Phillips county against Trousdale, within thirty days from the time the notice was served upon the attorney. On the 29th of March, the plaintiff caused a separate suit to be instituted against Trousdale, in Pulaski county, in which the first summons, to June Term, was returned *non est.* An alias, returnable to December term, was served, but not in time to obtain judgment at that term. Thus stood the case against Trousdale, at the time the action against his co-promissors, the present appellants, was tried.

According to statutory regulations, the note in question was several as well as joint, and the plaintiff could sue all the parties liable, or as many of them as he thought proper, so he have but one satisfaction of the debt. It is not claimed that the appellants did in fact sustain any injury by the omission to sue Trousdale, or any failure to do so, upon request of the surety, from which the law might employ a new contract or agreement, between the creditor and the principal debtor, whereby time was extended to the latter, and which operates as a release to the surety, available to him as a defence at law, to the extent that he could prove a diminution of the assets of the principal during the delay, and a consequent loss of recourse to the security, if then compelled to pay the debt, (*Warner vs. Beardsley*, 8 *Wend.* 194; *Huffman vs. Hurlbert*, 13 *Ib.* 377,) so as to bring this case within the principle first established in *Pain vs. Packard*, (13 *John.* 174,) and as that was the adoption, by courts of law, of the rule supposed to prevail in courts of equity, (*King vs. Baldwin*, 17 *Ib.* 391,)

the appellants have not shown themselves entitled, on that ground, to be relieved in either forum. It is only by virtue of the statute, whereby a security, on any bond, bill, or note, for the payment of money or property, may, by notice in writing, require the person having the right of action upon it, forthwith to commence suit against the principal debtor, and other party liable, and which, substituting presumption for proof of actual damage, absolutely exonerates the security, if suit be not commenced within thirty days after service of the notice, and proceeded in with due diligence, in the ordinary course of law, to judgment and execution, (*Digest, Title Securities, secs.* 1 *and* 2,) that they can claim to be discharged. As this statute introduces a new rule in derogation of the common law, and going beyond any principle admitted to prevail in equity, without presuming to debate its polity, it is not going too far to say, in accordance with established rules of interpretation, that the remedy afforded ought to be strictly pursued, and the provisions of the statute substantially complied with, where the security claims his discharge upon the purely legal defence of notice, without any consequent injury to himself by reason of the failure of the creditor to sue an insolvent principal, within the time prescribed. And such was the opinion of this Court in *Kelly vs. Matthews*, (5 *Ark.* 230,) holding that where there are several obligees named in the instrument, a security, seeking to bring himself within the statute, must cause the prescribed notice to be served upon the whole of them. So in *Adams vs. Roane*, (2 *Eng.* 360,) where notice to bring suit was served on the clerk, at Van Buren, to the assignees of the Real Estate Bank, and he informed one of the assignees of it, the Court said: "It certainly cannot be contended that a service upon the clerk could operate as a notice to the appellees; the clerk cannot be said to have the right of action. It does not appear that Drennen was served with the notice, in accordance with the statute, as he was only informed by the clerk that he had himself received such notice. The record does not inform us how far the clerk was authorized to waive or control the rights of the trustees,

and we are not at liberty to take judicial notice of any such power."

That case must be decisive of the present one, unless the legal relation between attorney and client be such as to make the notice effectual.

The statute provides that certain notices, during the progress of a suit, may be served upon the party or his attorney of record. The client is bound by the admission of his attorney in pleading, or evidence connected with the cause and admissible upon the record. But in the absence of any positive regulation of law, there is no authority for holding that notices of this description can be effectually given to the attorney before suit, or during the progress of a suit, so as to be notice to the client, whereby his interest may be injuriously affected, and a corresponding duty and liability imposed upon the attorney, to exercise a discretion about the bringing of a suit, which properly belongs to the client. The attorney is charged with the conduct of a suit, which is presumed to be brought under instructions from the client; if any discretion beyond this be specially delegated to him, he has it as agent or attorney in fact, and that should be made to appear by proof. The security has no reason to complain of hardship in being required to pursue the statute strictly. He may, as he could before its enactment, comply with his contract, and by paying the debt, take into his own hands the remedy against the principal; nor does the omission to give the notice, under a cumulative statute, deprive him of any right to be relieved, whether at law or in chancery, against unconscionable acts of the creditor; such as his refusal to sue upon request, his abandonment or neglect of collateral securities, his valid agreement for extension of time, which do, in fact, or in contemplation of law, occasion loss to the security, and may, without the aid of the statute, operate to release him. The notice here not being in compliance with the statute, because not served upon the person having the right of action, or any agent of his, authorized to bind him in that respect, might have been wholly disregarded.

It is sufficient to rest the affirmance of the judgment upon that conclusion, without going into an examination of other questions argued; whether one, claiming to be security, and really such, can avail himself of the statute for any purpose, as against an assignee, where the relation of principal and security does not appear on the face of the instrument, and the assignee is not shown to have taken it with knowledge of that fact; and also, conceding that a security may, at any time after a separate suit brought against himself, well require the creditor, by notice under the statute, to bring suit against the principal, whether if his exoneration depends upon any subsequent want of diligence in the prosecution of the suit against the principal to final judgment and execution, the relief is more properly cognizable in chancery than at law. Affirmed.

LEFILS & CHRISTIAN VS. SUGG.

Where no question of law is raised during the progress of the trial, nor motion made for new trial, no question is presented, by an exception overruled to the finding, for the consideration of the appellate court, as decided in *The State Bank vs. Conway*, 13 *Ark.* 344.

An infant is personally responsible for necessaries purchased by him; but his father is not liable in such case, unless upon a contract, express or implied, to pay for them. Such contract will not be implied from the fact that the father had given authority to his son to purchase an article of clothing, and had paid the amount of an account for goods sold the son, but which was not presented to and approved by him.

Appeal from Union Circuit Court.

Hon. SHELTON WATSON, Circuit Judge.

HARDY AND CARLETON, for the appellants, contended that the

appellee, by allowing his sons to trade for themselves for the year 1850, and by paying the account so made, constituted them in law his agents, and became liable to pay the account subsequently made by them with the same parties; and cited *Story on Agency, sec.* 45 *and* 55; 2 *Kent Com.*, 614, 615; 2 *Greenl. Ev., sec.* 65; 17 *Mass.* 98; 15 *East.* 34; 4 *Conn.* 288; *and McKenzie vs. Stevens,* 19 *Ala.* (*N. S.*) 691.

QUILLIN & LYON, for the appellee, contended that the case of *McKenzie vs. Stevens,* (19 *Ala.*,) referred to by the appellants, had no bearing on this case, because in that the account made by the son was paid *without objection;* and in this, the account paid by the appellee was not presented to him, nor was he told what was its character, but it was to have been shown to him subsequently.

That this is not such a case as this Court can review, and the rule in *State Bank vs. Conway,* 13 *Ark.* 344, applies.

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

There are two grounds, upon either of which, the judgment here appealed from will have to be affirmed.

The case was submitted for trial to the Court sitting as a jury, who, after hearing the evidence, found for the defendant, "to which finding," as the bill of exceptions states, "the plaintiff excepted, but the Court overruled the exception, and gave judgment for the defendant." As no question of law was raised during the progress of the trial, nor any motion made for new trial, so as to enable this Court to review, in that mode, the verdict of the Court, or jury, if manifestly against the weight of evidence, or without evidence to support it, the case comes directly within the decision in the *State Bank vs. Conway,* (13 *Ark.* 344,) and nothing is presented for the consideration of this Court.

But as this course may have been adopted before the promulgation of that decision, and while the practice remained in a state

of uncertainty, it may be more satisfactory to consider the points argued, and intended to have been saved in the Court below, where, as in the *State Bank vs. Conway*, it can be done, without reversing the judgment. Supposing, then, the plaintiffs had moved for a new trial, there was a question of fact to be determined, by the Court or jury, upon evidence, which, to say the least of it, left the issue doubtful, and in such case this Court, according to its repeated decisions, will not invade the province of a jury by disturbing the verdict.

Really, no question of law is presented by the record. The one argued may be understood from the following state of facts, extracted from the testimony, set out in the bill of exceptions: Two minor sons of the defendant took up goods on a credit, to the amount of $47, from the store of the plaintiffs, in the year 1851, the same being, at the request of the boys, charged to account of their father. During the previous year, 1850, they had, in like manner, bought goods to the amount of $35, including a blanket coat, which one of the sons had bought there by direction of his father; and one of the plaintiffs, meeting with the defendant in New Orleans, called upon him for payment, without exhibiting the account, or telling him what it was for, or who got the goods, and he paid it with an assurance that the plaintiffs would show him the account on his return home, and make it right. That account was never shown to the defendant, and he did not call for it. He never gave the plaintiffs any order to let his sons have goods on his account, or any notice not to do so.

It does not appear whether the sons of the defendant were living with him, or away from home, or whether he knew that they had used, or worn the articles, from which any assent, on his part, to the purchase of them, could be inferred. There is no attempt to prove that the articles in the then situation, whatever it might have been, of the youths, were necessary for their subsistence or comfort, nor is there any evidence, as to the condition in life of the defendant, or conducing to show that the articles purchased by his sons were such as his means would afford, and suitable to

the style in which he lived. Adjudged cases are to be met with, the decisions in which appear to have been influenced by such circumstances.

But, on examination, all those cases are found to be based upon contract, express or implied, and are referable to the doctrine of agency, either by means of a prior authority, from the parent, or his subsequent ratification, notwithstanding some *dicta* favoring the idea that he may be sued, upon his implied obligation for necessaries, which any person may choose to furnish to the child in want of them. The father, if of sufficient ability, may be required to maintain his children, (*Rev. Statute, Title Apprentices, sec.* 4; *Ib. Title Insane Persons, sec.* 48,) and if not of sufficient ability, they are to be bound out; but, up to the time, when his refusal or neglect to do so justifies the supervision of the Probate Court, having jurisdiction of such matters, the manner of discharging this important duty, "So well secured by the strength of natural affection, that it seldom requires to be enforced by human laws," is left to his own discretion. Under ever varying circumstances, there can be no legal standard for necessaries, and it would be subversive of parental authority and dominion if interested third persons could assume to judge for the parent, and subject him to liability for their unauthorized interference in supplying the supposed wants of the child. See *Mortimore vs. Wright*, 6 *Mees. & Welsby* 482; *Gordon vs. Potter*, 17 *Verm* 350; *Raymond vs. Loyl*, 10 *Barb. Sup. Ct. Rep.* 484.

Conceding that the fact of paying a previous account, without objection or further enquiry, is admissible in evidence against the defendant, to prove a course of dealing, and a circumstance from which might be inferred a continuing authority to pursue it, still it is only a circumstance, and by no means a conclusive one. It is true the liability of the infant, being only for necessaries, as against him, that is the essential enquiry; while the liability of the parent, being upon the contract, that alone needs to be established. But when the authority of the infant, acting as agent, to bind the parent, has to be implied from a previous course of

dealing, it may become important to understand what that was, in order to ascertain whether the transactions be consistent. Because the infant has some authority, it is not necessarily unlimited in the amount or description of the goods, which he may take upon the parent's account. If the person supplying the infant must conform to an express authority, so he should endeavor to pursue an implied one, else there would be no protection for the principal. A direction to supply articles, which may be superfluous and extravagant, could not be inferred from the fact of paying previous accounts for such as may have been necessary or useful. Looking at the bill of particulars of the demand in suit, and in the absence of any proof to the contrary, it is not to be presumed that the bulk of the articles, for example, kid gloves, cologne, fiddle-strings, bridles and spurs, walking-canes, and powder-flask and caps, a silk cravat, and a silk and linen coat, were such as the boys needed, or their father would have ordered for them.

In the most favorable view of the case for the appellants, the judgment ought to be affirmed.

DANLEY VS PIKE.

The notes of the Bank of the State of Arkansas, issued in the years 1838 and 1839, are receivable for taxes due to the State of Arkansas.

Appeal from Pulaski Circuit Court.

Hon. WILLIAM H. FEILD, Circuit Judge.

JORDAN, for the appellant.

PIKE, contra, cited *Woodruff vs. Trapnall*, 10 *How. S. C. R.* 203.

Mr. Justice SCOTT delivered the opinion of the Court.

At the June term, 1851, Pike filed his petition in the Pulaski Circuit Court, setting out the amount of the State and county taxes assessed against him for that year. That the tax-books, with the proper warrant annexed for their collection, were in the hands of Danley, as sheriff and collector; that, on the 26th of July, of that year, he had tendered to the sheriff certain funds, sufficient to pay the whole amount, among which were certain Bank notes, issued by the *Bank of the State of Arkansas*, in the years 1838 and 1839, amounting to the sum of forty-five dollars, which he had tendered towards the payment of his State tax, which exceeded that amount; that Danley received all the funds tendered except the Bank notes, which he refused to receive, and would levy, and sell the relator's property to make that amount unless prevented: and as the relator had no other adequate and complete remedy, he prayed for an alternative writ of mandamus. This was issued in pursuance of his prayer, which Danley returned into Court, admitting the truth of the matters recited therein, and for cause of refusal showed that he was advised that the Bank notes in question were not by law receivable for taxes due the State of Arkansas, and that if he should receive them, and give the relator acquittal, he would violate his duty as sheriff and collector of taxes, and subject himself to grievous loss and penalties. To this a demurrer was interposed by the relator, and joined in by the respondent, and, upon the hearing, the Court ordered a peremptory mandamus, and Danley appealed to this Court.

The question of law involved was decided by the Supreme Court of the United States in the case of *Woodruff vs. Trapnall*,

taken up by writ of error from this Court, and reported in 10 *How. R. p.* 203. And in accordance with that decision, the judgment of the Court below in the case at bar will be affirmed.

WOODRUFF VS SANDERS AD. OF PETTIT.

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The true construction of the act of 5th March, 1838, in force 20th March, 1839, (*Rev. Stat., ch.* 51,) is, that as to judgments rendered *after* the passage of that act, the presumption of payment was conclusive, after the expiration of ten years, unless repelled by part payment or a written acknowledgment; while, as to judgments rendered *prior* to the passage of that act, the presumption should be repelled, not only by those means, but by all the other means allowed at common law.

Error to the Circuit Court of Pulaski County.

Hon. WM. H. FEILD, Circuit Judge, presiding.

TRAPNALL, for the plaintiff, contended that, under the plea of payment, the defendant was bound to prove actual payment; and that he could not take advantage of the presumption of payment from lapse of time, under the statute, except upon special plea.

PIKE & CUMMINS, for the defendant, relied upon the statute of 5th March, 1838. *Rev. Stat., ch. XCI, secs.* 29 *and* 31.

Mr. Justice SCOTT delivered the opinion of the Court.

On the 29th of August, 1849, Woodruff sued out a *sci. fa.* from the Pulaski Circuit Court, to revive a judgment recovered

in his favor in that Court, on the 26th day of July, 1833, against Pettit. Several pleas were interposed, upon which issues were joined, among them the plea of payment. Subsequently, all of these were withdrawn, except the last named, upon which alone the case was heard and determined by the Court, without the intervention of a jury; and, upon the issue joined upon this plea, having been found for the defendant, judgment was rendered accordingly. A motion for a new trial was made upon the ground that the finding and judgment were against law and evidence, and that the deposition of Tunstall, which proved the payment, as plead, ought to have been excluded on the objection taken, "that the interrogatories," which appear in the deposition to have been written out, to be propounded to him, "were not answered," although it does appear that the witness was sworn "to testify the truth, the whole truth, and nothing but the truth, in regard to the matters in controversy," and accordingly made a connected and minute statement of all that he professed to know.

It is insisted, on the part of Pettit, without conceding the validity of this objection to the deposition of Tunstall, that the finding and judgment of the Court are sustained without regard to this deposition. And this, upon either of two distinct grounds, to wit: *First*, If the provisions of our statute regulating the common law rule, as to the presumptions of payment, does not reduce the period for a conclusive presumption of payment down to ten years, as to judgments rendered prior to the passage of that act, (which was the 5th of March, 1838,) but leaves it at twenty years, as at common law, then that the efflux of upwards of sixteen years, in combination with the facts in proof, that Pettit, from the day of the rendition of the judgment henceforward, resided in the county of Chicot, and was, during the whole time, in good circumstances, and amply able to pay all his debts, and that an execution, to that county, was issued in the year 1833, soon after the rendition of the judgment, which could not now be found in the clerk's office, fully authorized the Court below, sitting as a jury, in the absence of all rebutting testimony,

of which none was offered, to find in favor of the plea of payment, as was done. *Secondly*, If, on the contrary, the statute did reduce the period for a conclusive presumption to ten years, as to judgments rendered previous to its passage, then the Court was authorized to find as it did, in the absence of all rebutting testimony, upon the ground of the mere efflux of time alone, without any aid from the other facts in proof, much less any aid from the deposition of Tunstall.

At common law, a debt was presumed to be paid if unclaimed and without recognition for the space of twenty years, in the absence of any explanatory evidence; this rule was applied, not only to bonds for the payment of money, but to mortgages, judgments, warrants of attorney to confess judgment, decrees, statutes, recognizances, and other matters of record. Before the expiration of twenty years, the law did not make the presumption; nevertheless, the jury, upon an issue of payment, might infer the fact of payment from a lapse of time, short of twenty years, *in combination* with other circumstances in evidence, such as the settlement of an account in the intermediate time, or the obligee being poor and the obligor independent, or the parties residing in the neighborhood of each other, without any demand being made, and other like circumstances—the evidence to be more or less strong, in aid of the presumption from lapse of time, as the time is more or less short of twenty years. But although the full period of twenty years had elapsed, the law would not conclude that the debt had been paid, if the presumption was rebutted by evidence, such as proof of the defendant's recent acknowledgment of the debt, or of payment of interest within twenty years, or of demand made within that time, or of suit brought and the writ returned *non est inventus*, or that, during part of the time, the plaintiff was an alien enemy, and disabled to sue, or that the courts of justice were closed, and the country in the tumult and confusion of war and revolution.

Thus stood the law, until our statute of the 5th March, 1838, in force March 20th, 1839, (*Chap. XCI, Rev. Stat. of* 1839, *p.*

531,) which cut down the period, for this presumption of *law* from twenty to ten years, upon judgments and decrees to be rendered after the passage of that act, and also provided that, that presumption should only be repelled by proof of part payment or of a written acknowledgment made within that period (30,) and which put all rights of action, upon *every instrument for the payment of money* OR *property*, upon the same footing (31). Thus regulating this common law doctrine so as to make it approach more nearly to the rule given by the statute of limitations, which perhaps first suggested it, and in the wake of which it has followed. (See observations, as to this, in *Brian vs. Tims*, 6 *Eng. R.*, *p.* 600, 1 and 2.) These provisions of the statute (both repealed by the act of the 14th December, 1844,) are easily enough understood, but there was a further one, as to judgments rendered *prior* to the passage of the act, that the presumption of payment should apply to these in the "same manner as such presumption applies to sealed instruments," that is not altogether so clear (*sec.* 29 retained in *Eng. Dig.*, *Ch.* 100, *sec.* 32). These several provisions doubtless should be construed together, and, if possible, some meaning extracted which would give them all operation. And as judgments rendered *prior* to the passage of the act, are the express subject matter of the last cited section, it would seem to authorize the assumption that it was the design of the Legislature to place these, as well as judgments rendered *afterwards*, and all instruments for the payment of money or property, which are provided for in the other two sections, upon some footing different from that upon which they stood at common law.

The leading ideas, to be extracted from this legislation, when considered in gross, is the cutting down of the common law period of twenty years, and the narrowing of the ground for repelling the presumption when thus cut down, both tending to points of policy, which the practical operation of the statutes of limitation have commended to the Legislature. If it be supposed that both of these objects were designed to have been attained by the Legislature, in reference to judgments rendered *prior* to the pas-

sage of the act, as is plain was the design as to judgments rendered *afterwards*, and as to all instruments for the payment of money or property, then there would have been no occasion at all for discriminating between judgments rendered *prior*, and those rendered *subsequent*, to the passage of the act, as is expressly done in emphatic terms. On the other hand, if it be supposed that it was the design to apply the presumption of law in question to these judgments, in *all respects*, as it was applied to sealed instruments at common law, then the whole of section 29 amounts to nothing at all; because that was precisely the common law in its full length and breadth. If, however, it be supposed that it was the design of the Legislature to discriminate *in favor* of the rights of the plaintiff, as to judgments rendered *prior* to the passage of the act, each of the provisions of the three sections will be effective and sensible, and be in harmony with each other; and such a discrimination would be reasonable, because these statutory regulations of the common law doctrine of presumption of payment, are, in their terms, prospective as to judgments rendered after the passage of the act, and retrospective as to those rendered prior to its passage. The Legislature might, therefore, with much reason, while cutting down the period for a conclusive presumption of law, as to *both classes* of judgments, from twenty to ten years, prescribe that, as to judgments rendered *after* the passage of the act, this presumption should *remain conclusive*, unless repelled by part payment, or a written acknowledgment of indebtedness, within the ten years, in analogy to a like provision in reference to the limitation of actions prescribed in Lord TENTERDEN's act, which they had adopted as to this; while, at the same time, as to judgments rendered *prior* to the passage of the act, the presumption should be repelled, not only by these means, but by all the other means allowed at common law. As this construction allows all the provisions of the statute on this subject to be effective and sensible, and is reasonable, and no other, that has been suggested, comes up to this standard, we adopt it as the true interpretation of the legislative will. And when applied

to the facts of the case at bar, the finding and judgment of the Court below are doubly sustained, although the plaintiff in error might be allowed the fullest benefit of every exception to the deposition of Tunstall, either taken in the Court below, or the additional one made here in argument; because not only is there no evidence in the record tending, in any way, to repel the conclusive presumption of law, which attached after ten years, which the defendant had the right to rely upon in support of the issue upon his plea of payment in, but, in addition to this, he made proof of facts, and circumstances to fortify this presumption, had it been attacked.

Putting the case then upon this point, the judgment must be affirmed, without reference to the other points raised.

FOWLER VS. LAWSON.

A plaintiff in the Circuit Court has the right to take a non-suit, at any time before the jury retires from the bar, or his cause is submitted to the Court for decision; though the defendant file and offer to prove a set-off to an amount larger than the plaintiff's claim.

Error to Pulaski Circuit Court.

Hon. WM. H. FEILD, Circuit Judge.

FOWLER. A set-off is not merely a defence, but a cross-action, in which a defendant becomes plaintiff, and may recover against the original plaintiff as a defendant. (See *Rev. Stat.*, *p.* 726, 727, *ch.* 139.) Whenever the defendant filed his plea of set-off, showing

an excess due from the plaintiff to him, it became in fact a cross-action, in which the other party was defendant, and had no more right to take a non-suit than any other defendant. See *Riley & White vs. Carter*, 3 *Humph. Rep.* 231.

CURRAN, for defendant. A plaintiff may, as a matter of right, become non-suit in any action at any time before the jury retire, or the case is submitted to the Court. *Dig.* 813, *sec.* 111; 3 *McCord R.* 559; 4 *Watt's R.* 308; *Wooster vs. Burr*, 2 *Wend. R.* 295.

Mr. Justice SCOTT delivered the opinion of the Court.

Lawson sued Fowler in assumpsit, who interposed a plea of set-off for a larger amount than was claimed by Lawson. Issues were joined, a jury sworn, and some evidence produced, when, by leave of the Court, Lawson took a non-suit against the objection of Fowler, who offered to give evidence to sustain his plea of set-off, and claimed the right to have a judgment over against Lawson. But the Court overruled him, and permitting the non-suit to be taken, rendered judgment accordingly. To which Fowler excepted, and brought his case here on error; and to sustain his position, insists that the provision of our statute, (*Dig.*, *ch.* 150,) allowing the defendant to recover a judgment over against the plaintiff, if his set-off be found to exceed the plaintiff's demand, works such a change in the English doctrine on this point that, after the filing of a plea showing an excess in favor of the defendant, the plaintiff has no longer the right to take a non-suit without the consent of the defendant. The case cited from Tennessee (*Riley & White vs. Carter*, 3 *Humphrey R.* 230,) is in terms to this effect. That case, however, originated before a justice of the peace, who not only found, upon the trial, a balance due the defendant, but rendered a judgment for it in his favor, which was appealed from to the Circuit Court, where the plaintiff was refused leave to take a non-suit, and that refusal was affirmed by the Supreme Court of Tennessee. There is a case, however,

reported in the 3d volume of *Texas Reports* (*Thomas vs. Hill admr.*) 270, which fully sustains the doctrine contended for. On the other hand, there are reported cases to the contrary in New York, (*Wooster vs. Burr*, 2 *Wend. Bep.* 295,) Pennsylvania, (*McCredy vs. Fry*, 7 *Watts R.* 496,) Massachusetts, (*Cummins vs. Pruder*, 11 *Mass. R.* 206,) Maine, (*Sawyer vs. Tarbox*, 30 *Maine R.* 27,) South Carolina, (*Usher vs. Sibley*, 2 *Brevard R.* 32; *Wilson vs. Murphey*, 3 *Brevard R.* 387; *Bremham vs. Brown*, 1 *Bailey R.* 262,) and Kentucky, (*McCann vs. Boyer*, 8 *B. Mon. R.* 285.)

In some of these cases where, like in the case at bar, the non-suit was taken before the jury had retired to consider of their verdict, the courts rest their judgment upon the ground that the defendant could claim a judgment only in accordance with the provision of the statute, and, consequently, as no balance had been "found" by the jury, no judgment could be claimed.

In other cases, however, where the non-suit was not taken until after the jury had returned into court and announced themselves ready to deliver their verdict, (and in one case had made known to the *bar* that the verdict was for the defendant, *Usher vs. Sibley*, 2 *Bre. R.* 22,) the judgment was put upon the higher, and, we think, better ground, that the set-off law is not to be construed to limit or deprive the plaintiff of his general right to take a non-suit, which, under our statute, he may do at any time before the jury retires from the bar, or his cause is submitted to the Court for decision, (*Dig.*, *ch.* 126, *sec.* 10.) The judgment is affirmed.

Mr. Chief Justice WATKINS not sitting in this case.

McCONNELL VS. HARDEMAN.

In an action of trespass to personal property, it is necessary that the plaintiff aver that the property, for the taking or injury to which the action is brought, is of some value.

The statutory enactments in this State, in relation to the liability of the master for the tortious acts of his slaves, are modifications of the general law, which does not hold the master liable unless such acts were done by his orders, or with his privity, or were sanctioned by him: and, therefore, the liability of the master, for acts of his slaves, in which he did not participate, must be restricted to those trespasses which are indictable offences, or, not being so, are specified in the statute.

Error to Johnson Circuit Court.

The Hon. A. B. GREENWOOD, Circuit Judge.

BATSON, for the plaintiff.

FOWLER, for the defendant. Unless the master actually command or consent to the trespass committed by his servant or slave, an action of trespass cannot be maintained therefor against him. 1 *Ch. Pl.* (*Ed. of* 1809) 182; *Johnson vs. Castleman*, 2 *Dana R.* 378; *Middleton vs. Fowler*, 1 *Salk. Rep.* 182; *Puryear vs. Thompson*, 5 *Humph. Rep.* 399; *Wright vs. Weatherby*, 7 *Yerg.* 378; *Church vs. Mansfield*, 20 *Conn. Rep.* 287.

The second and third counts, each fail to allege that the horse was of any value; which is a fatal defect. See 1 *Esp. N. P* (*N. York Ed. of* 1811) *p.* 407; 1 *Ch. Pl.* (*Ed. of* 1808) 363; *Stephen on Pl.* 347.

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

The plaintiff in error sued the defendant in trespass, for the tortious act of his slave in taking the plaintiff's horse. The case

went off in the Court below upon demurrer to the declaration, which was adjudged insufficient. The second count does not vary materially from the first in setting out the cause of action. The third charges the trespass to have been committed by the defendant in person. But these two counts are defective in failing to describe the property other than as the plaintiff's horse, containing no averment that it was of any value, or any reference to such description in the first count. The substantial allegation in the good count is, that a certain slave, owned by the defendant and in his possession, seized, took, and rode off a certain horse belonging to the plaintiff. Considering the gravamen of the action to be for a trespass committed by the slave without the command or license of his master, a question of much interest in a slave-holding community, has to be determined.

It is quite apparent that there is but little similarity in the relation of master and slave, and that of master and servant, at the common law. The slave is property, and though, for some purposes, treated as a person, amenable to the law, and, at the same time, entitled to its protection for offences committed by or against him, the dominion of the master is absolute, except so far as it may be restrained or regulated by statute. The duty of the slave is obedience. His services and his acquisitions belong to the master, and in return for this, the duty of the master is to support and provide for the wants of the slave in sickness or in health, and to protect him against all unlawful violence or injury. Negro slavery is a domestic institution, no further controlled by statutory enactments than has been thought necessary by the Legislature, to ameliorate the condition of the slave and preserve the peace and good order of society. It is not founded in any contract between the master and the slave; and while the *status* or condition of the slave continues, no valid contract can be made between them. If the slave be injured by third persons, the redress by action is in the master, nor can the slave become civilly liable for injuries done by him to the master or to third persons.

On the other hand, at the common law, the servant, though a

menial, has civil, and may have political rights; his service begins, continues, and terminates in contract with the employer. Though necessity may often be a powerful incentive to obedience, he owes no duty beyond the obligation of complying with his agreement for service. The acquisitions of the hireling are his own, and though a recovery against him at law might be fruitless, the theory is, that he is not otherwise responsible for the private injury resulting from his torts or breaches of contract. The master is not responsible for the wilful or malicious trespass of the servant, to whom alone the injured party must look for redress. The liability of the master for the misconduct or negligence of the servant, while engaged in his employment, implies a corresponding liability on the part of the servant to the master for the consequences of his fault. The loss of service and character may also be checks upon persons of this class, ensuring their fidelity and good behavior.

On first impression of these broad distinctions, it would seem that the master ought to be liable to make reparation in damages to the person injured by the trespass of his slave. It was so according to the civil law, to which the institution of slavery as it exists in some of the American States, is very nearly assimilated. And yet, with the exception of Louisiana, such has not been the course of decisions in this country. It may be that the earlier decisions on this subject, where the common law system of pleading had been adopted, were influenced more by the form than the substance of the remedy, following a rule of law founded on reasons which have but little application to cases of this description. Of course, where the master commands or approves the trespass of his slave, it becomes his own act, and he may be sued for it, as if committed by himself. But the question is concerning those acts of the slave, which are done or omitted without the authority of the master, or even against his orders. In *Snee vs. Trice*, (2 *Bay*, 345), decided in South Carolina, in 1802, the extreme ground was taken that a master was not liable for the unauthorized acts of his negroes, though engaged in his

service or employment at the time, or for any act of theirs injurious to others, if done without his knowledge or approbation, though it was admitted that in all cases, in the way of trade or any public employment, or where a confidence is held out to the public, the master would be liable in damages to the party injured by the negligence or misconduct of the slave. As may be supposed for example, a negro black-smith who shoes a horse so negligently as to lame him, the master would be liable to the customer for his slave's want of skill. So a slave ferryman, or carrier, when allowed by the master to act in that capacity, (3 *McCord* 400.) The Court, in *Snee vs. Trice*, argued that slaves in Carolina being in general a headstrong, stubborn race of people, who had a volition of their own, and the physical power of doing great injury to neighbors and others, without the possibility of their masters having any control over them, especially when absent from them, it would be a most dangerous thing to make their masters liable for their unauthorized acts to the extent of the common law, where masters are liable for the neglects of their servants. In other words, as the counsel argued, such a doctrine would place every master in Carolina in the power of his slaves, who might, by their misconduct, ruin him, whenever they pleased to combine together for that purpose. The Court said: "Other salutary checks have been found by experience, more efficacious than that of recovering damages from the master." We are not told what those checks were, but they must have consisted in corporal punishments, which could not well be more severe or efficacious, if inflicted in pursuance of some sentence of law, than if administered by the master himself in the way of correction. The difficulty is, that the punishment of the slave in either mode, and the master might be indifferent to the mode, produced no compensation to the person injured by the trespass of the slave. The more recent case of *Parham vs. Blackwelder*, (8 *Iredell* 446,) is the best reasoned one we have met with, in support of the rule established in South Carolina. There, a slave of the defendant went with his master's wagon and team to the land

of the plaintiff, and cut and hauled away a load of wood, and carried it to the defendant's yard, for which the plaintiff brought trespass. RUFFIN, C. J., took the broad ground that, although the slave was in his master's employment, the master would not be liable if the servant wilfully committed the act; that is, without the direction of the master. That, he says, "is the true criterion of the master's responsibility; whether he was or was not the cause of the trespass by expressly ordering it, or subsequently sanctioning it; and not whether the person injured can or cannot have an action against the servant. If it turned on the latter ground, the owner would be liable, though he were present forbidding the servant, and doing all he could to prevent him from doing the wrong. In fine, it would bind the master to answer in damages for all the acts of a bad negro, upon the presumption of an authority to commit them; a presumption, which, as it seems to us, cannot be drawn from the relation of master and servant, in reference to one kind of servant more than to another. It is the misfortune of one, who is injured in his person or property by another, that he cannot obtain adequate pecuniary satisfaction; but the misfortune is not greater when the wrong-doer is a slave, than when he is any one else who has no property. That he is not able, in either case, to have such redress against the perpetrator of the wrong, affords no reason why he should recover from one who is as innocent as himself." Such is the conclusion of the Court in that case, and though we might suppose it to be based upon a fundamental error in regard to the nature of negro slavery, there are two considerations urged in support of it, one of which is certainly entitled to much weight. The Court say, that for the very reason that slaves are not liable for damages, our law renders them summarily punishable corporeally, in many instances in which free persons are not indictable; though that might be to some extent a consequence of the rule, rather than a reason for its adoption. But it was urged that the liability of the master, for any trespasses of his slaves not sanctioned by him, would render it necessary to his own preservation from ruin," to

keep them up, as he does his beasts, to prevent their going on the premises of another; "a doctrine," Judge RUFFIN said, "as abhorrent to the feelings as it is contrary to the usages of the country."

In Tennessee, the master is not liable for the trespass of his slave, unless he was privy to, or participated in, the act, and this, whether the slave be regarded as property only, or as a servant at the common law. (*Wright vs. Weatherly*, 7 *Yerg.* 367.) Upon the authority of this case, and that of *Snee vs. Trice*, the Court of Errors in Mississippi, in *Leggett vs. Simmons*, (7 *Smedes & Marsh.* 348,) held, though in a very doubtful and hesitating manner, that the civil liability of the master for the felonious killing, by his slave, of the slave of another, depended upon the criminal knowledge or agency of the master in the transaction. In the interesting case of *Brandon vs. The Huntsville Bank*, (1 *Stew.* 320,) where the plaintiff's slave found a roll of bank notes, which a stranger took from him and deposited in a bank for safe keeping, and the true owner not appearing, the plaintiff brought trover against the bank for the notes, Judge SAFFOLD was of opinion that because the money, when found by the slave, became the acquisition of the master, and he was entitled to recover it against all the world but the true owner, it did not follow that the master would have been liable to the owner, in case the slave, after finding the money, had wasted, concealed, or wantonly destroyed it, without his master's consent or privity. He thought that, in this country, in order to create responsibility on the master, "the slave must, at the time, be in his immediate employment, or from his vicious habits and general liberty, some degree of culpability must attach to the master to make him responsible." See also *Cauthon vs. Deas*, (2 *Port.* 276.) Without pursuing this examination further, it may be said that, at every turn, we find these questions complicated in the frame-work of society, by peculiar considerations, not referable to the common law, or governed by its analogies. For instances of this, may be cited

Scuddar vs. Woodbridge, (1 *Kelly* 195,) and *Neal vs. Farmer*, 9 *Georgia* 555.

Our statutory provisions, affecting masters' liability, are in imitation of the civil law, though essentially differing from it. Under the title, *Criminal Law*, a variety of trespasses are made indictable, such as killing, maiming, or administering poison to domestic animals; and, in like manner, many kinds of trespasses on real estate are specified. In the same title, under the head of *Slaves*, the statute provides that "masters of slaves in this State shall be held responsible for the full amount of single damages and costs of the trespass of his slaves, and any person injured by the trespass of any slave shall have his action against the master for the damage he may have sustained by such slave." And in *all trespasses and offences less than felony*, committed by any slave, on the person or property of another, the master may compound with the injured person and punish his own slave, without the intervention of any legal trial or proceeding; but if he refuse to compound, the slave may be tried and punished, and the damages recovered by suit against the master. Under the head of *Trespasses*, where civil remedies are provided for specified injuries to land, fences, growing crops, and the like, the person trespassing is made liable to pay double, and, in some instances, treble damages. Section 5 enacts that, "if a slave commit any of the trespasses *mentioned in the first two sections* of this act, the party injured may bring his action against the master, owner (or hirer for the time being) of such slave, for the recovery of single damages," &c. But if such trespass be committed under the direction of the master or owner, he is responsible for the same as if committed by himself. So by the act of January, 18th, 1843, the trespass of a slave or apprentice on the school lands, is made the act of the master.

These statutory provisions give color to the idea that masters are unqualifiedly liable for all trespasses committed by their slaves, though done wilfully and without the consent or knowledge of the master. But we must be content to take the general law to

be as settled the other way, and from an early period in our sister States, according to the decisions before referred to. Though not satisfactory, it would be unsafe to depart from them. By the civil law, the master is answerable for all the damages occasioned by an offence or *quasi* offence committed by his slave, but if done without his order, he may exonerate himself by surrendering the slave to be sold. (*Gurrier vs. Lambeth*, 9 *Louisiana Rep.* 339.) As laid down in the Institutes, (*Coop. Justinian* 355,) "It is reasonably permitted to the master to deliver up the offending slave, for it would be unjust to make the master liable beyond the body of the slave himself." But our statute prescribes no such reasonable limitation to the responsibility of the master, who would thereby be prompted to vigilance, without being exposed to utter ruin by the misconduct of his slaves. We consider that the statutory enactments in this State are modifications of the general law, and, therefore, the master's liability for acts of his slaves in which he did not participate, must be restricted to those trespasses which are indictable offences, or not being so, are specified in the statute. The case of *Jenning vs. Kavanaugh*, 5 *Missouri* 26, and that of *Ewing vs. Thompson*, 13 *Ib.*, are direct authorities for such construction. The common law being inapplicable to domestic slavery, the idea is to be repudiated that the master's liability is to depend, as for injuries done by his beasts, upon his knowledge of the vicious propensities of his slave, and the consequent negligence of permitting him to go at large. The common law doctrine relating to master and servant, though equally inapplicable, having been adopted, any extension of the master's liability is the creature of the statute. In any future expression of the legislative will, it will be for that department to consider, whether the true interests of slave-holders would not be promoted by making them liable for all trespass committed by their slaves, thus removing many causes of jealousy and ill-feeling against the owners of that species of property, and at the same time protect them by limiting their liability, as at the civil law, to the value of the offending slaves.

The act of the defendant's slave, as charged in the declaration, not being one of those trespasses enumerated in the statute, for which the master could be made liable, whether in form of trespass or case, the judgment of the Court below is affirmed.

RIDGE VS. FEATHERSTON.

In an action against the master for a trespass committed by his slave in killing an animal belonging to the plaintiff, the declaration should aver that the killing was wilful and malicious.

The act of killing a horse, done wilfully and maliciously, is one of those indictable offences enumerated in the statute; and, for which, if committed by a slave, the master is made responsible in damages to the party injured.

The action may be in case or trespass, according as the one or the other is the more appropriate remedy with reference to the common law distinctions between these forms of action.

In a civil suit against the master to recover damages for an unauthorized act of the slave, proof of his admissions or statements—certainly those not accompanying or explanatory of the act done—cannot be admitted against the master.

Error to Benton Circuit Court.

Before Hon. B. H. NEELY, Circuit Judge.

WALKER & GREEN, for the plaintiff, made the following points:

1st. That the action should have been in case and not in trespass: (*Comyn's Dig.*, *vol.* 7, *Title Trespass*, [*B.* 5,] *p.* 513; 1 *Ch. Pl.* 80; *Barns vs. Hud*, 11 *Mass.* 57; 2 *Ch. Pl.* 867): Where a statute prohibits an injury, and enacts that the party injured shall

recover a penalty or damages for the injury, and is silent as to the form of action, case is the proper remedy. 1 *Ch. Pl.* 142.

2d. That if trespass was the proper remedy, the declaration is defective.

3d. That the Court erred in admitting, as evidence, the declarations of the slave.

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

This was an action of trespass by Featherston, the plaintiff, in the Court below, in which the cause of complaint, set forth in the declaration, is, that Wagoola, a slave of the defendant, shot and killed a certain mare, belonging to the plaintiff. The only objection that can be taken to the declaration, in other respects sufficiently formal, is, that in stating the cause of action it is not averred that the killing of the animal was wilful and malicious, which we apprehend should have been done, or at least some words of a corresponding import used in conformity with the language of a penal statute. The proof at the trial was, that the defendant had three negro men, all of whom frequently carried guns; that used by Wagoola, being a large rifle. A few days before the mare was shot, a witness heard Wagoola tell the plaintiff, that if he did not keep her away from the defendant's plantation, he, Wagoola, would kill her. The mare was found shot, in defendant's field, the wound having the appearance of a large bullet hole. The field was near the defendant's house, the gap to it being open, and the fence down in several places. It was winter, and the frozen state of the ground indicated that the fence had been down for some days previous.

The Court, against the objection of the defendant, admitted evidence of what the witness heard Wagoola say, and also instructed the jury that the threat made by him "was evidence conclusive to prove the plaintiff's case, and should be taken into consideration by them."

The defendant moved for a new trial; and also in arrest of

judgment, because the plaintiff's remedy could only have been in case.

The act of killing a horse, done wilfully and maliciously, is one of those indictable offences enumerated in the statute, and for which, if committed by a slave, the master is made responsible in damages to the party injured. (*McConnell vs. Hardeman*, decided at the present term.) The remedy here was not misconceived; but though the statute used the word trespass as descriptive of the act, no reason is perceived why the form of the remedy may not be in case or trespass according as the one or the other is the more appropriate remedy, with reference to the common law distinctions between those forms of action.

Looking to the context of the instruction, the expression used in the charge, that the threat made by Wagoola was conclusive, must have been inadvertently given. But it was clearly not evidence, against the defendant, not shown to have been present, or to have authorized the slave to make it. No doubt there may be cases where the master recognizes or holds out his slave as his agent, so as to become bound by the acts and declarations of the slave connected with his agency. And it may be supposed, that after a conspiracy has been established, by competent testimony, between a white person and a negro, the declarations of either in furtherance of the common design, would be admissible against the other. But nothing of the kind is shown here. In an indictment against the slave for the offence of killing the animal, evidence of his previous threat would be admissible, and, in connection with other circumstances, might go far to satisfy the jury of his guilt. But, in a civil suit against the master, to recover damages for an unauthorized act of the slave, proof of his statements or admissions, certainly those not accompanying and explanatory of the act done, cannot be admitted against the master without indirectly making a negro a competent witness against a white man. The judgment will be reversed, and the cause remanded, with instructions to grant a new trial, and with leave to the plaintiff, if desired, to amend his declaration.

HERVY VS. ARMSTRONG.

The patrol system is a police regulation for the several townships in a county; and the authority of each company of patrol is limited to the township for which it is appointed.

In an action by an inhabitant of one township against members of the patrol company of another, for whipping his slave, evidence that such company was invited by some inhabitants of the former township to attend therein and disperse an unlawful assemblage of slaves, is not admissible under the plea of justification.

Although the battery of a slave, without excuse or provocation, by one not having authority to correct him, is an indictable offence, the master cannot recover in a civil action for whipping his slave, unless he proves special damage or injury to the slave resulting in a loss of service.

Appeal from Ouachita Circuit Court.

Hon. SHELTON WATSON, Circuit Judge.

CURRAN, for the appellant. The statute (*Dig.* 769, *sec.* 1) provides that a company of patrol shall be appointed in (not for) each township: and, though they are not bound to patrol out of their township, they are not confined to their particular township; as is the case with justices of the peace, who may act out of their respective townships. *Humphries vs. McCraw*, 5 *Ark. Rep.*

It is not an offence for a white man to assault a slave, unless it is done "without cause, lawful excuse, or without sufficient provocation," (*State vs. Hale*, 2 *Hawks. Rep.* 582): and may be justified where a slave is at an unlawful assembly. *Smith vs. Hancock*, 4 *Bibb. R.* 222.

Trespass will not lie by a master for a trespass on his slave, unless it be attended with a loss of service. *Cornfute vs. Dale*, 1 *Har. & John.* 4.

GALLAGHER, contra, argued, 1st. That a patrol has no jurisdic-

tion, as such, out of the township in which and for which he is appointed; and cited 1 *H. Bla.* 15; 1 *Bar. & Cres.* 288; 1 *Bla. Com.*, *p.* 356, *n.* 42, to show how cautious the law is in circumscribing the powers of public officers; and contended that good policy and the peace of society required that patrols should be restricted to their own townships, and be permitted to visit only their neighbors and friends in the unceremonious manner allowed by law.

2d. That trespass can be maintained for an assault and battery on a slave where no actual damage accrues. *Walker vs. Brown*, 2 *Bay's Rep.* 75; 2 *Bailey's Rep.* 98.

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

Armstrong, the appellee, sued the appellant, together with several other defendants, in trespass, for whipping certain slaves of his, it being averred, in the declaration, that the slaves in question were so bruised and hurt by the beating, as to be unable to perform labor and service for the plaintiff, their owner and master, for a long space of time thereafter, to wit: for the space, &c. The defendants pleaded not guilty, and also a special plea of justification, setting forth their appointment, by the county court of Ouachita county, as patrols in and for the township of Jefferson, in that county, and that, being in discharge of their duties as patrols, visiting all negro quarters, and other places, suspected of unlawful assemblages of slaves, on the said day, &c., being in discharge of their duties, they, the defendants, as a portion of said company of patrol, under the command of their captain, found the said slaves of the plaintiff strolling about, from one house to another, without a pass from their master or overseer, and thereupon they, the said defendants, as a portion of said company of patrol, under the command of their captain, and in pursuance and by virtue of said order of appointment, and in the lawful discharge of their duties, imposed on them by law, caused the said slaves to receive a number of lashes, not exceeding twenty, as was their duty and right to do, &c.

On the trial, the jury found, that the entire trespass, as alleged, was committed in the township of Marion, by the defendants, who composed a majority of the patrol, who had been duly appointed and sworn for Jefferson township. Upon the question made, whether the defendants had a right to act as a patrol for Marion, by virtue of their appointment for another township, but little doubt can be entertained. It does not appear that the defendants were called by the patrol of Marion township to their assistance, or acted under their direction. The provisions of the statute, as well as the policy of it, seem to require that the authority of each company of patrol should be limited to the township for which it was appointed. The extraordinary powers conferred upon them, being in their nature partly judicial as well as executive, to be summarily exercised, and involving a right of entry and search, without special warrant, which, to the extent that it can be constitutionally enforced, is fruitful in causes of irritation, and requiring the utmost firmness and prudence on the part of the patrol, in the discharge of their duty without aggression, furnish strong reasons to our minds why the act should not be so construed as to extend the lawful authority of patrol companies beyond the limits of their respective townships.

Whenever slaves are arrested, for any cause, by a sheriff, constable, or citizen, the law makes it his duty to carry them before some justice of the peace; whereby, though the hearing and punishment may be summary, as compared with other judicial proceedings, some time is afforded for deliberation, and an opportunity for the master to interpose. The patrol system is a police regulation, which, being kept alive upon the statute book, is a slumbering power, ready to be aroused and called into action, whenever there is an apparent necessity for it. The presumption is, that the people of each township are able to quell all ordinary disturbances occurring in it, by or among their slaves, and this can be better and more appropriately done by those who are neighbors and friends, having a common interest to protect, and a common danger to guard against, than by strangers, whose

interference has not been invited. Counsel supposed, and it is to be conceded, that extreme cases may arise, which would excuse an act, not strictly lawful, by patrols out of their district, or by any citizen, done from good motives, or hasty impulse, in order to maintain the due ascendency of masters over their slaves. Such excuse would go in mitigation of the damages awarded in a civil suit or assessed upon conviction, and, if mitigating circumstances are shown, juries of the vicinage would rarely disregard them. But as a defense of strict right, it is not a legal justification of a trespass, that it was committed by a company of patrol in one township, by virtue of their appointment by the County Court, to act, as we understand the statute, in another township. If the company can cross the line between two townships, they can go anywhere in the county. It was proved that there was a patrol in Marion township, but they had never been on duty; and though there had been none, the law provided the means of having one. The defendants proposed to prove that they had been invited over the line, by some of the inhabitants of Marion township, to attend and disperse what was reputed to be an unlawful assemblage of slaves. The Court below refused to admit such testimony, and properly so, when offered under the plea of justification. The patrol in Marion township was the proper authority to be called in requisition. If the defendants had a right to act there officially, it would follow that they could do so independently of the patrol of Marion township, and in opposition or hostility to them.

There is but one remaining question of moment in this case, and it is not without solicitude that the Court undertake to determine it. The defendants arrested the plaintiff's slaves on their way home from a religious meeting, on Sunday, which they, with some other negroes, had attended. There were white persons present at the meeting, and, so far as reported by the witnesses, it was orderly and well conducted. The negroes were tied and whipped, not exceeding ten lashes each, so that that the punishment, if deserved, or the defendants had authority to inflict it,

could not be said to be either cruel or excessive, though their cries and the sound of the blows were heard by persons at a distance. From the whole scope and humane policy of our statutory regulations in regard to slaves, there is an implied license for them to attend religious meetings, when conducted in an orderly manner, on Sunday, and on that day it is an indictable offence for masters to coerce them to labor. Altogether, it may be supposed the circumstances were such as to exasperate the plaintiff in a high degree. But he did not prove or offer to prove any special damage or injury to the slaves, resulting in a loss of their services, in consequence of the whipping they had received. The Court might have no hesitation in holding the battery of a slave, without excuse or provocation, by one not having authority to correct him, to be an indictable offence; though, in a prosecution for beating a slave, there may be circumstances of excuse or justification, which would not justify an acquittal if the battery had been committed upon a white person. But, for the purposes of the criminal code, the law regards the slave as a person capable of committing a crime, and against whom offences may be committed. The unprovoked battery of a slave is not only in itself a disturbance of the public peace, but it ought to be an indictable offence, not only because it is an injury to the slave, but an insult to the master, calculated to rouse angry passions, and provoke resentment, leading to breaches of the peace. And it would seem, as the master is morally bound to protect his slave, he ought to be allowed a right of action, which the slave cannot have, to the end that this may be done in a peaceable and lawful manner. At the common law, the servant, child, or apprentice, having a right of action, the only injury sustained by the master, and for which he can recover damages, is that resulting from a loss of service. Unless the master has an action, it follows that he can have no civil redress for any wanton or malicious battery of his slave, not attended with special damage. In *Cornfute vs. Dale*, 1 *Har. & Johns.* 4, CHASE, C. J., assigned, among other reasons for his decision, that the action, there being no loss of

service, did not lie in favor of the master, "because there was not a reciprocity of action; no action being maintainable against a master for an assault and battery committed by his slave; and that the injury to the slave was not dispunishable, it being indictable as an offence; and that, without an injury or wrong to the master, no action could be sustained." But, in this State, as recently decided in *McConnell vs. Hardeman*, the master may be made liable in a civil action to the person injured, for a battery, and for a variety of enumerated trespasses, though wilfully committed by his slave; so that the reason there assigned can hardly be said to apply. This is stating the argument strongly in favor of the plaintiff below, and yet we have to conclude that the master cannot recover for a battery upon his slave without proving special damage. For the breach of the peace, the offender may be punished by a public prosecution, which the master can set on foot. (*The State vs. Hale*, 2 *Hawks.* 582; *The State vs. Booyer et al.*, 5 *Strobart* 22.) But for the cruel injury, treating slaves as property, the master can only recover damages upon the ground of compensation. We have not seen the case of *Hilton vs. Caston*, cited from 2 *Bailey* 98, but, on examination of every other case within our reach, bearing on this precise question, we do not find one, where the fact is not stated, in the report, or inferable from the expressions used by the Court, that the injury, for which the master sued, was so severe as to be attended by a loss of service; unless it be the case cited of *Walker vs. Brown*, (11 *Humph.* 180,) which turned on a statute of Tennessee, and there, though the extent of the injury does not appear, the Court say the action is maintainable, because "the master is interested in the service and labor of his slave." In *Wheat vs. Croom*, (7 *Ala.* 349,) some strong expressions are used by the Court, and as the jury were allowed to measure the damages, not merely by the value of the slave, but to give smart money, it is to be inferred, though not stated, that the services of the slave were wholly lost to the plaintiff, by some wanton or cruel act of the defendant. In South Carolina, the idea was

favored that the master had a civil remedy, because, by statute, any one, offended by the insolence of a slave, could complain to the master, who refusing redress, application could be made to a civil magistrate; implying that the offended person ought not to take vengeance by his own arm; and it was not until the act of 1841, in that State, (*The State vs. Booyer et al.*,) that the mere battery of a slave, by any one other than the master, was made indictable or punishable as a public misdemeanor. Yet we find the earlier case of *White vs. Chambers*, (2 *Bay* 70,) so much relied on, was an action on the case, going for the special damage; and the fact appears that the defendant "beat the slave very severely, which laid him up for several days before he was able to go about his master's business again." According to the civil law, in many respects applicable to the condition of negro slaves in America, "an injury is never considered as done to a slave, but through him to the master; not, however, in the same manner as through a wife or child; as when some atrocious injury is done to the slave, manifestly in despite of the master; as if any one should cruelly beat the slave of another, in which case an action would lie; but, if a man should only give ill language to a slave, or strike him with his fist, the master is entitled to no action against him." *Coop. Justinian, Lib. IV, Tit. IV, De Injuriis, sec.* 3.

The difficulty is, that if the action lies without special damage, it must be the assertion of a distinct principle, so that it would be maintainable in all cases of a mere battery, however trifling or inconsiderable, and might thus tend to consequences, which would hardly be tolerated in a community where slavery exists. We apprehend the reason why the master cannot have a civil action for the battery of his slave without special damage, is, that it would encourage slaves, of their own propensity, or by the sufferance of their masters, to be insolent by word or demeanor. The elevation of the white race, and the happiness of the slave, vitally depend upon maintaining the ascendancy of one and the submission of the other. The rights of individuals must yield to

the necessity of preserving the distinction between races. If it were possible for actions of this nature to become frequent, without being humiliating to freemen, no code of rules could be framed by which to graduate the injury, or estimate the damages, involving such considerations as the insult intended for the master, the mental suffering of the slave, and the kind of provocation offered by him, which a white man would or not be excusable for resenting with blows.

The Court should have given the instruction asked for by the defendants, that the plaintiff could not recover without proving some actual damage by loss of service, and erred in giving all those of a contrary import asked for by the plaintiff. As the cause will have to be remanded, with instructions to sustain the motion of the defendants for new trial, it is to be observed, that the first instruction, given for the plaintiff below, concerning the slaves of a third person, does not appear upon this record to have any connection with the suit, and was clearly erroneous. Reversed.

MOSS VS. ASHBROOKS.

A final order, reciting that the cause was argued and submitted; that the Court is of opinion that the complainant's bill be dismissed; that the injunction be continued until the further determination of this cause, is not a final decree.

A prayer of appeal by the complainant, and an order that he have thirty days to file his recognizance, and that the recognizance, when so filed, shall operate as a full and complete supersedeas, is not an express grant of appeal, nor effectually provides for it.

Appeal from Pike Circuit Court in Chancery.

Hon. SHELTON WATSON, Circuit Judge.

CURRAN & GALLAGHER, for the motion to dismiss.

PIKE & CUMMINS, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

The final order of the Court below, is in the following words, *to wit:*

"This day came the parties, by their solicitors, and, after hearing the argument of counsel, respectively, this case was submitted. And the Court, upon inspection of bill, answers, exhibits, &c., herein, is of opinion that the complainant's bill be dismissed. And, thereupon, came the said complainant, by his solicitor, and prayed an appeal, and thereupon, by agreement of counsel, the affidavit required by law was waived, and that the complainant have thirty days to file his recognizance herein. And, thereupon it is ordered, adjudged and decreed that the said recognizance, when so filed, shall operate as a full and complete supersedeas herein. And it is further adjudged and decreed that the injunction heretofore issued, be and the same shall remain in full force until the further determination of this cause."

It is probable that this order was made during the February term, 1854, of the Pike Circuit Court, but so irregular is the transcript, that this is not entirely certain from its face. (*Rule* 16, 1 *vol. Ark. Rep., p.* 7.) On the 18th of March, 1854, in the vacation of the Court, it appears that the complainant filed "his obligation" with Thomas Hubbard and Wm. Moss, as his securities, reciting, among other things, that a decree had been rendered against him in this cause, from which he had prayed an appeal to this Court, which had been accordingly granted, and

was conditioned for its prosecution, &c. This, it appears, was *approved by the Clerk*, the day it was filed in his office.

Upon this state of facts, the appellees move to dismiss the cause from this Court: 1st. Because no final decree has been rendered herein by the Pike Circuit Court; 2d. Because no appeal was granted.

It seems that, upon the hearing, the Court was of opinion that the complainant's bill ought to be dismissed, but there is no express order or decree to that effect, and it is difficult to infer one, in the face of the express decree, in terms "that the injunction heretofore issued, be and the same shall remain in full force until the further determination of this cause." If the bill had been dismissed, the injunction would have necessarily fallen with it. And, unless the opposite party had waived his right, the Court ought to have proceeded under the statute for the ascertainment of damages. *Dig.*, *ch.* 86, *p.* 594, *sec.* 21.

What was the precise intention of the Court, in reference to the appeal applied for, cannot be readily seen from what is expressed in the record. It was certainly not expressly granted, or in any way effectually provided for in future, if it was to operate as a stay of proceedings, since the recognizance, provided for by the statute, to have this effect, must be approved by the "Court or judge granting the appeal." (*Dig.*, *ch.* 28, *p.* 244, *sec.* 137.) We think the motion ought to be granted.

WATKINS, C. J., did not sit in this case.

CLARK VS. ROOP.

In an action of assumpsit for work and labor, proof of work done by the plaintiff for a third person, may be given under the common indebitatus count for work and labor done for the defendant, where the work was done, at the request and upon the credit of the defendant.

Error to Johnson Circuit Court.

Hon. WM. H. FEILD, Circuit Judge, presiding.

S. H. HEMPSTEAD, for the plaintiff. The instruction asked by Clark should have been given, because it would seem to be a plain proposition that under a count for work and labor done for one person, evidence is not admissible to show that work was done for another and different person, and, when so admitted, cannot sustain the count.

The proof is clear that the work done by Roop was on the mill of Edwards, and, furthermore, was of no value, and a new trial should have been granted on that ground.

PIKE & CUMMINS, contra. No exception was taken, as to the refusal of the instruction, at the time, and no question remains as to that. (6 *Eng.* 627; 13 *Ark.* 354.) The Court cannot interfere to disturb the verdict—as there is sufficient evidence to sustain it. 13 *Ark.* 236, 295, 306; 6 *Eng.* 455, 630.

Mr. Justice WALKER delivered the opinion of the Court.

This was an action of assumpsit, brought by Roop against Clark, for work and labor done at the instance and request of Clark for him.

It seems that Clark, the owner of a mill, rented it to one Edwards. The mill was out of repair, and whether, under the con-

tract of rent with Edwards, Clark was to put the mill in repair, or keep it in repair, does not appear from the evidence. Be this as it may, Clark addressed to Roop the following note: "Mr. Roop: I want you to put in the new works in the water mill for Mr. Edwards." There is evidence that Roop worked on the mill, that he was a mill-wright, and of the value of the work done.

The only material point to be considered arises upon the instruction asked by the defendant, and refused by the Circuit Court; which was, in effect, that proof of work done by the plaintiff for Edwards, at the request of Clark, would not support a count for work and labor done for Clark. Under the circumstances of the case, we think the instruction properly refused. It is true that, in Clark's written request or engagement, (for, having been accepted by Roop, it became, in effect, such), he did request Roop to work upon the mill for Edwards, and if Roop had declared upon the special contract, there would have been stronger grounds for sustaining the instruction asked; but the defendant is charged in the common indebitatus count for work and labor. And, under such count, the question is, whether the plaintiff may not hold the defendant liable for work done at his request for another, as for work done for himself. The undertaking was certainly at the instance of Clark, and the credit given to him; at least the plaintiff might, if he thought proper, charge him with the value of the work. Such is the rule held in *Scott vs. Messick*, (4 *Mon.* 535.) In that case, the facts were, that Scott employed Messick to do the stone work on a building then being erected on the land of Mary Scott and for her. The action brought was assumpsit, under the common counts, for work and labor done, and for Scott and at his request. After the evidence was closed, the defendant moved the Court to instruct the jury as in case of a non-suit upon the same ground urged in this case. The Court held the doctrine to be well settled that, in respect to work and labor, or other personal service, however special the contract, if not under seal, and the terms of it have been performed on the plaintiff's part, and the remuneration was to be in money, it is

not necessary to declare specially; and the common law indebitatus count is sufficient. And in the same case, the Court, when considering the question of variance between the allegation and proof, says: "If Messick had declared specially upon the original contract with the appellant, for the work, it might, with great plausibility, at least, be said that, as respects the liability of the appellant, the wall which was put up under the contract by Messick, should have been treated as the appellant's wall, and, though proved to be upon the land of Mary Scott, the variance between the proof and the declaration in such case, would be a variance in form only; but, be that as it may, there can, we apprehend, be no reasonable doubt but that the variance is not such as to preclude a recovery under the indebitatus count."

The other grounds relate solely to the sufficiency of the evidence to sustain the verdict of the jury. There was proof that the defendant worked upon the mill by the day, that he was a mill-wright, that two dollars per day were paid wages for his services, and that others had given him that price. It is true that several of the witnesses depose that the work was of no value. One witness states that the new work was improperly put into the old work. Some of the witnesses are of opinion that the new work gave way first, others that the old work first gave way; and, from the whole tenor of the evidence, we may fairly infer that the work was considered, by the witnesses, of no value, because it gave way, and not that the work was not in other respects done in a workman-like manner. Now, it is very evident, that, if the defendant caused the new work to be attached to old work, which gave way, and thereby the new work became of no value, that the plaintiff should not be held accountable for the consequent loss of value in the work. The jury may have given credit to the witness who thus deposed, or they may have considered it work done by the day, under the inspection of the defendant or his agent. Be this as it may, the jury were the proper judges of the weight to be given to the statement of the witnesses, and as there was no total lack of evidence to sustain the verdict of the jury,

although it is far from satisfactory to our minds, we do not feel at liberty to set the verdict aside. Let the judgment be affirmed.

BYRD ET AL. VS. STATE, USE OF ASHLEY AD., &C.

When several defendants reside in different counties, separate writs of summons may be issued to the counties where they reside, or may be found, without any averment in the declaration as to their residence. 2 *Ark.* 449; 5 *Ib.* 179.

Where, upon settlement and adjustment of the accounts of an administrator, he is removed by the Probate Court, and ordered to pay over to his successor in administration, the amount so ascertained to be in his hands, no demand is necessary; and, if in an action upon the administrator's bond, a demand on a particular day be averred, the plaintiff is not bound to prove it; and a plea denying such demand, tenders an immaterial issue.

A plea of general performance of covenant in an action upon an administrator's bond, is demurrable. *Martin vs. Royster*, 3 *Eng.* 81.

In an action of debt upon a penal bond, the recovery of the plaintiff is not limited to the amount of the damages laid in the declaration.

Error to Pulaski Circuit Court.

Hon. WM. H. FEILD, Circuit Judge.

FOWLER, for the plaintiffs. Under the order of the Probate Court, a demand on Byrd was necessary in order for the plaintiff to maintain the action; and whenever a previous demand is necessary, it is also necessary to allege it specially in the declaration, with certainty as to time, &c. *Irwin vs. Wells*, 1 *Mo. Rep.* 13; 1 *Ch. Pl.* 322; *Arch. Civ. Pl.* 168.

The damages in the declaration and writ were laid at one dollar, and it was error to render a judgment for more damages than

claimed. (*Arch. Civ. Pl.* 170; 2 *Ch. Pl.* 15, *in note* 9; 7 *Humph. Rep.* 76; 4 *Litt. Rep.* 265.) And debt, in this case, sounds in damages.

Unless in cases where it is specially authorized by statute, the Circuit Courts cannot legally run their original process beyond the limits of the county where the suit is instituted. (*Auditor vs. Davis*, 2 *Ark. Rep.* 503; 1 *Scam. Rep.* 56, 404; 4 *Ib.* 303.) And our statute was never intended as a license to institute a suit in Pulaski county, and issue one writ to that county against one resident of that county and one resident of Jefferson county, and a separate writ to Jefferson against one resident of Jefferson: and the writs being so issued and served, ought to have been abated. *Bank vs. Terry & Stone*, 13 *Ark.* 390; 1 *Ark.* 463; 3 *Ib.* 343, 125.

The writs were wholly unauthorized without an averment in the declaration of the residences in different counties; and this objection could only be reached by plea in abatement. *Key vs. Collins ad.*, 1 *Scam. Rep.* 403; *Ib.* 547; 1 *Gilm. Rep.* 35; 1 *Ark. Rep.* 463; 2 *Ib.* 190; 2 *Texas Rep.* 246; 11 *Illinois Rep.* 475.

CURRAN, contra. That the pleas in abatement were insufficient, we refer to *Dig.*, *ch.* 126, *secs.* 5 *and* 6; *Dillard vs. Noel*, 2 *Ark.* 454; 3 *Ark.* 119; 4 *Ib.* 418.

The statute does not require any special demand or request to entitle an ad. d. b. n. to sue his predecessor in administration for the amount ascertained to be due by the Probate Court and ordered to be paid over. The averment was not necessary—it will be treated as surplusage, and cannot be traversed. *Gould's Pl.*, *sec.* 171; 2 *East* 333; *Hob.* 208.

It is well settled that under a statute requiring the declaration to contain special breaches of the condition of a penal bond, a general plea of conditions performed, is no answer. *Martin vs. Royster*, 3 *Eng.* 74.

Mr. Justice WALKER delivered the opinion of the Court.

Richard C. Byrd was appointed administrator of the estate of James B. Gladish, deceased, and entered into bond with his co-defendants, his securities, for the faithful performance of his duties as such administrator. Subsequently, upon a settlement with the Probate Court, he was found to be indebted to the estate $1,118. And, thereupon, the Court revoked his letters of administration, appointed Joseph O. Ashley administrator *de bonis non* of said estate, and made an order directing Byrd to pay the $1,118, so remaining in his hands upon settlement, over to Ashley his successor in administration. To recover this sum of money, Ashley has brought this suit upon the official bond of Byrd against himself and securities. The securities severally filed pleas in abatement. First: That separate writs of summons were issued to Pulaski and Jefferson counties; that to Pulaski, containg the names of two of the defendants, who were ordered to be summoned, when, in fact, but one of them resided in that county. The second plea was, in substance, that suit having been commenced in Pulaski county, a separate writ, issued to Jefferson county, against one of the defendants, who was a resident of that county, without averring in the declaration that such defendant resided in Jefferson county. There was also another plea, in abatement, filed by one of the securities, which, however, was intended to present substantially the same question.

The objection to the writs in this case, is not that sustained by this Court to the writs in the case of *Hartley vs. Tunstall et al.*, (3 *Ark.* 119.) In that case, each separate writ was issued, and liable to be served upon all of the defendants, if found by the sheriff to whom directed. This was held to be oppressive and vexatious, and imposing unnecessary costs upon the defendants. But there is no such objection to the writs in this case. The objection here is, in effect, that a defendant, resident of Jefferson county, is not liable to be served with process out of his county, and seems to be predicated upon the ground, assumed in the

second plea, that where there are two or more defendants in the same suit, who reside in different counties, in order to avail himself of the benefit of the act which authorizes separate writs to issue to the several counties in which the defendants respectively reside, the plaintiff must aver truly the residence of each of the defendants; so that, where several writs issue, they may, in this respect, correspond with the declaration; and, should the plaintiff fail to make such averment in his declaration, should the writs be issued to several counties, there would be a variance or non-conformity of the writs to the declaration, which would be matter of abatement. However plausible this may appear, the practice in this State has been different, under the sanction of the repeated decisions of this Court. It was held in the case of *Dillard vs. Noel*, (2 *Ark. Rep.* 449,) that no averment in the declaration as to the residence of either party is necessary; and also that a resident of one county may be sued in another; and more recently this decision was cited with approbation in the case of *Ford vs. Hundley*, (5 *Ark. Rep.* 179.) After setting forth the condition of the administrator's bond, the plaintiff avered that, upon settlement there was found to be a balance in his hands of $1,118, which he was ordered to pay over to plaintiff, and also a demand, on several different days, and refusal to pay. Byrd, by plea, traversed this allegation, at the several times set forth. To which the plaintiff demurred, upon the ground that the plea tendered an immaterial issue, because although there was a demand and refusal avered, yet as such demand was not essential to the plaintiff's recovery, that he was not bound to prove it, and that no material issue could be formed upon it.

In order to determine this question, it becomes necessary to consider the nature of the defendant's liability as administrator. He covenants to do whatever might be required of him by law, or enjoined by the lawful order, sentence or decree of any court of competent jurisdiction. The Probate Court had such jurisdiction, and, in the due exercise thereof, ordered him to pay the specific sum of money ascertained to be in his hands, and due

upon settlement; whereby he became liable to pay a specific sum, a debt due and payable to his successor. No act, on the part of the plaintiff, was necessary to entitle him to this money. He was as much entitled to sue for and recover it, as if it had been a debt due directly to his intestate; and if a demand was necessary, on his part, to entitle him to maintain an action against Byrd, upon the same principle, it would be necessary in all cases where administrators sue for debts due the estates of their intestates. It is the duty of the debtor to seek out his creditor, and to make payment to him; a readiness and willingness on his part will not excuse him. The debt being due, a right of action accrues to the plaintiff without any duty or act on his part for its recovery, as well in the one case as in the other; and so well established is this doctrine that even if the Probate Court had directed Byrd to pay over the money upon the *request* of the plaintiff, the weight of authority is, that the action could well have been maintained without such request. Thus it has been held that, where a note or bond for the payment of money is made payable on demand, suit may be maintained upon it without demand. The commencement of the action is held to be a demand in law, and the only advantage to the defendant is that, in the absence of a demand before suit brought, he will be only chargeable with interest from the commencement of the suit. *Cotton vs. Revell*, 2 *Bibb*. 101; *Gore vs. Buck*, 1 *Mon*. 209; *Leather's representatives vs. McGlasson*, 3 *Mon*. 224.

The demurrer was properly sustained to Byrd's fourth plea. A plea of general performance of covenant has been repeatedly held by this Court demurrable. *Martin vs. Royster et al.*, 3 *Eng*. 81.

The remaining grounds of error is, that the damages recovered exceed the amount laid in the declaration. This objection is doubtless good in actions *ex delicto*, or where the action sounds in damages. But this was an action of debt upon a penal bond, and although, under our statute, breaches are assigned and damages assessed, still the judgment is rendered in debt for the penalty

of the bond. The verdict of the jury is entered of record with a further judgment for execution for the damages assessed. Thus it will be seen that although there is an ascertainment of damages and an order for execution to levy them, still the form of the action and the judgment are the common law forms in debt, and in such action the recovery of the plaintiff is not limited to the amount of damages laid in the declaration. (1 *Ch. Pl.* 114, 339 418.) Judgment affirmed.

Mr. Chief Justice WATKINS not sitting in this case.

TATUM VS. HINES.

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At common law, and under the general law of this State, where personal property comes to the wife by distribution, the title vests in the husband, and the property is liable for his debts; and if, in such case, the wife sets up a separate estate in the property, under the statute of another State, such statute is a matter of fact to be established by competent evidence.

Where a chancery cause is tried upon the pleadings and exhibits, this court will not presume, for the affirmance of the decree, that testimony was heard at the trial; as where the cause is so set down for hearing, no oral testimony can be given.

Appeal from Union Circuit Court in Chancery.

The Hon. SHELTON WATSON, Circuit Judge.

LYON & CARLETON, for the appellant.

MARR & HARDY, for appellee.

Mr. Justice WALKER delivered the opinion of the Court.

This was a suit in chancery, commenced in the Union Circuit Court, by Hines and wife against Tatum, to enjoin the sale of a slave, levied upon to satisfy a judgment in favor of Tatum against John H. Hines; the slave being claimed as the separate property of the wife, and not subject to seizure and sale for the payment of the husband's debts.

The material facts upon which the claim of the wife rests, are these: The complainants resided in the State of Mississippi about the year 1840. At what particular time they married, or how long prior to that time they resided in that State, does not appear; nor is it important to know, so far as their rights in this case may be affected. In that year, Vincent Glass, the father of the complainant, Rhoda Hines, then a resident of Noxubee county, in that State, died intestate, being at the time of his death the owner of slaves and other property. Due administration was had upon his estate, and such proceedings had, that, on the 1st of October, 1841, distribution of said estate was made between the heirs; in which *Catron*, the slave now in dispute, and *Maria*, were allotted and set apart to the said Rhoda as her property; which was evidenced by the following instrument in writing:

NOXUBEE COUNTY, }
State of Mississippi. }

Know all men by these presents, that we, Joel Glass and James Glass, administrators of the estate of Vincent Glass, deceased, do certify that in the division of the negroes by the names of Maria and Catron were awarded to his daughter, Rhoda Hines, his legal heir, as her part of the negroes that was awarded between the heirs of the said Glass, deceased, and is her own property as such.

Given under our hands and seals, this the first day of October, 1841.

JAMES GLASS, [L. S.]
JOEL GLASS. [L. S.]

This instrument purports to have been acknowledged and admitted to record in Noxubee county, Mississippi, on the 4th of April, 1842, and, afterwards, on the 3d of June, 1842, it was recorded in Bolivar county, in that State, and on the 6th of May, 1848, said instrument, together with the certificates of acknowledgment and record in Mississippi, were recorded in Union county, in this State, to which the complainants removed, and where they continued to reside at the commencement of this suit, all the while being in the possession of the slave Catron, who was claimed by the wife as her property, and such was the general understanding in the neighborhood of their residence in Union county.

This may suffice to show the nature of the claim of the complainant, Rhoda, to the property. The answer admits the identity of the slave, that she came to the wife as stated in the bill, but denies that a separate estate, under the laws of Mississippi, vested in the wife, or that, if the statute of Mississippi has made provisions to that effect, that they have been complied with, so as to vest in the wife a separate estate. Indeed, the whold equity of the case turns upon this point.

The material allegation in the bill is, that by force of the statute law of Mississippi, the title to those slaves vested in the wife, a *feme covert*. At the common law, we know that this would not be the case, nor even under the provisions of our own statute, for it is not pretended that there has, in this instance, been a compliance with them. And if there is such a statute in Mississippi, it is a matter of fact to be established by competent evidence. The courts of this State have no judicial knowledge of the local laws of Mississippi. (*Newton ex. vs. Cocke ex.*, 5 *Eng.* 169.) And it certainly devolves upon the complainants to show what the law of Mississippi was. This, it appears, they have failed to do. By reference to the record, it will be seen that the case was tried upon bill, answer, replication, and exhibits, which necessarily excludes the introduction of evidence. We must therefore presume that the Court below rendered its decree, in favor of complain-

ants, upon the state of case made by the pleadings and exhibits, without evidence of the statute law of Mississippi, and in this there was manifest error, because it is by force of that statute, that the complainant must, if at all, recover. Having failed to set the cause for hearing upon evidence as well as the pleadings and exhibits, so that the complainants might have introduced evidence to sustain the most important allegation in the bill, the decree was rendered without evidence, nor, as the case was set for hearing, can any evidence be introduced. Let the decree be reversed, and the cause be remanded, with instructions to dismiss the bill, dissolve the injunction, and decree to the defendant damages according to the statute.

CREASE, TREASURER, VS. DANLEY, COLLECTOR.

Appeal from Pulaski Circuit Court.

S. H. HEMPSTEAD, Special Judge.

The question involved in this case, having been determined by the case of *Pike vs. Danley*, decided at the present term, on the authority of *Woodruff vs. Trapnall*, (10 *How.* 203,) this judgment must be affirmed.

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HARDY VS. HEARD ET AL.

The design of the statute, in requiring the recital of the judgment, execution, &c., in a deed by a sheriff for land sold under execution, was to relieve the purchaser from the necessity of producing the judgment, &c., and to leave to the party, who would contest the sale, to establish its invalidity.

A deed for land sold under execution, not containing the recitals mentioned in the statute, or not showing on its face a compliance with the law, could not be evidence under the statute. But if such deed is in compliance with the statute, it is only prima facie evidence, and may be entirely overthrown by evidence that the sale had never been made, or had not been made in accordance with law.

A vendee of real estate, holding under a bond for title, has such an interest in the land as is subject to a judgment lien and to sale under execution; subject to the legal and equitable rights of the vendor for the unpaid purchase money.

Mere inadequacy of price, without additional circumstances, is not sufficient to invalidate a sale under execution, when fairly and legally made.

The rule in chancery is, that the admission of incompetent evidence will not vitiate, if there is sufficient competent proof to sustain the decree. 4 *Eng.* 546.

It is a universal rule, that he who submits to answer, must answer fully and fairly all the material allegations and charges of the bill; and has no right to answer that he is not willing to admit any particular fact; nor take shelter behind sweeping and broad denials and vague generalities.

Where a defendant fails to answer a statement in the bill, which is neither charged nor presumed to be within his knowledge, such failure is not an implied admission of its truth, (*Blakeney vs. Ferguson*, 14 *Ark.*); otherwise, where it is charged or presumed to be within the defendant's knowledge, or where it is answered evasively.

A. sells and conveys a tract of land to B., reserving, in the deed, all pieces or parcels of land granted, bargained and sold to sundry persons in the town of Arkadelphia, in one and two acre lots: HELD, That the reservation in the deed was sufficient to put B. upon enquiry, and affect him with notice as to the persons to whom the lots had been previously sold; and as to the extent, situation and locality of the lots: and that a forfeiture of the lots previously sold, could not enure to the benefit of B.

In the absence of all evidence to the contrary, courts are bound to presume that any purchaser of real estate, informs himself of its boundaries, situation and locality, before making the purchase.

Appeal from Clark Circuit Court in Chancery.

The Hon. JOHN QUILLIN, Circuit Judge.

CURRAN, for the appellant.

FLANAGIN, for the appellees.

Hon. S. H. HEMPSTEAD, Special Judge delivered the opinion of the Court.

In 1846, James K. Rogers, owner in fee, of the west-half of the north-east quarter of section twenty, in township seven south, of range nineteen west, containing eighty acres of land, situated in Clark county, sold one acre of it, in the town of Arkadelphia, described by certain lines, to Robert Montgomery, for one hundred and fifty dollars, who paid a part of the consideration money, took actual possession, and erected, at a cost of one hundred dollars, a dwelling house and blacksmith shop on the lot, and enclosed a garden. Montgomery took a bond for title, which was not produced; but the scope and purport of it appears to have been that Montgomery was to pay one hundred dollars to Rogers, in two years in annual instalments, and then receive a title; and if not punctually paid the lot to revert, and improvements to be forfeited. On the the 15th of January, 1848, Rogers and wife, among other lands, conveyed by deed of bargain and sale with general warranty, to Henry K. Hardy, the appellant, the above described tract of land; but expressly reserving "all pieces and parcels of land granted, bargained and sold to sundry persons, in the town of Arkadelphia, in one and two acre lots," leaving one hundred and thirty seven acres as the quantity conveyed to Hardy.

Thomas A. Heard and Thomas B. Sloan obtained judgment against Montgomery, on the 25th of March, 1848, before a justice of the peace, for seventy-three dollars and ninety-one cents, and execution thereon being returned "nulla bona," a transcript was taken and filed in the office of the clerk of the Circuit Court of Clark county, where the lot was situated, on the 10th of July, 1848, in accordance with the statute. (*Digest* 661; *State use of Brown vs. Crow et al.*, 6 *Eng.* 652.) Execution issued out of that office, on the 1st of December, 1848, by virtue whereof the same

lot was levied on as the property of Montgomery; and which was advertised, and sold, at the succeeding court, in due form of law, to Heard and Sloan, the appellees, as the last and best bidders, and as the purchasers at the sum of ten dollars; and, who having paid the bid, the sheriff, on the 24th of September, 1849, made and acknowledged a deed to them in due form, and which was immediately recorded. About this time, they paid to Rogers the balance of the purchase money on the lot, and Rogers and wife made them a quit claim deed, embracing the one acre lot sold to Montgomery, dated the 29th of March, 1849; but which was neither acknowledged nor recorded, and which was certainly defective as a legal conveyance, and fell far short of the title Rogers was bound to make, on payment of the purchase money.

Heard and Sloan filed their bill to obtain title to the one acre lot, purchased by them at execution sale, and for general relief, and they made James K. Rogers, Henry K. Hardy and Robert Montgomery defendants to their bill. The Court, at the hearing, decreed "that all the right, title, interest and claim of the defendants to said lot vest absolutely in the complainants, and that the said complainants have an absolute title in fee simple, and discharged from any and all claim of the defendants." From this decree, Hardy appealed.

The first inquiry is, whether Heard and Sloan had such title to the lot as to authorize them to apply to a court of equity for relief, and of this we think there can be no doubt; nor do we apprehend any question can be made as to the jurisdiction of a court of equity to grant the relief sought. The deed of the officer to them, recited the names of the parties to the execution, and when issued, and the date and amount of the judgment, the return of "nulla bona" on the execution issued by the justice, the filing of the transcript, and other particulars as to the execution and sale; and which recitals are by express statute made evidence of the facts therein stated. (*Digest* 504.) The manifest design of this statute was to relieve the purchaser from the necessity of producing a judgment and execution, levy and advertisement; or, in

other words, to excuse him from the duty of proving, in the first instance, that the law had been complied with; and leaving it to the party, who would contest the sale, to establish its invalidity. The statute rests on the fundamental principle that public officers, executive, judicial and ministerial, are presumed to discharge their duties, until the contrary is made to appear; and on the further ground that there is no better method of encouraging fair judicial sales, and protecting *bona fide* purchasers, than to afford all reasonable facilities to enable them to reap the fruits of their purchases. A deed, not containing the recitals mentioned in the statute, or not showing on its face a compliance with the law, could not be evidence under the statute. (*Moore vs. Brown*, 11 *How. S. C. R.* 424.) Nor is a deed in compliance with the statute, any thing more than *prima facie* evidence, as was held by this Court in *Newton vs. The State Bank*, (14 *Ark.* 10); and may, therefore, be entirely overthrown by evidence; because, unless it was competent to prove that the sale had not been made at all, or that it had not been made in accordance with law, the door would be closed to enquiry; the deed, whether true or false, import absolute verity on its face, and so far from being only *prima facie* evidence would become conclusive evidence of the facts recited. Such a doctrine would place it in the power of an officer to deprive a man of his freehold against law, and with comparative impunity. Montgomery had a bond for title, and consequently had such an interest in the land, as was subject to a judgment lien, and subject to sale under execution. Our statute is very comprehensive, and declares all real estate subject to execution, whereof the defendant, or any person for him is seized "in law or equity," and also the lien of a judgment attaches to all estates and interests in lands and tenements, whether "legal or equitable," liable to be sold under execution. (*Digest* 498, *sec.* 25; 627 *sec.* 36.) The vendee of real estate, holding a bond for title, is in equity considered as the real owner, whether he had paid the purchase money, or actually taken possession or not, subject only to the legal and equitable rights of the vendor for

the unpaid purchase money. As owner, he has an interest; to which the lien of a judgment attaches, and which may be seized and sold under execution. In *Smith et al. vs. Robinson*, (13 *Ark.* 534,) the nature of title bonds was elaborately discussed, and the Court held that the parties to such a contract stood in the relative positions of mortgager and mortgagee, and that all the incidents of a mortgage attached to and controlled these kind of contracts. (5 *Porter* 452.) It follows, then, that the vendee, in analogy to the mortgager, is the owner of an equity of redemption, and that this is the real and beneficial estate, which is descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law (4 *Kent* 159, 160); subject, of course, to the rights of the vendor. The purchasers, then, succeeded to all the rights of Montgomery, and although the amount bid by them was small, yet it was the highest and best bid, at a public sale, on regular notice, at the time and place appointed by law, and which appears to have been fairly and properly conducted. It has become well settled that mere inadequacy of price, without additional circumstances, is not sufficient to invalidate a sale, fairly and legally made, and the sound reason for the rule is, that the intrinsic value of property cannot be measured by any precise standard; but depends upon opinion, different in different men, and influenced by various circumstances. It must, in its very nature, be fluctuating; high at one time, depressed at another, according to the actual condition of the monetary affairs, and comparative prosperity of the country. (1 *Story's Eq.* 245.) And there are other reasons equally persuasive. Lands offered for sale on execution, may be encumbered with prior liens, to nearly if not quite their value, or subject to adverse claims or pretensions, or there may be defects or suspicions as to the validity of titles; and to expect, under these and like circumstances, that property will sell for what a person, unacquainted with such circumstances, would say it was worth, would be unjust to purchasers, and destroy all confidence in judicial sales. *Livingston vs. Byrne*, 11 *Johns.*

566; *Williamson vs. Dale*, 3 *Johns. Ch. R.* 292; *Osgood vs. Franklin*, 2 *Johns. Ch. R.* 23 *to* 29.

Lands thus situated, can hardly be said to have any determinate value, beyond what they will produce at a public sale fairly conducted. It resolves itself into this, that the law, having designated the mode, manner, time, and place of sale under execution, has made that the test of value, and to disregard it, on the isolated ground of inadequacy of consideration, would not only be extremely dangerous, but would be to exert a sort of dispensing power, which is happily unknown to a government of laws. A precedent like that, carried out to its fullest extent, would, in the language of Lord Chief BARON EYRE, in *Griffith vs. Spratly*, (1 *Cox. R.* 383,) "throw every thing into confusion, and set afloat the contracts of mankind." It may be stated, then, as a safe and salutary rule of property, that mere inadequacy of consideration, or price, is not sufficient to avoid a sale fairly made.

There is nothing in the title, set up by Heard and Sloan, that renders it unfit or improper for a Court of equity to afford relief, in case they are in other respects entitled to it.

In deciding whether the decree is correct, as to Hardy, the most material point is, as to the identity and locality of the one acre lot sold by Rogers to Montgomery, and for which the latter held a title bond; and this must depend on the bill and answer of Hardy. For, although the deposition of Rogers was taken by the complainants, and read at the hearing against Hardy's objection, it discloses nothing material to that question, even supposing Rogers to be a competent witness, which we do not decide; although inclined to the opinion that he was incompetent. *Jackson vs. Hallenback*, 2 *John.* 394.

But we think the deposition may be excluded, and the decree maintained. The rule in chancery is, that the admission of incompetent evidence will not vitiate, if there is sufficient competent proof to sustain the decree. 4 *Eng.* 546.

The bill alleged that, in 1846, Montgomery purchased from Rogers one acre lot in the town of Arkadelphia, described in the

bill by particular lines, received a title bond, took possession, built a dwelling-house and blacksmith-shop, and enclosed a garden on the lot, and resided on it; that, in the purchase made by Hardy from Rogers, the deed contained an express reservation of one and two acre lots in Arkadelphia, sold previously to sundry persons, whose names are not specified in the deed; that Hardy knew, at the time of his purchase, that Montgomery had bought, improved, and was then living on, and in the actual possession of the one acre lot, mentioned in the bill; that the original title bond was pretended to be lost or destroyed; that Hardy, to defraud the complainants, sets up his pretended title to said lot; and he was specially interrogated and required to state, whether Montgomery had not purchased as alleged, whether the lot as described was not excepted from sale, whether Hardy did not know, when he purchased, that Montgomery had bought, improved and lived on the premises described; and whether the bond for title had not been fraudulently destroyed; and, if not, where was it, and what its stipulations and conditions?

The description of the lot levied on and sold by the sheriff, as contained in his deed to Heard and Sloan, and made an exhibit in the case, was the same, substantially, as that alleged in the bill, and the exhibit was admitted. These allegations were of a nature to require specific answers; and now let us see how they were met. Hardy admits that Rogers contracted to sell Montgomery one acre of land, "somewhere in the town of Arkadelphia, but the exact locality of said land this defendant is *not willing* to admit." He is careful to set out that, by the contract, if Montgomery failed to make punctual payment, the land and improvements should revert; but does not show when payment was to be made. He does not state that he was uninformed as to the locality of the one acre lot; or that the description of it in the bill was not correct or substantially correct; or state or hint in what respects inaccurate; nor does he, any where in his answer, deny the locality as alleged, and put the complainants to the proof. He admits that Montgomery erected, "*in the town of*

Arkadelphia, in the year 1846, *on some part* of said quarter section of land, a log cabin, blacksmith-shop, and fenced in a garden, but is not *fully informed* as to the *exact* location of the land claimed by said complainants." He states that, in the spring of 1848, as well as he recollects, he bought the improvements "made in said town," from Montgomery, for about fifty dollars, "being the improvements in the said bill mentioned," that Montgomery gave him possession thereof six or seven months afterwards, and stated to Hardy that he was unable to comply with his purchase, and that the same had reverted, or would revert, to Rogers. He admits that, at the time he purchased from Rogers, the latter made a reserve of twenty-three acres, which had been sold to sundry persons in the town of Arkadelphia, but did not specify to whom, and refused to have the names of the purchasers specified in the deed to Hardy, for the reason that the property might revert to Rogers, and might interfere with his rights. If this be so, it is difficult to account for the statement by Hardy, that Rogers was to give him the benefit of all the sales to those to whom titles had not been made. Hardy says he cannot state *positively* what land was reserved from sale in the deed to him, and refers to the deed, which he well knew contained only a general reservation; and so the enquiry was not answered at all. In one part of his answer, he admits that, in 1846, Rogers contracted to sell Montgomery one acre of land in Arkadelphia; and, in another part states, that he "does not know what time the said Montgomery purchased, or *pretended* to purchase, of said defendant, Rogers." He says he cannot state what has become of the bond or agreement between Rogers and Montgomery; that he recollects seeing it in the spring or summer of 1848; that he cannot state *fully* its stipulations, but his *impression* and *belief* are, that if Montgomery should pay Rogers ninety dollars in one and two years, that he was to have "one acre of land in the town of Arkadelphia, fronting on the road leading from *this place* to old *Greenville*," and, on failure to make payment, the acre was to revert to Rogers, his heirs or assigns. He does not state that he

had no present knowledge of the bond for title, or that he did not know in whose possession or custody it was, or whether it was lost or destroyed, but simply that he "cannot state what has become of it," without giving us a reason why.

This answer, in no one particular, or as a whole, comes up to the universal rule, that he who submits to answer must answer fully and fairly all the material allegations and charges of the bill, (*Story's Eq. Pl.*, 846, 847; 2 *Daniel Ch. Pr.*, 255,) and it can seldom fall to the lot of any court to pass upon an answer more unsatisfactory or evasive; and which should not have been allowed to be placed on the files of the court, as the decree *pro confesso* had to be set aside to let it in. That it is evasive, is self-evident; and, as was said in another case, it evinces a "studied choice of phraseology," and loose generalities, "to escape from any direct answer to the allegations in the bill." (2 *Sumner* 231.) Looking to the circumstances of the case, as developed by the record, and even on the face of the answer, no one, as we think, could come to any other conclusion than that Hardy was familiar with the purchase made by Montgomery from Rogers; the nature of the contract, the locality of the lot, and made his own purchase with a knowledge of these facts; and that he did not deny the description contained in the bill, because he could not conscienciously do it. It may fairly be presumed, that the fact was within his knowledge. Indeed, it could hardly have been otherwise. If this were a case where Hardy stood in the position of a purchaser of the one acre lot, it would be quite impossible for a court of equity to hold him as an innocent purchaser without notice, and allow him to retain the fruits of his purchase, because he would have to be held chargeable with notice of the prior rights of Montgomery, on the principle, now universally admitted, that whatever is sufficient to put a purchaser on enquiry, is considered as conveying notice. (4 *Cow.* 722; 1 *Johns. Ch. R.* 267; 2 *Vesey, Jr.* 440; 3 *Scam.* 202.) This is sometimes called constructive notice, or notice in law, and which is no more than evidence of

notice, the presumption of which is so violent, that it cannot be suffered to be controverted. 4 *Kent* 179; 1 *Story's Eq.* 399.

Where a party has possession or knowledge of a deed, under which he claims his title, and it recites another deed, which shows a title in a third person, the Court will presume him to have notice of the contents of the deed thus referred to, or recited, and will not permit him to introduce evidence to disprove it. Notice of a lease, is notice of its contents. (14 *Vesey* 426.) If a person purchases an estate in possession of tenants, he is bound to enquire into the estate those tenants have, and, therefore, will be affected with notice of all the facts, as to the extent, nature, and duration of their estates. (2 *Vesey, jr.*, 440; 1 *Story's Eq.* 399.) If a person is in possession of land, a subsequent purchaser is deemed to have notice of the possessor's rights, whatever they may be. (2 *Paige* 300; 5 *Johns. Ch. R.* 29; 1 *Merivale* 282; 6 *Wendall* 226; 3 *Paige* 423.) A person, being about to purchase a lot of land, was informed that another had "some sort of claim to it," and this was held sufficient to put him on enquiry, and constitute constructive notice. 1 *Smedes & Marsh. Ch. R.* 45.

Now, laying aside all other considerations, there were two facts in this case sufficient to put Hardy on enquiry, and charge him with notice: *first*, Montgomery was in actual possession of the lot when Hardy purchased; and, *second*, Rogers made an express exception, in his deed to Hardy, of lots previously sold by him to "sundry persons in the town of Arkadelphia." If there was no other fact or circumstance in the case calculated to put a prudent man on enquiry, this exception was unquestionably amply sufficient to demand from him an investigation as to the persons to whom lots had been sold, and the extent and situation and locality of those lots, if not already apprised of these facts. And he must be held cognizant of the locality of the lot sold to Montgomery, because the latter was in the actual possession, because it was a part of the reservation made in the deed, and because for Hardy to ascertain and to inform himself of the lines and

boundaries of his own land, was to learn the locality of the lot in controversy. *Jones vs. Smith*, 1 *Hare R.* 43.

Certainly, in the absence of all evidence to the contrary, courts are bound to presume that every purchaser of real estate informs himself of its boundaries, situation, and locality, before making the purchase. This is consistent with the ordinary course of human transactions, and the experience of mankind. The law itself makes that presumption effectual until destroyed by counter proof, and there is nothing in the record tending to weaken, but there are facts and circumstances, amply sufficient to sustain, that presumption in the case now under consideration.

As a defendant in chancery, submitting to answer, must answer fully and fairly, he has no right to say he is not willing to admit any particular fact or facts, and rest his defence there; nor can he take shelter behind sweeping and broad denials, or vague generalities. (3 *B. Mon.* 17, 18.) Such a practice would thwart the end to be attained by courts of equity, which is to arrive at the real justice of the case by appealing to the conscience of the defendant. And this brings us to the question as to the consequences of a failure to answer a fact charged, and presumed to be within the knowledge of the defendant. The general rule, as to answering in chancery, was elaborately discussed by this Court in *Blakeney vs. Ferguson*, decided at January term, 1854. The fact in that case was, that the complainants alleged themselves to be, and claimed as widow and heirs at law of Joseph Ferguson, deceasd. Blakeney, in answering, entirely omitted to notice or answer that statement, and there was no proof of it at the hearing. *It was neither charged, nor could it be presumed, to be within his knowledge.* On this state of case, quite different from the one now involved, the Court very correctly and properly applied the *general* rule, that the failure of Blakeney to answer that statement could not amount to an implied admission of its truth, and that, as the complainants had omitted to prove it, the decree could not be sustained. That rule is well supported by authority, and with it we are entirely satisfied; and think it

should govern in all cases, where the fact is neither charged, nor could be presumed within the knowledge of the defendant.

But, it has now become to be a clear exception to that rule, which we feel disposed to recognize and enforce, that where the bill charges the fact to be within the knowledge of the defendant, and which may fairly be presumed to be so; or without so charging, the fact may reasonably be said to be within the defendant's knowledge, if the answer is silent as to that fact, or it is answered evasively, it amounts to an *implied admission* of the fact thus stated; and no further proof is necessary to warrant a decree against the defendant upon it. (*Scotts vs. Hume, Lit. Sel. Cas.* 379; *Lewis vs. Stafford*, 4 *Bibb* 318; *Moore vs. Lockett*, 2 *Bibb* 69; *McCampbell vs. Gill*, 4 *J. J. Marsh.* 90; *Price adm. vs. Boswell*, 3 *B. Mon.* 17, 18; *Mitchell vs. Maupin*, 3 *Mon.* 187; *Bright vs. Wagle*, 3 *Dana* 256; *Armitage vs. Wickliffe*, 12 *B. Mon.* 488; *Neale vs. Haythorp*, 3 *Bland* 551.) Evasion is worse than silence; because the former may be the result of carelessnes or inattention, while the latter springs from design, and is entitled to no favor whatever.

This exception and qualification of the general rule are only applicable in cases of knowledge, either charged or presumed; and if a fact should be charged to be within the knowledge of the defendant, which in the very nature of things could not be, or it was extremely improbable it should be so, there could of course be no implied admission arising from either silence or evasion. Before the complainant can have the benefit of the implied admission, it must appear reasonable that the fact is within the knowledge of the defendant. The exception, herein adverted to, was noticed and admitted in *Blakeney vs. Ferguson*, to exist in cases "where the omitted or evaded fact, may be *prima facie* within the knowledge of the defendant," and although it was not received with favor, but rather regarded as of "mischievous tendency," yet the exception was not denied, nor the authorities by which it is sustained at all questioned.

A similar principle seems to have been acted on by this Court

in *Pelham vs. Floyd*, 4 *Eng.* 532, and which was a case where the facts charged were in the knowledge of the defendant, and not denied. The Court held that where facts are charged and not denied, but other facts are set up in avoidance, it was not necessary to prove the facts thus charged. And this exception, qualified as it is, does not appear to be unjust, or of dangerous tendency. It rests on the sole foundation, applicable to pleadings, that the distinct and explicit assertion, by one party, of a material fact, reasonably presumed to be within the knowlege of the other, and affecting his interest, will be controverted if it is not true; and the party is not concluded unless he has an opportunity of denying it.

Men act on this principle constantly, in the ordinary affairs of life; for it is a rule of evidence that what one party declares to another, without contradiction, when it naturally calls for contradiction if not true, is admissible evidence. (1 *Greenl. Ev.* 199.) It is acted on by courts, for the failure of a defendant, duly summoned, to defend an action at law, subjects him to judgment by default without further proof. His failure to appear, is a tacit admission of the cause of action and the right of the plaintiff to recover.

Bills in chancery are constantly taken for confessed, and, provided the bill is sufficient on its face, a final decree may be made on that admission without further evidence, and indeed proof could not be received to militate against that admission. (2 *Bland Ch. R.* 447.) It is not only supported by authority, but it grows out of a principle respecting admissions of extensive application in jurisprudence. And it is not dangerous to defendants, because, if they answer fully and fairly as to matters within their knowledge, the question can never arise, and if they do not, whether it be the result of negligence or design, they would come with an ill grace to complain of that which sprung into existence from their own default. It does not infringe or touch that cardinal rule, that where facts within the knowledge of defendants in chancery are clearly and positively denied, it requires one wit-

ness and strong corroborating circumstance to destroy the effect of the answer as evidence. 4 *Eng.* 550; 1 *Greenl. Ev.* 260.

Undoubtedly an insufficient answer may be excepted to, and a better one obtained; and it is not to be denied that this is the more appropriate practice, and conformable to the ancient equity practice. But the modern authorities do not permit us to doubt, that the complainant may, if he chooses, file a replication to an insufficient answer; and, if it is a case where the doctrine, as to implied admissions, would apply, have the benefit of that at the hearing. It may then be safely laid down as a general rule, as in *Blakeney vs. Ferguson*, that if the fact stated in the bill is not answered, and cannot be presumed to be within the knowledge of the defendant, and the complainant, not obtaining a fuller and more sufficient answer on exceptions, replies to the insufficient answer and goes to a hearing, he must rely upon his own proof to establish the fact thus stated, and not answered, because there is no implied admission of it. But, on the other hand, it is an admitted and established exception, that if the fact charged is presumed to be within the knowledge of the defendant, to evade, or to omit to answer that fact, is an implied admission, and, without further proof, it may be taken as true at the hearing, and a decree be rendered accordingly.

It follows that, as the locality of the one acre lot in controversy, may fairly be presumed to have been within the knowledge of Hardy, evading it in his answer, in the manner indicated, was equivalent to an admission of the locality as alleged in the bill, and was quite sufficient on that point, to support the decree, without further evidence.

Hardy does not show any right to this lot at all. It is true that he states his belief that the lot, as described and claimed by the complainants, embraced twenty-seven feet on the west side of an acre he was residing on, and had improved, and which was sold by Rogers to one Swink, in 1846 or 1847, and by Swink and Rogers, by deed of warranty to himself. As all pleadings must be construed most strongly against the pleader, it follows that

this sale may be assumed to have taken place in 1847, the latest period, and consequently after the sale of the lot to Montgomery At all events it is not shown to have been anterior. But waiving that consideration altogether, it is sufficient to dispose of this point to observe that, as this was new matter in avoidance, it was necessary for Hardy to prove it before any benefit could be derived from it, and there is certainly not a particle of evidence to show that twenty-seven feet of his acre were in fact included, as alleged by him, in the lot claimed by the complainants. The plaintiffs by putting in a general replication to his answer, had denied the matters therein alleged, and the legal effect was to put him to the proof. (*Story's Eq. Pl.* 877; 4 *Paige* 23; 8 *Pickering* 113; 10 *Yerger* 213.) Matter in avoidance must be proved. 1 *Munford* 373; 1 *Gill & Johns.* 272; 2 *Johns. Ch. R.* 89; 2 *Bibb* 38; 4 *Eng.* 532.

But, it is insisted that, by the terms of the title bond to Montgomery, on failure to pay at the time stipulated, the lot was to revert to Rogers and his heirs and assigns, and all improvements to be forfeited; and that, as Montgomery failed to pay according to stipulations, the right of Montgomery was forfeited.

Now, to say nothing of the rule, that courts of equity will never enforce a penalty or a forfeiture, or aid in divesting an estate for a breach of a covenant or condition subsequent, (2 *Story's Eq.* 1319; 4 *Johns. Ch. R.* 431; 1 *Peters* 232, 236,) and to lay aside the doctrine that time is not generally deemed in equity to be of the essence of the contract, (2 *Story's Eq.* 776,) it is not easy to perceive what claim Hardy has to avail himself of this forfeiture, supposing it to exist. If it was a right which Rogers could assign, he did not assign it, and, as has been already demonstrated, he did not sell the lot to Hardy, but actually excepted it; nor does it appear that the contract between Rogers and Montgomery was assigned, or transfered to Hardy, or that he had any right to it. If, in consequence of the failure to make payment, Rogers might have demanded the reversion of the lot, and insisted on the forfeiture; it is certainly true that he could waive

it, and, if it were necessary to establish a waiver, we should find abundant evidence of it in the quit claim deed, made by him to the complainants for the lot in controversy, and in his failure to answer the bill, and thereby confessing it, and submitting to a decree. This, then, is a defence with which Hardy does not appear to be connected, and of the benefit of which he could not avail himself, and it may be dismissed without further remark. In any view of the case, it does not appear to us that Hardy has any substantial reason to complain of the decree. It is true that he had no title to the lot in controversy to divest, and it would have been more appropriate to have enjoined him from setting up any title to it, and divested the title out of the other defendants, vested it in the complainants, and have pronounced a decree quieting the title. But the decree cannot operate injuriously to Hardy, and as we are satisfied that if we were to give him the lot in controversy, we should award him property, which it does not appear by this record he ever purchased, or to which he has any just claim, we shall direct the decree to be affirmed with costs.

WATKINS, C. J., did not sit in this case.

Cross vs. Haldeman.

Under the statute, title Practice at Law, sec. 6, which should be construed in connection with ch. 17, where a suit by attachment is instituted in one county, a separate writ may be issued to another county, and the credits and choses in action of the defendant attached, as well as his visible, tangible property.

A garnishee, answering and admitting his indebtedness, as the maker of negotiable paper, without reserve or qualification, does so at his peril. If notified at any time before final judgment that his note had been assigned before the service of the writ upon him, he is bound to apply for leave to interpose the defence.

Error to Lawrence Circuit Court.

Before Hon. B. H. Neely, Circuit Judge.

Fairchild, for the plaintiff. The Circuit Court had no right to issue a writ of attachment beyond its own county, and the defendant violated the rights of Moses Brown & Co., and their derivative holders of the note sued on, by appearing to the suit and acknowledging the indebtedness.

Wm. Byers, for defendant.

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

For the determination of the questions, argued on this writ of error, the case, as it appears upon the record, may be thus stated: The plaintiff, Cross, on the 4th of October, 1850, instituted suit against the defendant, Haldeman, in an action of debt, upon a note executed by him to Moses Brown & Co., or order, dated at New Orleans, on the 26th of March, 1846, and due six months after date, and by them assigned to the plaintiff, without recourse, the assignment being without date. The defendant pleaded, in substance, that on the 7th day of December, 1846, one William

Byers, being a creditor of Moses Brown & Co., instituted his action of debt by attachment, in the Independence Circuit Court, against the persons composing that firm, as non-resident debtors, in which suit he caused a separate writ of attachment to be issued to the county of Lawrence; which the sheriff of that county executed, on the 10th of December, 1846, by attaching the indebtedness of this defendant to Moses Brown & Co., and also summoning him as garnishnee of Moses Brown & Co., to appear at the return term of the Independence Circuit Court, and answer what might be objected against him in that suit. That at the time of the service of the writ of attachment upon him, he, this defendant, was indebted to Moses Brown & Co., the defendants in the attachment suit, in a certain sum, being the amount due upon the promissory note mentioned in the declaration of the plaintiff in this behalf. That he, this defendant, afterwards appeared before the Independence Circuit Court, and, for answer to interrogatories there exhibited against him by the plaintiff in attachment, admitted such indebtedness; and such further proceedings were had in that suit, the plaintiff, having established and recovered judgment for the amount of his demand against the absent defendants, Moses Brown & Co., by the consideration and judgment of that Court, on the 25th day of November, 1847, recovered against this defendant, as garnishee, the amount of his indebtedness to them so admitted to be due; and it was then and there further adjudged that this defendant, as such garnishee, should be, and was thereby, released from any further liability to said Moses Brown & Co., in respect thereof; that on the 26th day of November, 1847, this defendant paid the amount of such recovery against him to Byers, the plaintiff in attachment. And the plea avers that, at the time of the service of the writ upon this defendant, as garnishee, and said debt attached in his hands, on the 10th day of December, 1846, the promissory note in the plaintiff's declaration mentioned, was the property of, and owned by, Moses Brown & Co., to whom it was made payable.

The plaintiff rested upon his demurrer overruled to this plea,

the sufficiency of which was questioned upon two grounds: 1st. The want of jurisdiction in the Independence Circuit Court; 2d. That the defendant appeared there in his own wrong, and by confessing his indebtedness, wantonly jeopardized the rights of his creditors, Moses Brown & Co., and of any derivative holder of his negotiable paper by endorsement from them. The statute (*Digest, Title Practice at Law, sec.* 6) provides that "where a defendant in a suit, instituted by attachment, has property in several counties, separate writs of attachment may be issued to each county." There can be no doubt of the power of the General Assembly to enact such a law, and the only question is, whether the word property there used, includes credits or effects, which are *choses in action*, or is to be confined to visible tangible property, whether real or personal, susceptible of being entered upon, or seized into his possession, by the officer. It is obvious, from the context and import of the clause above quoted, that it deals in general terms, and should be construed in connection with the statute concerning attachments, (*Dig., ch.* 17,) by which the mode of proceeding is regulated in detail. That statute (*sec.* 6) contemplates that the defendant is to be attached "by all and singular his goods and chattels, lands, tenements, credits and effects." *Sec.* 8 points out the manner of levying the attachment; which, in respect of credits, is, by the officer going to the person who is supposed to be indebted to the defendant, and then and there, in the presence of two or more citizens of the county, declaring that he attaches the same. *Sec.* 38 authorizes an interpleader by any adverse claimant, other than the defendant, of "the property, credits, or effects, levied on, by virtue of any writ of attachment." Writs of garnishment upon judgments are not allowed to be run out of the county, in which the judgment is rendered, because the statute no where expressly authorizes it; and the Court would not be inclined to extend by implication a practice fraught with inconvenience to debtors, and so liable to abuse; more especially as the judgment plaintiff has a safer and better remedy by creditor's bill. If it be argued that the plain-

tiff in attachment, sending out his separate writs without control or limit, can at pleasure draw to one forum and from distant counties, a variety of vexatious litigations, and against garnishees who are not joint debtors, or in any way connected by a common interest, the only answer is, that, according to our best judgment in the matter, the statute seems to authorize it. It is to be observed that the plea here also alleges a substantive levy of effects under the writ directed to the sheriff of Independence, by means of which the Circuit Court of that county could acquire a jurisdiction of the proceeding *in rem* against the property there situate.

We may concede that, when the garnishee appeared in the Independence Circuit Court, and answered, admitting his indebtedness to Moses Brown & Co., without reserve or qualification, he did so at his peril. If notified, at any time before final judgment against him, that his outstanding note had been in fact assigned before the service of the writ upon him, he was bound to apply for leave to interpose the defence, and should have been allowed an opportunity of proving it. Cases may be supposed where a garnishee, forced into a hazardous position between cross fires, ought to be permitted, for his own protection, to acquit himself of further liability by paying the money into Court, upon his bill in chancery, which would bring all adverse parties interested before the Court in order to assert their claims to it. But here the plea contains a distinct traversable averment, that at the time of the service of the writ upon the garnishee, the note in question was the property of Moses Brown & Co., the defendants in attachment, and the admission of this averment by the demurrer, concludes the rights of the plaintiff now claiming to be the owner of the note by title subsequently derived from them. Affirmed.

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CHILDS ET AL. VS. THE STATE.

An affray, and assault and battery, are offences of the same class; and, though the higher offence may include the less, yet on an indictment charging generally that the defendants "did make an affray by then and there fighting, to the terror," &c., they cannot be convicted of an assault and battery.

Appeal from Lawrence Circuit Court.

Hon. B. H. NEELY, Circuit Judge.

FAIRCHILD, for appellants. The facts charged in an affray, do not include those necessary to put a party on defence of an assault and battery, for he is not apprised whom he has assaulted, nor that he has beaten any body.

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

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

The indictment in this case charged that the appellant and three other persons, on, &c., at, &c., "with force and arms, being assembled together and arrayed in a warlike manner, there and then in a public highway, there situate, unlawfully did make an affray, by then and there fighting, to the great terror and disturbance of the people there being," &c. The defendants being tried separately, the jury found each of them guilty of an assault and battery, and the appellant was accordingly sentenced to pay the fine assessed against him by the verdict. He moved in arrest of judgment, which was overruled, and the question renewed upon his appeal is, whether the conviction is proper.

It is true that every affray includes an assault; the definition of it, at the common law, being "the fighting of two or more

persons in some public place, to the terror of the King's subjects; for if the fighting be in private, it is not an affray, but an assault." 1 *Russell on Crimes* 291; *Roscoe Crim. Ev.* 269.

The essential ingredient of the offence is, that it is done in some public place, whereby terror and alarm may be occasioned to other persons, and it is therefore an aggravated disturbance of the public peace, punishable as a common law offence by fine and imprisonment (*Digest, ch.* 34, *sec* 2); whereas a simple assault or an assault and battery, is punishable by fine only. (*Rev. Stat.*, *p.* 246.) All the persons committing an affray, whether it ensue upon a sudden quarrel or a feud, are supposed to engage in or encourage it, with a mutual or common design, to fight or make a disturbance. If the like be done in a private place, each is guilty of an assault; and there can be no doubt that, if counts for the assault be added in an indictment for an affray, one or all may be convicted of the assault, if the evidence falls short of proving an affray. But, without going over the grounds of the decisions in *Cameron vs. The State*, (13 *Ark.* 717); *Johnson vs. The State*, (*Ib.* 686); and *Strawn vs. The State*, (at January term, 1854), our opinion here is, that the conviction appealed from cannot be sustained, because although the offences are of the same generic class, and the commission of the higher may involve the commission of the lower offence, yet the indictment in this case does not contain all the substantive allegations necessary to let in proof of the assault and battery. An affray may be well charged as a promiscuous fighting, the offence consisting in the public disturbance; but it is necessary that an indictment for assault and battery, should describe the offence by disclosing the name of the party injured, or upon whom it was committed, if known or capable of being ascertained, in order to apprise the defendant of the nature of the accusation, to enable him to defend against it, and identify it with such reasonable certainty as to guard him from any further prosecution for the same offence.

We have met with but one decided case to the contrary. In the *State vs. Allen & Royster*, (4 *Hawks.* 356,) the charge in the

indictment was that the defendants, Allen & Royster, "to, with and against each other, did fight and make an affray, to the nuisance of the citizens," &c. The jury found that the defendants were not guilty of an affray; but that the defendant *Allen* was guilty of an assault and battery upon the defendant, *Royster;* and that the defendant Royster was not guilty. TAYLOR, C J., and the rest of the Court, thought, that although there was no precedent to govern the decision in such a case, the conviction of Allen was right upon general principles, and the reason of the thing, which the opinion there proceeds to enlarge upon. But, by reference to the frame of the indictment in that case, it will be perceived that it was substantially a count for assault and battery; upon which, according to our own view of the matter, the defendant was rightly convicted, without recognizing it as an authority in the case now before us.

The judgment will be arrested, and the appellant discharged. The like decision is made upon the appeal of William and Eliza Clark, two other defendants, joined in the same indictment.

FOREMAN VS GIBSON.

After demurrer to the declaration and the general issue subsequently pleaded, the Court has no discretion to allow a plea in abatement.

Appeal from Washington Circuit Court.

Hon. FELIX J. BATSON, Circuit Judge.

ENGLISH, for the appellant. The plea in abatement was out of time, after demurrer to the declaration, and much more after the plea of not guilty. The proper motion was to strike it out. *Knott et al. vs. Clements ad.*, 13 *Ark. R.* 335.

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

After a demurrer to the declaration, and the general issue pleaded at the succeeding term, the defendant, at the third term, filed a plea in abatement, alleging that the appointment of the guardian *ad litem* for the plaintiff "was not made on his the said plaintiff's application." The Court below overruled a motion to strike this plea from the files, and the plaintiff, resting upon his exception, declined to reply to it; whereupon, final judgment was rendered in favor of the defendant.

The judgment of the Circuit Court will be reversed, and the cause remanded, with instructions to disregard the plea in abatement, and that the cause be proceeded in to trial upon plea to the action.

MELVIN VS. S. B. GENERAL SHIELDS.

An attachment bond, with the condition written under the signatures and seals of the obligors, held sufficient: and that if an objection to such bond could be taken in the Circuit Court on appeal from a Justice of the Peace, it must be by plea in abatement, and not by motion to dismiss.

Writ of Error to Yell Circuit Court.

Hon. WM. H. FEILD, Circuit Judge.

JORDAN, for the plaintiff. The condition of a bond may be either in the same deed or another—it may be included within it or endorsed upon it. (*Jacob's Law Dic.*, *Title*, *Bond;* 2 *Salk.* 462*;* 5 *Mod.* 281.) Any words, by which the intention of the parties can be discovered, are sufficient to make the condition of a bond. 2 *Coke*, 669 *and notes.*

After trial and appeal to the Circuit Court, the defendant could not take advantage of any informality in the bond, either by motion to dismiss, or plea in abatement. 3 *Ark.* 501*;* 5 *Ib.* 457*;* 6 *Ib.* 37*;* 7 *Ib.* 410*;* 9 *Ib.* 159.

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

The plaintiff instituted a suit by attachment under the statute, before a justice of the peace, against the steamboat General Shields. The master appeared and released the boat by entering into bond, and the cause progressed to a trial on the merits before the justice, where the plaintiff obtained judgment for the amount of his demand. The master of the boat caused an appeal to be taken to the Circuit Court, and there moved to quash the proceedings had before the justice, because the plaintiff had not filed a bond as required by the statute, before the issuance of the writ of attachment. The plaintiff had filed a bond with the justice, and the only objection, made to it in the Circuit Court, appears to be that the condition was written underneath the signing and sealing of the obligors. Notwithstanding the condition underwritten was followed and verified by the attestation of the justice approving the bond as sufficient, the Circuit Court, upon that motion, dismissed the suit at the costs of the plaintiff.

The proceedings before the justice were regular and conformable to the statute. If the objection taken to the bond could be made in the Circuit Court, it should have been done by plea in abatement, and, if so made, would be out of time, after a trial and on appeal allowed not for delay, but that justice might be

done. But, no matter when or how taken, there was nothing in the objection.

Reversed, and remanded, with instructions to reinstate the cause, and proceed in it to trial *de novo* on the appeal.

RINGGOLD VS. PATTERSON.

In a chancery cause, if the existence of a fact upon which the decision must turn, is doubtful, the chancellor should, of his own motion, and it is his duty, if insisted on by either party, to cause the fact to be ascertained by a jury.

The finding or determination of the chancellor concerning a material issue of fact, where the issue has not been sent to a jury, and there is a conflict of evidence, is not conclusive on appeal, like the verdict of a jury, or the finding of a common law court, sitting as one.

The omission of the advertisement of an execution sale, or the failure of the sheriff to make a literal compliance with that provision of law, would not vitiate a sale to an innocent purchaser, and if the sale take place without notice or advertisement by the consent and agreement of the execution debtor, it is valid as to him.

An execution sale, privately held by agreement of the debtor, at a time or place not appointed by law, may not be void; but, even where fraud is not alleged, the purchaser being ignorant of the want of notice, it would be reasonable to hold that it is voidable at the election of any junior incumbrancer or creditor, who had no notice.

The knowledge by the purchaser at executive sale, that it is made without advertisement and by private agreement, though it might not be conclusive evidence of fraud, is always a circumstance, and in connection with other attendant circumstances—such as apparent concert between the purchaser and execution debtor; material misrepresentations as to the property by the latter in the presence of the former, who is presumed to know the truth, calculated to deceive the plaintiff; the aceptance of a conveyance of the same lands from the debtor on further advances made,—may be a forcible one, from which collusion between the purchaser and the execution debtor is to be inferred.

Appeal from Independence Circuit Court in Chancery.

Hon. B. H. NEELY, Circuit Judge.

FOWLER, for the appellant, contended that the sale of land by an officer, under execution, is valid, and passes the title, although he fails to give notice of the time and place of sale, as required by law, and although the purchaser may have been aware that no notice was given, (*Turner vs. McRea*, 1 *Nott & McCord Rep.* 12; *Lawrence vs. Speed*, 2 *Bibb Rep.* 401; *Hayden vs. Dunlap*, 3 *Ib.* 216; *Webber & Co. vs. Cox*, 6 *Monroe Rep.* 111; *Shamburger vs. Kennedy*, 1 *N. C. Rep.* 1; *Reynolds vs. Rye*, 1 *Freem. Ch. Rep.* 470; 10 *Smedes & Marsh. Rep.* 258; *Pepper vs. Thornton*, 6 *Mon. Rep.* 33; *Byers et al. vs. Fowler et al.*, 12 *Ark Rep.* 272;) that although no notice of sale in this case was given, it is immaterial, as the execution debtor waived it. (1 *N. C. Rep.* 1; 3 *Wash. Cir. C. Rep.* 553.) That the belief, impressions, recollections of a witness are entitled to no weight as evidence without the facts on which they are based. (*Carrico vs. Neal et al.*, 1 *Dana Rep.* 537; *Span & Green vs. Welman*, 11 *Mo. Rep.* 234; *Clason vs. Morris*, 10 *Johns. Rep.* 531; *Van Dyne vs. Tharpe*, 19 *Wend. Rep.* 165; 2 *J. J. Marsh.* 426; *Langford vs. Cummings*, 4 *Ala. Rep.* 48.) That the execution debtor's conduct and statements, whether he be viewed as the former owner of the land, or as an accomplice in the alleged fraud, are wholly inadmissible as evidence against the purchaser, who holds the lands in opposition to him, and there being not a particle of proof *aliunde* of any confederacy or collusion. (*Greenl. Ev.* [*Ed. of* 1842,] *secs.* 112, 177, 233; 1 *Bar. Ch. Rep.* 115; *Gullet vs. Lamburton*, 6 *Ark. Rep.* 122; *Turpin vs. Marks*, 3 *J. J. Marsh. Rep.* 627; 4 *Bibb Rep.* 270; 3 *Litt. Rep.* 14; 4 *Dana Rep.* 223.) And argued this cause at length as to the effect of the answer denying the statements of fraud alleged in the bill; and upon the question of fraud or collusion, on the part of the appellant.

PIKE & CUMMINS, and WM. BYERS, for the appellee. Where a combination or common intent is shown, the declarations of a *particeps criminis* are evidence against the others. *Phill. on Ev., by Cowen & Hill, part* 1, *notes, p.* 177, 178; 6 *J. R.* 155; 11 *Mass. Rep.* 498; 3 *Ib.* 559; *Croft vs. Arther*, 3 *Desr. Rep.* 223; 6 *Har. & John.* 435; *Glenn vs. Keff*, 2 *Gill & John.* 132; *Moore vs. Tracy*, 7 *Wend.*; 8 *Smedes & Marsh.* 305.

Where the act has a tendency or operation to hinder and delay creditors, it is void. *Story's Eq., secs.* 349, 350, 351; *Merrit vs. Perry*, 13 *John. R.* 471; 18 *J. R.* 425; 20 *J. R.* 5; 7 *Paige* 87; 3 *Eng.* 260; 7 *Eng.* 218; 4 *Kent Com.* 464, *note.*

To authorize an appellate court, in chancery, to set aside a finding of the facts, there must be such preponderance of evidence against the finding and decree as would entitle the party to a new trial in a case at law. 11 *Sm. & Marsh.* 458; 1 *Hill Ch. R.* (*S. Car.*) 58; 16 *Ohio Rep.* 417; 12 *Ib.* 75.

That the answer was not sufficient to entitle it to any weight as evidence; and the facts show collusion with Dickinson, to hinder and delay his creditors.

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

The appellee exhibited his bill against Townsend Dickinson, Benjamin Dickinson, Ringgold, the appellant, and Hynson and Worley, tenants of his in possession, and also against William Moore, as administrator of Robert Moore, deceased: the object of which was to quiet the complainant's title to certain tracts of land, sold by the sheriff under execution against the two Dickinsons, and to vacate a marshal's deed to Ringgold for the same lands, alleged to have been purchased through fraudulent combination with Townsend Dickinson, to hinder and defraud his creditors, for an account of rents and profits of the land, while in the possession of Ringgold or his tenants; and as against the administrator of Robert Moore, for a decree under the statute requiring him to execute a deed to the complainant, in order to invest him

with the legal title to a portion of the land, which his intestate had sold to Benjamin Dickinson, who went into possession, and held under a bond, conditioned to make title, on payment of the purchase money, which the complainant represented had been fully paid.

Upon examination of this voluminous record of pleadings, exhibits and depositions, extending to near four hundred pages, it appears that the material question, upon which the decision must turn, is one of fact; that is, assuming that the acts and intentions of Townsend Dickinson were fraudulent, whether the purchaser, Ringgold, was concerned in, or privy to the same. It would seem that the chancellor, before whom the cause was heard, did not consider this so doubtful as to induce him to make up an issue and direct a jury to be empanneled for the trial of it, though according to our impression it was sufficiently doubtful to have made it desirable of his own motion, and his duty, if insisted on by either party, to cause the fact to be ascertained by a jury. It is now argued, on behalf of the appellee, that the finding or determination by the chancellor, concerning a material issue of fact, which he did not choose, nor either party ask him to submit to a jury, is conclusive like the verdict of a jury, or the finding of a common law court, sitting as one, which ought not to be disturbed where there is a conflict of evidence. The argument could not apply in the present case, because, as we understand the decree of the Court below, it went against the appellant upon the ground of legal or constructive fraud. But it can have no application in any chancery cause, where the issue has not been sent to a jury, beyond that degree of respect which might be due to the opinion of another court or judge. In the *State Bank vs. Conway*, (13 *Ark.* 350,) the distinction between appeals in chancery, and writs of error or appeals in common law cases, was adverted to. The Court there said, "The appeal in chancery is a rehearing, or trial of the cause *de novo*, upon the same pleadings and written evidence heard, and determined by the decree in the Court below, and, to some extent, necessarily involves the determination of facts." A

brief recital in the decree of the facts upon which it is rendered, is allowable and may often be useful, but is not now considered any more essential to its validity, than a statement of the reasons or legal argument which may have induced the conclusion; else a decree, right upon the whole record, might have to be reversed, because of omission or mistake in the recital of some particular fact.

It appears from the transcript, that, in the months of March and April, 1840, two judgments for near four thousand dollars were rendered against Townsend and Benjamin Dickinson, in the Circuit Court of the United States, upon which executions issued, and being levied upon a number of tracts of land, including those now in controversy, as the property of one or both of the Dickinsons, they were advertised to be sold by the marshal, at the court-house door, in Batesville, on the 15th day of March, 1841. Townsend Dickinson deposited with the plaintiff's attorneys, certain collateral securities, which they supposed to be valid, amounting to seven thousand dollars, and they agreed, in writing, to postpone the sale until the first day of May, following, when it was to take place without further notice, unless the executions should be satisfied by that time. Pursuant to this agreement, the marshal proceeded to expose the lands for sale, on the 1st of May, when a portion of the tracts were bought by the defendant, Ringgold, another portion by William F. Denton, since deceased, and the residue by an agent of the plaintiffs in execution, who attended the sale. Denton, on the day of sale, relinquished his bid to Ringgold, who paid the money and received a certificate of purchase for the tracts bought by himself and Denton, and on the first of June, 1842, obtained a marshal's deed for the same, being the lands now in controversy.

In April, 1840, T. & B. Dickinson were indebted to one James P. Carter, in the sum of $1,351, for which he held their promissory note, payable on the 1st of September, following. In October, 1840, Carter instituted suit upon the note in the Independence Circuit Court, against the two Dickinsons, and, on the 9th of

June, 1841, recovered judgment against them for $1,445. In July, 1842, he caused execution to be issued upon this judgment, which was levied upon the lands in controversy, but they were not sold. In May, 1843, a writ of *venditioni exponas* was issued pursuant to an order of court. Upon this execution, the Dickinsons claimed, and were allowed, the benefit of the appraisement law, and the property, failing to bring two-thirds of its appraised value, was withheld from sale for one year. In November, 1844, an alias *vend. ex.*, for which Carter had obtained an order of court, was issued upon his judgment, and the lands, being advertised, were sold by the sheriff, on the 1st day of the February term, 1845, of the Independence Circuit Court. At this sale, Carter became the purchaser, and, on the 7th day of February, 1845, obtained a sheriff's deed for the lands. On the 24th of the same month, he conveyed them to the complainant Patterson.

It is insisted, for the appellant, and it may be conceded, that his answer is a full and explicit denial of the allegations in the bill, to the effect that at the marshal's sale he colluded with Townsend Dickinson to aid him in defrauding his creditors, and among them the complainant, or that he purchased and held the lands in trust for Dickinson, with a private agreement that they might be redeemed, or sold for his benefit. To the extent that the answer is responsive, the answering defendant is entitled to the protection of the rule, that a decree cannot go against the answer, unless it is overturned by two witnesses, or one witness and strong corroborating circumstances. The complainant here prays that the defendant may be required to answer the allegations, and especially that he set forth and discover certain matters, about which he propounds a number of interrogatories. The allegations contained in the stating part of a bill, are the pleadings from which the complainant deduces his title to the relief sought It should set forth the facts essential to the relief, but need not detail all the evidence by which it may be expected those facts will be established. By the interrogating part of the bill, the

complainant proposes to make a witness of the defendant, and to elicit evidence from him in support of the allegations; and when he propounds special interrogatories, may shape them in a variety of ways, of a minute and searching character, as he would examine an adverse witness, if they appear to be relevant, so that the answers to them might conduce to establish the complainant's case or repel some anticipated defence. If the defendant does not plead to the discovery, or except to the interrogatories for being frivolous or impertinent, it is his duty to answer them fully and satisfactorily. Failing to do so, he may be treated as if in contempt, and the complainant by excepting may compel a further answer. If he reply, it is a waiver of the exception, and the fact, specially enquired about, and not answered, stands neither admitted (unless peculiarly within the knowledge of the defendant) or denied; to be proved by the complainant, one witness sufficing, like any other fact, where the defendant does not have the benefit of his denial or explanation under oath.

The prominent feature in the complainant's case, is, that the marshal's sale took place without any kind of notice contemplated by law to insure publicity. The rules promulgated by the federal court for this district, which were read and made part of the record at the hearing, adopt and conform to the State statute, as to the time and manner of advertising the notice of execution sales; and lands are required to be sold at the court-house door of the county in which they are situate. It is to be regretted that those rules do not go further, in conformity with the system and policy of the State law, by requiring that marshal's sales of real estate should take place on the first day of the Circuit Court of such county. As those courts are holden twice a year, and the judgment creditor in the Federal Court may sue out his execution, returnable to rule days, it is believed that this practice could be adopted in harmony with that prescribed for the State Courts, without any serious inconvenience. When it is considered that the levy of an execution on realty is an ideal act without notoriety or any visible change of possession; where the judgment

confers the lien, and the only means appointed by law to insure publicity and fairness in the sale, is by means of the advertisement of it, and the requirement that all such sales shall be held on the first day of each term of the Circuit Courts, usually the most public occasions in every county, drawing together a great concourse of people, and that by such sale the debtor is absolutely divested of his estate, the importance of complying with those requirements of law will be apparent. But in order to give confidence to purchasers at execution sales, so that property may bring the highest possible price, and which is, no doubt, the true interest of the debtor, the provision of law for advertising the sale, has been held to be directory, and the omission of it, or the failure of the sheriff to make a literal compliance with it, would not vitiate a sale to an innocent purchaser, who did not procure or participate in the irregularity; leaving the debtor, if injured, to his remedy against the officer thus negligent of his duty. In the case under consideration, the sale not taking place on any public occasion or time fixed by the State law, it is obvious that the only notice which could be given of the marshal's sale, was by means of the advertisement, and the sale as advertised having been postponed by a private agreement, and to take place without further notice upon a contingency known only to the plaintiffs and one of the defendants in the execution, there was really no observance of the usual means of publicity appointed by law. Now, so far as the defendant in the execution is concerned, it is clear that such a sale, taking place by his own consent and agreement, is valid, and he never can be heard to object to the title acquired by the purchaser, because any requirement of law had not been complied with, and which, being intended for his benefit, he had a right to waive. But other persons may be interested in having notice, actual or constructive, of the sale, at which every junior incumbrancer and creditor of the execution debtor has a right to be present, in order to bid upon the property, or see that it brings its full value. An execution sale, privately held by agreement of the debtor, at a time or place not appointed

by law, may not be void; but even where fraud is not alleged, the purchaser being ignorant of the want of notice, it would be reasonable to hold that it is voidable at the election of any junior incumbrancer or creditor, who had no notice, and who, in due season, offering to refund the purchase money, files a bill to have it set aside, the property resold, and the assets marshaled. It must be conceded there is a wide difference between holding the sale thus voidable, and absolutely void. If impeached and sought to be annulled and set aside for fraud, the knowledge of the purchaser of the want of advertisement, might not be conclusive against him. Because, in the absence of a provision by statute in this State, as we think would be desirable, whereby the property and assets of every debtor, in failing circumstances, may be more effectually secured to incumbrancers, according to priority, and apportioned among his general creditors, without being sacrificed in a scramble for undue preferences, a bill of that description, if sustained, would be attended with the same consequence of taking the property from one purchaser and vesting it in another, without any benefit to the general creditors, involving also a forfeiture, by the first purchaser, of the money he may have paid. But it is safe to say, that knowledge of such irregularity is always a circumstance, and, in connection with other attendant circumstances, may be a forcible one, from which collusion between the purchaser and the execution debtor is to be inferred.

In the years 1840, '41, and '42, the two Dickinsons were deeply indebted, beyond their means or ability to pay, and in 1841 and '42 there were various unsatisfied judgments against them in the Federal Court, and in the Independence Circuit Court, in addition to those before mentioned. In the month of March, 1841, T. & B. Dickinson, being largely indebted to the branch of the State Bank at Batesville, of which the defendant Ringgold was Cashier, made an arrangement, in which Townsend Dickinson was the principal actor, with the Bank, by which she obtained a deed of trust upon their plantation and negroes in Jefferson county, by making them a further advance of $5,000, a portion

of which was to be applied in discharging some previously existing liens upon that property; the whole to be repaid within a year. The result of which was, that the Dickinsons failing to make payment, the Jefferson property was sold under the deed of trust, bringing $2,000 over the debt to the Bank, of which excess one half was retained by the agent for his services, and the residue paid over to Townsend Dickinson. That property and the lands in Independence county, advertised by the marshal for sale on the 15th of the same month, embraced all the property of the Dickinsons, of which the witnesses deposing had any knowledge. At the sale which took place on the 1st of May, 1841, besides the marshal and clerk conducting it, and Townsend Dickinson, there were but few persons present; none who bid or appeared to take any interest in it, except the agent of the plaintiff's, the defendant Ringgold, and W. F. Denton. The two latter bid against the plaintiff's agent, but not against each other. They appeared to be acting in concert with Dickinson; that is to say, he frequently consulted with one or both of them, during the progress of the sale, and made representations in their presence and which were heard by others having no greater facilities for hearing, calculated to mislead the plaintiff's agent as to the *situation* of the lands, and location of the improvements, and the result was that one and the other purchased the two most valuable tracts, containing the houses and improvements, at comparatively low rates. On one occasion, when the agent was bidding sharply upon a tract of 278 acres, which he supposed was cleared land, Dickinson had the sale suspended, until he could step into the clerk's office and examine the records, and in a few minutes returned, reporting a mistake by some transposition of the tracts in the levy, so that the agent ceased bidding, and when the adjoining half section came to be offered, bought it at a higher rate, under the impression, from what Dickinson had said in a distinct and audible voice, that it embraced part of the farm, when in fact it was in the woods. It is proved that the lands in question lay within two or three miles of Batesville where Denton and the

defendant Ringgold had resided for many years previous. The purchases made by them averaged less than one-fifth of the real value of the lands, though this circumstance of itself is not important, since all the tracts, including those struck off to the plaintiff's agent, were sold at low rates; and it is part of the hardship of this whole transaction, so far as the general creditors of the Dickinsons are concerned, that the subsequent sale of the same lands to Carter, who doubtless bought at a hazard by reason of the clouds which had accumulated upon the title, was for a mere nominal sum.

There is no room for doubt respecting the acts and declarations of Townsend Dickinson. Previous to the marshal's sale, he proposed to one witness to sell him those lands, and suggested the plan of having them bought by a third person, under execution, so as to perfect the title to the witness, which was declined. On the day previous, the plaintiff's agent called upon him for information about the quality of the lands, location of the improvements, &c., and the answers were such as to deceive the agent. He requested the clerk of the court, in case the agent should call upon him for information about the lands, not to give him any satisfaction. On the day of sale, he stated to a witness, that the defendant, Ringgold, was to buy the lands for him, and allow him a certain time in which to redeem them; and, after the sale, he told another witness that such was his agreement with Ringgold. And what is singular, when these same lands were levied upon by Carter's execution, in 1843, we find the Dickinsons claiming the benefit of the appraisement law. But it is insisted for the appellant that he is not to be prejudiced by any declarations of Dickinson, to which he did not assent, until it is shown that there was a community of design between them, and that he was under no obligation to give, much less to volunteer, information to a rival bidder. We have left out of view every thing said by the witnesses about the impressions left upon their minds, as to what was the intention of the parties, their wish or design, when the acts or declarations, from which those impressions were derived, are

not stated. But two of the witnesses testify to their impressions of a fact. They are positive that Dickinson told them he was to have the privilege of redeeming, and they had the impression that Ringgold, at the time of the sale or shortly after, said the same. The impression, the belief, the recollection of a witness, about what was said, acted or omitted in any past transaction, are equally admissible as testimony, which is not always entitled to weight, because of the reckless or positive manner in which the assertion is made. Yet if that were the only feature in the case, we should hesitate to allow impressions, deposed to after a lapse of several years, and about which the witnesses admit their recollection is not clear or distinct, though of an affirmative fact, to outweigh a broad denial in the answer. So, in regard to the testimony of another witness, Wm. Lowe, who deposes to a conversation between Ringgold and the opposite party, shortly before the institution of this suit, in which he admitted that some limited time had been given to Dickinson to redeem; but, taking the whole together, the inference might be, that the privilege of redeeming was a gratuity, a matter subsequent to the sale, and not connected with any prior understanding.

In this balance of probabilities, two other facts, not before adverted to, remain to be considered. The appellant answers, that he does not know whether the marshal had given notice or not, of the sale, which took place on the 1st day of May, 1841, but he does not deny a knowledge of the agreement, entered into between Dickinson and the plaintiff's attorney, and the fact must be taken as established by the testimony, that the sale was not only without public notice, and made by virtue of the agreement, but that the marshal so proclaimed at the time, in the hearing of all present, including the appellant, who, if he did not know, had the means of knowing by what authority the sale took place. The other is, that the appellant, on the 28th day of December, 1841, accepted from Townsend Dickinson a conveyance of the same lands, which he had bought at marshal's sale, in May previous, for the consideration expressed of $1500. The explanation,

given of this, in the answer, is, that it was done to gratify Dickinson, and quiet his complaints about the low price at which the appellant had purchased the lands in question, and that he agreed to, and did settle and pay that amount of debts, upon which he was already bound as security for Dickinson, and expected to have to pay in any event, and without hope of reimbursement, so that the payment of this additional sum to Dickinson, in that mode, was a matter of indifference. Admitting this explanation, though the debts so paid are neither specified or satisfactorily proved, the acceptance of the deed was an unfortunate circumstance.

Waiving any enquiry, whether the special interrogatories are satisfied by the emphatic but literal denial of the allegations in the stating part of the bill, and giving to the appellant the full benefit of his answer as evidence, the conclusion of the Court, upon the whole case, is, that the decree appealed from ought to be affirmed. While it may be true, that the appellant was prompted by generous motives, and so unwillingly drawn into these transactions, there is no escaping from the conclusion, that he is chargeable with notice of the fraudulent designs of Dickinson.

The Court have not overlooked the claim, set up by the appellant to that portion of the lands in controversy, which had been sold by Robert Moore to Benjamin Dickinson, by reason of his having paid for Dickinson the greater part of the purchase money going to Moore. It does not appear that there is sufficient proof of this affirmative matter on the part of the appellant, upon which to found a partial decree in his favor. Affirmed.

PATTERSON VS. MOORE AS AD.

A conveyance of real estate to the grantee, without the word heirs, or other words of inheritance, conveyed only a life estate, at common law, and under the territorial statute of 1804. *Steele & McCamp. Dig., Title Conveyance, sec.* 1.

And such deed does not operate to pass the fee by way of estoppel; because the grantor, in his deed, "doth warrant and defend from himself, his heirs, executors and assigns forever" the estate conveyed.

Appeal from Independence Circuit Court in Chancery.

Before Hon. B. H. NEELY, Circuit Judge.

PIKE & CUMMINS, and WM. BYERS, for appellant. We submit that the provision in the first section, title Conveyances, (*Steele & McCamp. Dig., p.* 131,) was designed to abolish the common law rule, requiring the term "heirs" to be used in a conveyance to constitute a fee.

The deed, besides any covenants that may be implied from the words of conveyance, contains an express covenant to *warrant* and *defend from himself, his heirs and assigns* FOREVER; which is an express covenant of warranty in fee and an estoppel against the grantor and those claiming under him. *Rawle on Cov.* 188, 196, 197; *Shaw vs. Galbraith*, 7 *Barr* 111; *Tenett et al. vs. Taylor et al.*, 3 *Cond. Rep.* 295; 5 *Cond. Rep.* 644; 3 *Pick.* 51.

FOWLER, contra. We insist that by the deed to Mrs. Moore there is no estate of inheritance "limited to the grantor and his heirs"—and, there being no words of limitation in and by the deed, either express or implied, it is not a case embraced within the statute of Louisiana territory, of October 1, 1804; but it is left to operate according to its terms as at common law. See *Geyer's Dig., p.* 127, *sec.* 1.

The entire want of any words of limitation to the grantor, &c., leaves it, dehors the statute; and, at common law, it could only pass a life estate to the grantee; as it contains no such words as heirs, inheritance, &c., which are indispensable to pass an estate in fee simple. 4 *Kent Com.* (*3d Ed.*) 5, 6, 7; 2 *Black. Com.* 107, 108; LITT., *sec.* 1; *Co. Litt.* 8, 6.

MR. Chief Justice WATKINS delivered the opinion of the Court.

This is an appeal from a portion of the decree in the case of Patterson vs. Dickinson et al., in which the opinion of the Court has just been delivered, affirming the decree upon the appeal of Ringgold, one of the defendants in the Court below. A reference to that opinion will serve to explain the character of the bill, and the nature of the relief sought, as against the present appellee, and the only question presented may be understood from the following further statement of the case.

Among the lands sold on executions against B. & T. Dickinson, and about which the appellant and appellee in that case were contesting, were two fractions, one of about 100 acres, and one of about 24 acres, the titles to which were thus derived. Thomas Moore, the owner in fee of the 100 acre fraction, on the 7th day of November, 1825, executed his deed as follows: "This indenture, &c., between Thomas Moore, of the county of Independence, and territory of Arkansas, and Mary Moore, of the same place, of the other part witnesseth: That the said Thomas Moore, for, and in consideration of, the sum of five hundred dollars, to him in hand paid, hath granted, bargained and sold, and by these presents doth grant, bargain, sell and convey to the aforesaid Mary Moore, so much of a certain tract of land (describing it) so as to contain one hundred acres of land, which aforesaid tract of land for the stipulation above mentioned, the said Thomas Moore doth warrant and defend from himself, his heirs, executors and assigns forever." On the 18th of January, 1830, Mary Moore conveyed, to her son Robert and his heirs, all her right, title and interest in the same tract, reserving to herself the free use and

occupation of one undivided half of it, during her natural life. On the 13th of September, 1835, R. M. Saunders conveyed the fraction of 24 acres to Robert Moore in fee. On the 20th of February, 1837, Robert Moore sold both tracts to Benjamin Dickinson, with bond and covenant to make title to him and his heirs in fee, on payment of the purchase money, which is admitted to have been afterwards paid. On the 18th of July, 1838, Thomas Moore conveyed the entire tract originally entered by him, and including the 100 acres before mentioned, to Townsend Dickinson and his heirs.

Mary Moore having deceased, the chancellor, upon the final hearing, dismissed the bill, and denied the relief as against Wm. Moore, the administrator of Robert, who had died without executing a conveyance in compliance with his bond for title to Benjamin Dickinson. As to the 100 acre tract, the decision of the chancellor that Mary Moore, by the conveyance to her from Thomas, acquired only a life estate, was correct; and, as the bill was framed for title, without any alternative claim for compensation in damages, in the event of a failure or inability to complete it, the proper course was to dismiss the bill. Upon the question argued, it is proper to say, that since the adoption of the Revised Statutes of 1839, such a conveyance as that from Thomas to Mary Moore would pass a fee, the word heirs or other words of inheritance being dispensed with, so that if a less estate is intended, it must be expressly limited by appropriate words. It is believed the territorial statutes, in force at the time that deed was executed, did not make any change in the common law, in this particular. The act of 1804, (*Steele & McCamp. Dig., Title Conveyances, sec.* 1,) providing that all deeds, whereby any estate of inheritance in fee simple, shall hereafter be limited to the grantee and his heirs, the words *grant, bargain, sell,* shall be adjudged an express covenant to the grantee, his heirs and assigns, to wit: that the grantor was seized," &c.; "and, also, for quiet enjoyment against the grantor, his heirs and assigns," &c., could only have been designed to abridge and simplify conveyances, by ma-

king the use of certain words import those covenants usually inserted at full length. It is argued for the appellant, however, that the deed to Mary Moore operates to pass the fee by way of estoppel, arising out of the special clause of warranty at the conclusion. In the principal case of *Shaw vs Gilbreath*, (7 *Pa. State Rep.* 111,) cited for the appellant to this point, the special clause of warranty was from the grantor and his heirs to the grantee, his heirs, and assigns. Here, whether from ignorance or design, the clause of warranty is only against the grantor and his heirs, and that being consistent with the granting part of the deed, which purports to convey only a life estate, could not be so construed as to enlarge it into a fee. The consequence is, that Townsend Dickinson having acquired the title to this tract by the conveyance to him from Thomas Moore in July, 1838, it became subject to the judgments rendered against him, and would follow the disposition of the other property in controversy between Ringgold and Patterson.

But the legal title to the fraction of 24 acres, was in the heirs of Robert Moore, and under the statute authorizing decrees against administrators to make conveyances in completion of sales made by their intestates, the prayer of the bill should have been sustained to that extent. As to so much of the decree in favor of the administrator, dismissing the bill, it will have to be reversed, and the cause will be remanded to the Court below, to modify its decree in accordance with the opinion here expressed. The administrator appears to have occupied a disinterested position, not objecting to execute such conveyance as the Court might direct, to either party, who might be entitled to receive it; and the judgment upon reversal in part of the decree here appealed from, will be that each party pay his own costs incurred about the prosecution of the appeal to this Court.

WARE & MILLER VS. PENNINGTON ET AL.

A judgment in the words, "It is *ordered, adjudged* and *decreed*, by the Court," &c., is not a nullity; the words used being of fully equivalent import to the words, "It is considered," &c.

An agreement to assign a judgment against a third person, is a valuable consideration for a writing obligatory.

Error to Bradley Circuit Court.

The Hon. J. C. MURRAY, Circuit Judge.

PIKE & CUMMINS, for the plaintiffs. *Baker vs. State*, (3 *Ark. Rep.* 491,) does not hold that a judgment is void, because it does not contain the word "considered." If equivalent terms are used—as "adjudged and decreed"—there would be a valid final judgment. *Dooley et al. vs. Watkins*, 5 *Ark. Rep.* 705; *Drexel's appeal*, 6 *Barr.* 272; *Haner's appeal*, 5 *Watts & Serg.* 473.

YELL, contra. Ware & Miller, by their agent, obtained the writing upon which this suit was founded, by deception, in this: they pretended to transfer to the defendants a good and valid judgment, obtained in the Bradley Circuit Court, in their favor, against Denarbus Pennington, when in fact the pretended judgment was a nullity in law, and could not be enforced. *Baker vs. The State*, 3 *Ark. Rep.* 491; 1 *Chitty's Black.* 312, 313.

Mr. Justice SCOTT delivered the opinion of the Court.

At the January term, 1851, the judgment before rendered in the Circuit Court was here reversed, and this cause remanded. (6 *Eng. R.* 745.) Upon its return into the Circuit Court, the demurrer to the second plea therein was confessed, and by leave of the Court the defendant filed four pleas.

1st. *Nil debet.*

2d. That the plaintiff, on the 26th of April, 1841, in Bradley Circuit Court, recovered, against Denarbus W. Pennington, a judgment for $204 82, and costs, and their agent, W. W. Dorris, agreed with defendant, I. H. Pennington, that if he would execute to plaintiff the instrument sued on, and procure security thereon, he, Dorris, as such agent, would in writing transfer and assign the judgment to said I. H. Pennington, and that neither said plaintiffs, nor their agent, did so assign the judgment, in consequence of which said I. H. never realized anything from the said judgment, and the same is now worthless, and defendants say the *contract* and *agreement* aforesaid was the whole and only consideration, for which the writing sued on was given; and that, therefore, the consideration has wholly failed.

3d. That the only consideration for the instrument sued on, was an agreement of Dorris, as the agent of the plaintiff, to assign to said Isaac H. a certain supposed judgment, rendered in Bradley Circuit Court, on the 26th of April, 1841, in favor of plaintiffs, against Denarbus W. Pennington, in the words and figures following, *to wit:* then is copied the style of the case referred to, in the form of the usual entry of judgment on record, stating the appearance of the parties, the empanelling and swearing a jury, their verdict for plaintiffs for $204 82, and the judgment of the Court thereon, in these words: "It is therefore ordered, adjudged and decreed by the Court, that the said plaintiff have and recover of and from the said defendants the sum of two hundred and four dollars and eighty-two cents, together with all the costs in and about this suit in this behalf expended." The plea then proceeds to say, "Said supposed judgment is a nullity, is no judgment at all, and not recoverable by law, and, therefore, the defendants say that the writing upon which this suit is founded, was executed by them without any consideration whatever.

4th. The general plea of no consideration.

The first of these four pleas was stricken out on motion of the plaintiff, because issue was already formed on one identical with it, and issue was taken on the fourth. To the second and third,

demurrers were interposed. The causes of demurrer to the second, were:

1st. It did not show a failure of consideration.

2d. No demand was alleged for the assignment.

The causes of demurrer to the third plea, were:

1st. It is contradictory and inconsistent.

2d. It shows a good consideration.

3d. It does not allege ignorance of the form or nature of the judgment, or that they were deceived or imposed upon.

4th It was in other respects informal and insufficient.

The Court below sustained the demurrer to the second plea, but overruled that to the third, and the plaintiffs declining to reply further, and electing to rest on their demurrer, final judgment was rendered against them, to reverse which, this writ of error was sued out.

The overruling of this demurrer, and the subsequent judgment against the plaintiffs, upon their declining to reply further, are the errors complained of. To support the action of the Court in the premises, it is insisted that the judgment, set out in the plea, is a nullity, and to sustain this proposition, the case of *Baker vs. The State of Arkansas, reported in* 3 *Ark. Rep.* 491, and a citation to Blackstone's Commentaries, are relied upon. That was a criminal case, and the defendant, Baker, was under sentence of imprisonment in the State penitentiary for five years. It is true, however, that there are no indications in the report of the case that these circumstances either had any controling influence in moulding the opinion of the Court, or that the doctrine it established was to be confined to criminal cases alone of such grade. The expressions used are general and sufficiently broad to embrace civil, as well as criminal, judgments. The case was, that in the recording of the sentence of the law against Baker, in pursuance of the verdict of the jury, the terms "ordered by the Court," were used. The ruling was that these were insufficient to express a judgment, and that the words "it is considered by the Court," were necessary, for the reason, as given, that a judgment is the sentence of

the law pronounced by the judges, as the organ of the law, and is not the Court's own judgment. So subtle and purely technical is this distinction, it is fair to presume, if the opinion is to be interpreted strictly, that the Court never designed it to apply to cases beyond those like that before them, and this is the more probable, because in the subsequent case of *Dooley el al. vs. Watkins*, (5 *Ark. Rep.* 705,) where the case of *Baker vs. The State*, was cited as authority, it was not noticed in the opinion of the Court delivered, nor its doctrine applied in that case to a judgment in the Probate Court. But, howsoever this may be, this case does not decide the question made in the case before us; that was a direct proceeding for reversal, and the Court, finding no final judgment from which an appeal would lie, awarded a writ of *procedendo*, that one might be entered up; and, it seems from a further report of the same case, in 4 *Ark. R.* 57, this was afterwards done *secundum artem*, and the defendant ultimately sentenced in pursuance of the original verdict. Had the question been brought up in a collateral proceeding, as upon *habeas corpus*, to deliver the defendant, Baker, from imprisonment in the penitentiary, instead of in a direct one, as it was, and in such a proceeding the supposed judgment had been held a nullity, it would have been a direct authority upon the question involved; provided it should be taken, that in *Baker vs. The State*, the Court meant to decide that no other words could be substituted for "*consideratum est per curiam.*" This latter conclusion, however, could not be fairly arrived at from any expression in the opinion, or from the generality of the expressions, when considered in reference to the precise facts of that case. In the judgment entry, pronounced by the Court, the word "ordered," alone, was used, which might well have been regarded as not of equivalent import to "considered," and as no such word was used, there was no occasion to call forth the expression of any opinion, whether or not the use of such words would not have sufficed in lieu of the word "considered," so long established in the precedents. Thus the judgment entry copied in the plea differs

materially from that in the case of the *State vs. Baker*; since the terms here used are, "It is therefore *ordered*, *adjudged* and *decreed*, by the Court," &c., which we think of fully equivalent import to "considered."

In no view, then, does the case of the *State vs. Baker*, supported by the citation from Blackstone, decide the question at issue; since the proceedings in that case, although imperfect, were not held void—on the contrary, were ordered to be perfected—and the facts are essentially different, not only in the terms used in the judgment entries respectively, but in the character of the proceedings. Although the established precedents are to be regarded with the highest respect, and should not be departed from without caution, because like pleadings they are a safe-guard to justice in another sense, to hold as a nullity a mere formal departure when the substance is preserved, would be to turn the guns of the outworks upon the citadel of justice. When this point is thus settled, it is clear enough that the plea in question was no answer to the declaration; since, in its terms, it presents a valuable security as the consideration for the instrument sued upon, and not a mere nullity, as was supposed. The Court, therefore, erred in overruling the demurrer in question and in the final judgment rendered. Reversed.

THE STATE BANK VS. CRISWELL.

The Bank was not restricted by its charter to dealing in promissory notes only as collateral security.

Error to Izard Circuit Court.

The Hon. A. B. GREENWOOD, Circuit Judge.

S. H. HEMPSTEAD, for the plaintiff.

Mr. Justice SCOTT delivered the opinion of the Court.

The Bank sued Criswell, maker, in assumpsit, on a promissory note for $1,228 70, dated the 17th of March, 1842, payable at twelve months, at the Batesville Branch, in Arkansas Bank paper. It was payable upon its face to Wm. S. Hynson, who, on the day of its date, as is alleged, endorsed it to Aaron W. Lyon and Wm. M. Wolf, and they, on the same day, endorsed it to the plaintiff. The writ having been quashed, and final judgment rendered against the plaintiff, the case was brought into this Court, where, at the January term, 1850, that judgment was reversed, and the cause remanded. (5 *Eng. R.*, *in note at p.* 638.) When the cause was returned to the Circuit Court, four pleas in abatement were interposed, the issues upon which having been found for the plaintiff, the defendant filed eleven pleas in bar. After the determination of issues of law as to some of them, issues of fact were formed upon all except the *fourth plea.* To this, the Court below overruled the demurrer that was interposed to it, and the Bank, refusing to answer further, and electing to stand on the demurrer, final judgment was rendered for the defendant, and the Bank brought error.

That plea is as follows, to wit:

"Because, he says that the said plaintiff hath not, by the act of incorporation, nor the laws of the land, authority to deal in such instrument of writing as the one described and set forth in the plaintiff's declaration, unless the same was received by the plaintiff as collateral security, to secure some pre-existing debt due the said plaintiff. And this defendant further avers that the said plaintiff never did receive the said instrument, in the plaintiff's declaration mentioned, as collateral security, nor she does not now hold the same as collateral security. And the said defendant avers that the said plaintiff did not obtain the said instrument of writing in said declaration mentioned by any dealings authorized

by the act of her incorporation, or the laws of the land, and this he is ready to verify," &c.

The sixth section of the Bank charter, (Pamphlet Acts of 1836, p. 17,) in express terms authorized the Bank to "deal in bullion, gold and silver coin, promissory notes, mortgages, bills of exchange, public stock, or any collateral security." No one can reasonably suppose that it was the design of the Legislature that the Bank should have power to deal in gold and silver coin, only by way of collateral security for debts that might be due the institution. Promissory notes are, in express terms, put upon the same footing. Indeed, such a transaction as this, would have been directly within general banking powers without the aid of such an explicit provision, and there is nothing in the liquidation act, which was passed after this transaction, inconsistent with it. In fact, the 31st section of that act expressly authorizes any debtor, upon the conditions expressed, to substitute others in his stead. (Pamphlet Acts of 1843, p. 86.)

The plea was bad beyond all question, and the Court erred in overruling the demurrer, and in rendering the judgment it did. Reversed and remanded.

HANLY VS. ADAMS.

A judgment of the Circuit Court will be reversed, where the record shows that the judge presiding was disqualified to sit.

In a scire facias to revive a judgment, it is error to render a new judgment for the debt or damages; also to adjudge that it be revived from the date of the issuance of the writ, where the lien has expired before the sueing out of the *sci. fa.*

Under our practice, the scire facias is in the nature of a writ of summons, and may be served as such.

Error to Phillips Circuit Court.

Hon. CHARLES W. ADAMS, Circuit Judge.

ENGLISH, for the plaintiff. Should not a *sci. fa.* be served by copy? (*Sec.* 9, *ch.* 93, *Dig.*) See form of return in *Evans' Harris.*

The judgment should have been for the revival of the original judgment; and that plaintiff have execution thereof; and not in the form of a new judgment, as in debt on a judgment. *Evans' Harris, Entries, 2d vol., p.* 361; 3 *book Black. Com.* 421.

The judgment is for an excessive amount.

It gives a lien from the date of the writ, when it should have been from the rendition of the judgment. *Dig., ch.* 93, *sec.* 13.

The plaintiff in the suit, being judge of the Court, was incompetent to render the judgment, (CONST., *Art. VI, sec.* 12,) as there was no waiver by the defendant.

Mr. Justice SCOTT delivered the opinion of the Court.

This was a proceeding to revive the lien of a judgment, on a writ of *sci. fa.*, issued from the Phillips Circuit Court the 3d of October, 1851.

The judgment itself was recovered the 16th of April, 1843, and was for $819 92, damages and for costs. At the fall term, 1851, and at the spring term, 1852, the cause was continued, because, as is stated upon the record, the presiding judge, being a party, was disqualified to sit; at the succeeding November term, however, although the record shows the same disqualification, by some oversight, doubtless, there was a judgment of revivor taken by default. This was, that the judgment specified in the writ, and the lien thereby created be revived, and that the lien be continued from the 3d day of October, 1851, (which was the date of the issuance of the writ,) for the period of three years next thereafter, and then followed, that "said plaintiff do have

and recover of and from said defendant the sum of eighteen hundred and nineteen dollars and ninety-two cents for his damages, and eight dollars and twenty cents for his costs, &c., &c., and that execution issue," &c.

Besides the fatal objection that this judgment was taken when a judge was on the bench who was disqualified to sit, it is erroneous, because the lien was adjudged to be revived from the date of the issuance of the writ, instead of from the date of the judgment of revivor, as is expressly provided by the statute for cases where the lien has expired before the suing out of the *scire facias*, (*Dig.*, *ch.* 93, *p.* 624, *sec.* 13, *latter clause*,) and because a new judgment was rendered for the debt, which is not the object of a proceeding by *sci. facias* to revive a judgment or its lien, but to obtain execution of the judgment already obtained, (*Greer vs. The State Bank*, 5 *Eng. R.*, *p.* 457,), and to continue, when it has not expired, or reinvest, when it has, the lien created by statute. Besides, this new judgment for the debt, had it been regular, is for an excessive amount. No lawful computation of interest could swell the debt so greatly in such a period of time. Under our practice, the *sci. facias* is in the nature of a writ of summons, (*Alexander et al. vs. Steele, use, &c.*, 13 *Ark. R.* 392,) and when no mode is specially pointed out for its service, it may well be served as other writs of summons.

The judgment must be reversed, and the cause remanded.

O'NEILL VS. HENDERSON, TRUSTEE, &C.

Whenever a perfect title, according to the laws in force in the State in which it is made, vests property in the wife, or in trustees for her use, such title remains in her notwithstanding any change of the residence of the husband, who may exercise an apparent control and ownership of the property, or any act of fraud or negligence on the part of the trustee or the husband; nor is she required to do any act to protect her title—such as recording in this State the evidence of her title.

A trustee, who brings suit as such, is not required to offer proof of his acceptance of the trust—the bringing of the suit and acting as such. are sufficient.

Where the separate property of the wife was levied upon and sold for the husband's debts, no demand is necessary to entitle the trustee to recover against the purchaser in an action of detinue.

Where interrogatories are filed under the 9th, 10th, 11th and 12th sections, *ch.* 55, *Dig.*, and notice is given to the adverse party of the application for a commission, he is not entitled to notice of the time and place of taking the depositions.

Appeal from Drew Circuit Court.

Hon. SHELTON WATSON, Circuit Judge.

S. H. HEMPSTEAD, for the appellant. 1. The depositions taken in Tennessee, should have been suppressed. The application was to take testimony in an action of replevin, and this was an action of detinue. 5 *Eng.* 420.

2. It was a proper enquiry as to whether the negro woman and her child were conveyed to Burk's wife, to enable her husband to avoid payment of his just debts, and among them the debt due to the appellant. 5 *Paige* 586.

3. Henderson did not show any right of action in himself. If any one had such right, it was Burk and wife, and not this sham and pretended trustee, who, at all events, had nothing but a naked legal title. *Digest* 702.

4. The Court should have granted a new trial for the reasons

stated in the motion. O'Neill purchased at sheriff's sale; and Burk, the husband, had such right as was subject to execution. 3 *Eng.* 302; 2 *Litt.* 79; 7 *Ala.* 32.

PIKE & CUMMINS, for appellee. No new trial can be granted, because the verdict is clearly in accordance with the merits of the case. *Sparks vs. Beaver*, 6 *Eng.* 630; 7 *Ib.* 651.

No notice is necessary where depositions are taken on interrogatories. *Secs.* 9, 10, 11, *and* 12, *ch.* 55, *Rev. Stat.*

Removal from one State to another, does not affect the character of a loan. *Smith vs. Jones*, 3 *Eng.* 109.

No demand was necessary before suit. *Beebe vs. DeBaun*, 3 *Eng.* 510; *Prater vs. Frazier*, 6 *Eng.* 249.

Where property is conveyed in trust for wife, her possession is that of trustee, and so far from being inconsistent with deed, is according to the very objects of the transaction, and no presumption of fraud can be indulged.

Mr. Justice WALKER delivered the opinion of the Court.

This was an action of detinue, brought by Henderson, as trustee for Nancy Burk and her children, against O'Neill, for a negro slave.

The trial was had upon the plea of the general issue, and a plea of property in the defendant. Judgment was rendered for the plaintiff. Various exceptions were taken to the opinion of the Court upon the trial, all of which were presented upon a motion for a new trial, which was overruled, and, upon exceptions to the opinion of the Court in overruling the motion, are made part of the record, and assigned as grounds of error in this Court.

As the correctness of the decision of the Court below, in giving the instructions asked by the plaintiff, and refusing to give those asked by the defendant, must depend upon the nature of the plaintiff's title as trustee, and the effect of our statute of frauds upon it, we will proceed to examine the facts and settle the questions of law arising upon them.

In the year 1843, William Hack, a resident of the State of Tennessee, loaned a negro woman to his sister-in-law, Mrs. Nancy Burk, who, with her husband, John F. Burk, then resided in the State of Mississippi. In the fall of 1846, or the winter of 1847, Burk and wife, having the woman slave still in possession, removed to Drew county, Arkansas; the woman, in the meantime, having born "Joe," the property now in dispute. On the 20th of April, 1847, Hack conveyed said woman and her child Joe to the plaintiff, Simeon Henderson, in trust, for the sole use and benefit of Mrs. Burk during her life, and to her children after her death, for their separate use, maintainance and support, wholly free from the debts and liabilities of the husband, and denying him the right to exercise any control whatever over said slaves, or to hire or sell them. This conveyance by deed, of the date above, was duly acknowledged and recorded in the county of Marshall, and State of Mississippi, the then residence of Henderson, the grantee. Burk and wife still continued to reside in Arkansas with the slaves in their possession, and apparently under the control of the husband and wife, in the performance of ordinary household duties, until the 26th of June, 1849, at which time the boy Joe was taken in execution to satisfy a debt contracted by Burk with O'Neill, the appellant, on the 27th of April, 1849, for $66 47. The deed from Hack to Henderson was never recorded in Arkansas; nor was it known here that such conveyance existed. Under this state of facts, the question of law, intended to be raised by the instructions asked by the defendant, and refused to be given by the Court, is, whether the deed was or not void, under the *7th sec., ch.* 104, *Digest*, as against creditors and purchasers for want of registry in this State.

As between parties in interest, competent to assert and protect their legal rights, it would seem clear that the grantee holding the title to the property, by suffering the property to remain in the possession of a third person without notice of his title, could not hold against a creditor who had, upon the presumption that the title and true ownership were with the possession, given credit

to him who held such property in possession, or against an innocent purchaser, who buys upon such presumption, and in good faith pays his money for the property. But in a case like the present, where the real party in interest is a *feme covert*, subject to the control of her husband, and for the most part, by reason of her coverture, without power to assert and protect her interest, and rights, the law has thrown around her its protection, and not only relieves her from acting, or from the consequences of her acts, but also protects her against the negligence, or the abuse of the trust by the trustee. If such was not the case, the trust would amount to nothing, the trustee having a mere naked legal title in the property, but which (as is the case in this instance) is not to remain either in his possession, or under his control, but to be used and enjoyed by a wife and helpless children, made by the law, as well as their helpless dependance, and their affection, subject to the control of the husband, over whose character for prudence and discretion, by the mere fact of executing such a deed, a shade of doubt is cast: who may, at pleasure, change his residence, involve himself in debt or even sell the property. It would be hazardous to the interest of the wife, even with the greatest vigilance, on the part of the trustee, to require him to follow up the trust property, and have his interest in it made known of record; but even then, if the statute of frauds may be successfully pleaded against her rights, no vigilance on her part, or on the part of the trustee, would be sufficient to protect her interest, because the husband might remove the property, and contract with innocent purchasers and creditors to the utter overthrow of the rights of the wife.

That, under circumstances such as the present, and perhaps in this case, the husband may perpetrate fraud upon innocent creditors and purchasers, is very true, and it may seem wrong to protect the property against their equitable claim. But, then, when we consider the situation of the wife, how utterly impossible it is for her, in view of her relation to her husband, to protect her rights, it would be equally wrong to hold her responsible for the

acts of her husband. The most important question is, did the wife acquire an interest in the property as *cestui que trust*, by a full compliance with the laws of the State, in which the contract was entered into at the time it was executed. If so, we apprehend that no act of the trustee, or of the husband, nor would any apparent hardship, growing out of such act, divest her of her interest in the property. In the correctness of this position, we feel fully sustained by the opinion of the Supreme Court of the United States, (*Bank vs. Lee et al.*, 13 *Peters* 107.) The facts in that case were: That, in 1809, Richard Bland Lee, then a resident of Fairfax county, Virginia, with his family, conveyed several slaves to certain trustees, in trust, for the sole use of his wife, which deed was duly acknowledged and recorded in said county; afterwards, Lee moved with his family to Washington City, in the District of Columbia, and took with him the slaves so conveyed in trust, and exercised ownership over them as his, and executed a deed of trust to the Cashier of the United States Bank for said slaves, to secure the payment of $6,000, money borrowed of the Bank. The deed of trust executed in Virginia for the use of Mrs. Lee, was never recorded in the District of Columbia, nor had the Bank any notice whatever of the claim of Mrs. Lee to the slaves until long after the deed was executed to the Bank, and after the death of Mr. Lee.

Under this state of case, it was contended for the Bank, that, notwithstanding Mrs. Lee's title may have been perfect, and well protected against the statute of frauds, under the registry act of Virginia, whilst the property remained in the possession of Lee, in that State, yet when removed to the District of Columbia, the statute of Maryland, which requires all contracts for goods and chattels, whereof the vendor shall remain in possession, to be recorded, or else to be void as to purchasers, operated upon the Virginia title of Mrs. Lee, and defeated it for the benefit of purchasers from the husband. When answering this position, Judge CATRON, who delivered the opinion of the Court, said: "The statute has no reference to a case where the title has been vested

by the laws of another State; but operates only on sales, mortgages, and gifts, made in Maryland. The writing shall be recorded in the same county where the seller shall reside when it is executed. The seller, Richard Bland Lee, residing in Virginia, it was impossible for Mrs. Lee to comply with the act; that the Virginia deed secured to Mrs. Lee the same right here, that it did in Virginia, we apprehend to be, to some extent, an adjudged question." The Judge then cited *Smith vs. Burch*, (3 *Harr. & John.;*) *Crenshaw vs. Anthony*, (*Martin and Yerger* 110;) and closes his opinion thus: "The deed vesting the property in Mrs. Lee's trustees, having been duly recorded in the manner required by the statute, it was effectual, according to the laws of Virginia, to protect the title against subsequent creditors of, or purchasers from, Richard Bland Lee."

The case of *Crenshaw vs. Anthony*, was an action in detinue for a slave sold by a judgment creditor to satisfy a debt contracted by the husband, whilst the slave was in his possession. The deed of trust, securing the property to the use of the wife, was executed in Virginia, and there duly admitted to record, all of the parties and the property then being in Virginia. The husband moved to Tennessee, with the slave in his possession. The deed never was recorded in Tennessee, nor had the creditor any notice of the wife's title.

The Supreme Court of Tennessee held, that the deed made in Virginia, separating the title and the possession, was of a character to be operated upon by the Virginia statute, and had the deed not been recorded there, as to creditors and purchasers, the title would have been deemed to be with the possession; but, having been recorded there, a title, fair and unimpeachable, vested in the trustee, and *cestui que trust*, and, being valid in Virginia, the statute of Tennessee could not affect it; and that the wife's interests were not affected by her silence in regard to the title, which she held to the property. These decisions distinctly announce the principle, which we think must govern the decision of the case now before us, which is, that if a perfect title is ac-

quired in accordance with the laws of the State in which the parties reside at the time the contract is made, and where it is made, that such title is not affected by neglect or omission of the trustee, the husband, or the wife, to record such deed in the State to which the property may be removed, or where it may be subsequently held. Some importance seems by the Court, in the case of *Crenshaw vs. Anthony*, to be attached to the fact that the deed was recorded in Virginia, and it is said, that, had that not been the case, registry in Tennessee would have been necessary in order to prevent the operation of the statute of frauds in that State. If the Court intended to assert, that registry in Virginia was necessary in order to make the title in the trustee perfect, then this decision rests upon the ground assumed in the case of the *Bank vs. Lee*: That if the title is perfect, the wife is not bound to record such title in every State to which her husband may remove, and if it is perfect in the State where it is made without registry, that it is a matter of no consequence to the creditors of another State, whether it was or not recorded in the State where it was executed, because it is very evident that it would be no notice to them and no compliance with the laws of the State to which the property may be removed. We have remarked upon this part of the Tennessee decision, that we may avoid the inference, which might be drawn from silence, that we consider registry, in the State where the right accrues, essential to protect the rights of the wife only so far as may be necessary to make her title perfect in the property. And it has been deemed the more necessary to this, from the fact that the Supreme Court of Texas has made this part of the decision of the Court, in the case of *Crenshaw vs. Anthony*, the basis of their decision of the case of *Warren vs. Dickinson* and *Tutt*, 3 *Texas Rep.* 460. In that case, Warren and wife resided in Texas, and had in their possession a slave belonging to the father of Mrs. Warren, who resided in the State of Mississippi, where he died, and by his will bequeathed this slave to his daughter, Mrs. Warren. After the death of the testator, Warren (the husband) sold the slave to the

defendant, who had no notice of the title of Mrs. Warren. (unless the recording of the will in Mississippi should be held such). Under this state of case, the Supreme Court of Texas decided against the title of the wife to the slave; not because of any defect in the will, or that it was not in all respects a valid will according to the laws of Mississippi, where it was made; but upon the ground that the property and the claimant (the wife) should have been resident in Mississippi at the time the will took effect and was recorded.

Now it is evident, if this be the case, it cannot be for want of title in Mrs. Warren in the slave, unless it could be maintained that property cannot be devised unless it is actually in the date where the devise is made, and where it took effect, and where the devisee also resided; which is certainly not the law. But it must be upon the ground that registry, under the circumstances of the case, in the state of Mississippi, was equivalent to registry in Texas, in protecting the registry of the wife to the property there, and if so then as the will was registered in Mississippi before the sale of the slave to the defendant, it would seem to follow that the Court should have charged them with notice of the wife's title, and have decided in her favor; but as such was not the decision of the Court, and as it was held that the notice, to be effectual, should have been given whilst the property was in the State of Mississippi, and before the removal of the wife to Texas, we must presume that the Court, in fixing the notice at that date, considered it in some respects as essential to the validity of the title itself, when it took effect in Mississippi, and by so considering that decision, it may be reconciled with the rule held in the *Bank vs. Lee;* and if considered otherwise we must dissent from it, in so far as it may conflict with the opinion already expressed: that wherever a perfect title, according to the laws in force in the State in which it is made, vests property in the wife or in trustees for her use, such title remains in her notwithstanding any change of the residence of the husband, who may exercise an apparent control and ownership of the property or any act of fraud or negli-

gence on the part of the trustee or the husband; nor is she required to do any act on her part to protect her title. But the law, in consideration of her limited rights as a *feme cevert*, so far throws around her title its protection as to protect it from the consequences incident to such negligence or abuse of trust.

It is very true that this rule may result in cases of hardship to creditors and innocent purchasers, who, finding the property in the possession of the husband, may well presume the title to be in him: but, then on the other hand, without this rule, the greatest wrong might result to the wife, who for the most part is deprived, under the laws, of the power to hold a separate and distinct ownership, and who, on account of her marriage relations, public policy would not compel to expose the fraud perpetrated by her husband by gaining credit upon the faith of the property as being his. In view of these principles, a brief review of the facts of this case will enable us to decide the material question involved in it.

We have seen that the deed of trust was executed in the State of Mississippi, the residence of the trustee, and was there duly authenticated and recorded. This, in our opinion, was sufficient to vest the legal title in the trustee for the use therein expressed. It is true that a few months before that time, Burk and wife had removed with the slave to Arkansas, but this we have said did not affect the validity of the title. The debt, for the satisfaction of which the boy was seized and sold, was not contracted until more than two years after the execution of the deed of trust. Under this state of case, even under the rule as held, in *Warren vs. Dickinson*, by the Supreme Court of Texas, if the slave had been in Mississippi, and the wife, the *cestui que trust*, had also resided there, when the deed was executed and recorded, the subsequent removal of the property to Arkansas would not have affected the wife's title, and, if not there, would it if made a few months after? Was the creditor in the first instance affected with notice of a deed recorded in Mississippi? If so, why not when the deed was recorded a few months after? There can certainly be no good reason, because the same rule of law that required him to look to a registry beyond the limits of

this State at one time, would also at another, and as his contract was made long after the execution of the deed, he would be held to notice of it. But the truth is, that the registry of the deed in Mississippi was no notice to the creditor in Arkansas, no matter when made. At the time of the levy, the purchaser had notice of the title of Mrs. Burk; and, by a jury called to try the right of property, it was found not to be subject to the payment of Burk's debts, so that he purchased with the fullest notice of the trust, but the question does not turn upon notice at the time of the levy and sale, but upon the question as to whether the trust title was void under our statute for want of registry in this State, and we have said that it was not.

From the view thus taken of the rights of the plaintiff as trustee, it follows that the 1st, 2d, 3d, 5th and 7th instructions were properly refused by the Court below; all of them growing out of the supposed effect of the statute of frauds upon the plaintiff's title. It was not necessary, in order to maintain the action, for the plaintiff to offer proof of his acceptance of the trust; the bringing of the suit, and the acting as such were sufficient; therefore, the 4th instruction asked was properly overruled.

The 6th instruction was also properly overruled, because the property was tortiously taken from the possession of the *feme covert*, and although the tort was waived, and the suit brought in detinue, no demand was necessary to entitle the plaintiff to recover. *Schulenburg vs. Campbell*, 14 *Miss. Rep.* 491; *Prater vs. Frazier and wife*, 6 *Eng.* 249.

The remaining question relates to the admission of the deposition of a witness over the objection of the defendant. The principal ground of objection to the deposition is, that it was taken without notice to the defendant. The deposition was taken under the provisions of the *9th*, *10th*, *11th and 12th sections of the 55th ch.*, *Dig.*, 433, which provide for the taking of depositions upon petition to the Court. The order was granted upon petition for leave to take depositions upon interrogatories and cross-interrogatorion. The *11th section* provides, that the interrogatories shall

be drawn up and signed by the parties under the direction of the Court, and if either party shall refuse to join in such interrogatories, such refusal shall not prevent the issuing of the commission. Under the provisions of this statute, when the interrogatories are agreed upon by the parties and signed by them, or where one of the parties shall refuse to join, the effect of which is an abandonment of his right to file cross-interrogatories, there can be no necessity for notice of the time and place for taking the depositions, because the evidence is confined to the particular interrogatories propounded, and the officer, or person appointed by the Court to take the depositions, is charged with the due execution of the commission, and his conduct can in no wise be influenced by the presence of either party.

It seems that the defendant was duly notified of the application for the rule in this case, and thereafter must be presumed to have had notice of the further action of the Court upon the petition. His failure to file cross-interrogatories or to sign the interrogatories propounded by the plaintiff, could not, under the 11th section of said act, prevent the issuing of the commission, or become the grounds for objection to the depositions when taken. There was no valid objection to the deposition upon this ground, but, even if there was upon this or either of the other grounds relied upon, it could in no wise change the final determination of this case, because, independent of that deposition, there was clear and conclusive proof, to which it was cumulative, of the plaintiff's right to recover. And when this is the case, and the question is presented to the Circuit Court, as to whether the party should have a new trial, that Court may well refuse to set aside the verdict and grant a new trial under the rule repeatedly recognized by this Court, that where upon the whole case, as shown by the evidence, irrespective of that objected to as inadmissible, the verdict is right, it should not, because of the improper admission of such evidence, be reversed. (*Payne vs. Bruton*, 5 *Eng.* 60.) Affirmed.

BLAGG VS. HUNTER.

The acknowledgment of a deed of gift of slaves, before the clerk of a court, without the attestation of his official seal, is insufficient to admit it to record; nor is it evidence to prove the title of the donee—the possession remaining in the donor.

The failure of the clerk of a court to attest, under his official seal, the acknowledgment of a deed of gift of slaves, executed and recorded prior to the passage of the act of 5th Januaay, 1843, was not cured by that act.

If a person, under the influence of intoxication, so as to deprive him of the exercise of his understanding, makes a deed of gift of slaves, such deed is voidable at his election, or of any one claiming under him; but if he acknowledges the deed after regaining his reason, such act is a ratification of the deed.

The current report and understanding in the neighborhood, that a donor had made a deed of gift of slaves when drunk, and disavowed it when sober, is not admissible as evidence in an action for the slaves between the donee and one claiming under the donor; but the subsequent acts and declarations of the donor promptly made and persisted in upon a return of reason, repudiating the deed, would be competent to go in evidecce with other attendant circumstances illustrative of his mental condition.

Appeal from Randolph Circuit Court.

Hon. B. H. NEELY, Circuit Judge.

BEVENS, for the appellant. The deed should have been admitted by the Court to go to the jury as an enrolled or recorded deed; the certificate of the clerk should have been received, admitting it to record, thereby placing the plaintiff within *sections* 7 *and* 8, *article* 3, *chapter* 153, *Digest.*

As to the effect upon the plaintiff produced by the rejection of the deed, as an unrecorded deed, see 2 *Bl. Com.* 441; 2 *Kent Com.* 354; 1 *Ark. Rep.* 87; 7 *J. J. Marsh.* 204; *Dig.*, *ch.* 73, *sec.* 6; *ch.* 153, *sec.* 7 *and* 8.

Until the act of the Legislature of the 19th December, 1846, subsequent to the execution and acknowledgment of the deed offered in this case, there was no statute prescribing the mode of

acknowledging deeds of personal property—the 16*th section*, *ch.* 37, *Dig.*, relating entirely to real estate, and the provisions of this act, cannot, with propriety, be applied to conveyances of personal property.

A deed, recorded in the proper office, is prima facie evidence that it was regularly proven and admitted to record: and so, where the person taking such acknowledgment styles himself clerk of the Circuit Court, the certificate is prima facie evidence that he is such. *Lessee of Talbot vs. Simpson*, *Peters' C. C. R.* 188; *Lessee of Willing vs. Miles*, *Ib.* 429; 4 *Wash. Rep.* 715.

But if there was any defect in the certificate of acknowledgment, it was cured by the act of the 5th January, 1843.

The subsequent declarations of the grantor against the deed were very clearly inadmissible. 11 *Ark. Rep.* 249; 1 *Ch. Pl.* 603; 16 *J. R.* 110; 1 *Greenl. Ev.*, *sec.* 23.

The evidence as to the notoriety in the neighborhood of the grantee, that grantor repudiated his deed, was incompetent and inadmissible. 1 *Greenl.*, *secs.* 137, 138; *Morewood vs. Wood*, 14 *East* 329; 1 *Stark. Ev.* 30, 31.

FAIRCHILD, contra. The deed did not appear to have been acknowledged. There was a certificate of acknowledgment written out and signed by the clerk, but it was not authenticated by the seal of the Circuit Court, or by any seal of office, without which there was no evidence of acknowledgment. It was then not entitled to record, and could not be read to the jury as a deed acknowledged and recorded.

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

In an action of trover for a slave, the plaintiff claimed title by gift from one Lewis, and on the trial offered a deed of gift from Lewis to him, dated 10th of July, 1841, which purported to have been acknowledged by the donor before the clerk and ex-officio recorder of Randolph county, and by him filed for record in his office, all on the same day. The acknowledgment is attested by

the signature only of the clerk, not accompanied by his seal of office, or purporting to be sealed. The validity of this deed was also assailed by the defendant, upon the ground that it was made by, and procured from, Lewis while in a state of intoxication. He afterwards disowned the act, and remained in possession of the slave in controversy until his death, in 1844. In April, of that year, he made and published his will, bequeathing his property, including this slave by name, to his wife, Phœbe Lewis, who held him in her possession until May, 1849, when she sold him to the defendant Hunter.

The donor, being no blood-relation of the plaintiff, the alleged gift would not be upheld because made upon any good consideration, as between the parties to it, by any thing contained in the 6th section of the statute of frauds. *Digest, p.* 541.

The judge presiding at the trial excluded the deed offered as a compliance with the statute concerning gifts of slaves, (*Digest, Title, Slaves,*) because the acknowledgment was insufficient to admit it to record, but permitted the deed itself, without the accompanying certificates, to be read to the jury as evidence of a parol gift, if the plaintiff could prove that it was accompanied with a delivery of the possession. Slight as the proof was, that possession accompanied the gift, when contrasted with the opposing evidence that it remained with the donor, the plaintiff had the benefit of an instruction on that point. So that the real question is, whether the Court decided correctly in excluding the certificates of acknowledgment and record of the deed. The words of the statute are, "No gift of any slave, shall pass or vest any right, estate or title in, or to, any such slave, in any person whatsoever, unless the same be made, first, by will duly proved and recorded; or, second, by deed in writing to be proved by not less than two witnesses, or acknowledged by the donor, and recorded in the county, in which one of the parties lives, within six months after the date of such deed. This act shall only extend to gifts of slaves, whereof the donors have, notwithstanding such gifts remained in possession thereof, and not to gifts of such slaves,

as have come to the possession of, and remain with. the donee, or some person claiming under such donee." This act does not, like the general statute concerning conveyances of real estate, passed during the same session of 1837, specify the officers before whom the acknowledgment may be made, or the mode of taking it, as for example, if taken before a clerk, that it shall be signed by him and attested by his seal of office, if there be one. Construing these statutes together, as part of one entire system of registry, it seems plain, that when the General Assembly have required, or authorized any deed, or instrument of writing, to be acknowledged and recorded, it is understood that the usual mode provided for other cases is to be adopted, as well in respect of the manner of taking and certifying the acknowledgment, (see also the statute concerning "Mortgages,") as of the officers empowered to act in such cases. Without such a construction, it might be contended, that the clerk, in the present case, had no authority to take and certify the acknowledgment of a deed of this kind in any mode. The attestation then, of the clerk, without his official seal, was insufficient to admit it to record; as much so, as if the deed, having two or more attesting witnesses, had been proved by the oath of only one of them. The plaintiff relies upon an act of January 5th, 1843, to the effect, that all deeds, bonds, mortgages, and other conveyances of real estate, theretofore recorded, whether duly recorded or not, under the provisions of the law in force at the time of recording, should not, after the passage of that act, be impeached for not being duly recorded, but should have the same legal force and effect, as if recorded in the first instance; saving, however, to all persons any lien or right, in law or equity that might have intervened prior to the passage of that act. The only effect of this act (even supposing it to apply to chattels, mortgages and deeds of gift of slaves,) would be to legalize, from that time forward, the recording of conveyances, which had been spread upon the public record, notwithstanding some defect or informality in the acknowledgment of them, so as to make such records constructive notice to creditors, purchasers, and all third

persons, who might subsequently acquire an interest in the property, of the existence and contents of deeds, valid in the first instance, and sufficient to pass the title as between the parties to them. But it could not have been designed by it to impart validity to deeds, which were void in their inception, or which had become inoperative to pass any title from the donor, because of the failure to comply with certain requisites prescribed by the statute. It may seem a harsh and severe construction of the law, by which the plaintiff is to lose the property, or be deprived of any right he might have had to it, because of an informality, not owing to any fault of his, but to an omission or neglect of duty in the clerk. The statute for authenticating gifts of slaves, where there is no delivery of them to the donee, was intended to guard against frauds, and any course of decision, by which its plain requirements might be qualified or explained away, would have a most mischievous tendency to the public at large, while in any particular case the person injured by neglect of duty in an officer has a remedy by action against him.

The Court instructed the jury, that if they found from the evidence, that Lewis made the deed of gift in question, under the influence of intoxication, so as to deprive him of the exercise of his understanding, the deed would be void, and they should find for the defendant. Although there was a conflict of testimony on this point, the jury would have been well warranted in finding, upon the whole evidence, that the donor, at the time he executed the deed, was so drunken, or so much under the continuing influence of previous intoxication, as to be devoid of reason and understanding, and incapable of comprehending the nature and effect of the act. The plaintiff's father, who is shown to have been instrumental in procuring the deed, was present at the time it was prepared and executed. According to the tendency of the modern cases, see 2 *Kent Com.* 452; *Barrett vs. Buxton*, 2 *Aikin* 167; *Gore vs. Gibson*, 13 *Mees. & Welsby* 623; *Smith on Contracts* 232, where this question is discussed, a deed, executed under such circumstances, would be voidable at the election of the donor, or

any one claiming under him. On the supposition that the acknowledgment was valid at the time, or might have become so, if made before a competent officer, and duly certified at any subsequent time, within six months from the date of the deed, the instruction should have extended as well to the time of the acknowledgment, as to the making of the deed; because if the donor was rational when he made the acknowledgment, it would be a ratification of his previous act, though done while in a state of actual intoxication, or of *delirium tremens*. The Court erred in permitting the defendant to adduce evidence, to prove that it was currently reported and generally understood in the neighborhood that Lewis had made such deed of gift when he was drunk, and that when he became sober he disclaimed or disavowed it. Reputation or hearsay of matters which concern private titles, is not admissible, unless for a particular purpose, affecting a state of case which did not exist here. For example, if the deed had been regularly proved or acknowledged and recorded, evidence of such a common report, current in the neighborhood, might perhaps be admitted against one claiming to be an innocent purchaser from the donee, if shown to have been in the neighborhood when the report prevailed, and in a condition to have heard it, as a circumstance to charge him with notice. But as against the donee himself, the subsequent acts and declarations of the donor, promptly made and persisted in upon a return of reason, repudiating the deed, were competent to go in evidence with other attendant circumstances, illustrative of his mental condition, and as these appear to have been sufficiently proved, the judgment ought not, upon a motion for new trial, to be reversed for the error adverted to. In any view, the judgment would have to be affirmed, upon the first ground, that because of the invalidity of the deed, the plaintiff failed to show any title in himself; and it becomes unnecessary to notice any other exceptions reserved in the Court below or argued here. Affirmed.

HARSH VS. HANAUER.

The act of limitation of 14th December, 1844, enlarging the limitation of actions on promissory notes from three to five years, though prospective, applies to causes of action thereafter accruing without regard to the inception of the contract if of an anterior date.

Supposing the refusal to grant a continuance is assignable for error, this Court will not overrule the discretion of the judge at the circuit, unless the party excepting has placed upon the record an application coming fully within the statute in such case.

Interrogatories that are suggestive of the answer desired, or assume the matter in dispute, are objectionable: and if they be in relation to a note, it should appear that the original note was before the witness, or a copy of it referred to as an exhibit annexed to his deposition.

Where the question of variance depends upon inspection of the instrument, this Court will not undertake to determine it by a copy, or even a *fac simile.*

Appeal from Randolph Circuit Court.

Before Hon. B. H. NEELY, Circuit Judge.

BEVENS, for appellant.

EAIRCHILD, contra.

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

The appellant, on the 29th of January, 1852, instituted his action of debt against the appellees, upon a promissory note, alleged to have been executed by the firm of M. Hanuer & Sons, composed of M. Hanuer and the appellees, on the 21st of October, 1841, payable five and a half years after date; to which the defendant, Daniel, pleaded nil debet, payment, the statute of limitation of five years, and the statute of three years; and the defendant, Louis, pleaded nil debet, and also a plea under oath denying the execution of the note. The Court below overruled

a demurrer to the plea of three years limitation; which was erroneous, because the statute of December the 14th, 1844, enlarging the limitation of actions on promissory notes from three to five years, though prospective, applies to causes of action thereafter accruing, without regard to the inception of the contract, if of an anterior date. But this error is immaterial as the action failed on other grounds.

The appellant complains that the Circuit Court refused to grant a continuance upon the application of his attorney. Supposing this to be a matter assignable for error, this Court will not overrule the discretion of the judge at the circuit, unless the party excepting has placed upon the record an application, coming fully within the statute in such case, and especially is the plaintiff held to a strict showing, he having the privilege of going out of Court and commencing a fresh action, which, if brought within a year, saves the bar; while the discretion may be more liberally exercised in favor of the defendant, who, though in fault for not having used strict diligence, is to be concluded by the judgment. The application failed to disclose the name of the witness whose testimony was desired, and the omission is not excused by the neglect of a non-resident client to furnish his attorney with the necessary information. From the guarded phraseology of the affidavit, it may be inferred that the testimony sought to be obtained was either cumulative, or that the object of the application was to retake the testimony of witnesses then on file, and which it was admitted failed to establish, fully, the facts necessary to enable the plaintiff to recover.

At the trial, the Court below excluded the answers to certain interrogatories, in a deposition of a witness offered by the plaintiff, and which were objected to as leading. The 3d is, "Was M. Hanauer, his sons Daniel and Louis Hanauer, doing business together, in 1841, under the style of M. Hanauer & Sons?" Answer, "They were." 4th, "Are Daniel and Louis Hanauer sons of M. Hanauer?" Answer, "They are." 5th, "Did you know anything relative to a note executed by M. Hanauer &

Sons to Philip Harsh, at Cincinnati, Ohio, on the 21st of October, 1841, for three hundred and thirty dollars, payable five and a half years after date? If so, state all you know about it—who did it—and who was considered at that time the sons of M. Hanauer?" To this question the deponent answered, giving a detailed account of the manner in which such a note came to be executed by Daniel Hanauer, in composition of a debt the plaintiff held against the firm, not in itself objectionable; but inasmuch as it does not appear that the original note was before the witness testifying, or a copy of it referred to as an exhibit annexed to his deposition, the interrogatory was objectionable, not only for being suggestive of the answer desired, but because it assumed the very matter in issue. Where witnesses testify orally at the trial, the Court must have a discretion, varied by circumstances, in allowing or forbidding leading questions. But depositions as a substitute for oral testimony, are not to be favored, and the examination being had out of the view and presence of the judge, in order to determine whether questions are leading, he can only look to the scope of the interrogatories, and answers, when the deposition is taken in that form, under a general commission.

The remaining assignment for error is, that the Court below excluded, upon the ground of variance, the original note, upon which the action was founded, when offered in evidence upon the issues between the plaintiff and Daniel Hanauer. Without adducing the note, the plaintiff could not have succeeded as against him upon the plea of nil debet, though his other pleas were by way of confession and avoidance. The variance in question related to the signature. The Court was of opinion, and so decided, upon inspection of the note, that it purported to be signed by a firm of a different name from that described in the declaration. As we have not the original note before us for inspection, and cannot undertake to determine a fact of this nature, by a copy, or even a *fac simile*, which would be in effect referring the question of variance to the clerk making out the transcript, the alleged error, if any, is not examinable on this

record. The presumption is, that if the matter was doubtful or the plaintiff could fairly claim a surprise, the Court would have permitted him to be non-suit, with leave to set it aside on terms, and amend his declaration. Affirmed.

STATE BANK VS. GREER ET AL.

The decision of this case follows that of *Hanly vs. Carneal*, (14 *Ark.*,) *per* WATKINS, C. J.

MATHEWS VS. SANDERS AS AD.

The leading idea of the statute, (*Dig.* TITLE, *Evidence, secs.* 7 *and* 8) making the book of accounts of a deceased person, when proved to be regularly and fairly kept, evidence for his executor or administrator, is that the books of original entries shall in all cases be produced.

Error to Dallas Circuit Court.

Hon. J. C. MURRAY, Circuit Judge.

CURRAN, for the plaintiff.

PIKE & CUMMINS, contra. The admissibility of the proof under *sec.* 7, *ch.* 66, *Rev. St.*, was a question of competency addressed to the Court. *Churchman v. Smith*, 6 *Whart.* 146; 2 *Greenl. Ev.* 143,4; 2 *Cow. & Hill's notes*, 682, 701, which show the evidence to be competent.

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

In an action of assumpsit by Sanders, as administrator of Martin P. Mathews, deceased, against Ballard D. Mathews, the only evidence, offered by the plaintiff on trial in the court below, consisted of an account, made out by the intestate, proved to be in his hand writing, and found among his papers after his death.

The account was thus stated:

B. D. MATHEWS, Dr.

To M. P. MATHEWS.

For the year 1847, April 15th.

For services rendered per self, 8½ months, at 25 dollars per month,	$212 50
For the hire of Winnason,	125 00
For the hire of Andrew,	75 00
For the hire of Sal,	20 00
For a grey horse let Alderson have,	60 00
For the use of carryall,	15 00
	$502 50

B. D. MATHEWS, Dr.

To M. P. MATHEWS.

For the year 1848, January 1.

For services rendered per self, 7 months, at 25 dollars per month,	$175 00
10 months, hire, for Winnason and Andrew, at 10 dollars per month,	200 00

10 months hire for Sal, at $3,	30 00
For the use of carryall,	15 00
	$420 00
	507 50
	$927 50

This is the full amount due me from B. D. Mathews, that has never been settled."

Annexed to the paper, containing this account, was the affidavit of a third person, to the effect that he had seen the same in possession of the intestate before his death, and had found it among his papers immediately after his decease; and this witness also testified, and as it seemed, proved to the satisfaction of the Court, that the intestate in his life time had the reputation of keeping correct books. Whereupon, the Court admitted the paper to be read in evidence to the jury, against the objection of the defendant, who reserved his exception, but according to the practice heretofore settled, waived it by choosing to resort to a motion for new trial, in which the improper admission of testimony is not relied upon as one of the causes assigned. But the plaintiff moved the Court to instruct the jury, that unless they believed from the testimony, that the account read in evidence was a regular and fairly kept account of original entries of the deceased, Martin P., and that he was a person keeping running accounts for goods, wares and merchandize, or other property sold, or labor done, they should find for the defendant. Supposing the evidence, when admitted, to be competent, though it was as clearly incompetent, as would be proof, offered in an ordinary case, by a plaintiff, of his own declarations, there can be no reason why the defendant should not have had the benefit of the instruction, which the Court refused to give though couched in the language of the statute, and more favorable for the plaintiff than it might have been.

The leading idea of the statute is, that the books of original

entries kept by the deceased person are in all cases to be produced, and may be admitted in evidence for his executor or administrator, when accompanied by an affidavit identifying them to be books of the testator or intestate, it being first established, to the satisfaction of the Court, that the deceased had the reputation of keeping correct books. *Dig.*, title *Evidence*, *sec. 7 and* 8. The account produced was well enough as a bill of particulars of demand, if copied from a ledger, or extracted from a book of original entries, but it could be nothing more. As a detached piece of paper, with the items condensed in the manner above shown, the account itself was not an entry, or evidence for any purpose, although that may have been the mode in which the deceased kept his accounts. The statute contemplates that the books are to be "regularly and fairly kept." The perfection of which is, where the items of debits and credits against, or in favor of various persons, with whom the deceased may have had dealings and kept running accounts, follow each other in regular order and succession of dates, without erasure or alteration, confirmed it may be, by being carried to the separate appropriate accounts in the ledger. It may sometimes be a question for the Court below to determine what constitutes a book of original entries, or whether it is authentic and therefore competent, but when admitted, the very appearance of it, and the manner of keeping it would be matter of observation for the jury, who, even if there was no opposing testimony, would have to decide upon the weight or credibility of the evidence.

Being disposed, for the benefit of the estates of deceased persons, to give a liberal interpretation to the statute, we do not wish to be understood as intimating that a book of accounts, kept after the manner of a ledger, would be incompetent if it be really a book of original entries, or that the operation of the statute may not extend to the kind of demands charged in the account here, though from their character we could suppose that they are susceptible of being readily established by original evidence.

The judgment will be reversed and the cause remanded, with instructions, to grant a new trial, and for further proceedings according to law and not inconsistent with this opinion.

THE STATE VS. HAWKINS.

15 259
58 83

The whole scope of the first seven sections of the statute against gaming, is to prohibit what was then known and specified as banking games and all devices of the like kind, and does not embrace the game of rondo: nor is the betting at such game, a common law offonce.

Appeal from Crawford Circuit Court.

The Hon. A. B. GREENWOOD, Circuit Judge.

CLENDENIN, Attorney General, for the State. The question raised by the record in this case is as to the construction of *section* 1, *of chapter* 51, *of the Digest of Arkansas.*

The State was not required to prove that the game specified in the indictment was a banking game, for any gambling device would subject the offender to indictment.

MR. Chief Justice WATKINS, delivered the opinion of the Court.

The indictment in this case charged that the appellee, on &c., at &c., did bet a large sum of money, to wit, the sum &c., with and against divers persons, to the jurors aforesaid unknown, at and upon a certain gambling device, adapted, devised and designed, for the purpose of playing a game of chance at which money and property might there and then be won ,and lost, denominated *rondo.* The fact of betting was proved, as charged; and it was

further in proof, to the effect, that rondo is a game played with balls, by rolling them upon a billiard table, at which the players bet against each other, but not against the keeper or exhibitor of the table, who receives from the players a compensation, or commission upon the amount bet between them, for the use of his table; and he is in no other way concerned in the game. The Court below gave the first instruction asked for on behalf of the State, by which the jury were told to find the defendant guilty, and assess his fine at any sum not less than fifty, nor more than one hundred dollars, if they were satisfied of the fact of betting, and were also satisfied from the evidence, that rondo is a gambling device, adapted, devised and designed for the purpose of playing a game of chance, at which money or property may be won or lost. The attorney for the prosecution also asked the Court to charge the jury, that it was not nesessary for the State to prove that the game of rondo is a banking game; which was refused.

This indictment could not have been preferred under the 8th section of the statute against gaming, which applies only to games played with cards; where the act of playing by the persons engaged in it, constitutes the particular game upon which the money or property is bet. The only question is, whether it can be sustained by the evidence, upon any ligitimate construction of the first section. This Court has repeatedly held that the first section relates exclusively to the banking games, so called whether played with cards, or by means of any other contrivance, whether called by the names specified, or by any new name or device, and the distinguishing feature of which is, that they are set up or exhibited to bet against by all comers. It was for the suppression of this species of gaming, that the severe penalties of the statute are directed against all exhibitors of such prohibited games, and those who furnish money for carrying them on, or suffer them to be exhibited in their houses, or who bet against them. *Stith vs. The State* 13, *Ark.* 680, and the previous decisions there cited; *Johnson vs. The State, ib.* 685.

It would be a departure from those decisions, and a forced con-

struction of the first seven sections of the statute, to hold that they include such games as rondo was here shown to be. Upon the same principle, we would have to hold that billiard tables, ten pin alleys, a fives court, and the like, are gambling devices, adapted, devised or designed for the purpose of playing any game of chance, or at which any money or property may be won or lost, liable to seizure and confiscation, and the owners or keepers of them denounced as vagrants, because the persons, who play at them for amusement, and pay for the use of the table, alley, or court, may also bet with each other upon the issue of the game. The whole scope of the statute is to prohibit what were then known and specified as banking games, and punish all concerned in them, and all devices of the like kind, whether newly invented, or old ones reproduced under different names.

If it follows from this decision that betting at rondo is not an indictable offence, it is because the statute, which the Court has no power to enlarge, has failed to make provision for it. It is no more a common law offence than wagering by means of a raffle or lottery. *Norton vs. The State*, decided at January term, 1854. Affirmed.

JONES VS. THE STATE.

15 261
100 591

Where a defendant, indicted for a misdemeanor, punishable by fine only, has been tried and acquitted, and on appeal or writ of error to this Court, the judgment reversed, and the cause remanded, he may be tried again, without any violation of the constitutional provision, "that no person shall for the same offence be twice put in jeopardy of life or limb."

Appeal from Union Circuit Court.

The Hon. SHELTON WATSON, Circuit Judge.

CARLTON, for the appellant.

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

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

The appellant was indicted for betting at cards, and on trial was acquitted, at the April term, 1852, of the Union Circuit Court. Upon appeal, prosecuted by the State, that judgment was reversed, and the cause remanded to the Court below for further proceedings, to be therein had according to law, and not inconsistent with the opinion of this Court, reported in *The State vs. Quarles*, (13 *Ark.* 307,) made applicable to this and other cases, in which the same question of law was presented. Upon the remanding of the cause, the defendant pleaded that former acquittal, in bar of any further prosecution upon the indictment. To this plea, which will be treated as regular and formal in all its substantial allegations, a demurrer was sustained; and by consent the issue upon the plea of not guilty, being submitted for trial, to the Court sitting as a jury, the defendant was convicted, and a fine of ten dollars assessed against him.

When our former decision was pronounced, reversing and remanding this cause, it was done upon due consideration of the nature and grade of the offence charged, again noticed in *Stewart vs. The State*, (13 *Ark.* 749.) The punishment being a pecuniary matter only, and from which the defendant, though held in custody for its payment, may at any time discharge himself, by applying for the benefit of the laws for the relief of insolvent debtors, (*Digest, title Criminal Proceedings, sec.* 213,) the Court was, and is of opinion, that the statute of 1846, giving to the State the same right as the defendant to appeal, or prosecute her writ of

error, from the judgment of inferior courts, in all criminal cases where the punishment does not involve life or limb, (*Ib. sec.* 240,) is not in conflict with the spirit and meaning of the constitutional provision: "That no person shall, for the same offence, be twice put in jeopardy of life or limb." Such was the decided intimation by this Court, in the case of *The State vs. Graham*, (1 *Ark.* 434,) before the passage of the act referred to, their opinion resting on the general provision of the act of 1838, (*Rev. Stat.*, *ch.* 45, *sec.* 213,) allowing an appeal to the Supreme Court in all cases of final judgment, rendered upon any indictment, and the same distinction taken between felonies and misdemeanors, punishable by fine only. Affirmed.

THE STATE AND STATE BANK, EX PARTE.

Where two complainants are claiming the same property—the one as purchaser at execution sale against the other—their interests are distinct and several, and they will not be allowed to sue together as such for the purpose of divesting the title of a third party, also execution purchaser of the same party.

The Bank of the State of Arkansas, upon a bill for injunction, will be required to verify the allegations of her bill, and give bond, like other suitors; and will not be allowed to prosecute her suit under cover of privileges which belong alone to the State, by uniting the State with her as complainant.

The State, averring in her bill in chancery, that she bid off property at execution sale against the State Bank, but neither alleging that she paid the amount bid, or offered to pay it, but only that she was able and willing to pay, and that the Bank had the means and was able to pay, does not show such title as will warrant the granting of an injunction to restrain a purchaser of the same property, at a subsequent execution sale, from asserting his legal remedies.

Motion for a Mandamus to compel the Circuit Judge of Pulaski County to grant an Injunction.

S. H. HEMPSTEAD, for the motion.

PIKE & CUMMINS, contra.

Mr. Justice WALKER delivered the opinion of the Court.

This is an application for a mandamus to compel the judge of the Circuit Court of Pulaski county to grant to the complainants an injunction.

The judge, as appears from his endorsement upon the bill, refused to grant the injunction, because the State had no interest in the property described in the bill, and was not entitled to any relief in the premises, and because the Bank, the other complainant, who, in the opinion of the judge, had a right to equitable relief, refused to swear to the bill, or to give security according to law, in the sum of $6000, for the payment of damages in case the injunction should be dissolved.

This, the complainants refused to do, upon the ground, that the State is a party complainant; and, as such, is not bound to make such affidavit, or to enter into bond as ordinary suitors are. The defendants deny that the State has any such interest in the matter in litigation, as to entitle her to an injunction, and that the Bank, the other complainant, who, from the case made by the bill, is alone entitled to relief, is only entitled to it upon the usual terms imposed upon other suitors.

From the state of case presented by the bill, it is very evident that there is not only no community of interest between the complainants; but, on the contray, their respective claims are utterly irreconcilable with each other. Because, if the sale made by the sheriff to the State is valid, then the Bank, the defendant in execution, has no interest in the property, and if, on the other hand,

the sales were fraudulent and void, the property still belongs to the Bank, and of course the State has no claim to it.

So far as the title of the State is concerned, every thing depends upon her sustaining the validity of her own title: because, unless she has title to it, it is a matter of no consequence with her, whether the sheriff and Newton perpetrated a fraud in the after-sale of the property or not. Having no rights under her purchase, of course none could be affected by the conduct of others. If the bid by the State, through her agent, became forfeited by a failure on her part to pay the sum bid to the sheriff, or for other cause, and the sheriff, in combination with others, perpetrated a fraud in the sale of the property, it must have been to the prejudice of the Bank, the defendant in execution, and for which she has a distinct cause of action; and so far from the State being made a party complainant, the Bank, under the circumstances, with far more propriety might have made the State a party defendant, denying the validity of her purchase as well as that of Newton's, with an appropriate prayer that both titles be canceled. There is no identity of interest between the State and the Bank in this property, no reference is made to the interest or liability of the State as a stockholder, or as responsible for the capital upon which the Bank went into operation; nor does she claim as one interested in the property of the Bank, which, since the liquidation act, has been held by the Bank, to be disposed of for the benefit of her creditors; but, on the contrary, the title set up in the bill is purely as purchaser, at judicial sale, of property which she alleges was sold as the property of the Bank. The complaint is, that a judgment was obtained against the Bank upon which execution issued, and was levied upon certain lots of land situate in the city of Little Rock, the property of the defendant in execution (the Bank,) which were exposed to sale according to law, and bid off by Euclid L. Johnson, as the agent of the State, for her, at the price of $205. That the sheriff knew that the State was able and willing to pay said bid, and that the Bank had the means to pay, and was well able to pay the same for the State,

and all that the sheriff had to do was to call upon the State or the Bank for the same, and that it would be paid; that the State has at all times been willing to pay said bid; that afterwards, at the request of Johnson (the agent), the sheriff executed and delivered a deed to the State, conveying the property with its appurtenances to her; and that the deed *recites* and *admits* the receipt of the purchase money, and by virture of all which the State becomes the lawful owner of the property, and so continues to be. These, together with the further allegation, that after the sale to Newton, the Bank, in behalf of the State, paid the balance of the debt due the plaintiff in execution, to Mr. Watkins, the attorney for plaintiff, and that whether paid or not, she has tendered the money to the sheriff, and is yet willing to pay the same; may be considered the grounds upon which the State rests her claim to equitable relief—grounds which, as we have said, are not only wholly independent of, but are also adverse to, those of the Bank. Where co-plaintiffs have interests in the subject of the suit, but such interests are distinct and several, they will not be allowed to sue together as such, nor in case one of the parties plaintiff has no interest in the subject matter in issue, can they be joined. This rule is fully recognized and settled by authority. 1 *Danl. Ch. Pl. & Pr.* 350; *Story's Equity Pl.* 544; *Boyd vs. Hoyt*, 5 *Paige* 65.

And if not permitted to join in ordinary cases, where they have distinct rights, with much more reason would they be precluded from the right to assert privileges as suitors, which alone extend to one of them.

But, in the case before us, the parties do not stand in so favorable a position as co-plaintiffs do, who have distinct interests in the same subject matter, because the State, in this instance, fails to show any right whatever in the property, according to her own showing, because she neither paid the purchase money, nor did she offer to pay it, until after the day of sale, at which the property was bid off to her; and, when such is the case, the sheriff may treat the bid as forfeited, and proceed under the statute to

re-sell the property. The allegation that the sheriff knew that the State and the Bank had money, and were ready and willing to pay the bid, when applied to, is no sufficient excuse for not paying or offering to pay, within reasonable hours, on the day of sale. A mere willingness or ability to pay, is not sufficient. Willingness must be evidenced by payment, or an offer to pay. The law knows no distinction between bidders at a cash sale; they are required to pay the money bid, or hold themselves ready, and offer to pay at the place of sale, if required. No valid title passed to the purchaser, even by deed, unless the purchase money was paid. Until this is done, the sheriff has no right to make the deed; he cannot charge himself with the amount bid, and make the deed, because this would be to substitute himself as debtor to the creditor. This, the policy of the law forbids, as was expressly held in *The State vs. Lawson, sheriff*, 14 *Ark. R.* 121. And so rigidly is this law enforced, that even where the sheriff had received from the purchaser the larger part of the money bid, and credited him for the balance, the deed was set aside. *Dickerson vs. Gilliland*, 1 *Cow.* 498.

There is no averment that the purchase money was paid, or offered to be paid, on the day that the property was bid off by the State. The averment, that "the deed *recites* and *admits*" payment, is clearly not an averment that the money was in fact paid, but only that it was so recited in the deed; and, from the guarded language, in which it is expressed: the deed *recites* and *admits*, &c., the averment of a tender after that time, negatives the idea that payment was in fact made. This being the case, it is evident that the State, according to the case made in the bill, acquired no title to the property as purchaser, and as she sets up no other title or claim to the property, the Bank, whose claim is of a very different nature, can derive no aid, from the mere fact that the State is named as party complainant in the suit, nor will she be allowed to prosecute her suit under cover of privileges, which alone belong to the State as a suitor in the assertion of her own rights. That the Bank may be unable to give the security

required, is a misfortune common to all poor suitors. It is not contended that she is not as much bound to comply with the terms imposed by the statute, as any other suitor, and if unable to do so, like all others, she must abide the consequences.

The application must be denied.

Mr. Chief Justice WATKINS not sitting in this case.

THE STATE BANK VS. ETTER.

Where an execution is issued to another county, and levied upon land, and the defendant dies and the execution is returned without a sale of the property, it is necessary to revive the judgment before the lien can be enforced.

A judgment creditor, after levy of his execution upon the lands of the debtor in another county, and the death of the debtor, orders the execution to be returned without sale; but neglects to revive his judgment against the representatives of his debtor, or pursue his lien for two and a half years: HELD. That the judgment creditor, under the circumstances, has displaced his lien, and cannot set it up against the title of one who had in the mean time purchased the property at a sale, under the statute, by the administrator of the judgment debtor.

Appeal from Hempstead Circuit Court in Chancery.

Hon. SHELTON WATSON, Circuit Judge.

S. H. HEMPSTEAD, for the appellant.

PIKE & CUMMINS, and CURRAN, contra.

Mr. Justice WALKER delivered the opinion of the Court.

This was a suit commenced in the Hempstead Circuit Court in Chancery, to enjoin the sale of certain lands under a judgment and process at law.

The material facts set forth in the bill are, that, on the 23d of April, 1847, the Bank recovered a judgment, in the Pulaski Circuit Court, against John W. Cocke, upon which execution issued, on the 3d day of September, 1849, directed to the sheriff of Hempstead county, and was by him levied upon real estate there situate, the property of the defendant. After the levy, the execution was, by order of the Bank, returned without a sale of the property. A few days after the levy, Cocke, the defendant, died, and in the due administration upon his estate, under an order of the Probate Court, the administrator, on the 25th of December, 1850, offered the land so levied upon for sale, and the complainant, being the highest bidder, became the purchaser thereof, took a regular conveyance by deed, and entered upon and improved the property, well knowing, at the time of his purchase, that the land had been levied upon to satisfy the aforesaid judgment.

Afterwards, on the 2d day of March, 1852, the Bank sued out a writ of *vend. ex.*, directed to the sheriff of Hempstead county, by which he was commanded to expose the lands to sale, and in obedience to which he advertised the property for sale. To prevent which, and to quiet his title, Etter, the purchaser at the administrator's sale, has brought this suit.

The judgment against Cocke was rendered in the Pulaski Circuit Court, and was, therefore, not a lien upon the real estate of the defendant, situate in Hempstead county. The *27th sec., ch. 67, Dig.*, makes executions a lien upon real estate, to which the judgment lien does not extend, from the time the writ is delivered to the officer to be executed. The levy, therefore, created a specific lien upon the property taken in execution, but as no sale was made under that process, and as the defendant

died before the return thereof, and before an alias writ issued to sell the property levied upon, the question is, after the death of Cocke, the defendant in execution, had the plaintiff a right to further process, to sell the property so taken in execution and returned unsold. This is a question of much difficulty, in view of the qualified interest acquired by the creditor in the estate, by virtue of his levy, and also of our administration law, which provides a general system for the payment of all debts, as well those judicially ascertained as those unliquidated.

It is very true that, by virtue of the levy, there was created a qualified interest in the property, in so far that it was held in custody of the law, and was prima facie a satisfaction of the judgment, but notwithstanding this, the legal title to the property still remained in the defendant until his death, and after that, it passed to the heir or devisee, subject to the qualified interest of the administrator, in case it should become necessary to sell the same for the payment of the debts of the testator or intestate.

If we admit it to be true, that the judgment creditor, by virtue of his levy, had acquired a lien upon this particular property for the satisfaction of his debt, it by no means follows that he should be allowed to assert such rights by enforcing his lien irrespective of the rights and interests of the heir and the administrator.

By the common law, all proceedings are stopped by the death of either party, until regularly revived in behalf of, or against, the party interested in the prosecution, or the defence of the suit; and by statute (*Dig.*, *ch.* 93, *sec.* 18,) it is provided that judgments or decrees may be revived against the administrator, if for money, &c., or the heir, if touching the realty. Therefore, whether by the common law or by statute, it was in any event necessary to revive the judgment, before the lien could be enforced. Such was the opinion of the Supreme Court of New York, in *Stymets vs. Brooks*, (10 *Wend.* 210,) where it was held, that after the death of the defendant, no execution can run either against the heir, or the personal representative, without *scire facias*, because, until the judgment is revived, there would be a

discrepancy between the process and the judgment, and because the parties in interest have a right to day in Court, that they may show cause, if any, against the application of the property to the payment of the judgment. In *Bently vs. Cummins' Adm.*, (4 *Eng.* 487,) it was expressly held, by this Court, to be error, after the death of the defendant in execution, to sue out execution before the administrator is made a party.

The Supreme Court of Alabama sustains the issuing of a second writ of *fi. fa.* after the death of the defendant, without reviving the judgment against the administrator or heir, in case the first writ was executed in the life-time of the defendant, upon the ground that it is necessary to do so in order to uphold the execution lien. Such was the decision of that Court in *Horn vs. Collingsworth*, (4 *Stewart & Porter* 237.) But this decision and the Alabama doctrine, were reviewed by Chief Justice SHARKEY, in *Davis et al. vs. Helm*, (3 *Sm. & Marsh.* 34,) and expressly overruled. He denies that the question of lien or no lien has any thing whatever to do with the question of reviving by *scire facias*, and expressly rests his decision upon the ground, that whether the lien is a judgment lien, or an execution lien, still the party in interest in the property should have day in Court, before the property is exposed to sale, that he may show payment, release or any other matter of defence, and that this defence is equally available whether there is a lien or not.

These authorities are clear and conclusive as to the question of reviving the suit by sci. fa., after the death of the defendant, before process can issue for satisfaction of the judgment, whether there is or is not a lien upon the property. And, as in this case, the execution issued against the defendant, Cocke, after his death, and without revivor against the heirs or the administrator, there can be no doubt that the execution should have been quashed, or the plaintiff restrained from selling the property.

But there is another view, in which this question may be considered, which involves it in much difficulty, owing to the general provisions made by our statute for the payment of all debts against

the estates of deceased persons. It is very evident that the Legislature intended to provide for every description of claims, whether judicially ascertained to be due or not, and to provide for their payment, giving preference to such as were esteemed most meritorious. Judgment creditors are specially provided for, and where the judgment is a lien upon the real estate, the debt is placed in the third, which is a more favored class than that of ordinary debtors. Such creditors are not, however, permitted to assert their right to exclusive satisfaction out of the estate, upon which the lien exists, but must take under the administration law. Thus, in *Adamson et al. vs. Cummins' Admr.*, (5 *Eng.* 549,) where judgment was rendered in the Circuit Court against the administrator, upon which execution issued, and was levied upon the property of the intestate, it was held that the execution irregularly issued, and should be quashed, for the reason that, after the death of the debtor, his whole estate passed to the administrator, or rather into the custody of the law, to be disposed of under the direction of the Court, for the payment of debts *pro rata*, according to priorty of right to satisfaction. And the more recently decided case, (*Walker, admr. vs. Byers*, 14 *Ark. Rep.* 252,) in reference to the general scope and purpose of the statute, the court said, "In this system, two capital objects seem plainly in view, from the various provisions for their attainment: *First*, that the estate of every deceased person, after death, shall immediately pass to the custody of the law, to be administered for the benefit of creditors, and after the satisfaction of all claims presented, &c., the residue to pass to the heir or distributees."

Upon the authority of these decisions, if no levy had been made upon the property of the intestate before his death, we should not hesitate to decide that a sale under judicial process from the Circuit Court, would be irregular, and that the plaintiff might well be restrained from enforcing a sale of property under it. But what shall we say of the execution lien? If the sale had progressed, and been made at the return term of the writ, under which the levy was made, even though the defendant had after

levy and before sale, died, there would be strong reason for holding the sale valid; but after the return of the process, we have held, both upon principle and authority, that no further process can issue until the judgment is revived by *sci. fa.* against the parties in interest in the estate so levied upon, and the point of difficulty is, conceding, as we must do, that the levy created and held a lien when the writ was returned, what shall be the effect of the levy? Shall we give the plaintiff a right to revive the judgment, and sue out process for the sale of the property? If so, it evidently evades the general provisions of the administration law, by permitting one judgment creditor to make his whole debt out of the estate of the debtor, to the exclusion of the rights of all others; or shall we place the judgment creditor upon the same footing that judgment lien creditors are placed? If we go beyond this, and give greater effect to the execution lien, and follow it up to sale of the property levied upon, how long a time shall the judgment creditor be allowed to revive his judgment, and how long will the execution lien hold the property? The statute is silent upon this subject. There is no law to fix their limits, or declaring what shall amount to a waiver of the lien. Judgment liens are by statute limited to three years, and we have held that mere delay to sue out process for satisfaction within that time, will not displace the lien; but here, where there is no limitation by statute, unless a different rule be applied to execution liens, they might remain an incumbrance upon the estate until the right to satisfaction of the judgment is barred by limitation. These difficulties are pressed upon our consideration in the case before us. On the 3d of September, 1849, a levy was made, and by the voluntary act of the plaintiff, the writ was returned without a sale of the property, and no steps taken to revive the judgment against the representatives of the deceased defendant, nor any process for the satisfaction of the judgment, until the 2d of March, 1852, two years and a half after the levy, and near fifteen months after the property had been sold by the administrator. The judgment debt was never presented to the administrator, nor

filed for classification and allowance against the estate. Under these circumstances, we are of opinion that even conceding the right of the judgment creditor, who has had a levy upon the debtor's property before his death, to revive the judgment against the representatives of the deceased, and follow up his lien for the satisfaction of his debt, that by the order and directions of the plaintiff, his failure to revive the judgment, and to sue out process for the length of time herein shown, was sufficient to displace his lien upon the property. And, in thus deciding, we are not to be understood as in any respect changing the rule heretofore laid down with regard to jugment liens; for as regards these, the statute has limited the continuance of the lien, but with regard to execution liens, the statute is silent, and the court must necessarily determine, from delay and other circumstances, whether the lien has been waived or abandoned.

There is much good reason for placing jugdment creditors, who have liens by force of the jugdment, or the levy, upon the same footing after the death of the debtor; indeed it is difficult to preserve unimpaired the general provisions of the administration law in any other way, and particularly in cases where the property remains in the possession of the debtor, at the time of his death. The levy, in no case, changed the title to the property; and although a specific lien is thereby created upon it, the same general policy, which requires judgment lien creditors to give up the exclusive right to satisfaction out of the debtor's property over other creditors, which the lien had conferred, may upon principle be applied to execution liens also. But be this as it may, in the cause now under consideration, we are satisfied that no execution, after the death of the defendant, could regularly issue until the judgment had been revived against the representatives of the intestate, and that had this been done, and admitting the right of the plaintiff to sell the property levied upon by virtue of his execution lien, which we think very questionable, that the plaintiff, under the circumstances of the case, displaced his lien, and con-

sequently cannot set it up successfully against the after acquired rights of the complainant. Let the decree be affirmed.

Mr. Chief Justice WATKINS not sitting in this case.

PATE ET AL. VS JOHNSON ET AL.

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Amicable and family settlements of the estates of deceased persons, among the several distributees, are to be encouraged; and, when fairly made, strong reasons must exist to warrant the interference on the part of a court of equity.

A court of equity is competent to correct mistakes; but it will not do so on slight grounds, nor mere probabilities; nor unless the mistake be established by the clearest and most satisfactory proof, in case it is not apparent.

The recital of the consideration money, and its payment in a deed, is only prima facie evidence, and parol proof is admissible to contradict it—as where the recital is relied upon as evidence of a sale to a child instead of a gift.

Appeal from Hempstead Circuit Court in Chancery.

Hon. JOHN QUILLIN Circuit Judge.

PIKE & CUMMINS, for the appellants. That although the deed for land by a father to his son, may express a consideration, testimony may be admitted to show that nothing was paid, and that the conveyance was given as an advancement. *Belden vs. Seymour*, 8 *Conn.* 304; *Sparrow vs. Smith*, 5 *id.* 113; *Clapp vs. Tirrell*, 20 *Pick.* 247; *McCrea vs. Purmat*, 16 *Wend.* 460; *Meeker vs. Meeker*, 16 *Conn.* 383; *Powell's heirs vs. Powell's heirs*, 5 *Dana* 168; *Stewart vs. State*, 2 *Harr. & Gill* 114; and that the

value of the property advanced will be estimated at the time of the conveyance. *Barber et al. vs. Taylor's heirs*, 9 *Dana* 84.

CURRAN, for the appellees, relied upon the consideration expressed in the deed, as evidence that the land was sold, not given; and contended that there was no proof sufficient to outweigh the recital; that the execution of the deed being established, the court was bound, under the circumstances, to hold it a sale according to *Scott et al. vs. Henry et al.*, and *Roberts vs. Totten*, 13 *Ark.*

Hon. S. H. HEMPSTEAD, Special Judge, delivered the opinion of the Court.

The object of the bill in this case, was to correct an alleged mistake, as to an item of eight hundred dollars, for a tract of land in Missouri, supposed to have been given by Edward Johnson, Sr., to his son James Johnson, and which, in a proceeding for the division of the estate of the former among his heirs, had been charged as an advancement; and, hence, so much paid on the distributive share of the son in the estate of the father.

The division of the estate of Edward Johnson, Sr., exceeding twenty thousand dollars in value, among numerous heirs, was an amicable proceeding in the Probate Court of Hempstead county, and may therefore be regarded in the light of a family settlement, without strict adherence to formal requisites, but conforming to the equity and justice of the case. All parties appeared to be perfectly satisfied with the division, the distributive shares were received, refunding bonds given, and no complaint heard from any quarter. Amicable and family settlements are to be encouraged, and when fairly made, as it is evident this was, strong reasons must exist to warrant interference on the part of a Court of Equity. 1 *Story's Eq.* 132; 3 *Swanston* 463, 476. The chief reason for it, in this instance, is alleged to be, that after the division had been made, the report of the commissioner confirmed, and the distributive shares taken by the respective distributees, a deed was discovered among the papers of James Johnson, de-

ceased, and who had died before his father, dated the 20th day of September, 1819, and whereby it appeared that Edward Johnson conveyed to James Johnson, in consideration of one thousand dollars, to him in hand paid, a tract of land in Washington county, Missouri, with general warranty of title, and that this deed was not known at the time, and so that this land was improperly treated, and charged as an advancement, when in fact it was not a gift at all, but a purchase by James Johnson, the ancestor of the complainants, for a fair and valuable consideration.

It is not pretended that the commissioners were guilty of fraud, or of an intention to do injustice to the complainants, or that there was any fraud or unfairness in the division, except that the value of the land was improperly charged to James Johnson as an advancement, and that is the mistake sought to be corrected.

Now passing other questions of less importance, it is to be observed that a court of equity is competent to correct mistakes, and that this in fact is a part of its original jurisdiction, which we have no disposition to abridge. But to exert this power on slight grounds, or mere probabilities, would be intolerable, and wholly unwarranted. While therefore the power is unquestionable, it is placed within the influence of the wholesome restraint, that the mistake must be established by the clearest and most satisfactory proof, in case it is not apparent.

"Inferences, and presumptions, and *prima facie* proofs, are not sufficient." "The mistake must be made out," says Chancellor KENT, "in the most clear and decided manner." *Lyman vs. United Ins. Co.*, 2 *John. Ch. R.* 632; *Gillespie vs. Moon*, 2 *John. Ch. R.* 585; *Gray vs. Wood*, 4 *Black.* 432; *Carnall vs. Wilson*, 14 *Ark.* 487; *Marquis Townsend vs. Strangroom*, 6 *Veasey* 328. The mistake must be proved to the entire satisfaction of the court. 17 *John.* 376; 5 *Mason* 577.

And this rule is founded in sound policy; because, otherwise, the court, in attempting to reform one mistake, might commit another.

Most of the authorities cited above, apply in terms to written

contracts; but all the cases of this description, are embraced within the principle enunciated by them.

The Probate Court had jurisdiction of the subject matter, and an amicable division was made, and the distributive shares received by the heirs, and the matter was closed to the satisfaction of all parties concerned. It surely requires no argument to prove that such an adjustment ought not to be reinvestigated, either in part or in whole, on any other than grounds quite as strong as those required to reform a written contract.

The recital of the consideration money, and its acquittance in a deed, is only *prima facie* evidence; and parol proof is admissible to contradict it. *Kip vs. Denneston*, 4 *John.* 23; *Shephard vs. Little*, 14 *John.* 211; *Wilkinson vs. Scott*, 17 *Mass. R.* 257; *Gully vs. Grubb*, 1 *J. J. Marsh.* 391, 392.

The principle of estoppel, it is said, does not apply to the consideration expressed, date of the deed, recitals of quantity, or value, or other recitals, to which the attention of the parties is supposed to have been but slightly directed. 1 *Greenl. Ev.*, *p.* 90 note 1, *and cases cited.*

It has been often held that the usual clause in a deed of land, or other property, acknowledging the receipt, and declaring an acquittance of the consideration money, even although it is followed by a receipt of the same money endorsed on the deed, is not only inconclusive in an action for the purchase money; but some cases hold it to be evidence of the lowest grade; that it is a mere formal part of a deed, and that such receipts are given every day, when nothing has been paid. *Bowen vs. Bell*, 20 *John.* 338; 2 *Phil. Ev.*, *Cowen & Hill's notes*, 217, *and cases there cited.*

The weight of authority, however, undoubtedly is, that the statement of the amount of the consideration in a deed, is *prima facie* evidence in an action for the purchase money; or in any proceeding where the deed may be used as evidence. But it is nothing more, and hence it is competent to overthrow the *prima facie* cause by parol proof, or circumstances; and show that no

consideration was paid at all, or a different one from that expressed. This is of almost daily practice in the courts.

How stands the proof in this case? The complainant adduced a deed reciting the payment of one thousand dollars to Edward Johnson by James Johnson, for the tract of land in Missouri, and that made a *prima facie* showing that the land was sold and not given, and that was all the evidence relied on by them.

But to weaken, if not entirely destroy, the *prima facie* case thus made, we find (1) the denial in the answers that it was a sale; (2) the strong probability that, if it had been a sale, it would have been spoken of as such in the family; (3) the statements made by members of the family to the commissioners at the division, that the land in Missouri had been given by the father to the son; (4) that through a long series of years, the land was understood to have been a gift, and was so treated by common consent; and (5) the testimony of Morrison to the effect that James Johnson, the ancestor of the complainants, had frequently said that his father had given him land in Washington county, Missouri.

With these facts and circumstances against the *prima facie* showing made by the deed, we think it may be safely assumed, that the case does not present such clear and satisfactory evidence, as to warrant a court of equity in granting the relief sought by the bill.

To put the matter in the most favorable light for the complainants, there is no more than a slight preponderance of proof to show that the land was sold and not given. As we have seen from the authorities, that is not sufficient, and it follows that the decree must be reversed with costs, the case remanded with instructions to dismiss the bill.

Chief Justice WATKINS not sitting in this case.

N. B.—The Hon. DAVID WALKER was not present during the remainder of this term.

FOLSOM VS. FOWLER, AD.

A complainant in chancery may, upon a rule for that purpose, obtain the testimony of one of the defendants in the cause, saving exceptions as to his interest, &c.

A party defendant, who disclaims all right to the property in controversy, and holds the legal title only as a trustee for the benefit of others, is a competent witness against his co-defendant—the possible liability for costs not disqualifying him in chancery, where it is discretionary with the Court to adjudge costs against him; but in such case the answer is not evidence against the co-defendant according to the principle decided in *Blakéney vs. Ferguson*, 14 *Ark.*

An arrangement between two judgment creditors and the debtor, that a slave belonging to the latter be sold under execution, and bought in by the attorney of one of the creditors, who should hold the legal title, but the slave should pass into the possession of the other creditor and remain on hire until the debts were satisfied, with leave to the debtor to redeem in a reasonable time: HELD, That the nature of the transaction was, that the slave be pledged or mortgaged, and that the creditor must account for the slave and all hires after satisfying his debt.

Appeal from Jackson Circuit Court in Chancery.

Hon. B. H. NEELY, Circuit Judge.

BEVENS and FAIRCHILD, for appellant.

FOWLER, contra.

HEMPSTEAD, Special Judge, delivered the opinion of the Court.

The deposition of William Byers, one of the defendants, was taken in behalf of the complainant, under an order of Court, subject to all just exceptions. A motion was made to suppress it, on two principal grounds: (1) that he was a party defendant to the suit; and (2) that he had an interest in the event of the suit. The motion was overruled, the deposition admitted to be read as evidence at the hearing, and Folsom excepted.

It is not only competent, but a very common practice to obtain the testimony of parties to the record in suits in chancery. The rule in that forum goes further than at law; for there a party to the record cannot be examined as a witness, unless it is by the aid of some statute to authorize it. *Dixon vs. Parker*, 2 *Ves. Senr.* 222. The usual course is to obtain an order for leave to examine a party to the record, and previous notice is not necessary. The order is grantable of course, "*saving just exceptions*," which means on account of interest, or incompetency. 2 *Daniel's Ch. Pr.* 1044, 1045; *Plairville vs. Brown*, 4 *Hen. & Munf.* 402; *Neville vs. Demeritt*, 1 *Green. Ch. R.* 321.

The fact, that Byers was a party to the record, could not prevent the complainant from obtaining his testimony; and as the usual order was made for that purpose, the first ground of objection ought not to prevail. But next comes the more important question as to whether he was interested.

The tendency of modern decisions is to discourage and narrow exceptions to the competency of witnesses, and let objections go

to their credit. And this practice, well calculated, as it doubtless is, to elicit the truth, and afford a fair view of the whole transaction, has in some States been extended so far by legislation, as to make even interested witnesses competent. How far the experiment may prove successful, remains to be seen; and whether it does not offer too strong a temptation to perjury, may well admit of question.

With us, the principle of the common law prevails, that a person who is interested in the result of a cause, is incompetent. The interest must be real and direct, but the magnitude or degree of the interest is immaterial, because, be it ever so small, the effect is the same as if thousands were at stake. If the interest is direct, certain and vested, it amounts to a disqualification. 1 *Greenl. Ev.* 391, 386.

A direct and certain liability for costs in a suit, is sufficient to exclude a witness, and render him incompetent. But Byers cannot be said to stand in that category, because in chancery costs are discretionary, and it does not follow that the losing party must pay costs as at law. It is therefore not a certain and direct, but only a contingent liability, and not a sufficient interest to render the party incompetent as a witness, within the meaning of the rule of exclusion adverted to. 1 *Atk.* 451; 2 *Atk.* 228; 1 *Johns.* 556; 2 *Cowen* 186; *Daniel's Ch. Pr.* 1515, 1516; 6 *Johns. Ch. R.* 205; 1 *Johns.* 577.

Byers disclaimed all right to the slave in controversy, and only pretended to hold the naked legal title, as a trustee for the benefit of others. No decree was taken against him; none rendered in his favor; and his testimony was in fact against his own interest; because the effect of it was to divest the title out of himself. In all cases, a witness is competent to testify against his own interest. 1 *Greenleaf's Ev.* 410. We are unable to perceive any ground upon which he should have been excluded as incompetent; and entertain the opinion that his deposition was properly admitted.

According to the rule in *Blakeney vs. Ferguson*, 14 *Ark.* 642,

the answer of Byers could not be read against his co-defendant, (*Byers vs. Fowler*, 14 *Ark.* 105,) and the allowance of it was no doubt erroneous; but in chancery, the rule is well settled, that if there is sufficient evidence to sustain a decree, besides that which is incompetent, a party cannot be permitted to derive any benefit from that objection. Excluding the answer of Byers, still leaves sufficient competent evidence to maintain this decree.

The bill is founded on a claim, on the part of the complainant, to redeem the slave little Ben, or to account for him and his hire. It appears that Byers, as attorney for McKinney, had control of an execution against Stone, which was levied on the slave as the property of Stone. Folsom, the defendant, had an execution also, which was levied on the same slave, and was a junior incumberance. Stone was in embarrassed circumstances; and this was the only remaining property, out of which there was any prospect of realizing these debts, and they amounted to more than its value. Byers, Folsom, and Stone attended the sale, and the latter appears to have been averse to the sale of the property, without some right to redeem; and designed, as Byers learned and believed, to run off the negro, and thus defeat the collection of the McKinney and Folsom debts. To prevent that, Byers succeeded, after a good deal of difficulty, in effecting an arrangement, by which he was to bid off the slave under these executions, and hold the legal title; that the slave was to go into the possession of Folsom, and remain on hire until his debt was satisfied; and then that Stone, or any one of his family, might, in a reasonable time, redeem the slave by paying the amount of the McKinney debt. This was the substance of the arrangement; and it was verbal. It resulted from the fear, doubtless well founded, that, without it, the negro would be run off, or put out of the way; and indeed the conduct of Stone was such as not to commend him to the favorable consideration of a chancellor, or entitled him to the distinction of a law-abiding citizen; and were the facts less clear than they are, we should not hesitate to deny such a suitor any relief whatever.

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Byers acted as the agent of Folsom; took control of his execution; bid off the negro at the sale; and took the title in his own name, so as to have the control of him; which was no unnecessary caution, seeing that he was a sort of a mediator between hostile parties. Byers paid nothing towards his bid, except the costs of the two executions, it being understood that he was not to do so, but receipted for the amount realized on the Folsom execution, as if it had been actually paid. There seems to have been a misunderstanding as to the extent and precise nature of the arrangement, as made on that occasion: Folsom claiming that the slave had been purchased for his benefit, and was to be his, on paying the McKinney debt; leaving in Stone and family only a right of redemption within twelve months.

But there is no proof that any such arrangement was made; and the circumstances show that the only one which existed, was that set up in the bill and proved expressly by the deposition of Byers. In support of this view, it is to be observed, that the McKinney debt was discharged by Stone, and not by Folsom at all; nor did the latter ever tender the amount of that debt, so as to make the contract which he sets up available, even supposing such a contract to have existed. It is true that Folsom in his answer denies the arrangement, respecting this negro, as alleged in the bill; but then it is established by one positive witness and corroborating circumstances, and that is sufficient to overturn the answer, (*Barraque vs. Siter*, 4 *Eng.* 550,) and warrant the relief sought by the bill.

The real nature of the transaction was, that this slave was pledged or mortgaged for the payment of these debts; and when they were discharged, the owner, Stone, had the right of redemption; because once a mortgage, always a mortgage. And Courts of Equity are inclined to construe contracts to be mortgages, rather than sales, whenever their real character may be doubtful. *Scott vs. Henry*, 13 *Ark.* 112.

Folsom has no reason to complain, because, by the arrangement, which was made, the means of discharging his debt was placed

in his own hands, and the debt actually discharged by the labor of the slave, and which, as shown by the evidence, was as valuable to him as money.

As Folsom failed to surrender the slave, he became responsible for his value, which, on sufficient testimony, was fixed at eleven hundred dollars; and also for hire, which was fixed by the Court at thirty six dollars and twenty-five cents a month, from the 8th day of January 1848, to the 19th of November 1851, amounting in the aggregate to one thousand six hundred and seventy-five dollars.

After giving the Folsom debt the credits admitted by him in his answer, the hire, up to the 8th of January 1848, extinguished the residue.

The value of the slave we do not consider as estimated too high. Nor can we say that the hire was put at an unreasonable rate, although we should have been satisfied with it, under all the circumstances, if it had been less. We do not feel warranted, however, in abating the amount of hire, or reversing the decree for excess; because the testimony of those best acquainted with the negro, fully sustains the finding of the Court. Indeed, some of them go beyond it. The negro seems to have been very likely and of good habits, and an engineer and blacksmith, and in fact the preponderance of proof is that such a negro was worth eleven hundred dollars, and his hire worth what it was fixed at by the Court. Affirmed.

WATKINS C. J., not sitting.

DAVIS VS. TARWATER.

15 286
59 259

A deed, sufficiently formal as a deed of conveyance, with *habendum* clause, declaring that the grantee shall have and hold the lots and appurtenances to his heirs and assigns forever, but with a covenant to make a good and sufficient deed with warranty of title when required, is a present conveyance of the fee, with a covenant for further assurance, and not a mere agreement to convey.

Upon a bill in equity by the purchaser of real estate for the rescision of the contract of sale and re-payment of the purchase money, the complainant must show a surrender of the property, or an offer to surrender it to the person entitled, and that the vendor can be placed *in statu quo*. The allegation that he had "abandoned and yielded the possession of the land," is insufficient.

A complainant, who seeks the rescision of a contract, must do so in a reasonable time: and so, after more than ten years had elapsed from the date of the contract, and five years after the discovery of the imputed fraud, a court of equity will refuse to rescind the contract.

Appeal from Hempstead Circuit Court in Chancery.

Hon. JOHN QUILLIN, Circuit Judge.

PIKE & CUMMINS, for the appellant. On the point that the instrument executed to Tarwater, was a conveyance *in presenti*, and not a covenant or bond to convey in future, cited *Chiles vs. Conely's heirs*, 2 *Dana* 21; *Jackson vs. Bladjet*, 16 *J. R.* 172; *Jackson vs. Kipelbrack*, 10 *J. R.* 336; *Fisdale vs. Essex*, *Hob.* 34; *Baxter vs. Brown*, 2 *W. Bla.* 973; *Jackson vs. Delacroix*, 2 *Wend.* 433.

CURRAN, for the appellee. The words used in the deed: "bargained and sold, conveyed and confirmed," do not import a covenant of warranty. The statute, (*Digest*, 264, *s.* 1,) merely provides that the words "grant, gargain and sell," shall be a covenant of seizin in fee, free from incumbrances; *Gee vs. Pharr*, 5 *Ala.* 586; and the statute being in derogation of the common law,

must be strictly construed. Although there be words of conveyance *in presenti*, in a contract of purchase and sale of lands, still if from the whole instrument it is manifest that further conveyances were contemplated by the parties, it will be considered an agreement to convey, and not a conveyance; and the intention is clear, from the stipulation, that Davis should, "when required, make a deed in fee simple with covenants of warranty." *Jackson ex dem. vs. Moncreif*, 5 *Wend.* 26; *Smith vs. Robinson*, 13 *Ark.*; *Ives vs. Ives*, 13 *J. R.* 235.

Hon. S. H. HEMPSTEAD, Special Judge, delivered the opinion of the Court.

The first enquiry to be made, is, whether the instrument, executed by Aquilla Davis to George T. Tarwater, on the 19th of January 1839, was a conveyance of the four lots adjoining Spring Hill, or only an agreement to convey; in other words, whether the contract was executed or executory.

The intention, when apparent, and not contrary to any rule of law, will control; because the intent, and not the words, is the essence of every contract. In the construction of deeds, we are to consider the entire instrument, and not merely any particular part of it; and such exposition should be given, as that every part of a deed may, if possible, take effect, and every word operate. 3 *Johns.* 394; 16 *Johns.* 178; 2 *Bl. Com.* 379.

The mere form of an instrument is not material, (2 *Sumner* 490,) and KENT says, a deed would be perfectly competent, in any part of the United States, to convey the fee, if it should be to the following effect: "I, A. B., in consideration of one dollar to me paid by C. D., do bargain and sell to C. D., and his heirs, the lot of land; (describing it.) Witness my hand and seal." 4 *Kent* 461. Any writing that identifies the parties, describes the land, acknowledges a sale without reservation of the vendor's right, for a valuable consideration, and is signed and sealed by the grantor, is a valid deed of gargain and sale. *Chiles vs. Conely's heirs*, 2 *Dana* 21.

The deed in question, is sufficiently formal. It contained the names of the grantor and grantee, expressed a valuable consideration, used technical words of conveyance fit and appropriate to pass the fee to the vendee and his heirs, and which would have been improper in a mere agreement to convey, and finally contained the *habendum* clause, declaring that the grantee should have and hold the lots and appurtenances, to his heirs and assigns forever. The language used was amply sufficient to convey an estate in fee simple.

The covenant, on the part of Davis, to make a good and sufficient deed with warranty of title, when required, connot certainly be construed so as to convert the whole instrument into an executory agreement, because that would be to destroy a part of it, and thus violate the rule that every part must stand, and every word operate if possible. It is to be regarded, then, as a covenant for further assurance. By placing that construction on the deed, the whole may stand; and this would seem to conform to the manifest intention of the parties.

Although not in form, it is essentially a covenant for further assurance, because the covenantor, to comply with such a covenant, would be obliged, as we take it, to make a deed, answering substantially to the description as contained in that clause.

The covenant, for further assurance, does not prove that a contract is executory: but rather the contrary. The general warranty of title, contained in ancient deeds, has been long disused, and a set of covenants substituted in its stead, which are generally inserted in conveyances, by those who think, with Lord COKE, that it is not advisable to depart from the formal and orderly parts of a deed, which have been well considered and settled. *Rawle on Cov. for Title*, 164, 165.

These covenants are, (1) that the grantor is seized in fee; (2) that he has good right, and full power to convey; (3) that the grantee shall quietly enjoy the premises; (4) that the premises are free from incumbrances; and (5) that the grantor will make further assurance of title; the effect of which is, that the grantor

binds himself and his heirs to make all such further assurances of the land, as shall be lawfully and reasonably required by the grantee, or his heirs. (4 *Cruise Dig.* 408.) And all these covenants are probably contained in most English deeds, where there is not some more limited agreement. They pertain to complete conveyances of the fee *in presenti*, rather than to executory agreements.

Under our statute, the words "*grant, bargain and sell,*" import the first four covenants above named, unless limited by express words. *Digest*, 264.

The case of *Jackson vs. Blodgett*, 16 *John.* 173, is a very strong one to support this deed as a present conveyance, and is directly to the point in hand. In that, the instrument in the form of a bond, conveyed the land for the consideration therein expressed, using the terms grant, bargain and sell, and then a clause was inserted to the effect, that the vendor should, by a legal conveyance in the law, convey the land to the vendee and his heirs and assigns, as soon as he should be vested with the title. The court held the instrument to operate as a present conveyance, SPENCER, C. J., in his able opinion, citing various authorities, amply sustaining that view of the case, and moreover showing that it was conformable to reason. The doctrine as to leases, was referred to by way of illustration, and it was said that when there are apt words of present demise, and to these are superadded a covenant for a further lease, the instrument is to be considered a lease, and the covenant as operating in the nature of further assurance. 10 *John.* 337; 5 *Term Rep.* 165; *Cro. Car.* 207.

Perhaps the best proof that the parties intended this deed to operate as a present conveyance, is, that no period was fixed when the deed, alluded to in the clause, was to be made. It was only to be done when required, thus evincing that the vendee was quite willing to rest, for the present at least, on the deed he had received with the possession; leaving it to future events to determine whether it would be necessary to make the demand or not;

and which in point of fact never has been made at all, unless we are to consider this suit as a sufficient request.

Considering this deed, then, in all its parts, and to give effect to the whole, there can be but little, if any doubt, that it ought to be held as a present conveyance of the fee, with a covenant for further assurance, and not as a mere agreement to convey. When this same instrument was before this court, in an action of covenant between the same parties, (2 *Eng. R.* 153, 157,) it was not deemed essential to determine whether it was a bond for title, or deed conveying the lands therein described; the court remarking, however, that "were it necessary, they did not conceive that it would be difficult to show that it was a deed of conveyance, with a covenant to execute, upon request, a good and sufficient deed in fee simple with warranty of title."

Inasmuch as the incumbrance, created by the mortgage to the Real Estate Bank, cannot be removed at present, this bill has for its scope and object, the rescission of the contract of sale between Davis and Tarwater, and the repayment of the purchase money, with interest to the latter. Passing several interesting questions discussed by counsel, we are to enquire whether Tarwater is in a position to demand rescission, because if he is not, it would be quite useless to ascertain in what cases, and for what causes an executed contract may be rescinded.

There are two obstacles in the way of the relief sought by the bill; first, that it does not appear that the vendee ever surrendered the land, or gave notice of an intention to abandon the contract; and second, lapse of time.

The language of the authorities is uninformed, that he who seeks the rescission of a contract, must be in a situation to restore to the opposite party whatever he may have received from him; or, as more briefly expressed, he shall put his adversary *in statu quo*. This is the dictate of natural justice, as well as a clear principle of law. If the vendor cannot be placed *in statu quo*, the contract cannot be rescinded. And the rule is the same, whether the rescission is sought on the ground of fraud, mistake, or for any

other cause. *McDonald vs. Fithian*, 2 *Gilman* 269; 13 *Ark.* 182; *Cunningham vs. Fithian*, 2 *Gilman* 651. In the case of the rescission of a contract, it is well settled, says the court in *Griffith vs. Depew*, 3 *A. K. Marsh.* 180, "that the court ought to place the parties back *in statu quo*, as near as can be equitably done; that the vendor ought to refund the money with interest, and the vendee ought to restore the subject purchased with rents, and payment for waste, receiving credit for the valuable and lasting improvements he may have made. *Williams vs. Carter*, 3 *Dana* 201; *Caldwell vs. Caldwell*, 1 *J. J. Marsh.* 53.

In personal property, the rule is the same in actions at law. As where goods do not correspond with the order given, or with the sample, or are unsound, the purchaser ought immediately to return them back to the vendor; or give him notice to take them back, and thereby rescind the contract. Without this, he can not rescind the contract and recover back the price, (2 *Kent* 380; 1 *H. Bl. Rep.* 17; 1 *Term Rep.* 133) although he may sue for a breach of warranty without returning the goods. A party defrauded in a contract, has a choice of remedies: he may stand on the bargain and recover damages for the fraud in an action at law; or he may rescind the contract and return the goods bought, and receive back what he paid or sold. *Campbell vs. Fleming*, 1 *Adolph. & Ellis* 40. And this doctrine as to placing parties *in statu quo*, as nearly as possible, conforms to the civil law; and the application of a vendee to a court of equity to rescind a contract of sale, closely resembles the rescissory action of the civil law on the part of the buyer. The object of this action is to rescind the contract of sale, and it cannot be commenced but by virtue of letters of rescission obtained in chancery, by which a recission is directed, if the injury set forth by the buyer shall appear to the judge.

The seller must render to the buyer the price which he has received, upon condition that the latter render him the estate sold; which must be restored in the condition in which it was found; with all the augmentations subject to the contract, whether natu-

ral or alluvious, or artificial, as buildings erected upon the land. The seller, however, must make allowance for necessary repairs and erections, and the buyer is liable for rents and profits. *Pothier on Contracts of Sale, part* 5, *c.* 2, *sec.* 374, 381, 382.

The duty and obligation of vendor and vendee, do not differ essentially, under our system and under the civil law, because under both, the vendee may obtain the purchase money with interest, and must restore the estate. And while he is accountable for rents and profits, he may be reimbursed for necessary repairs and erections, and also for taxes and assessments.

And indeed it would be most extraordinary for any tribunal, professing to dispense equal and impartial justice between man and man, to allow a vendee of an estate to rescind a contract, recover the purchase money back, and neither restore, nor offer to restore, the estate.

Sir EDWARD SUGDEN declares that where one party fails to perform a contract, the other, if he means to rescind it, must give a clear notice of his intention to do so. The case of *Reynolds vs. Nelson*, 6 *Mad. Ch. Rep.* 19, is to the same effect. 1 *Sugden on Vendors*, 279, 382; *Hunter vs. Geridy*, 1 *Ham.* 449.

And so with regard to a sale of personal property, where there is fraud, the purchaser, if he wishes to rescind the contract, must tender back the property, before he can bring his action at law to recover the consideration. And it is not enough that he give notice to the vendor, and call on him to come and receive his goods; but he must himself return them back to the party defending him, before any right of action accrues. *Bain vs. Wilson*, 1 *J. J. Marsh.* 202; *Stewart vs. Dougherty*, 3 *Dana* 467; *Norton vs. Young*, 3 *Greenl.* 30; *Butter vs. Blake*, 2 *Har. & J.* 353; *Ketletas vs. Fleet*, 7 *Johns* 331. Tender would doubtless have the same effect, and although the rule is less stringent in regard to real estate, yet in chief ingredients it is the same.

In *Murphy vs. Officer*, 8 *Yerg.* 502, it was held that, on rescinding the contract, the purchaser was bound to give up the land;

and until he did so, an adverse title in himself, procured after the decree of rescission, could not be set up by him.

And in *Fitzpatrick vs. Featherstone*, 3 *Ala.* 40, it was expressly held, that a contract for the sale of land could not be rescinded, where the purchaser did not offer to return the land to the vendor.

This principle, so necessary to be enforced in these kinds of suits, is only a counterpart of the maxim, that he who asks equity must do equity.

It may therefore be asserted, as a rule well sustained by reason and authority, that if the vendee has gone into the possession of the estate, and wished to rescind the contract, he must give fair notice of his intention to do so, and must surrender, or offer to surrender the estate to the vendor, or, in case of death, to him on whom the descent is cast. He has no right to abandon it to the mercy of the public without notice, because the inevitable consequence would be waste and dilapidation, even if should escape a sale for taxes, and thus pass beyond the reach of vendor and vendee forever.

If after notice to the vendor, the possession is abandoned, the vendor can see that the land is properly taken care of, and taxes and assessments paid, as they accrue, and if he neglects it, he cannot charge the vendee with unfair conduct. But in the absence of notice, and without the return or offer to return the land purchased, or showing that it can be restored, the vendee comes into a Court of Equity with a poor grace to ask for the rescission of the contract, and under such circumstances is not entitled to it.

And it is for the person asking for the exercise of this highest power of a Court of Equity to show clearly, that he can restore the land on rescission, and that the parties can be placed in *statu quo*, and it is not for the opposite party to show that it cannot be done. 1 *S. & M.* 146. Contracts are not to be anuulled on slight grounds, and a clear case must be presented to warrant it. 1 *S. & M.* 443; 3 *S. & M.* 394; 5 *Munf.* 295. Now Tarwarter alleges in his bill that, immediately after he

found that the land was incumbered, and that he had been deceived and imposed on, he "*abandoned and yielded the possession of said land.*" He does not state when, nor to whom, but as he avers that he ascertained in 1845, that the land purchased by him was embraced in the mortgage to the Real Estate Bank, we may infer that that was the time of the abandonment, and that would give six or seven years as the length of his actual possession, according to the showing made by himself. This bill was filed in 1850, and who had the charge or control of the land during the intervening five years, or whether any one had, or whether the taxes were paid, or whether it could be restored when the bill was filed, or the decree pronounced, does not appear, and no notice appears to have been taken of that point by the Court below. The bill does not offer to restore it; nor is there a shadow of proof that any such offer was ever made; and which of itself, according to the case of *Fitzpatrick vs. Featherstone*, 3 *Ala.* 40, is a fatal objection. As all pleadings must be construed most strongly against the party pleading, we must take it that the possession of the land was not surrendered to any one, as it is not stated to whom. It cannot be contended that the surrender was made to the legal representatives of Davis, or his executrix, or that any notice was given to them, or any of them of his intention to abandon the contract. There is not the slightest foundation for such a surmise, and in fact none such has been made. It comes then to this, that Tarwater, choosing to abandon the contract in 1845, left the premises without giving notice to those interested, or offering to surrender the land; and five years after asks a Court of Equity to restore to him the purchase money with interest. It is very clear, from the facts and circumstances of the case, that he is not in a situation to demand it. If he was entitled to a rescission, the Court should have decreed the cancelation of the deed, and the restoration of the land, so as to do full justice between the parties, and the decree is erroneous in any view in which it may be considered. But this form of the

decree is less important, as we do not deem Tarwater entitled to the relief asked.

We now come to consider the effect of lapse of time.

The bill was not exhibited, until more than ten years had elapsed from the date of the contract, and, according to Tarwater's own statement, five years had elapsed from the discovery of the imputed fraud. No excuse is offered for this delay, nor has it been explained.

A complainant who seeks the rescission of a contract, must show clearly the defect in the title, and that there has been fraud, accident or mistake, and the remedy must have been pursued in good time. *Moss vs. Davidson*, 1 *S. & M.* 112; *Flecther vs. Wilson*, 1 *S. & M. Ch. R.* 376, 134; *Pintard vs. Martin*, *ib.* 126; *Ayers vs. Mitchell*, 3 *S. & M.* 690.

A party seeking rescission, must do so in a reasonable time. *Davis vs. James Exr's.*, 4 *J. J. Marsh* 9; 7 *Johns.* 331.

And in *Lawrence vs. Dale*, 3 *J. C. R.* 42, it was said by chancellor KENT, that if the law allowed a party to abandon a contract while *in fieri*, he ought at least to act promptly and decidedly on the very first discovery of the breach.

The case of *Roach vs. Rutherford*, 4 *Desaus.* 126, is more in point, and in many respects resembles the case at bar. It was there decided, that the purchaser after having remained in possession more than five years without being disturbed, could not resist the payment of the purchase money.

A party has no right to ly by for a long time for the purpose of first ascertaining whether he may not be able to realize a profit out of the contract, nor until the property, by a fall in prices, has greatly depreciated in value, nor until the title to the property by neglect has become doubtful or impaired. 1 *Gilman* 269; 2 *Gilman* 651.

Where a person has been guilty of negligence and slept on his rights, Courts of Equity will refuse to enforce such rights, deeming that the best interests of society require that causes of action should not be deferred an unreasonable time. Since the

decision of this Court in *Taylor vs. Adams*, 14 *Ark.* 62, this can hardly be considered as an open question in this State. It was there said that when a party seeking redress is apprised of his rights, or if they be fraudulently concealed from him, whenever the fraud is discovered, or might reasonably have become known, he must assert his rights in Equity within the period limiting the analogous remedy at law, unless he come within some saving or exception.

And it was also said that the objection that the claim is a stale one, may be taken at the hearing and when such a case is disclosed, the Court may of its own motion deny relief to parties who have slept upon their rights.

Now it cannot be successfully controverted that, if Tarwater had brought his action at law, for the recovery of the purchase money, he would, on his own showing, would have been barred by limitation; so in analogy to the statute, he must be held barred by the lapse of time when he comes into another forum.

Indeed, Equity will sometimes, under peculiar circumstances, hold a party barred of equitable relief when he is not of his legal right. Then it simply withholds its hand, and leaves a party to his remedy at law. *Mason vs. Crosby, Davies R.* 313.

Lapse of time is not founded upon statutory provisions, though the statute may be referred to at fixing a reasonable time for its operation. The rule is applied by Courts on a broad view of all the circumstance of the case. And even in cases where the demand is not barred by positive limitation, Courts of Equity refuse to interfere after a considerable lapse of time, from considerations of public policy and from the difficulty of doing entire justice. Nothing can call a Court of chancery into activity, but conscience, good faith, and reasonable diligence, and where these are wanting, the Court is passive and does nothing. *Piatt vs. Vattier*, 1 *McLean* 164; *S. C.*, 9 *Peters* 415; *McKnight vs. Taylor*, 1 *How. S. C. Rep.* 168.

Without adverting to other errors which exists in the decree, we are satisfied, for the reasons above expressed, that it should be

reversed, and the bill dismissed at the cost of the complainant. Reversed.

Mr. Chief Justice WATKINS not sitting in this case.

PHELPS VS. HENRY & CUNNINGHAM.

The proprietors, having projected a town, laid it off into blocks and lots according to a survey permanently establishing the initial point and designating the blocks and lots by stakes, and caused a map thereof to be recorded, and proceeded to sell the lots. Afterwards, a mistake in the survey being discovered, a resurvey is made, which is generally acquiesced in by the property holders and accepted by the corporate authorities of the town, though not assented to by the purchaser of lot No. 2, the assignee of the original purchaser—who had bought the lot and was put into possession according to the original survey, but after the resurvey accepted a bond for title describing the lot by number—by the resurvey lot No. 1 laps several feet over lot No. 2, the entire depth; and lot No. 2 laps over lot No. 3, &c., HELD, That the lots must conform to the resurvey, and the prior purchasers hold accordingly.

The principle, that quantity shall yield to course and distance in surveys, and that course and distance shall yield to natural objects or artificial monuments, is peculiarly applicable to irregular and large surveys, where quantity is not material: but where land is laid off into compact town lots, quantity is an object of importance, and when it is done according to a regular plan, it is expected that purchasers will buy with reference to it.

Questions in relation to locations in a new country, and in respect of projected towns, which have their first existence on paper, may be regarded differently from disputes between adjacent proprietors in cities, where existing foundations have been fixed by long acquiescence.

The presumption in a Court of Equity, upon a question of limitation between the owners of adjacent town lots, is that they hold according to their deeds, notwithstanding a mistake in the actual division between them, unless after acquiescence for a long period of years, or the possession becomes hostile.

Appeal from Crawford Circuit Court in Chancery.

Hon. B. H. NEELY, Circuit Judge, presiding.

WALKER & GREEN, for the appellant. The proof is that Brown and all who purchased at the auction sales, did buy by the stakes, and with the understanding that their deeds describing the lots according to their numbers vested in them the area included within the boundaries indicated by the stakes: as in the case of the United States surveys, where the boundary lines actually run and marked by the public surveyors, are to be taken and considered as the true boundaries, whether they be right or wrong. *Campbell vs. Clark*, 8 *Missouri Rep.* 553; *Conn aad others vs. Penn* 1 *Peters C. C. Rep.* 496.

The deed to Phelps, and indeed all the deeds describe the lots according to their respective numbers, and their boundaries can be proved even by hearsay evidence, (*Ib*). The mistakes committed by the surveyor, cannot prejudice the purchaser of town lots, when the boundaries are designated by the monuments erected on the lines run; and where town lots have been sold and held according to a survey, possession in respect to boundaries will be respected. *Ralsten et al., vs. Miller et al.*. 3 *Rand.* 44, 49.

PIKE & CUMMINS, contra, argued this cause at length, contending that the whole survey was governed by, and started from one fixed point and a front line, neither of which has ever been changed, and must govern in ascertaining the boundaries and lines of all the lots; that in the bond for title to Brown, which stipulated for title in accordance with the plat, there are no calls for course and distance except by reference to the plat, and no calls at all for any stakes or natural boundaries other than the fixed beginning point. The bond calls for the lot as designated on the plat. The intention, which was to run off the town with streets at right angles, must govern, and a mere blunder in the survey

could not be allowed to mar the symmetry of the town, citing *Jackson vs. Wendell*, 5 *Wend.* 146; *Jackson vs. Wilkinson*, 17 *J.R.* 156; *Jackson vs. More*, 6 *Cowen* 706; *Chinoweth vs. Haskel*, 3 *Peters* 96; *Barclay et al. vs. Howell's Lessee*, 6 *Peters* 516; *Lodge's Lessee vs. Lee*, 6 *Cranch* 237; *McIver's Lessee vs. Walker*, 4 *Wheat.* 444; *Mann & Toles vs. Pearson*, 2 *J. R.* 40; *Jackson vs. Ogdon*, 7 *J. R.* 238; *Dogan vs. Seekright*, 4 *Hen. & Munf.* 120; *Thomas vs. Patten*, 1 *Shep.* 333.

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

Henry and Cunningham, the complainants in the Court below, exhibited their bill in chancery against the appellant Phelps, the mayor and aldermen of the city of Van Buren, Jesse Turner and others, the object of which was to settle boundaries of certain lots in block No. 13, in Van Buren, and to enjoin actions of trespass brought, or threatened to be brought by Phelps against the complainants.

It appears that, in the year 1837, Thompson and Drennen, who are admitted to have been the owners of the land upon which Van Buren is situated, determined to lay off the town of that name, and proceeded to have the site divided into convenient blocks and lots for sale, with intervening streets and alleys for public use. The land bordered on the left bank of the Arkansas river, which there runs in a southeastwardly direction.

The plan projected by the proprietors was rectangular, fronting on the river. They accordingly caused a straight line to be run and established, corresponding with the general direction of the river, and at a convenient distance from it, so as to form what is called Front or Water street; and at an arbitrary point upon that line, they set a stake and established the south east corner of what was to be Main street, to be projected at right angles from the north east line of Water street; and which point became the south west corner of one of the blocks fronting on Main street, next to the river. The line of Water street, so run and established, and the place fixed upon it for the starting point of Main street, have

never been changed, and, as they could at all times be identified and ascertained, are to be regarded as the base of the projected subdivision. The surveyor employed by Thompson & Drennen, then proceeded to run off Main street, and the other streets intended to be parallel with it, and at right angles with the north east line of Water street, and also the cross streets parallel with and at right angles with Main and those streets leading from the river. As the survey progressed, stakes were driven in the ground to mark the corners of the different blocks, and also of each lot, according to the measurement made at the time. Every block was divided by an alley, ten feet in width, and all the lots were intended to be of the uniform size of 33 feet wide by 127 feet deep, and fronting on the streets leading from the river, except those next to the river, which were 125 feet in depth and made to front on Water street. The blocks were numbered in tiers, beginning on Water street, at the south west corner of the site. A plat of the town, thus projected and surveyed, was made, and, on the 21st of October, 1837, filed and recorded in the office of the clerk and ex-officio recorder of Crawford county. It does not appear that any field notes were made at the time the lines of the streets and blocks were run and measured, or any memorial kept of course and distance, or location of the stakes set by the surveyor, nor does it appear, from any memorandum on the plat, what the base of the actual survey was, but the plat as exhibited shows a rectangular survey as before described, with the names, width and dimensions of the streets and alleys, and numbers of the designated blocks and lots, delineated upon it, and the fact is abundantly proved, as admitted by the answer of the defendant, Phelps, that the extension lines were projected in accordance with the plan designed by the proprietors, from the north east line of Water street, and the point fixed upon it for the corner of Main street.

Soon after the survey and map were completed, Thompson & Drennen commenced selling lots by auction, and afterwards at private sale. In most instances, the auctioneer, and the persons accompanying him, moved about from block to block, and cried

the lots, answering to the description contained in the plat, upon the ground, where the stakes indicating their location were visible to the bidders. On the 28th of June, 1838, the proprietors sold to one R. C. S. Brown, lots No. 1 and 2, in block 13, on the usual terms of sale, which were on credit, they agreeing to make title on the final payment of his note for the purchase money. Lot No. 1 is at the south east corner of block 13, which is in the third tier from Water street, and fronting along the north west line of Main street. The adjoining lots 3 and 4, in the same block, were owned by the defendant Turner. A large portion of the stakes remained standing for several years, after the original survey was made, and when Brown purchased the lots indicated by the numbers on the plat, he went to the place where the stakes were pointed out to him by Drennen, as the corners of the lots in question, and he was put in possession of them. Subsequently, one Hazen became the owner, by transfer, of lot number 1, and at the February term, 1846, of the Crawford Circuit Court, he filed his bill, and at the August term of that year, obtained a decree for title to it against Drennen and the representatives of Thompson, who had deceased, and at the August term, 1848, it was sold under execution against Hazen, and purchased by Henry & Cunningham. On the 20th of June, 1841, Drennen, the survivor of Thompson, executed his bond for title to Brown, for lot No. 2, reciting and confirming the previous sale of it to him, and conditioned to make title on the receipt of the purchase money. In this bond for title, accepted by Brown, the lot is no otherwise described than as "a parcel of land situate in the town of Van Buren, &c., and known, according to the plat of said town, duly filed for record &c., as the lot No. 2, in block No. 13, fronting on Main street 33 feet." On the same day, Brown sold his interest in the lot, and assigned the title bond to the defendant, Phelps, who soon after built a house upon it, and at the February term, 1846, filed his bill, and at February term, 1848, obtained a decree for title predicated upon the bond of Drennen and the description of the lot contained in it.

In the year, 1842, it was discovered that the original survey was erroneous, that is to say, it did not correspond in its actual lines and distances, as run and measured, with the plan projected by the proprietors, or the plat filed in the recorder's office; owing to carelessness, it may be supposed, of the surveyor, there was a slight deviation in some of the lines from a right angle. But the more important fact is, that the measurement going north eastwardly from Water street, was inaccurate; whether because it was surface instead of horizontal, or because of a defect in the chain or line used, does not appear. The result of the measurement falling short, would be to derange the plan of the town, and diminish the size of some of the lots, unless the streets were infringed upon for quantity. In the same year, Drennen, in conjunction with the administrators of Thompson, the defendant Turner being one of them, caused a resurvey to be made, and a plat of it, with some additions to the town, was filed in the recorder's office. This survey, by which several permanent monuments of Stone were erected, is admitted to be accurate, according to the plan originally projected, and assumes the first line of Water street and the starting point of Main street, to be the base of the extensions. The change made by it affecting these parties is, that the location of lot 1, ascertained by exact measurement, was found to be about four feet further from the river, than it was before understood to be, and it laps over that much along the entire length of lot 2, in order to have its complement of front on Main street. In like manner, lot 2 laps over four feet on the adjoining lot 3, owned by the defendant Turner. Phelps never gave his consent, in any form, to the new survey, but, so far as shown, it was acquiesced in by the property-holders generally, and recognized by the mayor and aldermen, who required the buildings thereafter erected and the laying down of pavements, to be in conformity with it. And the recognition of the corporate authorities is to be inferred from the acceptance of the charter granted by the General Assembly, on the 24th of December, 1842, to incorporate the town of Van Buren, so far as it contemplated that

an authentic survey should be made and recorded under their direction, or adopted by them, if already done, and of the subsequent act of January 4th, 1845, incorporating Van Buren as a city, with reference to the limits fixed by the town authorities, and the survey and plat recorded in 1842. The houses built in Van Buren, previous to that time, were intended to conform to the original survey, and in some instances would be partially interfered with by the resurvey. Altogether, they exceed in number those erected after that time, but were mostly built of wood, and not so permanent or valuable as the recent structures.

In the year 1849, Henry & Cunningham built a brick storehouse covering the entire surface of their lot No. 1; and conforming to the resurvey, it occupies a strip four feet wide, and the length of the adjoining lot 2, claimed by Phelps, in virtue of his purchase, according to the original survey, and to which by his answer he asserted title, in opposition to that of the complainants. Decrees *pro confesso* were taken against all the other defendants, and, at the final hearing, the Court below decreed in favor of the complainants, confirming the boundaries of all the parties according to the resurvey, and giving to Phelps the full front and depth of lot No. 2, by requiring Turner, the owner of lot No. 3, to remove the house adjoining that of Phelps, and which obtruded four feet upon his lot as fixed by the decree.

The opinion of the Court, upon the case stated, is that the decree appealed from is just and equitable, and ought to be affirmed. In coming to this conclusion, we are not unmindful of the correctness of the general proposition contended for, on behalf of the appellant; that where an actual survey has been made, calling for natural objects, marked trees, or any artificial monuments, the objects described will govern, in ascertaining the boundaries of the tract conveyed according to the descriptive calls in the survey, in preference to given courses and distances, in which, from various accidental causes, errors may have occurred; and so again, that quantity, the least important matter of description in a deed, and seldom essential for any purpose, unless it can be construed

into a warranty of the extent of area sold, yields to course and distance, where either cannot be made to correspond with another. But that principle is peculiarly applicable to irregular surveys, usually on a large scale, where natural objects or established corners become more important than course or distance, and exactness of quantity is immaterial, compared with the repose and quiet of a country. It must be admitted that if Thompson & Drennen had sold to the appellant, or to Brown,, the original purchaser, whose right he acquired, any isolated portion of their tract, and caused it to be surveyed off to him, and marked by monuments even as perishable as the stakes here used, the actual location on the ground would control in a conflict between that and any other subsequent survey. But where a tract of land is laid off into compact town lots, it is obvious that the quantity stipulated for becomes an object of importance, and where it is done according to some well understood and regular plan, it is to be expected that purchasers will buy with reference to it. No one ought to have exclusive rights in preference to others. The public have an interest in the easement afforded by the streets, alleys, or landings, and ordinarily the corporate authorities are charged with the duty of preventing their symmetry and regularity from being marred, or the use of them obstructed by unsightly projections. Questions of this kind in a new country, and in respect of projected towns, which have their first existence on paper, may be regarded differently from disputes arising between adjacent proprietors in cities, where existing foundations have been fixed by long acquiescence, and where it may be assumed that the location of any one street or corner is as correct as another. There if streets are to be widened, or obstructions removed, it is done upon some equitable principle of compensation by the public at large, or those more immediately benefited, to the person, who is to be deprived of his property. But the purchaser of lots in a new town, designed to be built up according to a regular plan, open to his inspection, must have some concern in assuring himself, before he builds a house, of the correctness of its loca-

tion. Errors may occur from carelessness, or inattention, without any fraud or intentional wrong being imputable to any one, and nothing of that kind is alleged here. The appellant insists that Brown, the original purchaser of both lots, bought by the stakes; but it cannot be doubted that he bought the lots indicated by the numbers and description on the plat shown him and with reference to a consistent whole, as well as by inspection of the stakes, which he supposed, and were intended to mark the boundaries of the lots in question. If so far deceived as to lessen materially the value of his purchase, he might have recourse upon the vendors for damages, or obtain a rescission of the contract, or he might have a just claim for compensation, upon the corporate authorities, if his improvements had been improperly located by their direction. But conceding that such was the understanding of Brown, at the time of his purchase, the contract between him and the original proprietors became merged in the bond for title, which he subsequently accepted from them, and the rights of the appellant, as assignee of Brown, depend upon the terms of the bond, and the decree for title which he obtained in fulfillment of it. That called for a particular lot of a certain extent and front, as designated upon the recorded plat. Where a map is projected from the field notes of a survey, of which it is a representation, a sale by the map is a sale according to actual survey, on the supposition that the courses, distances and objects called for, are correctly delineated upon it. But, in this instance, the plan preceded the survey, and the map was a representation of the plan instead of the survey, of which no memorial was preserved, except the planting of corner stakes; and in the event of their removal or decay, the survey so called could not be retraced, but might be renewed, in conformity with the original plan, by starting from the initial line established on Water street. When the government of the United States adopted the system of square surveys, dependent upon arbitrary base lines, and in which a regular consistent plan precedes the survey, it was deemed advisable to provide against discrepancies between the practical result

and the theory, by the enactment of February 11th, 1805, to the effect, that the lines and corners actually run and marked, the courses, distances and areas returned, should be held and remain as permanent and true, without regard to mistakes and errors, which may afterwards appear to have been committed by the surveyors, in endeavoring to conform to the general plan.

The question of limitation argued by the counsel for the appellees, does not seem to be relied upon by the appellant. The bill was filed in April, 1850, and no contest about the right to the possession of the strip of four feet in controversy, arose until 1849, when Henry & Cunningham built their store house upon it. Admitting that Phelps was in peaceable possession of lot 2, since June, 1841, and under a claim of title, the statute of limitations then in force would not avail him, even if it applied to a case of this kind. The presumption in a Court of Equity would be, that he and the owners of adjacent lots held according to their deeds, notwithstanding a mistake in the actual division between them. An acquiescence, for a long period of years, in such a division, would raise a presumption that it had been originally agreed upon, and so ought not to be disturbed. But where the possession of land is held without title or claim of right, and only in ignorance of the true boundary, the intruder will be entitled to the protection of an adverse holding, computing it from the time when his possession became hostile by some unequivocal act, such as a refusal to move. Affirmed.

DANIELS VS. STREET.

Where a defendant in chancery, avails himself of whatever benefit he could have by means of his sworn answer, without objecting the want of jurisdiction at the hearing; and raises that question for the first time in the appellate court, the court would lay hold of any vestige of chancery jurisdiction before it would dismiss the cause, and send the plaintiff, to begin anew, in a court of law.

There can be no doubt of the vendee's right to recover compensation of his vendor, for a breach of warranty, upon proof that he has lost, or been deprived of, the beneficial enjoyment of the property, by means of a title paramount, though the property, being negroes and having volition, were seduced away from him, and he was placed in the attitude of plaintiff, instead of defendant.

Appeal from Ashley Circuit Court in Chancery.

The Hon. SHELTON WATSON, Circuit Judge.

PIKE & CUMMINS, for the appellant. There is no prayer in this case, for a *reformation* and *correction* of the bill of sale; nor under the prayer as connected with the special relief prayed, can a decree be rendered for such correction. 1 *Bibb* 468; 2 *Atk.* 3; *Ib.* 141; *J. R.* 590; 16 *Pet.* 194.

There is no proof of notice to Daniels, of the suit in Alabama, as would render the proceedings conclusive against him, (3 *Watts* 306; 9 *Lou. Rep.* 575; 15 *Wend.* 449,) and if there were, the recovery in Alabama is no evidence that the recovery was on a title paramount. 4 *Cond. Rep.* 436; 4 *Mass.* 349; 9 *Cow.* 156; 3 *Bibb* 280; 2 *N. Hamp.* 190; 3 *Yerg.* 403; 6 *Sm. & Mar.* 85; 10 *Ala.* 17. Hence the proof here of good title destroys the effect of the recovery.

YELL, contra. It is the peculiar province of a court of chancery, to relieve against mistakes in drawing instruments of wri-

ting. *Cook vs. Preston*, 2 *Root* 78; *Elmore vs. Austin*, *ib.* 415. *Lemaster vs. Burkheart*, 2 *Bibb* 29; 3 *J. J. Marsh* 190; *ib.* 232.

After a party has once answered to a bill in chancery, it is too late to urge that the opposite party had a remedy at law; unless the court of chancery is wholly incompetent to grant the relief sought by the bill. *Grandin vs. Leroy*, 2 *Paige* 509; *Hawley vs. Cramer*, 4 *Cowen* 717.

If a writing is so framed or drawn by fraud, accident, or mistake, as not to express the true intent of the parties, chancery will relieve by letting in parol evidence to explain it. *Anderson's Ex. vs. Bacon*, 1 *A. K. Marsh.* 50; *Martin vs. Lewis*, 1 *ib*; 3 *Conn. Rep.* 146; 6 *Har. & John.* 24.

In a sale of personal property, it is not necesssary to suffer an eviction to enable the party to recover; the vendee has his action at law without it. *Payne vs. Rolden*, 4 *Bibb.* 304; *Read vs. Stratton*, 3 *Hayw.* 159; *Laws of Slavery* 149.

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

The appellee exhibited his bill in chancery, against the appellant, setting forth that, on the 28th of July, 1843, in the State of Alabama, the defendant had sold, and delivered to him, four negro slaves, for the consideration of three thousand dollars then paid and satisfied, partly in certain debts due by the defendant, or for which he had become responsible as security, to the heirs of Jesse Street, of whom the complainant was one, and the residue in cash; and the defendant Daniels, at the time, executed his bill of sale, which was exhibited, under his hand and seal, whereby he declared, that he had that day, bargained and sold the four slaves, therein described, for the consideration above mentioned, and covenanted to warrant and defend the same from the just claims of all other persons whatsoever: but that the "complainant," either by fraud or mistake, omitted to insert the name of the "defendant" therein as vendee, in the bill of sale; though it was intended to be made to him as the purchaser and was delivered to him as such. But the defendant, at the time had no title to George and Solomon,

two of the negroes; and one Alfred Tann, claiming them adversely, secretly contrived to get them out of his possession, so that he was obliged to, and did, shortly afterwards, on the 20th, of April, 1846, institute his action of detinue in the Circuit Court of Sumpter county, Alabama, against Tann for their recovery, and which suit he caused to be diligently prosecuted up to the 12th of May, 1849, when the negroes were adjudged to be the property of Tann, a transcript of the record being exhibited. The defendant had in the meantime removed to Arkansas, and the complainant avers that the defendant promised him, that if he would go on and prosecute his suit with due diligence against Tann, and if he lost the same, he, the defendant, would pay him for the two negroes in question, and all attorney's fees and costs that he was compelled to expend about the suit, and that the defendant afterwards induced him to come out to Arkansas, under promise of paying him for the negroes, and the expenses and costs, which he had incurred. The complainant represents that, in the trade with the defendant for the four negroes, George and Solomon were estimated at sixteen hundred dollars though worth a thouand dollars each, when Tann clandestinely obtained the possession of them, and the service or hire of each, was worth one hundred and fifty dollars a year from that time forward, and proceeds to set forth the items of costs, attorney's fees, and expenses incurred by the complainant in the unsuccessful prosecution of the suit against Tann. The prayer of the bill is, that the defendant be required to admit the consideration and execution of the bill of sale to complainant, and the omission above menitoned considered as supplied therein; for decree against defendant for the value of the two negroes and their hire, and the amount of costs, attorney's fees and expenses incurred by complainant, and for discovery and general relief.

The chancellor, who rendered the decree appealed from, must have been unfavorably impressed with the answer of the defendant, which is, in some material matters respecting his knowledge of the pendency of the suit in Alabama, overturned by the evidence. And so in regard to the alleged omission, by mistake,

or inadvertance, of the complainant's name in the bill of sale; while he admits the sale or transfer of the negroes, and at the price stated, he denies that there was any mistake, and attempts to explain it in a manner which is unsatisfactory, and contains internal evidence of being improbable. True there was a mass of testimony in the cause, and much of it conflicting; but we think the chancellor was justified in ascertaining, as he did, the main facts to be, that the defendant sold and intended to warrant the title of the negroes to the complainant; that the two negroes in question were taken at the estimate of sixteen hundred dollars; that Tann, an adverse claimant, contrived to obtain possession of them secretly, so that the complainant was compelled to bring an action at law to recover them. That, in prosecuting that action, he relied upon the title of this defendant, Daniels, and that he was defeated in the prosecution of the same, because of the adverse title older and superior to that of Daniels, there relied upon by the complainant, and so lost the negroes; that the defendant in Arkansas was apprised of those facts, and advised about the prosecution of the suit against Tann, and furnished to an agent, who came to Arkansas, on his request for that purpose, documents and evidence of title to be used by Street on the trial in Alabama, and gave him assurances of indemnity in case he lost the negroes; that Street prosecuted the suit in good faith with the assistance of two eminent counsel, whose fees he paid, and also the costs of the suit, which was adjudged against him.

The equity of the case appears to be with the complainant, and the decree of the chancellor, requiring the defendant to pay him the sum of sixteen hundred dollars, with interest at six per cent. from the time he instituted the action of detinue against Tann, and two hundred dollars the actual costs of suit, not including counsel fees or other expenses incurred by him, making an aggregate of twenty-four hundred and twenty-four dollars, cannot be objected to as excessive.

It is true, as contended for the appellant, that the court below did not formally decree the correction of the mistake, though al-

leged and proven, and implied in the terms of the decree, so that the complainant appears to have obtained the substantial relief sought, being a compensation in damages for a breach of warranty, in spite of the mistake or disregarding it. Admitting the complainant could have had a remedy at law, the question of jurisdiction is now, for the first time, made in the appellate Court. Such being the case, where there has been a resort to chancery in the first instance for relief, and it has acquired jurisdiction by the submission of the defendant, to answer and make the discovery prayed for, and he has availed himself of whatever benefit he could have by means of his sworn answer, without objecting the want of jurisdiction by plea, answer, or motion at the hearing, the appellate court should lay hold of any vestige of chancery jurisdiction before it would unravel the proceedings, direct the cause to be dismissed, and send the plaintiff to begin anew in a court of law. *See Price vs. The State Bank*, 14 *Ark.* 55; *Cockerill vs. Warner*, *Ib.* 354.

We are not required to decide the questions argued, whether the notice to call in the warrantor, to maintain the title he has conveyed, should not be in writing, or whether any such notice can be effectual, if given to the warrantor in another jurisdiction foreign to that in which the suit is pending. And it may be conceded, that the notice or demand upon the warrantor, to prosecute a suit for the recovery of personal property, of which the vendee, subsequent to the sale, may have lost the possession, is an anomaly not falling within the contract of warranty to defend the title, and, imposing no obligation upon the warrantor to obey it, it may even be supposed that the defendant, in this particular case, is not concluded, by his voluntary participation, in the suit instituted by Street, in Alabama, and that the record of that suit would be no further evidence against him, than to establish the fact of the existence of the judgment there rendered; but there can be no doubt of the vendee's right to recover compensation, for a breach of warranty, upon proof that he has lost, or been deprived of, the beneficial enjoyment of the property by means

of a title adverse and paramount to that conveyed to him by his vendee. The complainant ought not to be placed in a worse position, because the negroes, having volition, were seduced away from him by Tann, so as to place him in the attitude of plaintiff, instead of defendant, and the covenant of warranty would be equally available to him, if the failure to recover, or the recovery suffered, was owing to a want of title in the vendor. Affirmed.

CAIN VS. LESLIE.

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C., the purchaser of an improvement on public land subject to entry, and L., who is security for the purchase money, enter into a parol agreement that L. shall advance the money to enter the land, and shall enter it, and hold the legal title as security for his advance and for his securityship: L. makes the entry accordingly: HELD: That he holds the land as trustee, and equity will enforce the performance of the agreement.

A sale of an improvement on public land, is recognized by statute, and the purchaser acquires a possessory right, which the law protects, and which is good against every body but the government or its grantee.

Appeal for Hempstead Circuit Court in Chancery.

The Hon. SHELTON WATSON, Circuit Judge.

CURRAN & GALLAGHER for the appellant. This case falls clearly within the principles recognized and settled in the case of *Rector vs. Keatts*, 1 *Ark. Rep.* 191.

PIKE and CURRAN, contra. The agreement between Cain and Leslie, was without any valuable or meritorious consideration; and equity will not enforce a voluntary agreement. 3 *Story Eq. Juris.* 430, *sec.* 43, *n.* 3; 18 *Ves.* 84; 4 *J. C. R.* 497; 1 *Cowen Rep.* 711. In this case, the very essence of a contract is wanting; there is no mutuality, no reciprocity in the contract. 2 *Story's Eq. Juris.* 60, *n.* 2. There is no time specified in which the contract is to be performed, nor is the agreement in writing. It is a mere parol agreement, indefinite as to time, and within the statute of frauds. *Dig.* 540, *sec.* 1; 2 *Story's Eq. Juris.* 60, *sec.* 751, 752; 1 *J. C. R.* 273.

MR. Chief Justice WATKINS delivered the opinion of the Court.

The substance of the bill of complaint in this cause, which was adjudged insufficient upon demurrer in the Court below, is, that, in the year 1851, the complainant Cain purchased of one Start an improvement on a certain tract of public land, belonging to the United States, for the consideration of one hundred dollars, of which he paid twenty-five dollars, and gave his note for the residue, being seventy-five dollars, with the defendant Leslie as security. The improvement consisted of between five and ten acres of cleared land, with a comfortable loghouse, and out buildings upon it, of which the complainant was put in possession. That, in October, 1852, Leslie, professing to be uneasy about being security for complainant, and at the same time his friend, and disposed to assist him in purchasing the land, proposed that he, Leslie, would advance the amount of money required to enter it, at the land office; and would make the entry in his own name, as a means of indemnity against loss, in respect of his securityship, and the purchase money to be advanced, and that when the complainant would pay him the amount of their joint note to Start, so that he might discharge it, and refund the entrance money with interest, he would hold the title to the land and improvements in trust for the complainant, and convey the same to him by a valid deed. That the complainant being poor, not having

the amount of money required to pay for the land, desirous to save his improvements, and fearful that some other person might enter the land, and deprive him and his family of their home, and confiding in the representations and promises of Leslie, consented to the arrangement proposed, and furnished him with the numbers of the tract, and authorized him to enter it at the land office in the way proposed and agreed upon; and which was accordingly done. That complainant continued in possession, and on the faith of the contract with Leslie and his promise to make a deed, on payment of those sums of money, went on to clear more land, and make additional improvements thereon. That, in the month of January, 1853, Leslie conveyed an undivided half of the tract in question to the other defendants, Steele and McFall, with intent to cheat and defraud the complainant, and put it out of his power to obtain a title. That Steele and McFall, being unfriendly with complainant, had confederated with Leslie to propose to enter complainant's improvement for him, and then induced Leslie to convey an undivided half of it to them; their object being to force the complainant to abandon the place, or pay them a high rent, or purchase their half at an exorbitant price, and further, to compel him to pay them some money which he did not justly owe, and of all which designs on their part, Leslie was apprised. That, in the early part of the same year, Steele and McFall notified the complainant, that they would require him to give security for the rent of their undivided half of the place, or else surrender possession of it to them. That complainant, as soon as he could raise the money, tendered to Leslie the full amount of their note to Start, and the hundred dollars advanced to enter the land, together with the interest accrued on both of those sums, and requested him to comply with the agreement by executing a deed then prepared and presented to him conveying the land to complainant. That Leslie would not receive the money or execute the deed. Prayer, that the defendants be decreed to hold the land as trustees for complainant; that they be

compelled to accept the money tendered, and execute proper conveyances to vest title in complainant.

The bill makes out a stronger case for relief, upon the facts confessed by the demurrer, than that of *Keatts vs. Rector*, 1 *Ark.* 391, where specific performance of a parol agreement respecting an interest in land was decreed, and comes directly within the principles there adjudicated upon the construction of the statute of frauds. It is true, that the complainant, not having a right of pre-emption, Leslie or any other person was at liberty to enter the land with the improvements upon it, and eject the occupant; and that any subsequent promise to compensate him for his improvement, would have been without consideration. But the sale of improvements on public land is recognized by statute, and the complainant, by his purchase from Start, acquired a possessory right, which the law protects, and good against every body but the government or its grantee. Though a mere chattel interest, a possession held by the sufferance of the United States, it was a sufficient consideration for the note given to Start; as was not doubted in *Nick's heirs vs. Rector*, 4 *Ark.* 252; see also *Brock vs. Smith*, 14 *Ib.* 431, and cases there cited. The equity of the complainant consists in the fact, that relying upon the agreement, which was designed to be, as it was, immediately executed, he relinquished the undoubted privilege of entering, or causing it to be done by some other person for his own benefit, the land which included his improvement. Regarding him as being up to that time an intruder upon public land, though it was in market under a standing offer of sale, then, if there was no agreement, he became at once a trespasser liable to be evicted by Leslie. There was indeed no change of possession, for being in, he continued to occupy. But his possession became for the first time lawful under the title acquired from the government, and with express reference to the agreement, and upon the faith of it, the complainant went on to clear more land and make additional improvements, without objection from Leslie.

Taking into consideration the other allegations in the bill, of

confederacy between the defendants to defraud and injure the complainant, it seems to be clearly a case where, unless the agreement be performed, an unconscionable fraud and deceit will have been practiced upon the complainant.

Decree reversed, and the cause remanded, with instructions to overrule the demurrer.

TRUSTEES OF R. E. BANK VS. BOZEMAN ET AL.

The Real Estate Bank brought an action at law, on a protested foreign bill of exchange, against the acceptor and endorsers, who pleaded *non assumpsit*, but afterwards filed their plea, *puis darrien continuance*, that the plaintiff had assigned the bill to certain Trustees. Upon a bill in chancery by the Trustees, for the recovery of the bill of exchange, HELD: That the endorsers were not estopped by the plea, *puis darrien continuance* in the case at law, from objecting want of notice of non-payment and protest.

A defendant in chancery, legally served with process to appear, is bound to take notice of any subsequent amendment of the bill, and answer any material allegation, and if he fails to do so, the complainant is entitled to a decree *pro confesso*.

But if the complainant does not prosecute his bill with due diligence against a defendant failing to answer — as where he does not take a decree pro confesso against him, — and proceeds against the other defendant, and upon the merits, he is not entitled to a decree against the defendant answering, the court may well dismiss the bill as to all.

Appeal from Pulaski Circuit Court in Chancery.

The Hon. WILLIAM H. FEILD, Circuit Judge.

PIKE & CUMMINS, for the appellant. The question which we present is, whether it was necessary to aver or prove the fact of notice, and whether Bozeman can be allowed, after his plea *puis*

darrien continuance, to insist that there was no notice given to him.

The plea *puis darrien continuance* waived all previous pleas, and every thing is confessed except the matter contested by the plea *puis*. *Morris vs. Cook*, 19 *Wend.* 699; 2 *Wend.* 300; 10 *Wend.* 675; 14 *Wend.* 161; 1 *Salk.* 178; *Cro. Eliz.* 49. The suit in chancery is in the nature of an equitable *sci. fa.* to revive and continue the suit against the defendants, in the names of the trustees, and Bozeman could not avoid his *confession* of the issue, which he had made when he filed his plea *puis darrien continuance*. As to the effect of confessions and admissions, see 1 *Greenl. Ev.* sec. 27, 169; 1 *Mees. & Wels.* 508; *Gresley on Eq. Ev.* 349; 2 *Cowens Phill. n.* 192, 331.

CURRAN, contra. Admitting that the plea *puis darrien continuance* in the suit at law, was a waiver of the previous pleas, and that if the matter of the plea *had been determined* against the pleader, it would have been a confession of the matter in issue, contended that if the chancery suit were a continuation of the suit at law, the defendant is not estopped by the plea, because it was not determined against him. *Bac. Abr.* 479; *Cro Eliz.* 49; *Yelv.* 181. That if the plea had been adjudged insufficient, the defendant was not precluded from relying on the defence of want of notice in his answer, and referred to the case of *Heyfron et al. vs. The Miss. Union Bank*, 7 *Sm. & Mar. Rep.* 434, decided upon a statute like that of this State allowing the defendant to plead as many pleas as he may think proper; and denied that any confession or admission in pleading, would conclude Bozeman from denying, in another action, the want of notice.

Hon. S. H. HEMPSTEAD, special Judge, delivered the opinion of the Court.

The object of this bill was to obtain payment of a bill of exchange, drawn by Gray and Turner on Simeon Buckner, the 1st of May, 1840, payable nine months after date, at the Canal and

Banking Company, New Orleans, Louisiana, which was accepted by Buckner, endorsed by Michael Bozeman and Radford McCargo, and discounted by the Real Estate Bank, for the benefit of Buckner; and was protested for non-payment. The bill was for the accommodation of Buckner.

On the 17th of July, 1841, suit was instituted on the bill, in Pulaski Circuit Court, against all the parties, by the Bank, as holder and endorsee, and afterwards the defendants Gray, Turner, Buckner, Bozeman and Mc Cargo, plead non-assumpsit to the action; and issue was made up on that plea. At the September Term, 1842, all the defendants pleaded *puis darrien continuance*, that after the commencement of the suit, the bank had assigned the bill to trustees; to which the bank replied, that the bill was assigned by deed and not otherwise; to which replication the defendants demurred. No further step seems to have been taken in this suit; but it is alleged that, by consent of parties, it was to stand and abide the decision of the Supreme Court on a similar replication in another suit. This however is denied in the answer of Bozeman, and not proved. As held in *Buckner vs. Real Estate Bank*, 5 *Ark.* 536, this was a good replication and sufficient to avoid the plea; and if the case had progressed, the demurrer must have been overruled. *Biscoe vs. Sneed*, 6 *Eng.* 104.

On the 2d of April, 1842, while that suit was pending, the bank assigned all her assets, choses in action, property and effects to trustees, (*Conway Ex parte*, 4 *Ark.* 302;) and on the 29th of July, 1845, the corporate franchises of the bank, on a writ of *quo warranto*, were, by the definitive judgment of this court, declared forfeited and seized into the hands of the State. *The State vs. The Real Estate Bank*, 5 *Ark.* 595. Thus ended her corporate existence, and she was no longer able to sue in her own name.

The trustees, having no adequate remedy at law, were obliged to resort to a court of chancery, and accordingly the present bill was filed, on the 2d of January, 1845, and was subsequently amended, which was answered by Bozeman only; and the case was

heard on the bill, answer, replication and exhibits, without testimony; and the bill was dismissed.

The principal question is whether the complainants were entitled to relief, as against the endorsers, without averment and proof of notice.

For the complainants, it is insisted, that the plea of non-assumpsit in the suit at law, put in issue the fact of protest and notice, and that the effect of the plea, *puis darrien continuance*, was to displace that plea, and leave only the single issue as to assignment after suit instituted. In other words, that it operated as an admission of notice, and that the parties are estopped from setting up that defence in this suit. Where the plea *puis darrien continuance* goes to the whole action, there can be no doubt that it is a waiver of previous defences; and that by operation of law every-thing is confessed, except the matter contested by the plea *puis*. 1 *Salk.* 178; 1 *Ld. Raym.* 693; 2 *Wend.* 300; 10 *Wend.* 680; 19 *Wend.* 699.

The reason of the rule, originally, was to attain singleness of issue, and prevent prolixity and confusion in pleading; but it never was any thing else than a strict technical rule, and as such has been maintained. As an admission in the suit, in which it was interposed, it was doubtless equivalent to proof of the fact admitted. But when we come to apply it in another proceeding, and to claim that the party is equally estopped by it, quite a different question is presented.

Now it is to be remarked that estoppels are not favored; because the truth may be excluded, (4 *Mass.* 181; 1 *Greenl. Ev.* 22,) and more especially where the effect would be to prevent a just defence.

And it sounds strangely in a court of equity, to hear a technical estoppel insisted on, to make out a case against a surety, as Bozeman appears to have been in this affair.

It is no doubt perfectly correct doctrine, that a party, who puts himself on one issue, admits all the rest, and could not controvert such admission by proof. It is called an admission in pleading,

and becomes effectual in the suit in which it was made, but certainly, on neither principle nor authority, could it be used as evidence in another suit or proceeding. And to make the principle applicable, it is contended by the counsel of the appellants, that this suit is in the nature of an equitable *sci. fa.* to revive and continue the suit against the defendants in the name of the trustees. But we think it must be regarded, as a regular bill in chancery, praying discovery and relief; and the gravamen of which is the collection of the bill of exchange. It necessarily contains a history of the proceeding at law, and the extinction of the corporate existence of the bank, and the failure of the remedy at law, as a reason for coming into a court of chancery, and without which indeed there would be a clear want of jurisdiction. 6 *Eng.* 113. We are not able to regard this proceeding as a mere continuation of the suit at law; because, to say nothing of the anomalous character of such a proceeding,—partly at law and partly in chancery—no authority has been produced to show that it should be so treated; and it seems to us that it would be impossible to view it as a part of the other proceeding, without disregarding plain and well established principles of law.

It is then a separate and independent suit in chancery, brought in consequence of the abatement of the other; and whatever admission might have been made, in pleading, in that suit, it cannot be used as evidence in this. It follows that Bozeman was not estopped from showing that he did not owe the debt demanded; and as notice to him was neither averred nor proved, and moreover was expressly denied by him, the dismissal of the bill, as to him, was proper and correct.

Notice of the dishonor of a foreign bill, is necessary to charge either the drawer or endorsers with its payment; and if it is not duly given, they will be discharged from all liability. *Story on Bills* 381. And the protest and notice are material averments; and an omission to aver notice, or some excuse for failing to give it, is said to be fatal even after verdict. *Chitty on Bills* 576; *Rushton vs. Aspinall, Dougl.* 679; 7 *East* 231.

For this reason, no decree could be had against Gray and McCargo, on the original bill, because it was silent as to notice. Independent of that, McCargo was not served with process in such manner as to make him a party to the suit. No decree *pro confesso*, was taken against either of them. But Gray was regularly served with process; and although there did not appear to be any equity against him on the original bill, yet an amendment was filed averring that the bill of exchange was drawn, accepted and endorsed by the parties, with a full knowledge that Buckner had not, nor would have, funds in New Orleans, to meet it at maturity; that the drawers had no funds in the hand of Buckner, or at the Canal and Banking Company, to meet the bill. This allegation as to a want of funds, was met by the answer of Bozeman, and not being proved could not affect him. But Gray, who was one of the drawers of the bill, and on whom a subpœna in chancery had been duly executed, was bound to answer it without any new subpœna. *Digest* 233. Having failed to do so, the complainants were entitled to a decree *pro confesso* against him, if they had sought it at the proper time. But they suffered the case to progress to a hearing as to others, without asking it, although nearly two years had elapsed from the filing of the amendment. In fact, they appear to have abandoned the prosecution of the suit, as to all parties except Bozeman; and as it is competent for a court to dismiss a bill, which has not been prosecuted with due diligence, we think on the whole case that the decree ought to be affirmed. Affirmed.

Mr. Chief Justice WATKINS not sitting in this cause.

BAKER VS. HOLLOBAUGH.

A verbal agreement for a division of public land, when either party should enter it, but indefinite as to time, where no trust is created between the parties, and there are no peculiar circumstances that would make it unconscionable for either party to resist a specific performance, is not entitled to favorable consideration, because clearly against public policy.

The Court, in the exercise of an equitable discretion to grant or refuse the specific performance of contracts, should refuse to enforce a voluntary agreement resting in parol, for the sale of land, where the agreement is not clearly and distinctly proved; or where the complainant fails to allege any sufficient equitable circumstances of fraud in the defendant, inducing hardship and loss to himself, unless the agreement be specifically performed.

It would not be an infringement of the salutary policy of the statute of frauds, to decree a specific performance of a parol agreement for the sale of land, as between the parties to the agreement, to the extent of the admission, in the answer, though differing in some degree from that charged in the bill, where the statute of frauds is not relied upon as a bar to the relief.

Appeal from Searcy Circuit Court in Chancery.

The Hon. B. H. NEELY, Circuit Judge.

S. H. HEMPSTEAD, for the appellant. 1. The agreement between the parties to the conditional line between them, was made when the lands belonged to the United States, and so the agreement was utterly void. (1 *Scam.* 114, 170, 396, 472; 5 *Blackf.* 64; 1 *How. Miss. R.* 150; 5 *Eng.* 560; *Floyd vs. Ricks*, 14 *Ark.*) No agreement as to the public lands can be binding so as to affect the legal title of the proprietor.

2. The establishment of a boundary by partition, or otherwise, is within the statute of frauds, and to be valid must be reduced to writing. *Dig.* 540; 12 *S. & M.* 431; *Roberts on Frauds* 282.

3. But if a disputed boundary may be established by parol, it must be by those who are owners of the soil when the agreement is made. 2 *Caines* 198; 12 *Wend.* 130; 9 *John.* 69; 2 *Gilman* 419; 4 *Wheaton* 513; 6 *Wend.* 469.

4. It may be insisted on in the answer, that an agreement relating to lands is not in writing, without formally pleading the statute of frauds. 2 *Paige* 178; 2 *Sand. Ch. R.* 144; 6 *Eng.* 411.

And where a parol agreement is alleged in the bill, and a different one admitted in the answer, no decree can be had without amending the bill. 2 *Edw. Ch. R.* 445; 6 *John.* 559; 1 *John. Ch. R.* 146; 12 *Ves. Jr.* 78.

W. BYERS, for the appellee, argued this cause upon the answer of the defendant, which he contended was evasive, and admitted all the material allegations of the bill; and that, upon the facts, the complainant was entitled to the decree.

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

The appellee, Hollobaugh, exhibited his bill of complaint in the Searcy Circuit Court, against Baker, the object of which was to enforce the specific performance of a parol agreement for the sale of land, and to settle a boundary alleged to have been agreed upon, in the division of the tract between them; and obtained a decree in accordance with the prayer of the bill.

In considering this case, we have allowed to the complainant in the Court below, the benefit of all just exceptions which might have been taken there to the answer of the defendant for insufficiency or evasion, by supposing to be true every material allegation of fact, charged in the bill, apparently within the knowledge of the defendant, and not specifically denied or admitted in the answer.

Without detailing the allegations in the pleadings, the substance of the issues may be understood from the statement of the case which follows: The complainant was the owner of the west-half, and the defendant the owner of the east-half, of the same quarter

section, at the time of filing the bill in February, 1853. The tract owned by Baker had been entered by him, at the United States Land Office, in February, 1846, and he also owned the forty acre tract immediately south of his half quarter. The complainant had entered his eighty acre tract, in January, 1849; adjoining and south of that lies the forty acre tract, which is the subject of the present controversy. Each party resided upon his half of the quarter section referred to, upon which improvements had been made some years before either of the tracts was entered, and while they were public land. The complainant bought the improvement on the west-half from one Kesner, and which had been originally made and occupied by one Dean. A branch running from north to south, along the open line divided the quarter section nearly equally between the owners of it; but on reaching the south boundary of the tract, the stream turned its course towards the west, so as to run somewhat diagonally across the forty acre tract in controversy, dividing it so as to leave the larger portion on the west side of the branch. A road ran in an east and west direction across this tract, dividing it nearly equally. Baker had an improvement upon it, on the east side of the branch, and the clearing of the complainant extended over upon it, on the west side, to the extent of about ten acres, the enclosure of his field coming down within a short distance of the road before mentioned.

The complainant represents, that before he purchased the improvement of Kesner, there had been an agreement between Baker and those occupying the west-half of that quarter, that the branch described should be the boundary between their respective improvements, and that the same branch, in its course through the adjoining forty acre tract, should continue to be the boundary between their improvements thereon, and that whoever entered that tract, should allow to the other, refunding his due proportion of the purchase money, the part of it lying on the east or west side of the branch, as the case might be, so as to include their respective improvements. On the 6th of February, 1852, the de-

fendant, Baker, without previously notifying the complainant, entered the forty acre tract in question; and, during the course of that year, the complainant tendered to him an amount of money sufficient to pay for the quantity of land supposed to lie on the west side of the branch, asked to have it ascertained by survey, and for conveyance from the defendant, which was refused. Baker, in his answer, denies that there was ever any such agreement, as that charged in the bill, between him and the complainant, or any other person, but admits that while the lands belonged to the government, there was a verbal understanding between him and the former settlers on the west-half of the quarter section, to this effect: that the branch should be the division line as far down as the road. Independent of the fact, that the agreement charged is not satisfactorily proven, there is another objection to the existence of its being a ground of relief. It was made concerning public land, for aught that appears in market, and subject to entry by any person, who chose to apply for it, and between parties who could not claim any thing more than a temporary occupancy, which was the extent of their rights; and regarding it as a settlement of boundaries, it was only for the time being, and did not have the effect of enlarging their title. If the parol agreement had contemplated the immediate or future purchase, when in market, of the tract in controversy, and it had been so acted upon as to make it unconscionable for one party to resist a specific performance sought by the other, relief might be had under peculiar circumstances, as intimated in *Cain vs. Leslie*, at the present term; because there is no reason why a trust may not arise under a contract having direct reference to the purchase of land from the United States, or from any third person. But here the alleged understanding about the prospective entry and division for their mutual accommodation of the forty acre tract, was vague and indefinite as to time, and it remained unacted on by the parties for several years, during all which time the title might have been acquired from the government, and the agreement consummated. The declared policy and design of the

United States, is to bring the public domain into market, and facilitate the sale of it; giving, it may be, a preference to actual settlers, where they choose to avail themselves of it on the terms prescribed; and that also, in order to encourage immigration, is not only the policy of the State, but she has a vital interest in being able to raise a revenue by taxation from lands alienated by the general government. So far as the long continued occupancy and appropriation to themselves by these parties of public land, was calculated to delay the sale of it, or to deter other persons from purchasing, any mere parol agreement respecting it would not be entitled to favorable consideration, because clearly against public policy.

The complainant also insisted upon having a specific performance upon other grounds, which may be briefly stated. It appears that the defendant, a few days after he entered the forty acre tract, called to see the complainant at his house, and told him in substance, that in making the entry, he had been compelled to take a part of his improvement, but did not intend to deprive him of it, and would sell it to him, he paying for the same a due proportion of the purchase money, at Congress price. Now the complainant alleges that, during the conversation on that occasion, the defendant agreed to let him have all that part of the tract lying on the west side of the branch, upon his verbal assurance not to fence up the wood land during his life time, and a day was appointed to have it run off and measured by a surveyor, and that on the faith of this agreement, he made some additional improvements. A material part of these allegations is denied by the defendant, who declaring his willingness to abide by the agreement, which was made, admitted that, on the occasion referred to, he did verbally agree with the complainant to sell him the improved land and the wood land to the branch, and as far down as the road, and no farther, with a proviso that he should never fence up the wood land, and he did not admit the making of any improvements beyond the resetting of a fence.

There are two grounds upon which, taken together, the court

below, in the exercise of an equitable discretion, to grant or refuse the specific performance of contracts, should have denied the relief sought in this particular case. The agreement itself, as claimed by the complainant, and upon which the decree is based, was not against the denial of the answer, so clearly and distinctly proved, as to entitle the complainant to a decree. Scarcely any two of the witnesses understood it alike, or profess to have heard the whole of the conversation. A short time afterwards, during the spring of the same year, when the parties met by appointment to survey off the complainant's portion of the land, their disagreement and mutual misunderstanding of the terms of the agreement manifested itself. The complainant then seemed willing to accept the deed, which the defendant proposed to make to him for the part west of the branch and down to the road, but the next day when they met again to have the deed executed, he refused it, and claimed all of the tract west of the branch.

The defendant, becoming the absolute owner of the land by purchase from the government, his offer to sell a portion of it to the complainant was voluntary, and the agreement resting in parol, the complainant has failed to allege any sufficient equitable circumstances, of fraud in the defendant, inducing hardship and loss to himself, unless specifically performed, so as to take it out of the operation of the statute of frauds. The continued possession of the complainant, to the extent of the agreement admitted by the defendant, was lawful. The improvements made by the complainant, after the conversation with the defendant, and before they met to have his portion surveyed off, were comparatively unimportant, such as any tenant in possession might be expected to make, and not ordinarily exceeding in value the use of cultivated land.

It would, in our opinion, be no infringement of the salutary policy of the statute of frauds, for the complainant to have a decree for the specific performance of a parol agreement for the sale of land, as between the parties to the agreement in full life, where an agreement, though differing in some respects from that charged

in the bill, is admitted, and the statute is not relied upon as a bar to the relief; but, in such case, an amendment of the bill might be requisite.

The decree appealed from, will be reversed, and the cause remanded, with instructions to permit the complainant to amend his bill, and to decree in his favor, but at his costs, to the extent of the admission of the agreement contained in the answer, that portion of the tract to be surveyed, the quantity ascertained and paid for by the defendant, at the minimum government price, with interest, if he will accept such decree, and otherwise to dismiss the bill.

ROANE EX. VS. RIVES.

A gift to a trustee, in trust for the use of a married woman and her increase forever to their use, &c., of a negro woman and her increase, without other words, becomes at once a use executed, passing the legal and beneficial interest to the *cestui que use*; and the marital rights of the husband attach immediately.

Appeal from Jefferson Circuit Court in Chancery.

The Hon. JOHN C. MURRAY, Circuit Judge.

CURRAN & GALLAGHER and PIKE & CUMMINS, for the appellant. When title to personalty is vested in a trustee, who holds a naked legal title *without other duties to perform*, and the whole beneficial interest is vested in the wife, the husband takes the property precisely as if the legal title to the property had been vested in the

wife directly. *Lamb vs. Milnes*, 5 *Ves.* 517; *Lindsay vs. Harrison*, 3 *Eng.* 302; *Hallet vs. Thompson*, 3 *Paige* 585; *Kenrick vs. Beauclerk*, 3 *B. & C.* 175; *Tyler vs. Lake*, *R. & M.* 189; *Hill on Trustees* 421; *White & Tud. Eq. Cas.* 28, 42; *Maulding vs. Scott et al.*, 13 *Ark.* 88; 2 *Story's Eq.*, *secs.* 1381, 1388.

YELL, contra. No precise set of words is necessary to create a trust; the intent only being regarded by courts of equity. *Fisher et al. vs. Fields*, 10 *J. R.* 483. Parol proof is admitted to support a trust. *Snelling vs. Utterback*, 1 *Bibb.* 609.

The deed of trust, clearly and without controversy, places the negro Betsey and her increase, out of the reach of any right of the husband, the words, "to Ann E. Rives, and her increase forever, to their use," &c., fixes the property beyond question in complainant and her children, and beyond the control of her husband: this is too plain to need argument or authority.

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

The appellee, who is the widow of Thomas. H. Rives, by her bill of complaint, sought to recover a slave named Betsey, and her increase, together with hire of the negroes, then in possession of the defendant, as executrix of Sam C. Roane, deceased. It appears that, in the year 1832, in the State of Virginia, Rives sold and delivered the negro woman Betsey, for value received, to Martha Rowlet, to whom he executed his bill of sale, and upon which she endorsed the following instrument:

"CHESTERFIELD COUNTY, March 1st, 1832.

I do give to my brother, Thomas W. Hill, in trust for the use of my daughter, Anne Eliza Rives, and her increase forever, to their use, &c., the within negro woman and increase. Given under my hand and seal, this date above written.

MARTHA ROWLET."

In the year 1838, Rives came to Arkansas, where he sold, among

other slaves, the negro woman Betsey and her child, to Roane, in whose possession and that of his executrix, they have ever since continued. Rives was joined by his family in the year 1840, resided in this State, until his death in 1852, and the complainant exhibited her bill in the year following. There were some allegations in the bill, to the effect that Roane bought the negroes in bad faith, and with a knowledge that they had been settled in trust for the wife of Rives; but these allegations are not proven, and the evidence, on the part of the defendant, tends to establish that her testator paid full value for them, supposing that he got a good title, and in ignorance of any doubt or dispute about it. The Court below decreed that the negroes in controversy be delivered up to the complainant, and that the defendant pay the sum of sixteen hundred dollars, assessed as the value of their hire and services.

Leaving out of view any other question made in the cause, the decree appealed from must be reversed, upon the construction of the instrument executed by Martha Rowlet. According to the cases of *Lindsey vs. Harrison*, 3 *Eng.* 302; *Sadler vs. Bean and wife*, 4 *ib.* 202; *Maulding vs. Scott*, 13 *Ark.* 88, and *Cox vs. Morrow*, 14 *ib.* 603, without going into an examination of other cases cited for the appellant, the conclusion is unavoidable that the character of the instrument is not changed by the intervention of a trustee. No duties are specified or required of him to be performed, which would make it an executory trust, but it became at once a use executed, passing the legal as well as the beneficial interest to the *cestui que use*. Tested by the cases which have gone farthest upon the construction of wills, the beneficiary here took an absolute estate, divested of any remainder in her increase; the phraseology in the connection used, being clearly words of limitation, and not of purchase. It may be true in point of fact, that the intended beneficiary was at the time a married woman, the wife of Rives, and that the object of the donor was to secure the slave to her separate use; but the conveyance to a third person in trust for her use, merely, and without any thing

more, will not, according to the authorities, be sufficient for that purpose at the common law, the case not being affected by any statute for securing to married women their separate property. Without some further expression on the face of the instrument, indicative of an intention to exclude the marital rights of the husband, they attach immediately, and the property becomes his, subject to his disposal like any other chattel of the wife, reduced to possession during coverture.

The decree will be reversed, and the cause remanded, with instructions to decree in favor of the defendant, dismissing the bill.

MERRICK & FENNO vs. HUTT.

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It was not the intention of the statute (*Dig.* 893) to make the tax-title, derived from the Auditor, valid against all objections; but to make the Auditor's deed *prima facie* evidence of title; and cast upon the assailant of the tax-title, the burden of proving that any requisite of the law had not been complied with.

It is not necessary that the Auditor's deed, for land sold for taxes, should contain recitals: it is sufficient if it describe the property sold and the consideration, and convey to the purchaser all the right, title, &c., of the former owner and of the State.

The particular land taxed stands liable for the tax, no matter who may be the owner, or into whose hands it may pass: and the sale is valid, if regular in other respects and the taxes were due and unpaid, no matter in whose name the land may have been assessed and advertised.

An attachment levied upon land, which has been struck off to the State for non-payment of taxes, only binds such interest as the owner had at the time, which is a right of redemption within two years.

An attachment on land does not divest the owner of his general property, but constitutes a lien from the time of the seizure; of which all persons are bound to take notice: it is, however, subject to all liens existing at the time.

Appeal from Pulaski Circuit Court in Chancery.

Hon. WILLIAM H. FEILD, Circuit Judge.

TRAPNALL and PIKE & CUMMINS, for the appellants. Proceedings by attachment, under our statute, (*sec.* 8, 43, *ch.* 17, *Rev. St.*,) are proceedings *in rem.* The latter section expressly contemplates the property from the levy of the writ to a sale under execution, as remaining in the custody of the law.

Without such express provision, the statute would have received the same construction. By the seizure, the *property* is taken and held within the jurisdiction of the court, in the same manner, so far as the property is concerned, as is done in an admiralty proceeding, or where a court of chancery seizes property to be administered or disposed of. *Senhorn vs. Kittzedge*, 20 *Verm.* 632; *Kane vs. Pilcher*, 6 *B. Monr.* 651; 7 *Engl.* 564.

It follows from this principle, that the title of a purchaser under an attachment, *relates* to the levy of a writ, and cuts out all junior liens, incumbrances or purchasers. 12 *Ala.* 838; 20 *Verm.* 187; 17 *Conn. R.* 67; 13 *Mass.* 73.

The following cases show fully the nature of the lien created by, and the effect of, a levy by an attachment: 1 *Litt.* 307; 5 *Monr.* 73; 1 *Story Eq.* 393; 1 *J. C. R.* 556; 4 *id* 609; 2 *Dana* 408-9; 3 *Atkins* 356; 1 *McLain* 95; 17 *Pick.* 271; 1 *Ala.* 678; 4 *S. & M.* 578; 19 *Pick.* 544; 4 *Dev. & Bat.* 388; 6 *Shep.* 231; 7 *How. Miss.* 658; 5 *Greene* 453; *Pick.* 341.

Because it is a proceeding *in rem*, wherein the property is seized openly by judicial process, forming part of the records of the country, to which all have access and of which all are bound to take notice, and over which the court has control—all the proceedings from the levy to the final sale of the property, have the force, credit and sanctity of judicial records—of the acts and judgments of the *court* itself. They stand in every respect in the attitude of the judgments of superior courts. They cannot be im-

peached, or irregularities be inquired into *collaterally*. *Borden et al. vs. State, use, &c.*, 6 *Eng.* 519; *Merrick & Fenno vs. Avery, Wayne & Co., Mans. Op. Janig. T.* '54; 20 *Verm.* 632; 5 *Watts & S.* 473; 6 *Barr* 272; 1 *Brev* 468.

The seizure of real estate operates as *notice* to the world. 17 *Conn. R.* 278; 6 *Iredell* 233; 7 *How. Miss. R.* 658.

No act of the debtor can in any way affect the title, after a levy. 17 *Conn. R.* 278; 8 *Ala.* 606; 4 *Dev. & Batt.* 388; 4 *Smed. & Marsh.* 579; 7 *Gill & John.* 421.

No change of possession occurs in attachments of real estate. 16 *Mass. R.* 405; 13 *Mass.* 130.

Any one purchasing the property after a levy of an attachment, is a purchaser *pendente lite*, and takes subject to the lien of the attachment. 5 *Monr.* 86; *Meux. vs. Anthony*, 6 *Eng.* 411; 7 *Eng.* 564, 565.

Hutt comes into possession with notice of the subsisting proceedings, and takes subject to the lien and title to grow out of it, which reaches back and takes priority over any demand or claim of his to the property. He is estopped in law to deny or controvert this. He purchased *in law*, for the value of the property, *less* the incumbrance, which he had a right to discharge. In other words, he was a mortgagor in possession, subject to be sold out, if the debt were not paid. This is precisely the position he occupies in the case. Of course a mortgagor cannot acquire any title adverse to the owner of the incumbrance: any title acquired enures to the benefit of the mortgagee. The same rule applies to other tenancies. 5 *Yerg.* 379; 9 *Verm.* 37; 3 *B. Monr.* 619; 3 *Ham.* 294; 1 *A. K. Marsh.* 330; 2 *A. K. Marsh.* 366; 6 *Verm* 602.

He cannot set up title in a third person. 6 *John. R.* 34; 5 *Wend.* 246; 7 *John. R.* 151.

A vendee, or those claiming under him, are estopped in an action of ejectment to show title in himself or a third person, as against the vendor. 7 *Cow.* 637, 717; 7 *Wend.* 407.

A tenant cannot resist his landlord's recovery in virtue of a title

obtained during his lease. 2. *Binn.* 468; 1 *Dana* 14; 10 *John.* 292. So of under tenant. 4 *Bibb.* 33; 1 *A. K. Marsh.* 245.

A trustee can acquire no title adverse to that of his *cestui que trust.* 6 *Dana.* 176.

See, at large, the various relations which forbid, on grounds of policy and good faith—as in cases of trustees, agents, &c., &c., purchases by one person to the prejudice of another. 1 *White & Tudor's Eq. Cas.* 72 *to* 118.

As to the duty of tenant to pay taxes—his inability to buy in a tax-title for his own benefit—which inability of course extends to any *holder* or purchaser, going in *pendente lite*—we need only refer to 7 *Eng.* 563, *&c.*, 586, 583, and cases cited, 7 *Engl.* 519.

Where a party comes in *pendente lite*, with his eyes open, he makes himself a trustee—he forces the other parties to accept him as trustee—to hold the property to answer on the close of the litigation. Of course, like all other trustees in possession, he would have a valid claim against the successful party for all necessary outlays in respect to the property, payable out of the rents, or otherwise. 1 *J. C. R.* 566.

Purchasers under attachment, stand in place of litigating parties—obtain by the purchase all their liens, privileges, and immuties. 1 *McLean* 95.

The forfeiture of the lot at the tax sale, was void: 1st, Because Stark had ample personal estate, out of which the taxes could have been made; and he made no demand on Stark, who lived on the lot; 2d. The sheriff did not, by the levy upon Starke's personal estate, attempt to enforce the collection of the taxes; 3d, That the sheriff made no levy upon said lot as Starke's; 4th, It was never advertised according to law. *Digest, chap.* 139, *secs.* 48, 69, 90; *ch.* 69, *sec.* 52; *ch.* 139, *sec.* 90, 88, 155.

Our statutes make no change in the *nature* of tax-titles. They say what shall be good evidence, *prima facie*, of a valid tax-title. The burden of proof is thrown upon the party who would impeach the title. But any irregularity properly established, which would invalidate a tax-title elsewhere, would destroy it here.

A sale of land is void if there be personal property from which the taxes could be made. 12 *Ala.* 617; 3 *Yerg.* 355; 4 *Blackf.* 70.

No title can be valid but upon a strict compliance with the law; even want of notice to an occupant after deed made, avoids sale. 16 *Wend.* 550; 5 *Hill* 286.

Failure to demand taxes on premises, and make same out of personalty, avoids sale. 7 *Cow.* 88.

Want of proper notice of sale, or a sale on a day different from the one fixed, avoids the sale. 10 *Ohio* 139.

It is useless to cite particular examples. The law must be strictly complied with, or the proceeding is a nullity. *Hogins vs. Brashears*, 13 *Ark.* 242; 25 *Maine R.* 359; 18 *Verm.* 470; 1 *Doug.* 119.

WATKINS & CURRAN, for appellee. The first point we make in this case, is, that no lien was created by the levy of the attachment; because the attachment was not levied according to law, as appears by the return of the officer, who did not go upon the premises, and there declare in the presence of a citizen, &c. *Dig., ch.* 17, *sec.* 8; *Gibson et al. vs. Wilson et al.*, 5 *Ark.* 422.

The return of the officer upon a writ of attachment, is the only record evidence of the lien; and the return must show that every requisite of the statute, which is mandatory and not directory merely, has been complied with; and no lien attaches unless the return shows that the officer has made the levy in the manner directed by the statute. See *Cheshire vs. Briggs*, 2 *Metc. R.* 486; 5 *Mectf. R.* 517; *Cox. vs. Johns*, *Verm.* 65; *Kettleridge vs. Bellows*, 6 *N. Hamp. R.* 399; 5 *N. Hamp. R.* 275. And the objection may be made by any subsequent purchaser or attaching creditor. 11 *Metcf. Rep.* 244.

Even if the levy created a lien, that lien was not connected with, or continued by, the judgment, for the reason that there was no judgment condemning the land. *Den ex. dem. Amyett vs. Backhouse*, 3 *Murph. N. C. Rep.* 63.

The appellee cannot, in any sense, be held to be a purchaser

pendente lite. He purchased the lot, went into possession, and paid the consideration, before the defendant in the attachment had notice, actual or constructive, of the suit. It is not the levy of the attachment, but the service of the notice on the defendant, that creates the *lis pendens. Denn's Lessee vs. James & Gilbert,* 1 *McLean R.* 328; 14 *Peters* 333; *Sandford vs. Dick,* 17 *Conn. R.* 213.

But we confidently submit that Hutt was the absolute owner of the property in virtue of his tax-title. The lot was regularly assessed in the name of Daniels, and forfeited for non-payment of taxes, and sold at Auditor's sale, and purchased by Hutt. It makes no difference, under our statute, whether land is assessed in the name of the true owner or not. It is the duty of every proprietor to see that his land is properly taxed, and the taxes paid, (*Dig. ch.*, 139, *sec.* 115); and if he fails to pay, and the land is advertised and not sold, for want of bidders, it is forfeited to, and all the right, title and claim of the former owner is vested in, the State. (*Ib.*, *sec.* 116.) No levy is necessary; and, in this case, every requisite prescribed by the statute, was complied with. The case of *Hogins vs. Brashears,* is not in point, because it appeared on the face of the deed that the sale was made on a day not authorized by law.

A tenant or trustee in possession, cannot purchase in an outstanding title, and use the same against his landlord or *cestui que trust*: but Hutt held in his own right, paid the purchase money, obtained an absolute deed, and cannot be said to be a tenant, and may well rely upon his tax title. *Blight's Lessee vs. Rochester,* 7 *Wheat. R.* 535; *S. C.*, 5 *Cond.* 335; *Warden et al. Bodley,* 14 *Peters Rep.* 162; *Jackson vs. Harsen,* 7 *Con. R.* 323; *Walker's Ex. vs. Ogden,* 1 *Dana* 250.

Starke had no interest in the lot, at the time the attachment is claimed to have been levied—consequently nothing was attached. The land was forfeited to the State, and the title transferred to her.

Hon. S. H. HEMPSTEAD, Special Judge, delivered the opinion of the Court.

The lot in controversy appears to have been taxed, for 1840, in the name of James Daniels as a non-resident, as well as in the name of James T. Starke, as a resident of Pulaski county. The latter was the equitable owner of the lot; but the legal title was in Darwin Lindsey. It does not appear that James Daniels had any right to the lot. He was, however, a non-resident, and the lot seems to have been regarded as non-resident property. After advertising it as such, it was offered for sale for the taxes of 1840, at the time and place prescribed by law, and was forfeited to the State in the name of Daniels. The collector, in his settlements for that year, received credit for the taxes charged on the lot.

The taxes for 1840, were not paid on it by any one, either as the property of Daniels or Starke, nor do any steps appear to have been taken that year to collect the taxes from the latter, who is proved to have been able to pay them.

The lot remained unredeemed for two years, and, on the 13th of February 1843, was sold at Auditor's sale, to Hutt, the defendant, who received the usual deed, and under which he asserts paramount title. He has been in actual possession of the lot since January, 1842, having then purchased it from Starke, for a full and valuable consideration, and, as far as appears, without actual notice that there was any incumbrance upon it, of any description whatever. He purchased it for a family residence, paying two thousand dollars, its full value, and took a deed directly from Lindsey to himself; Lindsey not having made title to Starke, although the latter had paid the purchase money. A. B. Bailey, on the 22d of July, 1841, sued out of the Pulaski Circuit Court, a writ of attachment against Starke, which was executed by seizing this lot as the property of Starke; and various proceedings being had, judgment was finally obtained in December, 1845, and the lot was sold under a special execution, on the 19th of October, 1846, and the complainants became purchasers at the sum of twenty-one dollars, and claim to be the owners of the lot.

The statute expressly declares that Auditor's deeds shall vest in the grantee, his heirs, or assigns, a good and valid title, both in law and equity, and shall be received in all courts in this State as evidence of a good and valid title in such grantee, his heirs, or assigns, and shall be evidence that all things required by law, to be done to make a good and valid title, were done both by the collector and Auditor." *Digest* 893.

A more comprehensive provision could hardly be found, and it might seem, at first view, to make the tax title, derived from the Auditor, valid against all objections. But that was not the design. The evil to be remedied was, that the entire burden of proof was cast on the purchaser to show that every requisite of the law had been complied with, and the deed of the officer was not even *prima facie* evidence of the facts therein stated. The general and prevailing principle was, that to divest the owner of land by a sale for taxes, every preliminary step must be shown to be in conformity with the statute; that it was a naked power not coupled with an interest, and every prerequisite to the exercise of that power, must precede it; and that the deed was not *prima facie* evidence that these prerequisites had been observed. *Williams vs. Peyton's Lessee*, 4 *Wheat* 77; *Stead's Executors vs. Course*. 4 *Cranch* 403; *Rollendorf vs. Taylor*, 4 *Peters* 349; *Gains vs. Stiles*, 14 *Peters* 322; *Bloom vs. Burdick*, 1 *Hill* 130; *Sharp vs. Spier*, 4 *Hill* 76; *Leygett vs. Rogers*, 9 *Barb*. 407.

The intention and scope of the statute were to change this rule, so far as to cast the *onus probandi* upon the assailant of the tax title, by making the deed *prima facie* evidence of title in the purchaser; subject to be overthrown by proof of non-compliance with the substantial requisites of the law. *Steadman vs. Planter's Bank* 2 *Eng*., 425; *Jackson vs. Morse*, 18 *John* 440. And the Supreme Court of the United States so held in passing upon our statute in the case of *Pillow vs. Roberts*, 13 *How. S. C. R.* 472; 7 *Eng*. 822.

Proof then that any of the substantial requisites of the law have been disregarded; or that the taxes have been paid, no

matter by whom, would be sufficient to destroy the tax title, (18 *John.* 440,) whether emanating from the Auditor or Collector. And so where it appears, from the deed itself, that any substantial requisite of the law has not been observed, the deed can have no effect, and the sale is void. *Moore vs. Brown*, 11 *How. S. C. R.* 424. As where a sale is made at a different place from that prescribed by law, or on a different day, as was the fact in *Hogins vs. Brashears*, (13 *Ark.* 242,) or by a person not having authority to sell, or without notice. In these, and like cases, the deed could not be operative, and so could not be regarded as *prima facie* evidence of title.

The deed of the Auditor, is not required to contain recitals. All that is necessary is, to describe the property sold, and the consideration, and convey to the purchaser all the right, title, interest, and estate, of the former owner; as well as all the right, title, interest, and claim, of the State to the land. (*Digest* 893.) The deed to Hutt conforms to this provision, and was duly executed, acknowledged, and recorded. The objection principally urged against his title is, that Daniels was not the owner of the lot at all, and that it was improperly taxed in his name, and that the sale to Hutt was void. But the statute answers that objection, by declaring, that "no sale of any lands or town lots, for the payment of taxes, shall be considered invalid on account of its having been charged on the tax book in any other name than that of the rightful owner, if such land or lot be in other respects sufficiently described in the tax book, and the taxes, for which the same is sold, be due and unpaid, at the time of such sale." *Digest* 889.

This provision is founded in sound policy. In the new States, where lands are cheap and abundant, and there is an almost entire absence of that strong attachment to the soil, which exists in a striking degree in older communities, conveyances of real estate are constantly made from one to another. The owner to-day ceases to be so to-morrow. If it were necessary to go into questions of actual ownership, the land taxed would indeed be in a

precarious condition, since changes of ownership, either real or simulated, would render the collection of a tax difficult, if not impracticable.

The name of the owner is comparatively unimportant. The description of the land in such manner as that it may be identified, and the non-payment of the tax, are the two considerations of the most importance in a tax sale. Indeed, the latter is vital, because no matter how formal and exact the proceedings may have been whenever it is made to appear that the taxes have been paid by any one, the sale is utterly void. The authority to sell is founded on the fact of non-payment. The statute intended to divest the title of the former owner for the non-payment of the tax, and for that only.

The particular land taxed, stands liable for it, no matter who may be owner, or into whosoever hands the land may pass. The State has, by express legislation, made the tax on lands a charge against them, notwithstanding any change of title by deed, judgment, or otherwise (*Digest* 885.) And this is not only constitutional, but entirely proper, in any point of view, in which it may be considered. It is a proper preference for a State to give herself, in order to insure certainty in the collection of the means necessary to carry on the government. The legal effect of it is to make the State first creditor for the taxes, and give her a lien on the land, paramount to all individual claims or pretensions. It is a charge which attaches to the thing under all circumstances, and, without exception, to be discharged only by payment. No judicial proceeding can impair, displace, or postpone, this lien; nor can it be done by the acts of parties. Payment alone is effectual to discharge it, and relieve the land from the incumbrance.

Taxation should not be regarded with odium; nor should courts, by injurious and astute construction, attempt to evade the force of the revenue law; but, on the contrary, give it a fair and liberal interpretation, and countenance only such objections as apply to the real merits of the case. (13 *How. S. C. R.* 476.) If the stat-

ute is to be enforced at all, this objection to the title of Hutt, acquired at tax sale, cannot prevail; for it was to meet such cases, that the provision was made as to taxing property in the name of a person not the true owner.

The attachment of Bailey was levied on the lot, on the 22d of July, 1841, after the lot had been struck off to the State, as the property of Daniels. The attachment only bound such interest as Starke had in the lot at the time, which was a right of redemption, within two years, as former owner." *Digest* 889. After the expiration of two years, he had no such right; and the land was subject to be sold by the Auditor in the manner prescribed by law. Any person who has a legal or equitable interest in land sold for taxes, is properly considered the owner for purposes of redemption. (*Black vs. Percifull*, 1 *Ark.* 473.) There can be no doubt that Bailey, the plaintiff in the attachment suit, had such an interest as to justify him in redeeming, in order to make his attachment effectual, and to relieve the lot from a prior charge, of which all persons were bound to take notice. It would have been analogous to the case of a subsequent encumbrancer, who discharges a prior one to protect his own and make it available. But neither Starke nor Bailey, redeemed, nor offered to redeem; nor were the taxes of 1840, paid, until the purchase by Hutt, of the Auditor, in 1843. Whatever right Starke had, was forfeited, and the purchasers of the lot under execution, succeeded to no greater right than he possessed.

It follows that the tax title of Hutt was paramount; unless he occupied such a position as to inhibit him from purchasing on his own account, and for his own benefit.

It is a general rule, that the tenant is not allowed to dispute the title of his landlord. The same relation subsists between a trustee and the *cestui que trust*. Nor can the tenant, in the one case, nor the trustee, in the other, purchase outstanding titles for their own benefit, to be set up against those for whom they hold. (14 *Peters* 162.) And yet the rule is subject to exceptions. If the tenant disclaims the tenure, and claims the fee in his own

right, of which the landlord has notice, the relation of landlord and tenant is ended, and the tenant becomes a trespasser, and is liable to be turned out of the possession, though the period of his lease has not expired. (3 *Peters* 47; 14 *Peters* 162.) But it is difficult to perceive how Hutt can be held as a tenant or trustee. He had purchased the lot, and had received a conveyance as purchaser, and certainly between himself and Starke, no other relation than that of vendor and vendee subsisted. He held adversely, not under him. In *Blight's Lessee vs. Rochester*, (7 *Wheaton* 548,) Chief Justice MARSHALL, delivering the opinion of the court, said: "The propriety of applying the doctrines between lessor and lessee, to a vendor and vendee, may well be doubted. The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor, are intended to be extinguished by the sale, and he has no continuing interest in the maintainance of his title unless he should be called on, in consequence of some covenant or warranty in his deed. The property having become by the sale the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this; nor is either the letter or spirit of the contract, violated by it." 14 *Peters* 162; 3 *Littell* 34; 4 *Littell* 274; 7 *Cowen* 323.

That Hutt was a trustee for Bailey, cannot be seriously insisted on. No fiduciary relations existed between them; and, under the circumstances of the case, to imply a trust would be to take one step beyond the shadowy boundary of constructive trusts, already extended beyond any safe and reasonable limits, and, in many instances, as easy to imagine as they are difficult to define.

If it was the duty of Hutt to pay the taxes accruing while he was in possession, it was certainly not his duty to pay those which accrued before that time for the benefit of any other person than himself; and so whether a tenant must pay taxes and assessments, is a question quite foreign to the case in hand, and

the authority to that point, cited by the appellant's counsel, has no application. Hutt cannot be considered in the light of a purchaser *pendente lite*. The true position he occupies, is that of purchaser under proceedings to obtain the satisfaction of a first incumbrance, and pending which a subsequent incumbrance attaches. To say that he is a purchaser *pendente lite*, under the second, would be to reverse the natural order of things, and postpone the first to the second incumbrance, and utterly destroy it. This cannot be tolerated.

The law requires the owners of land to see that the taxes are paid; and if they neglect it, they, or any one claiming under them, have no right to complain of the consequences of their own negligence. If, for disregarding this first and highest obligation a citizen owes the State, the loss of his property, charged with the tax, shall seem a disproportionate penalty, it must be remembered that to excuse it would produce the most serious embarrassments, if it did not eventually work the destruction of civil government itself.

As has been said, the lien of the State for taxes is paramount, under all circumstances; and hence, no suit or *lis pendens* between individuals can affect the right of the State to sell for taxes, and which may not inaptly be assimilated to a proceeding *in rem* in admiralty, in which the whole world, it is said, are parties, and the condemnation binding on all who have an interest in the thing. 9 *Cranch* 144.

The right to sell does not depend on the fact whether the property is taxed in the name of the rightful owner, but on the fact that the taxes are due and unpaid; and that the land is charged with them, to which charge or lien all claims and pretensions must yield, and of which all persons must take notice at their peril.

It is undoubtedly true, as argued by the counsel for the appellants, that an attachment on land constitutes a lien from the time of the seizure, of which all persons are bound to take notice; closely resembling, in that respect, a proceeding *in rem* in ad-

miralty. All who deal with regard to land attached, must do so subject to this lien, and the litle of the purchaser under attachment relates to the levy of the writ, and gives him priority over all intervening liens, incumbrances or sales. 1 *McLain* 95; 7 *Peters* 464; 1 *Ala.* 678; 8 *Ala.* 606.

And although Hutt does not appear to have had actual notice of the attachment in this case, yet that could not protect him, for he was chargeable with constructive notice; and, were it not for the tax title, acquired at the Auditor's sale, the title of Merrick & Fenno would have to prevail; not because Hutt could not purchase from Starke after the levy of the attachment, but because it would be a junior incumbrance. An attachment constitutes a lien, merely, upon the land; but the general property of the owner is not divested, and he may just as well sell, subject to that lien, as any other. The effect of the sale is to pass the general property incumbered by the attachment. If that is extinguished by the settlement or failure of the suit, the purchaser will hold free of the incumbrance. It never was doubted that real estate under attachment might be conveyed, as well as if unincumbered. *Arnold vs. Brown*, 24 *Pick.* 95; 3 *McLain* 355; 6 *Humph.* 151.

The attachment, however, is subject to all claims, liens, incumbrances, or charges existing against the land at the time, and these may render the attachment entirely ineffectual.

That is the precise predicament of the lot in question. It had been charged with the tax of 1840, and had been struck off to the State when the attachment was levied. Supposing Starke had an interest in the lot, subject to attachment, but having failed to redeem, and the attaching creditor having failed to do so, the prior lien for the taxes ripened into a perfect tax title in Hutt, the defendant, and thus rendering the attachment unavailing, and as Hutt has the paramount title, the decree dismissing the bill should be affirmed.

SEXTON VS. BROCK.

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185 268
85 394

Where some of the counts of the declaration are bad, and a general verdict is returned, this court will not, under the statute, award a new trial, if it shall appear from the bill of exceptions that there was evidence, applicable to the good counts, upon which the jury might have been warranted in finding their verdict.

The defendant filed the plea of the statute of limitations, but the record states that the parties went to the jury, "the defendant abandoning his plea of the statute of limitations"—such plea is out of the case, and will be so treated at any subsequent trial.

Where the bill of exceptions refers to papers with sufficient identification, without incorporating them at full length, they constitute a part of the record.

The interrogatory, "Do you know whether Brock was ever prosecuted for stealing a horse; if so, by whom and where?" is not objectionable as a leading question.

A general objection taken to the admissibility of all the testimony, without specifying the grounds of objection, is unavailing, if any portion of it was admissible.

One party has no right to read the depositions of his adversary, against his objection, which, though filed and published, he had never offered in evidence.

In an action for malicious prosecution, the important inquiry is, whether the defendant, at the time of the arrest, had reasonable or probable ground of suspicion that the plaintiff had committed the crime imputed to him.

The mere judgment, without the entire record, in respect to the right of property, may be conclusive, against the plaintiff in the action, as to the right of property at the time of the judgment, but not as to any previous time.

There is a wide difference between a felony and a trespass; and if one has reason to believe that another took or retained property openly and under color of claim, not used as a pretext for larceny, a charge of stealing is without probable cause, and raises a presumption of malice.

After two successive verdicts, this court would not be inclined to disturb the verdict for excessive damages, unless the record disclosed some evidence that it was the result of passion, prejudice, or corruption, on the part of the jury, if there be evidence to support it.

Appeal from Drew Circuit Court.

Hon. SHELTON WATSON, Circuit Judge, presiding.

PIKE & CUMMINS, for the appellant, contended that the evidence clearly shows, that the damages are grossly excessive; that the verdict must have resulted from mere prejudice, or other improper motive; and that Sexton had probable cause for causing the arrest. (*De Baun vs. Beebe*, 3 *Eng.* 510.) That the mere judgment offered as evidence was, of itself, inadmissible; the whole record should have been produced, (2 *Stark.* 371, 291,) and no parol evidence could be given of the existence of a judgment; that a party, who has taken depositions in a common law cause, cannot be compelled to read or produce them, nor can the opposite party do so without his consent. That, as some of the counts are clearly bad, the judgment must be reversed. *Ch. Pl.* 448.

YELL, for the appellee, contended, upon the facts, that the plaintiff had shown there was no probable cause for the arrest; that the defendant was bound to show that he had probable cause for the arrest and prosecution, (2 *Stark. R.* 389; 2 *Esp. N. P.* 529;) that malice is always implied from the want of probable cause, (*Marsh.* 224; 1 *Bibb* 413; 3 *Litt. Rep.* 335;) if the damages be considered by the court as excessive, still the quantum of damages in actions of tort is peculiarly and exclusively within the province of the jury. (2 *Bibb* 6; 3 *Marsh.* 455; 2 *J. R.* 63; 5 *Taunt.* 277; 1 *Burr.* 609; 2 *Wilson* 405; 3 *Bibb* 34.) That the defendant, not having withdrawn his depositions from the files, they were evidence in the case, and the plaintiff had the right to use them. *Teater vs. Fry*, 5 *Cranch* 335; 2 *Cond. Rep.* 273.

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

This was an action on the case for malicious prosecution, commenced by Brock against Sexton, in the Desha Circuit Court, where the plaintiff obtained a verdict for five thousand dollars; and, a new trial being granted, the venue was changed, on the application of defendant, to the county of Drew, where the plaintiff again had a verdict and judgment for the same amount;

and the defendant prosecutes this appeal upon exceptions to the decision of the court below, overruling his motion for new trial. The declaration contains several counts, and it is argued, for the appellant, that some of them are bad, and the jury having returned a general verdict, the judgment ought, for that cause, to be arrested or reversed, and *venire de novo* awarded. The statute, (*Digest, title. Practice at Law, sec.* 128,) provides that, where there are several counts in the declaration, and entire damages be given, the verdict shall be good, notwithstanding one or more of such counts may be defective. The effect of this statute is to require of the defendant to meet the objectionable counts by demurrer in the court below, or by moving for appropriate instructions to cause the jury to discriminate between the good counts, and any defective ones, upon which, taken separately, no valid judgment could be rendered, and to which the evidence could not apply. When the facts appear upon the record, or the entire evidence is set out by bill of exceptions, this court, having sanctioned the practice of allowing error after a motion for new trial, could no doubt be called upon to look into the sufficiency of the evidence; but would not award a new trial, if it shall appear, from the bill of exceptions, that there was evidence applible to the good counts; upon which, though conflicting, the jury might have been warranted in finding their verdict.

2. The defendant had pleaded, with the general issue, the statute of limitations of one year, upon which an issue was made up; but it appears, from an entry of record, that, on the first trial of the cause, the parties went to the jury, "the defendant abandoning his plea of the statute of limitations." It is contended that this meant only an abandonment of it for that trial. The effect of such an entry was to put the plea out of the case, and it would be so treated at any subsequent trial, unless the defendant had caused it to be reinstated by some new agreement of parties or order of court.

3. The objection is urged, by the appellee, that the defendant below failed to reserve any exception, according to *Berry & Sin-*

ger, 5 *Eng.* 484, and *Clay vs. Notribe*, 6 *ib.* 634. The bill of exceptions states that the plaintiff read in evidence, to the jury, the depositions of certain witnesses, naming each one, "which depositions are here now among the papers of this cause, marked; "filed March 22d, 1852, Y. R. Royal, clerk, exhibit A. and are ordered to remain on file herein, and to form and constitute a part hereof, as fully in every respect as if herein literally copied," then follows a package of depositions corresponding, in every respect, with such reference, except that it no where appears to be marked "Exhibit A." Clearly we think the identification of the paper sufficient, and that the objection applying to this and other papers similarly referred to, without incorporating them at full length in the bill of exceptions, in all other respects regular and formal, is not sustained by the cases referred to.

4. The defendant below moved to exclude that portion of the deposition of Thomas Caulk, a witness for the plaintiff, in which he stated, incidentally, that "he was on the jury when Brock recovered the horse," referring to the one in respect of which Brock had been prosecuted. It is true, that if Brock recovered the horse from Sexton, in a civil suit, the fact would have to be proved by the production of the record. But, on the supposition that the plaintiff subsequently produced the record, the testimony objected to, would either become unimportant, or it would be admissible for the purpose of identifying the horse. The second interrogatory to Boyd, specially objected to as leading, and which is as follows: "Do you know whether Benjamin Brock was ever prosecuted for stealing a grey stud horse; if so, by whom and where," is not objectionable on that ground. The general objection, taken by the defendant to the admissibility of all the testimony offered by the plaintiff, without specifying the grounds of objection, is unavailing, if any portion of it was competent.

5. During the progress of the trial, the plaintiff, in order to make out his case, and before the defendant had offered any evidence, proposed to read the depositions of two witnesses, which had been taken by and on the part of the defendant, the pack-

age containing the same, with other depositions, having been published, and they were then on file among the papers of the cause. The plaintiff, though notified of the time and place of taking the depositions in question, did not attend or cross-examine the witnesses. The court below permitted him to read the depositions against the objetion of the defendant. Under the statute, there are two modes of taking depositions by commission: the one being a general commission, where the opposite party must be notified in due season of the time and place of taking the examination; the other, a special commission, addressed to a particular officer, which goes out accompanied with interrogatories and cross-interrogatories, to which the examination must be confined, the same having been settled in the first instance before the judge or court, where the suit is pending. But all depositions, in common law cases, are taken *de bene esse*, and can only be read as if the witnesses "were present and examined in open court," upon certain conditions, as if it be shown the witness is dead, sick or infirm, or residing without the county, and the like, so as to excuse his personal attendance. Depositions are required to be filed, and, when published, must remain on file, for security, and as a precaution against alteration, and it is argued that this was also designed to make them common property, so as to entitle either party to use them at pleasure. Each party is expected to make out his case in evidence, and is presumed to know what witnesses will be required for that purpose, and to have taken the proper steps to compel their attendance, or procure their depositions.—There is some plausibility in the argument for the right of one party to read his adversary's depositions, but it will not bear examination, and the introduction of such a practice would be a serious innovation. Depositions in common law cases, are but a substitute, and an imperfect one, for the personal attendance of the witness when that is impossible or inconvenient to be obtained. Though the witness be present, the party, who caused him to be summoned, is under no obligation to offer him. If he offer a witness on one trial, he is not bound to do so at any subsequent

trial. Though a deposition once admitted without objection, cannot, as a general rule, be afterwards objected to, that does not make the deposition unconditionally evidence for the party who had it taken, or authorize him to dispense with the personal attendance of the witness, if to be had at any subsequent trial. The after objection is not allowed, because it would operate as a surprise upon the party again entitled to offer it. But, strictly speaking, a party taking a deposition, is no more obliged to read it again, than he would be to offer the same witness at a second trial, merely because he had once used him. If, having once read a deposition, the opposite party is induced to believe that it will again be used on the second trial, it might, on the other hand, operate as a surprise upon him, and be ground for setting aside a non suit, or granting a new trial, in the discretion of the court. Of course, where depositions are taken pursuant to any agreement or understanding, of which the Court will take notice, that they are to be read at the trial, they become the property of both parties, so that either party may read them, if taken for their joint benefit, or compel his adversary to do so, if taken in his behalf. When a witness has once been examined, or his deposition read in a judicial proceeding, where there was a cross-examination, or an opportunity for it, and he dies, or becomes insane, is gone abroad, or kept away by contrivance, so that it is impossible to procure his testimouy, proof is admissible of what he swore on the former trial, whether preserved in a bill of exceptions, notes of the testimony, the recollection of persons present, or by the deposition itself. If, under such circumstances, either party, deeming it material, has a right to prove what a deceased witness swore on the former trial, that becomes a new fact subject to counter proof; it comes in under the head of secondary evidence, being hearsay, and is admissible from necessity, because it is supposed to be the best evidence which the nature of the case admits of. The lost testimony is reproduced, as near as it can be, in its former condition, in chief and on cross examination. But depositions are not in the first instance original evidence, though

a substitute for it. The party taking it upon due notice, may be entitled, upon showing the death, infirmity, or absence of the witness from the county, to read it. There is no reason, from the necessity of the case, why the opposite party, if he desired the testimony, could not have procured it by deposition, or enforced the attendance of the witness. It may be the misfortune of either side that material testimony is lost. In this view, what the court say in *Crary vs. Sprague*, 12 *Wend.* 46, is in point, even though it may not be thought applicable to a case of secondary evidence, which that was. Here, the depositions had never been read before, and the plaintiff offered them merely because they had been taken by the defendant, and were on file. He then could only propose to read them as original testimony, and yet he was allowed to do this without showing any compliance with the conditions prescribed by the statute, or any effort to procure the attendance of the witnesses by subpœna. The plaintiff is supposed to introduce them as his own witnesses, but they not being present in court, the defendant had no opportunity for cross-examination, the great test of truth, upon which the admissibllity of all evidence, whether original or secondary, depends. If to be admitted because the deponents were the defendant's, witnesses, he may be taken at a disadvantage, because he was restrained from putting leading questions on his examination in chief, and if the deponents continue to be his own witnesses, he could not impeach or discredit them. Even if the plaintiff had appeared and cross-examined, that would not have given him a right to use the depositions as his own. As held in *Williams vs. Kelsey*, 6 *Geo.* 375, whether the deponent be cross-examined or not, he is the witness of the party introducing him; and when the examination in chief is read, the cross-examination, if there be one, follows, and may be read by either party as parcel of one entire deposition. We think the rule of practice is correctly laid down by the Supreme Court in Massachusetts, (*Dana vs. Underwood*, 19 *Pick.* 104,) that, where one party takes a deposition, it is at his option to use it or not, as he thinks fit; and if he declines using it, the other

party cannot read it without consent. The court there say: "A party may try the experiment of taking the depositions of a person known to be a willing witness for the other side; or believing that he is favorable to his own side, finds the contrary in the progress of the examination. The adverse party finding him a willing witness on his side, puts leading questions, and gets out answers which he could not do, if he were his own witness. Now, if this deposition, instead of being used at the option of the taker, may be used by the adverse party, without and against his consent, it would be wholly reversing the rules of examination, and going counter to the reasons on which those rules were established." See also, *Elliot vs. Shultz*, 10 *Humphries* 234. The case is not stronger than that of an answer to a petition for discovery in aid of a suit or defence at law, which the party calling for it may use or not as he chooses, but if he decline, the answering defendant will not be permitted to read it as evidence in his own behalf. *Conway & Reyburn vs. Turner & Woodruff*, 3 *Eng.* 356.

It must be conceded the question is not free from difficulty, and several authorities are to be met with of a contrary import, but most of them appear to have been decided upon some statute or rule of court, varying in every State. The case of *Yeaton vs. Fry*, 5 *Cranch* 335, (2 *Cond. Rep.* 273,) is a most unsatisfactory foundation for the superstructure that has been built upon it. There, the defendant excepted to his own depositions, because he did not produce proof of his having given notice to the plaintiff, who had admitted notice. Chief justice MARSHALL treated the exception as frivolous, in the aspect of the case before him, by saying: "The admission of notice by the plaintiff, is certainly sufficient, if notice to him was necessary, to enable him to use the defendant's depositions." In *Rogers vs. Barnett*, 4 *Bibb* 481, the court assign, as a reason for admitting a deposition to be read against the objection of the appellants, who had caused it to be taken, that they had every opportunity of a cross-examination, which would hardly hold good of their own witness. In *Gor-*

don vs. Little, 8 *Serg. & Rawle* 549, the court held, that when a deposition is taken and filed, it becomes the property of both parties, but that neither could read it, unless he had used the proper diligence to obtain the personal attendance of the witness. The court, in *Green vs. Chickering*, 10 *Missouri* 111, in a doubtful and hesitating manner, follow the lead of those cases. The Supreme Court of Alabama first decided, that, where a deposition is read, the party thus using it, admits it to be proper evidence, and it may be used on a subsequent trial of the same cause, by the opposite party; but, that the mere filing of a deposition, does not license the party, against whom it was taken, to read it as an admission to the jury; because, "before using the deposition, the party taking it may have discovered that it was inadmissible for him, or that the facts it proved were unfavorable to his interest, or were in themselves false." *Hallett vs. Walker*, 1 *Ala.* 585. In the subsequent case of *Stewart vs. Hood*, 10 *ib.* 607, the same court hold that the opposite party may use a deposition, when he has been cited to attend the taking, and has cross-examined; but the only authorities referred to, in support of the position, are *Yeaton vs. Fry*, and *Rogers vs. Barnett*. In *Polleys vs. the Ocean Ins. Co.*, 14 *Maine* 142, a majority of the court were of opinion that their rules of court, by implication, gave one party a right to use a deposition which the adverse party had caused to be taken, to be used on a former trial of the same cause, but was not used, the deponent having been present and sworn as a witness. In Iowa, by statute, all depositions taken in pursuance of the act, when returned into court, may be read by either party on the trial of the cause to which they relate. *Nash vs. the State*, 2 *Iowa* 299.

An examination of those cases, does not shake our conclusion that the court below erred in permitting the plaintiff to read depositions of the defendant which he had never offered in evidence, and against his objection.

6. The plaintiff below introduced, and was allowed to read, against the objection of the defendant, a certified copy of the

record entry of a judgment obtained by him in an action of replevin as administrator of Isham Brock, against Sexton, the defendant here, for the recovery of a certain stud horse, elsewhere proved to be the same, for the alleged stealing of which Sexton had caused Brock to be arrested. This copy, not purporting to be a complete transcript of the record in that suit, does not contain the declaration, or any of the proceedings had therein previous to the judgment entry. Neither does the essential fact appear from it, when the action of replevin was commenced, from which period the recovery would have shown title out of Sexton. In this kind of action, the important enquiry is, whether the defendant, at the time he caused the arrest, had reasonable or probable ground of suspicion that the plaintiff had committed the offence imputed to him. True, so far as the ownership of the horse was material, in this enquiry, it could be proved by parol; but the introduction of a partial record was injurious to Sexton, because the recovery might have been had upon some title acquired by Brock, subsequent to the arrest complained of. If the record had been complete, it would have been conclusive of the fact of the recovery, and that, at the time the action was commenced, Sexton had not title to the horse; but though raising a strong presumption against the defendant, the record of a subsequent recovery could not, under any circumstances, be said to be conclusive of the want of probable cause. The modification given by the court, to the instruction asked for by the defendant, on this point, was erroneous, inasmuch as the copy of the record produced did not conduce to prove, even in connection with other evidence, in whom the right to the horse was before or at the time when Sexton caused the plaintiff to be arrested.

7. The court below refused to give an instruction asked for by the defendant, to this effect: that, if the jury believe, from the evidence that John Brock by himself, or with Benj. Brock (the plaintiff,) took the horse in question from Sexton's negro, who was peaceably using him, and Sexton had had peaceable possession of the horse as above assumed, and he, immediately or on the next morning, pursu-

ed the parties to Napoleon, and there found John Brock escaping in haste by the Mississippi river, and Ben. Brock retained the horse, and left Napoleon with him, threatening violence if interrupted —Sexton had probable cause for causing the plaintiff to be arrested for stealing or harboring said horse, and unless the plaintiff not only had good title to the horse, but Sexton actually knew it, the jury are bound to find for the defendant. It is correctly argued, for the appellant, that, in order to make out his defence to this action, it was not necessary that he should have been the owner of the horse. Though a mere bailee, or a stranger to the title, it might have been not only his right, but his duty to the public, to set on foot the prosecution, if he had reasonable or probable cause to believe that the plaintiff was guilty of felony. But the instruction was objectionable, and properly refused.—There is a wide difference between a felony and a trespass, which Brock might have committed under color or claim of right, and without any felonious intent. In order to show a want of probable cause, it was not necessary for the plaintiff to have proved either that he had good title to the horse, or that the defendant actually knew it. True, the public have a concern that all criminals should be brought to justice, and hence a prosecutor without malicious motives will be excused, though his reasonable suspicions turn out to have been unfounded. In this respect, the action for malicious prosecution differs from malicious arrest for debt, or any malicious prosecution of a civil suit, wherein the plaintiff has the means of knowing personally, or of being well advised, whether he has probable cause for instituting it. But good motives will not shield any one who charges another with crime upon a frivolous pretext. If Sexton had reason to believe that Brock took or retained the horse, openly and under color of claim, not used as a pretext for larceny, the charge of stealing was without probable cause, and raised a presumption of malice.

8. It is urged, for the appellant, that the damages are excessive, that the verdict is not warranted by the evidence, and is contrary to instructions given. These are causes for which this court

will sometimes, though rarely, set aside the verdicts of juries, and award new trials. But, after two successive verdicts, and the refusal of the judge, who presided at the circuit, to offer the alternative of a new trial, or a reasonable remittitur, if he thought the damages excessive, this court would not be inclined to disturb the verdict, unless the record disclosed some evidence that it was the result of passion, prejudice, or corruption, on the part of the jury. Our impression of the testimony, as set out in the bill of exceptions, might be that it is unsatisfactory, but it cannot be said that the verdict was without evidence to support it.

For the errors before indicated, the judgment will be reserved, and the cause remanded, with instructions to grant a new trial.

Mr. Justice SCOTT, said:

Although concurring very fully with the Chief Justice, in the opinion delivered by him in this case, I may myself, perhaps somewhat more distinctly, express my own ideas as to the main point upon which the judgment must be reversed.

Depositions are the creatures of the statute, and to the extent that they are allowed in cases at law, they militate directly against those rules of the common law which require the personal attendance of the witness in open court, that his demeanor may be observed, not only as one of the tests of his credibility, but that his statements may be more accurately understood and weighed, to the end that the truth may be more fully and clearly ascertained. Of so much importance to the party, against whom a witness may be called to testify, is this common law right, "to meet the witness face to face"—regarded, that, in criminal prosecutions, it is secured from invasion by our bill of rights, (*Sec.* 11, *Const. Ark.*;) leaving the right, as to civil cases, subject to the legislative will.

If a statute, which invades this right as to civil cases under specified circumstances, were construed liberally, and made to extend to cases not clearly embraced within its terms, it is plain enough that such a construction would be in the teeth of that

cardinal rule which forbids such a construction of a statute derogating from common right. And accordingly this court refused to recognize any such liberal notions of this statute, in the cases of *Crary vs. Barlow & Taylor*, 5 *Ark.* 210, and *Crittenden vs. Johnson*, 6 *Eng. R.* 92, and required in substance that a party offering to read a deposition should show himself within the cases specified before he should be permitted to do so.

Not only has a party this common law right, to be confronted in open court with a witness brought to testify against him, but the further right to sift this testimony through the ordeal of a cross-examination. And this ordeal, when sustained by acumen and judgment, judicial experience has proven to be the highest test of truth known to the law. So long as the right to read the deposition, is confined to the party who takes it, this right cannot be invaded; but if the opposite party be allowed to do so, against the consent of the former, it must necessarily be otherwise, because the rules of law regulating the respective modes of examination in chief and cross-examination, are essentially different. True, this right of cross-examination, is also at the legislative will, subject to be regulated and qualified; that, however, is not the question, but whether it has in fact been done by the deposition statute. In the terms of the act, there is certainly nothing to indicate such an intention with any tolerable degree of certainty; and there is no necessity for it at all, so long as the witness can be found and retains a deposing memory. If such a rule were to obtain, as it does in some of the States, by express legislation, and, in others, by rules of court, it would seem to be indispensable, in order to prevent frequent cases of surprise, that a party, intending to read any of his adversary's cast-off depositions, should make his election to do so known, a sufficient time before the trial, to allow his adversary to procure evidence, if desired, to discredit the witness, or repel his testimony. It is true that it may be well said, that there is no more hardship in holding a party to a deposition that proves to be against him, than in holding him to the testimony of a witness who has been

foisted upon him in the witness box; but, to allow the opposite party to read such a deposition, is to say much more than that; because it is to say, that a party is not only to be held to such testimony at the one trial, but also at all future trials; which is not the rule as to the witness, who testifies in the witness box. So it may be said that a party may always make out his own case, if he can, by means of his adversary's witness; but this is true only of the trial in progress, and it does not follow, from that, that his adversary has to furnish like testimony for another trial, and that, too, at the sacrifice of his own common law right of cross-examination.

To suppose that it was the intention of the Legislature to place either party, in reference to evidence taken by deposition, in a more advantageous position than the same party would be in, if the witness was actually present at the trial, is to suppose an absurdity; because that would be to suppose that the representative or shadow of the thing, which was tolerated merely because the thing could not be had, was designed to be greater than the thing itself, which was more desirable.

But, inasmuch as a party is to be held to the testimony of a witness, who is foisted upon him in the witness box, during that particular trial, should he not, in like manner, be held to a deposition for one trial at least? Unquestionably no; for the reason, that the deposition, although on file and published by order of court, is not in evidence in the cause.

When a party, by means of the process of the court, has procured a deposition, its filing and its publication have placed it in the custody of the law, to prevent its alteration; he has done nothing more towards the preparation for the trial of the facts of his case by the jury, than when, by process of the same court, he has procured the attendance of his witnesses, had then sworn, and placed in the custody of the sheriff, under the rule, that they may not be tampered with. Under such circumstances, in criminal cases, according to the English practice, the defendant might examine, as upon cross-examination, such of the king's witnesses

as were not put upon the stand. The preponderance of the American authorities, however, are against that practice; and, according to these, if the defendant desires to examine any of such witnesses, he must make them his own, and the State may then cross-examine them. *Austin vs. The State*, 14 *Ark. R.* 563.

DRENNEN VS. LINDSEY.

The statute authorizing either party to make a witness of the opposite party in suits before justices of the peace, ought to be so construed as to allow such privilege on the trial *de novo*, in the Circuit Court on an appeal from the justice.

But if either party shall call his adversary as a witness, he will not be allowed to disprove or impeach his testimony by calling other witnesses.

A witness may be discredited by proving that he has testified or stated differently in any material respect on some former occasion, but the witness should first be enquired of concerning such former statement.

Appeal from Lawrence Circuit Court.

Hon. B. H. NEELY, Circuit Judge.

FAIRCHILD, for the appellant.

BYERS & PATTERSON, contra.

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

This suit was originally commenced before a justice of the peace, by Lindsey against Drennen, and on the trial in the justice's court, the plaintiff, in order to make out his case, called upon the defendant to testify as a witness, and he was required to do so,

under the statutory provision to that effect. *Digest, title Justices of the Peace, sec.* 108. Judgment being given against the defendant, he appealed, and on the trial *de novo* in the Circuit Court, the plaintiff, against the objection of the defendant, introduced, as a witness, the justice, before whom the case had been tried, and was allowed to prove by him what he understood the defendant to have admitted, when so testifying as a witness, at the call of the opposite party. And, thereupon, against the objection of the defendant, he was also required, at the instance of the plaintiff, to testify in the cause, on the trial *de novo* in the Circuit Court.

Although the statute, before referred to, enabling either party to make a witness of the adverse party to establish the demand sued for, or set off, and in a case of default when summoned, or refusal to testify, allowing the claimant of such demand or set off to be sworn as a witness in his own behalf, to establish the same, is applicable in terms to suits before justices of the peace, and not to suits originating in the Circuit Court, the statute, in our opinion, ought to be so construed that the privilege of calling the adverse party, attaching to suits commenced before justices of the peace respecting matters of contract with its consequences, adheres to and follows them into the Circuit Court, when removed there by appeal for trial *de novo*, upon the same cause of action and set off, if any, which was tried before the justice. All the reasons continue to exist why that class of cases, inconsiderable as to the amount involved in controversy, should be cheaply and expeditiously tried, with as little regard to forms of pleading, and in as summary manner as can be done, consistently with the due administration of justice. That practice may be regarded, to some extent, as a substitute for the attainment of the same end by petition for discovery, and to obviate the expense and delay usually attending such a proceeding.

But it seems clear, in this particular case, that an error was committed one way or the other against the appellant; and seeing that according to our view of the matter, the plaintiff, on the appeal

of the defendant, had the same right, and to the same extent, of calling him as a witness on the trial in the Circuit Court, which he had and availed himself of, before the justice, it follows that the plaintiff, still wishing to use the testimony of the defendant for any purpose, was bound to call him as the original and best evidence, and make an effort to produce his attendance as a witness, instead of resorting to proof of his statements or admissions on the previous trial. It might be different, if the defendant in the mean time had died, or for any other recognized disability it had become impossible for the plaintiff to have him sworn on the second trial, and in such case no doubt his testimony might be reproduced, like that of any other deceased, insane or absent witness, by proof according to established rules of what he testified on the former trial.

Moreover, the statute in question, making partial change in the law of evidence, has some peculiar features. Though it may be supposed the privilege would be seldom refused, neither party has the absolute right to call the other as a witness, but may be allowed to do so in the discretion of the justice or court, if no evidence be given to establish the demand or set-off in controversy, or if the evidence given be insufficient for that purpose. If the party called upon refuse to testify or make default, when summoned as a witness, the demand or-set off is not admitted, but the party claiming it is permitted to establish it by his own testimony; and if either party, called upon, does testify, the statute is express, that, after his examination, no further evidence shall be given in relation to such demand or set-off." That is to say, the plaintiff or both plaintiff and defendant in turn, if a set-off be filed, may make a witness of the other; but when he does so, it is an election to rest his side of the case upon the testimony of the adverse party, which he is not allowed to disprove or impeach by calling other witnesses. The perjury of such a witness may be a public offence, but for the purposes of the civil suit, he is not to be discredited by the party calling him to testify. A witness may be discredited by proving that he has testified or

stated differently, in any material respect, on some former occasion, but in order to do this, according to the rules of evidence, it is necessary that the witness should be enquired of concerning such former statement, and with sufficient certainty of specification to direct his attention to them. Here, the defendant, when examined in the Circuit Court, was not interrogated about any statements made by him on the first trial or on any previous occasion. Even if it had been allowable, under the statute, for the plaintiff to discredit his own witness, that has been the indirect result of the proceeding complained of, and regarding the defendant as a witness, and not as a party, he would stand contradicted by proof of his fomer statements, about which he was not interrogated, and had no opportunity to explain or justify.

It becomes unnecessary to go into a detailed statement of the plaintiff's cause of action, and the evidence by which it was sought to be established. It is sufficient to say, that, leaving out of view the objectionable testimony of the justice of the peace, as to his understanding of the defendant's admissions on the trial of the cause, before him sitting as a jury, we are unable, after a careful examination of the bill of exceptions, to find any satisfactory evidence conducing to show what interest, if any, the plaintiff had in the subject matter of the alleged contract, or that the defendant ever promised to pay him the sum of money charged in the account, or that there was any consideration for such promise.

The judgment will be reversed, and the cause remanded, with instruction to sustain the motion of the defendant for new trial.

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PATRICK VS. DAVIS.

Although a collector execute, deliver, and acknowledge, to a purchaser of land at tax sale, a deed containing recitals of every pre-requisite prescribed by the statute, yet, if the land was misdescribed in the advertisement of the tax sale, the owner is not divested of his title and estate in the land.

Appeal from St. Francis Circuit Court.

Hon. CHARLES W. ADAMS, Circuit Judge.

PIKE & CUMMINS, for the appellant. We submit that the purchaser, at a tax sale, cannot be disturbed by reason of any irregularity here alleged: that the sheriff's deed is conclusive. *Secs.* 112, 113, *ch.* 139, *Rev. Stat.; Pillow vs. Roberts*, 7 *Ark.* 822; *Newton vs. State Bank*, 14 *Ark.*

Mr. Justice SCOTT delivered the opinion of the Court.

In opening and examining this record, we were forcibly and very favorably impressed with the lawyer-like manner in which this case was gotten up, and is presented for our decision by the united professional skill of the learned court and counsel.

It was an action of ejectment by Patrick, who claimed the land in controversy, under sheriff's deed, made on a sale for taxes against Davis, the patentee and owner. The cause was tried and determined upon the general issue, (before the Hon. CHARLES W. ADAMS, Judge,) in the St. Francis Circuit Court, the parties having waived a trial by jury, and requested the court to find the facts as on special verdict, which was done.

From this, it appears, that the lands were patented to the defendant, Davis, who has held possession of them ever since. That, up to the 24th of December, 1850, he was a non-resident of the

State of Arkansas. That, in the year 1849, the lands were regularly listed for taxation in his name, and the State and county taxes duly assessed upon them in the county of St. Francis, where they are situated. That the taxes, so assessed, not having been paid, the collector attempted to advertise these lands for sale in pursuance of the statute, but described them as being situated in range number three *east*, instead of three *west*, their true description. In other respects, the advertisement conformed to the provisions of the statute. That the defendant had a resident agent in St. Francis county, authorized to pay the taxes in question, who, in due season, before the lands were advertised, applied to the collector to pay them, but was informed by that officer that the lands had been omitted to be listed and assessed for that year, and would be double taxed the ensuing year. That afterwards, when this advertisement appeared, this agent again called on the collector, and pointing out the mistake, was informed by that officer, that for the reason of this error the lands would not be offered for sale as advertised; and, in consequence, the agent did not attend the sale. That, nevertheless, at the time and place advertised, the collector did offer the lands described in the patents, and so misdescribed in his advertisement, and the plaintiff became the purchaser at the price set out in the deeds. That, in pursuance of that sale, the plaintiff received the usual certificate of purchase for the lands correctly described, kept them for a period beyond one year, and then, upon presenting them to the collector, received in exchange deeds for the lands in controversy; which are set out *in hæc verba*, and were duly acknowledged and recorded. These deeds do not in any way exhibit the misdescription of the lands in the advertisement; but, on the contrary, recite, among other things, that the collector "did proceed to advertise, and give at least thirty days' previous notice, according to law, that he would sell, &c., the said tracts of land," &c., the lands having been correctly described in a previous recital contained in the deeds. It also was found that the defendant owned no other lands, in St. Francis county, than those described in his

patents and in the declaration, and that he was in the possession of them at the time of the service of the writ. Upon this state of facts, the court being of opinion that the law was for the defendant—to which opinion the plaintiff excepted, and took his bill of exceptions—the finding, as upon special verdict, was in accordance with this opinion of the court. And final judgment having been rendered upon this finding for the defendant, the plaintiff appealed to this court.

The appellant's counsel submit that, under our revenue laws, it was the intention of the Legislature to place the validity of tax sales upon the same footing with execution sales under the authority of the Circuit Court; and that inasmuch as, in the latter class of cases, the want of actual advertisement, when returned by the sheriff as having been made, (*Newton vs. The State Bank*, 14 *Ark. R.* 9,) cannot be urged against an innocent purchaser, the only redress in either case should be through a proceeding against the officer for any damage which may have resulted from his negligence.

It has long been the prevailing doctrine, as was remarked in the case of *Merrick & Fenno vs. Hutt*, decided at the present term, that to divest the owner of his title and estate in lands, by a sale for taxes, it is necessary that it should be shown that every substantial step, prescribed by the statute, had preceded the sale. This was the principle of law recognized and applied by this court, in the case of *Hogins vs. Brashears*, 13 *Ark. R.* 242, and which had been almost universally recognized both in the Federal and in the State Courts. So much so, that it cannot but be presumed, that it was within the knowledge of the Legislature, at the time of the enactment of our revenue laws. Indeed, some of the provisions of these laws indicate that they were enacted in direct reference to a recognition of this doctrine. Thus, in the warrant to be attached to the tax books, the form of which is prescribed, (*Digest, ch.* 139, *sec.* 40,) if taxes are not paid within ten days after being demanded, the collector is affirmatively "commanded to levy and make the same, or the part remaining unpaid,

with costs, in the manner and by the proceedings prescribed by law," &c., and the same mandate is negatively repeated in the provisions of the 48th section, that this levy and sale shall be made in the same manner as under judgments and executions at law, "when not inconsistent with the provisions of this act." And then the further provision is made in the 113*th section*, that no exceptions shall be taken to any deed, which, by other regulations, is to contain a recital of these proceedings, "but such as shall apply to the real merits of the case, and are consistent with a fair interpretation of the intention of the General Assembly." Indicating, when taken together, not only a recognition of the doctrine in question, but enacting a modification of it, on a point where the drift of the decisions of the courts had practically made it objectionable, by the double error of a too ready ear to trivial matters of non-conformity to the statute, and the failure to discriminate between those matters, which are really conditions precedent to the validity of the sale, and those which are directory merely, and designed for the information of the officers and to promote method, saystem and uniformity, in the mode of proceeding. And in the same category may be included that capital provision of the statute, according with the legislation of several of the States, which, when the deed is regular upon its face, reverses the *onus probandi*, and subjects the tax title, when thus sustained, to be overthrown, only by proof of a non-conformity in the proceedings to some one of the substantial prerequisites to the sale.

True, the Legislature had equal authority to abolish the doctrine in question as to modify it; but it would only be that character of modification which would be inconsistent with the doctrine itself, that would work its abolition by implication, in the absence of express legislation.

If this doctrine rested upon the simple ground, that the power in question was a naked power — not coupled with an interest, then there would be more room, both for question as to its soundness, and for plausibility in the position assumed for the appel-

lant; because, in this respect, it does not perhaps differ at all from the sheriff's power, when selling land under execution from the Circuit Court; but it rests upon a much wider and more solid legal basis. Not only is it, in its nature, a special and limited power, but its operation is penal, in a summary manner, out of the cause of the common law, and against common right, and there are, therefore, at least three concurring, though distinct, legal reasons, why it should be strictly pursued. Such a power is as much a special one, as that vested in militia officers and courts marshal, to enforce the performance of military duty; and the obligations of the citizen to pay taxes and render military services, grow out of the same political contract. It is created by the statute, and the mode of its exercise specifically pointed out in a course different from that of the common law. It provides the resident tax payer no day in court upon the important question, whether or not he has neglected or refused to pay within ten days after demand; and it is upon this only that he can be put in default, and that the right to levy upon and sell his land, arises. It is, therefore, strongly against common right. If his land is sold, it is not because any court has adjudged him in default, but because a ministerial officer, in the double capacity of judge and witness, has passed upon his case *ex parte*.

If, as against a purchaser, at a collector's sale, all inquiry is cut off as to the advertisement, and the injured party turned over to the officer for redress, upon the principle contended for, the like would be the result as to the fact of refusal to pay within the ten days after demand, and as to all the other acts *in pais*. And if this rule is to prevail, it would seem that the collector's bond, unless greatly enlarged in amount beyond double the sum of the State and county taxes, would be a very inadequate security for the land owners of a county, against all of whose lands he would annually have process of execution; while the sheriff would not perhaps have like process against an equal quantity of land within a half century.

Such a power, as that defined for the collector of taxes by the

current of authority, lives only in the authoritative acts prescribed to be done by him—the power to do the succeeding act arising from his having authoritatively done the preceding one. When, therefore, one of these acts is omitted, the chain of his power is broken, and he having no general authority to invoke, to sustain any subsequent act, it is necessarily without power.

Not so, however, with the power of a sheriff, when selling land under a valid execution, issued from a Circuit Court upon a subsisting unsatisfied judgment of that court; because his power lives not only in his acts prescribed to be done by the statute, but in the judgment and execution concurrent with the statutory regulations for its exercise. These regulations prescribe the form of the process of execution, and the mode in which execution shall be done, and, in doing so, recognize and authenticate, at the same time, that they, to some degree, extend the inherent constitutional power of the Circuit Court to execute its own judgments. When, therefore, in doing execution, a sheriff should deviate from the mode prescribed by the statute, although to this extent the proceedings would be erroneous, there could not be any absolute defect of power, because his act would still be within the scope of the general constitutional powers of the court under whose authority he acts. Not unlike some of the acts of an executor, which, although not in conformity to the provisions of the statute regulating his duties, would nevertheless be upheld, because of his authority being derived from the testator and living in his will, although the statute prescribes the mode of its probate, the form of the grant of letters testamentary, and makes regulations for his representative action. These provisions of the statute being but in recognition and authentication of the power conferred by the will, the exercise of which they also regulate.

But, however well or ill-founded in legal reason this doctrine may be, it was too well established by the almost uniform current of decisions to have escaped the notice of the Legislature; and if it had been the intention to overturn it by our revenue laws, instead of simply modifying it on those points, where its

practical operation had pressed most severely against the validity of sales, it is fair to presume there would have been a far more distinct intimation of the legislative will to this effect, than can be gathered from any fair construction of the various provisions made. Indeed, some of these strongly indicate the contrary, as those made by the 91st and 92d sections of the law, which, after providing that the deeds for lands of residents sold for taxes shall be executed and acknowledged in the same manner as deeds are made for lands sold under execution, enacts that "such deed shall vest in the grantee, his heirs and assigns, a good and valid title, both in law and equity, and shall be evidence of the legality and regularity of the sale of such land, until the contrary be made to appear." *Sec.* 92. So, also, the 113*th section* provides that, "No exception shall be taken to any deed made by the collector for lands sold for taxes, but such as shall apply to the real merits of the case, and are consistent with a fair and liberal interpretation of the intention of the General Assembly." While the provisions, as to sheriff's deeds for land sold under execution, are simply that when acknowledged, or proved, and recorded, they shall be evidence, without further proof, (*Digest, ch.* 67, *sec.* 64,) and that the recitals contained in them, shall be evidence of the facts recited, (*id., sec.* 60,) without further verbiage. Although this discrepancy may have no very strong legal bearing, it may, nevertheless, be regarded as one of the signs, by which the true intention of the Legislature, as to the doctrine in question, may be arrived at. The principal evil of the doctrine, as it originally stood, was the difficulty, amounting almost to impracticability after the lapse of a few years, of the purchaser establishing, by proof, the various acts *in pais* of the collector, upon which the validity of his deed depended. That has been remedied in our revenue laws, by the provisions of the 92*d* and 112*th sections*, making the deeds, when regular upon their face, evidence of the regularity of the proceedings, and thus casting the *onus probandi* upon the party who questions the validity of the sale. Another evil was, that the invalidity of the sale was often declared, upon grounds of

trivial nonconformity of the proceedings to the provisions of the law, which in no way touched the real merits of the case. For this, the 113*th section* provides a remedy, in the provision that such objections shall not be allowed.

The objection in the case before us—which is substantially, as is in effect conceded by the counsel, a failure to advertise the lands for sale—makes it necessary that we should ascertain whether this nonconformity with the provisions of the statute, requiring that the lands should be advertised, is cured by the last cited section of the revenue law.

It may be stated, as a reasonable proposition, that all those provisions of the statute, which are mere regulations of business, designed for the information of the assessors and collectors, the county court, and the auditor, in the routine of their respective duties, touching the revenue, and intended to promote method, system and uniformity, in the mode of proceeding, the noncompliance with which can, in no respect, injuriously affect the individual rights or interest of the tax-paying citizen, cannot be said to touch the merits of any case he may make against the validity of a sale of his lands for taxes. Whereas, all those provisions, which are intended, or which may be of a character to operate practically, for his protection, security or benefit, the noncompliance with which would consequently be likely so to affect such rights or interest, would, without doubt, be of the merits of such a case. The former class of regulations may be, therefore, well regarded as purely directory, the noncompliance with which, although subjecting the recusant officer to legal animadversion, would not invalidate the sale; while the latter class may, with equal reason, be regarded as conditions precedent to the legality and validity of the sale. It was to enforce this plain, and, to some extent recognized, distinction, (*Torry vs. Millbury*, 21 *Pick. R.* 67; *Brainard et al. vs. Con. River Rail Road Co.*, 7 *Cush. R.* 505,) and to suppress the mischief which had resulted from its having been too often overlooked, doubtless, that our Legislature

enacted the 113*th section*, and which disallows objections for non conformity of the former class.

From this exposition of the law, it is plain that the objection in question is fatal. The advertisement, required by the Legislature, had too capital objects in view. 1st, To apprise the owner of the property; and 2d, To give notice to persons desirous of purchasing. Both objects are of importance. It is necessary for the interest of the owner, that he should be informed of a proceeding, which, unless arrested by the payment of the tax, would divest him of his property. And it was of equal, if not greater importance, that the property should be so accurately and definitely described that no purchaser could be at a loss to ascertain its situation and estimate its value. In the case of *Roukendorff vs. Taylor's Lessee*, 4 *Peters R.* 373, it was held that although all this information should be given to the purchaser at the sale, "yet the sale would be void unless the same information had been communicated to the public in the notice. Its defects, if any exist in the description of the property to be sold, cannot be cured by any communication made to bidders, on the day of the sale, by the auctioneer." In all the cases we have examined, where the question has arisen, it has been uniformely held, that a misdescription of the land in the advertisement, is fatal. And, in this State, there is an additional reason, that it should be so held, in the fact, that under our laws, lands may be as well assessed, taxed, and sold in the name of a stranger, as in that of the true owner. *Revenue Law, sec.* 115.

Besides this fatal objection, facts were found in this case strongly tending to show fraud in the officer making this sale.

The judgment will be affirmed.

DICKINSON ET AL. VS. BURR.

The obligor, or maker of assignable paper, being notified that one or more of the assignments, through which a plaintiff deduces his title to the instrument, are forged, ought, for his own protection, as against the true owner, to interpose the defence; but he cannot deny the assignment for any purpose, so as to put the plaintiff on proof of it, unless the plea be supported by the kind of affidavit prescribed by the statute.

The assignment of a writing obligatory to an agent for collection, does not divest the assignor of his interest in the instrument; but is merely an authority to the agent to receive payment: and the assignor, in such case, may sue in his own name, striking out or disregarding the assignment, or show that the endorsement was merely for collection, where no injury would result to the defendant. *Block vs. Walker*, approved: *contra*, *Brown vs. Purdy & Taylor*, 4 *Ark.* 535.

Although it is irregular to permit a party to read a paper referred to in the depositions taken by the opposite party, but not made a part thereof, yet if it is only corroborative of other competent testimony, it is not ground of new trial.

Appeal from Jackson Circuit Court.

Hon. B. H. NEELY, Circuit Judge.

BYERS & PATTERSON, and JORDAN, for appellants.

FOWLER and FAIRCHILD, contra.

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

This cause was before this court at the January Term, 1846, reported in 2 *Eng.* 34, on appeal from Independence Circuit Court, and the venue, after the remanding of the cause, being changed to the county of Jackson, it was there finally tried and determined, upon the amended declaration filed by the plaintiff, Burr,

such of the previous pleas as were adjudged good by the decision referred to, and certain additional pleas interposed by the defendant, Ruddell. It will only be necessary to state so much of the proceedings as will explain the points argued and relied upon for the appellants in this court.

Burr was the payee of the two covenants sued on, which were executed by the defendants for certain sums of money to be paid in Arkansas funds, and he claimed title to them by virtue of his assignment to John Ringgold, and a re-assignment of them from John Ringgold to him. Among the additional defences interposed by Ruddell, were two pleas denying the assignment and delivery of the covenants in question, from Burr to Ringgold, as alleged in the declaration. To these pleas, was appended an affidavit, to the effect that they were true in substance and in fact. On the plaintiff's motion, they were stricken from the files, upon the ground, that the affidavit was not in conformity with the statute, which provides that the assignee, suing upon assigned paper, shall not be required to prove the assignment, "unless the defendant shall annex to his plea, an affidavit denying such assignment, and stating in such affidavit, that he verily believes that one or more of the assignments on such instrument of writing was forged." We may suppose it to have been the intention of this statute to make the possession of any assignable instrument, purporting to be regularly assigned, a sufficient authority to justify the obligor in paying it to the assignee, or recognizing him as the holder, except in case that any of the assignments, through which the holder derives title, are forged. In such case, the obligor, leaving out of view the question whether he is, or is not, required in every instance to inform himself of the genuineness of the assignments, if notified of the forgery, would be bound, for his own protection, as against the true owner, to interpose the defence in the manner required by the statute. With that exception, which is a reasonable one, the policy of the law is not merely to relieve the plaintiff from the necessity of making certain proofs, but to exempt and separate the obligor from contro-

versies between intermediate holders, respecting the validity or consideration of any one or more of the contracts of assignment, to which he is a stranger, thus leaving any such party aggrieved to pursue his own appropriate remedy. But it is not necessary to decide here, that the defence of the obligor, when sued by an assignee, is restricted to cases where an assignment, from or through which the plaintiff claims title, proves to be a forgery, and that the defendant has no further concern about the derivative title of the plaintiff; because, whatever may be the reason of the statute, the construction to be given to it is unavoidable that the defendants below, in the present suit, were precluded from denying the assignment for any purpose, so as to put the plaintiff on proof of it, unless the plea be supported by the kind of affidavit prescribed. The defendants also pleaded, in substance, that the plaintiff had assigned and delivered the writings obligatory in question to the Bank of the State of Arkansas, whereby they became liable to pay the same to the Bank, and the plaintiff, at the time of the commencement of the suit, had no interest in them whatever; the plea being according to the precedent in *Block vs. Walker*, 2 *Ark.* 4, followed and adhered to in subsequent cases. The plaintiff replied traversing the fact of the assignment and delivery to the Bank, as alleged in the plea. This, with other issues, was submitted to the jury, who found for the plaintiff; and the case being considered as if no exceptions were taken during the progress of the trial to admissibility of evidence or instructions of the court, the only question upon the motion for new trial, is whether the verdict was warranted by the evidence.

It appears, that, before the obligations fell due, Burr deposited them with the Branch Bank at Batesville, of which Mr. Ringgold was cashier, for collection; and, for that purpose merely, the Bank having no beneficial interest in them. Instead of endorsing the paper in blank, as was customary with notes left for collection, Burr made his endorsement a special one: "To the order of J. Ringgold, Cash." Shortly after protest, Mr. Ringgold, with the approbation of Burr, received a partial payment in Arkansas

Bank notes, for which he transmitted a certificate of deposit to a firm in New Orleans, by direction of Burr. No further payments being made, the cashier subsequently re-delivered the writings obligatory to Burr, to whom they belonged, and who settled with the Bank the notarial fees and commissions for collecting. In June, 1843, Mr. Ringgold ceased to be cashier, under the liquidation act passed at the session of 1842, and was succeeded by another person, who took charge of the assets of the Bank under the title of Financial Receiver. In August, 1843, Burr struck out his endorsement to J. Ringgold, cashier; but, at some subsequent time, called upon Ringgold to re-assign the writings obligatory to him, which was done before the commencement of the present suit.

The record shows that the only contest, upon the merits of the case in the court below, was in regard to the amount of various partial payments in money and property, made by the defendants to the plaintiff, after the writings obligatory had been re-delivered to him by the Bank, and which it is to be presumed was satisfactorily settled by the jury; so that the judgment belongs to that class, which appearing to be right upon the whole record, ought not to be reversed, because of the refusal of the court below to grant a new trial.

But, in consequence of the decision in *Brown vs. Purdy & Taylor*, 4 *Ark.* 535, summarily disposed of, on the authotity of *Block vs. Walker*, it becomes necessary to notice those cases to which may be attributed the evident doubt and perplexity of the plaintiff, about the proper course to pursue, in order to recover for a breach of the contracts in question. The foundation, on which the decision in *Block vs. Walker* rests, is, that under the statute of assignments, the assignee, having the legal title and right of action, may, and must sue, and cannot sue in the name of any assignor, because it might have the effect to deprive the obligor or maker of the assigned instrument of the benefit of any equitable discounts or off-sets, or other defence he might have interposed against the last assignee, who should have been plaintiff in

the suit, and which defences are reserved to the maker or obligor by the terms of the statute. But in *Brown vs. Purdy & Taylor*, where, to a plea, like that in *Block vs. Walker*, the plaintiff replied that the note, upon which he brought suit, had been endorsed as alleged in the plea, but without any consideration, and for the purpose of collection merely, and was delivered to the endorsee as the plaintiff's agent, and that he thereby acquired no beneficial interest in it whatever, with a traverse of the allegation in the plea, that the plaintiff had assigned all his interest in the note to the person named, and had no interest in the same at the time of suit brought. The court held the replication to be no answer to the plea; because the assignor would only have been invested with the legal interest by a re-assignment, and that so long as the assignment from the plaintiff remained upon the note, no evidence was competent to show the legal interest to be in him. We are constrained to express our dissatisfaction with that case, and think a distinction is to be taken between it and *Block vs. Walker*, upon which it was made to rest. No doubt an assignment to an agent for collection, is an authority to him to receive payment and give a valid acquittance, as an agent may do any other act within the scope of his authority. In that view, the assignment to an agent is the same as if the owner of the paper had assigned it to himself, and a payment to the agent is a payment to the principal. The statute, which secures to the maker certain defences against the assignee, must intend that he is such assignee as acquired some beneficial interest in the assigned paper. Because, if he acted as agent, without deception or concealment, there is no reason why, as against him, the defendant should have any vested right of set-off, which he already has against the principal, and of which he could not be divested by any mere colorable assignment to an agent, or any third person without consideration, and for the purpose of cutting off some equitable defence. True the assignee, through an agent, may be *prima facie* the owner of the claim, and having the legal right may recover in his own name, when it would not operate to the

prejudice of the defendant, having just defences against the principal. But we are at a loss to understand why the principal may not sue in his own name, striking out or disregarding his endorsement to an agent; or why he should not be permitted to show that such was the nature of his endorsement in any case, where no injury would result from it to the defendant. The gist of the special plea in *Block vs. Walker*, as in the present case, assuming the facts pleaded to be true, is not that the plaintiff assigned the paper, because, before suit brought, it might have come to him again by assignment; but it is, that by such assignment, the plaintiff had parted with his title to the instrument, so that he had no interest in it at the commencement of the action. Here the issue was, whether there had been such an assignment from the plaintiff to the Bank; and the proof abundantly shows that it was properly found in favor of the plaintiff.

The defendants below reserved an exception to the ruling of the court, allowing the plaintiff to read in evidence a letter or memorandum from the cashier, addressed to Mr. Burr, in October, 1841, apprising him of the state of the business, the amount collected, &c., and the amount he owed the Bank for fees and commission. Mr. Ringgold had alluded to this letter in his deposition, given on behalf of the defendants, but without incorporating or making it a part of the deposition as an exhibit. In point of law, the ruling of the court may have been irregular, but as a ground for new trial, the objection is not entitled to serious consideration. The letter was only confirmatory of other competent testimony in the case, and the admission or rejection of it, either way, could not materially affect the result. Affirmed.

PRINCE, CHACE & CO. VS. THOMAS.

The defendant proposed to the plaintiffs to repair his carriage, and enquired as to the cost, and terms of payment: the plaintiffs replied that it would not cost less than $125, nor more than $150; and that the terms were cash, or 12 months credit, if he gave his note: the work was commenced, but the carriage taken away before it was quite completed, and no offer to give the note: HELD, That there was no special contract; but if so, it was abandoned by the parties; and that the plaintiffs were entitled to recover the fair value of the repairs actually put upon the carriage, upon its completion or acceptance by the defendant.

Appeal from Ouachita Circuit Court.

The Hon. SHELTON WATSON, Circuit Judge.

PIKE & CUMMINS, for appellant. If there was any proof of an agreement for time, that agreement was dependant on an act of defendant—the giving his note, which was not done. This failure annulled the contract for time, and the money became payable on completion of the work. *Ch. Con.* 375; *Russell vs. Minor*, 22 *Wend.* 659; *Lupin et. al. vs., Marie et. al.* 6 *Wend.* 77; 2 *Hall* 345; 17 *Pick.* 606.

There was no acceptance of the proposition for time; and therefore there never was any such contract. *Ch. Con.* 12, 13.

CURRAN, for the defendant. The only and true point was, whether the action was not prematurely brought. It is true that one of the witnesses testified that Thomas was to give a note; but the second instruction gave the plaintiffs the full benefit of that evidence. The jury decided that the debt was not due till the 1st January, and that defendant was not to give a note. The evidence clearly justified them in that conclusion, and it was their province to decide upon the conflict of testimony.

MR. Chief Justice WATKINS delivered the opinion of the Court

The declaration in this case contained the common counts in indebitatus assumpsit, for work and labor, and materials bestowed in the repairing of a carriage, for the defendant. The evidence conduced to show the following state of facts: that the defendant, having a carriage out of repair, proposed to the plaintiffs to put in repair, and inquired of them what it would cost; to which they answered, that it would cost him not less than one hundred and twenty-five, nor more than one hundred and fifty dollars. The defendant then inquired what were the terms of payment, and was told that the usual terms were cash, upon the completion of the work; but, if he would give his note, he could have twelve months credit: and the understanding of the plaintiffs was, that such note would bear interest, though that was not so expressed at any time in the presence of the defendant. The defendant then told them to take the carriage, and they accordingly removed it to their shop, to be repaired. Before the repairs were quite completed, that is, the carriage, lacking about fifteen or twenty dollars worth of work of being finished, but being in good running order, the defendant came to the shop, where the plaintiffs were, examined the work, expressed himself entirely satisfied with it, took away the carriage, and used it, and offered it for sale. No reason is shown why the work was not finished. For aught that appears, the carriage was taken away with the consent of the plaintiffs. They made no objection to its removal. Nothing was said, then or afterwards, about the defendant giving his note or entitled to any credit. No request or demand was made upon the defendant to give his note, but the plaintiffs immediately brought suit for the amount of the repairs, which were variously estimated by the witnesses to be worth from $85 to $120. The court below refused to give two instructions asked for by the plaintiffs, predicated upon the supposition, that a special contract had been proved to do the repairs for an agreed price, and that in such case no evidence was admissible to reduce the

verdict below the price agreed upon, unless to show that the repairs were not done in a workman-like manner. The court gave an instruction, on their motion to the effect, that, if the jury believed the defendant agreed to give his note for the work done upon the carriage on the completion, and he failed or refused to do so, when the work was completed, the amount agreed to be paid for the repairs became due at once, and that the burthen of proof was upon the defendant to show that he either gave such note or offered to do so, and the plaintiffs refused to receive it. The jury returned a verdict for the defendant, stating in it, for some unaccountable reason, that they found for him, under the instructions of the court. The case comes up on exceptions to the decision of the court refusing to grant a new trial, moved for upon the grounds that the court had erred in refusing to give the instructions asked for on behalf of the plaintiffs, and that the verdict was against evidence.

The verdict can be sustained only on the supposition that the jury believed the plaintiffs had agreed to do the work on a credit, and without requiring any note to be given for the price, and therefore the action was prematurely brought; of which there was some, but very slight evidence, depending on the statement of one of the plaintiffs in a casual conversation with a witness. Our impression of the evidence, is, that no special contract was established. The conversation amounted to no more than an assurance to the defendant that the repairs would not cost him beyond a certain sum. Nor did the defendant say or do anything clearly indicative of his acceptance of either alternative, to pay cash on completion of the work, or obtain credit, by giving a note. And if there was any special agreement, it was abandoned by the acts of each party; the defendant in accepting the carriage before the repairs were completed, and the plaintiffs by delivering it to him, without asking for the note. Notwithstanding what may have been said between the parties, the only construction to be put upon their conduct is, that they finally concluded to place the matter on the footing of a common undertaking to do the repairs for a reasonable compensation, and which would ordinarily

be due and payable on the completion of the work, or its acceptance by the defendant. The form of the declaration precluded the court from giving any such instructions as those which were rightly refused; and the instruction given was improper, because inapplicable to the case made by the evidence; so that the correctness of it, in the abstract, need not be considered. Nevertheless, the verdict was wrong, and the court ought to have granted a new trial, because, according to any reasonable view of the testimony, taking it all as true, the plaintiffs were entitled to recover the fair value of the repairs actually put upon the carriage. Reversed.

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MOSS VS. SANDEFUR, EX.

It was the intention of the Legislature (*secs.* 46, 47, 48, *ch.* 4, *Dig.*) to invest the Probate Court with jurisdiction to compel a discovery on oath, &c., where persons were intrusted, in the lifetime of the deceased, with custody of his effects, or at or about the time of his death, or soon afterwards, they come into their possession either casually or by design, and they continue to hold the same quietly and secretly, without color of lawful authority; but not to invest the Probate Court with jurisdiction of contested rights, and matters of litigation, as to the title to property, between the executor or administrator and others.

PIKE & CUMMINS, for the appellant. The civil rights of a slave were merged in the master. Any donation or conveyance of property to a slave, which the master chooses to accept, vests alone in the owner. 1 *Bla. Com.* 424; 1 *Domat's Civil Law*, *p.* 143, *art.* 1. *sec.* 97; 4 *Dessau.* 266, 267. Property found by a negro, vests in the owner. 1 *Stewart Rep.* 320; 9 *Ala.* 271; 2 *Pick.* 424.

The Probate Court had no jurisdiction. In any event, the

claim was an ordinary one for money had and received, and not a proceeding for specific property. *Art.* 6, *sec.* 10, *Const.; ch.* 48, *sec.* 5, *Rev. Stat.*

CURRAN & GALLAGHER, contra. There can be no question but what the Probate Court had jurisdiction. That the statute is constitutional, see *Welch vs. Lloyd*, 5 *Ark. Rep.* 369. The petition and affidavit bring the case within the statute. (*Dig.*, *ch.* 4, *sec.* 46,) and case cited.

Mr. Justice SCOTT delivered the opinion of the Court.

This cause was brought here by appeal, from a judgment of the Circuit Court of Hempstead county, affirming a judgment of the Probate Court, in the matter of a summary proceeding against the appellant, at the suit of the appellee, as the executor of James H. Dunn, deceased, under the provisions of the statute authorizing the Probate Court, in certain cases, upon complaint of embezzlement or concealment, to cause the party implicated to come before the court and discover on oath, and be further dealt with, if convicted. *Dig.*, *ch.* 4, *sec.* 46, 47, 48.

In the petition, which is verified in the manner prescribed by the statute, it is alleged that the petitioner "has been informed, and believes correctly, that James Moss has in possession, and has concealed money, belonging to the estate of the said James H. Dunn, deceased. Your petitioner, therefore prays," &c. Process of summons issued, commanding Moss to appear, and answer "a charge of concealing certain money, belonging to the estate," &c. The executor filed a number of interrogatories in writing, some of which were very general, to which he desired the answer of Moss. Moss appeared in obedience to the summons and filed his answer in writing, in response to these interrogatories the substance of which is as follows, to wit: That theretofore, there had been born of a certain negro woman slave, named Mourning, who was owned by, and is the property of, the heirs at law and distributees of James Moss, deceased, a female child,

named Eliza. That he had been informed, and believed it to be true, that James H. Dunn, in his lifetime, at divers times, and to divers persons, had admitted he was the father of Eliza, and recognized her as his child, and that he had made application to the heirs of James Moss, deceased, or to some of them, to purchase said child Eliza, that he might manumit her. That he had been informed, and believed it to be true, that said Dunn, in his lifetime, and some time before he made and published his last will and testament, "had given, delivered, and placed in the hands of said slave, Mourning," the sum of three hundred dollars, to be applied to the purchase and manumission of said child Eliza. That, several months before the death of Dunn, two months at least, —the said slave Mourning, at that time hired to and in the employment of said Dunn, brought to the respondent a sum of money in coin, which she said was three hundred dollars, and offered to leave the same in pledge with the respondent, as an indemnity against the death of said child, Eliza, which respondent had refused to permit said Dunn to take with her mother to Fulton, because, of the then unhealthiness of that place, and the jeopardy of the life of said child from that source. That, at the time of the death of Dunn, the slave Mourning was not hired to him (Dunn,) nor living with him; but was in the service of respondent. That Dunn died at Fulton, and respondent's residence at that time was some twenty miles from that place. That respondent went to Fulton, some five or six days, or a week after the death of Dunn, which was his first visit there after that event, and that was the first time, after that event, he had seen said slave Mourning; and said slave, at that time, placed into the hands of the respondent the sum of two hundred and eighty-two dollars, for safe-keeping. That this sum "is all the money that said slave ever gave to the respondent, for safe-keeping," "and that he now has and holds the same, for the use and benefit of him, her, or them, to whom it may pertain."

He denies that said slave Mourning took said sum, or any other sum, either from the store of the said Dunn, or from about

his person, either about the time of his death, or at any other time, without his (the said Dunn's) knowledge and consent. He denies that he, the respondent, "on the day of said Dunn's death, or at any other time, ever received any sum of money whatsoever, as he knows or believes, which belonged to, or was owned by Dunn, at the time of his death." "All of which said responses, allegations, and facts, in response to said general enquiries, this respondent avers and verily believes he can prove and establish, if permitted by the court, by competent and credible witnesses, except the offer of the said $300, as an indemnity for the life of said child Eliza."

Having thus responded to the interrogatories, he makes answer to the allegations contained in the petition, in the following terms, to wit: "That it is not true, that he has in his possession, nor has he, this respondent, concealed any money which belonged, or belongs to the estate of the said James H. Dunn; nor is it true, that the said John B. has been or is correctly informed in regard to the same, as he, in his said petition, has alleged; but it is true, and so this respondent avers the truth to be, that, at divers times, this respondent has conversed with the said John B., in regard to the said sum of money, so by this respondent received from the said slave Mourning, as above stated, and always informed the said John B., of the material facts in regard to the same, and never denied to him, or any one else, the fact that he had received from the said Mourning, the sum by him received as herein above stated and admitted."

He then denies the jurisdiction of the court in the premises, and insists that the remedy, if any, is in the Circuit Court; but submits that if the court retains jurisdiction, the law deducible from the facts is on the side of the respondent.

The entire response is verified by affidavit. Upon an inspection of the petition, interrogatories, and answers, as is stated in the record, that court was "of opinion that said sum properly belongs to the estate of the said James B. Dunn, deceased, and the record proceeds to state, "It is therefore considered, ordered,

and adjudged, that the said John B. Sandefur, as executor of the will of the said James H. Dunn, decased, have and recover of and from the said James Moss, the aforesaid sum of two hundred and eighty-two dollars, so admitted by him as aforesaid, and that the said Moss deliver the same up to the said John B. Sandefur, as such executor."

The appellant took a bill of exceptions, showing that the court overruled his objection to the jurisdiction in the premises, and upon the merits found and adjudged for the appellee.

It will be observed, that the appellant set up no claim to the money in question, either in his own right or in that of the heirs at law or distributees of James Moss, deceased; but averred that he had and held the same for the use and benefit of whomsoever it might rightfully belong to; and as the Probate Court adjudged no costs against him, it may be inferred that he was in that court regarded as presenting himself in the attitude of a stake-holder. Whether or not he was the legal representative of the estate of James Moss, deceased, or was one of the heirs at law, or distributees of that estate, does not appear. But, as the judgment of the Probate Court in this proceeding, where neither the legal representatives, nor the heirs at law, or distributees of James Moss, deceased, were parties, could not exonerate the appellant from a suit for the money in that behalf, wherein it would have to be determined what right these parties had to the money in question, upon the foundation of the ownership of the slave in question, the appellant would have sufficient interest in the controversy to authorize him to question the correctness of the proceedings and judgment.

The first and most important duty of an executor, or administrator, after his induction into office, is to collect, and take into his possession, and make and return an inventory of, the personal goods and chattels, moneys, books, and papers; and other evidences of debts belonging to the estate of his testator or intestate. And it was in aid of this duty, that the jurisdiction in question, un-

der which these proceedings were had, was invested in the Probate Courts.

This view of the provisions of the statute in question, was taken by the court in the case of *Welch vs. Lloyd*, (5 *Ark. R.* 370;) and is supported as well by the language used as by the context. In the original enactment, the sections of the statute cited above, as those under which these proceedings were had, and which passed under the notice of the court in the case cited, were numbered 47, 48, 49, and 50, in a consecutive series numbered from 42 to 56, inclusive, all exclusively upon the subject, and making numerous provisions for the collection, inventory, appraisement, and return of decedents' effects.

To aid in the performance of these important duties, the particular provisions in question invest the Probate Courts with authority to compel the attendance of persons charged, in the manner prescribed, either with concealing or embezzling any such effects, force them to make discovery on oath, and, if found unlawfully detaining any such effects, order their delivery to the executor or administrator entitled to receive them, and enforce obedience to the order by attachment.

The investment of such authority in these courts, was peculiarly appropriate in view of their functions in our Probate system, and doubtless the practical effects of its exercise have been altogether salutary, in all those cases, not of unfrequent occurence where persons, who have been intrusted, in the lifetime of the deceased, with custody of his effects, or who, at or about the time of his death, or soon afterwards, coming into their possession, either casually or by design, hold quietly and secretly, without color of lawful authority, and evading any discovery of the truth in the premises, either by direct means or studied silence; all with fraudulent views, stimulated by the difficulty or impossibility of proof, on the part of the executor or administrator, either of ownership or identity.

In cases where the executor or administrator may have had no knowledge of the affairs of the deceased, in his lifetime, he might,

by such means, be seriously obstructed in the performance of these important duties, and in proportion to his want of such knowledge, be hindered and baffled, and precisely in this ratio would the chances of escape from detection be increased, and such fraudulent designs stimulated. To meet such emergencies, the remedy adopted of forcing the moral offender who would rob the dead, to merge his moral into the criminal offence of outright perjury, or let go his unrighteous hold, cannot be without efficacy. Under its operation, the man of conscience, who may have quieted its voice, will hear it speak again in spite of him, when he approaches this open crime; and the hardened offender will at least calculate his chances of escape from the pains and penalties of perjury. When the authority in question is made to extend to the large class of cases, to which we have alluded, and the class must needs be large and infinitely various, because, fraud itself is "infinite," as remarked by Lord HARDWICK, in his letter to Lord KAIMES, manifesting itself as well in the suppression of the truth, as in the suggestion of a falsehood, it was a matter of sufficient importance, in point of mischief, to have attracted the attention of the Legislature, without supposing any regard whatsoever was had to the very questionable policy of turning into Probate Courts, from their accustomed channel, a great stream of litigation touching contested rights to personal chattels, which these courts from their constitution are so little calculated to sustain. Nothing short of a much more distinct and emphatic expression of the legislative will, to that effect, could authorize such a conclusion.

In our opinion, it is clear enough, from the obvious mischief, and the expressed remedy, when viewed in connection with the subject matter, and reasonable scope of the provisions made, that such was not the intention of the Legislature, but that it was to confine this jurisdiction to the class of cases above, which we have designated; or, at most, if it is to extend beyond to any case where the discovery required shows lawful color of adverse claim, either of possession or property, whether in the party ma-

king the discovery, or in a third person, it would be of that class of adverse claims which the Probate Court could properly authorize the executor or administrator to extinguish, for the benefit of the estate; such, for instance, as prior vested liens, like the inn-keeper's.

In the case before us, the discovery that was required, shows the money in question to be in such an equivocal attitude, as to be reasonably a subject of litigation between the executor, or administrator or distributees of James Moss, deceased, predicated upon the ownership of the slave, who deposited it, for safe keeping, in the hands of the respondent, and the executor of Dunn, who claims that it had been derived from his testator in his lifetime, or had been abstracted from his estate since his death, in some manner that did not divest his right to it. The case then, shown by the discovery, was not of either class to which the authority of the Probate Court to make the order of delivery, extended; and, therefore, the court erred in making that order.

The judgment of the Circuit Court must be reversed, and the cause remanded to that court, with instructions to reverse the judgment of the Probate, and enter up and certify to that court such a judgment as ought to have been entered up there. (*Dig.*, *ch.* 4 *sec.* 181, 182.

HERNDON VS. HIGGS, AD.

Under the statute of assignments, the maker of a note or obligation, being sued by an assignee, and having notice that one or more of the assignments are forged, ought, for his own justification, and the protection of the rights of the real owner, to interpose the defence.

But his position may be a hazardous one, and the defence at law not being complete, or adequate, he may elect to submit to judgment, and obtain relief in equity, by bringing all the parties in interest before the court.

And in such case, if the obligor has in good faith paid the debt to an intermediate assignor or holder of the instrument, he may pray for and obtain alternative relief, that the amount so paid be refunded to him in case it was wrongfully claimed and received by the person to whom he paid it.

After dissolution of an injunction, the complainant has the right to proceed with his suit to final hearing; and, upon a motion to dissolve, it is a gross irregularity for the court to render a final decree against the complainant, granting affirmative relief to a defendant who has filed no cross bill in the cause.

Appeal from Lafayette Circuit Court in Chancery.

Hon. SHELTON WATSON, Circuit Judge, presiding.

PIKE & CUMMINS, for appellant. After a cause is set for hearing and before a hearing, a party cannot by motion dismiss a bill for want of equity, because there may be a remedy at law. 14 *Ark.* 353.

Nothing but the facts on face of the bill can be considered here, and these facts show jurisdiction. 1 *Sto. Eq., sec.* 28, 33, 65, 71.

CARLETON, for appellee.

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

The bill of complaint exhibited by the appellant, sets forth a case of this description: That being indebted to one Hardy High-

tower, he had executed his obligation for the same payable to him; and in order to secure the payment of it, had made his deed of trust, to John O. Hightower, of certain slaves and land in Lafayette county, to which John O. and Hardy were parties, containing various stipulations, and the trustee, John O., was authorized to sell the property upon the contingency, and in the manner prescribed, and apply the proceeds of the sale, first, to "extinguish the debt in question." That the writing obligatory, along with the deed of trust, had been left in the custody of John O. Hightower, the trustee; and he afterwards dying, it was found among his papers, purporting to be endorsed in blank by the payee, H. Hightower, and also by one James B. Hightower. That the endorsement of Hardy Hightower was a forgery, and the writing obligatory in truth belonged to him. That the defendant, Higgs, as administrator of John O. Hightower, claiming title under the successive assignments from Hardy to James B., and from James B. to the intestate, had brought an action at law upon it against the complainant, who pleaded thereto denying the assignment from Hardy Hightower, and the action was dismissed. That the complainant had paid and satisfied the amount of the obligation to Hardy Hightower, and taken a receipt from him which was produced. That the defendant, Higgs, had brought another action at law upon the writing obligatory, in the name of Hardy Hightower for his use, as administrator of John O., which suit was pending. The administrators of John O. aud Hardy Hightower, were made defendants to the bill; upon the latter of whom process was not served, and no subsequent steps, by order of publication or otherwise, appear to have been taken against him. The bill prayed for an injunction to restrain the administrator from prosecuting the action at law, and in the alternative for a decree, making the injunction perpetual, and requiring the writing obligatory to be given up and cancelled, or if the complainant should be adjudged liable to pay the amount due upon it to the administrator of John O., then a decree that Hardy Hightower refund the amount, wrongfully received by him, to the com-

plainant; and for discovery and general relief. An injunction was granted in accordance with the prayer of the bill. Higgs, the administrator of John O., answered, to the effect, that, according to his information and and belief, the endorsement of Hardy Hightower was genuine, and for a good or valuable consideration to James B., and he had assigned the same to John O., in part payment of a quantity of land and some negroes bought of him, so that the writing obligatory came to be the individual property of his intestate, John O. That John O. and James B. were brothers, being the sons of the defendant Hardy Hightower. That James B. was the first administrator of John O., and inventoried the writing obligatory in question, as part of the assets of his estate, and defendant avers that complainant made a partial payment upon it, and took receipts of the administrator for the amount so paid. That James B. dying, the defendant was appointed administrator *de bonis non* of John O., and the writing obligatory came to his hand in that capacity. He denies the alleged payment by the complainant to Hardy Hightower, and avers that such payment, if any, was made by giving a new note or obligation for the money, which remains unpaid; that the transaction between them was colorable merely, and collusive, with intent to defraud the creditors of John O., by withdrawing, from his estate, a large amount of assets, which would otherwise be appropriated to the payment of their claims; and, by way of reserving the benefit of a general demurrer to the bill, insisted that the complainant had an adequate remedy at law.

To this answer, replication was entered, and the cause was set down for final hearing, with leave to either party to take depositions. At the succeeding term, the defendant, Higgs, moved to dissolve the injunction, because the bill disclosed no equity, and the complainant might have had a remedy at law. He also moved for a final decree in his favor, upon a suggestion, verified by affidavit and admitted to be true, that the complainant had, in the meantime, removed his property beyond the jurisdiction of the court, leaving no effects out of which the amount due upon the

writing obligatory could be made on execution, and no security for it except that upon the injunction bond. The Circuit Court sustained the motion, and proceeded to render a final decree, in the cause, dissolving the injunction with damages for delay, and decreeing that the complainant pay to the defendant, as administrator of John O. Hightower, the amount of principal and interest ascertained by computation to be due upon the writing obligatory in question.

The proceedings disclosed upon this record, have been remarkably irregular. On the face of the bill, no reason is perceived why James B. Hightower was not a proper party defendant, and, on the coming in of the answer, it appeared that his representatives, if any, were necessary parties, and the complainant should have been required to amend the bill. An injunction should not have been granted in the first instance, if, at the time of filing the bill, an action was pending, unless the complainant would first submit to a judgment at law, upon which the injunction would operate as a release of errors; so that, upon dissolution, the defendant could be remitted to his execution at law. Although if the successive assignees took a beneficial interest in the assigned instrument, it is difficult, since the decisions following *Block vs. Walker*, (2 *Ark.* 4,) to understand how the administrator could sue again in the name of the payee for his use, disregarding the assignments, and the defendant at law might have defeated that particular action, yet, if he choose to resort to equity, to have the rights of all the parties finally settled, the case was clearly one where it would be the proper practice to let the plaintiff at law proceed to judgment. (*Conway vs. Ellison*, 14 *Ark.* 367.) Without some showing of accident or other excuse, which might authorize the court, in the exercise of its discretion, to extend the time, the motion to dissolve the injunction should regularly have been made at the coming in of the answer on or before the second day of the return term. (*Digest, title Injunctions, sec.* 23.) And though irregularly made, it could only have operated upon the injunction, because it was the right of the complaniant to have the

cause progress to final hearing with or without an injunction. Without a cross bill, the defendant could not have obtained any affirmative relief, by decree against the complainant, for the payment of the debt in controversy. The cause appears to have been brought on for hearing upon the distinct ground, that the bill disclosed no equity, and also that the complainant had removed his effects. The cause having been regularly set for hearing, that proceeding was a surprise upon the complainant, unless desiring to adduce evidence at the hearing he was in default for not having procured depositions. Nor does it appear that the bill was dismissed because of the delay of the complainant in taking the proper steps to bring the other defendant, Hardy Hightower, before the court; otherwise, he had a right to an answer from that defendant, or to a decree by confession against him for indemnity, if, upon the final hearing, the court should be of opinion that the money rightfully belonged to the administrator, and also of opinion that the complainant had paid it in good faith, and, as he believed, to the real owner of the writing obligatory.

In the most favorable aspect of the case for the appellee, that is, upon the question of jurisdiction, the court below should have proceeded to adjudicate the cause. Supposing it stood upon bill, answer and replication, the denials in the answer were upon information, and the averment according to belief, except so far as the defendant may have had a knowledge of the fact of a partial payment to the preceding administrator. Being tested by the allegations contained in the bill, it would be substantially a case cognizable in equity. True, the defendant might have successfully resisted an action at law, upon plea under oath, denying the assignment. But chancery would also have jurisdiction, if the remedy at law was doubtful, inadequate, or hazardous; and the right to resort to chancery was not waived by any attempt to defend the second suit at law. In the construction of the statute concerning assignments, see *Dickinson vs. Burr*, decided at the present term, this court has held that the obligor or maker of assignable paper, being notified that one or more of the assign-

ments, through which a plaintiff deduces his title to the instrument, are forged, ought, for his own justification, and protection of the rights of the real owner, to resist payment of it, and interpose the defence; and this he may elect to do by plea at law. But it is obvious that his position, defending at law, may be a hazardous one, unless he defends upon indemnity from the real owner, who is not a party to the record, or bound by the decision. If the debtor voluntarily makes payment to either claimant, he may be said to take upon himself the responsibility of the act. But the case can be considered as though the complainant was resisting the demand of the holder, without having made payment to a third person claiming the debt; though the fact of such payment might, as we have seen, if made in error and in good faith, entitle the debtor to recover against such person wrongfully obtaining the money. The case had become complicated by the alleged fraudulent dealings of a trustee or agent, creating adverse interests between different parties, which could only be settled in one litigation, by bringing all of them before a court of equity. It is not intended to intimate any opinion upon the facts or merits of the case. It will remain for the chancellor to decide, upon the evidences, which may be adduced before him, which of the parties has been guilty of the gross fraud by each one imputed to the other.

The decree appealed from, will be reversed, and the cause, under all its peculiar circumstances, remanded, with the following directions: That the complainant submit to a judgment at law; that he amend his bill so as to bring the representatives of James B. Hightower before the court, or show some excuse for not doing it; that he take steps to obtain service of process, or notice by publication, against Hardy Hightower, and to compel an answer from him, or subject him to a decree; or, in default thereof, that the bill be dismissed; that the injunction be continued until the dismissal or final hearing; and the security afforded by the injunction bond retained as a guaranty for the diligent prosecution of his suit by the complainant; and that the cause, in other respects, progress regularly to final hearing.

BIXBY VS. THE STATE.

The court will, of its own motion, for the affirmance of the judgment, award a writ of certiorari, to perfect the record, *where the venue has been changed*, to the court in which the cause originated.

In the examination of a witness in a criminal case, he may be asked whether he had stated to certain persons that he was going to the trial "to have the prisoner hung, that he had lived long enough."

Exceptions taken to the admission or exclusion of testimony in a criminal case, are waived by a motion for new trial, not incorporating the matter of such exception as cause for the motion: but although such cause be assigned in the motion for new trial, this court will not reverse the judgment for such error, if there be other testimony sufficient to warrant the verdict.

In motions for new trial, upon the ground of newly discovered testimony, some discretion is vested in the judge presiding at the trial, who has an opportunity of judging whether they are made for delay or in good faith. They ought to show that the newly discovered testimony would induce a different result; and the application ought to be corroborated by the affidavit of some disinterested witness.

Error to Hempstead Circuit Court.

Hon. SHELTON WATSON, Circuit Judge.

S. H. HEMPSTEAD, for the plaintiff.

CLENDENIN, Attorney General, contra.

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

This writ of error returnable to the present term, brings up the record of the conviction of David Bixby, in the Hempstead Circuit Court, of murder in the second degree, for which offence he was sentenced to undergo confinement in the penitentiary for a term of years. The indictment had been preferred in the

county of Pike, where the offence was committed, and the venue changed to the county of Hempstead, pursuant to the statute, upon the application of the prisoner, setting forth a prejudice against him in the minds of the people of Pike county. The transcript returned with the writ of error failing to show the proceedings had in the Pike Circuit Court, for the empanneling of the grand jury, by whom the indictment was found, and the court here presuming that such proceedings were had in the Pike Circuit Court, where the original record remains, ordered ex-officio, in accordance with the intimation in *Stewart vs. The State*, 13 *Ark.* 745, and for the affirmance of the judgment, a special certiorari to the clerk of that court, to supply the omission. The copy of so much of the original record, returned with the writ, showing a legally constituted grand jury, at the term at which the prisoner was indicted, obviates one of the errors assigned by him in this court.

During the progress of the trial, the prisoner, on cross-examination of one of the witnesses on behalf of the prosecution, proposed to ask him the following question, viz: "Whether he had stated to Hardy C. Crosnol, Joseph Nelson, and Augustus Leslie, or either of them, since he left home, to attend this trial, that he was coming to Washington, to have the defendant hung, that he had lived long enough?" The attorney for the State objected, and the objection being sustained, the prisoner reserved his exception to the opinion of the court, refusing to allow the question to be put. This feature is the only one of any serious difficulty in the cause, and if it had to be determined on strict exceptions in point of law, the court could not do otherwise than hold that an error had been committed against the prisoner, for which the judgment should be reversed. The witness himself could not have objected to the question, neither was it foreign or collateral to the issue, but was proper to be answered for the benefit of the prisoner, as it might result in one of two ways. An affirmative answer would tend to establish a fact from which the jury might infer prejudice or ill will, on the part of the wit-

ness, which ought to be taken into consideration by them in weighing his testimony against the prisoner. If answered in the negative, a foundation would be laid for enabling him to impeach the witness, if he could, by proving the answer to be false.

But the prisoner moved for a new trial, the only grounds for which, assigned in the motion, are: 1st, That the verdict of the jury rendered in the cause was contrary to law. 2d, That it was contrary to evidence. 3d, Newly discovered testimony supported by the affidavit of the prisoner. Although upon the authority of *Bivens vs. The State*, 6 *Eng.* 457, the motion for new trial would not be a waiver of any matter not specified in it, which appearing upon the record, would have been cause for motion in arrest, or might be assigned for error in this court, that case admits the authority of *Walker vs. The State*, 4 *Ark.* 87, to this extent, that the effect of a motion for trial, in a criminal, as well as in a civil case, is to cut out all exception that had been put in during the progress of the trial, unless the matters excepted to be incorporated in, and thus renewed by, the exception to the decision of the court overruling the motion. See *State Bank vs. Conway*, 13 *Ark.* 354. And the court have uniformly held the motion for new trial to be a waiver of exceptions not thus renewed. The presumption is, that the party placing them upon the record, chose to abandon them as unimportant or untenable.

However, if that error had been assigned as one of the grounds of the motion for new trial, it is doubtful whether it would be sufficient to occasion a reversal of the judgment in the present case. In adopting that mode of bringing up his case for revision, the evidence is set out upon the record at the instance of the prisoner, and the object of this cannot be a mere matter of form, but to serve some substantial purpose by enabling this court to look into the whole record. It appears, from the bill of exceptions, that there were several witnesses for the prosecution, and that compared with the others, whose testimony is detailed, the witness to whom the excluded question was proposed, was unimportant, so that his entire testimony might have been

stricken out, without materially weakening the case made for the prosecution, or strengthening that of the accused.

In determining motions for new trial, upon the ground of newly discovered testimony, some discretion is vested in the judge presiding at the trial, because of his opportunities of forming a correct opinion whether the application be made in sincerity and good faith, or whether it is the last shift resorted to by an unscrupulous criminal, to evade the punishment of an offence of which he is found guilty, after availing himself of all the means liberally provided by law for securing a fair and impartial trial. On the face of the application, two reasons appear why it ought not to prevail in this court. We are unable to conclude that the newly discovered testimony, if adduced before another jury would change the result; and the ground of the motion fails unless there is reason to believe that it would or ought to induce a different verdict. The full responsibility of this consideration devolved upon the Circuit Judge, and the presumption is that his discretion was rightly exercised. Further, the application was based upon the uncorroborated affidavit of the prisoner. If, as he alleged, the newly discovered witness, of whom he did not hear until after the commencement of the trial, lived at so great a distance, that it was impossible to procure her attendance, no excuse is offered for not producing the corroborative affidavit of some disinterested person, through whom the information was communicated to the prisoner, so that it could at least be seen whether it was derived from the witness, or was mere report, intangible and unreliable. It is not doubted but that the State may, under some circumstances, adduce counter affidavits upon applications of this kind; but there can be no means of repelling the statements of the prisoner, so long as he relies only upon his own belief, and the sources of his information are kept concealed.

The judgment is not affected by the error complained of, in the allowance of certain items of costs, against the prisoner, which, if wrong, could be corrected by a motion for retaxation in the court below. Affirmed.

FOSTER VS. FOSTER, USE, &C.

A writ of certiorari, directed to a justice of the peace, should be delivered to and returned by him, together with a transcript of the record therein ordered to be certified to the Circuit Court; and not served upon him like a writ of summons.

The dicisions of this court, that, on a writ of certiorari, there should be a judgment of reversal or affirmance with an order remanding the cause if necessary, and not a judgment *de novo* for debt, damages and costs, approved.

Error to Union Circuit Court.

The Hon. SHELTON WATSON, Circuit Judge.

CARLETON, for the plaintiff. The Circuit Court had no jurisdiction to try the case on the merits, until the justice of the peace had responded to the writ of certiorari, and where the Circuit Court acquires jurisdiction on a writ of certiorari, it can render no other judgment than merely to quash the proceedings of the justice, or affirm them with an order to return them to the justice for executing the judgment. 1 *Ark.* 480; 4 *ib.* 473; 5 *ib.* 364; 3 *Eng.* 115; 4 *ib* 32; 6 *ib.* 614.

Mr. Justice SCOTT delivered the opinion of the Court.

Upon the petition, with accompanying exhibits of the plaintiff in error, a writ of certiorari to Grumbles, a justice of the peace, was ordered by a Circuit Judge in vacation, returnable into the Union Circuit Court, at the October term, 1851.

The sheriff, instead of delivering the writ to the justice, read it over to him, and himself returned the writ to the clerk, who had issued it, with a like endorsement as if he had served a writ of summons. It does not appear that the certiorari was ever in

any otherwise served upon the justice. Nor does it appear that the cause was ever certified into the Circuit Court by the justice. At the April term, 1852, the parties, announcing themselves ready for trial, the court, after hearing argument, and on "inspection of the papers," found "no material defect or error in the judgment and decision of the justice," and thereupon rendered a judgment final, in favor of the defendant in error against the plaintiff in error, "for the sum of thirty dollars for his debt, together with the further sum of one dollar and fifty cents damages, besides all costs" in that and in the justice's court. The plaintiff in error took a bill of exceptions, setting out the petition, and exhibits, and the final judgment of the court, and brought his case here by writ of error.

If the judgment of the court could be sustained upon a presumption that the cause intended to have been removed, had been in fact certified into the Circuit Court, in response to the writ of certiorari, we would indulge that presumption, and act upon it, but it cannot, because it is a judgment *de novo* for debt, damages and costs, and not a judgment of reversal or affirmance, with an order remanding the cause if necessary. *Thorn vs. Reed*, 1 *Ark.* 480; *Pulaski County vs. Irvin*, 4 *Ark.* 473; *Anthony Ex parte*, 4 *Ark.* 364; *Sawyer vs. Crawford County*, 4 *Eng. R.* 32; *Carnall vs. Crawford Co.*, 6 *Eng.* 614.

The judgment of the Circuit Court must be reversed, and the cause be remanded.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS,

AT THE JANUARY TERM, A. D. 1855.

STATE BANK VS. RODDY.

Where one of several defendants pleads to the action, and the plaintiff replies, and on motion of a co-defendant, the original writ of summons is quashed, and judgment "that he go hence," there is no final judgment in favor of the defendant pleading, to which a writ of error will lie.

Writ of Error to Jackson Circuit Court.

S. H. HEMPSTEAD, for the plaintiff.

FOWLER, for the defendant, moved to dismiss the writ of error.

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

The Bank of the State brought an action of debt, in the Jackson Circuit Court, against Roddy, Tayman and Fulcher, upon a writing obligatory. At the return term, the death of Tayman was suggested, and a *scire facias* ordered for the purpose of substituting his administrator. Roddy filed a plea of the statute of

limitations, and the cause was continued. At the next term, the plaintiff replied to the plea of Roddy, and moved to quash the *scire facias* issued to bring in Tayman's administrators, and that the cause proceed against the surviving defendants. On the motion of the defendant, Fulcher, the original writ of summons was quashed for the want of a seal, and judgment that Fulcher go hence—to which the plaintiff excepted. It does not appear, in the transcript before us, that any disposition was made of the cause, or final judgment, as to the defendant Roddy.

The plaintiff brought error against Roddy, suggesting, in the writ of error, the death of Tayman and Fulcher.

The motion of the defendant in error to dismiss the cause for want of a final judgment as to him, in the court below, must be sustained.

ROBINS EX PARTE.

Where there is no subordinate court competent to issue a writ of *habeas corpus*—as where the office of Circuit Judge in the proper county is vacant—this court will award such writ.

Motion for Writ of Habeas Corpus.

The petitioner filed a motion for a writ of *habeas corpus*, to admit to bail his negro man, who was in the custody of the sheriff of Pulaski county, on an indictment for murder. The petition alleged that the office of Judge of the Circuit Court of Pulaski county was then vacant, and would continue so for some time, and prayed that this court would issue the writ, &c.

FOWLER, for the motion.

Mr. Justice SCOTT delivered the opinion of the Court.

The showing, which, for the purpose of this application, will be taken as true, making it manifest (and being otherwise sufficient) that, from the accidental cause stated, there is no subordinate court competent to give the relief sought, and that without the interposition of this court in the exercise of its constitutional powers of superintending control, there will be a failure of justice, we think, in the exercise of this high discretion, that the application should be granted in pursuance of the doctrines heretofore laid down. *Amour Hunt Ex parte*, 5 *Eng. R.* 288; *Carnall vs. Crawford Co.*, 6 *Eng. R.* 617; *Marr Ex parte*, 7 *Eng. R.* 92, 93; *Allis Ex parte*, 7 *Eng. R.* 101.

PLEASANTS VS. HEARD.

A general verdict of guilty, in an action of trespass for assault and battery, is good upon issues to the pleas of *not guilty* and *son assault demesne.* [15 403 / 70 246]

The decision of the court below, refusing to grant a new trial, upon the grounds that the verdict is contrary to evidence and the damages excessive, will not be disturbed, where there is no total want of evidence to sustain any material allegation in the declaration, and the amount of damages, upon all the facts of the case, does not shock one's sense of justice.

The affidavit of a juror, after verdict rendered, is inadmissible to impeach and set aside the verdict rendered by him, upon his solemn oath, upon the ground that he, with the other jurors, had acted illegally and improperly in the mode adopted by them in agreeing upon the amount of damages nor can the admissions and statements of a juror be received for such purpose.

Appeal from the Circuit Court of Crawford County.

Hon. BEAUFORT H. NEELY, Circuit Judge, presiding.

CURRAN, for the appellant.

PIKE & CUMMINS, for the appellee, contended that the jury might well have resorted to the mode here adopted of ascertaining the amount of the plaintiff's damages, or to any other mode they might think proper, by way of compromising conflicting opinions, in a case, like this, sounding in damages. That neither the affidavit of a juror, nor his statements to others, is admissible in evidence to prove facts impeaching his own verdict. *Dana vs. Tucker*, 4 *J. R.* 487; *Meade vs. Smith*, 16 *Conn. Rep.* 346; *Bennett vs. Baker*, 1 *Humph.* 399; *Willing vs. Swasey*, 1 *Browne* 123; *Clark vs. Read*, 2 *South.* 486; *Vaise vs. Delawae*, 1 *T. R.* 11; *Owen et al. vs. Warburton*, 4 *Bos. & Pul.* 326; *Lessee of Sluggage vs. Swan*, 4 *Binn.* 150; *Price Ex. vs. Warren*, 1 *Hen. & Munf.* 385. That the verdict is responsive to the issues *Dyer vs. Hatch*, 1 *Ark.* 339; *Wilson vs. Bushnell*, 1 *Ark.* 465.

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

William B. Heard brought an action of trespass, in the Crawford Circuit Court, against Joseph C. Pleasants, for an assault and battery upon his person. The defendant pleaded not guilty, and *son assault demesne*. Issues were made up to these pleas, and submitted to a jury, who returned a verdict of guilty, assessing the plaintiff's damages at six hundred and twenty dollars. A motion for a new trial was made by the defendant, overruled, a bill of exceptions taken setting out the facts, and an appeal to this court.

The first and second grounds urged in the motion for a new trial, present the question whether the general verdict of guilty was responsive to the issues submitted to the jury.

The issues were to the pleas of not guilty, and *son assault demesne*. The jury returned their verdict as follows: "We, the jury, find the within named defendant, Joseph C. Pleasants, guilty in manner and form as charged in the within declaration, and we do assess the plaintiff's damage to six hundred and twenty dollars."

A general verdict is held to be good on two issues, where the finding necessarily shows that the subject matter of both issues was determined. *Wilson vs. Bushnell*, 1 *Ark. R.* 471; *Dyer vs. Hatch*, *ib.* 346; *Woolford et. al vs. Isbel*, 1 *Bibb* 247.

The plea of *son assault demesne*, is a special plea of justification. It confesses the battery alleged, but avoids and justifies it on the grounds of self-defence. The verdict, that the defendant is guilty in manner and form as alleged in the declaration, necessarily negatives the justification set up by such plea.

The third and fourth grounds urged in the motion for a new trial, are, that the verdict is contrary to the evidence; and that the damages assessed are excessive and unreasonable.

The testimony upon the trial, as set out in the bill of exceptions, is, in substance, as follows:

Pennywit, the first witness for the plaintiff, testified that he had been in company with the plaintiff, on the bank of the Arkansas river, and they were walking across the street (of Van Buren,) when they were met by the defendant, who spoke to the plaintiff, saying he wished to see him. Plaintiff and defendant walked off to one side, and witness continued on his way. The parties conversed together a short time, when witness heard a noise, which attracted his attention, and, on looking around, he saw the defendant striking at plaintiff with his fist; plaintiff, in the mean time, was retreating in the direction of the place where the witness was standing, and defendant, pursuing him. About the time plaintiff reached the opposite side of the street, near where witness was standing, he fell, but whether he stumbled, or was knocked down by the defendant, witness was unable to say. Defendant jumped on plaintiff as soon as he fell,

and was in the act of beating him, when several persons interferred, and separated them. Plaintiff was a small man, in bad health at the time, and very weak — defendant, a large, robust and athletic person. Plaintiff seemed to be badly hurt, and bled profusely from a wound inflicted above one of his eyes. Witness did not see the commencement of the difficulty, because he was not looking at the parties when the fight commenced.

This statement is corroborated by several other witnesses.

Dr. *Brown* testified that he was called upon to dress the plaintiff's wound — the wound above one of his eyes, was a small one; but it occasioned the eye and the side of the face to swell very much. Both eyes became inflamed in consequence of the injury, and the plaintiff suffered a great deal. The bill of witness against plaintiff did not exceed $20.

One witness for the plaintiff testified to declarations of defendant made previous to the difficulty, in which he complained that the plaintiff had treated him badly about the purchase of some lots.

Two witnesses were introduced, by the defendant. They do not contradict the statements made by the plaintiff's witnesses, but they testify that, before defendant struck the plaintiff, they saw the plaintiff draw back his clenched fist, as though he were going to strike the defendant.

All the witnesses concur in the fact, that plaintiff retreated, from the time defendant first struck at him; that defendant pursued him; and that plaintiff appeared to be pretty badly hurt.

Upon the testimony introduced by the parties, without instructions from the court, the jury, in the exercise of their peculiar province of passing upon the weight of the evidence, found the defendant guilty of a trespass upon the person of the plaintiff, and assessed the damages at six hundred and twenty dollars. There is no total want of evidence to sustain any material allegation in the declaration, and there is nothing in the verdict, as to the amount of damages, upon all the facts of the case, that shocks our sense of justice.

The decision of the court below therefore, refusing to grant a new trial, upon the grounds above stated, will not be disturbed.

The fifth, last, and most important cause, assigned in the motion for a new trial, is, that the jury, in assessing the damages, acted illegally and improperly, in this: that they agreed that each juror should set down in figures, the amount of damages he should be in favor of assessing, and that the aggregate of all the sums should be divided by twelve, and the quotient fixed upon as the damages; and that, in pursuance of such previous agreement, the jurors proceeded each to set down the amount he was in favor of assessing, and, after all the jurors had thus set down the several amounts, they were added up, and the product divided by twelve, which gave the sum of $620, which was accordingly taken and inserted in the verdict of the jury.

In support of this feature of the motion for a new trial, several affidavits were made and filed, which are in substance as follows:

William Walker, Esq., one of the defendant's counsel, made an affidavit to the effect, that, immediately after the verdict was rendered by the jury, he was advised by his colleague, Mr. Green, that Green B. Strawn, one of the jurors, informed him that the damages had been assessed or fixed upon by the jury, in the manner set forth above. That affiant then visited the jury room, and found a copy of the acts of the General Assembly, upon the back of which he found a column of figures in pencil, which was added up, showing the amount of all the sums to be $7,450, which was divided by twelve, making the product $620; and that affiant exhibited said pencil marks to Hardin Rainey, one of the jurors, and, on enquiry of him, whether the damages assessed in the case had been fixed upon as above stated, he answered in the affirmative, and said that the calculation in pencil, on the back of said acts, was the one made by the jury.

The affidavit of *Green B. Strawn*, one of the jurors, states, that, in assessing the damages, the jury agreed that each juror should state the amount he was in favor of assessing, that the several amounts should be added up, and the product divided by the

number of jurors, and that the quotient should be taken as the damages to be assessed in favor of the plaintiff; and that, in pursuance of said agreement, each juror stated the amount he was in favor of, which was set down, and the whole added up, which amounted to the sum of $7,450, which, being divided by twelve, produced the sum of $620, which was taken and inserted in the verdict as the damages assessed by the jury. That the figures in pencil, made on a copy of the acts of the General Assembly, shown to affiant by Wm. Walker, Esq., were the same made by Pickett or Wilcox, one of the jury, in setting down the several sums, adding them up, and dividing the product as above stated."

It is stated, in the bill of exceptions, that a like affidavit was made by Rainey, another of the jurors, but no such affidavit appears in the transcript.

On the hearing of the motion for new trial, it seems that the copy of the acts, above referred to, was produced in court, and the figures admitted to have been made by Pickett, one of the jurors. They are copied in the bill of exceptions. The twelve sums put down in a column, are 200, 2000, 500, 1000, 1000, 1000, 500, 500, 50, 150, 500, 150—added up 7,450, and the product divided by twelve, making 620, with 10 remainder.

On the motion for a new trial, the affidavit of the juror *Strawn*, was produced with the view to impeach and set aside the verdict rendered by him, upon his solemn oath, on the ground that he, with the other jurors, had acted illegally and improperly in the mode adopted by them of agreeing upon the amount of damages. Can the affidavit of a juror be received and considered for such purpose.?

In the case of *Stanton vs. The State*, (13 *Ark. R.* 319,) which was an indictment for murder, a motion for a new trial was made by the prisoner, on the ground that one of the jury, while in the charge of the officer, and deliberating upon their verdict, absented himself from the jury room—which was sustained by the affidavit of one of the jurors; that another juror, named, absen-

ted himself from the room, provided for the jury at the hotel, without being in custody of the officer, who had charge of the jury; that the officer, being notified of his absence, went in search of him, but came back without him; that the juror continued absent for about two hours, and did not return to the room until near daylight. To rebut this, the attorney for the State filed the affidavit of the juror, whose conduct had been thus impeached, explaining the cause of his leaving the jury room, and stating that, during his absence, he did not see or converse with any one. Mr. Chief Justice WATKINS in delivering the opinion of this court, in that case, said: It appears that the attorney for the State excepted to the opinion of the court, in allowing the first affidavit to be filed on behalf of the prisoner, and certainly the mode here resorted to of impeaching the verdict by the affidavit of one of the jurors who concurred in rendering the verdict, is subject to many serious objections. But, apart from that, and waiving any enquiry whether the affidavit on its face is sufficient to raise a presumption that the absent juror was exposed to improper influences, any such presumption is fully rebutted, and the absence explained by the affidavit of the juror himself."

This opinion would seem to disapprobate the receiving of the affidavit of a juror to impeach the verdict which he had concurred in rendering, but to admit of affidavits of jurors to uphold the verdict. In the case of *Cornelius vs. The State*, (7 *Eng.* 810,) the affidavits filed to impeach the verdict, were not made by members of the jury, but by other persons, and in that case, also, the affidavits of jurors were allowed to uphold the verdict.

In the case of *Owen et al. vs. Warburton*, (4 *Bosanquet & Puller's Rep.* 326,) it appeared, from an affidavit made by one of the jurors, that the jury disagreeing as to whether their verdict should be for the plaintiff or defendant, decided the matter by lot; and on this affidavit, a motion was made to set aside the verdict. Lord MANSFIELD said, "We have conversed with the other judges upon this subject, and we are all of opinion that the

affidavit of a juryman cannot be received. It is singular, indeed, that almost the only evidence, of which the case admits, should be shut out; but considering the arts which might be used, if a contrary rule were to prevail, we think it necessary to exclude such evidence. If it were understood to be the law, that a juryman might set aside a verdict by such evidence, it might sometimes happen that a juryman, being a friend to one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with the view afterwards to set aside the verdict by his own affidavit, if the decision should be against him."

Lord MANSFIELD observed, in the same case, that the authorities on the subject, were contradictory, and that it was proper to settle the question, and it was settled as above.

In Kentucky, it seems to be well settled that the affidavits of jurors, to prove such misconduct of the jury as will invalidate their verdict, or to question the purity of their motives, or to explain either the law or the facts which influenced them, with the view to impeach their verdict, are not admissible. But, that such affidavits are admissible in cases of mistake, &c., which do not subject the jury to any imputation of impure motives or palpable impropriety of conduct, See *Taylor vs. Giger*, 1 *Hardin Rep.* 536; *Heath vs. Conway*, 1 *Bibb* 398; *Doran vs. Shaw*, 3 *Monroe* 411; *Steele's heirs vs. Logan*, 3 *A. K. Marshall* 394; *Johnson vs Davenport*, 3 *J. J. Marshall* 390; *Cain vs. Cain et al.*, 1 *B. Monroe* 213.

In *Dana vs. Tucker*, (4 *Johnson Rep.* 487,) affidavits of two of the jurors were read to impeach the verdict on ground similar to that which is urged against the validity of the verdict in this case, and the court held such affidavits not to be admissible.

In *Clum vs. Smith*, (5 *Hill's Rep.* 560,) it was decided that affidavits of jurors could not be received to impeach the verdict for mistake or even in respect to the merits, nor to prove irregularities or misconduct, either on their own part, or that of their fellows.

In Connecticut, it seems that it has been adopted, as a universal rule, that where it is sought to to set aside a verdict for the mistake or misconduct of the jurors, those jurors are not competent witnesses to prove such mistake or misconduct. The *State vs. Freeman*, 5 *Conn. R.* 348; *Meade vs. Smith*, 16 *ib.* 356.

See, also, *Willing vs. Swasey*, 1 *Browne* (*Pen. Rep.*) 123; *Price's ex. vs. Warren ad.*, 1 *Hen. & Munf.* 385; *Shobe vs. Bell*, 1 *Randolph Rep.* 59; which have a bearing upon the question before us.

See, also, on the same subject, the following authorities: *Barlow vs. State*, 2 *Blackf.* 114; *Cluggage vs. Swan*, 4 *Binn.* 150; *Sehank vs. Stephenson*, 1 *Penn. Rep.* 587; and numerous other cases collected in the 2 *vol. United States Digest*, under the title *Jurors.*

Though there are some conflicting cases, we think it may safely be decided, upon authority, and for many good reasons, that the affidavit of the juror *Strawn*, was not admissible, in this case, to impeach the verdict rendered by him, for the cause stated in the affidavit. But we are not to be understood as deciding, that the affidavit of a juror may, in no case and for no cause, be received to impeach a verdict rendered by him. We mean only to decide the case now before us.

Mr. Walker, in his affidavit, does not profess to have any personal knowledge of the manner in which the jury agreed upon the amount of damages assessed by them; but simply states the admissions made by the juror *Strawn*, to his associate counsel, Mr. Green, and the admissions made by the juror, *Rainey*, to him, after the verdict was rendered.

Every reason of public policy, which would render it improper to permit a juror to impeach his own verdict, for the misconduct of himself, or his fellows, by affidavit, would apply, with increased force, to admissions or declarations made by him out of doors, after rendering the verdict. To allow such admissions or declarations to be proven by others, for the purpose of invalidating verdicts, it seems to us would open a wide

door, and temptation to the commission of frauds. The authorities are also against it. *Burgess vs. Langley*, 5 *Manning & Granger*, 721 (44 *Eng. Com. Law Rep.* 377;) *Clum vs. Smith*, 5 *Hill's Rep.* 560; *Cain vs. Cain et al.*, 1 *B. Monroe* 213; *Aylett vs. Jewel*, 2 *Blackst. Rep.* 1299.

Disregarding the affidavit of the juror *Strawn*, and the admissions made by him, and the juror *Rainey*, after the verdict, to Walker and Green, and there is no legal evidence before us as to the manner in which the jury arrived at an agreement upon the amount of damages assessed by them. It therefore becomes unnecessary for us to decide whether a verdict agreed upon in the manner stated in the affidavits in question, should be set aside or not. The authorities on this subject are in conflict.

The decision of the court below, refusing a new trial, is sustained, and the judgment affirmed.

BENNETT ET AL. VS. DAWSON ET AL.*

15 412
68 460
15 412
73 48
74 527

All claims against the estates of deceased persons must be exhibited, duly authenticated, to the administrator or executor, within two years after the grant of letters, as decided in *Walker ad. vs. Byers*, 14 *Ark.* 246.

And such claim must be so exhibited, although the cause of action had not accrued at the date of the grant of letters of administration. If the cause of action arises at so short a time before the expiration of the two years, as to make the exhibition impracticable, the effect is not to let in the claim as against the administrator, but against the heir or distributee.

It is the duty of the executor or administrator, at his official peril, to give the notice to creditors prescribed by the statute, but this is not a condition precedent to the exhibition of claims within the required period.

*This case was argued and submitted at the January Term, 1854.

Writ of Error to the Circuit Court of Hot Spring County.

Hon. JOHN C. MURRAY, Circuit Judge.

CURRAN & GALLAGHER, for the plaintiffs, submitted that, as the cause of action in this case did not accrue until within a few months before the expiration of the two years, this case does not come within the recent decisions of the court upon the statute. The legislature can limit the time for bringing actions without impairing the obligation of contracts, but cannot shorten the time unreasonably.

The 1st and 3d pleas are insufficient, because they do not allege that the notice prescribed by the statute, was given to the creditors. *Pearl vs. Conley et al.*, 7 *Smedes & Marsh.* 356; *Dowell vs. Webber*, 2 *Sm. & Marsh.* 452; *ib.* 403.

ENGLISH, for the defendants. We submit that upon the state of the pleadings, the claim was clearly barred, and that there is no error in the judgment of the court below; and we rely upon *sections* 54, 85, *chapter* 4, *Digest*, and the case of *Walker ad. vs. Byers*, decided at the July Term of this court, 1853, which is directly in point, and overrules the case of *Burton's ad. vs. Lockert*, 4 *Eng. R.* 411.

Mr. Justice SCOTT delivered the opinion of the Court.

This was an action of debt, commenced in the Hot Spring Circuit Court, on the 7th day of April, 1853. It is alleged, in the declaration, that the cause of action accrued on the 12th day of July, 1852.

The defendants filed three pleas:

1*st*. That the plaintiffs did not exhibit the alleged demand, duly authenticated by affidavit, within two years next after the date of the grant of letters of administration.

2*d*. *Nul tiel* record.

3d. That although letters were granted more than two years before the institution of the suit, to wit: on the 12th day of December, 1850; and although the demand accrued within two years next after said grant, to wit: on the 12th day of July, 1852, yet the plaintiff did not exhibit said demand, duly authenticated by affidavit, within two years next after the date of said grant.

To the *first plea*, the plaintiff replied, that the demand accrued on the 12th day of July, 1852, and was exhibited, duly authenticated by affidavit, within two years next after it accrued. The defendants demurred to this replication; and the court found the law for them.

To the *second plea*, the plaintiffs took issue in fact.

To the *third plea*, the plaintiffs demurred upon the ground, that it was sufficient to exhibit the demand within two years after it accrued, without regard to the date of the grant of the letters. This the court overruled; and found the law for the defendants; and the plaintiffs declining to answer further and electing to rest, final judgment was given for the defendants, and the plaintiffs brought their case here by writ of error.

The point of law involved was decided by this court in the case of *Walker as ad. vs. Byers*, 14 *Ark. R., p.* 246.

Two specific objections are made in this court to the third plea: *First*, That it shows that the cause of action accrued on the 12th of July, 1852, and that the expiration of the period of two years for the exhibition of claims, was the 2d day of December, of that year, leaving less than five months for the exhibition, which, it is insisted, is a period so unreasonably short that the law, if enforced, would impair the obligation of the contract. To this, it is a sufficient answer to say that the law was in force when the contract was made. But if a case should occur where a cause of action arose, from a dormant and contingent condition, at such an impracticable period, just before the expiration of the two years, as to make the objection tenable, the effect would not be to let in the claim, as against an executor or administrator, but as against the heir or distributee, as a superior equity to his in

assets that might have descended or been distributed to him; the legislature having the undoubted power, in the advancement of a great public policy, to prefer or to postpone one creditor to another.

The *other objection* is, that the plea does not allege that, upon the grant of letters, public notice was given to creditors as the statute prescribes. Doubtless, it is the duty of the executor or administrator to give the prescribed notice at his official peril, but this is not made a condition precedent, by the statute, for the exhibition of claims within the required period. Judgment affirmed.

Hon. E. H. ENGLISH, C. J., not sitting in this case.

ASHLEY, EX. VS. GUNTON ET AL.

After the endorser has become fixed by demand, protest and notice, mere forbearance by the holder, not based on any obligatory contract with the drawer for day, and which does not impair any of the substantial rights or remedies of the endorser, cannot work his discharge.

No objection will be heard in this court to the admissibility of evidence on the trial, on the ground that it was secondary, or not the best that the nature of the case would admit of, unless such specific objection was taken in the court below.

It is no objection to the final order of the Probate Court, allowing a claim against the estate of a deceased person, that the claimants, endorsees of a bill of exchange, had failed to fill up a blank endorsement at some time previous to the final order of the court.

The affidavit of one of several joint claimants, is sufficient to authenticate a claim against the estate of a deceased person.

To charge the drawer or endorser of a bill, by notice of non-payment and protest left at his place of business, or residence, it should be delivered to a clerk, if there be one, at the former place, or to some proper person at the latter, if any such there be, or it should be certified that no one could be found on application at such places. And so, it is not sufficient to charge an endorser, to show that the notary left the usual notice of non-payment at the hotel where the endorser resided, and addressed said notice to him, and left the same at said hotel — it not appearing whether the endorser was at the hotel when the notary called, whether the notary enquired for him, or handed the notice to any person to be delivered to him; or whether any person was at the hotel or not.

Appeal from the Circuit Court of Pulaski County.

Hon. WILLIAM H. FEILD, Circuit Judge.

WATKINS & CURRAN, for the appellant. The facts that Ashley was the accommodation endorser or security for Sevier, which was necessarily known to the plaintiffs; that the note was suffered to remain under protest from March, 1846, contrary to all banking usage, without any suit or demand against Ashley, until December, 1848, after his death and the insolvency of Sevier; that payments of interest on the note were made by Sevier from time to time subsequent to the protest, raise a strong presumption that time was extended to Sevier.

The statute (*sec.* 88, *ch.* 4, *Digest*,) providing for the exhibition of claims against the estates of deceased persons, requires *the claimant* to make the oath that nothing has been paid or delivered towards the satisfaction of the demand, except what is mentioned or credited thereon, and that the amount is justly due. The object and policy of this statute are to afford a protection to the estates of deceased persons against unjust claims, and of which the executor or administrator may be wholly ignorant—to purge the conscience of the complainant as to the truth and justness of the demand. Here were six persons then holding this claim; it did not belong to Mr. Gunton, who alone of the claimants made the affidavit, but to the others with him. A release by, or payment to, one of several joint payees or holders, is a valid discharge

to the debtor. Any one of these trustees might have received payment, or done any act to discharge the security; and yet another, if ignorant of it, might safely swear that the demand was unpaid and justly done. We contend that, under the statute, where there are two or more persons constituting one claimant, to any of whom a valid payment may be made, each competent to discharge the demand in any of the modes known to the law, they must all make the affidavit required.

We contend that there is not sufficient proof of notice to charge the endorser. If the holder undertook to give the endorser notice in Washington, it must have been a personal notice, and the evidence of the notice having been given, is not sufficient to charge him. The only evidence is the carefully guarded statement of the notary, that he left the usual notice in writing, addressed to the endorser, at Coleman's hotel, in the City of Washington, where he resided. Did he enquire if the endorser was in, or leave the notice at his room, or with a lodger, or inmate of the hotel, or with any servant of the house? *Bank U. S. vs. Hatch*, 6 *Peters* 257; *Miles vs. Hall*, 12 *Sm. & Marsh.* 332; *Fortner vs. Parham*, 2 *ib.* 163; *Stewart vs. Eden*, 2 *Caines* 121; *Ogden vs. Cowley*, 2 *J. R.* 274; *Ireland vs. Kip*, 11 *J. R.* 232; *Blakely vs. Grant*, 6 *Mass.* 386; *Woolridge vs. Brigham*, 12 *ib.* 403; *Bradley vs. Davis*, 26 *Maine* 45; *Hyslop vs. Jones*, 3 *McLean* 96; *Foster vs. Senneath*, 2 *Richardson* 338; *Holland vs. Turner*,) 10 *Conn.* 308; 7 *Gill & John.* 79; *Logan Bank vs. Butler*, 3 *Littell* 349; 2 *Aikin. Verm.* 263.

The endorsement should have been filled up to show title, and the right to recover on the note. See *Edwards vs. Scull*, 6 *Eng.* 326; *Martin vs. Warren*, *ib.* 286.

S. H. HEMPSTEAD, for the appellees. An endorsement *in blank*, constitutes a complete and perfect transfer of the interest in a bill or note, and vests the right of action, and all other rights, in the subsequent holders. It was not necessary to fill it up. *Sterling vs. Bender*, 2 *Eng.* 202; *Jordan vs. Thornton*, 2 *Eng.* 230;

Chitty on Bills, 10 *Ed.* 229 *et seq.;* 2 *Hall* 563; *Story on Bills, sec.* 207; *Story on Prom. Notes, sec.* 137; 7 *Eng.* 171.

The administration law must be beneficially expounded; and scarcely any serious doubt can exist that affidavits, made by the President and Cashier of the Board of Trustees of the Bank of Washington, come within the spirit, if not the letter, of the law.

Notice of the presentment and non-payment of the bill was given to Ashley by the notary, by delivering such notice at Coleman's hotel, in the city of Washington, where Ashley then resided, addressed to him on the same day of the protest. The question is, whether the holders of this note have used reasonable diligence, so as to hold the endorser liable; for the law neither contemplates nor requires the utmost and strictest diligence, of which the case is capable. 2 *Caine's R.* 126. The course pursued in this case was regular and legal, and according to the usual practice. At all events, it amounted to reasonable diligence. 15 *Wendell* 367; 5 *Binney* 543; 1 *J. R.* 294; 6 *Peters* 297; 3 *Conn.* 497; 2 *S. & M.* 656; *Miles vs. Hall*, 12 *S. & M.* 332; 3 *ib* 250; 2 *ib* 638; 657; 9 *ib.* 476; 10 *ib.* 542.

The law of the District of Columbia, requires notice to be left at the residence, lodgings, or place of business, of an endorser. A delivery to any particular person, need not be shown. The law merely exacts from the holder that reasonable diligence be used in giving notice; but it is not his business to see that the notice is brought home to the party, and whether the notice reaches the party or not, the holder has done all that the law requires of him if he leaves notice at the house, lodging, or place of business of the endorser, where he resides with the maker in the place where the note fell due, or if he sends notice by mail, if he resides elsewhere. These principles are fully sustained by the decisions of the Supreme Court of the United States. *Williams vs. The Bank of the United States*, 2 *Peters* 96; *Bank of Columbia vs. Lawrence*, 1 *Peters* 578; *Dickens vs. Beall*, 10 *Peters* 572; *Bank of the United States vs. Hatch*, 6 *Peters* 250; *Harris vs. Robinson*,

4 *Howard* 336; *Bank of the United States vs. Carneal*, 2 *Peters* 547.

By leaving the notice at Coleman's hotel, where Col. Ashley dwelt or lodged, afforded reasonable ground to presume that it would be brought home to him, and that is all the law requires. 1 *Peters* 578; 5 *S. & M.* 44. But, whether the notice was received by him or not, the holder used due diligence. 3 *Kent* 107; *Stedman vs. Gooch*, 1 *Esp. R.* 4; *Ransom vs. Mack*, 2 *Hill* 590; *Bailey on Bills*, 224; 1 *Maule & Selwyn* 545; 6 *Peters* 257; *Miles vs. Hall*, 12 *S. & M.* 332; *Ireland vs. Kip*, 11 *J. R.* 231; *Hartford Bank vs. Stedman*, 3 *Conn.* 494.

Mr. Justice SCOTT delivered the opinion of the Court.

This proceeding originated in the Probate Court of Pulaski county. It was for the allowance and classification of a claim against the estate of Chester Ashley, deceased. The application was granted, and a bill of exceptions having been taken on the part of the executrix, setting out all the evidence and the rulings of the court, an appeal was taken by her to the Circuit Court. That court being of opinion that there was no error in the proceedings and judgment of the Probate Court, affirmed that judgment, and the executrix appealed to this court.

It appears that the claim, proceeded for by Gunton and others, as surviving Trustees of the Bank of Washington, was founded upon an accommodation note, made by A. H. Sevier, payable to Chester Ashley, or order, and by the latter endorsed in blank, and the proceeds, by virtue of his written directions attached to the note, were placed to the credit of Sevier in the Bank. The note bore date the 18th of March, 1846, was payable sixty days after date; and, on the 20th day of May next following, was protested for non-payment by a notary public. Interest having been computed upon the principal sum, and two partial payments deducted, a balance was claimed to be due on the 24th of March, 1848, of the sum of nine hundred and twenty-seven dollars and fifty-seven cents, with interest from that date. This sum was sworn

to by William Gunton, in an affidavit before a justice of the peace, in the form prescribed by our statute for authenticating claims, by individual claimants, against the estates of deceased persons: and also by James Adams, Cashier of the Trustees of the Bank of Washington, in the form prescribed by the statute, for authenticating such claims, when in favor of corporations. The official character of the justice of the peace, before whom these affidavits were made, was regularly certified.

Examined copies of the resolutions adopted at a meeting of the stockholders of the Bank of Washington, a few days before the expiration of its charter, and in contemplation of that event, and of the deeds of assignment, executed in pursuance of these resolutions, to the trustees; the survivors of whom proceed in the case before us, were proven by depositions. Washington City was, by the same means, proven to be on the Maryland side of the Potomac river, and the provisions of the law of that State, in reference to the protest of bills of exchange and promissory notes, was read in evidence from the statutes of that State, published by authority. It was also proven that Col. Ashley was serving in the Senate of the United States, at Washington City, in May, 1846, having been elected a member of that body in November, 1844, and held that post from that time until his death. He had resided in Little Rock, Arkansas, for near thirty years, and when absent from home, at Washington, his house was usually kept open by some member of his family, by whom communications addressed to him at Little Rock, during the sitting of Congress, were forwarded to him at Washington City. That, in the Capitol, at Washington City, there was, in the year 1846, a Congressional postoffice, where members of both Houses of Congress received communications addressed to them, and mailed letters and papers they desired to send out; and also a city postoffice, through which communications would reach them. That the estate of Col. Sevier was insolvent, and would not pay the privileged debts allowed against it, nor any not secured by deed in trust made in his lifetime. That, at the time the note in question was discounted,

the appellees, together with one George Bonaford, since deceased, were the surviving Trustees of the Bank of Washington, and that said appellees are the *bona fide* lawful holders of the note, on which the claim is founded. Besides the protest, read in evidence, in which nothing is stated as to notice, it was proven, by the deposition of the notary, who made it, that he made the demand and protest, and "on the same day delivered, at Coleman's hotel, in the City of Washington, where Chester Ashley, the endorser of the said note, then resided, the usual notice of non-payment of the said note, and addressed said notice to the said Chester Ashley, and left the same at said hotel." It was also proven by a witness, who testified that he had been long conversant with mercantile and banking transactions, that it was not customary for Banks, in regular business, to let a note remain under protest, without renewal or security, for any length of time, without being put in suit; and it was otherwise shown in evidence that the partial payments endorsed on the note, under dates subsequent to the protest, were made by Sevier, and not by Ashley. That Ashley departed this life after the protest; and, about seven months afterwards, Gunton, as President of the Trustees of the Bank of Washington, advised his executrix of the note having all this time remained under protest, and enquired what arrangements would be made for its discharge, in case it was not soon paid by Col. Sevier.

After the endorser has been fixed by demand, protest and notice, mere forbearance by the holder, not based on any obligatory contract with the drawer for day, and which does not impair any of the substantial rights or remedies of the endorser, cannot work his discharge.

delay

Whatever objection might have been urged to the admissibility of some of the evidence, on the ground that it was secondary, or not the best, for aught that appears upon the record, that the nature of the case would admit of, no such specific objection was in fact taken in the court below; and, for that reason, cannot now be heard here. And whatever might be in that objection, if the

case was different, which is based upon the failure of the appellees to fill up the blank endorsement at some time previous to the final order of the Probate Court, it can cut no figue in this case, because of the competency of that court to allow, to a *bona fide* claimant, an equitable, as well as a purely legal, claim.

According to the laws of Maryland, read in evidence, the protest was admissible: the deposition of the notary, who made the protest, is also in evidence to the same effect, and makes the question suggested, as to the admissibility of the protest, of no consequence.

We think the claim sufficiently authenticated, under the provisions of our statute, by the affidavit of one of the joint claimants. The facts of this case, as to this point, were considered by us in connection with the cases of *Beirne & Burnside vs. Imboden et al.*, 14 *Ark. Rep.* 337, and *Walker as ad. vs. Byers, id. p.* 247, when they were decided, although, in neither of these cases, this precise point was involved. Such an affidavit is within the letter of the statute, in its tenacity for the affidavit of the claimant himself at the peril of perjury; and as it has to be made in positive terms, it could not be true if payment had been in fact made to either of the co-claimants.

A more difficult question, however, is raised in reference to the alleged notice of non-payment, which it will be necessary to examine more at large.

Demand and notice are conditions precedent to the endorser's liability, and unless he dispenses with them in some way, or by some act of his own prevents them, his liability cannot arise without demand and notice. Notices, which are not personal, must necessarily be given in writing, whether through the channel of the postoffice or some other; but, in common legal parlance, all notices are, in general, deemed personal, except those transmitted through the postoffice; because they are either actually so, or regarded as tantamount to personal notice. Hence, the expression, so often found in the books, that when the parties live in the same town, the notice must be personal.

So, of personal notice, it is constantly said in the books, that notice in writing, left at the place of business, or at the residence of the endorser, is tantamount to actual personal notice. All these, however, are but comprehensive expressions, entirely true in their general scope, but the doctrines they inculcate are qualified by other doctrines, more in detail, and equally well settled, to which these general expressions do not reach.

To fix the endorser's liability, the law does not require the strictest and utmost diligence in the holder, but only that fair and reasonable effort, which the law calls due diligence. 2 *Caines Rep.* 126. Hence, in interpreting the contract between the parties for the conditional liability of the endorser, it requires that the latter shall, within usual business hours, be at his place of business, and during the usual hours of suspension of business, be at his residence, or else to have some suitable person to represent him at these respective places within these respective hours. When, therefore, the endorser performs what is thus required of him, due diligence, on the part of the holder, would carry notice home to him; and, consequently, when the parties live in the same town, and the holder uses due diligence, but, in fact, notice does not reach the endorser, the law deems it the endorser's own fault, and adjudges that he has thereby prevented the holder from performing the condition precedent to his liability.

The true question then, in cases like this before us, is, whether due diligence has been used by the holder; not whether he has given notice, or the endorser has received it. *Dickens vs. Beale*, 10 *Peters Rep.* 580. And "this consists in giving notice, if after the usual and proper enquiries are made, it is practicable to give it; but if, when this is done, the holder or notary cannot give the notice personally, when the parties reside in the same place, or does not know where to direct it by mail, the *inquiry is due diligence, without notice.* *Id., same page.* And the proof of diligence is upon him who asserts it. *United States vs. Baker ad.*, 4 *Wash. C. C. R.* 465. And it is not to be presumed, nor that the notary was negligent, but to be determined upon the proof.

Rives vs. Parmley, 18 *Ala. R.* 262. A place of business must be understood to be a place actually occupied, either continually or at regular periods, by a person, or his clerks, or those in his employment. 8 *Porter's R.*, *Stephenson vs. Primrose*, *p.* 167. And a private boarding house where the endorser lodged, must be considered, to all intents and purposes, his dwelling house. *Bnk. U. S. vs. Hatch*, 6 *Peters R.* 257.

Judge KENT says, "Where the holder and endorser reside in the same town, notice to the latter will be good, if left at his dwelling house, in a way reasonably calculated to bring the knowledge of it home: and if the house be shut up by a temporary absence, still the notice may be left there, or at his place of business." 3 *Kent Com.* 107. This latter clause is no doubt true enough; but if the call was within the proper hours respectively, and there was no proper person there to receive the notice, all the authorities on the point show that the leaving of the notice, under such circumstances, would be a work of supererogation, because the effort to give the notice, under such circumstances, would itself constitute due diligence. So, Judge STORY says, of the mode of giving notice, where the parties reside in the same place, "It may be by a verbal notice to the party personally, or it may be by a written notice left at his domicil, or place of business. If the notice be written, it is not indispensable to be given to him personally. It is sufficient if it be sent, or delivered to some suitable person at his place of business, such as his clerk or agent, or to some suitable person at his place of residence. If the call is made at reasonable hours, and no person can be found to whom the notice can be communicated, the holder, or other party giving the notice, will be excused from further efforts." *Story on Bills*, *sec.* 300, and authorities there cited.

The result is, that when the leaving of notice at the place of business or residence, in his absence, will have the effect to fix the drawer or endorser, it must be delivered to some proper person. If none such be there, within the proper hours, the leaving of the notice is unnecessary, and a work of supererogation, because

the effort to give the notice under such circumstances itself constitutes due diligence. When the drawer or endorser is sought to be charged upon the ground of such notice having been left at his place of business or residence, it is incumbent upon the plaintiff to show that it was left under such circumstances as are sufficient to fix his liability; and of this, he must make clear proof. *Bell vs. The Hagerstown Bank*, 7 *Gill's Rep.* 231. On this latter ground, the plaintiff was nonsuited in the case of *Lawson vs. Sherwood*, 1 *Starkie* 314; where the proof was, that notice was served on the defendant two or three days after the dishonor of the bill, under circumstances, when notice on the second day would have been good, but not on the third day, Lord ELLENBOROUGH refusing to go upon "probable evidence without proof of the fact," because it was upon the plaintiff "to show that notice was given in due time."

The cases of *Rives vs. Parmly*, 18 *Ala. Rep.* 256, and *Coster Robinson & Co. vs. Thomason, use, &c.*, 19 *Ala. Rep.* 717, distinctly recognize these doctrines, and are full to the point, "that to charge the drawer or endorser of a bill by notice, left at his place of business or residence, it should be delivered to a clerk, if there be one, at the former place, or to some proper person at the latter, if any such be there, or it should be certified that no one could be found on application at such places." 19 *Ala. Rep.* 721. In the former case, the proof was that "notice of protest left at the boarding house of P. R. Rives, and at the office of L. Parmly—each this day." In the second case, it was, "Notice of protest left at the offices of the first and second endorsers." In both cases, for want of proof that the notices were left under such circumstances as would charge the endorser, the holder was not permitted to recover.

In the case before us, the proof of due diligence falls equally short. The circumstances under which the notary left the notices at Coleman's Hotel, are not shown further than that he delivered, at that hotel, the usual notices of non-payment, and addressed said notices to said Chester Ashley, and left the same at said

hotel. It does not appear whether Ashley was in the hotel when the notary called, nor whether any enquiry was made for him, nor whether the notices were handed to any person to be delivered to him; or whether any person was at the hotel or not. For aught that has been shown, the notary, when he called, might not have enquired for Ashley at all, or may have seen him, and not given the notice, but gave it to a stranger, who happened to be there *in transitu*, or even deposited it in the passage, or some private room, or otherwise left it in a manner, or under circumstances, wholly insufficient to charge an endorser, when he could have delivered it to him in person, had he enquired for him.

In the case of the *Bank of the United States vs. Hatch*, 6 *Peters Rep.* 256, where it was held that the delivery of the notice at the boarding house, to a fellow-boarder, with a request that he would deliver it to Hatch—the notary having first enquired for Hatch, and been informed that he was not within, was sufficient, Judge STORY remarked that, if the delivery had been to the master of the house, or to a servant of the house, there would have been no doubt of its sufficiency, and he cited the case of *Steadman vs. Gooch*, 1 *Esp. Rep.* 4, where the notice, left with the woman who kept the house, at which the party was a lodger, was held good, with no particular stress by the court, that decided the case, upon her character as proprietor, so as to distinguish it from a delivery to any other inmate of the house, whether servant or boarder. So, in the case of *Bradley vs. Davis*, 26 *Maine Rep.* 45, the notice was left with the bar-keeper at the Fremont House, in the city of Boston. But in the case before us, it does not appear with whom, if any one, it was left, or even that it was dropped in an urn, kept standing in the bar, as was the arrangement at the Fremont House, from whence letters were taken by persons to whom they were directed; and, if not taken within an hour or two, were sent off to their respective rooms.

Due diligence being the imperative prerequisite of the holder's right to recover of the endorser, because of the conditional contract of the latter, and the onus to prove due diligence being upon

the holder, we are compelled to say, in the light of the authorities we have cited, and others of the same caste, that we have examined, that such diligence as the law requires to charge a drawer or endorser, has not been shown in this case.

Finding this to be so, it is entirely unnecessary to examine the other question raised—which depends upon an alleged local custom of the banks in the District of Columbia—as to whether this note was not prematurely protested.

And although this case has been determined upon a dry point of law, it may not be improper to say that it is not altogether improbable that the result is consistent with its abstract right and justice on the merits, in view of the discrepancy, as to notice, between the protest in evidence and the deposition of the notary, who made it, and the unusual delay of the Trustees of the Bank, shown by the evidence, in taking steps against the endorser.

The judgment must be reversed, and the cause remanded to the Circuit Court, with instructions to reverse the judgment of the Probate Court, and enter up, and certify to that court, such judgment as ought to have been rendered in the Probate Court. *Digest, ch.* 4, *secs.* 181, 182.

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BALDWIN ET AL. VS. SCOGGIN, USE, &C.

The Governor has the power to remit fines under the provisions of the Constitution; although the Legislature has failed to regulate the exercise of such power.

And he may remit a fine, although the act of the Legislature declare that the fine, when collected, be paid into the county treasury, for the use of common schools.

A sheriff has no power or discretion to receive a note or property, in payment or satisfaction of a fine adjudged against a defendant in a criminal prosecution; nor has the county treasurer and *ex officio* treasurer of the common school fund, to whom

such fine is directed to be paid, any such power or discretion; a note so given and received in such case, being no payment or satisfaction, the fine had not passed beyond the pardoning power of the Governor.

Appeal from the Circuit Court of Ouachita County.

The Hon. SHELTON WATSON, Circuit Judge.

STITH, for the appellant. General construction and effect of pardons. 5 *Eng.* 284; 7 *id.* 122; 7 *Peters* 130; 3 *vol. U. S. Dig., p.* 78, *sec.* 14, and case there cited.

The judgment or conviction which was pardoned by the Governor, was in favor of the State of Arkansas. Can a promissory note satisfy or destroy a judgment?

CURRAN & GALLAGHER, for the appellee. By the constitution, the Governor has the power to remit fines, *under such rules and regulations as shall be prescribed by law*; and the law having prescribed no rules and regulations, and the Governor having no such power by "virtue of his office alone," could not remit the fine in this case.

That a note in ordinary cases, is a payment when so received, is *res adjudicata. See Real Estate Bank vs. Rawdon et al.*, 5 *Ark.* 559.

But, in this case, the note was a valid and proper mode of payment, because, by law, the fine was directed to be paid into the county treasury, for the use of common schools; and the county treasurer and *ex officio* treasurer of the school fund, was, by law, directed to loan the same at 10 per cent. interest, and, before the pardon by the Governor, the fine in this case was paid by the defendant, and loaned to him according to law, and so intended by the parties, without the formality of the defendant handing the money to the county treasurer, and he handing it back.

MR. Chief Justice ENGLISH delivered the opinion of the court. Josiah A. Scoggin, suing for the use of John H. Holcomb, his

successor in office, as county treasurer, and *ex officio* treasurer of the school fund of Ouachita county, brought an action of assumpsit in the Ouachita Circuit Court, against George W. Baldwin, Robert E. Armstrong, and John G. Banks, upon a promissory note.

The declaration alleged that, on the 8th day of October, A. D. 1852, the defendants made their promissory note, of that date, and thereby promised to pay, twelve months thereafter, to Scoggin, as county treasurer, and *ex officio* treasurer of the school fund of Ouachita county, the sum of $210, with interest at the rate of ten per cent. per annum, payable half yearly in advance, and delivered said note to said Scoggin, &c.

The defendants pleaded non assumpsit, and a special plea, alleging, in substance, as follows:

That the defendant, *George W. Baldwin*, together with one James Baldwin, were indicted, at the spring term of the Ouachita Circuit Court, 1852, for an assault, with intent to murder one William H. Wood; and, at the succeeding term of said court, were both tried and convicted of an aggravated assault, and fined in the sum of $321 each, and five minutes imprisonment, and ordered into the custody of the sheriff, until said fine and costs were paid. That said fine, in each case, was subsequently, during the same term, reduced by the court, to the sum of $200, and final judgment rendered in favor of the State of Arkansas therefor; as would more fully appear by the record, &c. That, being in the custody of said sheriff, for the payment of said fine and costs, the said defendant, *George W. Baldwin*, gave the promissory note sued on, which he executed, with the other defendants as his securities, for said fine, and ten dollars as advance interest thereon for six months, at the rate of ten per cent. per annum, and for no other purpose, and upon no other consideration whatever; and no money, or other valuable thing was passed between the parties.

That, after the execution of the said promissory note, and the delivery thereof to the sheriff of said county, to wit: on the 22d

day of October, 1852, his excellency, JOHN SELDEN ROANE, then Governor of the State of Arkansas, granted to the said defendant, George W. Baldwin, and the said James Baldwin, a *pardon*, in the words and figures following:

THE STATE OF ARKANSAS, TO ALL TO WHOM THESE PRESENTS SHALL COME—GREETING:

Whereas; At the *said* term of the Circuit Court of the county of Ouachita, George W. Baldwin and James Baldwin, were convicted of an aggravated assault, and sentenced to pay a fine of two hundred dollars each: and, *whereas*, many of the good citizens of said county have petitioned for the remission of said fine, not only on the ground of its enormity, but the injustice of the verdict: Now, therefore, I, JOHN SELDEN ROANE, Governor of the State of Arkansas, in consideration of the premises, and by virtue of the authority in me vested by the constitution of said State, do hereby remit said fine, and freely and fully acquit the said George W. Baldwin, and James Baldwin, severally, from the payment of all the pains and penalties thereof. The sheriff of said county, and all others, are hereby commanded to desist from all proceedings in the collection and enforcement of said fine.

IN TESTIMONY WHEREOF, I have hereunto set my hand, and caused the seal of the State to be affixed, at Little Rock, on the 22d day of October, A. D. 1852.

[L. S.]

By the Governor. JOHN S. ROANE.

DAVID B. GREER,
Secretary of State.

Which said pardon, or letters patent, accepted by said Baldwin, [*the plea further alleges,*] are under the great seal of the State, and shown to the court, &c.

The plea was verified by affidavit.

To this special plea, the plaintiff demurred, on the grounds: 1st. That the Governor had no authority, by the Constitution and laws of the State, to remit said fine. 2d. That the fine had been paid by Baldwin, before the granting of the pardon or remission of it by the Governor.

The court sustained the demurrer to the plea, the defendants rested, and suffered final judgment for the amount of the note sued on; and appealed to this court.

It is argued by the counsel for the appellee, that the Governor has no power to remit fines, because no regulation for their remission, by him, has been made by the statute.

On the organization of most governments, it has been deemed wise and humane to lodge a pardoning power somewhere, in order that the innocent may be relieved from punishment, where it is made manifest, after conviction, that they were unjustly condemned; and in order that, in proper cases, that mercy and clemency might be extended to the offender, which cannot be granted to him by the administrators of the law, under its stern sanctions.

In the country from which we have derived our language, our laws, and, to a limited extent, our forms of government, the pardoning power is vested in the king. It was exercised by him, from a remote period, and it was declared, in Parliament, by statute 27 *Hen. VIII, c.* 24, that no other person hath power to pardon or remit any treason, or felonies whatsoever; but that the king hath the whole and sole power thereof, united and knit to the imperial crown of the realm. 4 *Black. Com.* 397. There were limitations upon this power, however, in England. *Ib.* 398.

By the constitution of the United States, *Article* 11, *sec.* 2, it is declared that the President "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

STORY, in his *Commentaries* on the *Constitution, vol.* 2, *sec.* 1504, treating of this clause, after noticing the express exception of cases of impeachment from the pardoning power of the President, and

the implied exception of contempts, says: "Subject to these exceptions, (and perhaps there may be others of a like nature standing on special grounds,) the power of pardon is general and unqualified, reaching from the highest to the lowest offences. The power of remission of fines, penalties, and forfeitures, is also included in it; and may, in the last resort, be exercised by the executive; although it is, in many cases, by our laws, confided to the treasury department. *No law can abridge the constitutional powers of the Executive department, or interrupt its rights to interfere by pardon in such cases.*"

Thus it seems that this great prerogative of pardoning offences against the Federal Government, has been intrusted to the President, without reserving to Congress the power to abridge or restrict its exercise.

The framers of our State Constitution,, have entrusted the pardoning power to the Governor, but thought proper to reserve to the Legislature the right to regulate its exercise. The clause on the subject, is as follows: "In all criminal and penal cases, except in those of treason and impeachment, he (the Governor) shall have power to grant pardons, after conviction, and remit fines and forfeitures, under such rules and regulations as shall be prescribed by law." *Const. Ark., art. V, sec.* 20

The Legislature have thought proper, under the power thus given them to regulate the exercise of the pardoning power, to pass an act as follows: "In all cases, in which the Governor is authorized, by the Constitution of the State, to grant pardons for any offences punishable with death, or imprisonment for six months and over, or with corporal punishment, he may grant the same *with such conditions, and under such restrictions, as he may think proper;* and he shall have power to commute the punishment of persons under the sentence of imprisonment of six months and over, or corporal punishment, by substituting banishment in lieu of the sentence of the court." *Sec.* 244, *chap.* 52, *Digest, p.* 424. The succeeding seven sections, regulate the terms of banishment.

The section above copied, does not touch the remission of fines and forfeitures by the Governor, nor is there any statute regulating their remission; hence, it is argued that he has no power to remit them.

But the above section does not, in truth, regulate the exercise of the pardoning power in cases punishable with death, or imprisonment for six months or over, or with corporal punishment, but leaves the Governor to the exercise of his own discretion in granting pardons in such cases. That section, and those following, merely regulate commutations, and not pardons.

Yet, the Governor pardoned *Edwards*, and released him from imprisonment in the penitentiary, on a conviction of manslaughter, absolutely, and without terms; and the power does not appear to have been questioned. See *Edwards vs. The State*, 7 *Eng. R.* 122; also *Amour Hunt Ex parte*, 5 *Eng. R.* 284.

If the Legislature had passed no act on the subject of pardons at all, the Governor would thereby hardly be cut off from the exercise of this necessary and humane prerogative, conferred upon him by the Constitution. The Legislature have the right to regulate the exercise of the power; to throw checks and guards around it, perhaps, to prevent its abuse; but theysurely have no right to deprive the Governor of the pardoning power, by neglecting to regulate it, or by passing laws to prohibit it.

The failure of the Legislature to regulate the exercise of the power, would be rather an indication of confidence in the sound discretion of the executive, than of a disposition to deny to him the right of exercising this humane prerogative.

We are of opinion, therefore, that the Governor has the power to remit fines under the provision of the Constitution above copied; and, until this power is regulated by law, may exercise it according to his own sound discretion.

The Governor having the power, under the Constitution, to remit the fine in this case, the act, declaring that such fines, when collected, shall be paid into the county treasury, of the proper county, for the use of schools in said county, (*sec.* 46, *chap.* 145,

Digest,) does not deprive the Governor of the power to remit them, as held in *State vs. Simpson*, 1 *Bailey* 378, and *State vs. Williams*, 1 *Nott & McCord* 26.

But, it is argued, by the counsel of the appellee, that the execution of the note sued on, for the amount of the fine, prior to the remission of it by Governor, and the delivery of the note to the treasuer of the county and *ex officio* treasurer of the school fund, was equivalent to a payment of the money into the treasury, and a return of it to Baldwin, as a loan, upon security, and that thereby the treasurer of the school fund acquired a vested right to the fine, which could not be divested by the pardoning power of the Governor.

The plea alleges that Baldwin was convicted, fined $200, and ordered into the custody of the sheriff, until the fine and costs were paid. That, in order to relieve himself from such custody, he made and delivered to the sheriff, the note in question, for the amount of the fine, including advance interest at ten per cent. for six months, and that, shortly after the execution of the note to the sheriff, the Governor remitted the fine. It does not appear, from the allegations in the plea, that the plaintiff, as county treasurer and *ex officio* treasurer of the school fund, accepted the note from the sheriff, in lieu of the money, but, in order to put this case in the strongest view for the plaintiff, let it be presumed, from the facts, that the note was made payable to him, and that he afterwards sued upon it, that he did accept it of the sheriff in lieu of money—was the execution of such note a payment of the judgment of the court for the fine?

It is well settled that the sheriff had no discretion or power to receive any thing but money, in satisfaction of the judgment. *Randolph vs. Ringgold et al.*, 5 *Eng. R.* 279, and cases there cited.

Had the judgment been in favor of, or the money going to, a private individual, he might have accepted, in satisfaction of it, a note, property, or any thing else, that would have answered

his purposes, and the sheriff, under his instructions, might have received such satisfaction.

But the judgment in this case, was not in favor of, or going to, an individual. It was in favor of the State, and the law declares that, when the *money is collected*, it shall be paid into the treasury of the proper county, for the use of schools in said county, (*sec.* 46, *chap.* 145, *Digest*,) and other acts provide for its employment in purposes of education by the proper officers. See *Acts of* 1852, *p.* 149, *sec.* 19, *&c.*

The sheriff had no right to receive any thing but money, in satisfaction of tne judgment, and the treasurer of Ouachita county, acting not in his private right, but as an officer, for the benefit of the public, had no authority, by law, to receive of the sheriff, a note in lieu of money — no matter whether he acted in the matter, as treasurer of the county, or treasurer of the school fund. The law provides for, nor recognizes any such transactions. See *Rout vs. Feemster*, 7 *J. J. Marsh.* 131.

If this court were to decide that, by agreement between the sheriffs and county treasurers, notes might be taken in payment of fines, doubtless it would soon become a general practice for offenders, after conviction, to relieve themselves from custody, by executing such notes; and appeals to the sympathies of the officers might too often induce them to take insufficient security, to the detriment of the school fund and the public interest. However good the note may have been, in this instance, and with whatever good faith the officer may have acted in taking it, we know of no law to sanction it, and cannot indulge in liberal constructions to uphold a precedent which might be followed by bad consequences.

Holding the note not to have been a payment and satisfaction of the judgment, the fine, for which it was executed, had not passed beyond the pardoning power of the Governor; and the demurrer to the special plea of defendants should have been overruled. *Rout vs. Feemster*, *ubi. sup.*

Had the fine actually been paid to the sheriff, in money, and

the money paid over to the county treasurer, for the use of public schools, before the remission of it by the Governor, and had Baldwin brought an action to recover back the money, after the pardon, it might have become necessary, in such case, to decide whether the treasurer of the school fund, or the inhabitants of Ouachita county, had acquired any such vested right to the money before the pardon, as could not have been divested by it, but the view that we have taken of this case, renders it unnecessary, and perhaps, improper, to decide this question.

The judgment is reversed, and the cause remanded, with instructions to the court below to overrule the demurrer to the special plea, and that the plaintiff have leave to respond over, &c.

LEMON'S HEIRS VS. RECTOR ET AL.

The heirs or representatives of a deceased person, cannot, as a general rule, regularly maintain a bill in equity for the personal assets due to his estate, and which would descend to or be distributed to them—for the recovery of choses in action, an administrator or executor, only, can sue at law or in equity.

Appeal from Pulaski Circuit Court in Chancery.

The Hon. WILLIAM H. FEILD, Circuit Judge.

FOWLER, for the appellant. Even where there is an executor or administrator, who will not sue, or assent for the distributees to sue for chattels, to which they are entitled, such distributees

may file a bill in equity to enforce their rights. *Thomas vs. White*, 3 *Litt. Rep.* 180; *Woodward vs. Threlkeld*, 1 *A. K. Marsh Rep.* 10; *Deatley, &c., vs. Murphey, &c., ib.* 480.

A sole heir and distributee may recover possession of the estate, by suit, without an administration—the personal as well as real—and where there are no debts, and the entire balance of the estate has been long settled, as in this case, it would be an idle ceremony to take out letters of administration. *Hyde vs. Stone*, 7 *Wend. Rep.* 358; *Frazier vs. Wallace*, 1 *Richardson Eq. Rep.* 23; *Danley vs. Edwards et al*, 1 *Ark. R.* 437; 4 *Smedes & Marsh. Rep.* 711; 4 *How.* (*Miss.*) *Rep.* 458.

BERTRAND and CURRAN, contra. We venture the assertion, that no case can be found authorizing the heirs to sue for the enforcement of a decree for money recovered by the administrator, or to enforce the collection of any chose in action. The cases cited from 7 *Wend.* 358, 1 *Ark.* 437, 4 *Sm. & Marsh.* 71, and 4 *How.* (*Miss.*) 458, are suits by heirs for the recovery of *property*. See the case of *Davis vs. Rhone*, 1 *McCord's Ch.* 191, 195.

The decree could be enforced only in the name of an *ad. d. b. n.*, (*Dig., ch.* 93, *sec.* 20; *ch.* 4, *sec.* 37.

Mr. Justice SCOTT delivered the opinion of the Court.

The appellants allege, in their bill, that they are the heirs at law of James Lemon, who died may years ago. That, on the 28th of April, A. D. 1832, their ancestor filed his bill in chancery, against the appellees, (on whom process was served,) but died intestate before final decree. That, after his death, the cause was revived by Thomas Mathers, as administrator, and a final decree obtained for the sum of $250 principal, $127 interest then accrued, together with 6 per cent. interest from that date upon the principal sum, besides costs. That, soon afterwards, Mathers died, and James DeBaun succeeded him as administrator *de bonis non*, and the decree was revived, in his name, on the 25th of November, 1841. That a part of the money decreed was made under execution, and

the balance remained unpaid at the time of the death of DeBaun, who has also departed this life. That, since the death of DeBaun, no person whomsoever has administered on their ancestor's estate, which, with the exception of the balance due upon the decree, was fully administered before DeBaun's death, or was wasted by gross negligence of his several and successive administrators. That his debts and liabilities, however, were all fully paid and satisfied, so that the complainants, as his heirs and distributees, are, exclusively, entitled to the balance of the proceeds of this decree, and that the adult heirs at law are all non-residents of this State, and unable to give the security prerequisite for obtaining letters of administration. The prayer of the bill is for a decree enforcing the original decree in their own names, and for their own benefit. Noland demurred to the bill, and it was taken as confessed against the other two defendants. The demurrer was sustained, and the bill dismissed, and an appeal taken to this court.

It is a general rule of well settled law, that there can be, regularly, no suit for the recovery of the personal assets of an estate, but by the executor or administrator, who has the right to sue both at law and in equity.

This is in harmony with the doctrine, that the personalty does not, technically, descend like the realty, but vests in the executor or administrator, for the payment of debts, and for distribution, under the provisions of the statute. Thus, the executor or administrator becomes a trustee for creditors and distributees, and this general rule makes him the only regular organ through whom their rights can be ascertained, when asserted by a suit, and the law requires the formality of an administration, as necessary for the security of these rights.

Special cases, however, have been allowed, both in England and in this country, which form exceptions to this rule. The most common of these, in England, were cases of bankruptcy, or insolvency of the executor, or of collusion by him with the debtor of the estate, or with any one who improperly withheld any of the personal assets. In this country, where bond and security are,

in general, required, as a prerequisite for administration, it may be doubted whether mere insolvency or bankruptcy, where the executor or administrator has complied with these terms, would now constitute such a case, unless coupled with some abuse of his trust, and even, in that case, the Probate Court, in this State, has ample power to afford the most prompt and complete remedy. Special cases, however, predicated upon collusion, are referable to the chancellor's jurisdiction, in cases of fraud and trust; and, like fraud in general, collusion is not to be precisely defined, since it necessarily varies, in its aspect, with the circumstances of the almost infinite variety of cases, that might occur, in which it might be perceived. If to this general head of collusion, all abuses of the representative trust, whether active or passive, could be referred, it would embrace a very large proportion of the special cases that have been allowed, whether at the suit of a creditor of the estate, or of a distributee, or whether to recover a chose in action or a personal chattel. But it would not embrace them all; because, in some few cases, where there is no pretence of abuse, personal property has been allowed to be recovered at the suit of the distributee, when the executor or administrator has, in express terms, given his assent, upon the idea that the property descended to the heir, *sub modo*, through the statute of distributions, and that the express assent of the executor or administrator, to the prosecution of the suit, was analogous, and equivalent to the executor's assent to a special legacy.

If these special cases are much indulged in this State, it is manifest that our administration system cannot fail to be seriously disturbed by them. And although presenting themselves in the specious garb of simplicity and directness, their tendency will far more likely be to complicate and entangle both the rights of creditors and distributees, as well as the accounts of executors and administrators.

Policy will, perhaps, tolerate a wider departure from the rule in cases of personal property, than of choses in action, for the double reason that the latter is more directly and emphatically a

fund for the payment of debts than the former, and the rights, both of creditors and distributees, would be less jeopardised, because property could be more readily identified and reclaimed, when it might pass into improper hands, than money. But, in either class of cases, the considerations we have urged strongly urge that the rule should be seldom relaxed.

Whether, according to the weight of authority, the rule would be more readily relaxed in cases of personal property, than of choses in action, it is not necessary now to determine. It is sufficient to ascertain, whether it can be relaxed so much as to authorize us to sustain this bill. Its only material feature, to distinguish it from bills that might be filed by distributees in good faith, in a very great number of cases, soon after the death of the intestate, is, that, from the lapse of time, which appears upon its face, the period fixed by our statute for the presentation of claims against the estate, has long since expired; and, hence, there is no probability that any claim now unknown, recoverable against the representative of an estate, can ever be, hereafter, brought to light. If this feature could be regarded as equivalent to the answer of an executor or administrator, admitting the truth of the allegations of a like bill filed against him, as a joint defendant with the debtor proceeded against, there might be found, in some of the special cases, that have been allowed, some precedents going to favor the idea that it might be retained as one of these; but it is impossible that it can be so regarded, because, although no valid claim against the estate, recoverable against its representative, can in future be brought to light, that does not, in the least, sustain the allegation that the debts and liabilities, heretofore known, have all been paid and satisfied. So far as the rights of creditors are concerned, who may have heretofore had their claims allowed in the Probate Court, in the progress of the administration, there is no guaranty at all in a bill like this, where neither they themselves, nor any executor or administrator, are parties defendant, to call in question the truth of the allegations of the bill touching their interests; and hence, as to such rights the bill is, in substance,

purely *ex parte*, the debtor proceeded against being indifferent as to whom he may make payment under the sanction of the chancellor. And, aside from this objection, in no case whatever should a recovery be allowed, although a regular executor or administrator might be a party defendant, unless upon the terms that the money should be brought into court, and then distributed according to the statute: otherwise, there would be no security for the rights of distributees among themselves, especially for such of them as might be minors, as some of those are in the case before us.

And no special case, where either a creditor or distributee has proceeded for the recovery of a chose in action, has been cited, or is known to us, which comes up to the full support of this bill; while, on the other hand, besides the general considerations against it, which we have presented, there are authorities, both English and American, entitled to high respect, which repudiate it.

In the case of *Humphry vs. Humphry*, 3 *P. Williams* 347, which was a bill filed for an account of the personal estate, by the party entitled to it as distributee, and who had the right of administration, the Lord Chancellor sustained a demurrer to the bill upon the ground that it could not be maintained, even by such a party, without administration actually taken out. And afterwards, upon application, leave was given to take out administration, and charge this by way of amendment.

The case of *Bradford vs. Felder*, 2 *McCord's Ch. R.* 170, was like it, and was disposed of in the same manner.

In the previous cases, in South Carolina, of *Farley vs. Farley*, 1 *McCord's Ch. Rep.* 506, and of *Forester vs. Forester*, *id.* 325, where the whole subject seems to have been well considered, and the authorities fully examined, the bills were dismissed, on the ground that administration had not been taken out.

And, before that time, in the case of *Elder vs. Vanters*, 4 *Dessau. Ch. Rep.* 155, the chancellor had, upon the same ground of want of administration, in a case where a slave was in controversy,

refused to permit the complainant to retain the slave, which he had bought from the next of kin, though it was admitted that the debts were all paid, and although he held under a bill of sale, purporting to be for a valuable consideration, and had been in possession for ten years.

And these cases are all in harmony with the rule, that, in any proper case, where the chancellor may interpose, and restrain an executor from obtaining the possession of assets, and appoint a receiver to do so, the name of the executor must, nevertheless, be used, and he will be compelled to allow it. *Utterson vs. Muir*, 2 *Versey J.* 98, *and notes to Sumner's Edition; Taylor vs. Allen*, 2 *Atkins Rep.* 213.

There are two other reported cases, in South Carolina, subsequently decided—the one upon the authority of the other—apparently without any examination of authority, and without any reference to the cases we have mentioned, where the question was, whether or not the marital rights of the husband had attached. The decision was to the effect that, when a *feme sole*, being the only distributee, takes the possession of the personal property, without any administration had, and subsequently marries, the marital rights of the husband attach to the property. In one of these cases, the chancellor said, "James M. Spann was entitled to the administration in right of his wife. But to what purpose should he have administered? There were no debts to pay, and no distribution to make. Was it simply that he might get possession of his own rights? That would have been going through a nugatory ceremony. Or, if any other person had administered, could the property have been recovered from him? No. By going into equity, and showing there was no debt, and that his wife was exclusively entitled, a recovery at law would have been restrained." Upon these observations, the reporter appends the following remark, in a note, to wit: "If another administering, could recover the property at law from the husband, unless restrained by injunction, (which seems to be admitted,) does this not prove that the legal estate has not vested in the husband;

and, consequently, that the marital rights had not attached?" 1 *Richardson's Eq. R.* 23, *Haiser vs. Wallace.*

But, irrespective of the objection suggested in this note, the case is not a parallel one, to say nothing of its conflict, in principle, with the other cases cited from that State, because, in that case, the party was sole distributee, upon which circumstance stress is distinctly laid, while, in the case before us, after recovery, distribution among the several distributees would have to be made.

The other cases, cited in support of the bill, were all bills for the recovery of personal property, and not for choses in action, and may be referred either to the general head of collusion, in the comprehensive sense which we have suggested, or to the express assent of the executor or administrator.

By an act of our Legislature, passed in December, 1846, (*Digest, ch.* 4, *p.* 110, *secs.* 3 *and* 4,) providing that when one shall die, leaving a widow or children, and an estate not exceeding in value the sum of three hundred dollars, that the Probate Court shall make an order vesting such estate absolutely in such widow, or children, there was the further provision that it should not be the duty of the clerk or judge to issue letters of administration on the estates of any deceased persons, unless it should be necessary to preserve the same from waste or damage, or to protect the rights of creditors. But, these provisions can have no bearing upon the principles of law we have been considering, unless it could be concluded that the Legislature designed, in this indirect way, to abolish the rule that the personal estate does not technically descend, but vests in the representative for the payment of debts and for distribution. For which conclusion, there would seem to be but little foundation in these provisions, manifestly designed only for particular cases, and to tolerate the want of administration in those particular cases, when the parties, in effect, agree to dispense with the aid of the law at their own peril.

From the refusal to entertain such bills as this, no possible hardship can arise, because, our statute has made, in its various

enactments, the most ample and complete provisions for all such cases; and there is, therefore, less reason for admitting these special cases here than in England, or some of the sister States.

We think that the decree of the court below, dismissing the bill, was correct, and that it ought to be affirmed.

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WRIGHT VS. MORRIS, AS AD.

W. and T. entered into a contract, some time in the month of January, that T. was to oversee for W. that year, at the rates of five hundred dollars per annum: HELD, That this was not a special contract for a definite time, and at a fixed price, the complete performance of which was a condition precedent to a right to compensation; and that the contract being performed though, in some respects, differently from the terms of the agreement, indebitatus assumpsit will lie for such compensation as the overseer is entitled to.

A contract, that the overseer shall not carry a horse, or dogs upon the plantation of his employer, and if he does, that he shall forfeit his wages: the penalty is waived by the employer, if upon the horses and dogs being carried there, he agrees to receive compensation for keeping the horse, and merely requests that the dogs be taken off, instead of promptly discharging the overseer.

A contract, under such employment, that the overseer shall make a "fair average crop," means that the crop should be a fair average one, making due allowance for the season and unforeseen events beyond the control of a prudent, faithful overseer; and not that the crop shall be an average one, at all events.

Upon ascertaining the compensation due, in such case, to the overseer, the jury may, in their discretion, allow interest.

Appeal from the Circuit Court of Lafayette County.

Hon. SHELTON WATSON, Circuit Judge.

WATKINS & CURRAN, for the appellant.

S. H. HEMPSTEAD, contra.

Mr. Justice WALKER delivered the opinion of the Court.

Joshua Morrison, the administrator of the estate of Thomas Trulove, deceased, brought his action in assumpsit, in the Lafayette Circuit Court, against Morehead Wright, charging him in a common indebitatus count for services rendered by Trulove, as overseer, for Wright.

From the evidence preserved upon the record in the bill of exceptions, the contract, under which the services were rendered, in the language of one, who was called to witness it, was, "That Trulove was to oversee for Wright that year, at the rates of five hundred dollars per annum. That Trulove was to make a fair average crop; and, if he failed to do this, he was to forfeit his wages. That he was not to carry dogs on the plantation of Wright that year, and if he did, that he should forfeit his wages. And also, that he would not carry a horse on the plantation, and if he did, that he should forfeit his wages.

It appears, from the evidence, that this contract was entered into some time during the month of January, 1844. Wright, not long after this, left the State on a visit, leaving his plantation to the management of Trulove, and did not return home until some time in October or November.

The season for making a crop is shown to have been unusually bad. That Wright's plantation is situated on Red River, and although better protected from overflow than most of the farms on the river, that about one hundred acres of it was overflowed in April or May. The crop, however, was re-planted by Trulove, and cultivated until some time after the crops were usually laid by. It was in evidence, also, that between 50 and 100 acres of the cotton crop were seriously injured by the worms.

In the opinion of some of the witnesses, the crop was not well tended. One witness, who formed his opinion from observations made as he passed by the plantation, thought the management

of the farm bad, observed that the fields were grassy, and thought the crop short or indifferent. Another witness, who was overseer on an adjoining plantation, stated, "that the year 1844 was a bad year for making a crop, and that he thought Trulove made as good a crop as his neighbors generally did. That crops were not, generally, good that year."

Other witnesses were examined, all of whom concurred in representing the season as unusually bad for making a crop, and that the crops were generally more indifferent that year than they usually were. There was also evidence that Trulove kept dogs and a horse on the farm, and hunted with them occasionally. That Wright was apprised of this, and agreed with Trulove to receive compensation for keeping the horse, and requested Trulove to send the dogs off, which he promised Wright he would do; and which, according to the statement of one of the witnesses, was done at the time agreed upon; but, by another, that the dogs remained until Wright discharged Trulove, which was soon after his return home, for the alleged cause that Trulove had broken his contract.

This is, in substance, the testimony upon the trial before the jury. Whereupon, the defendant moved the court to instruct the jury: "That if there was a special contract, the parties were bound by it, and that plaintiff could only recover by showing performance on his part, unless discharged by Wright without cause. That if Trulove violated his contract, he could not recover upon the contract, or otherwise."

Which instructions the court refused to give; but instructed, in effect, that if there was a contract, the plaintiff should sue upon it, and could not recover in indebitatus assumpsit. But that if the defendant dismissed Trulove before his term of service expired, no matter whether for sufficient cause or not, the plaintiff was entitled to recover for the work done; and that if the defendant was injured by the misconduct of Trulove, they might assess the damages for such injury, and deduct it from the amount

found to be due Trulove for his wages, even though it went to the whole amount thereof.

These instructions were, evidently, given under a misapprehension of the nature of the contract in this case. This was not a special contract for a definite time, and at a fixed price, the complete performance of which was a condition precedent to a right to compensation. It was a contract to oversee at the rates of $500, not for $500. There was no agreement as to the length of time Trulove was to oversee; and the terms, which fix the *rates*, instead of a definite sum to be paid, tend to show that there was no time definitely agreed upon. From the nature of Trulove's undertaking, it must necessarily have been intended that the engagement should continue until after the crop was made. The contract was, in fact, to make a fair average crop. Upon that, depended Trulove's right to any compensation whatever. When that was done, however, we apprehend that his right to demand compensation for his services at the rates agreed upon was perfect, and as it was not known, at the time of making the contract, how long it would take to make it, it may be fairly inferred, that it was for this reason that the *rates* alone were agreed upon. At all events, there is enough in the express agreement to repel the idea that the services were intended to continue for a year. For if it had been the understanding, it is presumed that they would have so expressed it, in terms equally easy to express, and more significant of the real contract.

Under this view of the case, it becomes unnecessary to discuss the very intricate and doubtful questions, which arise upon special executory contracts, for the performance of labor, where the performance of the entire service is a condition precedent to the right to recover the sum agreed to be paid upon its performance. What acts or circumstances will amount to an excuse for the non-performance of such conditions, or whether under any, or what circumstances, the party contracting to perform a condition precedent, may abandon his contract, and sue in indebitatus assumpsit for the value of the services rendered under the contract and in

part performance thereof, we are not now called upon to decide, and in regard to which there are conflicting opinions by jurists of distinguished ability. Thus, the Supreme Courts of New York, Massachusetts, Alabama, and several others, where the contract is entire and executory, hold that it must be declared upon; because, whilst in force, the parties are bound by it, and there is no ground for implying a promise upon which a recovery may be had in indebitatus assumpsit. *Stark vs. Parker*, 2 *Pick.* 275; *Roberts vs. Brownrigg*, 9 *Ala.* 108; *Ladue vs. Seymor*, 24 *Wend.* 60.

Opposed to these decisions, is the decision of the Supreme Court of New Hampshire, in the case of *Britton vs. Turner*, 6 *New Hamp. Rep.* 481, in which it is held that, even in case a special contract should be voluntarily abandoned by the party, whose duty it was to perform services, which were a condition precedent to his right to compensation under the contract, yet still, if the party contracted with actually receives such services (although performed under, and in part performance of, such special contract), and thereby derives a benefit and advantage, over and above the damages, which have resulted from the breach of the contract by the other party, the labor actually done, and the value received, furnish a new consideration; and the law thereupon, raises a promise to pay, to the extent of the reasonable worth of such excess; for the recovery of which an action may be sustained; not upon the contract, but in indebitatus assumpsit. It may also be remarked, that South Carolina and Mississippi would seem to favor the rule laid down in the case of *Britton vs. Turner*, when the contract is made with overseers for their services; but the opinions of the courts in these States, are mainly predicated upon a custom or common understanding prevailing there in regard to overseers' wages. 6 *S. & M. Rep.* 639; 4 *McCord* 246.

The state of case before us, may be considered as coming more properly under the rule in regard to *executed*, than executory contracts. Which is, that when the contract has been fully per-

formed, according to its terms, and in some cases where it has been performed, but, in some respects, differently from the terms of the agreement, as nothing further remains to be done, under the contract, on the part of the party thus performing it, a duty is raised, for which a general indebitatus assumpsit will lie. 1 *Watts & Serg.* 304; 4 *Blackf.* 493; 4 *Cow.* 566.

Under these authorities, there can be no objection to the form of the action in this case, if the facts entitle the plaintiff to recover. The question then is, was this contract executed? Did Trulove make for Wright a fair average crop? If he did, he was entitled to recover the value of his services, rendered for the time he was employed, at the rates agreed upon. If not, he was, by his express agreement, entitled to no compensation whatever. There is certainly no illegality in the contract itself which forbids its enforcement.

The agreement, relating to the dogs and horse, when considered in connection with the testimony in regard to Trulove's habits, was evidently intended to remove from him temptations to misspend his time in hunting, for which he is said, by the witnesses, to be passionately fond. Thus understood, these are minor considerations, but in any event, if, as appears in evidence, Wright agreed to receive from Trulove a compensation for keeping the horse, or upon finding the dogs there, instead of promptly discharging Trulove for a breach of contract, requested him to take them off the plantation, which Trulove agreed to do, and as, according to the testimony of one witness, was done, such acts amounted to a waiver of all objection to Trulove's conduct in that respect. If it had been Wright's intention to claim the penalty for the violation of his contract, it was his duty, at once, to have discharged Trulove, and not to have permited him to perform services upon the faith of payment under the contract.

We come now to consider the main question in the case, the making an average crop. And first: How shall we understand the terms "fair average crop?" We cannot believe, that the crop should be such, at all events, and notwithstanding the occurrence of events unusual in their occurrence, and over which the over-

seer could have no control, even with the most skilful and faithful conduct on his part: for this would have amounted to an express warranty, at all events. The negroes, the teams, and the farm were committed to the care and control of the overseer, for the purpose of making the crop, and as well might it be supposed, that there was a warranty against cholera, that might have swept off every negro from the farm, as against unusual overflows: and yet, had the cholera visited the plantation and caused the death of the slaves, so as to prevent the cultivation of the crop, it could scarcely be said the overseer, who had demeaned himself well, should receive no compensation for his services, or that he ever intended, when contracting, to warrant a fair average crop under such circumstances. And, for the very same reason, he would not contract against overflow, or an extraordinarily bad season. But the obvious meaning of the parties must have been that the crop should be a fair average crop, making due allowance for the season, and unforeseen events, beyond the control of a prudent, faithful overseer.

Whether Trulove did this or not, was a question of fact, to be determined by the jury: and the extraordinary season, and like circumstances before them in evidence, as well as the crop raised, and the conduct and deportment of Trulove, should be considered in determining the question. And, when so considered, if they should find that Trulove did make a fair average crop, the plaintiff was entitled to a verdict for the value of his services for the time he was employed. If not, then, under his contract, he was entitled to nothing. It is unnecessary to discuss the questions, which would arise in case Wright had turned Trulove off, before the crop was made, as the evidence clearly shows a different state of case.

Under this view of the case, it is evident that the Circuit Court correctly refused to give the instructions moved by the defendant; and that, although the court erred in the instruction given to the jury, inasmuch as the verdict is such as the jury might well have found, under the evidence, had proper instructions been

given, it is evident that, if we were to reverse the judgment, and remand the case with instructions to grant a new trial, under proper instructions, the same verdict, under the evidence, might be sustained. The motion for new trial presented this question broadly before the court below, and the rule, as repeatedly held by this court, is that, although there may be error in the ruling of the court, upon some question of law, yet still, if such decision (although erroneous) did not tend to withhold material facts from their consideration, and if the verdict was correct in view of the whole case, and such as might have been rendered under proper instructions, it is not error, in the Circuit Court, to refuse to grant a new trial.

The only other question is, whether the damages are excessive. It is true, that the amount of the verdict exceeds the amount due the plaintiff's intestate for his services, for the time he was engaged at overseeing, at the rates agreed upon. But, allowing the plaintiff interest from the time the work was completed, which (under the statute, *Digest, ch.* 90, *sec.* 1, if they believed that there had been vexatious delay) they might in their discretion do, the verdict will be found to be less than might have been found. And that the jury did allow interest, in this case, there can be no doubt, upon comparing the amount of the verdict with the amount of the services rendered and the interest thereon.

Upon consideration of the whole case, we are of opinion that the Circuit Court did not err in refusing to grant a new trial. Judgment affirmed.

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CLARK ET AL. VS. BALES.

The defendant will be made liable for trespass, if it is proved that he came in aid of the person, who committed it, though he took no further part in it; and where there are circumstances in proof, connecting a defendant with the trespass, and the jury find a verdict against him, and the judge, who heard the testimony, refuse to grant a new trial, this court will not disturb the verdict.

When a joint trespass is proved, the jury are to estimate the damages against all the defendants, according to the amount which they think the most culpable of the defendants ought to pay: and where the trespass is an aggravated one, they are not confined to the actual damage, but may give exemplary damages.

Quere: Will the affidavit of a juror, after verdict rendered, that he was induced to consent to the verdict from a misapprehension of the instruction of the court, be admitted as cause for a new trial?

Writ of Error to the Circuit Court of Independence County.

Hon. B. H. NEELY, Circuit Judge.

FAIRCHILD, for the plaintiff.

W. BYRES, contra.

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

Henry Bales brought an action of trespass, in the Independence Circuit Court, against Johnson Clark, John Clark, Sarah Clark, Jonathan Clark and Robert A. Patterson, alleging, in the declaration, in substance, as follows:

1st. Count: That, on the 20th December, 1851, the defendants broke, and entered the close of the plaintiff, and drove away, and converted to their own use, a sow and nine shoats, of the value of $ 200, the property of the plaintiff.

2d. Count, for breaking and entering the close of the plaintiff, pulling down his fence, and carrying away his rails.

3d. Count: That the defendants seized, took, and drove away, the hogs of the plaintiff, to wit: one sow, and nine shoats, of the value of $200.

The defendants pleaded not guilty, the case was submitted to a jury, and a verdict returned for the plaintiff, assessing his damages at $100.

The defendants moved for a new trial, on the grounds following:

1st. The damages assessed by the jury are excessive, and unwarranted by the evidence, and law of the case.

2d. The verdict is against the evidence, and, entirely without evidence, as to defendant, *Robert Patterson.*

3d. The verdict was given on a misapprehension of the law of the case, as declared in the affidavit of *James Carson*, one of the jurors.

4th. The verdict is against the law and evidence.

To support the motion for a new trial, the defendants filed the affidavit of Carson, one of the jurors, made before a justice of the peace, stating, that affiant misunderstood the charge of the court to the jury, in this: that he understood the judge to charge the jury, "that if they, by the law and testimony, find one of the defendants guilty of the charge alleged in the declaration, all must be so found, and damages awarded accordingly, as to the parties charged, and that the jury had no right, or power, under the instructions of the court, as understood by affiant, to discharge any one of the defendants, without discharging all of them—that he understood the court to charge, that if any one were guilty of the trespass, all were guilty, and that damages must be found against all, or all must be acquitted. That, under this misapprehension of said charge, as understood by affiant, he acquiesced in the verdict of the jury. That he now understands the charge of the court to have been, that the jury had the right, under the law, to discharge one or more of the defendants in said cause, provided

they believed the testimony, as to any one of the defendants, was deficient, and did not sustain the charge alleged as to him or them. That, under such an understanding of the law and charge of the court, he could not, under his oath, as a juror in said cause, have consented to the verdict rendered, and, under such state of facts, he makes this affidavit."

The court overruled the motion for a new trial; the defendants excepted, took a bill of exceptions setting out the evidence, and brought error.

The substance of the testimony, as it appears in the bill of exceptions, is as follows:

Benjamin R. Henderson, a witness for the plaintiff, testified that he lived in the neighborhood of the parties to the suit; that, in December, 1851, a short time before the commencement of the suit, he was at the house of plaintiff, who lived upon an improvement upon the public land, which he had bought and claimed —the improvement consisted of a log-house, field, a lot around a stable and corn crib, and a hog-pen in the yard. The plaintiff had a large spotted sow, which he bought a year before that time, of one Henderson. Witness knew the sow well, when Henderson owned her, and saw her frequently in the plaintiff's possession, after he bought her of Henderson; and after which, she had nine pigs, which, in December, 1851, were quite large shoats. Plaintiff, at that time, had had the sow up in a pen, fattening for his pork—the shoats were running about the yard, stable and crib. When witness went to plaintiff's house, as above stated, he was told that the sow had been let out of the pen, the night before, by some person, and that the *Clarks* had driven her, and a part of the shoats, off, that morning; and, while witness was there, *Jackson Clark*, and two or three of the sons of the defendant, Johnson Clark; and *Jonathan Clark* and *Robert A. Patterson*, came up to the plaintiff's house, and said they were going to drive off the balance of the shoats. Plaintiff told them not to do so—that they could not drive or take them away, without legal authority. *Jackson Clark* replied that he had authority

enough — that they were his mother's hogs (*Sarah Clark*, one of the defendants,) and that he would take them; and he, and *Jonathan Clark*, and the sons of Johnson Clark, commenced driving them off, against the order of plaintiff, and, to get them away, they had to run some of them into the hog-pen, and catch them; and that they drove them off, and took them to said Sarah Clark's. Witness did not not recollect of seeing *Robert A. Patterson* doing any thing particular about said hogs, only he come with the others, and went away with them. Before they could get the shoats away, they had to run them around in the yard and lot of plaintiff, &c.

Witness was at the house of plaintiff, some eight or ten days before this; and *Johnson Clark* and *John Clark*, two of the defendants, came there, and said the sow and shoats belonged to their mother, or the estate of James Clark, deceased — witness did not remember which, and that they would have them. Plaintiff told them they could not have them without legal authority; and they said they had authority enough. On the next day, after the hogs were taken, as aforesaid, plaintiff got the constable, and a writ to take the hogs, and the plaintiff, the constable, and witness and some others, went to Mrs. Sarah Clark's, one of the defendants, and mother of the defendants, *Johnson Clark*, *John Clark*, and *Janathan Clark*, and there found said sow and pigs in a pen. The defendants, *Johnson Clark*, *John Clark* and *Jonathan Clark*, were there. The constable and plaintiff demanded the hogs, and the said *Johnson* and *John* came out to the pen, and told the constable and the plaintiff not to take the hogs. The constable told them his writ commanded him take them; and *Johnson Clark* told him if he attempted to lay down the pen, and take the hogs, if he were to knock him in the head and kill him, he could not be hurt for it. The constable and the plaintiff did not take the hogs. Witness passed there on the next day and saw the hogs—they had all been killed. Did not see who killed them—they were killed and dressed, but witness knew

them. Witness thought the sow and shoats were worth about $20—were worth from $15 to $25.

James W. Henderson, witness for plaintiff, testified, that he was one of the executors of James Clark, deceased, the husband of Sarah Clark, and father of said *Johnson*, *John*, and *Jonathan Clark*; and that *Robert A. Patterson*, the other defendant, was a son-in-law of said *Johnson Clark*. That, at a sale of the personal property of said *James Clark*, deceased, by his executors, the sow in question was sold, as part of his estate, purchased, and paid for, by one *John P. Henderson*, who afterwards sold her to the plaintiff.

Holland, witness for plaintiff, was with the constable when he went to Mrs. Clark's to demand the hogs for the plaintiff, and as to what occurred there, at that time, testified substantially as the witness *Benjamin R. Henderson*. He also saw the hogs at *Mrs. Clark's*, after they were killed.

Jackson Clark, witness for the defendants, testified, that one of the hogs running out was not sold at the executor's sale; and that his mother *Sarah Clark*, claimed the sow and pigs which plaintiff had in possession, and asked witness to go and get them for her. She told Johnson Clark's children to help witness drive them to her house. *Johnson Clark* was not present, and witness never heard him give the children any directions about the matter. Early in the morning, *Sarah Clark*, witness, the children of *Johnson Clark*, and *Jonathan Clark*, went up to the plaintiff's house, which was about a quarter of a mile from the house of the mother of the witness, to get the said sow and shoats, and found them near the house, running out near the road. The plaintiff forbid their taking them, but Mrs. Clark said they were hers, and told witness to drive them home; and she, *Jonathan*, *Johnson's* children, and witness, attempted to drive them to Mrs. *Clark's*, and did drive the sow and a part of the shoats, but a part of the shoats they did not get that time; but *Jonathan*, *Robert A. Patterson*, and *Johnson's* children, returned to the plaintiff's, and witness, *Jonathan* and *Johnson's* boys, drove the balance of

them to Mrs. Clark's, said Robert A. Patterson returning with them. They put them all in a pen at Mrs. Clark's, and witness afterwards killed and dressed them for his mother, at her direction. Neither John nor Johnson Clark was present when the hogs were killed, nor had any thing to do with the killing of them. Neither of them was present when the hogs were taken from the plaintiff. They were both present, however, when the constable and plaintiff came to Mrs. Clark's after the hogs.

The counsel of the plaintiffs in error, has not claimed, in his brief, that the court below should have regarded, or granted a new trial upon the affidavit of the juror, Carson, stating that he agreed to the verdict under a misapprehensien of the charge of the court. It need only be remarked, therefore, on this point, that we are inclined to place this affidavit with the class held to be inadmissible in *Pleasants vs. Heard;* and, even if allowed, the court below could best judge whether its charge was given in terms likely to mislead the juror, or whether the affidavit was not without just foundation. The charge of the court is not put upon the record, and we have no means of determining whether the juror could have mistaken it.

It is urged, by the counsel for the plaintiffs in error, that a new trial should have been granted, because there was no evidence to sustain the verdict, as against the defendant Patterson, and that the damages assessed were excessive.

The proof is clear that the hogs belonged to the plaintiff, that they were driven from his premises to Mrs. Clark's, and killed.

The defendants, John and Johnson Clark, were not present, it seems, when the hogs were driven off, nor when they were killed, but they were at Mrs. Clark's, when the plaintiff and constable went there for the hogs, and forbid their taking them from the pen. The defendant, Patterson, was the son-in-law of Johnson Clark, whose mother claimed the hogs. He went to the house of the plaintiff, it appears, with Jonathan Clark, and Johnson

Clark's children; was present when they were chasing a portion of the hogs about the premises, and returned with them to Mrs. Clark's, where they drove and penned the hogs.

The defendant will be made liable for a trespass, if it is proved that he came in aid of the person who committed it, though he took no further part in it. 3 *Phill. Ev.* 187.

It cannot be said that there was a total want of evidence to sustain the verdict as against any one of the defendants; and it was the peculiar province of the jury to pass upon the importance to be attached to the circumstances connecting each, and all of the defendants, with the trespass upon the property of the plaintiff, as detailed in evidence, in making up their verdict. Upon these circumstances they found all of the defendants guilty of a common cause; and the judge, who also heard the testimony of the witnesses, refused to set their verdict aside. We shall not, therefore, disturb it. See *Drennen vs. Brown*, 5 *Eng. R.* 138; *Bowen vs. Cook*, *ib.* 309; *Hubbard vs. State*, *ib.* 378; *Spratt et al. vs. Vaughan, &c.*, *Ib.* 474; *State Bank vs. Wooddy et al.*, *ib.* 638; *Bivens vs. State*, 6 *Eng. R.* 455; *Sparks vs. Beaver*, *ib.* 630; *Mains vs. State*, 13 *Ark. R.* 285; *Funkhouser and wife vs. Pogue*, *ib.* 295; *Hendrix vs. Sharp*, *ib.* 306.

Nor are we disposed to set aside the verdict on the grounds of excessive damages.

When a joint trespass is proved, the jury are to estimate the damages against all the defendants, according to the amount which they think the most culpable of the defendants ought to pay. 3 *Phill. Ev.*

The trespass in this case, was rather a flagrant one. The plaintiff's premises were invaded, his close broken, entered, his hogs driven off, killed and converted; and on the trial, the defendants proved no color of title to the property. True, the value of the hogs was proven not to exceed $25, but the jury were not confined exclusively to the value of the hogs, in determining the amount of damages to be awarded the plaintiff. They had the right to take into consideration the invasion of the plaintiff's

premises, the vexation to his feeling, the inconvenience to him arising from the deprivation of his property, as well as its value, and then to add something by way of "smart money," or exemplary damages.

Under all the circumstances of this case, we cannot conclude, that the verdict for one hundred dollars, was so exorbitant as to indicate corruption, or bad faith on the part of the jury, and shall not therefore, disturb it. See *Major vs. Pulliam*, 3 *Dana* 582; *Wort vs. Jenkins*, 14 *John R.* 352; 3 *Starkie Ev.* 1451. The judgment is affirmed.

OVERBY ET AL. VS. MCGEE.

15 459
67 194

It is a general rule that a sheriff, or other officer, who executes a writ of attachment or execution, is bound to take the debtor's goods alone; and that he is guilty of trespass for taking the goods of a stranger.

The owner of property levied upon and sold under a writ of attachment against another, may not only recover the property and damages for the detention, from the purchaser, but may also maintain an action of trespass against the officer and plaintiff in attachment, for the taking of the property; although, at the time of the levy and taking, the property was in the possession, *under a loan*, of the defendant in the attachment.

Appeal from Johnson Circuit Court.

Hon. FELIX I. BATSON, Circuit Judge.

WALKER & GREEN, for the appellants. A valid writ of attachment or execution, is a protection to an officer in seizing personal

property, which he finds in the possession of the defendant in such writ—possession of personal property being *prima facie* evidence of ownership. *Williams vs. Lownds*, 1 *Hall* 595; 8 *Cowen Rep.* 65; 7 *Wend.* 236.

Where a trespass has been committed by several persons jointly, the party may sue any or all of the trespassers; but he can recover but one satisfaction, and so the plaintiff having recovered the property and damages from the purchaser, as stated in the second plea, such recovery is a bar to the prosecution of this suit. 2 *Rawle Rep.* 395; 6 *J. R.* 168; *Cowen & Hill's Notes to Phill. on Ev., vol.* 3, *pages* 823, 978; 8 *J. R.* 383.

The gist of this action, is the injury to the possession, and the general rule is, that, unless, at the time the injury was committed, the plaintiff was in actual possession, trespass cannot be supported. In this case, the bailee or person in possession, had the right to maintain trespass, and not the general owner. 1 *Ch. Pl.* 174; 12 *J. R.* 183; 11 *ib.* 385; 11 *Mass.* 415; 17 *ib.* 299.

Mr. Justice WALKER delivered the opinion of the Court.

This is an action of trespass, brought by McGee, against Overby (a constable) and others, for forcibly taking a mule.

The defendants jointly pleaded the general issue; and the defendant, Overby, filed special pleas of justification; the first, and most material of which was, that, as constable, he levied an attachment upon the mule, having found it in the possession of Riggs, the defendant in attachment, and kept the mule, under and by virture of this authority, until the return of the writ.

To this plea, a demurrer was sustained, and the defendant refusing to plead over, insists here that the plea is a sufficient justification. It is conceded that, if the matter of defence is sufficient, the plea is good in all other respects. The grounds of the defence are, that possession is *prima facie* evidence of title to a chattel, and that *prima facie* title is sufficient to justify the officer in making a levy. It is true that the officer must, in distinguishing the defendant's property from that of a stanger, rely upon the ordinary

evidence of title to such property, amongst which are actual possession, use, declarations of ownership, and common reputation. And these, with many others, give evidence, more or less conclusive, of title. It is not to be expected that the officer has personal knowledge of the property owned by the numerous individuals against whom he may have process, or that he can, even upon enquiry, in many instances, get any reliable information. That goods are found in the storehouse of a merchant, or a horse or implement of husbandry in the possession of a farmer, in the absence of any evidence to the contrary, furnish such reasonable presumption of ownership. And the question is, shall the officer be held justifiable, in the absence of evidence to the contrary, in taking the goods in execution.

The general rule, as laid down by the authorities, is, that the sheriff, or officer, who executes a writ, is bound, at his peril, to take the debtor's goods alone; and that he is guilty of trespass for taking the goods of a stranger, even though assured, by the plaintiff in execution, that they are the property of the defendant. 4 *Term Rep.* 633; 3 *Maule & Selw.* 175; 8 *Cowen Rep.* 65; 1 *Pick.* 545.

To this general rule, there is an exception, to the effect, that where the goods of the defendant and a third person are so mixed that they may not be readily distinguished, the officer may levy upon them, and only becomes liable to a stranger for levying, should he refuse to deliver them to the rightful owner upon request. 7 *Mass.* 123.

The reason, upon which this distinction rests, is commendable for its tendency to encourage the officer in the discharge of his duty, when acting in good faith, by furnishing him protection, at least until he is advised that there exists an adverse claim to the property; and, when viewed practically, the injury likely to result to the owner, if any indeed, is nominal, because, when the property is not in his possession, when the levy is made, as he is not deprived of the immediate possession, no damage is likely to result, on account of the taking in the first instance,

to him, much less than to the defendant in execution; for, being possessed of it, the temporary use may be valuable to him. So that it is not until after notice of his claim, that the officer should strictly be held to act at his peril.

And when considered in reference to our statute, which provides for a trial of the right of property, after a levy has been made, and before sale, and of the effect which the verdict of the jury has upon the officer's liability, we should strongly incline to hold the officer justifiable, in the first instance, for taking the property in execution.

The statute declares that, if any person, other than the defendant in execution, shall claim the property levied upon, and shall give notice thereof to the officer, such officer may summon a jury to try the right of property, which, if found subject to the execution, the verdict shall be an indemnity to the officer in proceeding to sell the property; otherwise, unless indemnified, the officer is not required to sell it.

Now, it is evident that if the effect of the verdict of the jury, finding the property subject to the execution, is to justify the officer in selling it, it must be because he is considered as in the lawful discharge of his duty, up to the trial and verdict, as well as after it. Because, if the officer is to be held as a trespasser for making the levy, and up to the time of the trial of the right of property all the mischief intended to be remedied by the act, might arise before the officer could avail himself of the benefit of it. For, until after the levy is made, no trial of the right of property can be had. The justification must therefore be complete, extending to the levy, as well as the sale. And such is the decision of the Supreme Court of Kentucky, under a similar statute. *Terrel vs. Cockrill*, 3 *Bibb's Rep.* 258.

And although the officer may be justified in making a levy upon property found in the defendant's possession, and in the absence of evidence to the contrary, *prima facie* his, it by no means follows that if, upon demand or notice, the officer refuses to restore the property to the true owner, he should not be held

as a trespasser *ab initio*, as held in 7 *Mass. Rep.* 123. Nor do we intend to question but that the owner of property, wrongfully taken and converted by an officer, may not pursue and reclaim his property, or its value, regardless of any finding of the jury, upon the trial of the right of property, or whether the officer is notified of his title or not. The greatest extent to which either could go, would be to relieve the officer from liability as a trespasser in suit in trespass for damages.

But the officer, who levies a writ of attachment, may, with good reason, be held to greater strictness in making his levy, because, when once made, there is no means, by statute, for trying the title to the property levied upon, but he must, at his peril, return it with his writ. And, in addition to this, as attachment is a proceeding *in rem*, it is the defendant's property which gives authority to the court to proceed to render judgment and direct a sale. The trial by interpleader, after the return of the writ, it is true, may afford to the claimant some relief, but generally, after much delay and expense. In addition to these considerations, it may be remarked, that the whole current of adjudicated cases is in favor of holding the officer responsible at his peril for levying upon the property of a third person.

The question raised upon demurrer to the second special plea, which sets up in defence a recoverry of the mule in an action of replevin from a third person, in bar of a recovery in this suit, was settled by this court, when this case was before us upon a former occasion. See *Overby vs. McGee*, 7 *Eng.* 164. The demurrer was properly sustained.

Upon the trial, under the general issue, the proof was, in substance, that the mule was the property of the plaintiff, a resident of Texas, who loaned it to Riggs, the defendant in attachment, to ride home, with instructions, after he got home, either to send it back to the plaintiff, if an opportunity should be offered, or keep it until plaintiff came to Arkansas. That the mule was levied upon, and taken from the possession of Riggs, whilst on his way, but before he reached home.

The appellants contend, that the plaintiff was not entitled to recover in trespass, because, in such action, the plaintiff must not only show a general property in the chattel, but also possession. And that, although it may be true that the general property carries with it, *prima facie*, a right to immediate possession in most cases, and consequently is equivalent to actual possession, that in this case, this *prima facie* possession is repelled by evidence that the plaintiff had in fact parted with his right to immediate possession.

It is very true that, in some cases, the general owner of personal property may neither be in the possession of it, nor entitled to the possession of it, at the time the trespass is committed: and, it is equally true, that, when such is the case, the general owner cannot maintain trespass for such injury, (1 *Ch. Pl.* 169; *Hume vs. Taffs*, 4 *Blackf.* 136): as, for instance, where the property is in the hands of a bailee for hire, for a time which had not expired, when the trespass was committed. Because, as the general owner in such case, has, by contract, vested in the bailee a special property, coupled with actual possession, the bailee's right is good, even against the general owner for the time being. The inference, arising from the general ownership, of possession, is rebutted, and only exists in reversion; and, consequently, as there is neither actual possession, nor a right to possession in the general owner, he cannot maintain trespass. But, where the general owner merely permits another gratuitously to use his chattel, such owner may maintain trespass against a stranger for an injury done to it, whilst thus held. 1 *Ch. Pl.* 174.

In the case of *Long vs. Bledso*, 3 *J. J. Marsh.* 307, the facts were, that the plaintiff loaned his mare to a neighbor, against whom an execution issued, which was by the sheriff levied upon the mare, whilst in the possession of the defendant in execution. Under this state of case, the question arose whether the plaintiff (the general owner) was so possessed of the property, at the time of the levy, as to entitle him to maintain trespass. And it was

held, "that the possession of the loanee was, in legal contemplation, the possession of the lender."

This decision is directly in point, and is sustained upon this sensible ground that, when the actual possession of goods is in the bailee, and is held by him as a mere gratuity, and not upon contract, under which he has acquired rights beneficial to himself, and which he may assert, for the time being, even against the general owner, as such gratuitous possession is merely at the sufferance of the general owner, it may, at any time, be terminated by him, and is considered in legal effect his. So that, upon this ground alone, there was no sufficient ground for granting a new trial.

Finding no error in the judgment and decision of the Circuit Court, let it be affirmed.

McDANIEL VS. GRACE ET AL.

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63 257

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It is a general principle of the common law, that the laws of the place, where real property is situate, exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities, which should accompany them: and so, a married woman, residing in Louisiana, can convey lands in Arkansas only in the manner prescribed by the statute. *Chapter* 37, *Digest of Arkansas.*

If a married woman can make a power of attorney, authorizing her husband to execute a deed for her, conveying her interest in land situate in this State, the execution of the power should be acknowledged by the wife, in the same mode in which the statute requires her to acknowledge the execution of a deed.

Quere: Can a wife constitute her husband an agent to sell and convey her estate or interest in land?

It is necessary that a power of attorney to authorize the execution of a deed by an agent should be under seal.

A deed of conveyance of the wife's land, executed by the husband in the name of himself and wife, under a power of attorney from the wife, without seal, and not in express terms authorizing the conveyance of any land or interest in land, is null and void, as an act of the wife, and does not pass to the grantee any interest of hers whatever in the land.

The husband is entitled to curtesy in the wife's real estate, only where there is issue born alive, and a seizin in fact as well as in law, except in the case of waste, uncultivated lands not held adversely; and so, the husband would not have curtesy where the land is held by another adversely, and is the subject of litigation until after the death of the wife.

The right of the husband to curtesy has been extended by modern decisions; and it is now settled in equity, that he shall have curtesy of a trust as well as in a legal estate; of an equity of redemption, a contingent use, or money to be laid out in land: but not in a pre-emption right of the wife in the public lands of the United States.

A plea, to an action upon a bond, setting up as the consideration of the bond, a sale and conveyance by the husband in the name of himself and wife, under a power of attorney from the wife, of her interest, as heir, in a pre-emption right to public land, shows that the bond was wholly without consideration.

Where the vendee takes a deed for land without covenants of warranty, and the title fails, he cannot, on that account, avoid the payment of the purchase money, unles fraud, or its equivalent, has been practiced upon him. But where he has taken a deed with general covenants of warranty, and there is a total failure of title and an eviction, or its legal equivalent, the purchaser may avail himself of the plea of failure of consideration.

Where a note or bond is executed without consideration, or upon a consideration that has failed; and, subsequently, another security for the same debt is given in exchange or substitution, the original want or failure of consideration follows and attaches to the new security.

A replication is not subject to the objection of duplicity on account of the statement of several facts constituting but a single reply to the plea; nor where several matters are set up, one of which only is a good reply to the plea; and, as a general rule, all matters not responsive to the plea, may be struck out as surplusage.

Where the replication to a plea of failure of consideration states the circumstances under which the bond sued upon was executed, and which are no answer to the plea, but concludes with the averment, "that there was another and different consideration for the execution of the bond than that which is alleged in the defendants' plea; and there was a good and valid consideration in law for the execution of the instrument sued on;" such avermont will be treated as an issue to the plea, and all else considered as stricken out as surplusage.

Appeal from the Circuit Court of Jefferson County.

Hon. J. C. MURRAY, Circuit Judge.

YELL, for the appellant. In a plea of failure of consideration, the facts must be set out wherein it has failed. *Dickson vs. Burk*, 1 *Eng.* 412; *Cheney, use, &c. vs. Higginbotham*, 5 *Eng.* 273. Such plea must aver a complete failure. *Willit vs. Forman*, 3 *J. J. Marsh.* 292.

A plea, admitting consideration, but denying its validity in law, is not supported by proof of no consideration, or a failure of consideration. *Coyle vs. Fowler*, 3 *J. J. Marsh.* 472.

This must be a plea admitting consideration, but denying its validity in law: and if it cannot be supported by proof of failure of consideration, or no consideration, it is no bar to plaintiff's right to recover, and will be held had on the demurrer to the replication; for if proof cannot be given to support it, it is insufficient in law.

A plea, in all instances, alleging a failure of consideration, must set out clearly wherein the failure consists. 3 *J. J. Marsh.* 5; *ib.* 22; *ib.* 94; *ib.* 234.

PIKE & CUMMINS, contra. The law of the place where lands lie, governs as to the forms and solemnities to be observed in the conveyance thereof, and as to all contracts to convey. *Story Confl. of L., p.* 300, 303, 306, 358 *to* 362.

Ch. 37, *secs.* 10, 12, 16 *and* 21, *Rev. Stat.*, prescribes the solemnities to be observed in the conveyance of real estate, situate in Arkansas, by married women.

The power of attorney and deed in this case, were not so executed as to convey the interest of Mrs. Hooper. 1 *Hill. Ab.* 54, 55. A mere contract to convey her lands by a married woman, is void, even if these documents could be construed to amount to that. 1 *ib., p.* 55, *sec.* 16.

But the power here (if under our statute the husband could act as agent for his wife in the conveyance of lands) does not relate

to lands, nor authorize the husband to contract in relation thereto. Every power should be strictly construed. *Story on Agency, p. 75, et seq.; sec. 62, et seq.* Upon these grounds, there was a clear total failure of consideration.

The plea is good, according to the principles adjudged in *Smith vs. Henry*, 2 *Eng.* 207.

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

This was an action of debt, brought by James McDaniel, in the Jefferson Circuit Court, against William P. Grace and Robert E. Waters, upon the following obligation:

"$1200. On the 1st day of March, A. D. 1852, we promise to pay Elias Hooper, the sum of twelve hundred dollars, for value received of him. Witness our hands and seals, this March 31st, A. D. 1851.

GRACE & WATERS, [SEAL.]"

Which was assigned by Hooper to Moses Belcher, on the 1st day of April, 1851; and, on the next day, assigned by Belcher to the plaintiff.

The defendant, Waters, pleaded *non est factum*, to which plaintiff filed a special replication.

The defendant, Grace, obtained oyer of the obligation sued on, and the assignments thereon, and filed a special plea in bar, in substance, as follows:

That, on the 13th day of July, 1850, at the county of Jefferson, the said Elias Hooper, the payee, in the bond mentioned in the declaration, applied to the defendants, Grace & Waters, and then and there represented, declared and stated, that he and Mary E. Hooper, his wife, and their children—the only children and heirs of the said Mary E.—were citizens and residents of the State of Louisiana, and were domiciled there, as was true; and that the said Mary E. was one of three children, and sole heirs of one Nathan Cloyes, and as such owned, and was entitled in her own right, and exclusively, except as to such rights as said Elias ob-

tained and had therein in virtue of his marriage with her, or such interest as the widow of Nathan Cloyes might have therein as her dower, to one undivided third part of a certain pre-emption right, or claim, under the pre-emption laws of Congress, which said Nathan Cloyes, in his lifetime, had, and held in, and to a certain tract of land known and designated as the *north-west fractional quarter of section two, township one north, of range twelve west*, situate in the county of Pulaski, in the State of Arkansas, and lying immediately east of the Quapaw line. That said Elias or Mary E. never had, and have no other right or claim to the said land, other than such as was, as aforesaid, cast upon the said Mary E., as one of the heirs of the said Nathan Cloyes. And the said Elias then and there offered to sell and convey to the said defendants, in fee, all the right, title, interest and claim of the said Elias and Mary E., in and to the land aforesaid, in due form of law, for the sum of $2,500, and the defendants agreed and contracted to pay the said sum of $2,500 to the said Elias Hooper, in consideration, and only for and in consideration of the transfer and conveyance, in due form of law, in fee simple, to the said defendants, by the said Elias and Mary E., of all their right, title, interest and claim in and to the land aforesaid. That said Elias then and there, pretendedly, in pursuance of said contract, for himself, and for his wife, pretending to be duly authorized and empowered thereto, by the said Mary E., his wife, executed and delivered to the defendants, a pretended deed for said land, as follows—the same being signed and sealed by the said Elias for himself, and by him in the name of his wife, and by no one else, or in any other manner executed by his wife, who was not present, to wit:

"Know all men by these presents, that we, Elias Hooper, and Mary E. Hooper, wife of said Elias Hooper, of Claibourn Parish, State of Louisiana, for and in consideration of twenty-five hundred dollars, to us in hand paid, have this day bargained, sold, and conveyed, and by these presents do bargain, sell, and convey, unto William P. Grace and Robert E. Waters, of the State

of Arkansas, county of Jefferson, all of our right, title, interest and claim in and to, and out of the following described tract or parcel of land, *to wit:* the north-west fractional quarter of section numbered two (2), in township numbered one (1) north, of range numbered twelve (12) west, and extending to the adjoining partition, which land was formerly adjoining the town of Little Rock, east of the Quapaw line, but a portion of it is now included within the town or city of Little Rock, said land being situate in the county of Pulaski and State of Arkansas, together with all the privileges and appurtenances, buildings and dwellings of every description whatsoever thereto belonging. To have and to hold the aforesaid interest to them, their heirs and assigns forever; and we, the said Elias Hooper and Mary E. Hooper, do, and our heirs shall warrant and defend the above described premises unto the said William P. Grace and Robert E. Waters, against the lawful claims of all persons claiming by or through us. In testimony whereof, we have hereunto affixed our hands and seals, at Pine Bluff, this 13th day of July, A. D. 1850.

ELIAS HOOPER, [SEAL.]
MARY E. HOOPER, [SEAL.]
By E. HOOPER, Attorney in fact."

TEST:
J. C. MURRAY,
PETER GERMAN.

STATE OF ARKANSAS,
COUNTY OF JEFFERSON.

Be it remembered, that this day personally appeared before me, an acting and duly commissioned justice of the peace, in and for the county of Jefferson, and State aforesaid, Elias Hooper, who, on producing a power of attorney from his wife, authorizing him to act for her, in her name acknowledged that he had made and executed the foregoing deed of conveyance, for the uses and purposes and considerations therein expressed, and desired me to certify the same, which is hereby accordingly done, this the 13th day of July, A. D. 1850.

PETER GERMAN, J. P."

The plea makes profert of the above deed and acknowledgment, and continues:

And then and there, said Elias acknowledged said deed before Peter German, then a justice of the peace of said county, in the manner and form shown by the certificate to said deed annexed, and not otherwise: and the same was never, in any manner, or at any time, acknowledged by the said Mary E.: and said defendant further avers, that when the said Elias made said contract to convey said land, and when he made said deed, and acknowledged the same as aforesaid, he had no other written power or authority from the said Mary E. to act for her, than that conferred upon him by an instrument in the words and figures following, to wit:

STATE OF LOUISIANA, }
PARISH OF CLAIBOURN. }

Be it known, that this day before me, J. H. Cunningham, Parish Recorder, and ex-officio Notary Public, in and for the State and Parish aforesaid, duly commissioned and sworn, and in the presence of the subscribing witnesses, personally came and appeared Mary E. Hooper, wife of Elias Hooper, formerly Mary E. Cloyes, both residents of the State and Parish aforesaid, who declared that she had made, constituted and appointed, and by these presents do make, constitute and appoint, and in her place and stead put, and depute Elias Hooper, my husband aforesaid, he being present and authorizing the same, and accepting the same, my true and lawful attorney, for her and in her name, and for her use, to ask, demand, sue for, recover and receive all such sum or sums of money, debts, goods, wares, dues, accounts and other demands whatsoever, which are, or may be due, owing, payable and belonging to her, or detained from her by any manner, or ways, or means whatsoever, or in whose hands soever the same may be found; and also to pay and discharge all sums of money due and owing by her to any person, or persons whatsoever: giving and granting unto her said attorney, by these presents, my full power, authority, in and about the premises, to have, sue and

take all lawful ways and means in her name, and for the purpose aforesaid, and upon the receipt of any such debts, dues or sums of money, acquittances, or other sufficient discharges for her and in her name to make, seal and deliver. And generally, all and every act or acts, thing or things, whatsoever, needful and necessary to be done in and about the premises, for her and in her name to do, execute, and perform as fully, largely, and amply to all intents and purposes, as she myself might, or could do, if personally present; and attorneys, one or more, under him for the purpose aforesaid, to make and constitute, and again to revoke, at pleasure, hereby ratifying and allowing all and whatsoever, her said attorney shall lawfully do. This done and passed in my office, in the Parish of Claibourne aforesaid, in presence of W. W. Manning and Jacob Darsh, witnesses of lawful age, and domiciliated in said Parish; who hereunto sign their names, together with said parties, and me, the said Parish Recorder, on the twenty-ninth (29) day of June, in the year of our Lord one thousand eight hundred and fifty (1850).

(Signed,) MARY E. HOOPER.
ELIAS HOOPER."

ATTEST:

W. W. MANNING,
JACOB DARSH.

[L. S.] J. C. CUNNINGHAM,
Recorder and ex-officio Notary Public.

Notarial seal.

The plea makes profert of the above instrument, and continues: And the said instrument was executed in the said State of Louisiana, and the same never was signed, sealed or acknowledged by the said Mary E., otherwise than appears on the face of the said instrument. That, soon after the date of the aforesaid deed, the said Mary E. departed this life, leaving her surviving, her lawful children, who were and are minors. That when the foregoing contract for the sale of said land was made, as aforesaid, the said

land was, and ever since has been, held adversely by various persons claiming under a title adverse and hostile to the supposed title of said Mary E. and Elias, and they, or either of them, never gave, pretended, or had the power to give the possession of said land, or any part thereof, and said defendants, or either of them, never have been in possession of any part of said land, and have never received any rents or profits therefrom. That said Elias, or the said Mary E., or any one whomsoever, have never, in any manner whatsoever, conveyed, or attempted, or offered to convey, to the said defendants, or either of them, any interest or title whatever, in or to the said land, or any part of it, other than such as might have been vested in them by virtue of the deed and power of attorney aforesaid. Defendants aver and submit, that they, or either of them, in consequence, or in virtue of the deed and power of attorney aforesaid, did not acquire any title whatever in or to the interest, title or claim of the said Mary E., in and to the said land, or any part thereof; and at the time, and during her life, she, and since her death, her children and heirs, have been, and still are, the owners in fee of her interest and share in the claim and title in said land. That, in pursuance of the said contract for the sale of said land, and in full reliance on the good faith and honesty of the said Elias in the premises, on the date of the deed aforesaid, defendants paid down to said Elias the sum of $1,250, parcel of the consideration agreed to be given for the fee in said claim, and the title to the said land; and to secure the residue of the price agreed to be given for the same, and for no other cause or consideration whatever, executed and delivered to the said Elias, their bond for the sum of $1,250 payable about the first day of March, A. D. 1851; and after the same became due and payable, *to wit:* on the 31st day of March, 1851, the defendants paid said Elias the sum of $50, parcel thereof; and, in lieu and substitution of said bond, and for no other new or different consideration whatever, the said Wm. P. Grace made, sealed and delivered to the said Elias Hooper, the said bond in the declaration mentioned. And so the defendant submits that

the said contract in respect to the said land aforesaid, has become, and is void, and at an end, by reason of the imposition practiced upon said defendants in respect thereof; and by reason of the failure of the said Elias and Mary E., or any one else, to transfer and convey to the said defendants, or either of them, the fee in and to the claim or land aforesaid; and the consideration, whereon only the said bond sued on was based and founded, has failed, and said defendants ought not to be charged therewith"—concluding with a verification and prayer for judgment, &c., and sworn to by said Grace.

A demurrer to this plea having been overruled, the plaintiff filed a replication thereto, as follows:

"*Precludi non*, because the plaintiff says, that although the said defendants, on the 13th day of July, 1850, made and entered into a certain contract with Elias Hooper, the payee in the note sued on, &c., and that said Elias and Mary E., his wife, were residents of the State of Louisiana; and that the said Mary E. was one of the children and heirs of Nathan Cloyes; and that she was entitled to the one-third interest in and by virtue of a certain pre-emption right or claim, by virtue of the laws of Congress, which the said Nathan Cloyes, in his lifetime, had and held in and to the land described in said plea; and that said Elias never had and held any other interest than the interest aforesaid, and never pretended to have and hold any other right and interest in said land, except the right and interest which they had, and did fully convey to the said defendants all their rights, title, claim and interest to the land aforesaid, for the consideration of $2,500, and that the said defendants were fully apprised of all the rights that the said Elias Hooper and wife had in and to the land aforesaid, and all that they pretended to have; and all and every part of their rights were fully made known to said defendants at that time; and at the time it was fully made known to said defendants, that said lands were in litigation, and that there was risk in the purchase of said right; and hence, said right was sold for the small sum of $2,500; and the said defendants both being lawyers,

and understanding fully the claim and rights of the said Elias and wife, to said land; and the said Elias, then and there, fully exhibiting his power of attorney, from his wife, Mary E., to him, to sell and convey her interest therein; and after fully examining the same, with a knowledge of all the facts, made the purchase; and that said deed and said power of attorney, copied into said plea, are true copies of the power and deed then made; and that they conveyed all the rights of the said Elias and wife, that ever were agreed to be conveyed; and that the said deed fully contains the contract and fulfils the same; and that they never pretended to convey, and never contracted to convey, any thing but the half-interest of the said Elias and the said Mary E., in and to the land aforesaid; and if there were any mistakes, it was wholly and solely the fault of the defendants, for they drew the said deed to their own satisfaction — and the said Elias never made any pretence, in any manner whatsoever, but exhibited his power of attorney; and the defendants agreed to give $2,500 for their own interest, and were to risk all the consequences of the suit then pending. (a.) And if there were any defects in the said deed or power of attorney, the said Mary E., during her life, and the said Elias, were willing to make them good; and if they were not rectified, it was solely owing to the defendant's laches and neglect—and that said Mary E. never acknowledged said deed in said plea mentioned, except as alleged in said plea; and if there is any defect or illegality in said acknowledgment, or signing, it was wholly and solely owing to the laches and neglect of the said defendants, for they both being lawyers, held that said signing and acknowledgment of said Mary E., was good and valid in law, and fully accepted the same, informing the said Elias and Mary E. that the same was good and valid in law; and that they, the said defendants, never desired the same altered or amended during the said Mary E.'s lifetime. And that said land, so conveyed as aforesaid, is held adversely, and was so held at the time of making said deed; and that said Grace & Waters were fully advised of the manner in which said land was held when the said contract

and deed were made; and made the contract aforesaid with a full knowledge of adverse claims to the said land. The said Elias and Mary, his wife, never conveyed, and never have been desired or requested to convey, and never were, by said contract, to convey any other interest than that mentioned in said deed; and if the right of the land aforesaid has vested in the heirs of the said Mary E., it was, and is, owing entirely to the laches and neglect of the said defendants, in representing the conveyance aforesaid to be good, and in receiving and holding the same to be good and valid until the death of the said Mary E. [b]. And the plaintiff admits that the said defendants paid the sum of $1,250, as the said plea alleged, and that Grace & Waters then executed their note or bond to the said Elias for the sum of $1,250, due about the time in said plea alleged, and after the same became due and payable, and shortly previous to the 31st of March, 1851, at the county of Jefferson, the said Grace, acting for himself and Waters, made, and entered into, a new and other agreement with ——— Sloton, the agent of the said Elias Hooper, and sold and conveyed a certain tract of land in the county of Jefferson to said Hooper, and then and thereby paid off and took up the said twelve hundred and fifty dollar note, so due and payable as in said plea alleged—the numbers and description of the land are unknown to this plaintiff—and afterwards, the said Grace, acting for himself and Waters, canceled the said trade and the conveyance of the land aforesaid, and took into his possession the said contract, deed and papers of the conveyance of the lands aforesaid, with the said Elias Hooper, and took up the said papers, and the same have not been recorded, and are now in the possession of the said Grace—and afterwards, *to wit:* on the 31st day of March, 1851, for the consideration of the said land, conveyed as aforesaid by Grace to Hooper, and for and in consideration of the canceling of said trade, which was a new trade and contract, and entirely different and new from the contract first entered into by the said Elias and wife, and the said defendants, the said Grace acting for himself and Waters, on the 31st March, 1851, executed to the

said Elias Hooper, the said note or bond in said plaintiff's declaration mentioned, and for a valuable consideration, him thereunto moving. And so the said plaintiff says, that there was another new and different consideration for the execution of the said bond, than that which is alleged in said defendant's plea; and there was a good and valid consideration in law for the execution of said instrument sued on. And so the said plaintiff says the contract, mentioned in said defendant's plea, is not void; and, if it is, it is by the neglect, laches, and misrepresentations of the defendants, Grace & Waters, and not the fault of Hooper and wife, or of the plaintiff—and the plaintiff says there is another good, new, and valuable consideration, for which the said bond in the plaintiff's declaration described, was given—and, of this, the said plaintiff puts himself upon the country."

To this replication, the defendant, Grace, demurred, on the following grounds:

1st. Said replication is argumentative.

2d. Said replication is double.

3d. It tenders issues that are double, and not single, &c.

The court sustained the demurrer to the replication, the plaintiff rested; and final judgment was rendered, discharging both defendants; and plaintiff appealed to this court.

The counsel for the appellant insists that the demurrer to the replication reaches back to the plea, and that it is bad, because the facts set up in it, do not show a total failure of a consideration for the bond sued on.

By *sec.* 75, *chap.* 126, *Digest*, the consideration of a bond may be impeached by special plea, in the same manner as unsealed instruments; and by *sec.* 3 *chap.* 15, *Digest*, such defence may be interposed, by the maker, as against an assignee of the obligation.

In *Wheat, use, &c., vs. Dotson*, 7 *Eng. Rep.* 699, this court held that, to an action on a bond for the purchase money of land, a partial failure of consideration is the subject of recoupement, when the partial failure is in the quantity or quality of the land;

but otherwise, when the partial failure is in the title. That no defect of title, that does not amount to a total failure of consideration, can be set up as a defence to a suit for the purchase money: and perhaps not even then (the Judge, delivering the opinion, remarks) without eviction.

Intending, in the sequel, to attempt to show to what class of cases the rule applies, that the vendee may retain the purchase money, by showing a total failure of title and eviction, or its equivalent, we will, in the first place, endeavor to determine whether the plea in question sets out such facts as show a total failure of consideration.

Did the deed executed by Hooper, under the power of attorney from his wife, pass to Grace & Waters her interest in the land, which was the subject of the contract?

The general principle of the common law is, that the laws of the place where real or immovable property is situate, exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them. *Story's Conflict of Laws, sec.* 424, *p.* 708. Also, as to the capacity of the contracting parties. *Ib. sec.* 430, 431.

The plea, in this case, alleging that the land, which was the subject of the contract, lies in Arkansas, our laws must govern its transfer, and not the laws of Louisiana, where, it is alleged, Mrs. Hooper resided.

By the common law, a married woman could only convey her real estate by a fine or common recovery—she could not convey by deed. 2 *Kent Com.* 150; 1 *Hilliard on Real Prop.* 121; 2 *ib.* 271; *Dart's Vend. & Purch. of Real Prop.* 270, and cases collected in *Note.* 1. But, by statute, 3 *and* 4 *Wm.* 4, *c.* 74, a wife may convey by deed, with the husband's consent, and with a private acknowledgment. *Same authorities last cited.*

In most of the States of this Union, provision has been made, by statute, for the wife to convey her estate, by deed, with the consent of the husband, and the private examination of a magistrate. 2 *Kent Com.* 152, 153, 154.

By *sec.* 10, *chap.* 37, *Digest of the Statutes of Arkansas*, it is provided that, "A married woman may convey her real estate, or any part thereof, by deed of conveyance, executed by herself and her husband, and acknowledged and certified in the manner hereinafter prescribed."

Section 21, of the same chapter, provides that, "The conveyance of any real estate, by a married woman, or the relinquishment of dower in any of her husband's real estate, shall be authenticated and the title passed, by such married woman voluntarily appearing before the proper court or officer, and, in the absence of her husband, declaring she had, of her own free will, executed the deed or instrument in question, or that she had signed and sealed the relinquishment of dower for the purposes therein contained and set forth, without compulsion or undue influence of her husband."

Section 13 enumerates the officers who may take such acknowledgments in, or beyond the State; and *section* 16 requires the officer, taking the acknowledgment, to endorse a certificate thereof upon the deed.

Inasmuch as a married woman could not, by the common law, convey her estate by deed, and can only do so by virtue of such statutes, it seems that a substantial deviation from the form prescribed by the statutes, will render the deed invalid. 1 *Hilliard on Real Property*, 122; 2 *ib.*, *note* (*a*); *Dart's Vend. & Purch. of Real Estate* 270, *note* (1); *Thompson vs. Peebles' Heirs et al.*, 6 *Dana* 387; *Steel vs. Lewis*, 1 *Monroe* 48; *Harvey vs. Peck*, 1 *Munf.* 518; *Martin vs. Dwelly*, 6 *Wend.* 9; *Fowler vs. Shearer*, 7 *Mass.* 14; *Jackson vs. Stevens*, 16 *John. Rep.* 110; *Jackson vs. Cairns*, 20 *ib.* 310; *Depeyster vs. Howland*, 8 *Cowen* 277; *Lasseter vs. Turner*, 1 *Yerger Rep.* 413.

In *Elliot et al. vs. Peirsol et al.*, 1 *Peter's Rep.* 338, the court said: "By the principles of the common law, a married woman can, in general, do no act to bind her; she is said to be *sub potestate viri*; and subject to his will and control. Her acts are not like those of infants, and some other disabled persons, voidable

only: but are, in general, adsolutely void, *ab initio*. In Virginia and Kentucky, the solemn modes of conveyance by fine and common recovery, have never been in common use; and, in those States, the capacity of a *feme covert* to convey her estate by deed, is the creature of statute law: and to make her deed effectual, the forms and solemnities, prescribed by the statutes, must be pursued."

To the same effect, is *Hepburn vs. Dubois*, 12 *Peters* 345.

We think it may safely be said, upon the weight of these authorities, and many others of like effect, referred to in them, that had Mrs. Hooper joined personally in the execution of the deed in question with her husband, without acknowledging its execution before the proper officer, on a separate examination substantially in the mode prescribed by our statute, the deed would have been null and void as to her and her heirs.

It must be equally unquestionable, that, if she could make a power of attorney authorizing her husband to execute the deed for her, the execution of the power should have been acknowledged in the same mode in which the statute requires her to acknowledge the execution of the deed itself; otherwise, the whole purpose of the statute might be defeated by resorting to powers of attorney, and a wide door opened for impositions upon married woman. In this case, the execution of the power was not so acknowledged.

But could Mrs. Hooper empower her husband to convey her interest in the land, as her agent?

DART, in his work on *Vendors and Purchasers of Real Estate*, says any assurance of a married woman's interest in real estate, executed under a power of attorney, seems to be inoperative.

In Vermont, by statute, the wife may convey her estate, by deed of herself and husband, and her separate examination and acknowledgment are made necessary, and required to be certified upon the deed. In *Sumner vs. Conant*, 10 *Vermont Rep.* 9, land was devised to Martha Wentworth, wife to John Wentworth, and she and her husband executed a power of attorney to an agent to

convey the land, and the power was executed, but the court held that the conveyance did not pass her interest in the land, because she could not make the power. There, as by our statute, the right of persons generally to convey by power of attorney, is recognized; but, upon principle, it was held that the provisions of the statute, in reference to conveying by power of attorney, did not apply to married women.

In *Birdsly vs. Flint*, 3 *Barbour's Sup. Court Rep.* 510, it was said that a married woman could not appoint an agent. That, if she were, under her hand and seal, to appoint her husband her agent to dispose of her land, and he were to act under the power, the contract would be void at law, and the appointment of an agent to do a void act, would be void also.

In *Steel vs. Lewis*, 1 *Monroe* 48, the court said that until the passage of the act of assembly, on the subject, on the 1st of February, 1812, there was no provision existing in Kentucky permitting a *feme covert* to convey by letter of attorney, and hence the conveyance of her estate, by power of attorney, prior to that time, passed no title.

In a note to *Greenl. Cruise, vol.* 2, *p.* 24, it is said that the wife cannot convey by attorney. See also, *Linsley vs. Brown*, 13 *Cowen Rep.* 192.

STORY, in his work on *Agency, sec.* 6, *p.* 7, 8, says, "Married women ordinarily are incapable of appointing an agent or attorney; but where a married woman is capable of doing an act, or transferring property or rights, with the assent of her husband, there, *perhaps*, she may, with the assent of her husband, appoint an agent or attorney to do the same. So with regard to separate property, she may, *perhaps*, be entitled to dispose of it, or to incumber it, through an agent or attorney; because, in relation to such separate property, she is generally treated as a *feme sole*. I say, *perhaps*, for it may admit of question, and there do not seem to be any satisfactory authorities directly in point.

Whether a married woman may join with her husband in making a power of attorney, acknowledging it in due form on a

separate examination, authorizing the sale and conveyance of her interest in land, by an agent, is a question that does not arise in this case, and is not intended to be decided: but that she can constitute her husband an agent to sell and convey her estate, in view of the above authorities, and upon principle, is exceedingly questionable.

Aside from this, the power of attorney set out in the plea, in this case, does not contain any words, importing an intention on the part of Mrs. Hooper, to empower her husband to sell and convey any *land*, or interest in *land:* and it would require a latitudinous construction, not warranted by authority, to derive any such power from the language used in the instrument. See *Story's Agency, chap. VI.*

Moreover, the power of attorney is not under the *seal* of Mrs. Hooper, which is necessary to authorize the execution of a deed by an agent. *Story's Agency, section* 49, *p* 49*; ib., sections* 291, 252.

On the grounds above stated, the deed executed by Hooper, in the name of himself and wife, under the power of attorney, as set out in the plea, was null and void, as an act of Mrs. Hooper, and did not pass to Grace & Waters any interest of hers whatever in the land. As to her and her heirs, the deed was not only void at law, but the authorities above cited show that a court of equity would not compel her, or them, to a specific performance of the contract.

But it may be said that the deed was valid as the act of Hooper, the husband, and conveyed to Grace & Waters any interest he may have had in the land; and, therefore, constituted some consideration for the bond sued on.

According to the allegations of the plea, what interest had he in the land?

Where the wife is seized of an inheritance in land, the husband is entitled to the rents and profits during their joint lives. 2 *Kent Com.* 129.

But, in this case, the plea alleges that at the time Hooper con-

tracted to convey to defendants, and afterwards, to the death of the wife, the land was in possession of others, claiming under adverse titles, and that defendants derived no rents and profits therefrom.

Was Hooper a tenant by the curtesy?

We have no statute on the subject of the curtesy of the husband in the wife's land.

By the common law, *tenancy by the curtesy*, is an estate for life, created by the act of the law. When a man marries a woman, *seized at any time during the coverture*, of an estate of inheritance in severalty, in coparcenary, or in common, and hath issue by her born alive, and which might, by possibility, inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life, and it is immaterial whether the issue be living at the time of the seizin, or at the death of the wife, or whether it was born before or after the seizin. 4 *Kent Com.* 289; 1 *Hilliard* 110, 111.

Four things are requisite to an estate by the curtesy, viz: *marriage*, *actual seizin* of the wife, *issue*, and *death* of the wife. *Ib.*

The wife, according to the English law, must have been seized in *fact* and in *deed*, and not merely of a seizin in law of an estate of inheritance, to entitle the husband to his curtesy. 4 *Kent* 30.

The circumstances of this country have justly required some qualification of the strict letter of the rule relative to a *seizin in fact* by the wife; and, if she be owner of waste, uncultivated lands, *not held adversely*, she is deemed seized in fact, so as to entitle the husband to his curtesy. The title to such property draws to it the possession; and that constructive possession continues in judgment of law, until *adverse possession* is clearly made out. 4 *Kent* 30; *Jackson vs. Sellick*, 8 *John. Rep.* 262; *Green vs. Siter et al.*, 8 *Cranch* 229; *Davis et al. vs. Mason*, 1 *Peters Rep.* 503.

In New York, the husband of a woman who is either heir or devisee, but has never entered, shall not have curtesy. It is said

the requisition of actual seizin is limited to these two cases, and is not applicable where the wife claims under a deed. 1 *Hilliard* 112, *sec.* 8; *Adair vs. Lott*, 3 *Hill* 182; *Jackson vs. Johnson*, 5 *Cowen* 98.

The plea, in this case, sufficiently shows the marriage of Hooper and wife, issue, and the death of Mrs. Hooper. It alleges a want of seizin in fact, and possession of the land by others, claiming under adverse titles, at the time and ever after Hooper contracted to convey to Grace & Waters; but it fails to allege that there was no seizin in fact prior to that time and during the coverture. The plea undertakes to show a total failure of title and consideration, and should have shown that there was no seizin in fact, or its legal equivalent, at any time during the coverture, provided the seizin in law was sufficient.

Does it show a want of such seizin in law as to cut off the husband's curtesy? In other words, does *curtesy* attach to a pre-emption right in land?

There is no such estate in land, known to the common law, as a pre-emption right. It is the creature of statutes, passed by Congress, to encourage the settlement of the public lands. It is a preference right to purchase land of the government, arising where the settler has complied with all the conditions prescribed by law, to entitle him to such preference. It seems, from the allegations of the plea, that Nathan Cloyes had such a pre-emption right in the tract of land in question; and that by his death, it was cast, by descent, upon Mrs. Hooper, and his other heirs.

It seems that the right of the husband to curtesy has been extended by modern decisions.

In *Davis et al. vs. Mason*, 1 *Peter's Rep.* 507, the court said: "A husband, formerly, could not have curtesy of a use, that is, where his wife was *cestui que use*, (*Perkins*, *Curtesy*, *fo.* 89), and this continued to be the law down to the time of BARON GILBERT (*Law of Uses and Trusts* 239): at present, it is fully settled in equity, that the husband shall have courtesy of a trust, as well as a legal estate, (2 *Vern.* 536; 1 *P. W.* 108; *Atk.* 606;) of an equity

of redemption; a contingent use, or money, to be laid out in land." And so says Mr. KENT, 4 *Com.* 22–30.

It may be safe to follow such lights as far as they go, but it is the part of wisdom, perhaps, to stop where the lights give out.

We have not been able to find any decision that the husband is entitled to curtesy in a pre-emption right of the wife, and we are not disposed to be the first to break new ground in his behalf.

The conclusion is, that taking the allegations of the plea to be true, as on demurrer, Grace & Waters took nothing by Hooper's deed to them, and that the consideration, upon which the bond sued on was executed, wholly failed; and that the plea, if unanswered, is a bar to the action.

The replication to the plea, is next to be considered.

That the substantial allegations and matters of the plea might have been put into a more condensed form, is not to be denied; and that its redundancy furnishes some excuse for the unusual character of the replication, which is more like an answer to a bill in chancery, than a common law instrument of pleading, is equally true

That the replication contains much surplusage, is unquestionable. But surplusage, by which is meant matter that is altogether superfluous, does not, in general, vitiate the pleadings, even in point of form: the maxim being *utile per inutile non vitiatur.* In such cases, the unnecessary matter will be rejected by the court, and the pleadings will stand, as if it were *struck* out, or had never been inserted. *Gould. Plead., chap.* 3, *sec.* 170. But where a party pleads unnecessary matter, which shows that he has no cause of action, or no legal defence, the matter thus pleaded will be fatal to that which would, otherwise, have been good. *Ib., sec.* 171; *Martin et al. vs. Warren et al.*, 6 *Eng. R.* 285.

As to duplicity in the pleadings, which follow the declaration, the rule of the common law is, that every plea, or replication, must be *simple, entire, connected, and confined to a single point,* i. e., a single ground of complaint or defence. *Gould. Plead.,*

chap. 8, *part* 1, *sec.* 3. But the single point, to which plea, replication, &c., is required to be confined, need not, as of course, consist of a *single fact;* for several connected facts may be, and frequently are, necessary to constitute a single complete ground of demand or defence. *Ib.*, *sec.* 9; 1 *Chit. Plead.* 649–50.

Duplicity, in a plea or replication, consists in its containing two distinct matters, either of which would be a bar to the action, or answer to the plea. If a replication contain several distinct matters, but one of which is an answer to the plea, the others may be stricken out as surplusage. *Kellog & Kenneth vs. Miller & Rogers*, 1 *Eng. Rep.* 468.

If the replication in this case contains no answer to the plea, the demurrer to it was properly sustained. If it contains one distinct and good answer to the plea, the demurrer should have been overruled, the surplusage stricken out, and the defendant required to respond to the balance. If the replication contains two or more distinct matters, either of which is a good answer to the plea, it would be subject to the objection of duplicity, but what would be the effect of such duplicity, under our practice, need not be decided in this case, unless it be found that the replication in question is double.

In view of these general rules, the replication will be analyzed.

It is difficult to separate it into distinct parts, in consequence of the fact that several matters are repeated, in different forms, in several places, in the replication.

But the whole replication may be divided, for convenience of analysis, into three parts: 1st, from the beginning to the letter [a] in brackets; 2d, from *a* to (b); 3d, from *b* to the conclusion.

Part 1*st*, in substance, after admitting various allegations of the plea, in reference to the contract, seems to be intended as a denial of all fraud and misrepresentation on the part of Hooper, in making and executing the contract for the sale of his wife's interest in the land, with the defendants—with affirmative averments that he acted in good faith, exhibiting his power of attorney to act for his wife, to defendants, "who were lawyers;" and

that the interest of himself and wife in the land, and the condition of the land, were truly represented, &c.

There are some allegations of misrepresentations and imposition in the plea, not as to the interest of Mrs. Hooper in the land, nor as to the condition of the land in regard to adverse titles, but as to Hooper's power to sell and convey the interest of his wife.

Had these allegations in the plea been so material that the plea would have been bad without them, a denial of them, in the replication, would have been a good answer to the plea.

In order to a full understanding of what is understood to be the gist of the plea in this case, it may be well, at this point, to attempt to show to what class of cases the rule applies, that the vendee may retain the purchase money, by showing a total failure of title and eviction, or its equivalent.

Where a party contracts for, and receives a deed without covenants of warranty, and the title fails, he cannot, on that account, avoid the payment of the purchase money, because he has not thought proper to protect himself by obtaining covenants of warranty, unless fraud, or its equivalent, has been practiced upon him. *Rawle on Covenants for Title*, 607, 608, *and cases cited.*

But where the purchaser has taken a deed, with general covenants of warranty, and there is a total failure of title and an eviction, or its legal equivalent, and the vendor sues for the purchase money, the purchaser may avail himself of the plea of failure of consideration, and will not be forced to pay the money, and then resort to a cross action upon the covenants of his deed to recover it back. See *Rawle on Covenants for Title*, caption "THE PURCHASER'S RIGHT TO DETAIN THE PURCHASE MONEY," ETC., *p.* 604 *to* 732, where the authorities on this subject are collected, and clearly and ably reviewed.

In this case, the plea does not allege that defendants contracted for a deed with covenants of warranty, but simply for a deed conveying the interest of Mrs. Hooper and her husband in the land. Had such a deed been legally executed to them, they could not have resisted the payment of the purchase money, on the

ground that the pre-emption right failed, or turned out to be invalid, without alleging and proving that fraud was practiced upon them in making the contract. In that case, fraud would have been the gist of the plea, and its denial, a good replication.

But, in the case now before us, the gist of the plea is, that there was a failure on the part of Hooper to make to defendants a legal and valid conveyance of the interest which he contracted to convey to them in the land: and hence, the allegations of fraud are immaterial, and their denial or avoidance in the replication, mere surplusage.

Part 2d. A number of the allegations in *part 2d*, of the replication, are substantially the same as those embraced in *part 1st*, above disposed of. There are two features, however, in *part 2d*, that require consideration. *First*, It is alleged, in substance, that if the deed, executed by Hooper to defendants, was defective, Mrs. Hooper, during her lifetime, and her husband, were willing to execute a valid deed, but that defendants did not desire or demand it. But no tendor of a valid deed to the defendants is averred.

According to the decision of this court, in *Smith vs. Henry*, 2 *Eng. Rep.* 207, overruling *Byers & Miniken vs. Aikin*, 5 *Eng.* 419, and *Drennen vs. Boyer & Clark*, *ib.* 497, it was the duty of Hooper to tender to defendants a valid conveyance, before he was entitled to the purchase money. This feature of the replication is no answer to the plea.

The *second* feature of *part 2d*, of the replication, avers, in substance, that defendants accepted the deed executed to them by Hooper, with a full knowledge of the character of the power of attorney, under which he acted for his wife, and that they retained said deed, without objection as to its validity, until after the death of Mrs. Hooper.

The plea alleges that Hooper contracted to make to defendants a valid conveyance, and failed so to do. Does it excuse him for failing to comply with his contract, that defendants, as well as himself, perhaps, were mistaken in reference to his legal power

to act for his wife, and on account of such mistake, accepted an invalid deed?

Hooper was as much bound to know the law as the defendants. If he knew in fact that he had no legal power to act for his wife, he perpetrated a fraud on the defendants in attempting to convey for her. If he did not know that he had not legal authority to act for her, he simply labored under a mistake of the law. The defendants had no motive to cheat themselves, by accepting an invalid conveyance; and must, therefore, have acted also under a mistake. The mistake, then, to put it upon the fairest ground for Hooper, was mutual, and can hardly furnish an excuse for his failure to comply with his contract. See *The State vs. Paup et al.*, 13 *Ark. Rep.* 129.

Part 3d. The third and last division of the replication alleges, in substance, that, at the time the contract was made, defendants paid Hooper $1,250, and gave him their bond for $1,250, balance of the purchase money, as alleged in the plea. That, after the maturity of the bond, Grace, by agreement with the agent of Hooper, sold and conveyed to him, a certain tract of land, and thereby paid off and took up said bond; that afterwards, Grace, acting for himself and Waters, canceled said trade, and the conveyance of the land aforesaid, and took into his possession his title papers, &c.; and, thereupon, for the consideration of said land so conveyed by him to Hooper, and for, and in consideration of the canceling of said trade, &c., executed to Hooper the bond sued on: "and so the plaintiff says that there was another new and different consideration for the execution of the said bond, than that which is alleged in defendant's plea: and there was a good and valid consideration in law for the execution of the instrument sued on."

Treating this part of the replication as setting up affirmative matter in avoidance of the plea, it is not good.

Had the bond for $1,250, which Hooper held upon the defendants, been executed upon a valid consideration, and binding upon them in law, and had they paid it by transferring to Hooper a tract of land, and afterwards thought proper to cancel the con-

tract, take back the land, and execute a new note for any amount that might have been agreed upon in consideration of the canceling of the contract, doubtless the new note would have been upon a good and sufficient consideration.

But, according to the allegations of the plea, the bond for $1,250, executed by Grace & Waters to Hooper upon the original contract, was for a consideration which had totally failed, and they were not legally bound to pay it. If they paid it by transferring a tract of land to Hooper, as alleged in the replication, they got nothing for the land: and if they gave the bond sued on to get the land back, they gave it for what, in contemplation of law, belonged to them, as they parted with the land in the first instance without any consideration.

But disregarding, as surplusage, every thing in the replication but the words: "*The plaintiff says that there was another and different consideration for the execution of the said bond, than that which is alleged in the defendant's plea: and there was a good and valid consideration in law for the execution of the instrument sued on,*" concluding to the country; and there is a substantial issue to the plea, denying, in effect, the truth of its allegations, and putting the defendant upon his proof.

The plaintiff might have put in a replication denying the truth of the material allegations of the plea in detail; or he might have adopted a more brief and comprehensive form, and denied, in general terms, that the bond sued on was executed upon the consideration alleged in the plea, or that the consideration, upon which it was executed, had totally failed, in manner and form, as alleged in the plea. Either of these modes of replying would have put the allegations of the plea at issue, and have been more direct, perhaps, than the language above copied.

The replication in this case is certainly not skilfully drawn, and departs widely from those nice logical rules, which constitute pleading a science; and though there is much surplusage in it, yet, under the rule that the bad does not vitiate the good, the demurrer to it was improperly sustained. See *Johnson et*

al. vs. Killian, 1 *Eng. Rep.* 172; *McCoy et al. vs. Hill*, 2 *Littell Rep.* 372.

The judgment will be reversed, and the cause remanded, with instructions to the court below to overrule the demurrer to the replication, and permit the plaintiff to amend the same, if he thinks proper; and, if not, to treat it as an issue to the plea, regarding every thing else as stricken out as surplusage.

NOTE BY THE CLERK.—Mr. Justice WALKER announced that he dissented from so much of the opinion as decided that the replication should be treated as an issue to the plea; but neglected to file a written opinion.

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WORTHINGTON VS. CURD & CO.

Under our statute of assignments, a blank endorsement and delivery of a writing obligatory payable in property, or in money upon a contingency, constitutes such a transfer of the interest in the paper as to vest in the transferee a right of action and recovery against the maker—the commercial law giving the rule as to the form and mode of making assignments of such paper.

In an action upon a writing obligatory payable in property on a certain day, no demand is necessary, on the part of the holder, to entitle him to maintain an action against the maker. (*Cockrell vs. Warner*, 14 *Ark.* 352). But if the allegation in the declaration, that demand was made, renders proof of demand necessary, and there be any evidence of demand, the jury are the judges of its weight.

If the authority of the person making a demand does not sufficiently appear, the authority to make it will be considered as conceded by the defendant, where he makes no objection to the want of authority, but places his refusal on another ground specifically.

The *ex parte* affidavit of one of several plaintiffs of the loss of the instrument sued on, is competent evidence to prove the loss.

Where a general objection is made to the reading of a deposition, which appears regular on its face, this court will not notice any specific objections made for the first time in this court.

Instructions that are calculated to mislead the jury, or to the weight to be given to evidence, or that are asked without any evidence being given on which they can be based, should be refused.

A plea, to an action upon a writing obligatory by an assignee, that it was executed by the defendant in consideration of certain lands, for which he had received from the obligee a deed of conveyance with warranty of seizin, freedom from incumbrance, and for quiet enjoyment; but that there was, at the time of the purchase, and still is an incumbrance on a part of the lands to a greater amount than the writing sued on, is demurrable.

And so, of a plea that the assignees did not receive the instrument sued on in the usual course of trade, or on any legal or valid consideration, and that it was delivered to them in payment of a bet, and upon no other consideration.

Appeal from the Circuit Court of Chicot County.

The Hon. SHELTON WATSON, Circuit Judge, presiding.

PIKE & CUMMINS, for the appellant. The instrument sued on in this case, was not assignable at common law. Its negotiability depends wholly on our statute of assignments. *Ch.* 15, *Rev. Stat.* 161.

We think the statute was not designed at all to embrace commercial paper: but if it was designed to embrace such paper, and confirm its negotiability as established by the law merchant, we deny that the entire law merchant should be put in force, and applied to non-commercial paper, made negotiable by the statute, in all

points on which the statute is silent. We contend, that, on such points, not the law merchant, but the common law, as contradistinguished therefrom, must be resorted to, to aid the statute. It is a familiar rule, that common law is not to be presumed to be changed further than the statute expressly changes it. In fixing the rights of the parties, as to non-commercial paper, assignable under the statute, the common law, as to similar contracts, must be resorted to. *Buckner vs. Greenwood*, 1 *Eng.* 200.

Instruments assignable under statute, do not *vest* by an endorsement in blank and delivery, but by being transferred, endorsed, and assigned over to the assignee. In order to vest a *legal title*, under the statute, the *title* must be exhibited *in writing*. See *Block vs. Walker*, 2 *Ark.* 4; *Buckner vs. Greenwood*, 1 *Eng.* 200; *secs.* 4, 6, 7, *ch.* 15, *Rev. Stat.*

Even as to commercial paper, a blank endorsement confers, *per se*, no *legal* title, but a power, recognized by courts of law and equity, to perfect a legal title whenever the party may choose; but, until filled up, although the holder may have the equity and a legal power to perfect the title, no legal title exists. *Edwards vs. Scull*, 6 *Eng.* 325; *Cope vs. Daniel*, 9 *Dana* 415; *Clarke vs. Pigot*, 1 *Salk.* 125; *Lucas vs. Haynes*, *ib.* 130; *Story on Prom. Notes*, *p.* 149, *sec.* 133; *Story on Bills* 228, *secs.* 206, 7; 3 *Kent Com.* 89, 80; *Hubbard vs. Williamson*, 4 *Iredell* 266; *Bowie vs. Duvall*, 1 *Gill & John.* 179; *Mitchell vs. Mitchell*, 11 *Gill & John.* 388; *Barnes vs. Reynolds*, 4 *How. Miss. Rep.* 114; *Heinster vs. Rogers & Garland*, 6 *Harr. & John.* 282; *ib.* 140; *ib.* 527; 5 *ib.* 115; 3 *Misso.* 67. In the case of *Jordan vs. Thornton, &c.*, 2 *Eng.* 224, this question was not involved; and *Sterling vs. Snapp*, *ib.* 201, was an appeal from an *equity* court—that of a justice of the peace.

It is alleged a demand of payment was made, and issue formed upon that fact: and it is doubtful whether it was essential to aver a demand: they were bound to prove it or fail in their action; the party is bound to stand or fall by the issue. 1 *Ch. Pl.* 692, 3. A demand must, of course, be made by party entitled to receive the

money, and give vouchers—the owner or his agent. *Story P. N.*, *sec.* 246. No proof was offered of the authority of the person making the demand in this case. See *Taylor vs. Spears*, 1 *Eng.* 381.

The court admitted, in evidence to *the jury*, an *ex parte* affidavit of *one* of five parties, before suit brought, without showing that he ever saw or had custody of the instrument, or that search was made for it, or that the other parties might not have it. The averment of the loss, was a material one, and should have been proved on the trial of the cause, when the defendant would have had the benefit of a cross-examination. See *Poignard vs. Smith*, 8 *Pick.* 272; *Jackson vs. Parkhurst*, 4 *Wend.* 375.

P. TRAPNALL and S. H. HEMPSTEAD, contra. The obligation on which this suit was instituted, was for the payment of property on a specified day. It was a strict property note, and no demand was necessary on the part of the assignees to fix the liability of Worthington, or enable them to recover. It was the duty of the obligee to discharge it on the day, and his failure to do it, subjected him to the payment of the highest market value of the cotton. *Cockrell vs. Warner*, 14 *Ark.* 352; 3 *Cowen* 83; *Sedg. on Dam.* 497; *Elkins vs. Parkhurst*, 17 *Verm.* 105. And if a demand was necessary, there was a sufficient evidence of it, as appears by the verdict of the jury, who were the judges of the weight of the evidence to this point.

The affidavit of the loss of the convenant made by one of the plaintiffs, was admissible to establish the loss. *Digest* 814; *Kellog vs. Norris*, 5 *Eng.* 25; *Taylor vs. Riggs*, 1 *Peters* 596, *and cases cited: Greenleaf's Ev.*, *sec.* 349, *note* 2; *Cowen & Hill's notes to Phil. on Ev.*, *part* 1, *note* 122, *page* 138.

A blank endorsement in itself constitutes a complete and perfect transfer of the interest in the bill, and without the addition of any other words, will vest the right of action, and all other rights, in the transferee and subsequent holders. *Chitty on Bills* 229; *Wilkinson vs. Nicklin*, 2 *Dallas* 396; *Story on Bills* 207; *Grif-*

forn vs. Jacobs, 2 *Louis. Rep.* 192; *Tyler vs. Binney*, 7 *Mass.* 479; *Lovell vs. Everton*, 11 *John* 52; *Norris vs. Badger*, 6 *Cowen* 449; *Dugan vs. United States*, 3 *Wheat.* 173, 183; 15 *Mass.* 534; 9 *Dana* 415; 14 *Maine* 101; 7 *Porter R.* 175; 3 *Kent* 89. See *Sterling & Snapp vs. Bender*, 2 *Eng.* 201; *Jordan vs. Thornton*, 2 *Eng.* 230; *Bizzell vs. State Bank*, 3 *Eng.* 460; *Magruder vs. Slater*, 7 *Eng.* 171; *Owen vs. Lavine*, 14 *Ark.* 392.

Worthington took a regular deed with convenants of warranty and seizin; and it is perfectly well settled that a party must rely on his covenants, and while he is in possession cannot resist the payment of the purchase money in a suit at law, on the ground of failure of title. *Bumpus vs. Platner*, 1 *John. Ch. R.* 213; *Abbot vs. Allen*, 2 *J. C. R.* 519; *Gilpin vs. Smith*, 11 *S. & M.* 129; *Davis vs. Tarwater*, 15 *Arks.*

Mr. Justice SCOTT delivered the opinion of the Court.

This was an action of covenant, instituted, in the Chicot Circuit Court, by the survivors of the firm of E. Curd & Co. It was upon a covenant of Worthington to Abner Johnson, dated the 1st of February, 1840, payable the 15th January, 1850, for two hundred and fity bales of cotton, with provisions as to the quality of the cotton and weight of the bales.

It was alleged that Johnson, on the 7th of January, 1845, endorsed this covenant, in blank, to the firm of E. Curd & Co., and then delivered it to them; that the covenant and the endorsement were lost, and that, on the 15th of January, 1850, the 250 bales were demanded of Worthington, at his plantation and residence, by the plaintiff.

The defendant pleaded:

1st. That he was never notified of the assignment.

2d. That the covenant was never endorsed and delivered as alleged.

3d. That the covenant was not and is not, lost, as alleged.

4th. That the demand of the cotton was not made as alleged.

5th. That the defendant performed all the stipulations in the

covenant, and paid the cotton therein mentioned, according to its tenor.

6th. That the covenant was not endorsed and delivered to the plaintiff as alleged, but was so endorsed and delivered to a person unknown, and plaintiffs did not derive their title thereto directly from Johnson.

7th. That the covenant, together with others, was made to Johnson, by the defendant, to secure the purchase money of sundry tracts of land described, which were contracted to be conveyed by Johnson, to defendant, in absolute property, free of all liens and incumbrances, and that Johnson conveyed the same by deed with covenants of seizin, freedom from incumbrance, and for quiet enjoyment. That Johnson had not in fact a fee free from incumbrance, but, long time before had conveyed a portion of said land, which are described, to the Real Estate Bank, to secure stock therein, to the amount of thirty thousand dollars with interest, which remains wholly due and unpaid. That, in said sale and purchase, the lands in said mortgage specified, were estimated at, and were in fact worth, the same sum per acre, as that fixed by said contract for the other lands. That he has paid much the larger portion of the purchase money agreed to be given for the entire lands, and that the amount of money and interest due on the mortgage, greatly exceeds the balance unpaid on account of said purchase, including the covenant sued on, and therefore the consideration of said contract—the getting a clear and unencumbered title to all the lands—has failed.

8th. That the consideration of the covenant has failed, in that it was given on a contract that Johnson should convey the lands and plantation in fee, clear of incumbrance, when, in fact, a portion of the lands, which constituted the same, was encumbered much more than the amount of the covenant sued on, and that that incumbrance still exists to a much greater amount than is still unpaid—including the covenant sued on—of the whole purchase money. And that the encumbered lands were a material inducement to the purchase, and were estimated in the

same, as of as much value as the entire unpaid purchase money.

9th. That the plaintiffs never received the covenant in the usual course of trade, or on any legal or valid consideration, but won it on the result of the Presidential election, in the year, 1844, and it was delivered to them in payment of said bet, and upon no other consideration.

The 7th, 8th and 9th pleas were verified by the affidavit of the defendant.

Demurrers were interposed and sustained to the 1st, 6th, 7th, 8th, and 9th pleas. The second plea was stricken out on motion of the plaintiff, to which the defendant excepted; and his bill of exceptions was signed and sealed. And issues were taken on the 3rd, 4th and 5th pleas.

At a subsequent term, in pursuance of leave previously granted to the defendant to file additional pleas, he offered to file three additional ones, as follows, to wit:

1st. That the assignment and endorsement were not and are not lost.

2d. That plaintiffs never had possession of the covenant.

3d. That neither Johnson, nor any one else whomsoever, ever delivered said covenant to the plaintiffs, with a blank endorsement thereon.

But the plaintiffs objected, and the court sustained the objection as to the 2d and 3d additional pleas, and refusing to permit them to be filed, the defendant took his bill of exceptions. The first however was allowed to be filed, and issue was taken upon it.

Upon these four issues, the case was tried by a jury, who found for the plaintiffs, and assessed their damages at the sum of $11,-647; and judgment was rendered accordingly.

The defendant moved for a new trial, and the grounds of his motion were the following, to wit:

1st. That the jury found contrary to law and evidence.

2d. That the verdict was not justified by the evidence.

3d. That the court erred in admitting the *ex parte* affidavit of one of the plaintiffs.

4th. That the court refused to exclude certain illegal evidence, although moved to do so by the defendant.

5th. That the court erred in giving certain instructions, on motion of the plaintiff, against the objection of the defendant.

6th. That the court erred in refusing to give, and in modifying, certain instructions moved by the defendant.

7th. That the jury disregarded, and found contrary to the instructions.

8th. That the damages were excessive.

9th. That the plaintiff showed no right of recovery.

10th. That the verdict, "at first blush, would shock the sense of justice of any impartial person."

11th. That the court admitted to be read in evidence the deposition of Beekman.

This motion was overruled, and the defendant excepting, took his bill of exceptions, embodying all the evidence given or offered by either party, all the instructions given, asked for and refused, and modified, and the grounds of the motion for new trial, and appealed to this court.

The evidence was the following, to wit:

1st. The affidavit of Nathan Bowman, made before the clerk of the Chicot Circuit Court, on the 30th of April, 1850, written on the same sheet of paper that contains the declaration. This appears to have been filed the 1st of June next thereafter. In this affidavit, a copy of the covenant is set out, and the affidavit states, that the original was endorsed by Johnson, on the 7th of January, 1845, to E. Curd & Co., and then delivered by him, and that, since that time, in the month of January, 1848, it was lost, and has not since been found.

2d. The deposition of Beekman was read. He stated that he had often seen the covenant in question; that it was payable, according to his best recollection, in January, 1850. He did not recollect its date. He saw it in the possession of different members of

the firm of E. Curd & Co., in the year 1845; recollects distinctly that he saw it in the possession of Edward Curd and Edmund H. Curd, both of whom were members of the firm. That it was endorsed in blank on the back by Abner Johnson, that is, the name "A. Johnson," was so written thereon in his own hand writing. That, to the best of his recollection, there was a scroll representing a seal on the bond annexed to the name of the defendant, but none to the name of A. Johnson, on the back. That said firm of E. Curd & Co., was composed of Edward Curd, Rufus R. Williams, Richard Nicholls, Nathan Bowman, and Edmund H. Curd, all of whom were yet living, except the last named.

To all of which evidence, the defendant objected generally, but was overruled, and he took his bill of exceptions.

Then, by consent, the plaintiffs read in evidence the depositions of Peter Rowlet and A. H. Davies. The former stated, that, on the 15th day of January, 1850, he went to the residence of the defendant, in Chicot county, with a "gentleman, who demanded of him two hundred and fifty bales of cotton, on the lost Abner Johnson note, and that the defendant refused to deliver the cotton, unless they would satisfy the mortgage. That the cotton was demanded, by the gentleman, on the note which had been assigned by Abner Johnson to a firm; the names of the firm, I do not know." And that the defendant admitted that he had sold cotton that year at ten cents per pound. And that the demand was made at the residence and plantation of the defendant.

Davies stated that the defendant, in the year 1849, made a crop of cotton, on the plantation occupied by him, of 250 bales, or more; and, from the quantity of cotton usually made by him, that the witness had no doubt but that he had 250 bales packed and ready for market, by or before the 15th of January, 1850; that his impression was, that "good fair or fine" cotton was worth something over ten cents per pound; and "middling," from 9 to 10 cents, from the 1st to the 15th January, 1850.

It seems, also, from the bill of exceptions, that, on the part of the defendant, one of the plaintiffs, with his consent, was sworn

as a witness, and asked whether or not he had in his possession a copy of the covenant in suit, taken from the original when in existence. And, admitting he had such copy, he refused to produce it without first tearing off what was written on the same paper with the copy in addition thereto, which was objected to by the defendant, and the plaintiff persisting in his refusal, unless the matter, written on the paper in addition to the copy, was torn off, that copy was not produced and read. And this was all the evidence given or offered by either party.

On the part of the plaintiffs, against the objection of the defendant, the court instructed the jury:

1st. That the *ex parte* affidavit of Bowman, one of the plaintiffs, was competent evidence of the loss of the instrument sued on.

2d. That, under the issues in the cause, if the jury are satisfied from the testimony, as to the loss of the instrument, and that it was executed by the defendant to Johnson, and by him endorsed to the plaintiffs, and that the plaintiffs, by one of themselves or an agent, demanded the cotton of the defendant at his plantation, on the 15th day of January, 1850, and he refused to pay it, they must find for the plaintiffs.

3d. If the jury find for the plaintiffs, they must find the value of the 250 bales of cotton on the 15th day of January, 1850, and may find *ten* per cent. interest on the amount up to this date.

The defendant moved for thirteen instructions; some of which the court modified and gave, gave entire, and others refused, as follows: The court instructed:

1st. Under the issue on the plea denying the loss of the instrument sued on, plaintiffs are not entitled to recover unless they have proven, and shown to the jury, that the instrument is and was *lost*, before suit brought.

In this instruction, the court inserted the word "lost," in lieu of the words, "totally destroyed, or unless, after diligent and thorough search in all places and with all persons with whom it would likely be, it has been shown to be lost, so that the original could not be had."

2d. That the jury are the sole judges of the credit and weight of the testimony, and have the right, and it is their duty, if, under the circumstances, they disbelieve the statements of any witness or party, they can wholly disregard such testimony or statement.

3d. That the plaintiffs have no right to recover in this cause unless, on the day the instrument sued on fell due, they have *distinctly* proven to the satisfaction of the jury, that they, or some one of them, by himself or agent, who is, and was proven to be the agent and duly authorized by plaintiffs, or some one of them for that purpose, demanded, in that capacity, of defendant, at the residence and plantation of defendant, the cotton sued for.

These two instructions were given as asked, except that the word "distinctly," in italics, was stricken out by the court.

The 4th was refused entire. It was: That said plaintiffs are not entitled to recover in this action, unless they have proven that, before the loss of said instrument, the pretended assignment was filled up, payable to themselves.

5th. That an instrument, such as is described in the declaration, endorsed in blank, is negotiable by delivery, and any person having or hereafter having the same in possession, would have a *prima facie* showing of title thereto and right to recover thereon, and right to fill up the blank assignment to himself.

6th. That, when a party seeks to recover upon an instrument, alleging it lost, such as is supposed in the last instruction, clear and satisfactory evidence of loss or destruction of the instrument, should be given to the jury, before they would be warranted in finding for the plaintiffs.

7th. It is no evidence of the agency of one party for another, where the agent merely says he is so, and no evidence is adduced that the principal appointed him such agent.

8th. The plaintiffs are not entitled to recover in this action, unless they have proven to the satisfaction of the jury that the identical instrument sued on, was lost or destroyed, and that the instrument lost was executed and delivered by defendant and endorsed by Abner Johnson, each by their proper hand writing,

and such lost instrument corresponded strictly with the description given thereof in the declaration.

The *fifth*, *sixth*, *seventh* and *eighth* instructions, were *given* entire.

9th. *That the jury should not find for plaintiffs as to the loss of said instrument, without clear, distinct and satisfactory proof of the loss*, and the strictness of the proof required of loss or destruction, should be greater in proportion as there may be circumstances in the case tending to induce the jury to believe the note sued on may be withheld by plaintiffs from improper motives, when, in truth, it might be produced, or thus voluntarily made way with it.

10th. Where a party, who swears to the loss of an instrument, is shown to have sworn on information, derived from others, this should weigh strongly against his credit, and besides where there is no showing that the party alleged to have lost the instrument, could not be had or sworn, such testimony is mere hearsay, and is not competent to prove the loss at all.

The entire 10th instruction asked, was refused, and all of the ninth, except that portion of the first clause which is in italics, which was given.

11th. That the affidavit of Bowman, read in evidence to the jury, is not and cannot be considered or used by the jury, as any evidence at all of the existence, contents, date or time of payment of the instrument sued on: or, indeed, any evidence at all of any thing except the loss or destruction of the instrument. This instruction was given entire.

12th. That, among other facts and circumstances, to be considered by the jury, in weighing the testimony and arriving at a proper judgment, the jury may and should consider the acts of said plaintiffs and their attorneys or agents, in the progress of the trial, in withholding from the jury any copy or other written evidence of the contents of the pretended lost instrument, or any evidence of the loss of instruments, of a more certain or satisfactory character than the mere random statements or recollection

of a witness in regard to the contents. And any such conduct should discredit and weaken the effect of any evidence, coming from plaintiffs, adduced to show the contents or loss of the instrument. This instruction was also refused.

13th. The plaintiffs are not entitled to recover in this action, unless they have proven, to the satisfaction of the jury, that the pretended instrument sued on was *bona fide* assigned and negotiated to the plaintiffs and their deceased partner, and they were the owners thereof, and entitled to its proceeds. This instruction was given entire.

Both upon the pleadings and the instructions, the exceptions reserved distinctly raise the question, whether or not the plaintiffs below were entitled to maintain their action upon the blank endorsement and delivery of the instrument sued on, which they aver in their declaration.

Being a writing obligatory, payable in property, and, for that reason, not negotiable, upon the principle that promissory notes and other contracts in writing, payable in money, *but on a contingency*, were held in *Owen vs. Lavine*, (14 *Ark.* 389,) not to be so, it was, nevertheless, assignable under our statute, like such contracts were, in that case, declared to be, so as to vest a right of action in the assignee against the maker or obligor.

In the cases of *Walker, adm., et al. vs. Johnson et al.*, 13 *Ark. R.* 522; *Ellis vs. Dunham*, 14 *Ark.* 129; *Levi vs. Drew*, 14 *Ark. R.* 334; *Owen vs. Lavine*, 14 *Ark. R.* 389; and of *Anderson vs. Yell*, 15 *Ark. R.* 9; it has been shown, in entire conformity with the current of our previous cases, that our statute of assignments, in its nature, is not only such, in the sense in which such statutes, irrespective of the law merchant, have been expounded as statutes of assignments, in Virginia, Kentucky, and most of the western States, but that it also, at the same time, adopts the law merchant in a qualified form, (*Walker, ad., et. al. vs. Johnson et. al.*, 13 *Ark. R.* 530,) not only as to bills of exchange and promissory notes; but also as to all other "instruments in writing assignable by law for the payment of *money alone*," at the elec-

tion of the holder of any such paper. *Dig., chap.* 15, *p*, 163, *sec.* 9.

And, in quite a number of other cases, in analogy to the law merchant, its rules respecting the rights and remedies of the holder of bills, notes and writings obligatory indiscriminately, when for the payment of money, the manner of making the endorsement, and the time and mode of presentment, and notice, have been enforced. *Buckner vs. R. E. Bank*, 5 *Ark. R.* 541; *Sterling & Snapp vs. Bender*, 2 *Eng. R.* 202; *Ruddell & McGuire vs. Walker*, *ib.* 457; *Jordan vs. Thornton, use of Newborn*, *ib.* 224; *Watson vs. Higgins*, *ib.* 491; *Jones vs. Robinson*, 3 *Eng. R.* 480; *Eidson vs. Frazier*, 4 *Eng. R.* 219; *Weaver vs. Caldwell's Exr.*, *ib.* 339; *Feimster vs. Smith*, 5 *Ark. R.* 495; *Jones vs. Robinson*, 6 *Ark. R.* 504; *Martin et. al. vs. Warren*, *ib.* 285; *Edwards vs. Scull*, *ib.* 325; *Magruder vs. Slater*, 7 *Eng. R.* 171; *Smith vs. Capers*, 13 *Ark. R.* 9; *Sanger vs. Sumner*, *ib.* 280; *Sumpter vs. Tucker*, 14 *Ark. R.* 185.

Several of these cases were upon writings obligatory for the payment of money absolutely, where the endorsement was *blank*. The case of *Weaver vs. Caldwell's ex.*, was one of this kind, where the defendant was allowed, under the statute, to fix the assignment on such day as was most to his advantage to let in his set off.

And, in the case of *Watson vs. Higgins*, which was on a writing obligatory, upon the defendant pleading that the plaintiff had endorsed and assigned said writing obligatory, and was no longer the legal owner of it, but failing to set out the *name* of the *assignee*, the court held that the legal presumption was, that the assignment was in blank, and, this being so, the plea was bad, because "delivery" was not also averred: the court remarking that, "to constitute a valid transfer by endorsement or assignment, so as to divest the obligee or payee of his legal right and interest in any instrument made assignable by law, and to vest the same in the assignee or endorsee, there must be an assignor and assignee, an assignment, or endorsement of the instrument, which is consum-

mated by delivery." 2 *Eng. R.* 491. *Jordan vs. Thornton, use of Newborn, Magruder vs. Slater*, and *Sanger vs. Sumner*, were all upon writings obligatory endorsed in blank—the two former entirely so, and the latter blank as to the date only, of the assignment. In the latter case, the court remarked, "the assignment was not the less valid because there was no date to it; because, if made in blank, the simple endorsement and delivery of the obligation would have constituted a valid assignment, and have vested in the holder of such obligation the right, at any time before or after suit brought, to fill up the blank, and thereby to furnish evidence of the specific character of such right." *Sanger vs. Sumner*, 13 *Ark. R.* 283.

But no case has heretofore come up, where any question, as to the mode or effect of an endorsement, has arisen upon a contract payable in property like this before us, or upon any contract for money payable upon a contingency, which, as we have seen, rests upon the same basis.

In Kentucky, the statute of that State authorizing the assignment of bonds, bills and promissory notes, but subjecting them, in the hands of any assignee, to all equities, which the obligor, maker, or party, primarily liable, may have against the original assignor previous to notice of assignment, is held, by the courts of that State, not to make such instrument commercial paper. And hence, the commercial law is not there resorted to either for determining the extent or ground of the liabilities of the original parties, or in fixing the relations between successive holders or assignees, or the measure of diligence to be used by any assignee. But, for all such, the principles of the common law are mainly invoked when the statute is silent.

Nevertheless, in the entire silence of their statute, as to the *form* and *mode* of the assignment, which it authorizes, their courts have thought it most consistent, with good sense and sound reason, to look to the commercial law, as furnishing the strongest analogies upon the point. And, accordingly, in several adjudications, the rule of the commercial law, to this extent, has been

adopted and applied to assignments under the statute. *Reese vs. Walton*, 4 *B. Monroe* 510; *Odenheimer, &c. vs. Douglass et. al.*, 5 *B Monroe* 109; *Hunt vs. Armstrong's ad. & heirs*, 5 *B. Monroe* 400. In one of these cases, the court say, that "the delivery of a note, with the blank endorsement of the person having the legal title to it, deprives him of his interest, authorizes the assignment to be filled up to any subsequent holder, with the effect of vesting in him the legal title, and with the further effect of evidencing, *prima facie*, a contract of assignment between him and the blank endorser. *Reese vs. Walton*, 4 *B. Monroe R.* 511.

And it would seem from "*Tucker's Commentaries on the Laws of Virginia*," (*book* 2, *p.* 334, *title Assignments*,) that, from the same views upon the statute of that State authorizing the assignment of all "bonds, bills or notes, for the payment of money or tobacco, and all writings obligatory whatsoever," a like doctrine has been established in that State. This writer, when commenting upon the assignment of these contracts, indiscriminately, says, "How is this assignment made? It is usually by an endorsement on the back of the writing, with the name of the party subscribed, declaring the assignment. The endorsement of the name, however, will suffice, as the holder may afterwards write the assignment above it, (5 *Mun.* 388, 396; 1 *Esp. R.* 31, 34; *Chitty on Bills* 32; 5 *Cranch R.* 329,) even after suit brought. 5 *Ran. R.* 326.

This doctrine, resting alone upon the foundations of analogy and reason, in these two States—the respective statutes, to which it has been applied, making no reference at all to the commercial law—with much more reason, can it be adopted in this State, and applied to our statute indiscriminately, where such evident reference is made to the commercial law in the 9th section of the act, as to contracts payable in "money alone," and where, in other sections, so many terms are used as to all the contracts indiscriminately, that are made assignable, the meaning of which can be found no where else than in that law.

Nor is there much, in any of the previous decisions of this

court, to the contrary, while their main current, as we have seen, is in favor of it.

In the case of *Block vs. Walker*, 2 *Ark. R.* 8, the point decided was, that, under the statute, the assignee must sue in his own name, because he had acquired the legal title, and he would not be allowed, by suing in the name of the assignor to his use, to deprive the defendant of any defence he might have against the assignee. In doing so, it was not necessary to decide that the legal title could be acquired only in a particular mode. Nevertheless, the court, after going at large into a construction of the statute, and ultimately taking up the question of the assignee's right to strike out and erase an endorsement, and citing some supposed rule of the commercial law as to this, when the endorsement is full, and admitting that they were strictly applicable to bills of exchange, say "if they are true as to them, they certainly will hold good as to assignable instruments, under our statute, which do not vest by an endorsement in blank and delivery, but by being transferred, endorsed and assigned over to the assignee." Without questioning the accuracy of the citation of these supposed rules, by any enquiry whether the commercial law will compel a party to set up a derivative title in *any case*, except for the protection of innocent persons, who may have acquired an equity, while the paper was out in circulation and in their hands, (see *Martin et al. vs. Warren*, 6 *Eng. R.* 287, as to this point, when the endorsement is in blank,) it is manifest that no question, as to the effect of any blank endorsement, was involved in that, that was decided; and that if the point decided is to be sustained by the analogies of the commercial law, that then these are, equally, to the full against the remark of the court as to blank endorsement and delivery.

In the case of *Buckner vs. Greenwood*, (1 *Eng. R.* 200,) although the judge, delivering the opinion of the court, indulged in several latitudinous remarks which were not called for by the case before the court, the only material point decided was, that, under our statute, a party cannot recover in his own name upon

a bond, unless he is the obligee, or has acquired the legal interest in it through the obligee by assignment. In that case, the bond was payable to "bearer" merely, and the plaintiff sued as obligee, alleging that it was made by the defendants and delivered to him. The bond was endorsed, in blank, by the party to whom, it turned out in proof, it was executed; but this endorsement cut no figure at all in the case, and was not remarked upon in any way. The court say, "In this case, Greenwood was not the obligee, to whom the bond was originally given; it was proven, upon trial, that it was executed and delivered to a different person, and this fact was admitted by the plaintiff himself; nor does he claim the interest in, or sue upon, the bond, as assignee. Having sued upon the bond, as obligee, it was assential to the sustaining of his action, to prove its execution and delivery to him, if denied, which was done by the defendant's plea; but, so far from establishing the fact of delivery to him, the reverse was proven by the defendant, and was admitted by the plaintiff. For *these reasons*, the judgment is erroneous, and must be reversed."

The case of *Edwards vs. Scull*, (6 *Eng. R.* 325,) decides nothing beyond the point, that a blank endorsement may be filled up at any time before or during the trial.

Adopting, then, the rule of the commercial law, as to the form and mode of making the assignment as to contracts payable in property, or in money upon a contingency, as has heretofore been substantially done as to all other contracts made assignable by our statute, the remaining question, on this point, is, whether or not, according to that law, the blank endorsement and delivery of the instrument constitutes such a transfer of the interest in the paper as to vest in the transferee the right of action and recovery. And, as to this, although there is some want of harmony in the authorities—indeed a direct conflict to some extent—by far the greater weight affirms the proposition distinctly. *Chewning et al. vs. Gatewood*, 5 *How. Miss. R.* 556; *McDonald vs. Bailey*, 14 *Maine R.* 103; *Gilliam vs. State Bank of Illinois*, 2 *Scam. R.* 247; *Riggs vs. Andrews, &c.*, 8 *Ala. R.* 631; *Chitty*

on Bills 229; *Grifforn vs. Jacobs*, 2 *Lou. R.* 192; *Tyler vs. Binney*, 7 *Mass. R.* 479; *Lovell vs. Everton*, 11 *John. R.* 52; *Dugan vs. U. States*, 5 *Wheaton R.* 173, 183; *Denton vs. Dupessis*, 12 *Lou. R.* 83. 93; *Sprigg vs. Cunny's heirs*, 29 *Martin's Lou. R.* 253; 3 *Kent* 89; *Story on Bills* 207.

It follows then, that the declaration, to which the demurrer to the pleas runs back, must be held sufficient, and that there was no error in the refusal of the court to give the 4th instruction asked for on the part of the defendant below.

And, inasmuch as our holding the declaration good, removes the only ground of complaint, urged, in this court, against the action of the court below upon the several pleas demurred to, it will be unnecessary to notice any of these.

As to the plea stricken out, and the two additional ones refused to be filed, there is clearly no error.

With regard to the demand, none was necessary, as was decided by this court, on a like contract, in the case of *Cockrell vs. Warner*, 14 *Ark.* 352. But, conceding, as is argued, that, inasmuch as one was alleged, the party has to stand or fall by it, we think there is sufficient evidence in the record to have authorized the jury to find one. True, on some points as to the demand, the evidence is indefinite and vague, but the jury were the exclusive judges of its weight. Worthington made no objection, when the demand was made, on the score of want of authority; but placed his refusal on another ground specifically.

With regard to the affidavit of one of the plaintiffs below, which was read to the jury, to prove the loss of the covenant, Judge MARSHALL says, in *Taylor vs. Riggs*, 1 *Peters R.* 596, "As the fact of loss is generally known to the party himself, there would seem to be a necessity for receiving his affidavit in support of it." And, in *Kellogg & Co. vs. Norris*, 5 *Eng. R.* 18, this court held, upon a construction of our statute, that an *ex parte* affidavit was competent for this purpose, the opposite party, under such circumstances, having the privilege to be examined on oath to disprove the loss, if he can. That this is a correct in-

terpretation of the will of the legislature, may be further fortified by the provision for suits on lost instruments before justices of the peace; where it is expressly provided that the plaintiff may "file with the justice the affidavit of himself, or some other creditable person, stating such loss or destruction, and setting forth the substance of such instrument," and, in a subsequent section, making a like provision for the examination of the opposite party on oath, to disprove the loss or destruction. (*Dig.*, *ch.* 95, *secs.* 26, 27 *and* 28.)

The objection to the reading of the deposition of Beekman, was not specific, but general. It seems regular upon its face. If there be really any ground of objection, and it had been pointed out in the court below, the party offering the deposition might perhaps have obviated the objection, or at any rate could have had the privilege of taking a non-suit, if he had deemed it proper. To notice objections that are, for the first time, to be discovered in this court, would work surprise and injustice.

With regard to the instructions that were given to the jury, when considered all together, we consider them as favorable to Worthington, as he had any right to ask; and full as stringent against the plaintiff below, as could have been tolerated.

The objection to the third instruction, given on the part of the plaintiff below, that the jury might compute interest at the rate of *ten* per centum, has been obviated by an agreement of record to the effect that this was a clerical mistake in the transcript, and that the rate instructed was in fact but *six* per centum.

Nor do we think there was any error prejudicial to the defendant, either in the modifications of the instructions which he asked entire, or in the refusal to give the 10th and 12th instructions, which he moved.

Without a modification of the 1st and 9th instructions, and the refusal of the 10th, they were well calculated to mislead the jury as to the weight to be given to the affidavit of the loss, which was clearly competent evidence for them to consider on this point; and, besides, there was no evidence in, upon which to base

the latter clause of the 9th, as to the plaintiff's improperly withholding the covenant, and so much of the 10th as assumed that this affidavit was made upon information derived from others. They had already been told, in very distinct terms, that this affidavit was evidence only of the loss, and, if they did not believe it, they could disregard it entirely.

There was nothing in the record, upon which the 12th instruction asked and refused, could be based, except that one of the plaintiffs had refused to produce a copy of the covenant, taken as he said, from the original, before its loss, unless upon the terms of first tearing off what was written on the same sheet of paper in addition to the copy. In the absence of all proof, that his additional matter had any connection with the copy of the covenant, we think the instruction in question would have been improper.

Finding no error, and that the verdict and judgment are sustained by the law and evidence, we think the judgment ought to be affirmed.

NEVILL VS. HANCOCK AND EWING.

According to the well settled doctrine of this court, by moving for a new trial, the plaintiff abandoned the exceptions previously taken by him, to the decisions of the court below in refusing and giving instructions to the jury, inasmuch as he did not incorporate the decisions complained of, in the motion, as grounds for a new trial.

In order to charge an endorser, it is necessary to prove, on the trial, that payment was demanded of the maker, within a proper time, and refused, and that the endorser had due notice thereof, or, that the endorsee had used legal diligence to make such demand, and give such notice, or that they were waived.

Where suit is instituted against the maker and endorsor of a note, jointly, and the

plaintiff fails to make out his case against the endorser, for want of proof of demand and notice, such failure does not enure to the benefit of the maker.

A blank assignment, and delivery of a bond, vests the legal interest in the assignee and all subsequent holders.

Writ of Error to the Circuit Court of Clark County.

Hon. J. C. MURRAY, Circuit Judge.

CUMMINS, for the plaintiff. In suits on endorsed paper, before justices, it is not necessary that endorsements should be filled up. *Sterling & Snapp vs. Bender*, 2 *Eng.* 201. We understand, in this respect, notes and bonds to stand on the same footing. *Secs.* 1, 7, *ch.* 15, *Rev. Stat.*

Failure to prove notice on endorser, would not release maker jointly sued. *Ferguson et al. vs. State Bank*, 7 *Eng.* 512.

CURRAN & GALLAGHER, contra. The action was upon a bond, and, in such case, the endorsement must be in writing, or full endorsement, to show any legal title. *Block vs. Walker*, 2 *Ark. Rep.* 4. In a suit before a justice, the instrument sued on must show a legal liability to plaintiff from defendant. *Levy vs. Shurman*, 1 *Eng. R.* 182.

ENGLISH, Chief Justice, delivered the opinion of the Court.

In July, 1850, Samuel Nevill sued William P. Ewing and George Hancock, before a justice of the peace, of Clark county, upon the following obligation:

OCTOBER 31ST, 1849.

"$90. On or before the first day of January next, I promise to pay unto William G. Sanders, ninety dollars, for value received of him; witness my hand and seal, the date above written.

his

GEORGE W. ⋈ HANCOCK, [SEAL.]

mark.

ATTEST:

JOHN S. T. CALLOWAY."

Upon which were the following endorsements:

"Received, on the within note, fifteen dollars and 2 cents, Jan. 6, 1850."

"I endorse the within note, for value received, without recourse on me, Feb. 11, 1850.

W. G. SANDERS."

"I endorse the within note to S. Nevill, for value received, this May 9th, 1850.

WM. P. EWING."

The plaintiff obtained judgment against both of the defendants before the justice, and Hancock appealed to the Circuit Court of Clark county, where the cause seems to have progressed, *de novo*, to final judgment, as against both the defendants.

The cause having been submitted to a jury, the plaintiff read in evidence, the obligation and endorsement sued on, and copied above; and then proved, by Calloway, the subscribing witness, that he wrote the obligation, and saw Hancock make his mark thereto.

The plaintiff having closed, the defendants introduced a receipt, signed by Wm. G. Sanders, and proved, by Calloway, that he wrote the receipt, and that it was signed by Sanders.

The plaintiff then showed the witness the following writing obligatory:

"One day after date, I promise to pay unto George Hancock, or order, sixty-five dollars, in corn, at cash price, delivered where I choose, in Clark county, or sixty-five dollars in cash accounts due me, which I will vouch for the immediate payment of, for value received; witness my hand and seal, this 27th Oct. 1849.

Signed, JAMES W. BEVILL, [SEAL.]"

And then asked said witness, if this was the same instrument of writing mentioned in the receipt, of which he had spoken? And he said that it was.

Here the defendant closed. The receipt referred to above, does not appear in the record.

The plaintiff moved the court to give the following instructions to the jury:

1st. That, if they believe, from the testimony, that Wm. P. Ewing endorsed the said note to Samuel Nevill, the plaintiff, he is equally liable with Hancock, and they should find accordingly.

2nd. If the jury believe that Sanders merely took the note to collect or return; that he acted merely as the agent or attorney of Hancock, and if he collected the same, it was to be appropriated upon the note in controversy; and, if not collected, was to be returned, and that Sanders returned the said note, or offered to do so, in a reasonable time, then they should find accordingly for the plaintiff.

3d. That if Bevill did not tender the corn, at the customary cash price, in the neighborhood, and cash accounts, which were due at the time, that Sanders was not bound to take the corn or the accounts.

4th. That, if the jury believe, from the testimony, that the said note was endorsed by Sanders in blank, it will pass by delivery, and that if they believe that S. Nevill was the holder of the note at the time the suit was brought, they should find for the plaintiff.

5th. That, if the jury believe, from the testimony, that Nevill was the holder of the note in controversy, it was *prima facie* evidence of title, and that, without rebutting testimony, they are bound to find for the plaintiff."

It seems that the court gave the 3d of the above instructions, but refused to give the others, and the plaintiff excepted.

The defendants moved the following instructions:

1st. That, unless the jury believe from the evidence, that the bond sued on was assigned by Sanders to Ewing, and assigned by Ewing to the plaintiff, Nevill—that an assignment cannot be proven by any evidence, other than by written evidence, or an assignment in writing—and unless the written evidence intro-

duced before the jury, on the trial of the cause, shows that said bond was so assigned, they are bound by law to find for the defendants.

2d. That, unless said plaintiff has proved by evidence in this case, that the holder of the bond sued on, made a demand of payment on said Hancock, after said bond became due, and was assigned by Ewing, and thereupon gave due and proper and reasonable notice to said Ewing of the non-payment by Hancock, before the commencement of this suit, the jury are bound, by law, to find a verdict against said plaintiff.

3d. That the endorser of a bond is not liable, unless he receives due notice of the non-payment thereof, and that where a party sues an endorser jointly, or in the same action — as the plaintiff has in this case, and fails to prove that the endorser has had due notice of demand and non-payment before suit brought, or some waiver, or subsequent [promise,] the plaintiff cannot recover against either of the parties in the suit."

All of which instructions, it seems, the court remarked, at the time, it would give, but only read the first instruction to the jury, remarking that it was all that was necessary to settle the case, and the plaintiff excepted.

The jury returned a verdict for the defendants, and judgment was rendered that they go hence, &c.

The plaintiff filed a motion for a new trial, on the grounds, 1st. That the jury decided contrary to law. 2d. That the verdict of the jury was contrary to the testimony adduced in the cause.

The court overruled the motion for a new trial, and the plaintiff excepted, took a bill of exceptions, setting out the facts, as above stated, and brought error.

According to the well settled doctrine of this court, by moving for a new trial, the plaintiff abandoned the exceptions previously taken by him, to the decisions of the court below in refusing, and giving intructions to the jury, inasmuch as he did not incorporate the decisions complained of, in the motion, as grounds for a new trial. See *Sawyer vs. Lathrop*, 4 *Eng. R.* 67; *Danley vs.*

Robin's Heirs, 3 *Ark. R.* 144; *Ashley vs. Hyde & Goodrich*, 2 *Eng. R.* 92; *Anthony vs. Humphries as ad., use, &c.*, 4 *Eng. R.* 176; *Samuel vs. Cravens*, 5 *Eng. R.* 38; *Berry vs. Singer*, *ib.* 483; *Hopkins et al. vs. L. B. & C. M. Dowd*, 6 *Eng. R.* 627; *Clay's ad. vs. Notrebe's Ex*, *ib.* 631; *Ford vs. Clark*, 7 *Eng. R.* 99.

It therefore becomes unnecessary to decide whether the court erred in refusing instructions asked by the plaintiff, or in giving such as were moved by the defendants.

The question to be determined, is, whether the verdict is sustained by the evidence introduced upon the trial, as it appears in the bill of exceptions.

The plaintiff, to make out the case on his part, introduced the obligation and endorsements sued on, and closed, without offering further evidence.

Hancock, the maker of the obligation, and Ewing, an endorser, after maturity, were joined as defendants in the action, under our statute. *Sec.* 9, *chap.* 15, *Digest.*

Both, under the statute above referred to, and by the principles of the law merchant, in order to charge Ewing as an endorser, it was necessary for the plaintiff, his endorsee, to have proven upon the trial, that payment of the bond was demanded of Hancock, the maker, within a poper time, and refused, and that Ewing had due notice thereof; or to have shown legal diligence and failure, for good cause, to make such demand, and give such notice, or that such demand and notice were waived. The plaintiff having failed to introduce any such proof on the trial, the jury properly found a verdict for the defendant, Ewing. *Ruddell & McGuire vs. Walker*, 2 *Eng. R.* 457; *Jones vs. Robinson*, 3 *Eng. R.* 484; *Jones vs. Robinson*, 6 *Eng. R.* 504; *Grace et al. & McDaniel*, 13 *Ark. R.* 394; *Lary vs. Young*, *ib.* 410; *Ellis vs. Dunham*, 14 *Ark. R.* 127; *Levy vs. Drew*, *ib.* 720.

But the failure of the plaintiff to make out his case against Ewing, for want of proof of demand and notice, or something equivalent, does not enure to the benefit of the defendant Han-

cock, the maker of the obligation, whose undertaking was separate and distinct from that of Ewing's, the endorser. This court has held that, where several are sued upon a joint contract, a successful plea by one going to the validity of the contract, or to the satisfaction or discharge of the debt, operates as a discharge to all the defendants; but it is otherwise where the plea goes to the personal discharge of the party interposing it. *Bruton et al. vs. Gregory*, 3 *Eng. R.* 180; *Ferguson et al. vs. State Bank*, 6 *Eng. R.* 512.

This being the law where the action is upon a joint contract, the rule would apply with greater force, where, as in this case, the undertakings of the defendants are distinct and separate, and they are joined in the action by virtue of the statute above referred to, and could not have been joined by the common law. The defence of want of demand and notice, was personal to Ewing, the endorser, and had no application to the undertaking of Hancock, the maker.

The next question to be considered upon the record, is, whether the plaintiff made out his case as against Hancock, the maker of the obligation sued on. It is contended, on behalf of the defence, that the plaintiff showed no legal title in himself to the obligation. The bond was made payable to Sanders, and by him assigned in blank, as to the name of the assignee, and afterwards endorsed by Ewing to the plaintiff.

In the case of *Sterling & Snapp vs. Bender*, 2 *Eng. R.* 201, this court held that a bill or note endorsed in blank, is transferable by delivery only, and so long as the endorsement continues in blank, it makes the bill or note, in effect, payable to bearer. That, by the endorsement, the payee divests himself of the legal interest in the bill or note, and it is vested by delivery in the holder. That, an endorsement in blank, constitutes a perfect transfer of the interest in the bill or note, and without the addition of other words, will vest the right of action, and all other rights, in the transferee and subsequent holders.

That case is precisely like the one now before us, except that was a suit upon a note, and this is a suit upon a bond.

Our statute of assignments, and the course of decisions under it, have, we think, placed bonds for money upon the same footing with notes, as negotiable instruments, and we see no good reason for making a distinction between them. See *Worthington vs. Curd & Co.*, decided at the present term, where the decisions of this court on this subject are collected and reviewed.

The plaintiff having a legal right of action upon the bond, and having read it, and the endorsement, to the jury, his case was made out as against the maker, Hancock, and it was incumbent upon him to produce evidence to discharge himself from liability, as the maker of the bond, to entitle him to the verdict of the jury.

The only evidence introduced by the defendants, was a receipt, with the testimony of Calloway, that it was signed by Wm. G. Sanders. The plaintiff then produced the obligation of Bevill, payable to George Hancock, in corn or cash accounts, and proved, by the same witness, that this was the note referred to in the receipt.

We think it apparent upon the whole record, that the jury found a verdict in favor of Hancock, under the erroneous impression that the plaintiff had no legal title to the bond sued on. We see nothing in the evidence to avoid the obligation and discharge Hancock.

The judgment of the court below must be reversed, and the cause remanded, with instructions to grant a new trial, as to the defendant Hancock, and that the cause progress as against him.

DYER ET AL. VS. BEAN ET AL.

15 519
60 73

15 519
f80 461

Under the rule that it requires two witnesses, or one witness and strong corroborating circumstances, to overturn a positive denial in the answer; the testimony of a witness, that he was intimately acquainted with a party, and believed that she was a native of the Chickasaw tribe of Indians, without stating upon what facts the belief rests, or that it is common reputation, is not sufficient to establish the fact against the positive denial of the answer.

Quere: Has the wife any equitable interest in the money arising from the sale of her real estate, after the proceeds of the sale have come into the hands of her husband?

Where an agent bids off negroes at an administration sale, for and at the request of his principal, who pays for them, and to whom they are delivered, the title of the principal is perfect, without any written conveyance; and no bill of sale subsequently made by the agent to another, can convey any title.

Imperfect voluntary gifts will not be enforced in chancery, no matter how manifest the intention of the party to perfect the gift.

By the common law, the husband and wife cannot contract with each other; nor can the husband make a grant or gift to his wife, nor the wife have personal estate to her sole and separate use. But, in this State, such property may be conveyed directly by the husband, or a third person, directly to the wife; and, in such case, the husband will take the legal interest, and be treated in equity as a trustee for the wife.

Delivery is essential to the validity of a bill of sale; that is, it must go out of the hands or control of the grantor with the intent that it should go to those of the grantee, and must ultimately go there. Proof that, at some time before or after the death of the wife, it was in the hands of the husband, and was destroyed by him, is not sufficient evidence of a delivery to the wife.

Inconsistencies and evasions in an answer, as well as direct contradictions by the evidence, are entitled to consideration in estimating the weight of evidence necessary to overturn such answer.

Appeal from Franklin Circuit Court in Chancery.

Hon. FELIX I. BATSON, Circuit Judge.

WALKER & GREEN, for the appellants. The negroes in controversy were purchased with a part of the proceeds of the sale of their mother's "reservation under the provisions of the treaty made by and between the United States and the Chickasaw Nation of Indians; and conveyed, by deed of conveyance, by the agent who purchased them for the defendant, Joab Bean, and by his express direction. But, supposing the proof insufficient to establish the allegation that the negroes were paid for out of the proceeds of Mrs. Bean's land, the validity of the conveyance to her and her daughters, was not thereby affected.

A voluntary settlement binds the party making it, nor can he alter it, how much soever he may be inclined to do so, unless there be a power of revocation. "He must lie down under his own folly. It is void only against creditors, and only to the extent in which it may be necessary to deal with the estate for their satisfaction. To every other person, it is good: satisfy the creditor, and the settlement stands." 1 *Maddox Ch., m. p.* 280.

A voluntary conveyance to a wife by her husband, can only be impeached by a judgment creditor. *Lanton vs. Levy*, 2 *Edw. Rep.* 297; *Magniac vs. Thompson*, 7 *Peters S. C. Rep.* 348; *Taylor vs. Heriot*, 4 *Dessau.* 227; *Jenkins vs. Clement*, *Harp. Eq. Rep.* 72; *Bunn et al. vs. Winthrop et al.*, 1 *John. Ch. R.* 329; *Sourverbye vs. Arden*, *ib.* 240; *Smith et al. vs. Yell et al.*, 4 *Ark.* 393.

Gifts between husband and wife, *without the intervention* of *trustees*, have often been supported in equity, when not made to the prejudice of creditors, or *subsequent bona fide* purchasers, *without notice*. *Guardian of Elms vs. Hughes*, 3 *Dessau.* 185.

A husband may, when creditors will not thereby be defrauded, pay for an estate, and direct the conveyance to be made to his wife, and it will be presumed to be an advancement to her. *Spring vs. Hight*, 9 *Maine Rep.* 408; *Sexton vs. Wheaton and Wife*, 8 *Wheat S. C. Rep.* 225; 5 *Cond.* 419; 2 *Story's Com. on Eq. Ju., sec.* 1318. And it was objected, and successfully, too, in the court below:

1st. That Mitchell's executor did not convey the negroes to Hutchins by bill of sale.

2d. That the testimony was insufficient to prove that the bill of sale from Hutchins conveyed the negroes to Mrs. Bean *and her daughters*, and that it was executed by Joab Bean's direction.

If the title to the slaves had been in question between complainants and Mark's representatives, and it had been alleged and proved that, by the law of Mississippi, a bill of sale was necessary to pass the title to slaves, there might have been something in the first objection. By the common law, personal property passes by delivery, and there being no evidence or allegation in the pleading as to the law of Mississippi on that point, the presumption obtains that the common law is in force there.

The sufficiency of the proof to sustain the allegation, that the bill of sale from Hutchins conveyed the negroes to Mrs. Bean and her daughters, and that its execution was by the direction and procurement of Joab Bean, cannot, we think, be seriously questioned; and but slight evidence of the contents of the bill of sale would be required as against Joab Bean, as it is apparent that he destroyed it. "If a man, by his own tortious act, withhold the evidence by which the nature of his case would be made manifest, every presumption to his disadvantage arises against him. And if a person is proved to have defaced or destroyed any written instrument, a presumption arises, that if the truth had appeared, it would have been against his interest, and, accordingly," slight evidence of the contents of the instrument, will in such a case be sufficient. *Broom's Legal Maxims*, 218; *Haldane vs. Havey*, 4 *Burr.* 2484; 1 *Phil. Ev. 9th Ed.* 4478.

The voluntary destruction of written evidence, or its non-production when under the control of a party, after notice to produce, is not sufficient to establish the writing as claimed by his adversary; but every doubt as to its contents, every thing equivocal in the secondary evidence to which his adversary is driven, or imperfect, vague, or uncertain, as in dates, sums and whatever

is material, shall be presumed against him. *Life & Fire Ins. Co. vs. The Mech. Fire Ins. Co.*, 7 *Wend.* 31; 2 *Cow. & Hill's Notes to Phil. Ev.* 293; *Mad. Ch.* 326; *Blade vs. Norland*, 12 *Ward Rep.* 173.

PIKE & CUMMINS, for the appellees. Clearly this property came from the husband. The bid was his, though made through an agent, and he had paid the purchaser money. The bill of sale was in law *his* act and deed.

The rights of Mrs. Bean, and of her daughters, depend upon the general rules of law as administered in this court.

It is not to be doubted that, although agreements between husband and wife, during coverture, for the transfer from him of property directly to her, are void at law, and though equity examines them with great caution before it will confirm them, still it will do so, *when the transfer is fairly made, upon a meritorious or valuable consideration;* and that the cases have gone further, and maintained mere gifts.

In *Wallingsford vs. Allen*, 10 *Peters* 583, where these doctrines were laid down, the transfer was held to have been made for a *valuable* consideration, because in lieu of alimony allowed the wife, pending a suit therefor. *Magniac vs. Thompson*, 7 *Peters* 248, was the case of an *ante-nuptial* settlement, where the marriage that followed was a valuable consideration.

But still, no doubt the rule is, as laid down in *Elms vs. Hughes*, 3 *Dessau.* 153, that gifts from husband to wife are often supported, provided the same be not made to the prejudice of creditors, *or*

And, where a husband has given property to his wife, a mere *subsequent bona fide purchasers, without notice.*

voluntary assignee of the husband cannot impeach the transaction as fraudulent. An assignee for the benefit of creditors, is such a *voluntary* assignee. *Rogers vs. Fales*, 5 *Barr* 147.

Thus, in *Adams vs. Brackett*, 5 *Metc.* 280, shares of stock subscribed for by a husband, and certificate taken for them in the name of his wife, were held her separate property. The court

held that there was, what was required in *McLean vs. Longlands*, 5 *Ves.* 79, "a clear and distinct act, by which the husband divested himself of his property."

But this doctrine has not obtained every where. It was repudiated in *Fourth Eccl. Society vs. Mather*, 15 *Conn.* 599, as it was in *Dibble vs. Hutton*, 1 *Day* 221, as an innovation "upon the sacred unity of the persons of husband and wife."

The doctrine is thus stated in *Herr's Appeal*, 5 *Watts & Sergeant* 494, "where a gift by a husband to his wife is reasonable, and not in fraud of creditors, equity sustains it as a provision for her, to which the interposition of a trustee is not indispensable: but such gift must be established by clear and convincing proof, not only of the act of donation and delivery, but of her separate custody of it."

Now, it is exceedingly doubtful, in this case, whether the bill of sale was ever delivered to Mrs. Bean at all. The bill avers that it was, and that it came to the possession of the daughters. The answer of Joab Bean positively denies this, and the evidence certainly fails to overturn the answer.

Even if the court thinks it proven that the land sold to Mitchell was really the property of the wife, still, upon its sale, the proceeds belonged to the husband, subject only to her equitable right to a support therefrom. *Martin vs. Martin*, 1 *Comst.* 473.

FOWLER, also for appellees. Aside from other questions involved, the case stands as a gift at common law, of a *personal chattel*, to a *feme covert* by a *third person*, the title to which vested *eo instanti* in the husband, and, on the death of the wife, *remained his*, of course. And the effect was the same, whether it was a *gift*, *bequest* or *purchase*, and whether the husband paid the purchase money or not. The property became his *absolutely*. 2 *Saund. Pl. Ev.* 567; *Co. Litt.* 351, *b.*; *Clancy's Husb. and wife*, 1, 2, 3, 4; 3 *Term Rep.* 631, *Milner vs. Milner*; 3 *How. Miss. Rep.* 395, *Lowry vs. Houston*; 10 *Yerg. Rep.* 222, *Ham-*

rico vs. Laird; 1 *Edw. Ch. Rep.* 389, *Hunter vs. Hallett; Toller's Law of Executors* 225; 2 *Vern. Rep.* 659, *Harvey vs. Harvey.* Taking it in the view, aside from the statutes of Mississippi, &c., of a direct gift from the *husband to the wife*, as it clearly was, it was *void in law;* because, a husband cannot make a gift, or any other transfer of property, directly to his wife. There must be a *trustee.* In this case, there was none. See 1 *Black. Com.* 442; *Clancy on Husb. and Wife,* 1; *Freem. Ch. Rep.* 313, *Armfield vs. Armfield.* And, the foregoing, placing it in its most *favorable* light for the complainants, is a just view of the character of the transfer to Mrs. *Bean*, by her husband, through *Hutchins*, a *mere agent*, or "conduit pipe," with *no interest* whatever in the transaction. The negroes were purchased *by the husband*, and *paid for by him*, and *Hutchins* the mere "*medium*" to give *color* to a gift to the wife, otherwise *clearly void*, and which is not bettered by such a means. It is manifest that the husband paid for the slaves out of his own means; and the bill of sale must be considered as made to Mrs. Bean by the husband, *directly*, and *without any consideration whatever.*

It is charged, and established by the evidence, that Hutchins made the bill of sale to Mrs. Bean, on account of Bean's being *involved in certain* securityships; and, of course, to *hinder* and *delay*, if not to *defraud, Bean's creditors.* And, all such transfers, independent of the statutes of frauds, whether made directly or *indirectly*, were void at common law, and *fraudulent* as to *creditors, &c.* See 5 *Cond. Rep.* 426, *Sexton vs. Wheaton;* 2 *Hayw. Rep* 348, *Brady vs. Ellison;* 9 *Dana Rep.* 111, *Thomas vs. McCormack;* 2 *Brockenb. Rep.* 147, *Hopkirk vs. Randolph;* 9 *Ark. Rep.* 486, *Dardenne vs. Hardwick.* And, the doctrine that such a contract is binding between the parties, where possession is also transferred, I do not controvert. *But Joab Bean never* transferred the possession in this case; but *retained* it *himself*, with the *exclusive control of the slaves as his own.* And I deny that, in such case, either Mrs. *Bean*, or *her representatives*, could ever enforce the contract against him. Such is not the policy of the

law: and equity never lends its aid. See 1 *Ves. Sr.* 319, 320, *Henkle vs. Royal Ins. Co.*

Whatever the parties have *illegally*, or fraudulently, agreed *to execute*, both law and equity *refuse* to compel the one or the other *to execute it.* 1 *Sug. on Vend.* 444, *note* 3; 4 *Alab. Rep.* (*N. S.*) 525, *Dearman vs. Dearman;* 8 *Ark. Rep.* 82, *Martin vs. Royster et al.;* 5 *N. Car.* (*Ired. Eq.*) *Rep.* 23; 11 *Humph. Rep.* 10, 11, *Ohio Ins. Co. vs. Merchants, &c.;* 4 *Pet. Rep.* 188, 189, *Bartle vs. Coleman;* 1 *Cowp. Rep.* 343, *Holman vs. Johnson. But*, leave the parties where they are found, without lending aid to either. 8 *Ark. Rep.* 82, *Martin vs. Royster;* 4 *Alab. Rep.* 525; 5 *Alab. Rep.* 193; 5 *N. Car. Rep.* (*Ired. Eq.*) 23; 11 *Humph. Rep.* 11, *Ohio Life Ins. Co. vs. Merchants, &c.;* 4 *Pet. Rep.* 188, 189, *Bartle vs. Coleman.*

Mr. Justice WALKER delivered the opinion of the Court.

This is a suit in chancery, brought by the complainants, to recover certain negro slaves, which complainants claimed in right of complainants, Catharine, Elizabeth, and Josephine, as the children and heirs-at-law of their mother, Peggy Bean; and also under a bill of sale, executed by one Hutchins, at the instance of the said Joab Bean.

The history of the case, as drawn from the bill, is: That the mother of complainants, Catharine, Elizabeth, and Josephine, was a native Indian woman, of the Chickasaw Nation of Indians, and intermarried with their father, the defendant, Joab Bean, and resided with him in the Indian Nation; that, under the provisions of a treaty made between the United States and said Nation, their mother was entitled to a grant of lands, which she conveyed to their father, the said Joab Bean, who sold the same to one Wyatt C. Mitchell, for the sum of $5000; that Mitchell died, leaving a balance of said sum still due of about $1,450; that, at the sale of Mitchell's property, the negro woman Hannah, and two children, were bought by one Hutchins, for the said Joab Bean, who paid for the negroes with this balance due from

Mitchell's estate for the land; that Hutchins, afterwards, at the instance of Joab Bean, conveyed the slaves to their mother and the complainants (her daughters) by name; that their mother then resided in the State of Mississippi, and that by virtue of the statute laws of that State, their mother, although a married woman at the time, could take and hold slaves in her own right; that she continued to reside there until her death, and that, by virtue of another statute of said State, at the death of their mother, the property descended to, and vested absolutely in, them; that, up to the time of their mother's death, which was in April, 1848, she had possession of the bill of sale from Hutchins to her and her children for the slaves; that the slaves remained in the possession and use of the family, and were claimed and owned by them as their separate and absolute property, and were so recognized and spoken of in the country in which they resided; that, after the death of his wife, Joab Bean removed to Arkansas, with his three daughters (the complainants,) and the negro woman Hannah and her children, and has ever since kept said slaves in his possession, except the girl Caroline, sold to defendant, Mark Bean, all of whom are the children of the woman Hannah; that one of complainants, the daughter of said Peggy, after her death, kept the bill of sale for said slaves in her possession, until some time after the removal of said Joab Bean to Arkansas, when it was by him surreptitiously obtained possession of and destroyed; from which time, the said Joab set up title in himself to said slaves, and sold one of them to his co-defendant Mark Bean, who, at the time well knew of complainant's right to the slaves, and at whose instance the said Joab, by threats and menaces, caused the complainant Elizabeth to sign her own name, and her sister Josephine's, to the bill of sale executed by the said Joab to the said Mark for the girl Caroline, without consideration to them paid.

The other complainants claim, by virtue of marriage with their co-plaintiffs, the children of Peggy Bean.

The defendant, Joab Bean, in his answer, admits his marriage with the mother of complainants, Catharine, Elizabeth, and Jose-

phine; but positively denies that she was a Chickasaw Indian woman, or that she was descended from an Indian woman, or that she was ever in the Chickasaw Nation, until after his marriage with her, which took place in the (then Territory,) now State of Arkansas; admits that, after his marriage, he removed to the Chickasaw Nation, in the State of Mississippi. He positively denies that his wife ever was the head of a family in said Nation, or was entitled to a grant of land there, or that, in fact, any lands were granted to her, or that she ever conveyed any lands to him. He states that he was, in his own right, entitled to a tract of land which was granted to himself, by the Nation, and upon which a patent issued from the United States, in his own name. He admits the sale of this tract to Wyatt C. Mitchell, and that part of the purchase money remained unpaid at the time of Mitchell's death; admits the purchase of the woman Hannah and her children, by Hutchins for him and as his agent, and that they were paid for by crediting his claim against said estate with the sum bid. He denies that any bill of sale was executed, by the executor of Mitchell to Hutchins, for said slaves. He denies that Hutchins made the bill of sale to his wife and daughters, at his instance, but says that, if made, it was done at Hutchins' own instance, without authority from defendant for so doing; that he is advised that Hutchins made the bill of sale, because defendant was involved in securityships, from which Hutchins feared that he might suffer pecuniarily; that Hutchins had no title whatever to the slaves; that the bill of sale executed by Hutchins to his (defendant's) wife and children, never was delivered to them: but was always kept by defendant in his possession, until about a year before the date of his answer, when it was destroyed by himself. He denies that he ever heard of complainant's claim to the slaves, until after his removal to Arkansas; that the negroes have, ever since they were purchased, remained in his exclusive possession and use, and are now held and claimed by him as his absolute property, except the girl Caroline, sold by him to his co-defendant Mark Bean; that the girl, at the time

of the sale, was represented by him to his co-defendant as his absolute property; but that he having heard something of the claim set up by his children, the complainants, expressed a wish that they also should sign the bill of sale, which complainants, Elizabeth and Josephine, did freely and voluntarily, without threats, coercion or undue influence.

Defendant, Mark Bean, claims the title to the girl Caroline, as a purchaser for a valuable consideration; admits that he requested the complainants to join in the bill of sale, to avoid all contest or dispute about the title, having heard that they had asserted some claim to the slaves; that he was not present when the bill of sale was executed and acknowledged, but is informed and believes that it was done freely and voluntarily, without undue influence.

Upon the final hearing of the case, the court below decreed that the bill be dismissed at the costs of complainants, from which they have appealed to this court.

The evidence will be considered in connection with the several questions of fact to be settled.

The complainants set up title to the slaves by virtue of a direct conveyance from Hutchins to Mrs. Bean, and her children by name, and also by descent as her sole heirs. If, however, the title passed to the mother, so as to vest title in her, it is a matter of no importance to the complainants, whether they acquired any title under the bill of sale or not. Because, if the title vested in the mother, and there remained until her death, there is no doubt that her children, under the statute of Mississippi, where she resided at the time of her death, were entitled by descent to the slaves.

This being the case, we will first proceed to investigate the title of the mother.

For the purpose of strengthening the equitable claim of the wife to the slaves, and also as furnishing a motive for making the transfer, or rather for directing Hutchins to make it, the complainants allege that the money paid by Joab Bean to Mitchell,

for the slaves, was part of the purchase money for a tract of land which came to the husband by the wife, Mrs. Bean. We will, therefore, proceed to examine the evidence, and settle this question of fact.

Joab Bean positively denies that his wife was a Chickasaw Indian, or descended from one, or that she was a native of the Nation, or was ever in it until his marriage. He also denies that she was, under the treaty, entitled to a grant of land, or ever received one or conveyed one to him; but admits that he did sell a tract of land, which had been granted to himself, to Mitchell, and out of which he paid for the woman Hannah and the two children. The answer is, therefore, a positive and circumstantial denial of this allegation; and, under a familiar rule, in such cases, it must be taken as true, unless disproven by the positive evidence of two witnesses, or, of one witness, sustained by strong corroborative evidence.

The evidence is clearly not sufficient to sustain the allegation against the denial of the answer. There is only one witness, by whom an attempt is made to prove that Mrs. Bean was a Chickasaw Indian woman, or a descendant of one, or that she was a native of the Nation, or resided there prior to her marriage. These are facts, which, if true, we must presume could have easily been proven. The only witness, who testified, touching this point, was Tuttle. He says, "that he was intimately acquainted with Mrs. Bean, and that he believed she was a native of the Chickasaw tribe of Indians." No facts are given upon which this belief rests, nor is it given as common reputation. As mere belief, it was, in any event, inadmissible, if objected to; but, whether it was objected to or not, is of no moment, for standing, as it does, unsupported any other evidence, it is wholly insufficient to sustain the allegation against the denial of the answer. Mrs. Bean, therefore, according to the evidence, is not shown to be a Chickasaw woman, or a native of that Nation, and, if not, then, under no provision of the treaty, was she entitled to a grant of land.

But had this not been the case, there is no evidence, either that she received a grant of lands, or that she conveyed any land whatever to her husband, except that of Tuttle and Howry. Tuttle says "that he *believes* that, under the laws of the country, the said Peggy Grace was entitled to three sections of land, not ¾ sections. He does *not* know that Joab Bean procured a title to said land from his wife. A patent issued from the United States, and was issued in the name of said Joab Bean's wife, the said Peggy Grace." This belief of the witness, in regard to matters which, if they ever transpired, were from their nature of necessity reduced to writing, and matters of record, would if objected to, have been excluded, but, as the exception to the admissibility of evidence, only went to hearsay evidence, as secondary evidence, unexcepted to at the time when it was offered, we must give it such weight as it is entitled to. But, so far from being supported by the testimony of the other witness, Howry, his statement, in an important particular, is flatly contradicted. Howry says that the patent for the land sold by Joab Bean to Wyatt Mitchell, issued in the name of Joab Bean alone; and, when we remember that this witness was the executor of the estate of Mitchell, and no doubt had the custody of his title papers, his statement, so far from sustaining the allegation in the bill, or the statement of Tuttle, fully sustains the answer of Bean in this particular. It is also shown, by this witness, that the deed from Bean and wife to Mitchell, was certified in accordance with the treaty stipulations, which, as argued by counsel, raises a strong presumption that the land conveyed was acquired under a grant under the provisions of the treaty, and that, as no provisions by treaty was made for allowing white men, resident in the Nation, separate claims for land, Bean could not thus have acquired a grant; and, if not acquired by him, it must necessarily have come through the wife. This persuasive argument is certainly entitled to consideration. What the real state of case is, is a matter of much doubt from the evidence—it certainly falls short of sustaining either the bill or the answer. Under the issue, it de-

volved upon the complainants to show that the grant was made to Mrs. Bean. This, we think, has not been sufficiently done. It is not shown that Mrs. Bean was a Chickasaw Indian, or the head of a family, or, in any respect, one of the class of persons provided for by the treaty; nor that any grant whatever was made to her: nor is there any proof that she ever made a transfer of any grant to her husband. The treaty prescribes the manner in which, if a Chickasaw woman married to a white man, she shall make a conveyance. Until she shows this to have been done, even conceding the proof to exist of a grant to her, she would fail to sustain her bill by proof. But, so far from this, the weight of the evidence tends to prove that the patent issued directly to Joab Bean, in his individual right, and, to that extent, goes to sustain the answer, which, under all the circumstances, must prevail.

Having thus disposed of the question, as to the equitable interest of the wife of Joab Bean, in the fund out of which he paid for the slaves, if indeed she could be said to have any in the proceeds of the sale of property after the money had come to the hands of the husband, the next question to be considered, relates to the purchase and subsequent transfer, or attempt to transfer them, by Hutchins to Mrs. Bean, or to her and her children.

There can be no doubt but that Hutchins bid for the negroes, at the request of Joab Bean, and for him; and, on the same day, delivered them to Bean; and that Bean paid for the negroes out of the proceeds of the sale of the tract of land to Mitchell.

Whether Hutchins did or not receive a bill of sale for the slaves, from the executor of Mitchell's estate, as alleged by the complainant, is a matter of doubt, according to the evidence. Harvey, the executor, says, "That he does not remember whether he made a bill of sale to Hutchins or not, but is inclined to think he did." Hutchins, who bid off the slaves, says, "He does not remember to have received a bill of sale for the slaves, but thinks he did not."

Giving the statements of these witnesses equal credit, and pre-

suming that if such instrument had been executed, either would, under the circumstances of the case, be equally apt to have remembered it, we may consider the belief of one a fair set-off against that of the other.

Joab Bean states positively, in his answer, that no bill of sale ever was executed to Hutchins, and the answer remains unimpeached. And, as a necessary and legitimate consequence, therefore, it follows, that the legal title passed to, and vested in, Joab Bean. The bid by Hutchins having been at Bean's instance, and for him, was, in fact, his bid; the slaves were at once delivered over to Bean as his property, and his title became and was perfect without any written conveyance; Hutchins so understood it, and testifies "That the original title to the slaves was in Joab Bean:" in other words, that Bean was, in fact, the purchaser at the sale of Mitchell's estate. Bean, in his answer, states that the bill of sale was made by Hutchins to Mrs. Bean, after the payment of the purchase money for the slaves by him. There was, therefore, at the time the bill of sale was made to Mrs. Bean, nothing wanting to make the title in Joab Bean perfect and conclusive, both in law and equity. To test this matter fully, after all this, suppose Hutchins had himself set up a title, legal or equitable, to the slaves, upon what would it have been based? Upon the bid? That was for Bean. Upon the fact that he executed his notes for the purchase money? The money was paid by Bean. Upon a formal transfer to him by bill of sale? None such was made. Upon possession of the slaves? He had delivered them to Bean. There is, therefore, no shadow of ground upon which to rest a claim or title in him; and, consequently, he could convey no title, because he had none to convey.

The title, both legal and equitable, was in Joab Bean; and, if under his directions, Hutchins had made a conveyance in Bean's name, the conveyance might have been held good as the act of Bean, through his agent Hutchins. But such was not the case; the bill of sale was from Hutchins, in his own right, and not as agent for Bean, or in Bean's name; and, consequently, no title passed

by virtue thereof to Mrs. Bean, or to her and her heirs or children.

But, if it should be said that Bean, by directing the bill of sale to be made, adopted it as his, and is, in equity, bound by it, still there is this obvious difficulty to be surmounted. Being an imperfect gift, however manifest the intention of Bean may have been to settle this property upon his wife and children, the chancellor will not enforce it.

In the case of *Coleman vs. Sanell*, 1 *Ves. Jr., page* 51, it was argued, for the complainant, that the gift was an equitable gift, instead of a legal one. In answer to which, the Lord Chancellor replied, "If you have it at law, there is an end: if not, the question is, whether you can have a voluntary agreement executed in equity. The difficulty is to show a case where any voluntary gift has been executed in equity. You are not upon a question whether a court of equity will set up a deed, you cannot proceed upon at law." And, in the further consideration of the same case, the Chancellor said: "Where a deed is not sufficient in truth to pass the estate out of the hands of the conveyor, but the party must come into equity, the court has never yet executed a voluntary agreement. To do so, would be to make him who does not sufficiently convey, and his executors, after his death, trustees for the person to whom he has so defectively conveyed; and there is no case where a court of equity has ever done that. Whenever you come into equity to raise an interest by way of trust, you must have a valuable, or at least a meritorious, consideration. Nothing less will do." And so, also, it was held in *Antrobus vs. Smith*, 12 *Ves.* 46, and *Willan vs. Willan*, 16 *Ves.* 82, that a court of equity will not lend assistance towards perfecting a mere voluntary contract.

Under these authorities, it is very evident that, no matter how manifest the intention of Joab Bean may have been, to have the property conveyed, and notwithstanding the attempt to convey it through Hutchins, (which we have seen was not sufficient to convey the legal title,) and no matter how strong the equitable

obligations upon him to perfect it, if upon a valuable consideration, yet, being a mere voluntary gift, it cannot be enforced.

But, if we could be mistaken upon this point, as the conveyance would, in legal effect, be from the husband, in whom the legal title vested, the wife could gain no aid from the statute of Mississippi, which permits a *feme covert* to take and hold property in her own right, because the statute, in express terms, excepts out of its provisions conveyances from the husband to the wife after coverture, and the question would arise, could she hold a separate estate by deed of gift or otherwise, made directly to her. By the common law, the husband and wife cannot contract with each other, nor can the husband make a grant or gift to the wife, nor the wife have personal estate, to her sole and separate use. Such contracts are void at law. *Willingsford vs. Allen*, 10 *Peters U. S. S. C. Rep.* 594; *Tomay vs. Sinclare*, 3 *Howard Rep.* 326.

Not only is the wife's capacity to contract with her husband, extinguished by the merger of her legal existence in his, but as her possession is, in contemplation of law, his possession, she is incapable of receiving from him that delivery and transfer of it, which is essential to the validity of gifts.

When property is intended to be conveyed to the separate use of the wife, whether by the husband or by a third person, the most usual, and perhaps the safest course is, to convey it in trust to a third person for the use of the wife. Many of the earlier decisions seem to hold this as indispensably necessary, but, with the exception of Connecticut, most, if not all, of the American courts, in conformity too with the later English decisions, hold that the interposition of trustees is not indispensably necessary. *Willingsford vs. Allen*, 10 *Peters S. C. R.* 594; *Elens vs. Hughes*, 3 *Dessau.* 148; *Spring vs. Hight*, 22 *Maine Rep.* 408; *Herr's Appeal*, 5 *Watts & Serg.* 498; *Hill on Trusts* 611. And such also has been the decision of this court. *Smith et al. vs. Yell*, 4 *Ark. Rep.* 295. But a deed made directly to the wife, will create a separate use without the interposition of trustees. In such case

the husband will take the legal interest, yet he will be treated in equity as a trustee for the separate benefit of the wife. *Hill on Trusts* 609. And whatever question may arise as to the words necessary to create a separate trust for the wife's use, when the conveyance is made by a third person to the wife, yet, when made by the husband to the wife, it must, though not in express terms, necessarily be for her separate use; otherwise, the disposition would be futile. *Steel vs. Steel*, 1 *Iredel Eq.* 452.

If, therefore, the bill of sale, which we must consider as, in effect, a voluntary settlement of property upon the wife, had been executed to Joab Bean himself, and such as would have conveyed an absolute title to the slaves, we should, under the authorities to which we have referred, uphold it as a valid gift or settlement upon the wife without the interposition of trustees, and without reference to the statute of Mississippi, which cannot govern the case, when considered as a conveyance from the husband.

But suppose we should consider that the legal title was, at the time Hutchins executed the bill of sale, in him, and the bill of sale in all respects sufficient to convey the title in the slaves to Mrs. Bean, if delivered to her in person, or such acts done as in law amounted to a delivery, the question is, under the issue in this case, in which the due execution of the deed is put in issue, was there in fact a delivery in this case, or such acts as amounted to a delivery. Considered as the act of Hutchins, a third person, under the statute of Mississippi, the wife was, beyond question, competent to take and hold the separate and exclusive legal title in the slaves, and the same rules of law, governing contracts between persons resting under no legal disability, will apply to this state of case.

As a question of fact, to be settled by the evidence, under the rule that when the answer is under oath, and puts in issue a fact alleged by the complainant, by a direct denial thereof, that the positive testimony of two witnesses, or one witness with strong corroborative circumstances, is necessary to overturn the answer, a preliminary question is raised, which may, to some exent, qual-

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ify the rule in particular cases. It is this, that, as the answer of the defendant, Joab Bean, has been met and flatly contradicted, in regard to one or two material facts in issue, in regard to which, from their nature, we must presume he was informed (as for instance, with regard to the execution of the notes for the purchase money for the slaves, and also with regard to the execution of the bill of sale by Hutchins, with his knowledge or consent) whether these circumstances do not so far detract from the credit due to the answer, as to allow slighter proof to overturn it, than if it stood uncontradicted.

The rule in the common law courts, is, to allow such circumstances to go to the discredit of the witness, and there would seem to be no satisfactory reason why it should not apply to the answer of a defendant, and such would seem to be the rule held by the Supreme Court of New York, in the case of *Forsyth vs. Clark*, 3 *Wend.* 646; *Jackson vs. Hart*, 11 *Wend.* 349.

Without intending to establish a rule of evidence, upon the authority of these decisions, we do not hesitate to say, that inconsistencies and evasions, as well as direct contradictions by the evidence, are entitled to consideration in estimating the weight of evidence necessary to overturn an answer.

That portion of the evidence bearing upon the question of delivery, is substantially as follows: Hutchins, who executed the bill of sale, states the fact that he did so, at the request of Joab Bean, and that it was executed to Mrs. Bean and her heirs. Henry Frick states that, after Bean removed to Arkansas, he heard him say that his daughters (complainants) had a bill of sale for the negroes until a debt was paid. He also states that he found an instrument of writing in his trunk, which he took to be a bill of sale for the negroes, and handed it to one of Bean's daughters, (one of complainants). Hulda Johnson states that, after Bean came to Arkansas, she heard him say that his daughters had told it about that the slaves belonged to them: that they had had a bill of sales for the negroes, but that he had got it, and torn it up, and burned it. George Taylor, who deposed

with regard to what transpired in Mississippi, says the bill of sale was given by Hutchins to Mrs. Bean, wife of Joab Bean, and he had it in his possession: the bill of sale read: "I have this day bargained and sold, to Peggy Bean, one negro woman and two children, for the sum of fourteen hundred and fifty-four dollars." This, together with the fact that the negroes always remained in the possession of Bean, and as far as the evidence tends to show, served the family as slaves usually do, and from which, under the circumstances, but little can be drawn, because, even if they had been formally delivered to Mrs. Bean, they would have continued, in all probability, to perform the same service, and be controlled in the same way. Much of the evidence, with regard to common neighborhood understanding, was hearsay, and, under the exceptions taken on both sides, should be excluded.

From the evidence of Hutchins and Taylor, it is most probable that the bill of sale was made to Mrs. Bean alone, or to her and her heirs, not to her daughters by name; and, if so, then the complainants must take as heirs of their mother, and in order to recover, they must show title in her. What, then, do these facts prove? Certainly not a delivery of the bill of sale to Mrs. Bean; because there is no evidence, whatever, that, at any time during her life, she knew any thing of the transaction, or set up any claim to the property, unless we take common rumor, which can not be admitted as evidence. See *Blagg vs. Hunter, July term, Manuscript Opinions.* Nor are we to be understood, that actual delivery of a deed is necessary, although that is the usual manner of delivery. Mr. GREENLEAF, in his work on *Evidence, vol.* 2, *sec.* 297, expresses himself in terms which we prefer to adopt. He says, "The delivery of a deed is complete, when the grantor or obligor has parted with his dominion over it, with intent that it shall pass to the grantee or obligee; provided the latter assents to it, either by himself or agent." Admit, in the case before us, that Hutchins did execute the bill of sale, and passed it from his possession to a third person, with the intent on his part, that it

should pass to Mrs. Bean, the question is, did Mrs. Bean assent to it; or, if it be said that, as this deed was for her use and benefit, her assent will be presumed, the question still recurs, did it so pass, or did Mrs. Bean, by any act, ratify it? If the deed, at any time during the life of Mrs. Bean, had been in her possession, or if found after her death, amongst her effects, delivery would be presumed. *Sicard vs. Davis*, 6 *Pet.* 124; *Sengham vs. Wood*, 15 *Wend.* 545.

It has been held, in some cases, that even where the deed remains in the possession of the grantor *until* after his death, and then comes into the hands of the grantee, that the delivery will be sufficient: as where one made a voluntary conveyance by way of provision for his daughter, but kept the deed in his possession, until after his death, the conveyance was held good. *Buma vs. Winthrop*, 1 *J. C. R.* 329. Or, in case where, by the terms of the deed, the grantor is as much interested in its preservation as the grantee, the grantor may retain the possession of the deed without formal delivery. *Blakemore vs. Burnside*, 2 *Eng. Rep.* 508.

But as a deed takes effect from delivery, which is essential to its validity, it must be delivered; that is, must go out of the hands or the control of the grantor with the intent that it should go to those of the grantee, *and that ultimately it does so.* The point, at which the proof fails here, is, that we have no evidence what disposition Hutchins made of the bill of sale. The witness Taylor saw it in Joab Bean's possession, but, whether before or after the death of Mrs. Bean, does not appear. It may be inferred as well before as after. As this was in Mississippi, and the proof is that, very soon after Mrs. Bean's death, Joab Bean removed to Arkansas, this fact of itself raises the presumption that it never was delivered. *Hatch vs. Haskins*, 5 *Shep.* 391.

The other witness found the paper, which he supposed to be a bill of sale to Joab Bean's daughters, for the slaves, in his trunk, and gave it to one of them. How this came there, is not explained.

The witnesses, Frick and Johnson, depose as to admissions of Bean, and if we were considering this, as a title derived from him, they certainly conduce, in no small degree, to establish the existence of a bill of sale to his daughters, and also of its delivery; for he admitted that they had had the bill of sale, and the presumption is, that it was delivered to them, unless we may suppose that they gained possession of it through Frick, who says he found it in his trunk, and gave it to them. How it came there, is not explained. Indeed, it is impossible to read the evidence in this case, without being struck with the omission to explain fully the facts and circumstances, which must, in the nature of things, have existed, and which, with almost studied care, are omitted. Detached parts of conversations, are given, without explanation, or the circumstances which gave rise to them. But, notwithstanding all this, these after-conversations, however they may tend to prove possession of the bill of sale by the complainants, which is *prima facie* evidence of delivery, but remotely tend to prove that the bill of sale was ever in the possession of Mrs. Bean. Bean says, in his answer, that the bill of sale never was in his wife's possession, or in that of his daughters, but was always kept in his own possession. There is no positive evidence contradicting his answer, whilst there is that of Taylor, going to sustain the statement that he kept the bill of sale in his own possession; and, notwithstanding this, in view of all the facts and circumstances of the case, as detailed by the witnesses, although slight and unsatisfactory taken separately, when considered together, they leave a strong impression upon our mind that, if the facts were fully developed, they would show a delivery of the bill of sale to Mrs. Bean.

But clear and unquestionable proof is required to authorize a decree in a case of this kind, as expressly held in *Willinsford vs. Allen*, 10 *Peters S. C. R.* 594; *Clancy on Husband and Wife*, 260. And we would not feel altogether satisfied that the evidence in this case was sufficient to overturn the answer: nor is it necessary that we should decide this point, because, from the

view taken of the case, the contingency upon which this question would arise, does not exist. Hutchins had no title to the slaves at the time he executed the bill of sale, and of course communicated no title by it.

So far as regards the rights of Mark Bean, the other defendant, they evidently stand upon different ground. The bill of sale executed by Joab Bean to him, was also executed by two of the complainants, and although it is charged that the bill of sale was executed by them under duress, the proof of the subscribing witnesses is very clear that such was not the case. But, an inquiry upon this branch of the case is unnecessary, because, under the view which we have taken of the case, the complainants are not entitled to recover as against Joab Bean, and, of course, they can not controvert the title of one holding under him. Let the decree be affirmed.

RUSSELL VS. CADY, SURVR.

Where there is a total want of evidence to sustain the verdict, this court will award a new trial: as where the jury render a verdict against the defendant, upon proof, that G., being in possession of a house, which defendant had conveyed by deed, not recorded, to G's wife, employed mechanics to repair it, saying, but without authority from defendant, or proof of agency, that defendant would pay for the repairs; if not, he (G.) would pay for them.

Appeal from the Circuit Court of Pulaski County.

Hon. WILLIAM H. FEILD, Circuit Judge.

TRAPNALL and PIKE & CUMMINS, for appellant.

FOWLER, contra.

Mr. Justice WALKER delivered the opinion of the Court.

Buchanan and Cady sued William Russell, in assumpsit, for work and labor as house-joiners, and for materials. The general issue, payment, and the statute of limitations, were pleaded; upon which issues were taken, and a trial had before a jury, who found a verdict for the plaintiffs for $305 10; upon which judgment was rendered. Russell moved for new trial, on the ground that the verdict was contrary to evidence; which was refused, and Russell appealed to this court.

The evidence given on the trial, is perserved in a bill of exceptoins, and is, beyond doubt, amply sufficient to sustain the verdict, if Russell can be held accountable for the work. It appears, from the evidence, that one Garritt employed the plaintiffs to work upon a house, which had been conveyed by Russell to the wife of Garritt, the deed not having been recorded; and, at the time Garritt employed the plaintiffs, he told them that Russell would pay for the work, and that, if he did not, he (Garritt) would. Garritt also testified that he had no authority from Russell to have the repairs made, charged for in the bill of particulars, but did not tell plaintiffs that he had no such authority; that some of the repairs were necessary, and some not; that Russell had authorized him to have a roof put on the house, which he did. This, however, was not a part of the work sued for. That the house was Russell's, but was intended for Garritt's wife, to whom he had made a deed for it, but that, at Russell's request, the deed was not recorded. That Garritt had been in possession

of the house ever since the repairs were made; that, at the time the contract was made, he had some means of his own, and credit.

This is, in substance, the evidence in regard to the contract, and the ownership of the property. There is no contest as to the performance ef the work, or its value; and the only question is, can the plaintiff hold Russell responsible for this work. We think not. Garritt is not shown to be Russell's general agent; nor to have had special authority to have the repairs made. Indeed, from the terms of the contract, the plaintiff must have known that Garritt had no such authority, or at least a doubtful authority, or why did Garritt agree to pay, in case Russell should refuse? This was not Russell's property; but the property of Garritt's wife. The fact, that the deed had not been recorded, could make no difference. Perhaps he thought so, when he said it was Russell's property. But this could not be the case when he had conveyed it by deed.

The plaintiffs, no doubt, performed the work, believing that Russell would pay, or, if he did not, that Garritt was bound for the work, and able to pay. It may be their misfortune that he is not; and, if there was any evidence whatever of Russell's assent to the work, or if he had done any act from which an agency might have been inferred, in view of the merits of the claim, we should not disturb the verdict. But we think that there is a total want of evidence to charge Russell for this work; and, for this reason, the court below should have granted a new trial.

Let the judgment be reversed, and the cause remanded, with instructions to grant the defendant a new trial, and for further proceedings to be then had.

GLANTON VS. ANTHONY ET AL.

Where a purchaser of a portion of the lands, donated, by the United States to this State, for purposes of internal improvement, situate in Jackson county, and for which he had executed his notes as prescribed by law, but received no certificate of purchase, conveyed by deed "all his right, title, or claim of, in, and to any improvement or improvements on public land, that are situate in Jackson county," parol testimony, or the facts and circumstances under which the deed was executed are admissible to explain the meaning and intent of the conveyance, and to show that the deed was for the conveyance of the grantor's interest in the land so purchased of the State.

When parties have deliberately put their agreement in writing, in such terms as import a legal obligation, without any ambiguity as to the object or extent of the agreement, all oral testimony of conversations or declarations, before or at the time of the execution of the contract, or afterwards, should be rejected.

But parol evidence may be introduced, the more perfectly to understand the intent and meaning of the parties; and, whatever indicates the nature of the subject, is a just medium of interpretation of the language and meaning of the parties, and is also a just foundation for giving the instrument an interpretation, when considered relatively, different from that which it would receive, if considered in the abstract.

No distinction can exist between an interest in an improvement on public land, and an interest in the land itself; and so, by a deed conveying all the grantor's interest in such improvement, all his interest in the land, which can be only equitable or possessory, passes by the deed to the grantee.

Appeal from the Circuit Court of Jackson County in Chancery.

Hon. BEAUFORT H. NEELY, Circuit Judge.

BEVENS, for the appellant. The subject of the conveyance in the deed of John J. to Benjamin F. Glanton, admits of no doubt or ambiguity. *Pelham ad. vs. Wilson et al.*, 4 *Ark. Rep.* 292. The court will effectuate the intention of the parties, if it can

be done consistently with the rules of law. 1 *Mass. Rep.* 219; 10 *J. R.* 133; *Ch. on Bills, 6th Ed.* 92. But parol evidence is not admissible to explain an ambiguity on the face of the instrument; and no construction can be put upon a contract directly contradicting its express stipulations. There is no ambiguity in the terms, "an improvement on public land." *Cobbs vs. Fontaine*, 3 *Rand. Rep.* 487.

Parol evidence is never admissible to explain an ambiguity, which is not raised by extrinsic facts, (*Starkie's Ev.*, 3 *vol.* 1000; *Phill. on Ev.*, 4 *Ed.* 566, *ib.* 6 *Ed.* 563; nor be admitted to show that the parties intended to use a word, or term, in any other or different sense than the well known meaning of the expression. *Doe on Dem. of Spicer vs. Lea*, 11 *East. Rep.* 312. *Ib.* 142.

Where there is no latent ambiguity, and the terms of the instrument are clear, even prior letters of the parties are inadmissible to restrain or alter the sense of the instrument. *Tucker vs. Maxwell*, 11 *Mass. Rep.* 143; *Johnson vs. Johnson*, 11 *Mass. Rep.* 359, 363; *Johnson vs. Weed*, 9 *J. R.* 310; *Putnam vs. Lewis*, 8 *J. R.* 304; *Ch. on Con.*, 3 *Amer. Ed.*, *marg. p.* 25.

Where a contract is once reduced to writing by the parties, all oral testimony of a previous colloquium, or of conversations, or declarations, at the time when it was completed or afterwards, is rejected, as it would tend, in many instances, to substitute a new and different contract for the one really agreed upon, possibly to the prejudice of one of the parties. *Jordan vs. Fenno*, 13 *Ark. Rep.* 598; 1 *Greenl. Ev.* 298; 3 *Cowen & Hill's notes to Phill. Ev.*, *note* 961, 984; *Jackson vs Jackson*, 5 *Cowen* 173; 12 *Wend.* 61; 4 *Ark.* 179; 13 *Ark. Rep.* 449.

It being apparent then that the deed conveyed only the interest of the grantor in an improvement on the public land, no oral testimony can be admitted to prove that the grantor intended to convey any legal or equitable interest in the land, as charged in the bill.

JORDAN, for the appellee. Upon a fair construction of the deed

from John J. to Ben. Glanton, aided by parol evidence of extraneous circumstances, it is evident that the former conveyed to the latter his entire interest in the land in controversy. In arriving at the true construction of a deed, the court will look to the entire deed in all its parts. *Chit. Con.* (*5th Amer. Ed.*) 73, 83; *Bridge vs. Wellington*, 1 *Mass.* 219.

The situation and true intent of all parties and the subject matter, are to be considered in determining the meaning of a contract. *Sumner vs. Williams*, 8 *Mass.* 216; *Fowle vs. Bigelow*, 10 *ib.* 382; *Wilson vs. Troupe*, 2 *Cow.* 228; *Davis vs. Barney*, 2 *Gill & John.* 382; *Lawrence vs. Dale*, 11 *Verm.* 549.

The rule that excludes parol evidence, to contradict or vary the terms of the written instrument, only excludes evidence of the language of the party, and not of the circumstances in which he was placed, or of collateral facts. 1 *Greenl. Ev.*, *sec.* 297, 286; 2 *Phill. Ev.* 712 (615.)

The question, as to the admissibility of parol evidence, depends upon whether there is a latent or patent ambiguity on the face of the deed. That there is no such patent ambiguity on the face of the deed, as to render it inoperative and void for uncertainty. 1 *Greenl. Ev.*, *sec.* 297, 298, 286, 287 *and notes*; *Gresley's Ev.* 201, 203, *209*. But, on the contrary, it falls clearly within the rule of latent ambiguities, and that parol evidence may be resorted to, to annex a definite meaning to the written expressions, and to point out their application to the proper subject matter. 2 *Stark. Ev.* (*7th Amer. Ed.*) 757; 1 *Greenl. Ev.* 282; *Selden vs. Williams*, 9 *Watts* 9; *Hayden vs. Ewing's Devisees*, 1 *B. Mon.* 113; *Franklin Ins. Co. vs. Drake*, 2 *ib.* 52; 4 *Dana* 337; 2 *Leigh Rep.* 630; 3 *Har. & John.* 469; 2 *Binn.* 109; 19 *J. R.* 313.

An ambiguity, raised by extrinsic evidence, or where it partakes of the nature of both a patent and latent ambiguity, may be removed by parol evidence. 2 *Phill. Ev.* (*5th Amer. Ed.*) 712 (664); 5 *Pick.* 170; 1 *Mason C. C. R.* 9; 2 *Leigh.* 630; 7 *Dana* 276.

Parol declarations of the grantor, previous to the execution of

the deed, and at the very moment of its execution, are admissible to explain the intention with which it was done. 2 *Steven's Nisi Prius* 1539; 3 *Humph.* 107; 5 *Rand.* 211; 13 *Ark.* 116.

Mr. Justice WALKER delivered the opinion of the Court.

This is a suit in Chancery, from the Jackson Circuit Court. The grounds for equitable relief, are based upon the following state of facts: John J. Glanton, a resident of Jackson county, on the 27th day of January, 1843, applied for and purchased of the Governor of this State, then land agent for the State, the east half of section twenty-nine, in township nine north, of range three west, containing three hundred and twenty acres, it being part of the 500,000 acre donation of lands to the State for purposes of internal improvement; for the payment of which, he executed to the State, ten bonds, for the sum of sixty-four dollars each, payable annually, so that the whole payment would be made at the end of ten years. That no certificate of purchase was delivered to the said John J. Glanton, by said land agent; and that, subsequently, the said John J. Glanton, who had improved said lands, on the 16th day of July, 1845, by deed, conveyed all his right, title, interest and claim, in and to said land, for a valuable consideration, to Benjamin F. Glanton, who, on the 13th of October, 1846, by deed, conveyed all his right, title, interest and claim, in and to the aforesaid tract of land, to John Fisher, for a valuable consideration. That John Fisher, on the 9th day of August, 1847, by his written endorsement, on the deed from Glanton to him, for a valuable consideration, transferred all his right, title, interest and claim, to said land, to complainant and James Strong, whereby complainant and Strong became the joint owners of the land. That, subsequently, upon a division of lands, between Strong and complainant, this tract was allotted to complainant as his separate property.

That John J. Glanton, soon after his transfer of the land to Benjamin F. Glanton, removed to Texas, and, sometime thereafter, died; that, after the purchase made by complainant of Fisher

he entered upon the land, and made valuable improvements, under the assurance, and belief from the representations of Fisher, that a regular transfer of the certificate of purchase from the State had been made. That, afterwards, on the —— day of December, 1851, the said Benjamin F. Glanton obtained letters of administration on the estate of John J. Glanton, and made application to the land agent for a certificate of purchase, in the name of John J. Glanton, which was issued and delivered to the said Benjamin F. Glanton, who, well knowing all the facts, fraudulently claims the land under said certificate, and is endeavoring to dispose of the same to innocent purchasers. The whole of the purchase money is still due to the State; all of which, he is willing, and tenders, and offers to pay. That he bought the land in good faith, believing that, when such payment was made, the title would pass directly to him; and, in faith of such being the case, became and is an actual resident upon the lands, and has made thereon lasting and valuable improvements.

There would seem to be but little doubt of the existence of the several purchases and transfers, as alleged by complainant: but the point of contest is, as to what estate passed by the deed from John J. Glanton to Benjamin F. Glanton. The complainants contend that they purchased the improvements upon the land, and also the equitable interest of John J. Glanton, in the land; that such was the agreement and understanding of the parties at the time that Benjamin F. Glanton purchased, and also at the subsequent purchases and transfers, and that the language used in the deed of conveyance, from John J. to Benjamin F. Glanton, is, by its legal import, aided by parol evidence of latent ambiguities, sufficient to convey the entire interest of John J. Glanton in the land and improvements thereon.

On the other hand, the defendants insist, that there is no latent ambiguity in the deed; that it clearly imports a conveyance of an improvement upon the land, not the land itself, and that parol evidence is inadmissible to explain, vary, or enlarge, the written contract.

The whole question, therefore, turns upon the legal effect of the deed. The clause expressive of the interest or estate conveyed, is in the following words: "Also, all my right, title or claim of, in and to any improvement or improvements on public land, that are situate in Jackson county aforesaid." This language is very indefinite, both with regard to the identity and extent of the improvements and of the nature and extent of the interest itself. If, however, the grantor had improvements on public lands in Jackson county, then they were conveyed, but there is nothing in the deed by which they could be identified or distinguished, and the grant is void for uncertainty, unless parol evidence is admissible for that purpose. And so with regard to the interest conveyed—it is all the grantor's interest; but what that interest is, is not defined. Whatever interest the grantor had, was doubtless intended to be conveyed, and, unless parol evidence is admissible to show what that is, it would be taken in its popular sense, a possessory right, subject to the right of the United States, the owner of public lands.

The complainant insists that he has a right to show, by parol, what this interest was; that, although the legal title to the land was in the State, still, by virtue of the contract entered into by John J. Glanton, with the land agent, he had at the time an equity which attached to the land, and which was conveyed under the general terms, right, title, or claim, to any improvement, &c.

Whether this position is correct or not, must depend upon the fact as to whether the language used by the contracting parties in the deed, when considered in connection with the circumstances connected with making the contract, may be construed to embrace as well the equitable interest acquired by John J. Glanton, by virtue of his purchase from the State land agent, as the work and labor bestowed upon the land in improving it. If so, then it may be introduced.

The rule is, that when the parties have deliberately put their agreement in writing, in such terms as import a legal obligation, without any ambiguity as to the object or extent of the agree-

ment, all oral testimony of conversations or declarations, before or at the time when it was reduced to writing, or afterwards, should be rejected: for, as the parties have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, nor substituted in its stead. *Jordan ad. vs. Fenno*, 13 *Ark.* 598; *Hooper vs. Chism*, 13 *Ark.* 449.

But, parol evidence may be introduced the more perfectly to understand the intent and meaning of the parties, and whatever indicates the nature of the subject, is a just medium of interpretation of the language and meaning of the parties in relation to it, and is also a just foundation for giving the instrument an interpretation, when considered relatively, different from that which it would receive, if considered in the abstract.

Mr. GREENLEAF, in his work on *Evidence*, (*Vol.* 1, *page* 386,) after a full investigation of this subject, remarks, "That, in all cases, in which parol evidence has been admitted in exposition of that which has been written, the principle of admission is, that the court may be placed, in regard to the surrounding circumstances, as nearly as possible in the situation of the party whose written language is to be interpreted—the question being, what did the person, thus circumstanced, mean by the language he has employed?"

The extent and application of this rule, will be more fully understood by reference to a few of the adjudicated cases under it.

In the case of *Eli vs. Adams*, 19 *Johnson's Rep.* 317, Adams, an officer, had a writ of capias against one White, at the suit of Eli, who gave to Adams written instructions to show White as much indulgence as he could, with safety to himself and without hazarding the debt. Upon a suit against the officer, for an escape, the escape was not disputed; and the only question was, whether parol evidence was admissible to explain the circumstances, under which the writing was given by Eli to the officer, in order to show the extent of the indulgence meant by the terms, "*as much indulgence as he could*," and it was held that such parol evidence

was admissible. Judge SPENCER said, "these facts do not contradict the writing, but are essential to its right import and meaning."

In the case of *Hayden vs. Ewing*, 1 *B. Mon.* 112, George Ewing devised the children of *Si*, and his wife *Judah*, to his daughter, Catharine Hayden. It was admitted that the terms of the will, unaffected by extraneous facts, would embrace all the children of Si and Judah, but contended that parol evidence was admissible to show that one of the children was not intended to be conveyed. In this case, the court said, "At most, the facts relied on by Hayden, only make out a case of latent ambiguity, arising upon the application of the devise to the subject described in it, and, as such, it may be solved, not only by the facts, both in and out of the will, but also by parol evidence of intention, for it is a question, not of power, but of intent."

In the case of *Freeland vs. Burt*, 1 *Term. Rep.* 701, where certain premises were leased, including a yard, by metes and bounds, and the question was, whether a cellar, under the yard, was or was not included in the lease, verbal evidence was held admissible to show, that, at the time of the lease, the cellar was in the occupancy of another tenant, and therefore that it could not have been intended by the parties that it should pass by the lease.

And so, also, where a house, or a mill, or a factory is conveyed *eo nomine*, and the question is, as to what was part and parcel thereof, and so passed by the deed, parol evidence is admissible. *Roops vs. Barker*, 4 *Pick.* 239

These decisions will suffice to show the application of the rule, and, in accordance with which, we will hold parol evidence in this case admissible, not to add to, or vary, the terms of the contract, but to show what the parties intended to convey by the use of terms, which, in the absence of such evidence, are susceptible of a different meaning from that intended by the parties contracting.

Turning to the evidence—The witness Miller states that the understanding, at the time the contract was made, was that John

J. Glanton conveyed all his improvement and claim or interest in 320 acres of land, entered under the *two dollar act*, and also all his interest or claim to an improvement called the Cook place, both of which lay in Taylor's Bay, in Jackson county. These two were all the claims owned by Glanton, within the knowledge of witness: the former of which was known as the John Glanton place.

Witness Roddy states, that he was called upon, by John Glanton, to draw the deed, and did so; that John Glanton told him that he had sold his negroes, stock, and all the land he owned, in Jackson county, to his brother Ben. Glanton, and he wanted him to draw up the deed; that he had not the numbers of the land, but that he owned no other land in the county, and that the conveyance could be made sufficiently certain without the numbers. Witness read the deed in the presence of both parties. No objection was made to it. He is positive that it was the understanding of both parties, and they so agreed, that the instrument conveyed all the right, title, and interest, in the land, on which John then lived, to Ben., and without any reservation of title in John. That the land lies in Taylor's Bay, in Jackson county, and is known as the John J. Glanton place. The land lies in township 9 north, of range 3 west—is not certain as to the numbers of the section, but believes it to be the east-half of section twenty-nine, containing three hundred and twenty acres. This was the only improvement owned by John J. Glanton, on public lands in said county, except one known as the Cook place. John Glanton died intestate without issue, leaving a mother, Margaret Roddy, and his brother, Ben. Glanton.

Witness Spradlin was present when Ben. Glanton sold the John Glanton place to Fisher, heard him tell Fisher that he had bought the place of his brother, John J. Glanton; that he, Fisher, was to pay the State of Arkansas for the land, or to clear it out of the office at Little Rock; that he believed that a certificate had issued from the State to his brother for the land, but that it had been lost or mislaid, and his brother John had neglected to

assign it over to him; but he would guaranty such certificate, and that it would be an easy matter for him, Fisher, to get one from the office himself. Ben. Glanton told witness that was the land he had bought from John J. Glanton.

There is other evidence to the same effect; but, if admissible, this is most amply sufficient, in connection with the exhibit showing that John J. Glanton had, before the conveyance to Ben. executed his notes to the State in payment for this land, under a contract to purchase, which, even in the absence of a certificate of purchase, gave him an equitable title to the land.

Leaving out of question all that the witnesses say, about the agreement or understanding of the parties either before, at, or after, the deed was executed, and holding the deed itself to be the sole repository of the contract, the facts and circumstances under which the deed was executed, and which may well be received in evidence, are, that John J. Glanton owned an improvement on public land, which had been donated, by the United States, to the State of Arkansas, for purposes of internal improvement; to which, as an applicant under an act of the State Legislature, he had acquired an equitable interest, which would, upon the payment of the purchase money, entitle him to a perfect legal title, all of which was well known to both parties at the time they were contracting, and at the time the deed was executed; and that the reason why a fuller and more perfect description of the property conveyed, was not inserted, was because the parties had not access, at the time, to the numbers of the land.

Taking these facts, then, in connection with the terms expressed in the deed, can there be a doubt but that John J. Glanton intended to sell his entire interest in the land, such as it was, or that Ben. Glanton intended to purchase less than such entire interest?

The distinction, between an interest in an improvement on public land, and an interest in the land, attempted to be set up by Ben. Glanton, cannot exist: because, the owner of an improvement on public land, of necessity, has some interest in the land,

on which the improvement is situated—not a legal title, nor in most cases, an equitable title, such as may be perfected into a legal title, but still a possessory title, which, under the laws of this State, is recognized and transmissible by descent or deed, and it is also recognized by the laws of Congress, so far as to make the improvement the basis of a preference claim to the land itself. All this title was vested in John J. Glanton, at the time of his transfer to Ben. Glanton, and was known to him. Suppose we attempt to separate the claim and interest in the improvement from that to the land, on which it is made. How can it be done? The possessory right to the land itself is inseparably connected with the improvement; so that, the sale of the one necessarily includes the other. And when Ben. Glanton insists that he bought no interest, except the naked improvement, disconnected from all interest in the land, he made the whole transaction a stupid farce. Would any man buy what he could not hold an hour? Did he intend to leave an outstanding interest in John J. Glanton, which would, at his pleasure, cut him off from the benefit of his purchase? Surely no one can believe it. Nor is such the meaning of the parties, as gathered from the whole transaction. John J. Glanton, in express terms, sold and conveyed "*all his right, title, and claim,*" to the improvement. It is shown by parol evidence what that interest was. The interest acquired from the State then attached, and, being a right and claim, it passed; because he conveyed all his right, claim or interest. He not only, in express terms, conveyed all his right, &c., but he conveyed it forever: and covenanted that he had a good right to sell the same; and that it was free from all incumbrance; and, in order to free it from incumbrance, the claim acquired from the State must necessarily pass; or otherwise, there was an incumbrance at the time known to both parties.

The common sense of this transaction is, that the whole interest of John J. Glanton was intended to pass, and did pass by the deed to Ben. Glanton.

The answer of Ben. Glanton is a great sham. No one of com-

mon sense would have made such a contract, as he says he made. His answer is flatly contradicted by some three or four witnesses, and is wholly irreconcilable with his transfer to Fisher. He does not pretend that he had any other title than that acquired by his deed from John J. Glanton, and yet he conveys to Fisher the very title which, he says, he never contracted for, and never got of John J. Glanton. The question of fact, resolves itself into this: if he had such title as he conveyed to Fisher, he got it from John J. Glanton, and his answer was false; or, if he did not get such title from John J. Glanton, then, he perpetrated a fraud upon Fisher, by selling an estate which he did not possess.

The answer is, in fact, neither more nor less than an attempt to defeat a title that passed through him to the complainants, by setting up the deficiency of his own title, in his individual right; and asserting title in himself, as administrator of the estate of his brother. He does not claim as heir to his brother, or if he did, it is evident that he could not set it up against the title of the complainants, who hold under his grantee. But the truth is, that if any interest or estate remained in John J. Glanton, after his conveyance to Ben., it passed, at John's *death*, *to his* mother, Mrs. Roddy, who has entered her disclaimer in favor of complainants, leaving the sole ground of defence to rest upon his rights as administrator. It is not shown that the estate is in debt, or, if so, that there is not ample personal estate out of which to pay such debts; so that, in any event, Mrs. Roddy, who sets up no claim, is the only real defendant in interest.

So far as the real equity of the case is concerned, it is rarely that a stronger case is made out than the present, or that slighter grounds of defence exist. Indeed, the only question that could seriously arise, grows out of the admissibility of parol evidence, which has already been discussed.

The objection, to the sufficiency of the allegations in the bill, to let in such proof, is not tenable. This is not a case of accident, mistake, or fraud, where the facts and circumstances are to be set out, in order that it may be seen whether in fact, if proven,

they amount to such as entitle the party to relief. The equity in this case, rests upon the contract in terms, and the parol evidence is introduced, not to prove another or a different contract, but to show what the contract really was.

In view of the whole case, we think the decree well sustained by the proof and the equity of the case. Let the decree be affirmed.

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KELLY'S HEIRS ET AL. VS. MCGUIRE AND WIFE ET AL.

It is a general rule of construction, that a statute should be so considered as that every clause, sentence, or part, shall stand, if possible; and that general words or clauses, may be restrained by particular words or clauses in the same statute; and when there are different provisions in the same statute, expressed in different words, they ought to be so construed as to avoid inconsistency.

It would be unsafe to construe a statute according to mere grammatical rules, or to rely on punctuation, as any material aid in ascertaining the true meaning. Neither bad grammar nor bad English will vitiate a statute.

The true construction of our statute of Descents and Distributions, (*chapter* 56, *Digest*,) is:

1st. That, as to both real and personal property, it was the design of the Legislature, when there were descendants of the intestate, to send down both to them, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, without any regard to the fact as to how the estate was acquired.

2d. That, as to personal property, it was the design, where there were no descendants, that it should go to collaterals, in the same way it would have gone to descendants, if there had been any; that is to say, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, and without inquiry as to how the property was acquired by the intestate.

3d. That, as to real estate, it was the design of the Legislature, where there were no descendants, to point out the lines of the succession, and that this is to depend on the fact whether the inheritance is ancestral or new; and, if ancestral, then whether it come from the paternal or maternal line.

4th. If the inheritance was ancestral, and come from the father's side, then it will go to the line on the part of the father, from whence it came, not in postponement, but in exclusion of the mother's line; and so, on the other hand, if it come from the mother's side, then to the line on the part of the mother, from whence it came, to the exclusion of the father's line.

5th. If the inheritance be not ancestral, but a new acquisition, then, after a life estate reserved in succession to the father and mother, if alive, it will go in remainder, first, to the line of the intestate's paternal uncle and aunts, and their descendants, in postponement of the mother's line, until the former becomes extinct; and then to the line of the intestate's maternal uncles and aunts, and their descendants; unless there should be kindred lineal or collateral, who, either in right of propinquity, or by right of representation, stand in a nearer relation to the intestate than the uncles and aunts: in which case, such nearer kindred would take the inheritance to the exclusion of both of these collateral lines; and, in their hands it would become an ancestral estate, and afterwards go in the blood of the relative from whence it came, in the ordinary course of descent prescribed for ancestral inheritances. *Digest, secs.* 10, 11, *p.* 437.

6th. That, when the inheritance is fixed, by these facts, in any given line, it will pursue that line until it becomes extinct, and the objects of bounty, and the order in which they succeed one another, and the proportion they take, are to be ascertained by the first section, which is to be considered as the general table of descent. The father, mother, brothers, sisters, and so on, mentioned in that section, are those who are to be considered when counting from any propositus, whether the propositus of a single line only, or the concurrent propositus of both lines, as the intestate is as to personal property.

7th. In all cases, where the inheritance is in any one line, it there goes in succession *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, precisely as if the other line was extinct, and precisely as the inheritance of a bastard would take a course in his mother's line, he having no father's line at all.

8th. The half-blood and their descendants, take personalty, as well as realty, equally with the whole blood, except that they are excluded from real estate, when ancestral, if they lack the blood of the transmitting ancestor.

Under a prayer for general relief, the court may grant any that the facts stated will warrant, although it may be inconsistent with the special relief prayed. *Cook vs. Bronaugh*, 13 *Ark.* 183.

A party, to be charged in a contract, must not only express his assent that he will be bound, but he must be endowed with such degree of reason and judgment, as to enable him to comprehend the subject; and he must execute it freely and understandingly, with a full knowledge of his rights, and of the consequences of the act.

If a person, although not positively *non compos* or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition, or to resist importunity or undue influence, a contract, made by him under such circumstances, will be set aside.

The opinions of the subscribing witnesses to a deed or contract, are competent in all cases, where the object is to prove capacity or incapacity to make a contract, when the facts or circumstances are disclosed on which the opinion is founded.

Reputation or hearsy, is admissible in all matters of pedigree: and so, the repeated declarations of the father, that he had married, and by the marriage had two children, naming them; his recognition of them as his legitimate children, their recognition of him as their father, and of each other as brother and sister; and the fact, that the marriage and legitimacy of the children were spoken of and known in the family, are sufficient to prove the marriage of the father and the legitimacy of the children.

Where property in litigation, is placed in the hands of a receiver, during the pendency of a bill for its recovery, the court should, before the final decree, require the receiver to report his acts and doings under the appointment, and render an account, that the court may ascertain the condition of the property placed in his hands, and be enabled, in its final decree, to settle the rights, and do justice to all the parties in a conclusive manner.

Appeal from the Circuit Court of Independence County in Chancery.

Before the Hon. A. B. GREENWOOD, Circuit Judge.

This cause was argued at the January Term, 1854, before the Hon. CHRISTOPHER C. SCOTT, Judge, and Hon. SAMUEL H. HEMPSTEAD, Special Judge.

ENGLISH, for the appellants, James Kelly's heirs. 1. It is submitted, for the heirs of James Kelly, that, upon the death of *Clinton*, the entire estate, personal and real, which descended to him from his father, Charles Kelly, who acquired it, ascended to *Greenberry Kelly*, his grand father, who was the nearest surviving relation to *Charles*, and the nearest, of the whole blood, to *Clinton;* and that the estate did not pass to the *half sisters* of *Clinton;* who were strangers to the *blood* of *Charles*.

It may be well to enquire upon whom the common law cast the real and personal estate of *Clinton Kelly*, upon his death,

that the changes made by our statute of descents and distribution may be more readily understood.

The canons of descent, familiar to every lawyer, follow:

1*st Canon.* The inheritance shall lineally *descend* to the issue of the person who last died actually seized, but shall never lineally ascend. 2 *Black. Com.* 208.

2*d Canon.* The male issue shall be admitted before the female. 2 *Ib.* 212.

3d. Where there are two or more males, in equal degree, the eldest only shall inherit, but the females together. *Ib.* 24.

4*th Canon.* The lineal descendants, *in infinitum*, of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living. This is called succession in *stirpes*, according to the roots. *Ib.* 217.

5*th Canon.* On the failure of lineal descendants, or issue of the person last seized, the inheritance shall descend to his collateral relations, being of *the blood of the first purchaser*, subject to the three preceding rules. *Ib.* 220.

6*th Canon.* The collateral heir of the person last seized, must be his next collateral kinsman of the whole blood. *Ib.* 224.

The estate shall escheat to the lord, sooner than the *half-blood* shall have it. *Ib.* 227.

7*th Canon.* In collateral inheritances, the *male* stocks shall be preferred to the *female*—that is, kindred, derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near—unless where the lands have, in fact, descended from a female. *Ib.* 324.

Under the 1st canon of descent, *Greenberry Kelly* could not inherit Clinton's real estate, because the estate could not *ascend*, but must *descend*.

Under the 5th, 6th, and 7th canons, Clinton's half-sisters could not inherit from him; 1st, because they were not of the *blood* of *Charles Kelly*, who acquired the estate, or was the first pur-

chaser; 2d, because they were of *half-blood* to Clinton; and 3d, his male collateral kindred were preferred to them.

Clinton, dying without issue, the estate would have descended to the next collateral male kin of the whole blood, under rule *five*, and the three preceding ones. And, as the parties appear upon this record, assuming the legitimacy of Mrs. Eickelburner, *William Martin*, her grandson, and second cousin to *Clinton*, would have taken the estate.

It may be safely asserted that we look alone to our statutes for the disposition of personalty, and not to the common law.

The 56th chapter of our *Digest* purports, by its caption, as well as its provisions, to be a statute of *descents* and distribution —that is, to prescribe how both *real* and *personal* estates shall descend, and be distributed, and, in construing its various provisions, they should be made to harmonize with both of these manifest purposes of the act, if possible.

Section 1, is in these words: "When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed in parcenary, to his kindred, male and female, subject to the payment of his debts, and widow's dower, in the following manner: *first*, to children, or their *descendants*, *in equal parts; second*, if there be no children, then to the father, then to the mother; if no *mother*, then to brothers and sisters, or their descendants, in equal parts; *third*, if there be no children, nor their descendants, father, mother, brothers or sisters, nor their descendants, then to the grandfather, grandmother, uncles, and aunts, and their descendants, in equal parts; and so on, in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts."

This section repeals the 1*st canon* of descents, so far as it prohibits the lineal *ascent* of estates, and enables the father to take the estate of the son dying without issue, *personal* and *real*, and the *grandfather* to take it, where there is no issue, father, mother,

brothers or sisters, &c. This section also repeals the 2d *canon* of descents, which prefers the male to the female; also, so much of the 3d *canon* of descents as prefers the *oldest male* to the exclusion of his brothers; and modifies so much of the 7th *canon* as prefers males of the collateral line to females. It does not expressly make any other changes in the canons.

Under this section, the great body of property descends, and is distributed, and it is to be observed and borne in mind, that *personal* and *real property* are put upon the same footing.

The 8th and 9th sections provide for the descent of property per *stirpes*, according to the roots, and accords with the *4th canon.*

The 10th section is in these words: "In cases where the intestate shall die without *descendants*, if the *estate* come *by the father*, then it shall ascend to the father and *his heirs;* if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition, it shall ascend to the father for his lifetime, and then descend, in remainder to the collateral kindred of the intestate, in the manner provided in this act; and, in default of a father, then to the mother for her lifetime; then to descend to the collateral heirs as before provided."

Under *section* 10, therefore, *Clinton* dying without issue, his estate went back to *Charles*, who acquired it, and he being dead, it passed to his father, *Greenberry*, who was his nearest of kin, and *heir*, under *section* 1.

Charles being dead at the time *Clinton* died, did not prevent the estate from passing through him back to *Greenberry*, his *heir*, because *section* 22, of the statute, declares that "the expression used in this act, 'where the estate shall have come to the intestate, on the part of the father' or 'mother,' as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by gift, *devise* or *descent*, from the parent referred to, or from any relative of the *blood* of such parent."

The estate in controversy *descended* from *Charles* to *Clinton*, and *Clinton* dying without issue, passed back to *Charles* and his *heirs*—he having had no other child than *Clinton*, his father was his only heir.

But, it is argued that the 10th section applies exclusively to real estate, and not to personal. It is submitted that this construction is not warranted for several reasons: 1st, the first section of the statute clearly manifests the policy of the Legislature to put the descent of personal and real property upon the same footing, and to the same persons. 2d, In this State, where slavery exists, the value of personal estates greatly preponderates over that of real, and every reason that may have induced the Legislature to provide for the restoration of real property to the first purchaser, or his blood, on the failure of issue of the person last seized, applies, with increased force, to personal property, including slaves. 3d, The first section, putting the descent of personal and real property, generally, on the same footing, and to the same persons, if the Legislature intended to vary the rule in the 10th section, the intention, it is reasonable to suppose, would have been expressed, and not left to implication or construction.

The word "*estate*" is used in the 10th section as a generic term, embracing every species of property, and not in a restricted technical sense, applying only to lands. It is often used in the same book, where it manifestly embraces real and personal property, and sometimes personal property only.

Nor do the words "*ascend*" and "*descend*," as used in the 10th section, indicate that the section applies only to lands. These words are used in their ordinary, and not in a restricted, sense. The word *descent*, is often applied, in the law books, to the transmission of personal as well as real estate, (2 *Kent Com.* 426,) and simply means the passing or transmission of property from an ancestor to an heir—the word *ascent*, the passing of property from an heir or descendant to an ancestor.

Section 12, is in these words: "Relations of the half-blood

shall inherit equally with those of the whole-blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance come to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance."

It is argued, by the counsel of the half-blood, that the qualification or third clause of this section merely cuts off "*descendants*" of the half-blood from ancestral estates, and not "*relations*" or parents—that it does not exclude *Clinton's* sisters, but would have cut off their descendants, had the sisters been dead, leaving children.

Such a construction puts the first clause of the 12th section in direct conflict with the 10th section, which preserves estates in the hands of the *blood of those* who *acquired* them; and clearly indicates that it was the policy of our Legislature to remove the disqualification resting upon the half-blood by the common law only as to estates *acquired* by the intestate, and not to remove such disqualification as to estates transmitted to them from *ancestors.*

An argument has been based upon the punctuation of the 12th section, to support the construction that the 3d clause qualifies the second clause only, and not the first; and also upon the grammatical construction; but these can have no weight, because the proper construction of the whole section is to be derived from the general scope, tenor, and context of the language employed.

Again, it is argued, by opposing counsel, that, if the 3d clause of the 12th section does qualify the 1st and 2d clauses, and exclude from ancestral estates every degree of half-blood, it only cuts them off from the real estate of the intestate, as the term "*inheritance*" is used, which is defined by the 20th section to mean *real estate.*

Assume that the words *inherit* and *inheritance* refer exclusively to *real estate* wherever used in the chapter, and the hypothesis

will lead to absurd consequences, and mar the harmony of the chapter as a system of descents and distributions, and will readily be seen by a comparison of the 2d, 3d, 8th and 9th sections.

All the provisions of the chapter under consideration, will better harmonize upon the hypothesis that the descent and distribution of real and personal estate, generally, is put upon the same footing, that both go to the same persons and in the same proportions, with the qualification that *ancestral* estates, personal and real, are to be preserved in the hands of the *blood relations* of those who acquired them, than upon any other hypothesis. If this be so, the 20th section, defining the term *inheritance*, must yield to the general scope and design of the whole chapter. *Bacon* says "a thing which is within the letter of a statute, is not within the statute, unless it be within the intention of the makers. And, again, the construction to be put upon a statute, is that which best answers the intention of the Legislature, and whenever this intention can be discovered, it ought to be followed, although such *construction seems contrary to the letter of the statute.*" *Bacon Ab.*, STATUTE I, 5. *Miller vs. Salmons, 7 Welsby, Hurlston & Gordon, Exchquer Reports*, per MARTIN, J., p. 522. PARKE, J., p. 545.

We have seen that to take the words *estate*, *descent*, *inherit* and *inheritance*, to apply to real estate exclusively, wherever they occur in the chapter, leads to absurd results, and mars the harmony of the chapter, but to take them in a more liberal and popular sense, as they are often used in the books, as well as in common parlance, the provisions of the chapter harmonize.

We have seen that the word *estate*, is often used in the *Digest*, in reference to personal property, and often to include a man's entire property, personal and real. We have also given an instance above, where Mr. KENT speaks of the *descent* of personal property. Other instances occur in *4th Kent*, 420, *et seq.*

So he applies the term *inherit* to personal estate. He says, in a number of the States, "bastards can *inherit* from, and transmit

to, their mothers, real and *personal estates.*" 4 *Kent* 414. In the succeeding pages, the word is frequently applied in the same way. So in 2 *Kent* 212, *et seq.* The term *inherit*, as well as *inheritance*, is used in regard to personal property.

So the word *distribution* is sometimes applied to the partition, or division of *real estate* among heirs, though usually applied to personal property. It is so applied (to lands) by JACKSON, J., in *Sheffield vs. Lovering*, 12 *Mass.* 493-4. It is used in reference to both personal and real estate, in the section above quoted from *S. & Mc. Digest.*

It was not the design of our Legislature to proscribe *half-blood*, merely because they were such, but the policy (in this, as in other States, 2 *Hillard on Real Property*, *p.* 198, *to* 207,) was to preserve in the hands of a man's own blood relations, property acquired by him, and not to permit it to pass into the hands of strangers; and there is certainly nothing unjust or unreasonable in this.

The general policy of the country excludes any construction of our statute that would give the half-blood the personal and not the real estates, because, in a majority of the States, as Mr. KENT remarks, (2 *Kent*, 426,) "the descent of real and personal property is to the same persons, and in the same proportions;" and, as before remarked, there is the same reason, in this State, for preserving ancestral slaves, and other personal property, in the hands of the blood of him by whose industry they were acquired, as lands.

2. It is affirmatively alleged, by the cross-bill of the Eickleburner heirs, that, at the time *Greenberry Kelly* conveyed the estate in controversy, to his nephew, *James Kelly*, he was, by reason of old age, disease and intemperance, totally destitute of capacity to execute a valid deed; that it was obtained from him by fraud and circumvention, and is null and void. These allegations are positively denied by the sworn answer of James Kelly; and it is submitted that the complainants, in the cross-bill, have utterly failed to sustain them by the proof in the cause.

Fraud and *incapacity* being alleged by complainants in the cross-bill, and denied by the oath of James Kelly, the complainants were bound to establish the affirmative by the oath of two witnesses, or one with corroborating evidence; and there being, in this case, a large number of witnesses on both sides, this *preponderance* in favor of the *affirmative* must *prevail* throughout the *whole* of the *evidence*, or must still result from the entire testimony, otherwise the truth of the answer—*the denial*—will *prevail.*

In addition to this advantage, on the part of *James Kelly*, there is a great legal principle that comes to his aid, and that is, that every man is presumed to be *sane* and *rational*, and the party impeaching his sanity, or alleging insanity, must prove it. See *Dean's Med. Juris.* 525; *Jackson on dem., &c. vs. King et al.*, 8 *Cowen Rep.* 207. This legal presumption is recognized in all the cases cited below.

To render the deed in question void for want of capacity, it was incumbent on the parties impeaching it, to show that, at the time it was executed, Greenberry Kelly was *totally destitute of understanding.* 1 *Beck Med. Juris.* 380; *Van Alst vs. Hunter*, 5 *J. C. R.* 148; *Dean Med. Juris.* 555 *to* 568; *Jackson on dem. &c. vs. King et al.*, 4 *Cowen*, 207; *Odell vs. Buck*, 21 *Wend.* 142; *Beverly's Case*, 4 *Coke* 123; *Co. Litt.* 247 *a*; *Stewart's Exr. vs. Lispenard*, 26 *Wend. Rep.* 255; *Blanchard vs. Nestle*, 3 *Denio* 37; *Case of McDaniel's Will*, 2 *J. J. Marsh.* 331.

The opinions of witnesses, aside from the facts stated by them, are of no value in estimating capacity. It is for the court, and not the witnesses, to form an opinion from the facts. *Sears vs. Shafer*, 1 *Barbour Sup. Court Rep.* 412; 3 *Wash. C. C. R.* 587. See the collection of authorities on this subject, in *Cowen & Hill's Notes on Phillips' Ev.*, *note* 529, *vol.* 2, *part* 1, *p.* 759.

GREENLEAF, says, (*Evidence*, *vol.* 1 *sec.* 440,) that subscribing witnesses to a will may give opinions as to the testator's sanity, but other witnesses can speak only as to facts; but DANIEL, J., in *Crowell vs. Kirk*, 3 *Dev.* 357, said that even subscribing witnes-

ses were not allowed to express an opinion as to the testator's sanity.

WATKINS and CURRAN & GALLAGHER, for appellants, the heirs of Eikelburner. On behalf of the *Eikelburners*, it is submitted:

1. That the estate of *Clinton* Kelly, not being a new acquisition, but having come to him by his father *Charles* Kelly, under 1st and 10th sections of the statute of *Descents and Distributions*, *Digest*, *chap.* 56, upon his death ascended to his *paternal* grandfather, *Greenberry* Kelly. We are content, for the present to insist, that such is not only the letter, but the spirit and reason of the statute, being in accordance with the dictates of nature, in all countries; and we confess that, at first sight, we are unable to perceive what available arguments can be made use of to rebut the conclusions we have drawn in the premises.

With regard to the incapacity of old Greenberry Kelly to execute a valid conveyance, we would refer the court to the following authorities:

The same amount of capacity to make a will, is not required, that the law requires to make a valid contract. *Lespenard Will*, 26 *Wend.* 306; *Ib.* 311, *and cases cited; Bell vs. Martin*, 1 *Dow. Parl. R.* 386; 3 *Wash. Ct. Ct. Rep.* 587; 4 *Wash. Ct. Ct. Rep.* 262; 9 *Vesey*, 610; *Wilson vs. Wilson*, 2 *Dow. Parl. R.* 383; *Harrisson's Will*, 1 *B. Monroe* 351; *Dean Med. Juris.* 565; 2 *Green. Ev.*, *p.* 648, *sec.* 688, *note* 3, *and cases cited;* 1 *U. S. Law Mag.* 224, *Converse vs. Converse.*

It may safely be assumed, as a general rule, that wherever a person, through age, decrepitude, or affliction, or disease, becomes imbecile, and incapable of managing his own affairs, and a proper subject of a commission in the nature of a writ of lunacy, so as to have a *curator* or *tutor* appointed for him, in such case, a court of *chancery* will set aside any unreasonable or improvident disposition made by him of his property. Chancellor KENT, in the *matter of Barker*, 2 *Johnson Chancery Rep.* 234, says: "Yet it is certain, that when a person becomes mentally disabled,

from whatever cause the disability may arise, whether from sickness, vice, casualty or old age, he is equally a fit and necessary object of guardianship and protection."

Where the question is, whether a grantor had sufficient legal capacity to execute a deed, there it is incumbent on the party assailing the deed, to show unsoundness of mind, or insanity. But it is incumbent on a party, who sets up a voluntary conveyance, executed under suspicious circumstances, *to show affirmatively that the transaction was fair and honest.* The whole burthen of proof is shifted, and rests on the party claiming under the deed. When the gift is disproportionate to the means of the giver, and the giver is a person of weak mind, of an easy temper and yielding disposition, liable to be imposed upon, a court of equity will look upon such a gift with a very jealous eye, and will very strictly examine the conduct and behavior of the person in whose favor it is made. If it can discover that any arts or stratagems, or any undue means have been used by him to procure such gift; if it see the least speck of imposition at the bottom, or that the donor is in such a situation with respect to the donee as may naturally give him an undue influence over him; if there be the least *scintilla* of fraud, a court of equity will interpose. *Sears vs. Shafer*, 1 *Barbour's Sup. Court Rep.* 413; *Wheelan vs. Wheelan*, 3 *Cowen* 586; *Clarke vs. Fisher*, 1 *Paige* 171.

No man can look at the *facts* of this case without having his sense of propriety and justice shocked. In the language of Lord HARDWICK, in *Chesterfield vs. Jansen*, 2 *Vesey. Sen.* 155, the fraud "May be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses, and not under delusion, would make, on the one hand, and as no honest or fair man would accept, on the other." *Van Alst vs. Hunter*, 5 *John. Ch.* 160; *Gartside vs. Isherwood*, 1 *Brown Ch. Rep.* 560; *Gilson vs. Joyes*, 6 *Vesey* 278; *Somers vs. Skinner*, 16 *Mass.* 348; *Dunn vs. Chambers*, 4 *Barbour Sup. Court Rep.* 379; *Russell vs. Russell*, 4 *Dana* 43, 44; *Cruise vs. Christopher's Administrators*, 5

Dana 182; *Harvey vs. Pecks*, 1 *Munford* 526; *Whitehorn vs. Hines*, 1 *Munford* 587; *Brice vs. Brice*, 5 *Barbour Sup. Ct. Rep.* 540; *Osmond vs. Fitzroy*, 3 *P. Williams* 130, *and cases cited in notes; Administrator of Bunch vs. Administrator of Hurst*, 3 *Dessa.* 292.

Connected inseparably with this question, is that feature in the case, which stamps the conveyance with fraud and unfairness. James Kelly first procured *a power of attorney* from Greenberry Kelly, to recover the estate *for him*. While that power was unrevoked, the *agent* procured from his *principal*, a gift or conveyance of the whole estate, *to himself*, without any valuable consideration. This instrument moreover is curiously worded. Taken in connection with the fact of the previous power of attorneys, if old Greenberry Kelly had any glimmering of understanding or judgment, it was calculated to impose upon him, and convey the idea that this paper was of a like character.

The rule of Equity applicable to dealings between agent and principal, is clearly laid down in 1 *Story Eq.*, *p.* 318, *sec.* 315, *et seq; Ib. p.* 232, *sec.* 218. It seems to us, that this feature in the case, taken in connection with the gross imbecility of Greenberry Kelly, is *conclusive.*

Some rule of law must of necessity be laid down, as a test of legal capacity, and as it is impossible, or at least difficult, to undertake to discriminate between different degrees of understanding, between persons of sound minds and those of weak minds; the abstract rule of law is that neither eccentricity nor imbecility of mind, nor extreme old age, nor (as it regards wills) incapacity to make contracts, are sufficient to invalidate a will, and that the words *non compos* or of unsound mind, are legal terms, and import *a total deprivation of understanding.* Applying this rule to deeds or contracts, and we have stated it in the broadest and most favorable manner for the conveyance, and comparing the *facts* reported in the leading cases relied on by the counsel for James Kelly, with those proved in this case, we think it will clearly appear that the capacity to contract, was wanting. See

Hale vs. Brown, 11 *Ala.* 87; *Donelson vs. Posey*, 13 *Ala.* 752; *Lazan vs. Toulmin*, 9 *Ala.* 662; *Willson vs. Bigger*, 7 *Watts & Serg.* 111; *Rumph vs. Abercrombie*, 12 *Ala.* 64; *Ford vs. Ford*, 7 *Humph.* 92; *Howard vs. Coke*, 7 *Ben. Mon.* 655; *Clarke vs. Lawyer*, 3 *Sandf. Ch.* 351; *Butler vs. Haskell*, 4 *Dessa.* 684.

The 1st section of the 56th chapter of the *Revised Statutes*, is as follows: "When any person shall die, having title to any real estate of inheritance, or personal estate, and shall be intestate to such, it shall *descend* and be *distributed* in *parcenary* to his *kindred, male and female*, subject to the payment of debts," &c. Now mark the words, the estate, both real and personal, shall *descend* and be *distributed* to his kindred, male and female. Does not this section "*ex vi termini*," show that the position we assume in our 4th point, is undoubtedly and incontrovertibly correct? *Clark vs. Sprague*, 5 *Black. Rep.* 415.

The section above referred to, arranges the "table" of descents and distributions as follows: First, to children or their descendants in equal parts; second, if there be no children, then to the father, then to the mother, if no mother, then to the *brothers* and *sisters*, or their descendants in equal parts; third, if there be no children or their descendants, father, mother, brothers or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts; and so on, in other cases without end, passing to the nearest lineal ancestor, and their children and their descendants in equal parts." Now, admitting that the remaining portion of our statute contained no restricting clause concerning the half-blood, that under this section alone, the terms "*brothers* and *sisters*," included the half-blood as well as the whole-blood; but brothers and sisters alone; not their descendants or any other relatives of the half-blood, as would be the case in the whole-blood; yet all the authorities cited by the opposite party [i e. the half-blood] from the Kentucky, Mississippi, Indiana and Massachusetts Reports, are based upon statutes which contain no restrictions upon the half-blood, and are merely to the effect that, where the statute

contains no words restricting the rights of the half-blood, and the words *brothers* and *sisters*, are used *generally*, that, in such case, the half-blood are included as well as the whole-blood, under such *generic* terms.

But the 10th section is as follows:

"In cases where the intestate shall die without descendants, if the *estate* come by the father, then it shall ascend to the father and his heirs; if by the mother, the *estate*, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the *estate* be a *new acquisition*, it shall ascend to the father for his lifetime, and then descend in remainder to the collateral in kindred of the intestate, in the manner provided in this act; and default of a father, then to the mother for her lifetime, then to descend to the collateral heirs, as *before* provided;" and the expression used in this act "where the estate came by the father or mother," is explained by the 22d section of said act, which declares "that such expression, as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by gift, devise, or descent from the parent referred to, or from any relative of the blood of such parent." And by the 12th section, it is enacted that, "Relations of the half-blood shall inherit equally with those of the whole-blood."

But, if the proposition be true, the deduction is untenable, inasmuch as in the cross-bill filed by the said Eikelburners, they fully trace their relationship and genealogy as well with Charles Kelly and D. W. Clinton Kelly, as with old Greenberry Kelly, and having stated such *facts*, it is the province of the court alone to draw the proper *deductions* therefrom; if the pleader undertakes to state the legal *conclusion*, it is at the most mere surplusage, and even when alleged it is improper to make it the subject of traverse. It is the duty of the pleader to state the facts. It is the province of the court alone to draw the legal *conclusions* therefrom. Upon this point, we do not think it necessary to call the attention of the court to any but the following authorities. "It is unnecessary to state matter of law, for this the judges are

bound to know, and can apply for themselves to the facts alleged." *Stephen on Pleading, page* 345, *rule* 2, (*Doct. Pl.* 102, per BUTLER, J., *The King vs. Lyme, Regis. Doug.* 159;) *ib.* 348. As regards the analogy of the rules of pleading in equity, to those at common law, see *Lube's Equity Pleading, p.* 2, 3, 9, *and note.*

We maintain, in behalf of the Eikelburner heirs, that they are entitled to the whole of the estate, real, personal and mixed, to the exclusion of the half-blood, who are not of the blood of Charles Kelly.

It cannot be denied that our statute is a complete system of descents and distributions, as *ex vi termini*, it purported to be, and must be construed according to the spirit of the act, more than even by the letter thereof. 8 *Term* 254; 3 *Call* 303; 2 *Wash.* 296; 4 *Bac. Abr.* 638.

We maintain that our statute of Descents and Distributions, has four grand objects: 1st, To destroy primogeniture; 2d, To destroy the indivisibility of real estate; 3d, To preserve the *estate* (both real and personal) in the blood of the transmitting ancestor; and 4th, To cause the estates (both real and personal) of persons dying intestate. to go together. *Jackson vs. Cooley*, 8 *J. R.* 128 *and* 135; 1 *Phil. Ev.* 240.

For proof of marriage, we refer to 1 *Green. Ev., sec.* 107; 4 *Phil. Ev., p.* 286, *et seq.; Fenton vs. Reed.* 4 *J. R.* 52.

Finally, as regards declarations of members of family to prove marriage and relationship, we would refer the court to the following authorities, viz: 1 *Phillips & Ames on Ev. pages* 243–7; *Henney vs. Henney*, 2 *W. Blk.* 877; *Read vs. Passer*, 1 *Esp.* 213; *Leader vs. Berry, do.* 350; *Doe vs. Fleming.* 4 *Binn* 266; *Smith vs. Smith*, 1 *Phil.* 294; *Hammack vs. Bronson*, 5 *Day* 290; *Moulkon vs. Attorney General*, 2*d Russ & Mylne* 164; *Bowles vs. Young*, 13 *Ves.* 140–147; *Whitecock vs. Baker*, 1 *Ves.* 514; *Goodnought vs. Moss, Cowper* 591; *Johnson vs. Lawson*, 2*d Bing.* 86; *Chapman vs. Chapman*, 2 *Conn.* 47; *Berkley Peerage case*, 4 *Camp.* 401–418; *Doe vs. Brady*, 8 *B. & C.* 813; *Jackson vs. Russell*, 4 *Wend.* 545; *Keller vs. Nuttz*, 5 *S. & R.* 251; *Whitehead*

vs. Clanch, 2*d Hamond* 3 *and* 4; *Fenton vs. Russ*, 4 *Johnson R.* 52, 54; *Johnson vs. Johnson*, 1 *Dessau.* 595; *Allan vs. Hall*, 2*d Nott & McCord* 114, *et seq.*

3d. It is insisted that the Eikelburner heirs cannot recover, if the half-blood could not inherit, as the grandfather would only take an equal part with Mrs. Eikelburner's descendants, and that is not the case made in the bill.

We deny that the paternal aunt would inherit the estate with the grandfather, and allege that such a proposition is contrary to the letter and spirit of our Revised Statutes. *Sec.* 1, *Rev. Stat., chap.* 56, entitled Descents and Distributions, says: "Estates of deceased persons dying intestate shall descend and be distributed, &c., 1st to children or their descendants in equal parts; if no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants in equal parts; third, if there be no father, mother, brothers or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts, and their descendants in equal parts; and so on, in other cases without end, passing to the nearest lineal ancestor and their descendants in equal parts." And, again, *section* 10, of the same statute, is as follows: "In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs, *&c.* Now, in the present case, the estate came to D. W. C. Kelly, on the part of his father, Charles Kelly, and upon his death without descendants, who, by the aforesaid section, were his heirs? Why, his father being dead, it went to the heirs of Charles Kelly, and by the first section above cited, old Greenberry Kelly [the nearest lineal ancestor] was Charles Kelly's heir, and upon Greenberry Kelly's death, the Eikelburners took the estate by virtue of their being descended from old Greenberry Kelly, and from the fact that they were the nearest collateral relations of the whole-blood of the said Charles Kelly.

As to the opinions of witnesses, on questions of soundness or unsoundness of mind, we submit the current and general result

of the authorities to be as follows. The opinions of medical men, are always admissible. The attending physicians, are presumed to have peculiar opportunities for judging of capacity, and their opinions, based on their observation and scientific knowledge, are entitled to the first consideration. And such opinions are admissible in evidence, though the witness founds them not on his own personal observation, but on the case itself as proved by other witnesses on the trial—not the general merits of the cause, but on the facts proved, though he may not be asked his opinion of the case on trial, he may be asked his opinion upon a similar case hypothetically stated. 1 *Green. Ev., sec.* 440; *Culver vs. Haslam*, 7 *Barbour Sup. Court Rep.* 322. The testimony of Dr. *Kirkwood*, is clearly admissible. He was not asked as to the validity of this particular conveyance, or the capacity of Greenberry Kelly to execute it, but, in view of the facts testified to by other witnesses, supposing them to be true, what was likely to be the effect of the disease, old age, &c., upon the mind, and the capacity to dispose of property.

Next, subscribing witnesses may testify as to their opinions, because the law (more especially in regard to wills) has placed them about the testator to ascertain and judge of his capacity. 1 *Green. Ev., sec.* 440; 2 *ib., sec.* 691. Questions of this nature are found generally to turn upon the opinions of the subscribing witnesses, because their observation relates to the precise time of executing the deed or will.

Questions as to soundness or unsoundness of mind, *form an unavoidable exception* to the general rule, that only *experts* can testify as to opinions. *Culver vs. Haslan*, 7 *Barbour Sup. Court Rep.* 321, and *Clary vs. Clary*, 2 *Iredell* 78, quoted in *Potts vs. House*, 6 *Geo.* 324, (*U. S. Law Mag., vol.* 3, *p.* 278,) are leading cases on this point. In *Culver vs. Haslan*, WILLARD, J., cites numerous cases, from which the rule is well established, that opinions of all witnesses are admissible, when founded on their actual observation and acquaintance with the testator. The value and force of the opinion depend on the general intelligence of the

witness, the grounds on which it is based, the opportunities he has had for accurate and full observation, and his entire freedom from interest and bias." *Whitehorn vs. Hines*, 1 *Munford* 564.

2d. As to the pedigree, or relationship of the Eikelburners to Charles Kelly, the propositus, in this case, and their legitimacy.

The recognition or proof of collateral relationship, is admissible evidence of the lawful marriage of those through whom that relationship is derived. 2 *Green. Ev.*, *sec.* 462.

As to proof of declarations and hearsy, to prove "pedigree," we refer to 1 *Green. Ev.*, *sec.* 103; *Elliott vs. Parsall*, 1 *Peters* 337; 2 *Phil. Ev.*, *p.* 617, *note* 466; *ib.*, *p.* 618, 19 *and* 20, in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, *unless* the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, in which case, *all those* who are not of the blood of such ancestor, shall be excluded from such inheritance." Comparing these several sections together, it is apparent that it was the intention of the Legislature to exclude all persons, not of the blood of the ancestor from whom the estate, both real and personal, descended, from a share in the inheritance.

H. F. FAIRCHILD, for appellees, Mrs. Marsh and Mrs. McGuire. I. The property of Clinton Kelly, at his death, fell to his sisters, Mrs. Marsh and Mrs. McGuire. They have it by our statute of Descents and Distributions: "Sec. 1. When any person shall die, having title to any real estate or inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts, and the widow's dower, in the following manner: 1st, to children or their descendants, in equal parts; second, if there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts; third, if there be no children, nor their descendants, father, mother, brothers or sis-

ters, nor their descendants, then to the grandfather, grandmother, uncles and aunts, and their descendants, in equal parts; and so on, in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts." For they, Mrs. Marsh and Mrs. McGuire, are the sisters of Clinton Kelly, and, under the 1st section above copied, take his goods and estate. *Sheffield vs. Leveriny*, 12 *Mass.* 496; *Clay vs. Cousins*, 1 *T. B. Mon.* 75; *Garner vs. Collins*, 3 *Mass.* 403, 404; *Doe & Hicky vs. Deloach*, 1 *How. Miss.* 37; *Clark vs. Sprague*, 4 *Blackf.* 412; *Grigsbg vs. Breckenridge*, 12 *Ben. Mon.* 631; *Wren and wife vs. Carnes and wife*, 4 *Dessa.* 408, 409, 410, 419, 420.

Sec. 12, of same chapter, is as follows: "Relations of the half-blood shall inherit equally with those of the whole-blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole-blood, unless the inheritance come to the intestate by descent, devise, or gift, or some one of his ancestors, in which case, all those who are not of the blood of such ancestor, shall be excluded from such inheritance." This section does not conflict with the point. It excludes the descendants of Mrs. Marsh and Mrs. McGuire from any inheritance that came to Clinton Kelly; it does not affect them. Such is the grammatical, the logical, and the legal, construction of this section, and the only one conformable to the spirit of the statute.

1. The grammatical and logical construction of the section.

2. The legal constructions of the section, is as above given. On the construction of the sentences and clauses in the section, we cite a few authorities. *Sabron vs. Woram*, 1 *Hill* 92; *Areson vs. Areson*, 5 *Hill* 410; *S. C.*, 3 *Denio* 465, 469, 470; *Van Allen vs. Mooers*, 5 *Barb.* 111; *Sholl vs. Sholl, do.* 312; *Leggett vs. Perkins*, 2 *Comst.* 315; *Curle vs. Curles Admin.* 9 *Ben. Mon.* 310.

3. In ascertaining the spirit of the statute, we must remember that it enlarges the rights of the half-blood, and we ought, therefore, not to draw arguments and illustrations to expound the statute, from the spirit, doctrine and analogies of the common law,

but from the statute of distributions, and from the statutes of the States; that although diverse in some particulars, concur in holding the half-blood worthy to inherit in greater or less degrees. 4 *Kent* 374; *Clay vs. Cousins*, 1 *T. B. Mon.* 75; *Nichol vs. Dupree*, 7 *Yerg.* 426, 427.

Our statute is a complete scheme of descents, and must be construed by its intent, gathered from the words, having due reference to the derivation, reason and spirit of the enactment. Rules of descent are creatures of positive law, but everywhere recognize the claims of relationship. *Gardner vs. Collins*, 2 *Pet.* 93; 2 *Black.* 211; *Wendell's Ed. note* 617; 4 *Kent* (*7th Ed.*) 376, 411 *marg. pages.*

For the rule of the common law object of the rule relative to the half-blood, see 4 *Kent* 402, (*7th Ed.*) *marg.*; 2 *Blacks.* 224, 227, 230, 231. Condemned in 2 *Blackst.* 231, 233, and repealed in England, *Id.* 240; 4 *Kent* 403, and never was applied to the commonest and highest inheritances, as estates entailed and the sovereign power. Whence comes the conclusion, that, so far as the statute enlarges the rights and capacities of the half-blood, the constructions must be liberal, in harmony with the spirit of the statute, and prevailing tendency of legislation and construction upon the subject, and so far as the statute respects the rights, and confines the capacities of the half-blood, its meaning must be confined within the words used.

4. The restriction upon the descendants of the half-blood, in section 12, accords with authority and legal analogies. *Stretch vs. Stretch*, 1 *South.* 182, 185; 4 *Dessa.* 413. As in the early Kentucky and Virginia statutes, and those of other States, that allow the half-blood to have inheritable capacity, but assign it a place after the whole-blood of the same degree. It corresponds with the 4th canon of English descents. 2 *Black's* 216, 219; 4 *Kent* 384, 375, 389, 391, 400, 408. And with the rule that controls the succession to personal property, wherever the common law prevails, viz: that stated in the statute of distributions, that there shall be no representatives among collateral relations, after

the children of brothers and sisters. *Marr vs. Harding*, 2 *Vern.* 233; *Petty's case*, 1 *P. Wms.* 25; *Bowers vs. Littlemood, do.* 594; 4 *Dessa.* 410, 411, *in notes.*

We have nothing to do with sections 10 and 11, as they have no application till the intestate, Clinton Kelly, who had no father or mother, be shown to have died without sisters.

II. Throwing aside the claims of the half-blood, Greenberry Kelly was not the heir of Clinton Kelly. The bill and cross-bill affirm the fact. The half-blood deny it. The marriage of Greenberry Kelly to the mother of Charles Kelly, is then the fact to be proven, by those who claim under him. What evidence is required to prove marriage? It is, of course, according to the issue, according to the possibilities of making proof, according to the positions of the parties to the controversy. In this case, James Kelly's claim is precisely as if Greenberry Kelly were the plaintiff. The suit is brought by Greenberry Kelly himself, by means of his assignee, his marriage is a fact, one material fact in the case, he must know the truth of it, and must be held to strict proof of it, by such testimony as on any civil case, will prove an actual marriage.

Then the Eikelburner heirs cannot make good their claim by the evidence usually resorted to, and allowed to prove remote facts, in the establishment of a pedigree, because they claim directly from Greenberry Kelly, alleging that, by his death, in 1847, they have succeeded to his property; that he had title to it, in October, 1844, at the death of Clinton Kelly, being his grandfather, and heir. They have then to establish that allegation to be a fact.

The claim of each adverse party rests upon two facts, one that is common to them both, that Greenberry Kelly was the lawful father of Charles Kelly; the second fact in the one case, that he conveyed his interest to James Kelly, and in the other, it is that they are the proper heirs of Greenberry Kelly.

The effort of each being to vest an estate in Greenberry Kelly, from 1844 to 1847, the allegation of each being that Clinton

Kelly's estate was so vested, they must prove that he was the grandfather of Clinton Kelly, that is, that he was married to the mother of Charles Kelly. 2 *Stark. Ev.* (*7th Am. Ed.*) 833; *Remmington vs. Lewis*, 8 *Ben. Mon.* 611, 612; *Kuhl vs. Knauer and wife*, 7 *Ben. Mon.* 130; *Armstrong vs. McLonald*, 10 *Barb.* 300. But, upon the general rules of proving marriage in civil cases, no marriage is proven, according to the lowest requisites of the books. 2 *Greenl. Ev. secs.* 461, 462; 1 *do. secs.* 103, 104, 107; 1 *Ph. Ev.* 240, 248, (*Cow. & Hill's Ed.* 1843 *e.*); 2 *Stark Ev., Title Pedigree*, 833, *et seq.*; *Vowles vs. Young*, 13 *Ves.* 143, *to end of case; Whitlock vs. Baker, do.* 414; *Monkton vs. Attorney General*, 6 *Cond. Eng. Ch. Rep.* 426, 438, *from* 2 *Russ. & Myl.* Greenberry Kelly's statements cannot be taken as evidence, as it would be allowing him to make evidence for himself. *Glynn vs. Bank of England*, 2 *Ves.* 42, 43. The books never have gone so far as to receive his declarations. 1 *Ph. Ev.* 240; 2 *Stark. Ev.* 839, *and note; Monkton vs. Attorney General, supra.*

The fact of his marriage is not incidental, it is the matter of issue; there is no evidence of any ceremony, none of co-habitation, or reputation, nobody has ever been acquainted with his wife, has even seen or heard of her, knows her maiden name, and there are, on the other hand, positive circumstances of suspicion, unlike *Jackson vs. Cooley*, 8 *John.* 131. See, also, 1 *Greenl. Ev., sec.* 106. The case of *Clayton vs. Wardell*, 4 *Comst.* 230, and *Gaines vs. Relf*, 12 *How.*, were much stronger than this, in which the alleged marriages were adjudged not to be proven. In many of the foregoing relations, the character of this hearsay evidence, is commented upon. Also, see *Mima Queen vs. Hepburn*, 2 *Cond. Rep.* 498, *from* 7 *Cranch* 260; *Fosgate vs. Herkimer Man. and Hydraulic Co.*, 12 *Barb.* 358; *Stein vs. Bowman*, 13 *Pet.* 220.

III. If no marriage have been shown to make Charles Kelly and Mrs. Eikelburner legitimately related as brother and sister, the Eikelburner heirs cannot take an inheritance from Clinton Kelly, under the 3d section of the chapter of Descents—that section is as follows: "Section 3. Illegitimate children shall be cap-

able of inheriting and transmitting an inheritance, on the part of their mother, in like manner as if they had been legitimate of their mother." In support of this proposition, are cited *Stevenson's heirs vs. Sullivant*, 4 *Cond. Rep.* 640, 641, *from* 5 *Wheat.* 207; *Scroggin vs. Allen*, 2 *Dana.* 363; *Stover vs. Boswell*, 3 *Dana* 234; *Remmington vs. Lewis*, 8 *Ben. Mon.* 606, 608, 610; *Black vs. Cartnell*, 10 *Ben. Mon.* 188, 193, 194; *McCormick vs. Cantrell*, 7 *Yerg.* 615; *Brown vs. Kerby*, 9 *Humph.* 460.

IV. The Eikelburner heirs cannot recover, because if Greenberry Kelly were the lawful father of Charles Kelly, and if the half-blood could not inherit Clinton Kelly's estate, the grandfather would only take an equal part with Mrs. Eikelburner's descendants, and that is not the case made in the bill. *Sec.* 1, *ch. Descents*, *Dig.*; 4 *Kent* 408. This objection is not mended by the death of Greenberry Kelly, and the descent of his estate to the Eikelburner heirs, because, to meet such case, they should have claimed, as they would have derived one-half the estate directly from Clinton Kelly, at his death in 1844, and the other half from Greenberry Kelly, at his death, in 1847. For the consequences of his error, see *Kelsey vs. Western*, 2 *Const.* 506; *Roberts vs. Elliott*, 3 *T. B. Mon.* 397; *Price vs. Berrington*, 7 *Eng. Law & Eq. Rep.* 259, 260; *Maulding vs. Scott*, 13 *Ark.* 94, 95.

V. At all events, Mrs. Marsh and Mrs. McGuire must have the personal property of Clinton Kelly, as his next of kin, and distributees under the 1st section of the chapter of Descents, and under the 13th section. Whoever are cut off by section 12, are only cut out of inheriting real estate. Inherit and inheritance are the subjects of exclusion, and what is meant by them, is plainly written in section 20, to be real estate that has descended, and nothing else. Such, also, was the meaning of them at common law. So in the 22d section; the terms used in the 10th and 11th sections, are defined in the same way. Then, if the real estate of Clinton Kelly cannot descend to his sisters, his personal property must be distributed to them. For no rules, or canons of descent, ever impeded the flow of an intestates personalty, to

his nearest relatives, whether of the half-blood or whole-blood. Such was the old common law, such has been the system under the statute of Distributions, in England, and such is the law in the United States. 2 *Black's* 491, 505, *and notes* 57, 58, *Wend. Ed.; Beeton vs. Darkin*, 1 *Vern.* 169; *Earl of Winchelsea vs. Norcliffe*, 1 *Vern.* 403, 437; *Crooke vs. Watt*, 2 *Vern.* 124; *Burnett vs. Mann*, 1 *Ves.* 156; *Pinkard vs. Smith, Litt. Sel. Cas.* 237, 338; *Karwon vs. Lowndes and wife*, 2 *Dessa.* 214; *Guerard vs. Guerard*, 4 *Dessa.* 406, 408; *Hallett vs. Hart*, 5 *Paige* 316; *Champion vs. Baldwin*, 1 *do.* 562; *South vs. South*, 3 *T. B. Mon.* 93; *Nixon vs. Nixon*, 8 *Dana.* 68; 1 *B. Mon.* 270; *Greenia vs. Greenia*, 14 *Mo.* 328.

VI. The conveyance from Greenberry Kelly to James Kelly, is void.

1. The subscribing witnesses do not establish it.

This must condemn the deed, unless there is a greater preponderance of proof than would otherwise be required, for the fact was forced upon James Kelly's representatives, that Greenberry Kelly's competency was the issue, and the testimony of the attesting witnesses is the most decisive. *Brook vs. Luckett's Exr.* 4 *How. Miss.* 482; 2 *Paige* 149, which defines the duty of attesting witnesses.

2. The weight of the testimony shows that Greenberry Kelly, when the conveyance was made, was utterly incompetent to know what he was doing. He was imbecile from disease, dissipation, and old age, without sense, discretion, reason, memory, or accountability. In this connection, the admissibility and weight of opinions, as evidence, will be discussed. *De Witt vs. Barley*, 13 *Barb.* 550; *Culver vs. Haslam*, 7 *Balf.* 314; *Lester vs. Pittsford*, 7 *Verm.* 161; *Morse vs. Crawford*, 17 *Verm.* 499; *Grant vs. Thompson*, 4 *Conn.* 203; *Porter vs. The Pequonnoc Manufacturing Co.*, 17 *Conn.* 257; *Rambler vs. Tryon*, 7 *Serg. & Rawle* 90; *Whitehurst vs. Hines.* 1 *Mun.* 547, 586, 587; *Brydges vs. King*, 3 *Eng. Eccl. Rep.* 113, 114, 135, *from* 1 *Hagg.* 256.

3. If Greenberry Kelly were not so imbecile as to avoid the

deed, the attendant fraud, and undue influence taken in connection with his old age, and feebleness of body and mind had that effect. *Bunch's admr. vs. Hurst's admr.* 3 *Dessa.* 291, 294; *Harvey vs. Pecks*, 1 *Mun.* 519, 526, 527; *Clarkson vs. Hanway*, 2 *P. Wms.* 203; *Clarke vs. Fisher*, 1 *Paige* 171; *Affd.* 2 *Comst.* 498; *Sears vs. Shafer*, 1 *Barb.* 412, 413; *Gartside vs. Isherwood*, 1 *Bro. Ch. Cas.* 561, 562; *Osmond vs. Fitzroy*, 3 *P. Wms.* 130, *and note* 1; *Ingram vs. Wyatt*, 3 *Eng. Eccl. Rep.* 179, 187, 190, *from* 1 *Hagg.* 389.

4. It belonged to James Kelly to clear the deed, and the transactions attendant of all suspicion, to show that everything was fair, for as the deed was procured by his agency, for his benefit, the presumption of law is against its honesty and validity. *Lansing vs. Russell*, 13 *Barb.* 523, *et seq.*; *Sears vs. Shafer.* 1 *Barb.* 415; *Billinghurst vs. Vickers*, 1 *Eng. Eccl. Rep.* 70, 72, *from* 1 *Phil.* 187; *Paske vs. Ollat*, 1 *Eng. Eccl. Rep.* 273, *from* 2 *Phil.* 323; *Ingram vs. Wyatt*, 3 *Eng. Eccl. Rep.* 170, 172, 174, 187, 188, 191, 193, 200, 204, 295, *from* 1 *Hagg.* 384.

VII. Greenberry Kelly's right to the property, as to him, could be be nothing more than expectancy, and was therefore for this, with the other circumstances, void. *Clarkson vs. Hanway*, 2 *P. Wms.* 203; *Twistleton vs. Griffith*, 1 *do.* 310; *Berney vs. Pitt*, 2 *Vern.* 14; *Nott vs. Johnson*, *Id.* 27; *Wiseman vs. Brake*, *Id.* 121.

Col. FOWLER and Mr. BYERS, also argued this cause for the appellees.

Hon. S. H. HEMPSTEAD, Special Judge, delivered the opinion of the Court.

Whatever may have been the original foundation of the right of property, it admits of no question that its protection, in some shape, is engrafted into the jurisprudence of every civilized nation. In most of them, it constitutes an important feature of their organic law. No government, however powerful, and whe-

ther free or despotic, could long command the affections and allegiance of its members, or preserve the order and tranquility of civil society, without respecting and securing this right, and affording adequate redress for its violation.

The transmission of property, whether by descent, succession, or purchase, depends upon the municipal regulations of each State, and no duty more delicate can be imposed on courts of justice, than to pass upon and enforce these regulations. It is for the judiciary to construe, not legislate; and when the real intention of the law-maker is ascertained, it must be declared, regardless of consequences. If cases are omitted, which ought to have been included, or hardships arise not foreseen, the remedy for the evil rests in the wisdom and discretion of another department. For us, it is sufficient to know, *ita lex scripta.*

This voluminous, and really difficult case, involves the construction of our statute of Descents—presenting questions not hitherto decided in our courts, and we can safely affirm, that they have been examined with care, diligence and patience. We have to thank the respective counsel for their very able arguments in the case.

The facts, as far as they have a bearing on the present branch of the subject, are, that, about the year 1810, Charles Kelly emigrated to what is now Arkansas; and, in 1815, married Mrs. Craig, a widow, who had two daughters by a former marriage, named Elizabeth and Emeline. Charles Kelly, an enterprising, shrewd, business man, aided by the prudence, skill, and good management of his wife, accumulated in Arkansas, where he lived, a large estate, consisting of real and personal property. He died intestate in 1834, and, by the law in force, his real estate descended, and his personal property was distributed to James De Witt Clinton Kelly, who was the only surviving issue of the marriage with Mrs. Craig. She died in 1836, and the son above mentioned, called, for brevity, Clinton Kelly, died intestate in Arkansas, the place of his domicil, in 1844, at the age of seventeen years, without having married and without issue, leaving, as claimants for

his property, his paternal grandfather, Greenberry Kelly, the descendants of Mary Eikelburner, his paternal aunt, and his two sisters of the half-blood, Elizabeth and Emeline; the first of whom is the present Mrs. Marsh, and the second, Mrs. McGuire.

The half-blood claim the entire estate of Clinton Kelly, real and personal, as his next of kin, and to the exclusion of all other persons.

We shall say nothing, at present, of Greenberry Kelly, or the Eikelburner heirs; because, if the pretensions of the half-blood to the whole, realty and personalty, should prove to be well founded, it would be an useless enquiry.

To form a new system of descents, will always be found a work of difficulty. Human wisdom is inadequate to making out and establishing a perfect one at once. It is quite impossible to foresee all the consequences of an attempt so important, extensive and ramified. Omissions and imperfections, however, as they are discovered, must be supplied and remedied by subsequent laws.

Excepting the first section, and some minor provisions, our statute of descents was borrowed from one in New York, but with additions not calculated to improve, and with attempts at brevity and perspicuity, neither happy nor successful. The original was, what it purported, and was intended to be, a pure statute of descents; using appropriate technical terms, regulating the inheritance of real estate, and not looking to the distribution of personal property at all. 2 *Rev. Statute, New York*, 750; *Digest* 436.

The first section of ours was extracted from some other statute of descents; amended by the revisers, by the interpolation of so much as relates to the distribution of personal estate; thus blending two subjects of a totally different nature, and governed by totally different rules. And it is this, which produces no small degree of difficulty in our system. We must, however, apply to it that universal rule of construction, that a statute should be so considered as that every clause, sentence, or part, shall stand, if possible; or, in other words, such construction as will best an-

swer the intention of the makers. 9 *Bac. Abr.*, STATUTE, *J.* 2, *J.* 5. General words or clauses in a statute, may be restrained by particular words, or clauses in the same statute. And when one section in a statute may be both general and particular, or where there are different provisions for different purposes, and penned in different words, in the same chapter, they ought to be so construed as to avoid inconsistency. *Id.; Campbell's case*, 2 *Bland.* 209. The application of these rules to the case in hand, will be readily perceived.

The 1st section is general and comprehensive, embracing all lands, whether ancestral or newly acquired, subject to certain exceptions and qualifications hereafter more particularly noticed, and these exceptions refer to real estate alone. This section also constitutes the table, by which real estate is to descend and personal property be distributed. As, by its express language, it relates to both real and personal property, it was manifestly the design of the Legislature, when there were descendants of the intestate, to send down both to them *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, without any regard to the fact as to how the property had been acquired. And as to personal property, where there are no descendants of the intestate to distribute it to, collaterals will take in the same way as descendants, if there had been any: that is to say, without any inquiry as to how it was acquired, and, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree. This was manifestly the design of the Legislature. The sections of the statute which have reference to both real and personal property, and expressly name or allude to both, or embrace them in their spirit, are the 1st, 4th, 5th, 15th, 16th, 17th, and 18th. The 15th, 16th, 17th, and 18th, touch the subject of advancement. And, to attain the object in view, it was necessary to blend real and personal property together; because the amount received is the inquiry; and, whether in land or personal property, produces the same result.

It may not be unworthy of remark, that neither in the 1st, 4th,

5th, nor in these sections, is the technical term "inheritance," used at all.

The 1st, 4th, 5th, 15th, 16th, 17th, and 18th sections, are the only ones designed, in our opinion, to apply to both real and personal estate. All the rest embrace real estate alone.

The effect of the 1st section is, to constitute the persons, who take the personal property, whether *per capita*, or *per stirpes*, and whether of the whole or half-blood, the absolute owners. Nor is it material, whether those persons are of the paternal or maternal, or the lineal or collateral line. By that section, as already remarked, real and personal estate goes in the same channel, and if no subsequent provisions had been introduced, touching real estate, the precise bearing of which, it is probable the revisers did not perceive, our labors would have been comparatively easy. At present, nothing further need be said as to personal property, as we shall find it necessary to allude to that hereafter, and shall now speak in reference to real estate.

The effect of the 1st section, subject to the exceptions and qualifications alluded to, is to vest an absolute estate of inheritance in lands in the person who takes. And every estate, interest and right, legal and equitable, in lands and tenements and hereditaments, excepting only leases for years, and estates for the life of another person, are thus inheritable and descendable; or, as the 1st section expresses it, "having title to any real estate of inheritance," constitutes an inheritable estate, thus abolishing the common law doctrine, derived from feudal times, of actual seizin in the ancestor. Whoever claimed by descent, was bound to show that he was heir to the first purchaser; and the seizin of the last possessor, from whom he claimed as heir, was considered as presumptive evidence of his being of the blood of the first purchaser. It supplied the difficulty of investigating a descent from a distant stock, through a line of succession become dim by the lapse of ages. 4 *Kent* 386.

But, with us, ownership, or title to property, is substituted for seizin; and that maxim *seisina facit stipitem*, of such controlling

consequence in the English scheme of descents, is entirely superseded. By descent or hereditary succession, is understood the title whereby a person, upon the death of his ancestor, acquires the estate of the latter as his heir at law. 3 *Bac. Abr.*, *Descent* 104.

We pass now to the more particular consideration of the 10th section.

The manifest intention of the first part of this section, was to preserve ancestral estates in the line of the blood from whence they came. It was a partial adoption or recognition of the common law principle, which invariably followed the line of the blood. If the estate comes to the intestate by the father, or as it may be differently, and as well expressed, on the part of the father, then it must ascend to the father and his heirs, and thus overturning the inflexible rule of the common law, that an estate could never ascend; but should rather escheat to the lord. And so, if it comes by or on the part of the mother, it goes to the mother and her heirs, in exclusion of the heirs of the father. In other words, it remains in the paternal or maternal line, from whence it was derived.

The expressions, "come by the father," or "mother," or on "the part of the father" or "mother," mean the same thing. *Maffit vs. Clark*, 6 *Watts & Serg.* 260. They are familiar to, and derived from, the common law, having an appropriate, technical meaning, which we must suppose the Legislature intended to adopt. They embrace not only the father, but all of the ancestors of the father, both paternal and maternal. *Co. Litt.* 12 *a.* Whenever, says Lord COKE, lands do descend from the part of the mother, the heirs of the part of the father shall never inherit. And, likewise, when lands descend from the part of the father, the heirs of the part of the mother shall never inherit. *Co. Litt.* 13 *a.*

The 10th and 22d sections must be construed together, although the exact expressions used in the latter, are not contained in any part of the statute. But words of equivalent signification, are employed, and they are embraced within the spirit of the 22d

section. Any other exposition would render the section entirely nugatory; and we must so construe statutes as that every part may have its proper effect, if possible.

The expression, then, "come by the father, or mother," is not limited to an estate acquired by descent merely; but includes an estate which comes to the intestate by gift, devise, or descent from the parent referred to, or from any relation of the blood of such parent. Such is the letter and spirit of the statute. In other words, there are two classes of cases provided for: one, where the blood of the person, from whom the estate came, whether it be by descent, devise, or gift, is regarded; and the other, where the blood of the intestate forms the *stirps*, or stock of descent, without respect to ancestral blood.

Chancellor KENT says there is a difference in the laws of the several States, between the succession to estates, which the intestate had acquired in the course of descent, or by purchase. "If the inheritance," says he, "was ancestral, and came to the intestate by gift, devise, or descent, it passes to the *kindred*, who are of the *blood of the ancestor from whom it came*, whether in the paternal or maternal line." 4 *Kent* 404.

The portion of the 10th section, as to *new acquisitions*, gives the father and mother a life estate only, with remainder to the collateral heirs of the intestate: such as brothers and sisters, and their descendants, and so on. A new acquisition, or newly acquired estate, does not afford, of itself, an exact idea of the mode of acquisition. By the common law, there were two modes of acquiring an estate—distinguished by the general appellations of descent and purchase. In the first, it was by operation of law; and, in the second, by act or agreement of parties. Devises and gifts fall in the latter class. An estate by purchase there became inheritable to the heirs general of the purchaser, first of the paternal, and then of the maternal line. 2 *Bl. Com.* 243.

It must be understood, however, that a new acquisition, in the sense intended by the statute, is one which the intestate has acquired by his exertions and industry, (*Brewster vs. Benedict*, 14

Ohio 385), or by will or deed from a stranger. In other words, it is an estate derived from any source other than descent, devise, or gift, from father or mother, or any relative in the paternal or maternal line. *Butler vs. King*, 2 *Yerg.* 116.

If the son should purchase land from the father or mother, for a valuable consideration, it would be a new acquisition, and descend as such; because nothing is received by way of bounty at the hands of ancestors; which is the case as to lands descended from, or devised, or given by them to the intestate, and it was thought reasonable that they should remain in the blood from which they came.

Land is to be considered as having come from, or by, or on the part of, the father or mother, when it comes by gift, devise, or descent, either mediately or immediately from them, or from any person in their respective lines. *Shippen vs. Izard*, 1 *Serg. & Rawle*. 223.

The 12th section provides that, "relations of the half-blood shall inherit equally with those of the whole-blood, in the same degree, and the descendants of such relatives shall inherit in the same manner as descendants of the whole-blood; unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors—in which case, all those who are not of the blood of such ancestor, shall be excluded from such inheritance.

It has been contended, with much ability and ingenuity, that the restriction in the latter clause of the section, applies to the descendants of the half-blood only; and that such is the grammatical and logical construction.

But we are unable to subscribe to this argument. It would be unsafe to construe a statute according to mere grammatical rules, or to rely on punctuation, as any material aid, in ascertaining the true meaning. Neither bad grammar nor bad English, will vitiate a statute any more than a deed. It is well known that ancient statutes were without sections or punctuation, and hence the reasonable and universal rule that the sense must be collected from the whole act.

It is clear that the meaning and intention of this section was to prohibit the half-blood, and their descendants alike, from sharing in the inheritance of an estate which might come to the intestate by descent, devise, or gift, from an ancestor; in all cases, *where they were not of the blood of such ancestor.* The reason for excluding the half-blood, is just as strong as for excluding their descendants, and it is impossible to conceive any well founded distinction between the two. And whatever opinion we might entertain, as to the hardships of such a rule, in any given case, or as to the impolicy of establishing lines of blood at all, in a new country, where almost every man is the architect of his own fortune and the stock of descent; yet the Legislature has spoken its will; the language is too plain to be doubted, and addresses a prohibition to the courts, not to be disregarded or evaded.

The half-blood are not excluded from inheritances, and they and their descendants may inherit even an ancestral estate, provided they can show they are of the blood of the ancestor from whom it was transmitted to the intestate. *Gardner vs. Collins*, 2 *Peters* 58. In newly acquired estates, they inherit equally with the whole-blood in the same degree.

HILLIARD, in his Treatise on Real Property, (*vol.* 5, 207), says: "In Arkansas, if there are no descendants, and the estate came from the father, it *passes to him and his heirs.* The half-blood and descendants inherit unless the estate is ancestral, in which case, *none inherit but those of the ancestral blood.*"

The word "blood," in its technical and natural sense, includes the half-blood. *Baker vs. Chalfant*, 5 *Wharton* 477. In a note, in the last edition of his commentaries, KENT says, "the words in the laws of the several States, regulating the descent of ancestral inheritances, require that the heir should be of the blood of the ancestor. This would, in the ordinary sense of the words, admit the half-blood, for they may be of the blood of the ancestor, though only half-blood to the intestate." The 12th section of our statute is an exact transcript of the 15th section of the New York Revised Statutes, and, in considering that section, he fur-

ther said that, *not being of the blood of the ancestor, was the only ground on which the half-blood was excluded from ancestral inheritances.* 4 *Kent* 404, *note b., and authorities there cited.*

In *Torrey vs. Shaw*, 3 *Edw. Ch. R.* 362, the Vice Chancellor, in commenting on a similar provision, observed that here is an exclusion as well where property comes by devise or gift—each of which is a species of purchase—as where it comes by descent; unless the parties claiming be of the blood of the donor. This proceeds, said he, upon the principle that the blood of the ancestor is necessary to enable collateral relations to take, where the property came from an ancestor by either of the modes of transmission spoken of.

In *Dew vs. Jones*, 3 *Halstead* 340, the half-blood of the person dying seized, was held entitled to inherit an ancestral estate; because he was of the half-blood to the person dying seized, as well as of the blood of the ancestor from whom the lands came.

Our statute provides for ancestral and newly acquired inheritances. The half-blood may inherit both, and will be excluded from the first only when lacking ancestral blood. With that exception, the half-blood and descendants stand upon the same footing with the whole-blood and descendants.

After carefully considering each of the provisions of the statute, and all together as a whole, we have come to the following conclusions:

1st. That, as to both real and personal property, it was the design of the Legislature, when there were descendants of the intestate, to send down both to them, *per capita, if in* equal degree, and *per stirpes*, if in unequal degree, without any regard to the fact as to how the estate was acquired.

2d. That, as to personal property, it was the design, where there were no descendants, that it should go to collaterals in the same way it would have gone to descendants, if there had been any: that is to say, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, and without enquiry as to how the property was acquired by the intestate.

3d. That, as to real estate, it was the design of the Legislature, where there were no descendants, to point out the lines of the succession, and that this is to depend on the fact, whether the inheritance is ancestral or new; and, if ancestral, then whether it come from the paternal or maternal line.

4th. If the inheritance was ancestral, and come from the father's side, then it will go to the line on the part of the father, from whence it came, not in postponement, but in exclusion, of the mother's line; and so, on the other hand, if it come from the mother's side, then to the line on the part of the mother, from whence it came, to the exclusion of the father's line.

5th. If the inheritance be not ancestral, but a new acquisition, then, after a life estate, reserved in succession to the father and mother, if alive, it will go in remainder, first to the line of the intestate's paternal uncle and aunts, and their descendants, in postponement of the mother's line, until the former becomes extinct; and then to the line of the intestate's maternal uncles and aunts, and their descendants; unless there should be kindred, lineal or collateral, who, either in right of propinquity, or by right of representation, stand in a nearer relation to the intestate than the uncles and aunts; in which case, such nearer kindred would take the inheritance to the exclusion of both of these collateral lines; and, in their hands, it would become an ancestral estate, and afterwards go in the blood of the relative from whence it came, in the ordinary course of descent prescribed for ancestral inheritances. *Digest, secs.* 10 *and* 11, *p.* 437.

6th. That, when the inheritance is fixed, by these facts, in any given line, it will pursue that line until it becomes extinct, and the objects of bounty, and the order in which they succeed one another, and the proportion they take, are to be ascertained by the 1*st section*, which is to be considered as the general table of descent. The father, mother, brothers, sisters, and so on, mentioned in that section, are those who are to be considered when counting from any propositus, whether the propositus of a single

line only, or the concurrent propositus of both lines, as the intestate is, as to personal property.

7th. In all cases where the inheritance is in any one line, it there goes in succession, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, precisely as if the other line was extinct, and precisely as the inheritance of a bastard would take a course in his mother's line, he having no father's line at all.

8th. The half-blood, and their descendants, take personalty, as well as realty, equally with the whole-blood, except that they are excluded from real estate when ancestral, if they lack the blood of the transmitting ancestor.

It is manifest, that Mrs. Marsh and Mrs. McGuire can take nothing in the real estate, which descended to Clinton from his father, Charles Kelly. They are excluded by an express provision of the statute, not because they are of the half-blood merely, but because the estate is ancestral, and they are not of the blood of the ancestor who transmitted it to the intestate.

On the same principle, the intestate's mother, and all his kindred on her side, are peremptorily excluded. It is, therefore, only his paternal kindred, who are called to the inheritance. And the intestate having left no children, or their descendants, and no father and no mother, no brothers or sisters, or their descendants, capable of inheriting, his grandfather, grandmother, uncles and aunts, and their descendants, of the blood of his father, Charles Kelly—from whom the inheritance came to him, and who held it as first purchaser, as an *ancient fee;* and was, therefore, the true stock of descent—were his next of kin called to the inheritance. Of these he left, him surviving, a grandfather, Greenberry Kelly, and the descendants of an only paternal aunt, Mary Eckelburner, and these descendants together, by the right of representation, were entitled to share the inheritance equally with the grandfather, under the general provisions made in the 1st section of the Statute. And the grandfather, having died after succeeding to this inheritance, these same descendants, of his daughter, Mrs. Eikelburner, as his lineal descendants, took the inheritance

from him, as his heirs of the blood of Charles Kelly, the first and last purchaser of the estate; and are, therefore, entitled to the entire real estate that descended from Charles to Clinton Kelly.

But, for the half-blood, it has been contended that the Eikelburner heirs cannot recover, because, conceding that Greenberry Kelly was the lawful father of Charles Kelly, and that the half-sisters would not inherit the estate, the grandfather would only take an equal part with Mrs. Eikelburner's descendants, and that this is not the case made by the bill; and, it is further urged that the objection could not be cured by the death of Greenberry Kelly, and the descent of his estate to the Eikelburner heirs; and that, to meet such case, they should have claimed, as they would have derived, one-half of the estate directly from Clinton Kelly, at his death, in 1844, and the other half from Greenberry Kelly, at his death, in 1847.

This position is not tenable, because the cross-bill states the facts fully in their proper order; and, with sufficient certainty, traces out the genealogy, and asks for general relief. Now, there can be no question of the soundness of the rule that it is only necessary to state the facts in a bill in chancery; and it tends to prolixity, and is generally improper to state matters of law; unless, perhaps, law and fact be so blended as to render it necessary. Under a prayer for general relief, the court may grant any that the facts stated will warrant, although it may be inconsistent with the special relief prayed. *Story's Eq. Pl.* 40, 41, 42; *Cook vs. Bronaugh*, 13 *Ark.* 183.

The personal estate, including the slaves of Clinton Kelly, stands on a different footing, as we will now proceed to demonstrate.

It may, perhaps, be regretted that the Legislature omitted to frame a separate law providing for the distribution of personal property to the next of kin in all cases, after the model of the English statute of CHARLES II, instead of resting it on a few general expressions, and a few sections in a statute of descents. However, we sit here to ascertain the legislative will, as best we can,

and, after moulding it into form and shape, to execute it; because the intention constitutes the law. 1 *Kent* 462; 15 *Johns.* 380.

As already remarked, the only sections of the statute, which name or refer to both personal and real property, are the 1st, 4th, 5th, 15th, 16th, 17th, and 18th. The 4th and 5th, are general, and were intended to legitimate children in certain cases, and the effect of them no doubt would be, to enable such children to inherit real, or take personal property precisely as if born legitimate. The other sections of the statute, were not, in our opinion, designed by the Legislature, to apply to or embrace personal property. They use technical terms of fixed legal import, applicable alone to real estate, such as "inherit," "inheritance," "descend," "descent," "ascend," "descendants," "heirs," "blood of the ancestor," "estate," and others of like import, not, properly speaking, applicable to personal property. When we speak of that, we speak of it as subject to distribution to the next of kin, and not as inheritable. We do not doubt that some of these terms, in common parlance, and even in judicial opinions, and in treatises by eminent juridical commentators, are sometimes, for the sake of convenience, applied to personal property, in a popular sense. That is the case with the term "estate," although it signifies the interest which a man has in lands. 2 *Bl. Com.* 103. Standing by itself, this is the idea it conveys; and hence some other word is generally used, when a different idea is to be expressed, such as "personal," or "moveable," and from which it receives a popular instead of a technical meaning. If technical words are used in a statute, they are to be taken in a technical sense, unless it clearly appears, from other parts of the statute, that the words are intended to be applied differently from their legal acceptation. 1 *Kent* 462.

Now, so far from that being the case, it is reasonably certain that the Legislature did not intend these terms to have any other than their legally received meaning; because, if so, it would have been easy to have expressed that intention in plain language. If terms and language are used in some sections, so as to require the in-

clusion of personal property, and not used in others, where, without them, such property could not be embraced either by the letter or spirit, the inference is irresistible that it was purposely omitted. There are other reasons for the exclusion equally cogent. Personal property is moveable from place to place, exists to-day and perishes to-morrow; while land remains the same, although the ownership may change with the seasons. In view of this difference, and out of deference to the common law, it is reasonable to suppose that the statute never designed to embrace personal property throughout. If so, inquiry would have to be made as to ancestral and newly acquired property, which, in many instances, could hardly be satisfactorily done, and, in some, not at all: and the litigation that would spring up from such a prolific source, would be truly alarming. Families would be plunged into open hostility with each other; the ties of blood and kindred severed, and the peace and quietude of domestic life disturbed by an unworthy scramble for property. When the administrator proceeds to make distribution of the moneys in his hands, would it not be truly absurd to talk about ancestral and newly acquired estates? From the very nature of the thing, would it not be almost, or quite, impossible to ascertain the facts, or apply such a rule? The statute of New York, from which ours was taken, would, in the absence of any thing else, be decisive of this question, because it was framed and adapted to the descent of real estate alone.

But, if any thing further was necessary to produce complete conviction, it is to be found in the 20th section of our statute, which expressly declares, that the term "inheritance," as used in the act, should be understood to mean real estate. *Digest*, 439. This is a legislative declaration which, in plain language, excludes the idea that personal property was intended to be embraced in any other than the sections alluded to, and also negatives the idea that the terms, therein employed, were used in a mere popular sense. No construction is to be indulged that would produce absurd consequences, or avoid a part of a statute: both of which would happen, if

personal property should be held to be included in all the sections; whereas, by construing the 1st, 4th, 5th, 15th, 16th, 17th, and 18th, as alike embracing realty and personalty, and the others as extending to real estate alone, the whole statute has its proper effect, and each part may stand. And if there may be some omitted cases, or real and personal property may go to different persons, the remedy, for any supposed evil consequences, must be provided by the Legislature.

Now, under the statute of distributions, the half-blood are admitted equally with the whole-blood, for they are equally as near of kin. And so posthumous children, whether of the whole or half-blood, take equally as other children. 2 *Kent* 422, 424; 1 *Vernon* 437. Ever since the case of *Crooke vs. Watt*, 2 *Vernon* 124, it has been settled that, in the distribution of personal property, the half-blood should have an equal share with the whole-blood, as next of kin. *Smith vs. Tracy*, 2 *Mod.* 204; *Crooke vs. Watt*, *Shower's Parl. Cas.* 108. By the civil law, brothers and sisters of the half-blood are eqully next of kin with those of the whole-blood. A half-brother or sister, is of the blood of the intestate, because each of them has some of the blood of the common parent in his or her veins. *Gardner vs. Collins*, 2 *Peters* 87. This construction was put on the English statute of distributions more than a century ago, as appears by the case of *Crooke vs. Watt*, above cited, and has ever since been adhered to in England. The same construction appears to have been adopted in this country. *Gardner vs. Collins*, 3 *Mason* 403; *Hillhouse vs. Chester*, 3 *Day* 166; 2 *Yeates* 545; *Sheffield vs. Lovering*, 12 *Mass.* 490.

It follows from the premises, that Mrs. Marsh and Mrs. McGuire, sisters of the half-blood, and as next of kin to the intestate, are entitled *per capita*, share and share alike, to his whole personal estate, including slaves and their increase, to the exclusion of all other persons. And it necessarily follows, too, that no others than themselves, or those claiming in their right, could require an account for waste or mismanagement, or hold any one responsible in that regard. Manifestly, neither James Kelly, nor the

Eikelburner heirs, could be entitled to any relief whatever, as far as the personal estate is concerned, nor entitled to any account of it whatever.

We come now to enquire whether the conveyance, from Greenberry to James Kelly, was valid.

And first, it is to be observed, that the party to be charged in a contract, must not only express his assent that he will be bound, but he must be endowed with such degree of reason and judgment as to enable him to comprehend the subject. The assent, which is requisite to give validity to a promise, supposes a free, fair, and serious exercise of the reasoning faculty. *Chitty on Contracts* 134. The law presumes there is full capacity to contract, and mental incapacity forms an exception to the general rule; which must be shown by those who would set aside the contract. *Id.* 135.

It would be wholly impracticable to lay down any exact general rule as to incapacity to contract; because each case will be found influenced by its own peculiar circumstances. But it may be freely admitted that mere weakness of understanding, is not, of itself, sufficient to invalidate a contract, if the person is capable of comprehending the subject. The law does not seem to have attempted to draw any discriminating line by which to determine how great must be the imbecility of mind to render a contract void; or how much intellect must remain to uphold it. The difficulty of making such a discrimination, is apparent. *Jackson vs. King*, 4 *Cow.* 218.

While the solemn contracts between men, should never be disturbed on slight grounds; yet it may, perhaps, be assumed, as a safe general rule, that, whenever a person, through age, decrepitude, affliction, or disease, becomes imbecile, and incapable of managing his affairs, an unreasonable or improvident disposition of his property, will be set aside in a court of chancery. *In re James Barker*, 2 *John. Ch. Rep.* 232.

To analyze all the cases, on this subject, cited by counsel, would carry this opinion to an unreasonable length. The case of *Sears*

vs. Shafer, 1 *Barb.* 410, best accords with our idea of the true doctrine on this subject. If a contract is freely and understandingly executed, by a party, with a full knowledge of his rights, and of the consequences of the act, it must stand. This court disclaims all jurisdiction to interfere on account of the improvidence or folly of an act done by a person of sound though impaired mind. But, on the other hand, contracts have been set aside and cancelled, when want of consideration, or the improvident nature of the transaction has raised the presumption that fraud and misrepresentation were employed. *Shelford on Lunacy*, 267. When a gift is disproportionate to the means of the giver, and the giver is a person of weak mind, of easy temper, yielding disposition, liable to be imposed on, the court will look upon such a gift with a jealous eye, and strictly examine the conduct and behavior of the person in whose favor it is made, and if it can discover that any acts or stratagems, or any undue means have been used, to procure such gift; if it see the least speck of imposition, or that the donor is in such a situation with respect to the donee as may naturally give him an undue influence over him; in a word, if there be the least scintilla of fraud, a court of equity will interpose. 1 *Bro. Ch. R.* 560; 2 *P. Wms.* 208; 2 *Atk.* 325; 3 *P. Wms.* 130; 1 *Vesey Jr.* 19; 2 *Vernon* 189; 11 *Wheaton* 125; 1 *Barb.* 413.

Let us look, then, to the position of the parties and the circumstances of the case, and see whether any suspicious marks can be discovered, or any reasons exist why a court of equity should not lend its sanction to this contract; for, whoever sets up a contract, and invokes the aid of a court of equity to enforce it, must show that it is certain, fair, and just, and ought to be performed, or that the party should be enabled to reap the fruits it gives him.

The conveyance was made by Greenberry Kelly to James Kelly, his nephew, on the 20th of February, 1847, in consideration of love and natural affection, and purported to convey, without any reservation, all the real and personal property in Arkan-

sas or elsewhere, which had descended to the donor, or to which he was entitled, as the representative of his grandson, Clinton Kelly. The donor, at the time of this transaction, had passed the period usually allotted to human existence. He was in the last stages of second childhood, with his physical energies wasted, and his mental powers decayed. A century had passed over his head, and still he lived, as he had been living for at least twenty-five previous years—the recipient of the public bounty—an inmate of the poor-house—where, three months afterwards, he ended his long and profitless life. The hands of strangers smoothed his brow in death—the feet of strangers followed his remains to the grave. If he had not outlived his race, he appears to have outlived their affections.

Long before the execution of the deed, his memory was so impaired as to render him unconscious of events, and he appears to have been as ignorant of what was going on in the world, as if he had not existed at all. In stirring political times, when taken to the polls, to exercise the right of suffrage, he could not retain the names of candidates for whom he was expected to vote, although repeated to him over and over again, or, as one of the witnesses expressed it, repeated "an hundred times." It is true that the boisterous and riotous scenes of his early manhood shed their light, like a dim taper, on his memory, thus affording, perhaps, the strongest evidence of his old age. It is a wise dispensation that those, who are no longer capable of mingling in the active scenes of life, or appreciating its enjoyments, should not also be deprived of the happiness, incident to longevity, of reperusing the volume of earlier life.

He was, undoubtedly, a very infirm and feeble old man—usually in bed—had been afflicted with general palsy for at least twenty-five years—was partially deaf—had been an intemperate man—would become intoxicated whenever opportunity offered—had been a county charge and under the control of keepers for about thirty years—was never known to have property; transact business, or make contracts—was indifferent to property, and in-

capable of managing or taking care of it. Surely, such a man must be the prey of the artful and designing, and is a fit subject of guardianship in a court of chancery. Indeed, the mind is shocked at the idea that such a man could understandingly dispose of a large estate, in a foreign jurisdiction.

These deductions will be found fully warranted by the evidence; and this, also, to have been the condition of the donor.

On the other hand, James Kelly, the donee, had hardly passed the prime of life, was a shrewd, enterprising, business man, strong minded, far seeing; and who had amassed a large fortune in trading and trafficking in the southern States. He was well calculated to have influence over a man in the condition of Greenberry Kelly, and seems not to have been over scrupulous in its exercise for the benefit of himself. He seems to have coolly calculated the prospect and chances of the death of Clinton Kelly, and to have kept an eagle eye on the property of the latter, until he acquired it by the deed in question.

These were the parties to the deed. The deed itself was drawn up by counsel employed and paid by James Kelly, was produced at the poor-house by him; the persons who witnessed it, went there at his instigation; it was read over—the old man was propped up in his bed—his hand steadied to enable him to make his mark—and, when accomplished, the centenarian sunk back on his pillow into the lethargy from which he was roused—the company collected for the occasion departed—the doors of the poor-house closed, and uncle and nephew saw each other no more.

To this instrument, there was four subscribing witnesses. Subscribing witnesses, it is said, are placed around a testator to ascertain and judge of his capacity. 3 *Mass.* 237, 330; 4 *Mass.* 593. Their attention is supposed to be directed to that point, and they may give their opinions in respect to the sanity or capacity of the testator. 1 *Greenl. Ev.* 440. James W. Bullock, who took the acknowledgment and subscribed as witness, after detailing the facts, gives it, as his opinion, that the conveyance was of very little value; meaning, as we understand it, that the capacity was

wanting. Wade B. Hampton, keeper of the poor-house, another subscribing witness, after adverting to various facts and circumstances, states his opinion to be, that a man of Greenberry Kelly's age, and as low as he then was, was not capable of making a contract. The other two subscribing witnesses do not establish the capacity to do the act, to our satisfaction.

The witnesses, who testify as to the incapacity of Greenberry Kelly, are about equal in number to those who speak as to his capacity; but we found our judgment on facts, circumstances, and acts detailed by the witnesses—holding, at the same time, opinions to be competent, in all cases where the object is to prove capacity or incapacity to make a contract, when the facts or circumstances are disclosed on which the opinion is founded. There are strong reasons for it. Human language is imperfect, and it is often impossible to describe, in an intelligible manner, the operations of the mind of another. We learn its conditions only by its manifestations, and these are indicated not alone by articulate words, but by signs, gestures, conduct, the expression of the countenance, and the whole action of the man. Nor is there any danger from such opinions, when the reasons for them are disclosed. The value and force of the opinion depend on the general intelligence of the witness, the grounds on which it is based, the opportunities he had for accurate and full observation, and his entire freedom from interest and bias. *Culver vs. Haslam*, 7 *Barb.* 321; *Clary vs. Clary*, 2 *Iredel* 78; *Wheeler vs. Alderson*, 5 *Hagg. Eccl. Rep.* 574, 604, 605; *Rambler vs. Tryon*, 7 *S. & R.* 92.

The instances, in which opinions are competent, are admirably and succinctly stated by professor GREENLEAF, in his treatise on Evidence. 1 *Vol.*, *sec.* 440; 13 *Barb.* 550.

It is worthy of reiteration, that James Kelly employed an attorney to draw the deed, and the donor, as we think, neither saw nor knew any thing of it until it was presented for execution. It was read over merely, but the effect of it was not explained; nor does it appear that the donor had any accurate conception of

of the value of the estate he was conveying, or the extent of his own right.

We have not overlooked the fact that one of the witnesses, J. J. Ashley, a relative of James Kelly, and subscribing witness to the deed, undertakes to show the contrary, by mentioning an inquiry made by the old man of James Kelly, when they all went into the room to execute the instrument, as to whether the deed produced was the one he, the old man, had requested James Kelly to have prepared; to which the latter, according to the statement of this witness, replied that it was. Now, other witnesses present, having equal opportunities of seeing and hearing all that transpired, heard no such inquiry or response, and they state there was no conversation on the subject before the execution of the deed. This witness too, after having made himself active in the service of James Kelly, in hunting up witnesses, and discovering testimony to sustain the deed, deliberately swears that he was indifferent in his feelings, and would as soon one party should succeed as the other. It is too plain to be questioned that he testified under a strong bias. This is manifest from his deposition, and no great degree of reliance is to be placed on his testimony, when opposed by many disinterested witnesses.

It is inferrible from the testimony, that, at previous periods, Greenberry Kelly had a vague idea that Clinton Kelly was rich; but if he knew or could recollect it at the time, it falls far short of that knowldge of the subject matter, which the law requires to render a contract valid, when executed under suspicious circumstances.

In short, after a careful examination of all the proof and circumstances, we cannot bring our minds to believe that he was in a condition to know, or had the capacity to comprehend the value of the estate, or the nature or extent of his rights, by any explanation that could have been made, and much less that he understood them from a single reading of a legal instrument.

The fact of a voluntary deed having been prepared by, or at the instance of the party, who takes a benefit under it, is gene-

rally considered a suspicious circumstance and raises a presumption of fraud, (*Shelford* 271; *Owen's case*, 1 *Bland's Ch. R.* 370; *Sears vs. Shafer*, 1 *Barb.* 415), and it is incumbent on a party, who sets up such a conveyance, especially when executed under suspicious circumstances, to show affirmatively that the transaction was fair and honest. *Sears vs. Shafer*, 1 *Barb.* 409.

Lord COKE, in enumerating the four different classes of persons deemed in law *non compos mentis*, puts in the second, a man who was of good and sound memory, and has lost it. *Beverly's case*, 4 *Co. R.* 124; *Co. Litt.* 247 *a.*

If a person, although not positively *non compos*, or insane, is yet of such great weakness of mind, as to be unable to guard himself against imposition, or to resist importunity or undue influence, a contract, made by him under such circumstances, will be set aside. And it is not material from what cause such weakness arises. It may be from temporary illness, general mental imbecility, the natural incapacity of early infancy, the infirmity of extreme old age, or those accidental depressions which result from sudden fear, constitutional despondency, or overwhelming calamities. And although there is no direct proof that a man is *non compos*, or delirious, yet, if he is of weak understanding, and is harrassed and uneasy at the time; or if the deed is executed by him *in extremis*, or, when he is a paralytic, it cannot be supposed that he had a mind adequate to the business which he was about; and he might be very easily imposed upon. 1 *Story's Eq.* 234; 1 *Fondbl. Eq. b.* 1, *c.* 2, *s.* 3. STORY lays it down, as a doctrine well established by authority, and as generally true, that the acts and contracts of persons who are of weak understanding, or who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justifies the conclusion that the party has not exercised a deliberate judgment, but has been imposed upon, circumvented or overcome by cunning, or artifice, or undue influence. 1 *Story's Eq.* 238; 1 *Bro. Ch. Rep.* 560, 561.

Without attempting to decide, on the present occasion, what

exact degree of imbecility will vitiate a contract, we find no difficulty in saying that we cannot bring ourselves to believe that this conveyance was freely and understandingly executed by Greenberry Kelly, with a full knowledge of his rights, and the consequences of the act. The fact that he assigned a valuable estate, without making the slightest provision for himself, and when he so much needed it; the fact that he was a passive instrument in the hands of the man who received the bounty, and to whom he was under no obligation; the fact, amply proved, that he was incapable of managing his affairs, or making contracts, stamp this conveyance as one which no man, in the possession of his faculties, would make on the one hand, and no fair man would accept on the other. 2 *Vesey Sen.* 155.

If such a deed could stand, we can hardly conceive of a case where a court of chancery would interfere to protect the feebleness of old age, or guard it against fraud and imposition.

This conveyance ought to be set aside and cancelled, and, as neither James Kelly nor his representatives show any right, otherwise than by the conveyance, it follows that their bill was properly dismissed, and the relief prayed by them denied.

The next question is, whether the descendants of Mary Eikelburner can inherit from Clinton and Greenberry Kelly. And this depends on the fact whether she was his legitimate daughter.

Hearsay, or, as it is generally termed, reputation, is admissible in all questions of pedigree. And the phrase, "pedigree," embraces not only descent and relationship, but also the facts of birth, marriage and death, and the times when these events happened. The entry of a deceased parent, or other relative, made in a Bible, family missal, or any other book, or document, or paper, stating the fact and date of the birth, marriage, or death, of a child or relative, is regarded as the declaration of such parent or relative in a matter of pedigree. Correspondence of deceased members of the family, recitals in family deeds, descriptions in wills, and other solemn acts, are original evidence, where the oral declarations of the parties are admissible. Inscriptions

on tombstones, and other funeral monuments, engravings on rings, inscriptions on family portraits, charts of pedigree, and the like, are also admissible, as original evidence of the same facts. 1 *Greenl. Ev.* 103, 104, 105; *The Berkley Peerage Case*, 4 *Campb.* 401, 418; *Jackson vs. Cooley*, 8 *John.* 128, 131.

Probably the only exceptions to the rule arise in prosecutions for bigamy, and in the civil action for criminal conversation. In these cases, from the very nature of the issue, an actual marriage must be established, and reputation will not suffice. 7 *John.* 314; 4 *Burr.* 2057, 2059; *Doug.* 171; 1 *A. K. Marsh.* 331; 3 *Phil. Ev., note* 782, *page* 1147. Declarations of members, or relatives of the family, or general repute in the family, are good evidence to establish marriage, death, birth, heirship, and the like, and may be proved by others as well as surviving members of the family.

It would serve no useful purpose to reproduce, in this opinion, the testimony on this point, but it will suffice to state its effect.

It is proved, by the repeated declarations of Greenberry Kelly, running back thirty or forty years, that he was married in Pennsylvania, and by that marriage, had two children, Charles and Mary; that he separated from his wife in Chilicothe, Ohio, she remaining there and keeping the daughter Mary, and he emigrating to Clark county, Kentucky, and taking with him his son, Charles. He always recognized these as his legitimate children; they recognized him as their father, and recognized each other as brother and sister. The marriage, and legitimacy of these children, were spoken of and known in the family, and no doubt was expressed as to the one or the other. In the community, they were received and regarded as the lawful children of Greenberry Kelly, by a lawful marriage.

Considering the great lapse of time, and the fact that the parties were in the humbler walks of life, it would not be expected that any better evidence could be produced; and, indeed, it is matter of surprise that such an amount of it has been brought forward, sufficient at least to prove the marriage of Greenberry Kelly, and

the legitimacy of Charles Kelly and Mary Eikelburner, as his children. On these points, we entertain no doubt.

Greenberry Kelly having inherited one-half of the realty from his grandson Clinton, as his lineal heir, and having died intestate without making any valid disposition of it, and Mary, his daughter, who inherited the other half, as paternal aunt, having died before him leaving children, the entire estate went to those children who were living, and to the issue of such as were dead, *per stirpes*, under the statute of descents.

It is proved that Mary Eikelburner and Jacob Eikelburner intermarried; that they removed to Naples, in Illinois, in 1831; and both died within a few days of each other, in 1833 or 1834, leaving as children then surviving, as follows: *First*, Louisa McKee, wife of James McKee, who died without issue, in about 1836, and he about 1838; *second*, Martin Eikelburner, who died, in 1839 or 1840, leaving a wife and only child, a son named William Eikelburner. The widow married a Mormon, named Weaver, and has since died; *third*, Frances Nutt, wife of John F. Nutt, of the State of Ohio; *fourth*, Martha Ann Cobb, wife of Orrin Cobb, of Pike county, Illinois; *fifth*, Mary Jane Puttz, wife of Abraham Puttz, also of Pike county, Illinois.

William Martin Eikelburner, Frances Nutt, Martha Ann Cobb, and Mary Jane Puttz, the first, the great grandson, and the others, the grand-daughters of Greenberry Kelly, were his heirs, and inherited the portion of the real estate, *per stirpes*, which had ascended to him from his grandson, Clinton Kelly, as well as the portion that had ascended to their ancestor, Mary Eikelburner.

It appears, by the pleadings in the cause, that, by deed bearing date the first day of May, 1846, from John F. Nutt and Frances, his wife, to Edwin R. McGuire, for the condsideration of $1,800, the latter succeeded, by purchase, to the rights of Nutt and wife in the estate.

The other heirs filed their cross-bill, claiming the whole real and personal estate, except the part conveyed and assigned to McGuire; and prayed, among other things, that their title to the

estate might be established, confirmed and quieted, and a partition and division be had, between them and the assignee of Nutt and wife, according to their respective interests, and that if division could not be equitably and fairly made, that the property be sold and the proceeds divided, and the conveyance to James Kelly be brought into court and cancelled; that a receiver be appointed, to take charge of the lands and slaves, and for general relief.

Now, for reasons already suggested, they had no claim to the personal estate of Clinton Kelly, and consequently, were not authorized to call any one to account in respect to it; and, so far as that was concerned, the relief asked was properly denied. But, as to the real estate, a partition thereof should have been decreed according to the prayer of the bill, giving one-fourth to each one of the heirs above named, and one-fourth to the above named assignee; and commissioners should have been appointed, and the division made according to law and the rules and practice of a court of chancery. And if partition could not be made, without great prejudice and injury to the owners, to decree the sale thereof according to law.

John Ringgold, administrator of Charles Kelly, and Joseph H. Egner, guardian of Clinton Kelly, filed pleas supported by answers, averring, in substance, the final settlement and confirmation of their accounts as administrator and guardian, respectively, by the probate court; that there was no fraud therein, and prayed the benefit thereof in bar of the relief sought against them by Kelly's heirs, and the Eikelburner heirs.

These pleas appear to have been set down for argument, and to have been disallowed, and no further steps taken with regard to them. It is said that the effect of overruling a plea, is to impose upon the defendant the necessity of making a new defence. This, the defendant may do either by a new plea, or by an answer, and the proceedings upon the new defence will be the same, as if it had been originally made. 2 *Daniell's Ch. Pr.* 802. And, after a plea has been overruled, the same defence may be

insisted on by way of answer. *Goodrich vs. Pendleton*, 4 *Johns. Ch. R.* 549.

But we shall not find it necessary to make any inquiry as to the sufficiency of the pleas, or the action of the court upon them, because, as already stated, the subject matter to which those pleas related, was one in which James Kelly, nor his representatives, nor the Eikelburner heirs, had any interest.

Mrs. Marsh and Mrs. McGuire, who succeed to the whole personal estate and slaves of Clinton Kelly, *per capita*, are the only persons, who had the right to call for account in respect to that property. They have not complained, nor asked for an account, nor attempted to surcharge or falsify the settlements made by either Ringgold or Egner.

Every case in chancery, when it comes to a hearing, should be so fully prepared as to enable the court to render a final decree as to all parties, and all interests involved, and thus put an end to litigation speedily. In this, the object of all appears to have been to try the question as to who would take the personal, and who inherit the real estate; losing sight of details of some importance, and thereby protracting litigation, and imposing additional labor on this court.

Every case brought into the appellate court, should be so perfect in preparation, as to enable us to render such decree as the inferior court should have rendered, and so as to fully adjust the rights of litigants.

It appears that Edwin R. McGuire was appointed receiver in the case, on the 2d of June, 1848, to safely keep the property in litigation, and hold the same subject to the order and decree of the court, and entered into bond with security, in the sum of $8,000, conditioned for that purpose, payable to the lawful heirs of James D. W. C. Kelly.

A receiver is an officer and representative of the court, and subject to its orders, and is, at all times, entitled to its advice and protection. 3 *Daniell* 1949; *Cammack vs. Johnson*, 1 *Green Ch. R.* 163, 173. Property placed in the hands of a receiver, is con-

sidered as in the custody of the court. The possession of the receiver is that of the court, and any attempt to disturb it, without leave of the court first obtained, will be a contempt on the part of the person making it. 3 *Daniell* 9; *Vesey* 335; 8 *Paige* 388; 2 *Story's Eq.*, *sec.* 833 *a*, 833 *b*; 7 *Paige* 513.

Now, before the final decree, the court should have required the receiver to report his actings and doings under his appointment; and to render an account according to the usages and practice of a court of chancery. And this was necessary to ascertain the condition of the property placed in his hands; and how he had discharged the trust; and to enable the court, in its final decree, to settle the rights and do justice to all the parties in a conclusive manner.

The decree of the court is silent on that subject, thus leaving the property in litigation where it had been placed, and making no disposition of it. In that, the decree falls short of doing justice to those entitled to the property. It was surely important for the court to have had accounts taken; to have had the administratorship of Clinton Kelly, which had been brought into the Circuit Court by this proceeding, adjusted and settled, and distribution made to Mrs. Marsh and Mrs. McGuire; and also to have decreed a partition of the real estate, which Clinton Kelly owned or possessed at the time of his death, as prayed by those heirs in their cross-bill.

If the record contained the requisite facts and information, upon which this court could render such a decree, it would proceed to do so without hesitation. To attempt it, however, we would run the risk of doing injustice to some, and falling short of the measure of justice to others. All we can do, is to express our views; remand the cause, with such directions as will most probably enable this whole controversy to be finally settled between the parties litigant, according to the principles of equity, and right, and justice.

On the whole case, we are of opinion that, so much of the de-

cree as dismisses the bill and amended bill of James Kelly, ought to be affirmed with costs.

The decree, dismissing the cross-bill of the Eikelburner heirs, is erroneous, and must be reversed with costs, and the case be remanded, with the following directions:

First, That Edwin R. McGuire, the receiver in the case, be required to account as to the property placed in his hands, in such manner as to the court shall seem equitable and just, and required to surrender the same for the purpose of division and distribution.

Second, That the administratorship of James De Witt Clinton Kelly, be adjusted and settled finally, and that the slaves, moneys, assets, and all his personal property, be distributed, equally, share and share alike, to the said Elizabeth and Emeline, half-sisters of said James De Witt Clinton Kelly, in such manner as shall be just and equitable, and legal, and that this be speedily done.

Third, That all the real estate, of which James De Witt Clinton Kelly died possessed, or of which he was owner, or to which he had title, mentioned in the pleadings in this cause, be divided, and partitioned by decree into four parts, according to the prayer of the cross-bill of Cobb and wife, and others, one part to Martha Ann Cobb, one part to Mary Jane Puttz, with their husbands; one part to William Martin Eikelburner; and one part to Edwin R. McGuire, as assignee of John F. Nutt and Frances, his wife, and that their title be quieted, and that they hold as tenants in common.

Fourth, That, if division and partition cannot be made without prejudice to said heirs, that the court decree a sale according to law.

Fifth, That the deed of conveyance from Greenberry Kelly to James Kelly, dated 20th of February, 1847, be canceled and declared void.

A decree will be entered in this court, carrying out the above directions according to law and equity, and the court below will proceed in the case in a speedy manner, and not inconsistent with this opinion.

STATE, USE OF JONES, WOODWARD & CO. VS. BORDEN ET AL.

Where a sheriff sells property, levied upon under an execution, and the purchaser refuses to pay the money bid, it is not such a sale, within the meaning of *sec.* 70, *chap.* 67, *Dig.*, as would make the sheriff responsible for the amount.

A sheriff is not responsible, as for neglect or refusal to make sale of the property levied upon under execution, where, by his return, it appears that he had not time to sell on the day appointed by law for making sales, because other sales required by law to be made on that day, consumed the whole time within which sales may lawfully be made.

An officer derives his power to levy upon and sell property from the judgment and the writ, and a sale, after the return day of the writ, would be void.

Appeal from Pulaski Circuit Court.

Hon. WM. H. FEILD, Circuit Judge.

CURRAN & GALLAGHER, for the plaintiff, cited *sections* 68, 69, 70, 54 *and* 55, *ch.* 67, *Dig.*, and contended that it was the duty of the sheriff to have struck off the property for cash, and required the same to be paid, and as, in this case, he saw fit to strike off the property without requiring cash to be paid down, he is liable to the plaintiff, as he thereby saw fit to assume the payment of the amount bid, and it was a satisfaction of the execution. See *Simmons vs. Bradford*, 15 *Mass.* 83; 7 *D. & C.* 370; *Lyman vs. Lyman*, 12 *Mass.* 319.

When the sheriff chose to allow the time of sale to elapse, without requiring the cash of Beebe, for his bid, and thereby deprived plaintiff of his remedy, he assumed the debt, or the amount bid, and cannot set up, as a defence, that the defendant in the execution had no title to the land.

The statute prescribes that lands be sold under execution on the 1st day, and that the execution be made returnable on the 2d day of the term: (*Dig.*, *ch.* 67, *secs.* 9, 52); and a sale made after the return of the writ would be void. 7 *Eng.* 554, 555; 4 *Sm. & Marsh.* 631.

The return of the sale of the property, was a satisfaction of the judgment; and no other execution could have been issued: it follows then that the sheriff is liable, as he ought to have received the amount of the bid either from Beebe, or have re-sold the property—the plaintiffs have no recourse against the purchaser.

PIKE & CUMMINS, for the defendants. If the sheriff had *no time* to sell on the first day of sale, after Beebe refused to pay his bid, and no power to sell afterwards, he was not bound to do any thing at all afterwards. And as the plaintiffs have chosen to allege that he *did* make the money, they must abide by their allegation, and cannot recover, unless he did actually make it. *Taylor et al. vs. The County of Pulaski*, 4 *Ark.* 596.

It is very clear that if a sheriff, on an execution against B, take the property which belongs to A, he is a trespasser. 2 *Pick.* 121; 1 *Mass.* 530; 17 *ib.* 244; 2 *A. K. Marsh.* 268. And the owner of the property may waive the trespass, and bring his action for the money, which the goods sold for. *Lindon vs. Hooper*, *Cowp.* 419. And justice and common sense would seem to teach that he could not *also* be liable to an action for the money. It is well settled, *that he may retain the proceeds in his own hands*, as an indemnity against his liability to the rightful owner, where he has sold the property. *Payne vs. Fershaw*, *Harper* 275; *Bruton vs. Cannon*, *ib.* 389; 6 *Greenl.* 28; 16 *Pick.* 556.

The plaintiffs were not precluded from any further attempt to enforce their judgment by execution. They were entitled to bring an action, in the name of the sheriff, against Beebe, for the money bid, or, if they prefered, to cause a re-sale by *vend. ex.*

Mr. Justice WALKER delivered the opinion of the Court.

This was an action of debt, against William B. Borden and his securities, on his offical bond as sheriff.

The first breach states that, on the 26th of June, 1843, Jones and Woodward obtained judgment in the Pulaski Circuit Court against James C. Anthony for $600 debt, $66 66 damages and costs: that, on the 11th September, 1843, *fi. fa.* issued, returnable November 28th, 1843, and was levied on certain lands and returned without sale, and unsatisfied: that, on the 1st October, 1844, a *vend. ex.* issued and came to the hands of Borden, then sheriff, ordering sale of the land levied on, and for want of sufficiency of such property further to levy, and that under that writ he made the full amount of the debt, damages and costs, and had failed to pay over the money.

The 2d breach, after a like recital, avers that, at the return day, Borden, as sheriff, *certified and returned* that he had, by virtue thereof, sold property to the amount of $1026, and avers that he had not paid over the money.

The 3d breach states the same judgment, *fi. fa.* levy, and *vend. ex.*, and then sets out the return of Borden; which was, that he made further levy on two negroes, and advertised the land and the negroes for sale, and offered them for sale on the 21st April, 1845; that Roswell Beebe purchased lots 7, 8, 9, 10, 11, and 12, in Block No. 2, for $1026, which bid he refused to pay; that the matter being before the court, he so returned for its decision, that he employed all the time, between 9 A. M. and 3 P. M., and could not sell the land as mentioned and described within the hour of 3 P. M. having arrived before he reached them on his sale book, and that F. W. Trapnall bought the negroes for $40, which was applied on certain specified older executions: that there was no other property, and so the writ returned unsatisfied, and so the plaintiff proceeded to aver that, by this return, the judgment was satisfied, Jones and Woodward deprived of the right to further execution, and the debt, &c., lost to them.

The 4th breach is the same, only averring hindrance and delay by reason of such return.

Issues were taken upon the 1st and 2d breaches, which we will consider after we have settled the law arising upon the demurrer to the 3d and 4th breaches, which was sustained.

The special causes of demurrer were; 1st. That neither breach shows any cause of action; 2d. That each shows that Borden had no power to execute the writ; 3d. That neither of the breaches contains any allegation that the return is untrue; and, if true, then there is no cause of action.

The first and third grounds raise the same question, and indeed the main question in the whole case: and the determination of the sufficiency of the 3d breach will be conclusive of that arising upon the fourth.

The truth of the facts returned by the sheriff is not controverted, and the question is, does the return excuse the sheriff for not having the money bid for the property before the court?

The plaintiffs rely upon the following provisions of the statute, as fixing the liability of the sheriff. By the statute, *Dig.*, *Ch.* 67, *page* 506, it is enacted: "If any officer to whom any execution shall be delivered, shall neglect or refuse to execute or levy the same according to law, or shall take in execution any property, or if any property shall be delivered to him by any person against whom an execution may have been issued, and such officer shall neglect or refuse to make sale of the property so delivered, according to law, &c.; in any such event, such officer shall be liable and bound to pay the whole amount of money in such execution specified, or thereon endorsed and directed to be levied."

Sec. 69 provides, that "If such officer shall not, on the return of any execution, or at the time the same ought to be returned, have the money which he may have become liable to pay as aforesaid, and pay the same over according to the command of the writ, any person aggrieved thereby, may have his action against the officer, and his securities upon his bond, &c."

Sec. 70 provides, "If any officer sell any property under any execution, whether he receive payment therefor or not, or shall receive the money in any execution specified or thereon endorsed and directed to be levied, or any part thereof, and shall not have the amount of such sale, or the money so made before the court, and pay over the same according to law, he shall be liable to pay the whole amount, &c."

The questions presented are, was there a sale of the property by Borden to Beebe; if so, then no matter whether he received the money bid or not, he was clearly liable to pay it over under the provisions of the 70th section: or if after the levy he refused or neglected to sell the property levied upon, then he would be liable under the 67th section.

First, then, was the property sold? That it was offered and struck off to Beebe is admitted; but as he refused to pay his bid, was it a sale of the property? If so, then, the purchaser would acquire property which he had never paid for, the sheriff would become the guarantor for the payment of the money, and would be left to his recourse against the purchaser to make it out of him, if he could? Such never was intended by law to be his liability, nor is such the effect of a bid unpaid, as is manifest from the 53d section, which declars that, "if any person shall refuse to pay the amount bid for any property struck off to him, the officer making the sale, may again sell such property to the highest bidder, and, if any loss shall be occasioned thereby, the officer may recover such loss by action against the first bidder, &c." Under this section, the first bidder, by failing to pay the sum bid, forfeits it, and acquires no interest whatever in the property, as held by this court, in the cases of *Newton vs. State Bank*, 14 *Ark.* 15, and *The State vs. Lawson, sheriff*, 14 *Ark.* 118.

There was, then, no sale of property in this case, and the next question is, did the sheriff neglect or refuse to sell the property levied upon?

This is a matter of fact, to be determined by the return itself, under the issue formed; because, if untrue, the sheriff's liability

would have arisen upon a count for a false return, in which case, the truth of the facts stated in the return would have been put in issue; but, in the case before us, the only question is, taking the return as true, is the sheriff guilty of neglect for not selling the property? He states that he had not time to sell on the day appointed by law for making sales, because, after once offering it for sale, other sales, required by law to be made on that day, consumed the whole time within which sales may lawfully be made; and this return we have held to be sufficient to execuse the sheriff from neglect in not re-selling the property, after the first bidder had failed to pay his bid. *Newton vs. State Bank*, 14 *Ark.* 15. It is not to be expected of a sheriff, who has a number of sales to make within a few hours, that he shall stop selling, after an item of property is sold, until the money is paid for it, and if not, to set it up again for sale; but his duty must be performed with due regard to all the interest committed to his care on that day, and if he really had not time to re-sell the property, no one should be allowed to hold him chargable with *neglect* of official duty.

The next question is, when then should he have sold the property so levied upon? In *Newton vs. The Bank*, we held a sale under the same writ, made on the second day of the term of the court to which the writ was made returnable, even though erroneous and perhaps reversible upon error for that reason, not to be void, and that a sale on that day, the writ still being in force, would communicate title in the property to the purchaser. But we did not decide, in that case, that the sheriff was bound to sell on that day. And, after that time, his power to sell under the writ, ceased. An officer derives his power to levy, and sell property (particularly real estate) from the judgment and the writ, not from the statute; *Whiting & Slark vs. Beebe*, 7 *Eng.* 554; and although there are some authorities, which would seem to sanction a sale of personal property, which had previously been levied upon, after the return of the writ, without a *ven. ex.*, the better rule seems to be to require the officer to act under

authority of a writ, both in making the levy and the sale. *Whiting & Slark vs. Beebe.* The effect of the return made by Borden, on the writ in this case, was to leave a subsisting levy to be disposed of by sale upon further process for that purpose, and, with his return thus made, his liability, under that process, ceased; and if the plaintiffs had desired to pursue their remedy upon the judgment to final satisfaction, they could only do so by an alias writ to sell the property levied upon. The subsequent sale of the real estate, made by Borden, without a writ, was no disposition of the property. His acts, without process, were void, and in no wise tended to satisfy the judgment.

If, upon a re-sale of the property, it should sell for less than it was bid off at, in the first instance, the statute provides a remedy against the first bidder for the deficit. This remedy is a just punishment upon an intermeddling bidder, who declines to make good his bid, and is at the same time important to both the debtor and the creditor: but this redress, such as it is, is given against the bidder alone. If the money is not made out of his estate, there is no responsibility resting upon the sheriff to pay it; nor is he bound to advance it, in the first instance. The recovery, in fact, is one by the debtor and creditor, for although, under the statute, the suit is brought in the name of the sheriff, he is evidently but a nominal party, and it is even doubtful whether he is responsible for costs: but of this, we are not, at present, to consider.

From the view thus taken of the legal liability of the sheriff, it follows, that the demurrer to the 3d and 4th breaches, was properly sustained; and, if sustained upon the ground that the return which was set out in the breach, was not sufficient to charge the sheriff, it follows, that it was a good defence to the 1st and 2d breaches; and, consequently, the 2d plea of defendant to these breaches, was properly held to be good.

The remaining question of law is that arising upon the demurrer to the plea averring that the property, levied upon and sold by the sheriff, did not belong to Anthony, the defendant in execution.

This question would have been properly before us for consideration, if, in fact, a sale of the property had been made; but, as we have held, that a sale without a writ was void, it follows that no title whatever passed; and it becomes unnecessary to determine to whom the property belonged, or whether, if sold, the sheriff might withhold, from the plaintiff, the money for which the property sold, upon the ground that the property in fact belonged to a third person.

It may not be amiss, however, to remark that there are strong reasons for sustaining the plea. If personal property, the sheriff would be liable to an action of trespass for taking it; and should a recovery be had against him by the owner of the property, if remaining unsold, the property would become his, because the payment of the damages would be all that the owner could recover. Suppose this to have taken place after levy, and before a sale of the property, it could hardly be said that the sheriff, because, by mistake he had levied upon the property, should be compelled to follow up his levy and sell property which he had paid for out of his own pocket, and which was in law his, and apply the money to the satisfaction of the execution; and if not before sale, after the sale, as he is still liable ever to the true owner of the property, it would seem but just that he should be permitted to show the fact that the property was not the defendant's, in order that he might retain the money as an indemnity against loss, if sued for the property, or for the money for which it was sold, either of which might be done. *Ineden vs. Hooper*, *Cowp.* 419; *Walcott vs. Pomeroy*, 2 *Pick.* 121; *Owing vs. Friar*, 2 *A. K. Marsh.* 268.

But, as this question is not properly presented upon the record, after the disposition made of the other questions of law, we will express no definite opinion upon it.

The only important question involved was as to the liability of the sheriff upon his return, which, under the issue formed, must be taken as true, and that we have already decided. Let the judgment be affirmed.

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THE STATE VS. FAIRCHILD.

The legislature can pass any law, not prohibited by the legitimate operation of any of the limitations imposed upon it by the powers delegated to the federal government, or by the restrictions in the constitution.

The act, approved the 15th January, 1855, establishing a separate Chancery Court for the county of Pulaski, declared to be constitutional.

A writ of *quo warrante* was issued, upon the motion of the Attorney General, against the defendant, to show by what authority he exercises the office of chancellor, and assumes to exercise a separate chancery jurisdiction, aside and apart from the Circuit Court, in and for the County of Pulaski. The defendant filed his response, setting out the act of the General Assembly, establishing a Chancery Court of said county, his nomination to and confirmation, by the Senate, as chancellor of such court, and his commission and oath of office. The State demurred to the response, and the defendant joined in the demurrer.

Mr. S. W. WILLIAMS, Attorney General, for the State.

Mr. HEMPSTEAD and Mr. WATKINS, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

The issue upon the demurrer to the response of chancellor Fairchild, presents the question whether or not the act of the Legislature, approved the 15th of January, 1855, in its provision for establishing a separate court of chancery, at the seat of government, and for the appointment of a chancellor to preside therein,

is constitutional. No other question has been discussed, or seems to be involved, and to the solution of this, as best we may, we shall at once proceed.

No one, it is presumed, will doubt but that this, like those of all the sister States, is a government of delegated and limited powers. Some of these limitations pervade the entire government throughout each of its departments in detail; while others restrict only a particular department, or one or more of its details only. They result, for the most part, from the powers delegated by the people of this State to the Federal Government. From our bill of rights, and from provisions of other portions of our written constitution, with these limitations upon its authority, the Legislature is the great residuum of the sovereign powers entrusted to the Government; and, consequently, can pass any law not prohibited by the legitimate operation of any of these limitations. If all the provisions of the constitution relating to chancery and corporation courts were expunged from that instrument, and the remainder retained, there would unquestionably be strong ground upon which to maintain a negation of any power in the Legislature to establish any court of either class; because, in that case, the entire judicial power would seem to have been permanently vested in courts that had been, in express terms, created by the constitution; in which also corresponding provisions for the appointment of all the appropriate officers had been made. But when, on the contrary, there is, in connexion with those, the express provision that "The General Assembly may also vest such jurisdiction as may be deemed necessary in corporation courts, and when they may deem it expedient, may establish courts of chancery;" (*Art. VI, sec.* 1,) and that, "Until the General Assembly shall deem it expedient to establish courts of chancery, the Circuit Court shall have jurisdiction in matters of equity, subject to appeal to the Supreme Court in such manner as may be prescribed by law," (*sec.* 6) there would seem to be no ground at all upon which to doubt the power of the Legislature in question, to be exerted whenever they may deem it

expedient. For these provisions express, in very distinct terms, the affirmative of the proposition.

It will doubtless be conceded that no limitation to the power thus affirmed can be found to have resulted from any delegation of powers to the Federal Government from the people of this State, that would not equally apply to every action of our people in convention, in reference to the establishment of a State government. And a like concession will be made as to any that could result from any of the primeval objects of human government, which were too palpable and self-evident even to have a place in a bill of rights, and are therefore supposed and taken for granted in every move for the establishment of a government by a free people. Hence the only limits to the power in question, in the aspect in which it is presented to us, is to be found in our bill of rights and other provisions of the constitution. And as to the bill of rights, it may be safely affirmed, that the extent of limitations is not beyond the measure that was practically illustrated by the convention, in the creation of the courts that were ordained by that body, and cannot be so great, in one respect at least, because the right of trial by jury has never been construed under like circumstances, to have any reference to proceedings in chancery.

Further limitations, then, upon this affirmed power, if any exist, are to be sought only in other provisions of our constitution, either in themselves or in their legitimate results. Of the former, none have been suggested or are known to us. Of the latter, all that have been urged, are referable to a single head, to wit: inequality of benefits, and inequality of burthens. It being insisted that equality of benefits and of burthens, as a pervading element, is diffused to every fibre of our government: and doubtless this is true as to its aims and objects; but these are human, and are sought to be effected by human means. And if completeness is to be the measure of this inequality, and the fruits of human government the proof, such aims are utopian, but still worthy of the best efforts of the enlightened patriotism of the

age, that approximation may still progress. So, if approximation to this designed equality of benefit and burthen, is to be the test, unless some measure for it be fixed by the constitution, in some tangible landmarks, that will perform the double office of a standard for its ascertainment, and a limitation upon the legislative power on the subject, there can be no test by which to determine the constitutionality of legislation involving any question of equality or inequality of benefit and burthen.

It has been urged that such a tangible landmark can be found in the political truth, that must have been in the view of the convention, that justice can be best administered in a system embracing numerous courts, so arranged that every citizen should have convenient access to justice, and that the system of common law courts illustrating this truth as conceived by the convention, so far as practicable, or at least so far as indicated by the temporary investment of the chancery powers by that body, should be regarded as this tangible landmark to perform this double office. Whether this be so or not, it is not necessary for us to determine, because the facts of this case present no departure from that standard, since the act in question in no way disturbs the investment of the chancery power as temporarily made by the convention, except only as to the single county of Pulaski; and, as to this county, the main effect of the enactment is but to divest one functionary of chancery powers, and to invest another with the same. Nor can the objection, made to the mode of appointment of the latter functionary be sustained, since it is in express terms provided in the constitution, that "The appointment of all officers, not otherwise directed by this constitution shall be made in such manner as may be prescribed by law." *Art* 4, *sec.* 28. Nor the objectoin upon the ground of inequality of benefits and of burthens, urged against the salary provided for him out of the State Treasury; since there is no express inhibition upon the legistative power as to this, and if the provision as to the salary of other judicial officers, is to be the test, there is still no inhibition; because, under these provisions, no one could

doubt but that it would be entirely within the powers of the Legislature to fix unequal salaries for judicial officers of the same class, and upon the principle that this objection is urged, ought to do so, when unequal labors are required. And in one respect at least, relative inequality of labor is imposed upon the Circuit Court for Pulaski county, so long as the seat of government remains here, since by law all suits against the State must be brought in that court. And there can be no substantial difference between paying a salary to *one* functionary who should perform all the labors, and to *two*, who might be required to divide them. Nor does there seem to us anything in the objection that the failure of the Legislature to divest the Circuit Courts of other, or of all the other counties, of chancery jurisdiction, at the same time that they divested that for the county of Pulaski, in the manner provided in the act in question, in any way involved their power in the premises. Because there is no express provision of the constitution to this effect, and legitimate inferences from such provisions as seem to touch the point at all, would be rather in favor of the action of the Legislature than against it, since it is to be strongly inferred from the temporary investment of chancery powers in the Circuit Courts, that in the judgment of the convention, the people of the State were not then in a condition to require separate chancery courts, and that these wants were afterwards to arise. And it could scarcely be expected otherwise, than that in the progress of development these wants would sooner be manifested in some particular quarters of the State, than in all portions at once. Hence, as to corporation and chancery courts, a large discretion seems to have been wisely entrusted to the Legislature, subject to the political responsibility of its members to the people; of which the judiciary can take no cognizance without passing the line, which, in our form of government, circumscribes this department.

It but remains to announce that we entertain no doubt of the constitutionality of the act of the Legislature in question, so far as this case involves it, and therefore that the demurrer must be overruled, and judgment entered accordingly.

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PLEASANT VS. THE STATE.

An order for a change of venue, is sufficient, when it substantially conforms to the requirements of the statute.

Upon a change of venue, the original indictment remains in the court where it is preferred, and a transcript of it sent to the court to which the cause is removed.

The allegation, in an indictment against a negro for an assault, with intent to commit a rape, upon a white woman, is material, and must be proved; and the woman herself is competent to testify as to that fact.

The prosecutrix, in a trial for an assault, to commit rape, cannot be interrogated as to her criminal connection with any other person, or be compelled to answer questions that tend to criminate and disgrace her; nor can her chastity be impeached by evidence of particular acts of unchastity, though it may be, by general evidence of her reputation, in that respect.

A witness may testify as to the appearance of the prosecutrix, immediately after a rape has been committed upon her, or attempted, on his examination in chief, or, on his recall, as rebutting testimony: but not as to the particular facts she may have related to him, except to confirm her testimony after her credit has been impeached.

It is the province of the judge, at the trial, to confine the examination of witnesses to matters relevant to the issue, and to exercise a sound discretion in excluding irrelevant and foreign matter: and where a question does not, in its terms, manifest a relevancy to the issue, its object should be stated.

A witness is privileged from answering questions that would disclose his connection with another and distinct offence from the one on the trial of which he is called to testify.

Though a State's witness, in a criminal prosecution, break the rule and converse with other witness, this would not be absolute cause to exclude him from testifying—his conduct would go to his credit.

The rule in *Clark adx. vs. Moss et al.*, 6 *Eng. Rep.* 741, as to what constitutes a leading question, approved.

The practice has prevailed in this State, and will not be disturbed, of impeaching the character of a witness for truth and veracity, by permitting the witness to give his own opinion as to the credibility of the person impeached, founded on general reputation, after showing that he has the requisite knowledge of such reputation.

On a trial for rape, or an assault, with intent to commit a rape, evidence may be given that the prosecutrix is a "lewd woman, a strumpet, or prostitute," if founded upon her general reputation; but not upon the personal knowledge of the witness.

Where the court arrested the further examination of a witness, this court will presume that it exercised a sound discretion, in the absence of any showing that some further material fact was proposed to be proved by him.

The master is a competent witness for his slave in a case affecting his life, (*Austin vs. State*, 14 *Ark.* 555); and where such owner is excluded from testifying, and the grounds of his exclusion are not stated, this court may presume, in a case involving the life of a human being, that the judge supposed him to be incompetent by reason of his interest.

The object of instructions by the court, is to settle the law upon controverted points; and none need be given as to facts that are proven, and about which there could be no controversy.

Where instructions have been given, sufficient to guide the jury in coming to a conclusion as to the credibility of a witness, and the weight to be attached to his testimony, the court may decline to give others in relation to the same points.

Appeal from the Circuit Court of Ouachita County.

Hon. THOMAS HUBBARD, Circuit Judge.

S. H. HEMPSTEAD and QUILLIN, for the appellant. The defendant had the right to ask the prosecutrix and witnesses as to particular acts of lewdness on her part, and was not confined in the examination to her general character as to want of chastity and virtue, or truth and veracity; and had the right to ask the prosecutrix as to her connection with other men; and also to ask of, and prove by, other witnesses, particular instances of such connection. *The People vs. Abbott*, 19 *Wend.* 192.

Even though the witness may not be compelled to answer questions affecting his character, the defendant had the right to ask them, and the court clearly erred in not permitting the questions to be asked, and notifying the witness of his privilege, who might have answered or claimed his privilege. 1 *Phill Ev.* 279, 7 *Ed.*; 1 *Mood. & Walk.* 192; *ib.* 48, *note* 3; 6 *Cowen* 264.

The evidence of the particulars of the statements, made by the prosecutrix after the alleged assault, were hearsay, and inadmissible. *The People vs. McGee*, 1 *Denio* 19.

The prosecutrix may be proved to be, *in fact*, a common prostitute, and not merely by general reputation. 1 *East* 444, 445; *Roscoe on Crim. Ev.* 708; *Rex vs. Barker*, 3 *Carr. & Payne* 589.

The court erred in refusing to permit, on the objection of the State, the owner of the prisoner to be sworn as a witness. *Austin vs. The State*, 14 *Ark.* 555. The objection to the witness, does not appear upon the record, but he is described as the *owner*, and this court will presume that the objection was because of his *interest*, or that the attorney of the State would have specified the objection.

The court erred in not permitting the question put to Landers, to be answered; in arresting the further examination of the witness Burnes; in refusing to give the fifth and sixth instructions asked by the prisoner; in giving the three instructions asked by the State.

Mr. Attorney General CLENDENIN, for the State. The defendant's counsel offered the owner of the slave as a witness, but the record does not show what the witness was expected to prove, or whether he would or could prove any thing. In ordinary cases, this court will presume in favor of the ruling of the court below, and that, unless the record shows the contrary, that the Circuit Court decided correctly.

In a common law action, a security in a bond for costs, or attachment bond, could not testify for his principal. Suppose, on the trial, the security was offered as a witness and ruled out, and the bill of exceptions only stated that he was offered and excluded, this court would presume that the Circuit Court decided correctly. The owner is a competent witness for or against his slave; but it does not appear that he was excluded on that point alone.

Mr. Chief Justice ENGLISH, delivered the opinion of the Court.

Pleasant, the slave of James Milton, was indicted, in the Union Circuit Court, for an assault with intent to commit rape upon

Sophia Fulmer, a white woman. He was tried, convicted, appealed to this court, and the judgment was reversed. See *Pleasant vs. The State*, 13 *Ark. Rep.* 361.

The cause having been remanded, it was twice continued on the motion of the accused, and afterwards, at the June term, 1854, he applied for a change of venue, upon which application the court made the following order:

"Came the State, &c., and the defendant is brought to the bar of the court in custody, &c., and files his petition for change of venue herein, upon his own application, duly sworn to by said petitioner, and the affidavit of James Milton, a creditable person, to the truth of the allegations therein, stating for cause of removal, as appears from said petition, that the minds of the inhabitants of said county of Union are so prejudiced against him (the appellant,) that he cannot have a fair and impartial trial; all of which appears to the satisfaction of the court. It is, therefore, considered and adjudged by the court, that the trial of this cause be removed to the county of Ouachita, in this State. It is further ordered, by the court, that said defendant be remanded to the jail of the county of Union, in the custody of the sheriff, &c.; and that, without any unnecessary delay, the said sheriff from thence take the body of the said defendant, and him convey to the jail of said county of Ouachita, and there deliver him to the keeper of said jail, together with the order by virtue of which the said defendant is imprisoned and held: and it is further ordered, that this cause be certified accordingly."

A duly authenticated transcript of the record and proceedings in the cause, including the order of removal, the petition therefor, &c., &c., appears to have been transmitted to the Ouachita Circuit Court, where the case came on to be tried at the September term, 1854.

The counsel of the prisoner moved the court to dismiss and strike the cause from the docket, for want of jurisdiction, on the grounds, that the order for the change of venue, was not made in compliance with the statute, and was not sufficient to divest the

jurisdiction of the Union Circuit Court, and vest it in the Ouachita Circuit Court.

I. The court overruled the motion, and the defendant's counsel excepted.

The defendant was tried by a jury, convicted, motion for a new trial, and in arrest of judgment, overruled, and bill of exceptions setting out the facts.

On the trial, *Sophia Fulmer* introduced, as a witness, on the part of the State, testified, in substance, that she was the Sophia Fulmer mentioned in the indictment—she knew the defendant, his name was Pleasant—he was a negro man, and belonged to James Milton. He came to her house, in the fall of 1851, laid down the yard fence, rode into the yard, hitched his horse to a bush, and come into the house where she was ironing or starching clothes. There was a jug under the table, and a bottle setting on the table; and he said, "you seem to have liquor here;" and took up the bottle, and before she had time to speak, took a drink; and gathered hold of her breast, and asked her to give him a chew of tobacco, and as she handed him the tobacco, he caught her by the arm, and took hold of her breast again, and *stove* her down on the floor, several times, and *stove* her on the bed, and tried to smother her with her clothes, where her baby was lying, and threw her on the baby, and satisfied himself on her clothes and knees and legs—she did not know that she was thrown on the baby, but it kept screaming—and, so soon as he was done, he jumped up and ran as fast as he could; and the first time she saw him, after he got off of the bed, was as he jumped off the gallery, fixing his pantaloons, and going towards his horse. She then got the gun, and when she got to the door with it, he was just going out of sight, on his horse. She then threw down the gun on the bed, took up the child, and ran toward the mill, where her brother and Mr. Landers were. They were the closest persons to the house she knew of. She told them what had happened at the house, and Mr. Landers went with her to the house. She was bruised on her breast and arm, and her *breast* was torn down

before. The negro caught hold of her breast, and threw her on the floor. She tried to scream and halloo as loud as she could, but he tried to smother her with her clothes. He took her dress and all her other clothes, and pulled them up over her head. This was done in the county of Union, State of Arkansas. Pleasant was a *negro*, and she a *white woman*.

II. (To the proof, by Mrs. Fulmer, that she was a white woman, the defendant objected, the court overruled the objection, and he excepted.)

The negro, Pleasant, had been to the mill, and came back by the house of witness, but turned out of the direct road, and came to the house.

Cross-examined—Defendant had never been to her house before, as she recollected, but had passed by, and asked for peaches, and gone to the orchard and got them. When she got to the door with the gun, defendant was going out of sight, around the horse lot, not more than fifty yards from the house, on his horse. The mill is a half mile from the house, and the house is twenty yards from the road he ought to have gone, in going home, or not quite so much, very close by. The first part of the day was wet, was not cold, but cool weather. It is called six miles from the negro's house to the mill. He came to the mill early in the morning. She could not state the hour of the day when the assault on her occurred. It was not cold enough to have a fire. The fire had died down after she got breakfast, and she did not mend it up any more. There was a little fire in the fire place, not much. It was not more than eight or nine o'clock, when the defendant came there to the mill. She did not see him as he went, though she was at home all the morning.

She agreed to take from James Milton, the owner of defendant, as a compensation not to prosecute the suit, $125, if he would run the boy off, and that she was scared into it by her brother, James Fogle, and Mr. Landers, and another man whose name she did not know. There were present, at the time, her brother, Landers, her husband, Jacob Fulmer, James Milton, John C. Willingham

and Richard Goode, and the stranger, whose name she did not know. The money to be obtained on the compromise, was not to be divided between her and Landers, and she knew of no understanding by which any debt her husband owed Landers was to be paid out of the money to be obtained from Milton. Did not know whether she said or not, at the time the compromise was being talked about, that the reason why she would compromise, she knew she was under a bad character, and did not want to go to court. They stated to her that they would prove certain things on her, and blacken her character. This, they said at the time they were persuading her to compromise; and they told her the law would not hurt her for compromising. She did not swear on the former trial of this cause that she got the gun first, and he (the negro) left afterwards, but that he left, and was on the gallery in a run, when she got the gun.

III. The defendant's counsel proposed to ask the witness, Mrs. Fulmer, the following questions, to the asking of which, the attorney for the State objected, the court sustained the objection, and defendant excepted.

"1. Have you, or not, had several difficulties with your husband, and has he not treated you badly?

"2. Have you not had difficulties with your husband about other men, he accusing you of illicit intercourse with them?

"3. Did you not insist that James Tiffin should stay all night with you, when your husband was not at home, in January or February, 1851; and did you not say, when he said the night was cold, and he must sleep with a woman, and if he staid there he might have a difficulty with your husband, not then at home, no, there would be no fuss about it, and that you liked to hug up a man, and tangle legs with him of a cold night; and did you not tell, at the same time, a Mr. E. H. Goodwin that he might go over to a house not far off, and that he might get to sleep with a girl there, that night, or some such conversation?

"4. Did not Jackson Burns solicit criminal connection with

you, some short time before the commencement of this suit, and did you not reply that you were not in a proper condition?

"5. Did not you try to take out a warrant against Jesse B. Bailey, for an attempt to commit a rape upon you in the year 1849 or 1850?

"6. Did you not tell, during those years, divers persons that said Bailey attempted to rape you?

"7. Did, or did you not, invite a negro woman slave, belonging to one of the neighbors, in the year 1851, in the presence of James Tiffin, to sit down at your table to dinner, and she did so, and you sat down and waited on her?

"8. Did you or not, in 1850, or 1851, have criminal connection with one William Landers, while you resided at the place where you resided, when you state defendant attempted to commit a rape upon you?

"9. Have you never had criminal connection with one James Smith, a witness in this cause?

"10. Have you not had criminal connection with other person or persons, than your husband since you were married; and not long before the commencement of this prosecution?

"11. Do you not know your husband was pretty largely in debt to Mr. Landers, at that time, and had no means to pay with?

"12. Were you not in the habit, about the year of the commencement of this prosecution, of riding about in the neighborhood of nights, behind Landers to see and sit up with the sick, and leave your husband at home, and when he would go on similar visits, you and Landers would stay at home?

"13. Did not Landers, at several times, or at one time in particular, in the presence of James Smith, lay his head in your lap, and you would comb it, since you were married, and shortly before the commencement of this suit?"

Wm. Landers, a witness on the part of the State, testified, in substance, that the defendant was a negro slave, and belonged to James Milton, that Sophia Fulmer was a white woman. Witness saw defendant in the fall of 1851, at the mill; he came there,

got his meal, and started back. In about half an hour, Mrs. Fulmer came to the mill, and said "that defendant came to the house and took hold of her, and had a considerable scuffle, and threw her on the bed, and smothered her with her clothes, and that she tried to halloo."

IV. (Defendant objected to the introduction of Mrs. Fulmer's declarations to witness, as hearsay, and moved to exclude them, but the court overruled the objection, and defendant excepted.)

Witness went to the house, loaded a pistol, and told her she must defend herself, for he could not stay there to defend her. The bed-clothes were all taken off the bed but one sheet, and were lying at the foot of the bed on the floor, and his gun was lying across the foot of the bed. He had left his gun sitting in the corner of the house. Jacob Fulmer, the husband of Sophia Fulmer, had gone to Eldorado. The mill is about half mile from the house, and the nearest neighbor lives about a mile off. He first saw defendant, on that day, at the house. It was witness' house, and Fulmer was living with him at that time. Defendant called for his meal, and he told him to go on to the mill, and as soon as he got breakfast, he would be down there. There was a young man there, and witness thinks he went down to the mill with him, and that left Mrs. Fulmer alone at the house. It was a cool drizzly day, raining a little, but not much. All this occurred in Union county.

Cross-examined—Did not recollect how long he had known Mr. and Mrs. Fulmer, nor how long they lived in the house with him. Did not believe they lived with him two years. They had no family but one child, and witness had none then. He became acquainted with them at Clawson's; was informed that Fulmer was out of business, and witness applied to them to go and live with him. They staid with him as much as twelve months. Witness did not use any means to intimidate, influence or induce Mrs. Fulmer, to a compromise with Milton, in reference to this prosecution. Believes that defendant hallooed at the fence, about twenty steps from the house, as he went on to the

mill. Thinks he (witness) was in the house eating breakfast; and he, James Fogle, and Mrs. Fulmer were in the house at the time; there was no other woman on the place; Mrs. Fulmer got the breakfast, and waited on the table.

Questions by defendant—"1. Was Fulmer very poor, and wholly unable to pay any thing, and was he not indebted to you about the time of the commencement of this prosecution?

"2. And was it not understood, and agreed, between you and Mr. and Mrs. Fulmer, that the money, to be obtained from Milton, on a compromise, should be applied in part to the payment of your debt, or some such agreement or understanding, between you and them?

"3. Was there not some consultation between you and Mr. and Mrs. Fulmer, in reference to a compromise with Milton about the time of the commencement of this prosecution?

"4. Did you and Mr. Fulmer, or you alone, not send for Milton, to come down to your house, for the purpose of trying to effect a compromise?

"5. Did you not try to get Milton to pay two hundred dollars, or some other amount, to prevent this prosecution?"

V. To the asking of which questions, the State's attorney objected, the court sustained the objection, and defendant excepted.

VI. It appears that, at the time Wm. Landers was offered by the State, as a witness, the defendant objected to his testifying, on the grounds that he was seen, a short time prior thereto, while under the rule, and in a room with his head out of a window, conversing with Jacob Fulmer, another witness for the State, who had staid the previous night with his wife, Sophia Fulmer, after she had testified, and he and she had been discharged from the rule, under the injunction of the court not to confer directly or indirectly with any other witness yet to be examined and under the rule. But the court permitted the witness to state what conversation occurred between him and Fulmer, at the time referred to, and to purge himself of contempt; and then permitted him to testify in the cause; and defendant excepted.

Here the State closed her testimony in chief.

Jno. C. Willingham, witness for defendant, testified, in substance, that Fulmer and wife lived with Landers, in the year 1851. On Monday after the offence was charged to have been committed, witness, hearing that Milton's negro man had been taken up by Fulmer, went to Fulmer's, to see about the matter. He was not requested to go by Milton, but Milton knew he was going, and remarked to him that he had better not go. When he got there, he saw Mrs. and Mr. Fulmer, Landers, Mrs. Fulmer's brother, and two strangers, one of whom he learned was a relation of Landers. The charge against defendant was talked about. Mr. Fulmer kept saying he would not have had it happen for $200. After he had made this remark several times, witness asked him if $200 would satisfy him to drop it. He said he did not know, but would go in and see his wife, who had lain down, and if she was satisfied to drop it, he was. Fulmer went and talked to his wife, and she stated to him that Mr. Landers would compromise it. Witness then talked with Landers about it, and his first proposition was about half the worth of the negro. Witness told him he could make no proposition himself, but could tell Milton. Landers said, tell Milton to come up soon in the morning; and witness told Milton on his way home.

Milton and witness went to Fulmer's, next morning. Did not hear the first of the conversation between the parties; but heard Milton tell Landers and Mrs. Fulmer, "he would not give it." Mr. Fulmer seemed to have very little to do about it. There were two or three propositions made by Landers and Mrs. Fulmer to compromise, each time agreeing to take less, Milton declining to accept them. The last proposition made by them, was to take $125, which was agreed to by Milton; and $75 thereof was to be paid to Mrs. Fulmer, either in money, or in the store; and the balance was to be paid to Landers. Mr. Fulmer was present, but witness did not think he said anything at that time. Landers and Mrs. Fulmer called on witness to stand for Milton, and he agreed to do so: the parties seemed to be satisfied. There

were no other terms in the compromise than that Milton should pay the $125. Did not know that any means were used by any one there to procure the assent of Mrs. Fulmer. She said to Landers, that any thing he would do, she would be satisfied with, and that she had told him so at the first. Witness was near by Mrs. Fulmer and Landers, when the compromise was being talked about, and heard no threats, or other means used to induce her to assent to the compromise, by Landers, or any one else. Did not know where the defendant was, when the compromise was made. Witness, Milton, and Landers, started to Eldorado, and Mr. and Mrs. Fulmer were to stay out of the way, and not to appear against the defendant at all. The object of Landers' trip to Eldorado was to stop the prosecution, but, after he got there, he ascertained he could not do it. The parties remained in Eldorado until evening, then went on home by Landers', and met the deputy sheriff on the way, who had been after Mr. and Mrs. Fulmer, but was returning without them, and Landers, in speaking of their keeping out of the way, said he had them where the sheriff could not find them. The Saturday previous to witness going to Fulmer's, was a wet day in the forenoon, showers falling enough to wet any one, disagreeable and cold. It is something like five miles from Milton's to the mill.

Cross-examined—When witness first went to Fulmer's, he saw the parties named in his examination in chief, and either Landers or Fulmer came out, did not recollect which. There was but one room in the house. The conversation commenced soon after he got there, by Mrs. Fulmer, talking about the way she had been treated by defendant. There was something said by witness, in his examination on the former trial, to the effect that if Milton would give up the boy to be whipped, he should not have prosecuted him; thinks he said, on his former examination, that the proposition to take $200, was repeated; thinks he also stated, "Would you, Fulmer, take $200, not to prosecute this suit?" did not recollect positively. After the proposition for a compromise, was talked about, Fulmer said he would see his wife, and he and

witness both went into the house. Thinks he asked Fulmer to go out, and have a conversation with him about the compromise. Distance from Fulmer's to Eldorado, about eight miles.

James Tiffin, witness for defendant, testified, in substance, that, on one evening in January, 1851, he and E. H. Goodwin, stopped at Fulmer's, to warm, and staid about half an hour. Fulmer was from home. Mrs. Fulmer and child were there. He had lived within about three miles of Mrs. Fulmer, for some three or four years; knew her general character for chastity and virtue, and it was bad. He had heard many persons speak of her, and never heard but one say he believed her virtuous.

Questions by defendant—"1. Please state the conversation you had with Mrs. Fulmer, the evening you say you and Mr. Goodwin were there in January, 1851.

"2. Did Mrs. Fulmer say anything to you, that evening; and, if so, what was it?

"3. Did, or did not, Mrs. Fulmer insist that you should stay all night with her?

"4. Did she, or not, tell you she liked to hug up a man in her arms, and tangle legs with him of a cold night?

"5. Did she, or not, tell E. H. Goodwin, if he would go to a certain place, near by, that he could get to sleep with a girl that night?

"6. Did you, or not, see a negro woman, slave of one of the neighbors, sitting down at Fulmer's table, in 1851, shortly before the commencement of this suit, by the request of Mrs. Fulmer, and she sitting down at the table, waiting on her?

"7. Did you, or not, hear Mrs. Fulmer say her husband had treated her badly about other men, and that if he did not quit it, she would leave him, and marry another man, which she could do very quick?"

VII. To the asking of which questions, the attorney for the State objected, the court sustained the objection, and defendant excepted.

Cross-examined—Witness meant, by general reputation, what

every body says, and rumor. He had known Mrs. Fulmer ever since she came to the country, three or four years, before the commencement of this prosecution.

E. H. Goodwin, witness for defendant, testified that he had known Mrs. Fulmer some five or six years, beginning in 1849; had lived in four or five miles of her; could not say that he knew her general character for chastity and virtue. Did not know much about her any way—only knew her when he saw her. He was going on twenty-two years old.

Jesse B. Bailey, witness for defendant, testified that he knew Sophia Fulmer—had known her something over four years; was not very well acquainted with her; during that acquaintance, he lived from four to twenty miles from her. He was not in the county in the year 1849. Most of the year 1850, he lived in about four miles of her. Knew little about her in the year 1851. Had heard her spoken about very much, but did not know very much about her general character. Knew nothing personally, but only what folks told him, and they did not speak well of her. He knew her general reputation for chastity and virtue in 1850 and 1851, and it was not very good—people did not speak very well of her. He knew her general reputation for truth and veracity, and that it was bad. He came here in February, 1850, and went to O. F. Neill's, in April, and, in September, went to another place, about the same distance. She has been moving about a great deal, and so has he. He ought not to like Fulmer, if he did. He was not more than five or six miles from where she lived, in the year 1850 and 1851.

Question by defendant—"1. From what you know from said Sophia Fulmer's general character, for truth and veracity, would you believe her on oath, in a court of justice?"

VIII. Objected to by attorney for the State, ruled out by the court, and defendant excepted.

James Smith, witness for defendant, testified that he had known Mrs. Fulmer since the year 1849; part of the time he had lived with Fulmer, did not recollect the precise time—it was in 1849

or 1850, or about that time. He was tolerably well acquainted with her general character in the years 1849, 1850 and 1851. Had no learning, and did not know what general reputation meant.

Questions by defendant—"1. Do you know what the belief of a majority of the people, where she lived in 1849, 1850 and 1851, was in regard to the character of the said Sophia Fulmer; and what, if you know, was it in regard to her character for virtue and chastity?

"2. What is the opinion of a majority of the people where she lived in 1849, 1850 and 1851, in reference to her character; and what was it in reference to her character for chastity and virtue?

"3. Do you, or not, know that said Sophia Fulmer has had criminal connection with some other person than her husband, repeatedly during the year 1849, 1850 and 1851?

"4. Do you, or not, know that she is a base and lewd woman, and was such in 1849, 1850 and 1851?"

IX. To the asking of which questions, the State's attorney objected; objection sustained by the court, and defendant excepted.

Michael Harrell, witness for defendant, testified that he knew Sophia Fulmer, in 1849, 1850 and 1851; could not say he knew her general character; knew nothing himself, only what he heard from others.

Question by defendant—"Do you know what was the universal talk and belief of the people, in her neighborhood, where she lived in 1849, 1850 and 1851?

Answer—"Does not know that he heard every body say, but he heard a good many talking; does not recollect, but there was a right smart talk as to her character."

Jacob Burns, witness for defendant, testified that he knew Sophia Fulmer in 1849, 1850 and 1851; had known her about six years; did not know any thing about her character for truth and veracity.

Question by defendant—"Do you know the general rumor and belief of the people, about Sophia Fulmer, where she lives?"

X. Objected to by the attorney for the State, objection sustained by the court, and defendant excepted.

XI. "Whereupon, the court said it would arrest the further examination of said witness, and did so," to which the defendant excepted.

Robert H. Smith, witness for defendant, testified that he was acquainted with the general character of Sophia Fulmer, in the years 1849, 1850 and 1851, and that her character was very bad; he never heard any one say it was good. Her general character for chastity and virtue, was bad from rumor, and from all the information he could gather. He knew her general character for truth and veracity, and it was bad; so far as he ever heard, she was regarded as unreliable, and her character was bad, so far as he knew.

Questions by defendant—"1. Would you believe her on oath, in a court of justice?

"2. Do you believe she is entitled to credit or belief in a court of justice?"

XII. Objected to by State's attorney, objection sustained by the court, and defendant excepted.

The bill of exceptions next states as follows:

XIII. "The defendant, by his attorney, then offered to introduce James Milton, the owner of said defendant, as a witness in his defence in this cause; and, to the introduction of said Milton, the State, by her attorney, objected: the court sustained the objection; and to the decision and ruling of said court, in sustaining said objection to the introduction of the said Milton, defendant, at the time, excepted."

Here the defendant closed his testimony.

XIV. The State recalled *Wm. Landers*, and offered to prove, by him, the appearance of Mrs. Fulmer, at the time she came to the mill after the alleged assault upon her, to which defendant objected, the court overruled the objection, and defendant excepted.

Whereupon, Landers testified that when Mrs. Fulmer came to

the mill, her dress was torn down in front, and she was crying; no marks or bruises were seen upon her by witness.

Both parties having here closed their testimony, the State's attorney moved to instruct the jury as follows:

"1st. That, if they believe, from the testimony, that the prisoner, Pleasant, assaulted Sophia Fulmer, with an intent feloniously to ravish and carnally to know her, forcibly and against her will, and that the said Sophia Fulmer is a white woman, they must find the defendant guilty.

"2d. That, should the jury believe, from the testimony, that Sophia Fulmer, the person alleged to have been assaulted, is a white woman, and has been, and was at the time of said alleged assault, of easy virtue, and that other white men, than her husband, had had illicit intercourse with her, such facts are no justification to the prisoner, and that, if they believe the prisoner did assault her with an intent feloniously to ravish her, and carnally to know her forcibly, and against her will, they must find defendant guilty.

"3d. That, should the jury believe, from the testimony, that the reputation of Sophia Fulmer, the prosecutrix, for truth and veracity, in the neighborhood where she lived, is bad, nevertheless if they believe, from her manner of testifying, from the other testimony in the cause, and from corroborating circumstances deposed to by witnesses, that her testimony is true, they must find defendant guilty."

XV. Which instructions the court gave, against the objection of defendant, and he excepted.

The defendant moved the following instructions:

"1. If the jury believe, from the evidence, that there was an agreement, between said Sophia Fulmer and Landers, to extort money from Milton, the owner of the negro, and this prosecution was set on foot for that purpose, they will find the defendant not guilty.

"2d. If they believe, from the testimony, there was a compromise made in this cause by said Sophia Fulmer, and Landers,

for the small sum of one hundred and twenty-five dollars, it detracts from their credibility.

"3d. If they believe, from the evidence, that said Sophia Fulmer has sworn falsely in this cause, they will find the defendant not guilty.

"4th. If they believe, from the evidence, that two unimpeached witnesses have contradicted said Sophia Fulmer, in her testimony given in this cause, they are authorized to disregard her evidence.

"5. If the jury believe that the said Sophia Fulmer has made mis-statements in a very small trivial matter, knowingly, in her testimony, in this cause, they are authorized to reject her testimony.

"6. The jury should scrutinize the testimony of the prosecutrix closely; and, if not sufficiently corroborated by other evidence, and is contradictory in itself, they may find the defendant not guilty.

"7. If they believe, from the evidence, that Sophia Fulmer's reputation for chastity and virtue is bad, it detracts from and lessens her credibility.

"8. If they believe, from the evidence, that the character of Sophia Fulmer, for truth and veracity, is bad, she is entitled to less credit: and if they believe her statements untrue, they should find defendant not guilty.

"9. That they are the judges of the sufficiency of the evidence.

"10. If the jury entertain a reasonable doubt of defendant's guilt, they should acquit."

XVI. All of which instructions, the court gave but the fifth and sixth, and defendant excepted to the refusal of the court to give them.

XVII. The motion for a new trial, was upon the following grounds:

1. The court permitted improper evidence to be given to the jury by the State.

2. Ruled out proper testimony for the defendant.

3. The court erred in not permitting defendant to ask proper and legal questions of divers witnesses.

4. In giving the instructions asked by the State, and in refusing to give the fifth and sixth instructions, moved by the defendant.

5. In arresting the examination of the witness Burns.

6. In not permitting defendant to introduce and examine, as a witness, James Milton, the owner of the defendant.

7. In divers other decisions made in said cause.

8. The verdict of the jury is contrary to the evidence, to the law, and the instructions of the court.

9. The court permitted Landers to testify, both in chief and upon re-examination.

10. The court erred in overruling defendant's motion to dismiss the case.

XVIII. The motion in arrest of judgment, was upon the following grounds:

1. There is no indictment in this court in the cause, and defendant was put upon his trial upon what purports to be a copy.

2. The court had no jurisdiction in this cause, there being no sufficient order of the Union Circuit Court showing a change of venue to this court, &c.

The motions for new trial and arrest being overruled, defendant was sentenced to be hanged on the 9th November, 1854; he appealed to this court, and the circuit judge having refused to suspend the sentence, it was done by order of one of the judges of this court in vacation.

A full statement of all the material facts appearing of record, has thus been made, in order that the points presented for the decision of this court, may be clearly understood.

I and XVIII. The motion to dismiss, and the motion in arrest of judgment, involving the regularity of the change of venue, may be considered together. It is urged, in both motions, that the order for the change of venue, was not sufficient to transfer the jurisdiction of the cause from the Union to the Ouachita Circuit

Court. The objection to the sufficiency of the order, is general, pointing out no particular defect. The application for the change of venue was made under the provisions of *secs.* 131, 132, *chap.* 52, *Digest*, and the order substantially conforms to *secs.* 133, 134, *and* 138, of the same chapter. See *State vs. Hicklin*, 5 *Ark. R.* 190; *Brown vs. State*, 13 *Ark. Rep.* 96. The additional objection in arrest of judgment that defendant was tried upon a copy of the indictment, is of no force. On a change of venue, the original indictment remains in the court where it is preferred, and a transcript of the record and proceedings in the cause, including the indictment, &c., is sent to the court to which the cause is removed, as was done in this case. See *sec.* 140, *chap.* 52, *Digest.*

II. The second exception is, that the court permitted Mrs. Fulmer to testify that she was a white woman. The allegation in the indictment, that she was a white woman, was material, and had to be proven by the State; and this court said, when the case was here before, that her own statement, to that effect, or that of any witness who knew her, though matter of opinion founded on her appearance, might be sufficient. *Pleasant vs. The State*, 13 *Ark.* 376. No reason is stated, and none can be conjectured, why she was not competent to testify as to that fact. It is to be presumed that she knew her parentage and race, as persons generally do, with that moral certainty required to prove such matters in legal proceedings; and, if any doubt existed as to the accuracy of her knowledge, or the truth of her statement, it was subject to contradiction by other witnesses, as well as any other statement made by her. See 1 *Greenlf. Ev.*, *sec.* 103, 104, 105

III. The third exception presents a question of some importance. On the cross-examination of Mrs. Fulmer, the counsel of the prisoner proposed to ask her thirteen questions, which, upon the objection of the attorney for the State, the court ruled out. Some of these questions, were designed to draw from her directly a confession or denial that she had been guilty of illicit intercourse with other persons than her husband, before the alleged

assault upon her by the prisoner: and others of these questions were intended to put her upon a confession or disavowal of specific improprieties, tending to the same point.

Our statute declares that if any negro or mulatto shall commit, or attempt to commit, rape upon a white woman, he shall, on conviction, suffer death. *Digest, chap.* 51, *part* 4, *art.* 4, *sec.* 9.

This statute embraces every class and condition of white females, and, regardless of their character or position in society, protects them from brutal assaults by negroes and mulattoes. When the offence is proven, the character of the female, however abandoned, furnishes no justification for the act.

But, in ascertaining the guilt or innocence of the accused, the same rules of evidence are to be observed, as govern in the trial of white persons, charged with like offences. *Digest, chap.* 51, *part* 10, *sec.* 6.

By the rules of the common law, it is well settled that, in trials for rape, or assaults with intent to commit rape, the character of the prosecutrix, or injured female, for chastity, may be impeached, not for the purpose of furnishing a justification or excuse for the offence, but for the purpose of raising the presumption that she yielded her assent, and was not forced in point of fact; and this presumption would doubtless be stronger or weaker, according to the degree of prostitution or degradation established by the impeaching evidence.

But, surely it may not be unsafe, or unjust to the prisoner, to say, that, in this State, where sexual intercourse between white women and negroes, is generally regarded with the utmost abhorrence, the presumption that a white woman yielded herself to the embraces of a negro, without force, arising from a want of chastity in her, would not be great, unless she had sunk to the lowest degree of prostitution.

But, returning to the question more directly under consideration, how is the chastity of the prosecutrix to be impeached?

Rex vs. Hodgson, 1 *Russell & Ryan* (*British Crown cases*) 211, is a leading case on this subject. Hodgson was tried for rape,

before Mr. Baron WOOD, at the Summer Assizes, in the year 1811. After the prosecutrix had given her evidence in favor of the prosecution, the counsel for the prisoner, on cross-examination, put these questions to her: "*Whether she had not before had connection with other persons? and whether she had not before had connection with a particular person named?*"

The counsel for the prosecution objected that she was not obliged to answer these questions, but it was contended by the prisoner's counsel that, in a case of rape, she was.

The learned judge allowed the objection, on the ground that the witness was not bound to answer these questions, as they tended to criminate and disgrace herself, and said that he thought there was not any exception to the rule in the case of rape.

The prisoner's counsel then offered a witness to prove *that the prosecutrix had been caught in bed, about a year before this charge, with a young man*, and offered the young man to prove he had connection with her.

The counsel for the prosecution objected to the admissibility of this sort of evidence of *particular facts*, not connected with the present charge, as they could not come prepared to answer them.

The judge allowed the objection, and the witnesses were not examined.

The prisoner was convicted, but the judgment was respited, and these points saved for the consideration of the judges.

In December, 1811, the case was considered in the King's Bench, by all the judges except four, who were absent; and was postponed for consideration to Hilary Term, in January, 1812, when all the twelve judges being present, they determined that both the objections were properly allowed

In *Rex vs. Clarke*, 2 *Stark. Rep.* 241, (3 *Eng. Com. L. Rep.* 393), HOLROYD, J., held that, in an indictment for rape, or an assault with intent to commit rape, the chastity of the prosecutrix might be impeached by general evidence, but that the prisoner could not go into evidence of particular facts.

In *Rex vs. Martin*, 6 *Carr. & Payne* 562, (25 *Eng. C. L. R.*

575), WILLIAMS, J., held that, on the trial of an indictment for rape, the prosecutrix might be asked, whether, previously to the commission of the alleged offence, the prisoner had not had intercourse with her by her consent. The judge also said, that he was of counsel in the case of *Rex vs. Hodgson*, and seemed to doubt the correctness of the doctrine of that case.

In *Barker's case*, 3 *Carr. & Payne* 588, (14 *Eng. C. L. R.* 730), PARK J., after consulting Mr. Justice JAMES PARKE, on a trial for rape, allowed the prisoner's counsel to ask the prosecutrix, with a view to contradict her, whether, since the alleged offence, she had not walked in the town of Oxford, on High street, to look out for men, and whether she had not walked in High street, with a woman reputed to be a common prostitute, Mr. Justice PARK said he had great doubt, whether, since the case of *Rex vs. Hodgson*, he could permit the prisoner to prove particular acts of criminality in the prosecutrix, though he might certainly give evidence of general lightness of character, and general evidence of her being a street walker.

In *Rex vs. Robins*, 2 *Moody & Robinson* 512, the prosecutrix having, on cross-examination, denied that she had had connection with other men than the prisoner, COLERIDGE, J., after consulting with ERSKINE, J., held that those men might be called to contradict her. It does not appear, from the report of this case, that any objection was made to the prosecutrix being asked whether she had had connection with other men.

Though it seems individual judges, sitting in the inferior courts of England, have expressed doubts as to the correctness of the decision of the twelve judges in *Rex vs. Hodgson*; yet, such doubts are not to be regarded as overturning that case.

Upon trials for rape, or assaults with intent to commit rape, says Mr. PHILLIPS, evidence is admissible, on the part of the prisoner, that the woman bore a notoriously bad character, for want of chastity and common decency; also that she had been before criminally connected with the prisoner. 1 *Phill. Ev.* 468. But she is not obliged to answer, whether, on some former occasion.

she had not a criminal connection with other men, or with particular individuals; nor is evidence of such criminal intercourse admissible. 2 *Phil. Ev.* 419. To the same effect, see 2 *Starkie Ev.* 951-2; *Roscoe's Ev.* 96; *Wharton's American Crim. Law* 440; 1 *Greenl. Ev., sec.* 458; 5 *Kinnie's L. Comp.* 202; *Camp vs. The State*, 3 *Kelly's Rep.* (*Geo.*) 417.

In *The State vs. Jefferson*, 6 *Iredell's Rep.* 305, a slave was indicted for a rape upon a white woman. The woman was a witness, and proved the offence. The prisoner admitted his connection with her, but alleged that it was by her consent, and that there had been a previous criminal intimacy between them. After an answer in the negative, to a question put to the woman, on her cross-examination, whether she had not allowed the prisoner to put his hands on her, in a free and familiar manner, it was proven by another slave, on the part of the prisoner, that he had frequently seen the prisoner treat her in that manner.

The prisoner offered further to prove, that the woman had permitted other negro men to kiss her, and take other liberties with her; but, upon objection of the State's attorney, the court rejected this evidence. On appeal to the Supreme Court of North Carolina, the decision of the judge on this point, was sustained. The court, by the Chief Justice, said: "That familiarities had occurred, indicative of habitual criminal connection between the prosecutrix and the prisoner, as proved by the prisoner's fellow servant, was properly left to the jury, as tending to disprove the probability of the use of force or fear by the prisoner, and to discredit the witness for the State. No doubt, too, that it would have been proper to receive evidence that the woman was a strumpet, upon similar grounds; and particularly that she had intercourse with other negroes; *but that ought only to be done upon general evidence:* for, it is a question of character, and, as in other cases where that question arises, it would be a complete surprise, if *particular instances of such familiarity*, with a certain person, or with certain persons, were received as evidence to establish the character. The point, indeed, is not new, but was ruled

in *Hodgson's case*, *Russ. & Ry.* 211, and *Rex vs. Clarke*, 2 *Stark. R.* 241."

We have looked into this question with much care, because of the decision of the Supreme Court of New York, in the case of *The People vs. Abbot*, 19 *Wend. R.* 192, relied on by the counsel of the appellant, where it was held that, on a trial for rape, or assault with intent to commit rape, the prosecutrix might be asked whether she had not had previous connection with other men; and that she was not privileged from answering.

Our conclusion is that the weight of authorities is against this case, on this point. Such an examination of the prosecutrix, is inquisitorial, and tends to compel her to criminate and disgrace herself, or to commit perjury. The subject may be concluded by quoting and adopting the rule as stated by Mr. GREENLEAF, in the 3*d vol. of his work on Evidence*, 2 *Ed.*, *sec.* 214, *p.* 195. He says: "The character of the prosecutrix, for chastity, may be impeached; but this must be done by general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity. Nor can she be interrogated as to a criminal connection with any other person, except as to her previous intercourse with the prisoner himself; nor is such evidence of other instances, admissible."

But it seems that though the prosecutrix is not bound to answer such questions, as to her connection with other men, yet this is but a privilege allowed her, which, on being properly advised by the court of her privilege, she may waive, if she think proper. 1 *Greenl. Ev. sec.* 460; 2 *Phill. Ev.* 425, 427; *Southard vs. Rexford*, 6 *Cowen R.* 254, *and cases cited.*

The 11th question, which the counsel for the prisoner proposed to put to Mrs. Fulmer, it may be remarked, is not of a class with the others, having reference to the indebtedness of her husband to Landers, and which the court below perhaps ruled out for irrelevancy.

IV. It was competent for Landers to state, on his examination in chief, the appearance of Mrs. Fulmer, when she came to the

mill, and that she complained that an assault had been made upon her; but the court erred in permitting him then to state the particular facts which she related to him. But the particulars of her statement might have been brought out, by way of confirming her testimony, after the attempt made by the prisoner to impeach her credit. 3 *Greenlf. Ev., sec.* 213; *Rex vs. Clarke*, 2 *Stark. Rep.* 241; *Roscoe Cr. Ev.* 863; *Whart. Am. Cr. Law* 441; 2 *Starkie Ev.* 951; *Stephen vs. State*, 11 *Georgia Rep.* 225; *The People vs. McGee*, 1 *Denio* 19; *Regina vs. Megson*, 9 *Carr. & Payne* 420.

V. The fifth exception, was to the decision of the court ruling out, on the objection of the State, five questions put to the witness Landers, on his cross-examination, by the prisoner's counsel. The object which the counsel had in view, in asking these questions, is not stated in the bill of exceptions, but is left to inference. It is the province of the judge, at the trial, to confine the examination of the witnesses to matters relevant to the issue, and to exercise a sound discretion in excluding irrelevant and foreign matters. Where the counsel puts a question to a witness, which does not, in its terms, manifest a relevancy to, or bearing upon the issue, it would be the duty of the counsel, in fairness to the court, to state its object, in order that the judge might not be put upon the hazzard of committing an error, by admitting or excluding it. The object of the five questions, which the prisoner's counsel proposed to ask Landers, was, perhaps, to draw from him an admission or denial, that Fulmer was indebted to him, had not the means to pay, and that he, Landers, combined with Fulmer and his wife, to obtain money from Milton, the owner of the slave, by compounding the prosecution: in other words, to implicate Landers in the compounding of a felony, and thereby to discredit him. See *Digest, chap.* 51, *part* 7, *art.* 3, *sec.* 6. If this was the object, though the questions might be put, the witness was privileged from answering. *Pleasant vs. The State*, 13 *Ark.* 378. Had Landers been an accomplice of the negro in the alleged assault upon Mrs. Fulmer, he, not being indicted, could

have been compelled to testify on the trial of the negro, and his testimony could not have been used against him afterwards. See *State vs. Quarles*, 13 *Ark.* 307. But, if he chose to disclose his connection with another and distinct offence, he would not be protected; and, therefore, could not be compelled to do it. *Whart. Am. Cr. Law* 307.

VI. It seems that, on the trial, the witnesses were put under the rule, and afterwards, Landers was seen conversing with Fulmer, who had been with his wife after she was examined; and, for this cause, the prisoner moved to exclude him from testifying, but the court, after ascertaing from Landers what conversation had passed between him and Fulmer, permitted him to testify. The presumption is, the contrary not appearing from the bill of exceptions, that the court ascertained, from Landers, that no conversation had occurred between him and Fulmer, prejudicial to the prisoner. But, if this were not so—even if Landers had remained in, or returned to, the court-house, after he was put under the rule, and heard Mrs. Fulmer testify, this would not have been absolute cause to exclude him, but the court had the discretion to permit him to be examined, and his conduct would have gone to his credit. The power of the court to exclude a witness for disobedience of the rule, is rarely exercised in this country, but the witness is punishable for contempt. 1 *Greenlf. Ev., sec.* 432; *State vs. Brookshire*, 2 *Ala. Rep.* 305; *Keith vs. Wilson*, 6 *Mo. Rep.* 435; *Dyer vs. Morris*, 4 *Ib.* 214. See, also, *Roscoe Crim. Ev.* 162; 1 *Starkie Ev.* 189; 2 *Phillips Ev.* 395.

VII. The 3d, 4th, 5th, 6th, and 7th questions, put by the prisoner's counsel to his own witness, James Tiffin, were leading, according to the rule as held in *Clark, adx. vs. Moss et al.*, 6 *Eng. Rep.* 741, and were objectionable on that ground. All of the questions were designed to prove upon Mrs. Fulmer particular improprieties, tending to impeach her chastity, which, we have determined above, is to be done by general evidence.

VIII. The *eighth* exception, as well as several others of the same class, presents for consideration the proper mode of impeach-

ing the character of a witness for truth and veracity. On this subject, *Greenleaf* (1 *Ev.*, *sec.* 461,) says: "The regular mode of examining into the general reputation, is to inquire of the witness whether he knows the general reputation of the prisoner in question among his neighbors; and what that reputation is. In the English courts, the course is further to inquire whether, from such knowledge, the witness would believe such person on his oath. In the American courts, the same course has been pursued; but its propriety has, of late, been questioned, and perhaps the weight of authority is now against permitting the witness to testify as to his own opinion. The inquiry must be made as to the general reputation of the witness where he is best known. It is not enough that the impeaching witness professes merely to state what he has *heard* "others" say, for those "others" may be but few. He must be able to state what is *generally said* of the person, by those among whom he dwells, or with whom he is chiefly conversant; for it is this only that constitutes his general reputation or character. And, ordinarily, the witness ought himself to come from the neighborhood of the person, whose character is in question."

In support of the remark, that the weight of authority in America is now against permitting the witness to testify as to his own opinion, Mr. GREENLEAF cites *Gass vs. Stinson*; 2 *Sumner Rep.* 610; *Kimmel vs. Kimmel*, 3 *Serg. & R.* 336, 338; *Wike vs. Lightner*, 11 *Ib.* 198; *Swift's Ev.* 143; *Phillips vs. Kingfield*, 1 *Appleton's Rep.* 375.

These authorities are entitled to great respect; but, in this State, the practice has prevailed to permit the witness to give his own opinion as to the credibility of the person impeached, founded on general reputation, after showing that he has the requisite knowledge of such reputation, and we are not disposed to disturb this practice.

The usual mode of putting the question, is:

"Do you know the general reputation of the witness, for truth and veracity, among his neighbors?" If answered in the affirma-

tive, the inquiry may be made, what it is, whether good or bad.

Then the witness may be asked:

"From your knowlekge of his reputation, for truth and veracity, among his neighbors, would you believe him on oath?" See the authorities above cited; also, *Whart. Am. Cr. Law* 312; 1 *Stark. Ev.*, 7 *Am. Ed.* 211, 212, *and note* (1); 2 *Phil. Ev.* 432.

In cases of rape, or assaults with intent to commit rape, the inquiry as to the reputation of the prosecutrix, is not confined to truth and veracity, but extends, as we have seen, to her chastity. Whether this is the only exception to the rule, we do not mean to decide in this case, as the question does not arise. There are some authorities against confining the inquiry, in any case, to the reputation of the witness for *truth* and *veracity*, and in favor of extending it to the entire moral character and standing in society. *Sec.* 1, *Greenlf. Ev.*, *note* 3 *to sec.* 461, *p.* 582.

The question put by the counsel of the prisoner, to the witness, Jesse B. Bailey, and ruled out by the court, was not in the usual form; nor does it appear to have been preceded by the preliminary question as to the knowledge of the witness of the reputation of Mrs. Fulmer, for truth and veracity among her neighbors. True, he made a statement as to what his knowledge, on that subject, was, but it is doubtful whether it was such as to entitle him to express an opinion as to her credibility. Before he could express such opinion, however, he should have been required to answer the preliminary question in the affirmative.

IX. The court should have permitted the witness, James Smith, to answer the *first* and *second* questions put to him by the prisoner's counsel, as they referred to the *general character* of Mrs. Fulmer, for *chastity*. The *third* question, was properly disallowed by the court, because it referred to a criminal connection between her and some particular person. The *fourth* was put in a leading form; and, on that account, was objectionable. Moreover, this question: "Do *you*, or not, *know* that she is a bad and lewd woman, and was such in 1849, 1850 and 1851?" is perhaps put in a more restricted form than is warranted upon principle. The

witness is called upon to state that she is a lewd woman, upon his own knowledge, without any reference to her reputation in her community. That it may be proven that she is a *strumpet* or *prostitute*, is conceded; but if this may be done by a witness upon his personal knowledge of her, without regard to her general reputation, it places the character of the prosecutrix in the power of the witness, regardless of any appeal that she may be able to make to her good standing in the community. As well ask the witness, if he had had connection with her, as to ask him to state, upon his own knowledge, that she was a lewd woman. If a woman is a prostitute, it is soon "whispered to the winds," and generally known among her neighbors. Communities are ordinarily quick scented upon such subjects, and sometimes the reputation of the innocent is blasted upon false suspicions. With all due respect for the learning of Judge COWEN, we think he has gone further, in *The People vs. Abbot*, than the authorities warrant.

X. The question put by the prisoner's counsel to the witness, *Jacob Burns*, neither referred to her reputation for truth or chastity, but enquired for the "rumor and belief" of the people about Mrs. Fulmer generally, and, in that form, was properly disallowed by the court.

XI. For what reason the court arrested the further examination of this witness, does not appear; but the presumption is, that the court exercised a sound discretion in terminating his examination, in the absence of any showing in the bill of exceptions that the prisoner proposed to prove by him some further material fact in the cause, and was cut off by the dismissal of the witness from the stand.

XII. Both of the questions proposed on behalf of the prisoner, to the witness, *Robert H. Smith*, were properly ruled out by the court. They sought his opinion as to whether Mrs. Fulmer's oath was entitled to credit, without indicating to him, in the terms of the inquiries, that his opinion must be founded on his knowledge of her general reputation for truth and veracity among her neighbors.

XIII. The court excluded *James Milton*, the owner of the prisoner, from testifying in his behalf. On what grounds the judge refused to permit this witness to be introduced, is not stated in the bill of exceptions, but we may presume, in a case of this magnitude, involving the life of a human being, that the judge supposed the owner of the slave to be incompetent, by reason of his interest in the result of the prosecution. In this, the court erred. This court has decided, upon high authority, and on grounds of public policy and humanity, that the master is a competent witness for his slave, and that his interest goes to his credibility. *Austin vs. The State*, 14 *Ark. R.* 555.

XIV. The court did not err in permitting the State to re-call the witness Landers, to prove the appearance of Mrs. Fulmer, when she came to the mill, immediately after the alleged assault upon her by the prisoner. This might have been proven on the examination in chief, but it was competent as rebutting testimony, after the attempt to impeach the prosecutrix.

XV. The *first* and *second* instructions given to the jury, on the part of the State, are substantially as given on the previous trial, and approved by this court when the case was here before. No valid objection is perceived to the *third* instruction for the State. Mrs. Fulmer proved, substantially, every material allegation contained in the indictment; her credibility was the only matter left for the jury to determine, and the third instruction was intended to advise them of the legal tests by which they were to be governed in coming to a conclusion as to the credit to be given to her evidence. It is true that the court did not tell the jury, in either of these instructions, that, in order to convict the defendant, they must find, from the testimony, that he was a negro, that the offence was committed in Union county, and on a day previous to the finding of the indictment; but all these facts were proven, and there could have been no controversy about them. The object of the charge of the court is, to settle the law upon controverted points. In the *first* instruction, asked by the prisoner, and given by the court, it was assumed that he was a *negro*.

XVI. Taking all the instructions given by the court to the jury, they appear to have been favorable enough to the prisoner; and those given at his instance, were sufficient to guide the jury in coming to a conclusion as to the credibility of the principal witness for the State, and the weight to be attached to her testimony, without the *fifth* and *sixth*, which the court declined to give, and which were expressed in terms stronger, perhaps, than was warranted by law.

XVII. All the grounds urged in the motion for a new trial, have been considered, except the one that the verdict was contrary to the evidence. If this were the only ground, the verdict of the jury, whose province it was to pass upon the weight of the testimony, would not be disturbed. According to the statement of Mrs. Fulmer, corroborated, to some extent, by the testimony of Landers, the prisoner insolently intruded upon an unprotected woman, at her own house, engaged in her domestic duties, and committed an assault upon her, brutal in its nature, and abhorrent to humanity. If the jury believed her testimony, they could not have done otherwise than find the prisoner guilty.

But, for the errors committed by the court, as indicated above, the judgment must be reversed, and the cause remanded, with instructions to grant the prisoner a new trial, &c.

BISCOE ET AL. VS. BYRD ET AL.

15 555
70 374

The acknowledgment of a deed is valid, if taken before a judge or justice of the peace, within the limits of the State in which he is commissioned to act—it being a ministerial, not a judicial act.

Appeal from the Circuit Court of Pulaski County.

HON. WM. H. FELD, Circuit Judge.

PIKE & CUMMINS, for the appellants.

CURRAN, for appellees.

Mr. Justice WALKER delivered the opinion of the Court.

As nearly all of the questions arising in this case, depend upon the contingency that we hold the deed of mortgage from Byrd to the Real Estate Bank, to be improperly registered, we will proceed to state the facts necessary to a proper understanding of the issue touching that point, and to investigate it.

The bill, in this case, was filed by the trustees of the Real Estate Bank, to disencumber the lands conveyed by deed of mortgage to the Bank by Byrd, to secure the payment of all such sums of money as he might borrow from the Bank on account of subscriptions for stock; and, upon which, as such stockholder, he had borrowed $7.600; and to foreclose the mortgage, and subject the property to the payment of said debt.

The mortgage deed was filed and admitted to record, together with the certificate of acknowledgment, taken before a justice of the peace, on the 16th day of September, 1837.

On the 24th day of June, 1840, Andrew R. Jones and William Woodward, recovered judgment, in the Circuit Court of the United States for the District of Arkansas, against Byrd and Dunn, for the sum of $5.661 43 damages and costs of suit; upon which judgment such proceedings were had, that, on the 25th day of November, 1844, George C. Watkins became the purchaser of the land so mortgaged to the Bank, to whom a regular deed was made and recorded on the 30th November, 1844.

On the 10th November, 1840, Edward Pitman & Co., recovered judgment in the Pulaski Circuit Court against Byrd & Dunn, for

the sum of $1.617 73 damages, together with costs: and, also, another judgment for the sum of $3.668 05 damages, together with costs; each of which judgments, by force of the statute, created liens upon the real estate of the defendants, within the county in which they were rendered, from the day of the rendition thereof respectively.

Under this state of case, the contest, for priority of title, is raised between the Bank, the mortgagee, and Watkins, the purchaser, under the judgment lien.

Conceding that the deed is, in all respects, valid and sufficient, and properly recorded, if the acknowledgment is sufficient, and that the judgment, and all the proceedings under it, are valid and regular, and that the judgment lien had not been displaced, by lapse of time, or otherwise; the purchaser, under the judgment lien, contends that the mortgage, although prior in date, and also in its entry upon the record, did not create a prior lien upon the land, in favor of the Bank, to the judgment lien under which he purchased, for the reason, as he alleges, that there was no valid acknowledgment of the deed by Byrd, which was indispensably necessary to affect him with notice under the registry act.

The only objection to the certificate of acknowledgment, is, that the acknowledgment was taken and certified in Pulaski county, where the lands lie, by a justice of the peace, commissioned and qualified to act as such, within, and for, the county of Chicot. There is no question, but that the acknowledgment was taken in Pulaski county by a justice of Chicot county: and, the point at issue, is, was such act valid?

By the constitution of this State, the qualified voters of each township elect the justices of the peace for their respective townships. They are required to reside in the township for which they are elected. Their jurisdiction, as to the subject matter, cognizable before them, is defined; but, as to the territorial jurisdiction, nothing is said in the constitution. The Legislature has extended the jurisdiction of justices in certain cases, civil and

criminal, beyond the limits of their respective townships, and given them jurisdiction, co-extensive with the county in which the justice is elected, not only in regard to ministerial, but also judicial acts. *Digest, chap.* 95, *sec.* 1, *p.* 672. And we have held those statutes to be constitutional. *Humphries vs. McCraw*, 5 *Ark. Rep.* 62.

If the Legislature had power to confer, upon the justices of the peace, jurisdiction beyond the limits of their respective townships, and co-extensive with the limits of the counties in which they are elected, (and particularly when it is a judicial power thus conferred), there would seem to be no good reason, why a mere ministerial power might not be conferred upon them, any where within the limits of the State. And that they did so, we think fairly deducible, not only from the general terms used in conferring the power to take the acknowledgment of deeds, but by the previous course of legislation upon the subject.

The deed, in this case, was acknowledged before the Revised Statutes took effect, but after the formation of the State Constitution, and the election of officers under it. Under our Territorial Government, justices of the peace were chosen by a joint vote of the Legislature. *Steel & McCampbell's Digest, p.* 354, *sec.* 1. And, under the statute in force, during the Territorial Government, justices of the peace had power to take the acknowledgment of deeds, within the county in which they resided, and were qualified to act, and in which the land conveyed was situated. *Steel & McCampbell's Digest, p.* 133, *sec.* 4. So, that they were, in express terms, limited to their respective counties by legislative enactment; and so the law remained until after the formation of the constitution; and at the first session thereafter, indeed within a few months, a Legislature, composed of many of the members of the convention, who framed the constitution by an act, approved the 31st October, 1836, enacted "That, in addition to the mode now prescribed by law, the proof or acknowledgment of any deed of conveyance, or the relinquishment of dower of any such deed, &c., may be made before, and taken by, any judge or justice of

the peace, or notary public, in the State, or any clerk of the Circuit Court in any county in the State." Now, by reference to the old law, each of these officers had power to take the acknowledgment of deeds, and the only difference is, that the one limited the officer to the county, the other does not. What, then, are we to understand by the terms, "In addition to the mode now prescribed by law?" Most clearly, that the Legislature intended to enlarge the territorial jurisdiction of the officer; because, that is the only way by which it could be enlarged. There was no addition of officers, before whom the acknowledgment might be taken, and no change as to the manner of taking the acknowledgment.

These duties are, in no wise, connected with the judicial powers of the justice. He is required to keep no record of his acts; the only evidence of which, is his certificate upon the deed. It is, in its nature, an act of personal trust, and is conferred on several officers, some of whom have no judicial power, in consequence of their presumed capacity and integrity. It belongs to that class of duties known and recognized by this and other courts, as strictly ministerial. Thus, it has been held, that, taking a recognizance is a ministerial act. *Albee vs. Ward*, 8 *Mass. Rep.* 84; *Levy vs. English*, 4 *Ark. Rep.* 65. Taking an affidavit is such. 4 *Bos. & Pul.* 37. And so, also, is the taking of the acknowledgment of a deed. *Gill vs. Fontleroy*, 8 *B. Mon.* 177; *Beaumont vs. Yateman*, 8 *Humph. Rep.* 543; *Hopkins vs. Menderback*, 5 *J. R.* 234; *Moore vs. Vance*, 1 *Ham. R.* 1; *Kinsman vs. Lewis*, 11 *Ohio Rep.* 479.

And being ministerial, it is held that the officer performing them, is not limited to his appropriate territorial jurisdiction, in the performance of them. Thus, in *Loveboard vs. Moorehead*, 4 *Bos. & Pul.* 37, a fine and recovery were allowed to pass, on an affidavit made before two English justices, who were, at the time of taking it, in France. And although it was held in *Jackson vs. Humphries*, 1 *J. R.* 498, that an oath, administered by a New York judge in Canada, was void; because, taken beyond his ter-

ritorial jurisdiction—that case was subsequently, in effect, overruled by the same court, in the case of *Hopkins vs. Menderback*, 5 *J. R.* 234. And in *Moore vs. Vance*, 1 *Ham. R.* 1, the case of *Jackson vs. Humphries*, was reviewed and expressly overruled. In that case, a deed, acknowledged before a United States Judge, for the territory north-west of the Ohio river, taken beyond the limits of the territory, was held to be valid, and this decision was subsequently re-affirmed by the same court in *Kinsman vs. Lewis*, 11 *Ohio Rep.* 479.

These decisions are strongly in point; and some of them carry the rule further than is necessary, in this case, or than we would perhaps feel inclined to do. They all consider the officer, whether judge, justice, or notary public, as acting, in this respect, rather as commissioner, to whom plenary power is given to take the acknowledgment of deeds, than as an officer, in the ordinary discharge of official duties.

Without, therefore, intending to be understood as extending this rule to the judicial acts of a judge or justice, or that, even when acting in a ministerial capacity, they may go beyond the limits of the State in which they are commissioned and qualified to act, as would seem to be the case in *Moore vs. Vance*, and *Loveboard vs. Morehead*, in which the act of the officer was held to be valid, even when done beyond the limits of the State, under whose authority they profess to act, we feel authorized, in view of the general terms in which the power is conferred, the nature of the act to be performed, and the authoritative precedents of other courts, to hold the acknowledgment of a deed, taken before a judge or justice of the peace, valid; if taken within the limits of the State, in which he is commissioned to act. And even if this was a doubtful question, as the statute may have been so construed, and acted under, and rights acquired to real estate, we should feel it our duty to adopt the most liberal construction, and one which would sustain and uphold the title to property heretofore conveyed.

The case of *Share vs. Anderson*, 7 *Serg. & R.* 62, it is true,

would seem to hold a different rule. It was, in that case, held that the power to take the separate examination of a married woman, was limited to the particular district in which the justice presided, but this decision was expressly made upon the ground that the act was a judicial, not a ministerial act; and is, therefore, in direct contradiction to our own decisions, and those of most of the other States, and can have but little weight, in determining the question before us.

This question being settled, it is unnecessary to pursue our investigation further, or to settle the questions which would arise in case our decision had been different on this point, many of which have been settled by this court since the submission of the case.

Having decided that the acknowledgment was taken before a competent officer, there is no question but that the deed of mortgage created a prior specific lien upon the land, from the 16th of September, 1837, the day on which it was filed and admitted to record, in favor of the complainants. The court below, therefore, erred in deciding that the judgment lien creditors were not affected with constructive notice of the mortgage lien, and that the same was postponed to the prior rights of the judgment creditors, to satisfaction out of the lands of the creditor, Byrd, and this, wholly irrespective of the question as to whether such judgment creditors, and the purchaser under the judgments, had actual notice of such prior mortgage lien or not, or whether such notice, if given, would be equivalent to registry notice; with regard to which, we express no opinion, because, it is unnecessary to do so, in order fully to settle all the rights involved in the case; and, also, because the mortgage is prior in date to the statute, under which the counsel seem to suppose it must be determined.

The complainants are clearly entitled to prior right to satisfaction out of the mortgaged property, and for that purpose, the mortgage should be foreclosed, and the lands therein described sold, to pay the sum admitted by the parties to be due, together with ten per cent. interest thereon until paid.

The judgment creditors, for whom Watkins bought the property, no doubt, acquired a valid legal title to the land, subject to the prior incumbrance of the mortgage debt, and if they choose to hold their purchase, and pay off such incumbrance, they should be permitted to do so; but, if they fail to do this, the lands should be sold, and the proceeds applied to the payment of the debts of the several creditors, giving priority to each, according to date. The sums due to the several claimants seem to have been properly ascertained by the court below, from an agreed state of case submitted by the parties: after which, and the payment of the costs as herein directed, the overplus, if any, to be paid to said Byrd, or his legal representatives.

Let the decree of the court below be reversed, and set aside at the cost of the appellees, and a decree be entered in this court, in accordance with the opinion herein delivered, in conformity with the practice in equity, decreeing against the appellees the payment of the costs incurred at their instance in the court below, and the residue of the costs against the defendant, Byrd, to be paid out of the proceeds of the sale of the mortgaged premises.

GUTHRIE VS. FIELD ET AL.

A bill in chancery, continued at two successive terms, by consent, with leave to the defendants to answer—at the third term, no steps were taken, nor the case called up—at the fourth term, the complainants, at the calling of the cause, moved for a decree *pro confesso;* but the court dismissed the cause for want of prosecution: HELD, That the court erred.

Appeal from the Circuit Court of Pulaski County in Chancery.

Hon. WM. H. FIELD, Circuit Judge.

TRAPNALL, for the appellant. The complainant was entitled to the decree asked for. *Sec.* 19, *chap.* 28, *Digest.*

S. H. HEMPSTEAD, contra. It is competent to dismiss a bill for want of prosecution. *Monteith vs. Taylor*, 9 *Vesey* 615; *Lyon vs. Dumbell*, 11 *Vesey* 608.

Mr. Justice SCOTT delivered the opinion of the Court.

It appears, from the bill of exceptions, that, on the 9th of February, 1854, both the complainants and the defendants appeared by their solicitors, and that this cause was regularly called up for trial, and that thereupon the complainants moved for a decree *pro confesso* against the defendants therein, who had been served with process, and had failed to answer the bill, which motion the court overruled, and thereupon, on its own motion, ordered the cause to be discontinued, upon the ground, as is stated, that no steps had been taken in the cause since in the year 1850, and a decree was made accordingly, from which the complainants appealed to this court.

It appears, from the transcript, that, on the 12th June, 1851, some of the defendants were allowed, until the succeeding term, to answer, and, by consent, the cause was continued; the complainants, at the same time, obtaining an order of publication against other defendants. It also appears, that, on the 20th January, 1853, the defendants were allowed further time to file their answer until the succeeding term, and the cause was continued. At the next succeeding term, it does not appear that any steps were taken by either party, or that the case was called up at all. Then follows the term when the decree in question was made, which, to say the least of it, is sustained, under the circumstances,

by no precedent, cited or known to this court. So far from the complainant having failed to prosecute his suit, it appears that, upon the only occasion when the cause was called up, he endeavored to progress in the manner provided by law, (*Digest, chap.* 28, *secs.* 13, 19,) which the court would not allow, and without further ado, thrust his cause out of court. The only two cases cited to sustain the action of the court in the premises, fall very far short of doing so.

The decree will be reversed, and the cause remanded to the Chancery Court for Pulaski county, to be proceeded with according to law.

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THE STATE VS. SORRELLS.

The usage of the government, continued from the adoption of the constitution, is entitled to regard in the determination of doubtful constitutional questions.

The enactments of the Legislature are to be upheld by the courts in the absence of any clear and manifest repugnance to the constitution; and there is no such repugnance in the law providing for an election to fill, for the unexpired term, a vacancy in the office of Circuit Judge.

Under the constitution, as amended, Circuit Judges are elected for a term of four years; and, upon the happening of a vacancy, the election is for the unexpired portion of the term, and not for a full term of four years.

Writ of Quo Warranto.

S. W. WILLIAMS, Attorney General. The only question to be determined in this case, is, whether the resignation of Josiah

Gould, in 1851, created a vacancy in the office of Circuit Judge of the 2d Judicial Circuit, or a vacancy in his term of that office.

Authorities to show that it created a vacancy in the office: *Sec.* 7, *art.* 6 *Const.; The State vs. Scott*, 4 *Eng.* 176; *Story's Com. on Const., secs.* 181, 182, 183 *and* 210, 212; 2 *Bl. Com.* 116; *Acts of* 1848, *page* 9; *Const., p.* 52; *Hughes vs. Buckingham*, 5 *Sm. & Marsh.* 632; *Johnson vs. Wilson et al., N. Hamp. R.* 202; *Am. Dig.* 398; *Hill vs. The State*, 1 *Ala.* 561; *Fletcher vs. Peck*, 6 *Cranch; Dartmouth College vs. Woodward*, 4 *Wheat.; The People vs. Yerby*, 6 *Cowen* 651.

GALLAGHER, for defendant. Under our form of government, no officer or incumbent of any office, has a property therein. *State vs. Floyd*, 4 *Eng.* 302; *State vs. Scott, ib.* 300. The commission, in itself, gave no right—the same being derived solely from the election. *Hill vs. State of Alabama*, 1 *Ala. R.* 561.

There can be no such thing as an officer *de jure*, an officer *de facto* existing at the same time as incumbents of an office. *Beardman vs. Holliday*, 10 *Paige Ch. R.* 223; *Smith vs. Halfacre*, 6 *How. Rep.* (*Miss.*) 588.

The main and sole question upon which the case depends, is simply this: can the people elect a judge of a Circuit Court, the office being vacant by the death or resignation of the previous incumbent, whose term of office has not expired—can there be such a thing as an "unexpired term?" That there can be, see *Smith vs. Halfacre*, 6 *How.* (*Miss.*) *Rep.* 580.

The distinction we assume, is, that where the appointing power is in an individual, and the appointee dies, then there is no vacancy in the term, but there is one in the office: but in cases where the appointment is in the Legislature or people, *ex necessitate rei*, upon the death or resignation of the incumbent, there is a vacancy in the term, and there remains a vacancy in an unexpired term of office.

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

Upon the order of the Attorney General, the clerk of this court issued a writ of *quo warranto* against Thedoric F. Sorrells, requiring him to show by what warrant he exercises the office of Judge of the 2d Judicial Circuit, of this State.

The plea of Sorrells, in response to the writ, alleges, that on the first Monday of February, A. D. 1849, an election was held in the several counties composing said circuit, for the election of a judge thereof, under the provisions of the *act of 29th December*, 1848, entitled *an "act to divide the State into Judicial Circuits, to provide for the election of Judges," &c.*, at which election, Josiah Gould was duly elected, and afterwards, on the 26th day of February 1849, commissioned by the Governor, judge of said 2d circuit, for and during the term of four years from the date of his commission, and until his successor should be elected and qualified, according to law. That Gould qualified, and acted as such judge, until the 29th day of March, 1851, when he sent his resignation to the Governer, to take effect on the first Monday of August following. That thereupon the Governor issued writs of election to the sheriffs of the several counties composing said circuit, commanding them to hold a special election on the 1st Monday of August, 1851, for the purpose of electing a judge for the unexpired term of the said Josiah Gould; at which election John C. Murray was duly elected, and afterwards, on the 18th day of August, 1851, commissioned by the Governor, judge of said circuit to fill the vacancy occasioned by the resig nation of said Gould, and for and during the remainder of his term, according to law. That Murray qualified, and entered upon the duties of said office, and was entitled to hold the same, until the 26th day of February, 1853, when Gould's term expired, and until his successor was elected and qualified.

That, on the first Monday of August, 1854, a general election (being the first general election after the expiration of Gould's term, and Murray's commission) was held in the several counties

composing said circuit, for the election of a judge thereof, pursuant to the act of the 29th December, 1848, above referred to, and "*An act to provide for an election of one Representative to Congress, &c., and to change the time of holding other elections,*" *approved* 11*th December*, 1851: at which election, the defendant, Sorrells, was duly elected, and afterwards, on the 22d day of August, 1854, commissioned by the Governor, judge of said 2d circuit for the term prescribed by the constitution. That shortly after the issuance of his commission, he qualified, and entered upon the discharge of the duties of said office; and by virtue of the premises, claims the right to hold and exercise the same, &c.

The Attorney General demurred to the plea, and the defendant joined in the demurrer.

If Murray was entitled to hold the office, under the constitution, for four years from the date of his commission, and not merely for the remainder of Gould's term, the election and commission of the defendant, were irregular, and his plea is insufficient.

When the constitution came from the hands of its framers, it contained various provisions in reference to the office of circuit judge, which it may be well first to cosnider; and then to determine how far these provisions have been modified by subsequent amendments.

Original provisions.—1. "The judicial power of this State shall be vested in one Supreme Court, in *Circuit Courts*, in County Courts, &c. *Art. VI., sec.* 1.

2. The State shall be divided into convenient *circuits*, each to consist of not less than five nor more than seven counties contiguous to each other, for each of which a judge shall be elected, &c. *Ib., sec.* 4.

3. The General Assembly shall, by joint vote of both houses, elect the judges of the Supreme and *Circuit Courts. Ibid. sec.* 7.

4. The *judges* of the *Circuit Court*, shall be at least twenty-

five years of age, and shall be elected for the term of four years from the *date* of their *commissions*. *Ibid.*

5. *Vacancies* that may happen in offices, the election to which is vested in the General Assembly, shall be filled by the Governor during the recess of the General Assembly, by granting commissions, which shall expire at the end of the *next session*. *Art. V., sec.* 15.

6. The General Assembly shall meet every *two years*, on the first Monday of November, at the seat of Government, until altered by law. *Art. IV., sec.* 7.

7. The Governor may, by proclamation, on extraordinary occasions, convene the General Assembly, &c. *Art. V., sec.* 8.

8. The 8th section of the "SCHEDULE" provides for the holding of the first session of the General Assembly, under the constitution, on the 2d Monday of September, 1836."

The constitution was adopted, in convention, on the 30th January, 1836, and the State was admitted into the Union, by act of Congress, approved 16th of June, 1836.

At the first session of the General Assembly held under the constitution, the State was divided into six Judicial Circuits: *Acts of* 1836, *p.* 138, 181; and a judge elected for each circuit, for the term prescribed by the constitution. *House Journal*, 1836, *p.* 133, 134, 205.

The following persons were elected:

1st CIRCUIT—J. C. P. Tolleson.
2d. " —De La F. Roysdon.
3d. " —Lewis B. Tully.
4th. " —J. M. Hoge.
5th. " —Charles Caldwell.
6th. " —Allen M. Oakley.

The Governor, by proclamation, convened the General Assembly on the *first Monday of November*, 1837. In his message, he informed the two Houses, that *Oakley*, who had been elected judge of the 6th circuit, at the previous session, "*refused to act*," and that on the — day of February, 1837, under *sec.* 15, *art.* 6,

of the constitution, he had "commissioned Levin I. Handy to fill the *vacancy* occasioned by the *refusal referred to.*" Also, that the judge of the second circuit resigned his office on the 23d of October, 1837, and that no commission had been granted to fill the vacancy, in consequence of the near approach of the called session of the General Assembly. *House Journal*, 1837, *p.* 178, 179. Acting on this information, it appears that the two houses proceeded, on the 13th of November, to make an election, and Euclid L. Johnson was elected judge of the second, and Levin I. Handy, judge of the sixth circuit, who were declared, the *House Journal* says, "*duly elected for the term and period prescribed by the constitution of the State, and until their successors are duly elected and qualified.*" *House Journal*, 1837, *p.* 224, 225. The *Senate Journal* says, "for and during the *time prescribed by law*," page 23.

At the same session, on the 13th February, 1838, the two houses proceeded to an election of judge of the *sixth* circuit, to fill the vacancy occasioned by the resignation of Levin I. Handy, and Wm. Conway B. was declared duly elected "*for the term and period prscribed by the laws of this State.*" *House Journal*, 1837, *p.* 427.

At the regular session in 1838, the *seventh* circuit was created; *acts of* 1838, *p.* 4: and R. C. S. Brown elected judge. *House Journal*, 1838, *p.* 318.

At the session of November, 1840, Wm. K. Sebastian was elected judge of the *first* circuit; Isaac Baker, of the *second;* Thomas Johnson of the *third;* Joseph Hoge of the *fourth;* John J. Clendenin of the *fifth;* and were severally declared "*elected for the term prescribed by the constitution and laws of the State.*" *House Journal*, 1840, *p.* 295, 299. It does not appear that E. L. Johnson had resigned the office of judge of the 2d circuit, but it would seem that it was considered that the time for which he had been elected at the called session, had expired. Moreover, at the session of 1840, Conway B. was re-elected judge of the *sixth*

circuit. *House Journal*, 1840, *p.* 459, and commissioned on the 19th of December, 1840, the day of his election.

On the 1st March, 1842, Sebastian resigned the office of judge of the *first* circuit, and Tolleson was appointed by the Governor to fill the vacancy. At the regular session of the General Assembly, in November, 1842, John T. Jones was elected judge of the 1st circuit "*for the time prescribed by law.*"

During the same session, Wm. Conway B. resigned the office of judge of the *6th circuit—House Journal*, 1842, *p.* 78; and John Field was elected to the office, "*for the time prescribed by law.*" *Same Journal*, *p.* 109. R. C. S. Brown was also re-elected judge of the *7th circuit*. *Ib.*, *p.* 110.

At the session of November, 1844, Wm. H. Sutton was elected judge of the *second circuit;* Wm Conway B. of the *third;* Seborn G. Sneed of the *fourth;* John J. Clendenin of the *fifth*, "*for the term prescribed by law.*" *House Journal*, 1844, *p.* 40, 42; and John Field having resigned the office of judge of the *sixth circuit* (*Appendix to House journal*, *p.* 57) George Conway, who had been appointed by the Governor to fill the vacancy, was elected judge of that circuit "*for the term prescribed by law.*" *House Journal*, 1844, *p.* 42.

The two houses rufused to go into an election for judge of the *first circuit*, holding that John T. Jones was elected at the session of 1842, for the full term of four years, and not merely to fill out the unexpired term of Sebastian. *House Journal*, 1844, *p.* 32, 36. *Senate Journal*, *p.* 28–'30. This decision will be noticed hereafter.

At the session of November, 1846, John T. Jones was re-elected judge of the *first circuit;* Wm. H. Field was elected judge of the *fifth* (Clendenin having resigned and the Governor having appointed Field in his place, September 1st, 1846); Wm. W. Floyd was elected judge of the *seventh* circuit. *House Journal*, 1846, *p.* 154. The *eighth* circuit was created at the same session, and C. C. Scott elected judge thereof. *House Journal*, *p.* 155, and Wm. C. Scott was elected judge of the *third* circuit. *Ib.*, *p.*

214—all of whom were elected for the "*term prescribed by law.*"

By an amendment, proposed to the constitution at the session of 1846, and ratified at the session of 1848, the General Assembly was deprived of the power of electing circuit judges, and the elections transferred to the people.

Thus we have endeavord to trace the election of judges, by the General Assembly, from the adoption of the constitution, down to the session of 1848, for the purpose of ascertaining what the usage of the government has been: because, in the determination of doubtful constitutional questions, such usage is entitled to regard, when it tends to confirm or overturn a particular hypothesis.

From this investigation, it would seem that down to the session of 1844, the usage was not altogether uniform.

Thus, for the *second* circuit, Roysdon was elected, at the first session, on the 20th October, 1836; on the 23d of October, 1837, he resigned; on the 13th of November, of the same year, *E. L. Johnson* was elected in his place, at the called session; and at the session of 1840, Baker was elected for a new term. This was all regular, if Johnson was elected to fill out the remainder of Roysdon's term, but if Johnson was elected for a new and full term of four years, his term did not expire until November, 1841, and Baker was commissioned a year too soon (23d Nov., 1840.)

For the *sixth* circuit, Oakley was elected 20th October, 1836; and declined to accept the office. The Governor, supposing this to be such a vacancy as he had the power to fill, commissioned Handy, in February, 1837; who was elected at the called sesion in the following November, but resigning, during the session, Conway B. was elected in his place, on the 13th of February, 1838. On the 19th of December, during the session of 1840, Conway B. was again elected and commissioned. Regarding his election in February, 1838, as being for the remainder of Oakley's original term, which expired 20th October, 1840. Conway B.'s second election and commission were regular. But if he was elected

in February, 1838, for a new and full term of four years, it did not expire until February, 1842; and though the General Assembly, during the session of November, 1840, had perhaps the power to elect him for a new term, over a year in advance of the expiration of his first term, in order that a vacancy might not occur in the recess of that body, yet it was not regular to commission him again until the expiration of his first term, as, under the provision of the constitution, his second term would commence from the date of his commission. But the fact that the Governor commissioned him on the 19th December, 1840, at the time of his election, is an argument to prove that it was then understood, that his first commission was not for a new and full term, but for the remainder of Oakley's term.

Sebastian was elected judge of the *first* circuit, at the November session, 1840, resigned in March, 1842, the Governor filled the vacancy by commissioning Tolleson; at the session of November, 1842, Jones was elected, and at the November session, 1844, the question was made before the General Assembly whether Jones had been elected for a full term of four years, or for the remainder of Sebastian's term. Each house directed its committee on the judiciary to look into, and report upon the subject.

The question was investigated by but two of the members of the committee of the Senate, (Mr. Trimble and Mr. Yell) and, as they say, in their report, only for the "*short period of one night;*" but they reported it to be their opinion, that "the constitution authorized an election for circuit judge for the period of four years only; and that the Legislature could not elect for a longer or a shorter period: and that, therefore, Jones was elected for a full term. They refer to the case of *Smith vs. Halfacre*, 6 *Howard's Miss. Rep.* 582, but thought that case not applicable to the one before them, because in Mississippi the judges were elected by the people, and the provision there for periodical general elections, had some controlling influence in the decision of that case. Their report was adopted by the Senate; but, by what vote, does not appear. *Senate Journal*, 1844, *p.* 28.

The committee of the House was divided. A majority reported that Jones was elected for four years, and that there was no vacancy. The minority reported that he was elected but for the remainder of Sebastian's term, which had expired. The house adopted the report of the majority of the committee on a division of 41 to 33. *House Journal*, 1844, *p.* 32, 36.

The opinion of the Attorney General (Mr. WATKINS, recently the Chief Justice of this court) was taken, and accompanied the minority report. He says: "In regard to all officers to be elected by the people, I conceive the intention [of the constitution] to be manifest, that they hold from one general election to another, and all appointments and elections to fill vacancies, can only extend to the next general election, in order to preserve the simplicity and purity of the elective franchise. The decision of the case of *Smith vs. Halfacre*, 6 *How. Rep.* 582, turns upon this reasoning."

After citing the cases of *The People vs. Green*, 2 *Wend.* 266; *The People vs. Coutant*, 11 *Wend.* 132, and the same case affirmed 11 *Wend.* 511, and remarking upon them as standing somewhat opposed to *Smith vs. Halfacre*, he says: "I therefore incline to the opinion that when Judge Jones was elected for the term prescribed by the constitution, he was elected for four years from the date of his commission; at the same time I feel it my duty to say, that this question is not free from doubt in my mind. I can suppose the case of judges elected at irregular or called sessions of the General Assembly; according to the view I have taken, their commissions would expire at the like irregular periods, and those offices would necessarily remain vacant to the great prejudice of the people, until the next session of the General Assembly. The whole subject is an open one in this State, and the question remains to be decided by the Supreme Court."

He concludes his opinion, by advising the General Assembly to make an election, in order that the question might be settled upon *quo warranto;* but no election was made.

That the constitution fixes the term of the office of circuit judges

at four years from the date of their commissions, does not admit of question; but whether its framers intended every judge elected by the General Assembly to hold his office for four years, from the date of his commission, irrespective of the term of his predecessor; or intended that the General Assembly should elect the judges regularly every four years, and if a vacancy occurred in the mean time, the person elected to fill such vacancy should hold only to make up the term of the former incumbent, is a question of some doubt; and it is not necessary for us to express a decided opinion on this point, as the case before us arises under the constitution as amended.

The amendments to the constitution, bearing upon this subject, are as follows:

1. "Judges of the Supreme and *Circuit Courts*, Clerks of the Supreme and Circuit Courts, Attorneys for the State, Sheriffs, Coroners, County Treasurers, Justices of the Peace, Constables, and all other officers, whose term is fixed by the constitution, to a specific number of years, shall hold their respective offices for the term now prescribed, and until their successors are elected and qualified. *Ratified November* 17*th*, 1846.

2. The qualified voters of each judicial circuit, in the State of Arkansas, shall elect their circuit judge.

3. That the General Assembly of the State of Arkansas shall not be restricted, as to the number of counties that shall compose a judicial circuit in this State." *Ratified November* 25*th*, 1848.

By additional amendments, ratified at the same time, the election of Prosecuting Attorneys, County and Probate Judges, was also transferred to the people.

It may be observed that while the power of electing the circuit judges was in the General Assembly, the Governor was authorized to fill vacancies occurring in recess, but the amendment of November 25th, 1848, transferring the election of judges to the people, made no provision for filling vacancies happening between times that might be fixed for general elections, by death, resignation or removal; and, therefore, the mode of filling such vacan-

cies was left open for legislative regulation. Though the election of judges for the regular constitutional term of four years, must be made by the people, yet it can hardly be questioned but that in the absence of any constitutional prohibition or restriction upon the General Assembly, they have the power to control the manner of filling vacancies occurring in the regular terms.

The General Assembly of November, 1848, after adopting the amendments to the constitution, transferring the election of the judges, &c., to the people, passed an act providing for such elections, &c. *Acts of* 1848, *p.* 50. This act, passed by the same body of men who ratified these amendments to the constitution, is entitled to some respect, as an exposition of their understanding of the intention and effect of such amendments. Opinion of Chancellor WALWORTH in *Coutant vs. The People*, 11 *Wend.* 512; and MARCY, J., in *The People vs. Green*, 2 *Wend.* 266.

The first section of this act, divides the State into six judicial circuits.

The 2d section provides that an election shall be held at the several election precincts of this State, on the 1st Monday of February, 1849, and every two years thereafter, for the election of a County and Probate Judge for each county, and a Prosecuting Attorney for each judicial circuit; who shall hold their respective offices for the term of two years from the date of their commissions, and until their successors are elected and qualified.

The 3d section provides, that there shall be elected, at the election to be holden as aforesaid, on the first Monday of February, 1849, and *every four years* thereafter, a judge of the circuit court for each of the judicial circuits, who shall hold their respective offices for the *term of four years* from the date of their respective commissions, and until their successors are elected and qualified.

The 5th, 6th and 7th sections, provide for the mode of conducting the elections, making the returns, &c.

Section 8 is in these words: "If any *vacancy* shall occur in either of the offices of Judge of the County and Probate Court,

of *Judge* of the *Circuit Court*, or Prosecuting Attorney, by death, resignation, removal from the county in the case of a Judge of the County and Probate Court, removal from the circuit in case of a Judge of the Circuit Court or Prosecuting Attorney; or otherwise, it shall be the duty of the Governor to issue a writ of election to fill such vacancy, directed to the sheriff or sheriffs of the proper county or counties; which election shall be holden on a day named in said writ of election; and the person so elected to fill a *vacancy*, shall hold his office for the *unexpired term of his predecessor*, and until his successor is elected and qualified."

The wisdom of this provision for filling *vacancies*, is so manifest, that it should be upheld by the courts, in the absence of clear and undoubted repugnance to some clause of the constitution. If no regard were paid to regular terms in the election of judges—if every judge was elected for four years from the date of his commission, regardless of the term of his predecessor, and of the time of his election, no system of periodical general elections could be preserved, but numerous special elections might occur, greatly to the inconvenience of the voters, and at unnecess ry public expense. But it was argued by the Attorney General, that this inconvenience might be avoided, by a provision of law, permitting a judge, elected at a special election, to hold the office for four years, and then to hold over, under the amendment to the constitution of November 17th, 1846, above copied, until the next general election succeeding the expiration of his term. True, this might be done, but it would be a departure from the spirit and intention of this amendment, which was designed not to extend the term of office fixed by the constitution, but to prevent temporary vacancies, between the going out of one judge, and the coming in of another.

At the time the election of judges was transferred to the people, the judges of the *first*, *third*, *fifth* and *seventh* circuits held unexpired terms. The terms of those of the *second* and *sixth* had expired; the *fourth* had expired, and was vacant by removal; and the judge of the *eighth* circuit, having been appointed one

of the judges of this court, his successor held a temporary commission from the Governor.

The General Assembly seem to have been under the impression that the adoption of the amendment to the constitution, providing a new mode for the election of the judges, worked a vacancy in the offices of all the incumbents; and hence, they provided for a general election on the first Monday of February, 1849.

But there being doubts about the effect of the change of the mode of election upon the unexpired terms of the incumbent judges, the General Assembly, by the 10*th section of the act of December* 29*th*, 1848, directed the Attorney General to issue a writ of *quo warranto* against one of the incumbents, to test the question; and provided that if the Supreme Court decided that he was entitled to hold out his term, then the judges of the *first*, *third*, *fifth* and *seventh* circuits, who were elected at the previous session of the Legislature, should respectively be judges of the *first*, *third*, *fifth* and *fourth* circuits, as established by that act, until the first Monday of February, 1851, and until their successors were elected and qualified; "and if a *vacancy* occur in the office of judge of either of the circuits last aforesaid, such vacancy shall be filled in the manner and *for the time* prescribed in the *eighth* section of this act; and at the general election, to be holden on the first Monday in February, 1851, and every *four years thereafter*, a judge shall be elected for each of said circuits, who shall hold his office for the *term* of *four* years, and until his successor is elected and qualified."

A *quo warranto* was accordingly issued against WM. C. SCOTT, Judge of the *third* circuit, and a majority of this court held that he was entitled to hold out the remainder of his term, notwithstanding the amendment of the constitution changing the mode of electing the judges. Mr. Justice SCOTT dissenting. *State vs. Scott*, 4 *Eng. Rep.* 270.

On the 1st Monday of February, 1849, under the 4th section of the act of December 29th, 1848, above copied, Gould was elected

judge of the second circuit, for the full term of four years, from the date of his commission, (26th February, 1849.)

By *sec.* 1, *chap.* 61, *Digest*, the first Monday of August, 1846, and every two years thereafter, was set apart for general elections.

When the election of judicial officers was transferred to the people, the General Assembly thought proper to separate them from political elections, and fixed them upon the 1st Monday of February, 1849, and every two and four years thereafter.

But afterwards it was deemed expedient to change this policy, and, by act of January 11th, 1851, (*Pamph. acts*, 1850, *p.* 129,) the election of Judges and Prosecuting Attorneys was made to fall in with the other general elections; and it was provided, among other things, "That, after the first Monday in February, 1851, a circuit judge shall be elected, in each judicial circuit, at the first general election, after the expiration of the commission of the presiding judge thereof." This act makes no change in the act of 29th December, 1848, as to filling *vacancies* in *unexpired terms.*

On the 29th March, 1851, Gould resigned the office of judge of the second circuit, to take effect after the first Monday of August, 1851; and, at a special election, held on the first Monday of August, 1851, ordered by the Governor, under the act of 29th December, 1848, Murray was elected, and on the 18th of the same month, commissioned to fill the *vacancy* in Gould's term, which expired on the 26*th of February*, 1853; and Murray held over until the first general election thereafter, in August, 1854, when the defendant, Sorrells, was elected, and commissioned for a new term.

That these elections were in accordance with the enactments of the Legislature, there is no question, and we have already said that these enactments are to be upheld by the courts in the absence of any clear and manifest repugnance to the constitution. Our State Constitution is a limitation, and not (like the federal constitution) a grant of powers. The great residiuum of sover-

eignty is in the law making power; and the Legislature can pass any law which it is not expressly, or by necessary implication, prohibited from passing. *State vs. Ashley*, 1 *Ark.* 538; *Smith's Com.* 236 *to* 312; *State vs. Fairchild*, present term.

It is a settled principle, in the legal policy of this country, that it belongs to the judicial power, as a matter of right and of duty, to declare every act of the Legislature, made in violation of the constitution, or of any provision of it, null and void. 1 *Kent's Com.* 450. But the question whether a law is void, for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in *a doubtful* case. It is not on slight implication and vague conjecture, that the Legislature is to be pronounced to have transcended its powers, and its acts considered void. The opposition between the constitution and the law, should be such, that the judge feels a clear and strong conviction of their incompatibility with each other. *Fletcher vs. Peck*, 6 *Cranch* 87; *Smith's Com.* 575, 576.

The view that we have taken of the power of the Legislature, to regulate the mode of filling *vacancies*, occurring in the regular terms of the judges of the circuits, between the periods fixed for general elections, is not only sustained by the case of *Smith vs. Halfacre*, 6 *How. Rep.* 582, but is in accordance with the established usage of the government, in reference to *vacancies* happening in other offices, which are filled by elections of the people, under original provisions of the constitution.

Thus it is provided that the qualified voters, &c., shall elect circuit clerks, sheriffs, coroners, county surveyors, treasurers, justices of the peace, constables, &c., who are to hold their respective offices for *the term of two years, &c. Constitution, art. VI., secs.* 7, 15, 16, 17.

The constitution is silent as to the mode of filling vacancies in these offices—it provides for the regular terms, but not for *vacancies* in such *terms.*

The Legislature has supplied the omission, and provided for filling all such vacancies. In some instances by Executive appoint-

ments, and in others by special elections; and, in all such cases, the vacancy is filled for the *remainder* of the *unexpired term*, and until the next general election. Thus the frequency of special elections is avoided, and a system of periodical general elections, is preserved. See *Digest, chap.* 165. The necessity, and wisdom of adopting the same policy in reference to filling *vacancies* occurring in the *terms* of the circuit judges, is manifest, and we do not doubt the power of the Legislature over the subject.

The demurrer of the State to the plea of the defendant, is overruled.

LOFTIS VS. GLASS, EX.

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A testator directs that his real estate be sold by his executor, and the proceeds divided among his children: such proceeds are personal property; and, upon the death of the children without issue, will be distributed to their mother as next of kin. *Kelly's Heirs vs. McGuire et al., ante.*

Appeal from the Circuit Court of Lafayette County in Chancery.

Hon. SHELTON WATSON, Circuit Judge.

PIKE & CUMMINS, for the appellant.

CURRAN & GALLAGHER, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

The complainant, who is the widow of the late Richard F. Loftis, filed a bill in chancery against the defendant, as executor

of the last will and testament of her deceased husband, alleging, in due form, the death of her husband, in the year 1846, in this State, of which he was a citizen: that by his last will, regularly executed before his death, and afterwards admitted to probate, in due form of law, he directed the defendant, his executor, to sell all of his property, real and personal, and to place the whole proceeds at interest until his lawful heirs should become of age; among whom, at that time, it should be equally divided. But, if either one should marry before coming of age, he or she should be deemed of age, and the executor should pay such, his or her proper equal share of the money. Besides, his widow, the complainant, (who claimed and received dower out of the estate) he left three infant children, all of whom afterwards died intestate, before arriving at age, and without issue, none of them having married. By a codicil the testator provided that after five years Powell Loftis should be the executor, and that Glass, the defendant, should pay over all the moneys and effects to him, and that he should then take charge of the whole estate, and pay over the same to the testator's heirs, as directed in the will; and, upon the refusal of the latter, David Loftis was to become executor. That, in accordance with the directions of the will, the defendant, as executor, sold the lands and slaves, has realized the other assets, and has paid the debts; and she prays an account, the correction of various items in the settlements of the defendant, as executor, in the Probate Court, that the residue of the estate may be decreed to her, as distributee of her deceased children, and for general relief.

A general demurrer was interposed and sustained to her bill, and the complainant appealed to this court.

The lands in question having been sold by the executor, in the execution of the power to sell, granted him by the will, the title of the heir was thereby divested; (1 *Litt. p.* 169; 1 *Call's R.* 429), and the proceeds of the sale in the executor's hands, was necessarily personal estate. And even before the sale was made, the lands would have been regarded in equity, as the personal estate.

of the devisee or legatee upon the established principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as the species of property, into which they are to be converted. 1 *RandolphR.* 313; 1 *Mad.* 289, 317; 2 *Mad.* 108; 1 *Ves. & B.* 174; 1 *Hov. Sup.* 121.

The whole residue of the estate of the testator being personal, and having vested in his infant children under his will, and they having died intestate, without issue, and leaving no father then surviving, the complainant, as their mother, was next in the order of succession, fixed by our statute of descents and distributions, as construed in the case of *Kelly et al. vs. McGuire & wife et al.*, decided at the present term, and is entitled to the entire residue to the exclusion of all others. She was, therefore, clearly entitled to the relief sought, and it was error in the court below to sustain the demurrer to her bill; and, for that reason, the decree must be reversed.

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WEST ET AL. VS. WILLIAMS ET AL.

A devise to A. for life, with remainder to B., does not lapse by the death of A., in the lifetime of the testator, but vests immediately in B. on the death of the testator.

Where lands are devised by a maternal ancestor, the devisee, though he acquires the land by purchase, holds them as an ancestral estate *ex parte materna;* and, upon his death, without issue, those only of his heirs who are of the blood of such maternal ancestor, can inherit. *Kelly's Heirs et al. vs. McGuire et al., ante.*

Where lands and personal estate are both devised, charged with legacies, the personal estate must first be exhausted in the payment of the legacies, before resort can be had to the land.

A minor son, possessed of real estate, dies without issue; the father enters upon the land, claiming as heir to the son, and makes valuable and lasting improvements: he is entitled, in equity, to set off such improvements against the rents and profits.

Cross Appeals from the Pulaski Circuit Court in Chancery.

Hon. WM. H. FIELD, Circuit Judge.

PIKE & CUMMINS, for the appellants, West et al. The first question in this case, is, whether the intestate, Eugene L. H. Williams, took, at the death of the testatrix, the share devised to his mother, Henry E. Williams, for life; or whether that legacy of the *residuum* lapsed.

The general principle as to lapsing is, that wills not taking effect until the testator's death, can communicate no benefit to persons who previously die. 1 *Jarman on Wills*, 293. But this rule does not extend to a legacy given, over after the death of the first legatee; *for, in such case, the legatee, in remainder, is entitled to have it immediately. Prescott, adm. vs. Prescott*, 7 *Metcalf* 141; *Doe vs. Roach*, 5 *M. & S.* 482; *Hopkins vs. Hopkins*, 2 *Atk.* 581; 2 *Jarman* 671; 2 *Vern.* 378; 2 *Atk.* 320; 2 *Keene* 555.

It is clear, therefore, that the lands in Arkansas belonged to the heirs of Mrs. *Williams'* child. Who those heirs are, is to be ascertained by the laws of Arkansas. The estate came to the child from Mrs. *Taylor*, its grandmother; because, the child did not take thro' its mother at all—but by *purchase*, and not by descent.

When legal terms are used, they are to be understood in a legal sense; technically, the words "purchase," and "on the part of," used in a statute, are to be construed as at common law. *Barnits, Lessee vs. Casey*, 7 *Cranch* 468; *Hall vs. Jacobs et al.*, 4 *Harr. & John.* 254.

Purchase, taken in its most extensive sense, is thus defined by LYTTLETON: "The possession of land, &c., which a man hath by his own act or agreement; contradistinguished from acquisition *by right of blood; and includes every other mode of coming to an estate.*" 2 *Bla. Com.* 241.

The intestate in this case, taking by devise from his maternal

grandmother, took by *purchase*. When the estate vested in him, his mother was dead. He dies, possessed of the land, in fee. To whom did it go on his death?

The counsel contended that the complainants, who are the heirs at law of Mrs. E. M. O. Taylor, must take the land, to the exclusion of the other heirs (the defendants) of Mrs. Henry E. Williams, not of the blood of Mrs. Taylor, and after quoting and commenting upon the several sections of the statute of descents and distributions, cited *Gardner vs. Collins*, 2 *Peters* 58; 1 *Lomax* 588; 2 *Bla. Com.* 221; *Hall vs. Jacobs*, 4 *Harr. & John.* 256; 2 *Hilliard on Real Estate, chap.* 77, *sec.* 68; 4 *Kent* 405; *Torray vs. Shaw*, 3 *Edw.* 360; *Conn. Stato*, 204, 5 *id.* 34, 5; *Lewis vs. Gorman*, 5 *Barr.* 164; *Walker's adm. vs. Smith*, 3 *Yeates* 480; *Shippen vs. Izard*, 1 *Serg. & Rawle* 226; *Bevan vs. Taylor*, 7 *Serg. & Rawle* 397; *Maffit vs. Clark*, 6 *Watts & Serg.* 253; *Stewart's Lessee vs. Jones*, 8 *Gill & John.* 1; *Burgwyn vs. Devereaux*, 1 *Ire.* 583; *Pipkin vs. Coor*, 1 *Law Repos.* 104; 2 *Murph.* 231; *Ham vs. Martin*, 1 *Hawks* 423; *Butler vs. King*, 2 *Yerg.* 116.

It seems to us that, with the light which the law in other States sheds upon the subject, there ought to be no great difficulty in construing our own statute. "If the estate *come by the mother*, it shall descend *to the mother and her heirs*," is the language of the statute. The 29th section then explains the words "come *by* the mother," to mean the same thing as the words "*come on the part of the mother*," and provides that the expression shall be construed to include every case where the inheritance shall have come to the intestate by gift, devise, or descent, from the parent referred to, or from any relative of the blood of such parent.

The common law followed invariably the line of the blood. It is not presumed that a statute is intended to change the common law any further than it does so expressly: and, in the 12th section, the Legislature, by excluding relatives of the half-blood where the inheritance comes to the *propositus* by gift, devise or descent, from *any* one of his ancestors, and providing that in every such case, all who are not of the blood *of that ancestor* shall be ex-

cluded, make their meaning and intention, in the other sections, perfectly apparent. Section 12 shows, evidently that they meant to carry out the principle that, in all cases where an estate comes to the intestate, from a particular ancestor, only such of his next of kin as are of the blood of *that* ancestor shall take.

The *statutory* definition of the meaning of the expression "come on the part of the father," or "mother," is only the interpretation which the courts would have given to it, on general principles, and in carrying out the leading object of the law under the controlling intention of the Legislature, in the same manner as they construe the word "children" in a devise, to include grand children, which is now well settled. *Ewing vs. Handley*, 4 *Litt.* 349; *Drayton vs. Drayton*, 1 *Desau.* 327; *Deveaux vs. Barnwell*, 1 *id.* 499; *Izard vs. Izard*, 2 *Desau.* 303; *Tier vs. Pennell*, 1 *Edw.* 354; *Marsh vs. Hague*, *id.* 174; *Smith's case*, 2 *Desau.* 123, *n.*; *Cooke vs. Brookeing*, 2 *Vern.* 106; *Reeves vs. Bryer*, 4 *Ves.* 698; *Royle vs. Hamilton*, *id.* 439; *Mowatt vs Carow*, 7 *Paige* 328; *Radcliff vs. Buckley*, 10 *Ves.* 195; *Earl of Oxford vs. Churchill*, 3 *Ves. & Bea.* 69.

Is Dr. Williams entitled to have the legacies reimbursed to him? In other words, were they charged on the land? His son was legatee of one-third of the negroes, all the land, and the *residue* of all other property. "Out of the estate," so devised, these legacies were payable.

Chancellor KENT said, in *Livingston vs. Newkirk*, 3 *J. C. R.* 319: "It is too well settled to be questioned, that the *personal* estate is to be *first* applied to the payment of debts and legacies; and that a mere *charge* on the land will not exonerate the personal estate, nor anything short of express words, or plain intent in the will of the testator." That this is correct, and that the personal estate, where real and personal estates are *jointly* charged with the payment of debts or legacies, is to be *first* applied, and the real estate only when the personal estate falls short, is undeniable. See, fully in point, *Duke of Ancaster vs. Mayer*, 1 *Bro. C. C.* 454; *Lawson vs. Hudson*, *id.* 58; *Burton vs. Knowlton*, 3 *Ves.*

Jr. 108; *Brummel vs. Prothero*, *id.* 113; *Tait vs. Lord Northwick*, 4 *Ves.* 823; *Hartley vs. Hurle*, 5 *id.* 546; *Watson vs. Brickwood*, 9 *id.* 453; *Hancock vs. Abbey*, 11 *id.* 188; *Webb vs. Jones*, 1 *Cox* 245; *Gray vs. Minnethorpe*, 3 *Ves.* 103; *Bootle vs. Blundell*, 1 *Meriv.* 227; *Walker vs. Jackson*, 2 *Atk.* 624; *Kidney vs. Coussmaker*, 1 *Ves. Jr.* 436; *Hamilton vs. Worley*, 2 *id.* 62; *Gittins vs. Steele*, 1 *Swanst.* 28; *Pitt vs. Raymond*, cited 2 *Atk.* 434; *Chaplin vs. Chaplin*, 3 *P. Wms.* 364; *Galton vs. Hancock*, 2 *Atk.* 424; *Wride vs. Clark*, *Dick.* 372; *Davies vs. Topp*, 2 *Bro. C. C.* 259, *n.*; *Mannin vs. Spooner*, 3 *Ves. Jr.* 114; *Harwood vs. Ogtander*, 6 *Ves.* 199; *S. C.* 8; *id.* 106; *Milnes vs. Slater*, 8 *Ves.* 295; *Minor vs. Wicksteed*, 3 *Bro. C. C.* 627; *Austen vs. Halsey*, 6 *Ves.* 475; *Nyssen vs. Gretton*, 2 *Yo. & Coll.* 222; *Davis vs. Gardner*, 2 *P. Wms.* 188; *Parker vs. Fearnley*, 2 *Sim. & Stu.* 592; *Dolman vs. Smith*, *Pre. Ch.* 456, cited 1 *Roper on Leg.* 696; *Philips vs. Philips*, 2 *Bro. C. C.* 274; *Fitzgerald vs. Field*, 1 *Russ.* 428; *Halsewood vs. Pope*, 3 *P. Wms.* 324; *Lord Inchiquin vs. French*, *Amb.* 33; *Samwell vs. Wake*, 1 *Bro. C. C.* 144; *Rhodes vs. Rudge*, 1 *Sim.* 79; *McClelland vs. Shaw*, 2 *Sch. & Lef.* 538; *Walker vs. Hardwick*, 1 *Myl. & K.* 396; *Roberts vs. Roberts*, 13 *Sim.* 337; *Brydges vs. Phillips*, 6 *Ves.* 567; *Aldridge vs. Lord Wallscourt*, 1 *Ball & Beatt.* 312; *Tower vs. Lord Rous*, 18 *Ves.* 132; *Seaver vs. Lewis*, 14 *Mass.* 83; *Lupton vs. Lupton*, 2 *J. C. R.* 614; *Tole vs. Hardy*, 6 *Cowen* 333; *Wright vs. Denn*, 10 *Wheat.* 204; *Gridley vs. Andrews*, 8 *Conn.* 1; *Downman vs. Rust*, 6 *Rand.* 587.

FOWLER, for Williams et al. By the the first section of our statute of descents and distributions, the estate of *Eugene*, so dying intestate, is giving *absolutely* to the *father*. How far it is qualified, by other sections of the same act, is the question here, and produces the great difficulty in its construction.

By the 10th section, where the estate is a *new acquisition*, it is made to ascend to the *father during his life*, &c. Gen. *Williams*, my client in this case, insists *first*, that the estate *ascended*

to him in fee, on the death of his son, under the *first section* of the statute; and that this section should not be trammelled by subsequent sections of the staute of doubtful bearing. *But*, if not his, in fee, that under the circumstances of the case, and the heavy legacies charged upon it, that under the 10th section, it became a *new acquisition* in the hands of his son; and ascended to the *father* for his lifetime. And that such legacies were so *charged* upon the *estate*, and so *changed* its nature and condition, he refers to 1 *Roper on Leg.* (1*st Am. Ed.* 1829,) *p.* 448 *to* 454; 2 *Vern. Rep.* 708; *Trott vs Vernon*, 3 *Brown Ch. Rep.* 731, *Minor vs. Wicksteed.*

If these positions be erroneous, he insists that a proper construction of the 10th and 22d sections taken together, (if the latter really applies to the former, and it fails to quote language used in the former,) is that, on the death of *Eugene*, his *estate* having come by the *mother*, or rather by his grandfather, *Lewis C. Taylor*, (which the bill admits) must ascend to the heirs of his *grandfather*, and not those of his grandmother, as the estate clearly came by the grandfather.

And the *bill* having admitted this fact, the complainants are bound by it.

Or, under the *same sections*, whether the estate came to *Eugene* by *devise* or by *descent*, that it came to him "*by the mother*"—his own mother, *Henry E. Williams*—and should ascend to *her heirs;* which *heirs* are *both the complainants and the defendants;* and the estate should be divided *amongst them all.*

But, if none of the above constructions be the true canons of descent, under our statue, it is insisted, on the part of *Williams* and his co-defendants, that *Eugene* did *not* take, under his grandmother's will, as *devisee*, but *inherited* the *land* as her sole *heir at law.*

For, where *land* is *devised* to the *heir at law* in the same estate, which he would take *as heir*, the devise is *inoperative*, and the *heir* takes by *descent* as the *better title.* 2 *Dev.* (*N. C. Law Rep.*) 323; *Hoyle et al. vs. Stone.*

And, if *Eugene* took by *descent*, his title came by *his mother, through her blood*—for, without her, he could not have inherited at all—and his estate would ascend to the *heirs of his mother*.

And, if the court should deem this a *casus omissus* in our statute, and unprovided for *specifically*, the 13*th section* provides that the estate "shall descend according to the course of the common law."

And according to the common law, the *heirs at law* of *Lewis C. Taylor*, the *first purchaser*, must *inherit*. See 2 *Black. Com.*, *p.* 220.

In any event, *Williams*, as a trustee, in possession under the will, or acting as guardian by nature for his infant son, or honestly believing the land was his own, is entitled clearly in this proceeding to be re-imbursed to the extent of his expenditures, for *permanant* improvements, and for the *lagacies* which he paid *with his own money*. The complainants seeking equity, are bound to act equitably.

Mr. Justice SCOTT delivered the opinion of the Court.

West and others exhibited their bill in chancery, against Williams and others, for the recovery of a tract of land, and the rents, and profits of the same, from the death of Eugene L. H. Williams.

The land in controversy, was originally owned by Lewis C. Taylor, who, by his last will and testament, devised it in fee to his wife, Mrs. Elizabeth M. O. Taylor. During her widowhood, Mrs. Taylor, by will, devised as follows: To her brother, William Overton, one-third of her negroes and $1000 in money; to her sister, Mrs. West, one-third of her negroes for life, remainder to her children; to her daughter, Mrs. Henry E. Williams, all the residue of her estate, including a tract of land in Arkansas (which is the land in controversy) for life, remainder to her children, with a proviso, that if any such child come of age, or married in their mother's (Mrs. Williams) life time, its share should be then delivered to it. In case of Mrs. Williams' death, without issue,

living *at her death*, the property devised to her to go over to Overton and Mrs. West. If any of Mrs. Williams' children coming of age, or marrying, and receiving their share, should die in their mother's life time, its, or their share, "to fall back into the mass," and go to Overton and Mrs. West. The clause carrying the property over, on the death of Mrs. Williams, without issue, provides that the whole of her share shall go over, "saving such as may have been allotted off to such of the children as before directed."

Mrs. Williams died in the life-time of the testatrix, leaving but one child, a son, Eugene L. H. Williams, who died in infancy, without issue, after the death of the testatrix.

Mrs. Taylor also devised to certain nieces and nephews, legacies to be paid in money to the amount of $1.300 in the aggregate. Then follows item 5th of the will, in these words: "The foregoing cash legacies and bequests, shall be paid by my son-in-law, Joseph R. Williams, out of the estate hereinafter bequeathed and devised to my beloved daughter, Henry E. Williams, wife of said Joseph R. Williams, and her children, with the accompanying limitation over in certain contingencies, as such estate hereinafter bequeathed to my said daughter and children, is to, and is hereby declared, shall be, and remain in, the care and under the management of him, the said Joseph R. Williams, free of rent, interest, or hire, so long as, by limitation aforesaid, said estate shall remain in the use and possession of my said daughter, Henry E. Williams." And the 6th item of the will, which gave Mrs. Williams all the residue of the estate — that is, one-third of the negroes, all the land, and all other property, real, personal, and mixed, except a carriage and horses, declares that she is "the same to have and to hold, *subject to the legacies aforesaid*, separately to herself and her children," &c.

Joseph R. Williams, and William Overton were named as executors; and, by a codicil, $1.000 were given to Sarah B. Wilkins, a sister of the testatrix, to "be paid," in the language of the will, "by my son-in-law, Joseph R. Williams, out of the property de-

vised my daughter, his wife." A copy of the will is made a part of the bill.

The negroes were divided, the other legacies delivered, and the pecuniary legacies paid off as directed by the will; the latter by Joseph R. Williams, out of his own funds.

The will of Mrs. Taylor was executed the 10th of November, 1846, and was admitted to probate in Montgomery county, Tennessee, the 2d of April, 1849. She having died, a short time before, in that State, where Eugene L. H. Williams also died, a month or two after the testatrix. Ever since his death, Joseph R. Williams, his father, has been in possession of the land, and in receipt of the rents and profits. After the death of the testatrix, Joseph R. Williams married Jane T. Wilkins, daughter of Jane Wilkins, vice Taylor, who was a sister of Lewis C. Taylor, the deceased husband of the testatrix.

The complainants are the heirs at law of the testatrix, and the defendants are the heirs at law of Lewis C. Taylor, deceased husband of the testatrix.

Williams, in his answer, also claims the land as heir of his deceased son, Eugene L. H. Williams, and that if not, that it went to the heirs of his deceased wife, (the mother of Eugene), who are both the plaintiffs and the defendants; that is to say, as well the heirs of the testatrix as of her deceased husband, Lewis C. Taylor. He also sets up that if the land should not be decreed to him, the legacies paid by him should be charged upon it, and the land sold to re-imburse him, and that the rents and profits should not be charged against him further back than to the 1st January, 1850; because, under the laws of Tennessee, he has already distributed so much of them as accrued for the unexpired portion of the year 1849, as part of the personal estate of the testatrix. And that against the rents and profits, for which he might be held accountable, all valuable and lasting improvements made upon the land ought to be set off. He also submitted that the charge of the pecuniary legacies, upon the property devised to his son, so changed its nature as to make it a new acquisition and not

ancestral, within the meaning of the statute, and that thus his son was constituted a new stock of descent. He does not, however, in any way, allege, or set up that the personalty, devised along with the land, was *insufficient* to pay off the legacies charged in gross upon the whole estate devised.

The court below decreed the land to the complainants, and that Williams should account to them for the rents and profits, from the 1st day of January, 1850; and directed the master to enquire into, and report the dates when the legacies were paid, the amount of rents and profits, that ought to have been received, the value of permanent and lasting improvements made on the land, with annual rests and interest on both sides. The value of such improvements, and the amount of the legacies paid to be set off against the rents and profits, and that the defendants pay all the costs.

From that decree, both parties appealed to this court.

It is shown, very clearly, by the reasoning, and the authorities cited by counsel on the one side, and is admitted by the counsel on the other, that, under the facts of this case, the legacy of the residuum to Mrs. Henry E. Williams for life, with the limitation over, did not lapse, but immediately upon the death of the testatrix, vested in Eugene L. H. Williams, her grand son. The lands in controversy, then, belong either to all the heirs of the latter, or else to such of them, only, as under the provisions of our statute of descents and distributions are capable of inheriting them from him.

Coming to him by devise from his maternal grandmother, Mrs. Taylor, who had taken them by purchase from her deceased husband, and held them as an ancient fee, they were in his hands, an ancestral estate *ex parte materna*, within the meaning of the 10th section of our statute, explained and enlarged by the 22d section; and the question is, who of the parties in this controversy, are entitled, under our laws, to inherit these lands from Eugene L. H. Williams, who died intestate, thus seized and possessed of them?

According to the interpretation of the statute in the case of *Kelly et al. vs. McGuire & wife et al.*, decided at the present term, where the whole subject was fully discussed and elaborately considered, it was held that ancestral estates embrace not only descended estates, but also all others, which may have come to the intestate by gift, or devise, from either parent, or from any relative of the blood of either parent, and that, as to all such, it is the manifest intention of the Legislature, upon the death of the intestate, without issue, to preserve them in the line of the blood from whence they come, to the same extent that descended estates were so preserved at common law.

To carry out this intention, it is obvious, that the same means must be resorted to, that were used at common law, to make it effectual as to descended estates, and should these fall short in any case, when applied to estates given or devised, then that analogous means must be used. Hence, the inevitable principle, substantially announced in the case cited, that to be of the blood of the last purchasing ancestor, in the line of the transmitting relative, is as indispensable to enable a collateral to inherit, as heir of the intestate, an ancestral estate which was *given* or *devised* to the intestate, as to be of the blood of the last purchasing ancestor was, according to the principles of the common law, to enable him to inherit, as heir of the intestate, an ancestral estate which had come to the intestate by descent. Consequently, whether an ancestral estate come to the intestate by gift, devise, or by descent, upon the failure of issue, it can be inherited by such of his heirs only as are of the blood of the last purchasing ancestor, in the line of the blood from whence it came, either maternal or paternal, as the case may be. 4 *Kent* 404. And this is in exact harmony with the provisions of the statute in excluding the half-blood and their descendants from inheritances *only* when *these* are *ancestral*, and *they* not of the blood of the transmitting ancestor.

Upon this ground, not only is Joseph R. Williams, the father of the intestate, excluded from this inheritance, but also all the

next of kin of the intestate on the side of his grandfather, Lewis C. Taylor; none of them being of the blood of his grandmother, Mrs. E. M. O. Taylor, from whom the estate came to him, and who held it as purchaser. It is, therefore, only the complainants below, all of whom are of this blood, that are called to the inheritance in question.

In response to the position of the counsel of Joseph R. Williams, that inasmuch as the devise was to the same person, who would have taken the estate as heir at law, the devise shall be held inoperative, and the devisee as *in by descent*, it is to be remembered that, although it might be so held, the result would be precisely the same, because in that case none of his next of kin could have inherited, upon his death without issue, except such *only* as were of the blood of his grandmother, from whom, as representing his mother, he inherited the estate; his grandmother having held it as last purchaser. In that case, however, the result would have been very different, as to future descents from those who, in either case, would inherit from Eugene and die without issue; because, only such of the heirs of such intestate inheriting from Eugene and dying without issue, could be called to the inheritance, as were of the blood of *Eugene's grandmother*, who would still remain the last purchaser in the line of descents; whereas, under the actual state of the case, Eugene, having taken an ancestral estate by devise from his grandmother, is *in* by *purchase*, and thereby becomes himself a stock of descent as to all those who might inherit from those who inherited from him, it being the rule of the American law, as to such future descents of ancestral estates, to stop at the last purchaser, and ascend no higher for blood. *Gardner vs. Collins*, 2 *Peters Rep.* 58; 2 *Hilliard, chap.* 77, *sec.* 64; 4 *Kent* 405.

And, in addition to the reasons already given, this rule would peremptorily exclude all the next of kin of the intestate, who are of the blood of Lewis C. Taylor, even had he (Lewis) been some relative, either paternal or maternal, of Mrs. Taylor, instead of being her husband, and of no kin to her at all—so far as appears

upon this record—because, although he had been such a relative, and had devised the land to Mrs. Taylor, as he did, in calling the next of kin of Eugene to the inheritance left by his failure of issue, the law would have gone *no higher up* the ancestral line for blood, than to the *first* purchaser of the estate, who, in that case, also, would have been Mrs. Taylor.

According to the actual state of case, however, as it appears upon this record, the estate, when in Mrs. Taylor's hands, was not an ancestral estate at all, but a new acquisition, within the definition of such estates given in the case of *Kelly et al. vs. McGuire & wife et al.;* because, she held it by devise from her husband, Lewis C. Taylor, who, so far as this record shows, was a stranger to her blood, both paternal and maternal; but, in the hands of Eugene, it was an ancestral estate, *ex parte materna;* because it had come to him from his maternal grandmother. And this being so, in accordance with the ancient maxim of the common law, "that he who would have been heir to the father of the deceased, and of course to the mother, or any other real or supposed *purchasing ancestor*, shall also be heir to the son"—a maxim that will hold universally, except in the case of a brother or a sister of the half-blood. 1 *Black. Com.* 223; 1 *Lomax on Real Property*, 589. None of the heirs of Eugene could inherit the lands from him, who would not also have been heirs of Mrs. Taylor, his grandmother, and these, in this case, are those who were the complainants below, to whom the Circuit Court of Pulaski county correctly decreed them.

There being, in our opinion, nothing in the position taken in behalf of Joseph R. Williams, that the legacies, charged upon the whole estate, devised, real and personal, so changed the nature of the real estate as to make it, in the hands of the intestate, a new acquisition, within the meaning of our statute: And there being no pretence that the personal estate was insufficient to pay the legacies charged in gross, upon the whole estate devised, it is perfectly clear, in the light of the immense array of authority, cited to the point, that so much of the decree as directed that the

pecuniary legacies paid by Joseph R. Williams should be set off against the rents and profits of the land since the first day of January, 1850, for which he was properly held accountable to the plaintiffs below, is erroneous, and must be reversed. The residue of the decree is equitable, and ought to be affirmed and executed. The cause will, therefore, be remanded to the Chancery Court for Pulaski county, with instructions to this effect.

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SCULL ET AL. VS. VAUGINE ET AL.

The construction of the statute of descents and distributions, as to real estate acquired by descent, and as to personal property, in the case of *Kelly's Heirs et al. vs. McGuire et al., ante*, approved.

Upon division of property among heirs, and settlement of the widow's claims upon the estate, the heirs execute a deed, to which the widow, who is the grandmother of A. is a party, by which they convey to A. a slave, then in the possession of the grandmother, *with the proviso that*, "In the event of his death, before he come to the age of twenty-one years, or has heirs of his own, then to revert and become the joint property of the grantors;" and declare the grandmother trustee and guardian of the minor to take and keep possession of the slave for his use; the grandmother continues in possession of the slave, during the lifetime of A., some fifteen years: HELD, That the conveyance created an absolute estate in the grantee, that the proviso is repugnant to the deed and void: that if the grandmother held under the deed, she held according to its legal effect, and not as trustee for the benefit of the grantors; that her possession was adverse, and the statute of limitations a bar to their recovery of the slave.

Cross Appeals from the Circuit Court of Jefferson County in Chancery.

Hon. JOHN C. MURRAY, Circuit Judge.

TRAPNALL, for appellants, Scull et al.

YELL, and PIKE & CUMMINS, for Vaugine et al.

The pretended deed of trust executed by Taylor and others, was a mere nullity, because it was executed by parties having no interest whatever, unless it be as to Paul and Francis Vaugine, who were direct heirs of the intestate. As to them, possibly, it had force.

The statute of limitation would clearly attach as against all the other parties, in favor of the party in possession. As to all other parties, it could be nothing more than a *constructive* trust, if any trust at all. In such case, the statute would operate as well in favor of Mary Vaugine, as Marshall and wife, and Joseph Vaugine. *Sonser and wife vs. De Meyer et al.*, 2 *Paige* 574; *Kane vs. Bloodgood et al.*, 7 *J. C. R.* 90; 4 *Cowen* 718; *Litt. Sel. Cas.* 511; 3 *Litt.* 381; 6 *Monr.* 11; 1 *Dev. & Batt.* 73, 325; 8 *Port.* 211; 9 *Dana* 139; 20 *J. C.* 325; 3 *J. C. R.* 190; 4 *Wash. C. C. R.* 631.

As to those who joined in the deed of trust, and were competent to make it: the deed conveyed an *absolute property to Joe Vaugine.*

The deed is an absolute conveyance, "to have and to hold to him and his heirs," &c.

This gives an absolute estate in real or personal property. Any *subsequent* condition, or proviso, repugnant to it, is simply void. 2 *Black. Com.* 156, 7; *Co. on Lit.*, *vol.* 2, *p.* 30, 32 *N. S.*; *Appendix N.* 4, 36, 38; *Moody vs. Walker*, 187, 8, 3 *Ark. Rep.*; *Jarmin on Wills*, 809, 810, *&c.*

Mr. Justice SCOTT delivered the opinion of the Court.

All the parties, both complainants and defendants, have appealed to this court, and the material facts of the case may be

thus stated: Stephen Vaugine, son of Francis Vaugine, deceased, died intestate, in Jefferson county, in this State, in or about the year 1831, seized and possessed both of real and personal estate, and leaving him surviving a widow named Matilda—who is one of the defendants—and an only child, named Joseph, an infant of tender years. Matilda, the widow of Stephen and mother of Joseph, afterwards married Joseph J. Marshall, who is another one of the defendants. Joseph lived until the year 1846, when he also died, within age, intestate and without issue.

The complainants are Mary F. M. Scull, a daughter of Francis Vaugine, deceased, and several others of the name of Scull, who describe themselves as the heirs and legal representatives of James Scull, deceased; several of the name of Dodge, who describe themselves as the heirs and legal representatives of John Dodge, deceased, and Emma Dodge, deceased; the last named of whom was also a daughter of Francis Vaugine, deceased: several of the name of Vaugine, who describe themselves as the heirs and legal representatives of Francis N. Vaugine, deceased; the last named of whom was a son of Francis Vaugine, deceased; Paul Vaugine, who is also a son of Francis Vaugine, deceased: several who represent themselves as the heirs of Eulalia Taylor, deceased, who was also a daughter of Francis Vaugine, deceased.

They filed their bill in chancery in the Jefferson Circuit Court, on the 15th day of April, 1847, against the two defendants already mentioned, and also against another named Mary Vaugine, who is the widow of the said Francis Vaugine, the latter having departed this life intestate, as is alleged, soon after the death of his son Stephen. Mary Vaugine, the defendant, is not the mother of any of the complainants, or of any one they represent, or of Stephen, but the step-mother; but she is the maternal grandmother of Joseph, being the mother of Matilda.

The complainants claim, by their bill, the whole of the property, real and personal, which, by operation of law, came to Joseph, on the part of his father Stephen, upon the death of the latter. This claim, the defendants, Marshall and wife, deny *in*

toto; and, so far as the personal estate is concerned, they are fully sustained by the construction of our statute of descents and distributions, made during the present term, in the case of *Kelly's Heirs et al. vs. McGuire & wife et al.;* because Mrs. Marshall, under the facts of this case, as we have stated them above, was the sole distributee of her deceased son Joseph, to the exclusion of all other persons. But the real estate, having been inherited by Joseph, from his deceased father Stephen, was in his hands an ancestral estate, *ex parte paterna*, according to the doctrines settled in the case cited, and upon his death without issue, passed by inheritance to his (Joseph's) next of kin of the blood of his father, who was the last purchaser of the estate. And Joseph leaving him surviving, no father, and no mother capable of inheriting, and no brothers, or sisters, or their descendants, his paternal grandfather, grandmother, uncles and aunts, and their descendants, were the next class called to the inheritance. Of these, he had only uncles and aunts, and their descendants; the latter, to take *per stirpes*, the equal share of him or her they represent. These appear as complainants along with others, who seem to have no interest in, or claim to, the inheritance.

The rights of those entitled to inherit, however, are subject to the rights in the land which vested in Mrs. Marshall, as the widow of Stephen, the last purchaser, under the territorial laws: (*Steele & Mc. C. Digest*, 222, 223, 224 *and* 55; 210, 212); and until these parties do equity to her, (who, although she has not sought her rights by cross bill, has, in her answer, interposed the fact that she has never yet received dower in the estate of her deceased husband) they cannot, in conscience, recover from her, to say nothing, by way of objection, to the frame of their pleadings.

In addition to these alleged rights of the complainants below, which have been thus disposed of, they set up claim, as against these defendants, to a certain negro woman named Monnette and her increase, upon the foundation of a state of facts which we will now proceed to set out in the manner insisted upon by them, without any regard to various objections made, on the part of the

defendants, as to the failure and deficiency of proof, as to some of them, or as to the incompetency of some of the evidence allowed by the court below, to prove several of these alleged facts, against the objection of the defendants. It being unnecessary, as will be seen, in the view that we take of this part of the case, to consider these objections.

In the year 1826, Francis Vaugine being then a widower, married a second wife, Mary Derreuisseaux, who is the Mary Vaugine, one of the defendants in this suit. With her, he made a marriage agreement, in which among other things, he stipulated that all her property brought into the marriage, should go to the children of the marriage, if any, and if none, then to Mary's own children by her marriage with Derreuisseaux; and that he would secure to her, by will or otherwise, eighty acres of land, and improvements upon it, with two thousand dollars in slaves, cattle, &c.

On the 1st of January, 1831, which was a few weeks before the death of Francis Vaugine, he executed a deed, conveying to Mary F. Scull, Ulalia Taylor, and Elizabeth Taylor, children of Creed Taylor, Emma Dodge, F. N. Vaugine and Paul Vaugine, a number of parcels of land, describing each; a number of negroes, specifying each by name; a number of cattle, hogs, household and kitchen furniture, farming utensils, &c., and *all other property* the grantor *then* had, or *might die possessed of*, to have and to hold, &c., then following a clause, "It being expressly understood that said property, real and personal, by the grantor here disposed of, is to remain in his possession during his own life time, and on his decease, said property is to be taken possession of by Creed Taylor, James Scull and Francis N. Vaugine, they being of the same degree of kin to the grantor, and having severally paid equal proportions of the five thousand dollars before specified, they to divide the said property equally between the grantees." It having been recited in this deed, that it was executed upon the consideration of love and affection to the grantees, and of five thousand dollars in hand paid, and of the further conside-

ration of the grantees collectively paying, after the grantor's death, the unpaid part of his just and lawful debts.

No subscribing witness appears to this deed but from the certificate of John Fisher, it appears to have been acknowledged before him as a justice of the peace, on the 1st day of January, 1830, which was one year before its date.

On the 25th April, 1831, Francis Vaugine being then dead, the parties seem to have assembled at his late residence, which was the then residence of his widow, the defendant Mary, to take into possession, and divide the property in accordance with the provisions of the deed, when difficulties arose from two sources, to wit: *First*, Because no provision had been made for the widow, either in satisfaction of the marriage agreement, or of her lawful claim of dower: *Secondly*, Because Joseph Vaugine, the only child of Stephen Vaugine, had been, in no way, provided for. Upon an examination of the deed, it was found, that in it the name of Monnette, (the negro girl, then about twelve years old, about whom and her children this contest has arisen) did not appear, as did the names of all the other negroes of the estate. She then being in possession of the widow, the defendant Mary, as she had been before, from the death of Francis Vaugine, by a deed of that date, executed by James Scull, John Dodge, Francis N. Vaugine, Creed Taylor, and Paul Vaugine, (reciting their willingness to do equal and impartial justice in the distribution of the estate of Francis Vaugine, deceased, of whom they claimed to be heirs, and that he had, in his life time, conveyed his whole estate, both real and personal, except the said negro girl Monnette to them, and that no part of his estate had been conveyed to Joseph, the minor, and only child of Stephen, deceased, also one of the heirs of Francis, deceased; therefore, acting for themselves, and in right of their children) they "granted, bargained, and sold to the said Joseph Vaugine, the minor son of Stephen Vaugine, deceased, the said negro girl Monnette, to have and to hold to the said Joseph Vaugine, his heirs, &c: and, whereas, the said Joseph Vaugine is a minor, we hereby constitute and

appoint Mary Vaugine, grandmother of the said Joseph, his trustee and guardian, to take and keep possession of said negro girl Monnette, for the use of said Joseph Vaugine, to be kept by said Mary Vaugine until the said Joseph comes to the full age of twenty-one years, provided the said Mary Vaugine shall live so long; and, in case of her death, then to go to the possession of the lawful guardian of said Joseph, and in the event of the death of said Joseph, before he comes to the age of twenty-one years, or has heirs of his own, then said negro girl Monnette to revert and become the joint property of us, the undersigned heirs of Francis Vaugine, Sr. Given under our hands," &c.

For the satisfaction of the claims of the defendant, Mary Vaugine, founded upon the marriage agreement, and her claims founded upon her right of dower in the estate of her deceased husband, a deed was executed on the same day by James Scull, and Mannette, his wife, John Dodge, and Ettunnette, his wife, Francis N. Vaugine, and Audel, his wife, Creed Taylor, in behalf of his children by Ulalia, his wife, and Paul Vaugine, and Harriet, his wife, giving, granting, and conveying to her eighty acres of land, with the improvements upon it, all the stock of cattle and hogs of the estate, then on the south side of the Arkansas river, three head of horses, two yoke of oxen, and the whole property, negroes, and other articles then in existence, which the defendant Mary had, at the time of her marriage, in 1826, with Francis, in consideration of which, she, as a party to the deed, signing and sealing the same, acknowledged satisfaction of her claim under the marriage agreement, and surrendered the same, and relinquished all right to dower in the estate.

From that time, the negro girl Monnette, and her increase, continued in Mary Vaugine's possession until after the death of Joseph Vaugine, a period of upwards of fifteen years.

Upon this state of facts, supposing them all to have been established by proper evidence, which, as we have remarked, is contested, the question arises, whether or not the statute of limitations, interposed and insisted upon by all the defendants—who

do not contest or litigate as among themselves at all—is a bar to a recovery by the complainants.

To avoid the statute bar, it is not shown that any of the complainants were infants, or otherwise within the savings of the statute, at any time within five years next before the commencement of this suit; but it is insisted that the possession of Mary Vaugine was, as trustee, under an express and continuing and subsisting trust, up to the death of her grand son Joseph, which occurred within that period. And they rely upon the deed of 25th of April, 1831, conveying the slave in question to Joseph, by the terms of which, as we have seen, Mary Vaugine is made trustee to hold possession of the slave. In her answer, she denies that she ever was trustee, or held the slaves in question as such, but in her own right; and there is no testimony of her acceptance of the supposed trust created by the deed, except in the deposition of Creed Taylor, which was objected to as incompetent evidence, upon the ground of his interest in the event of this cause; he being liable over to his children, as it is contended, in the event they fail in the suit, by reason of the defendant's gaining title by the efflux of time under his (Taylor's) act by deed. But conceding the deed properly in evidence, and the testimony of Taylor in connection with it admissible, which, as we have remarked, it is unnecessary to decide, the question is, will all that remove the statute bar?

This necessarily depends upon the legal effect of the deed. Then, what was this legal effect, even when construing the words "heirs of his own" to mean "heirs of his body," as was proven by the complainants, against the objection of the defendants,' to have been the intention of the grantors? Clearly, as we think, to create, so far as the grantees could do so, an absolute estate in Joseph Vaugine, the grantee, quit of all trusts and conditions whatsoever, within the doctrine several times recognized by this court, that although chattels and money may be limited over after a life interest, they cannot be, after a gift of the absolute property: nor can there be an estate tail in a chattel interest, for

that would lead to a perpetuity, and no remainder over can be permitted on such a limitation, it being the settled rule, that the same words, which, under the English law, would create an estate tail as to freeholds, give the absolute property as to chattels. *Moody vs. Walker*, 3 *Ark. R.* 187, 188.

It being perfectly apparent in this case, from the language of the whole deed, taken together, that it was the intention of the grantors, that the slave should not revert, if Joseph had children, whether he died under or over twenty-one years of age, and that she should revert if he died without children, whether under or over that age, and this construction being for the benefit of Joseph, is fully authorized by the rule, which is as old as construction itself, that "a grant shall be taken most strongly against him who made it, and most beneficially for him to whom it is made." *Noyes Maxims, p.* 62. And being adopted, it follows that, being an attempt to create an estate tail general in a personal chattel, the absolute property is vested in the grantee, so far as the grantors could do so, and hence, any condition or proviso repugnant to such absolute grant, is simply void, as is shown by the authorities cited to the point. And these being void, Mary Vaugine was no trustee, there being nothing left in the grantors upon which a trust could be raised; and allowing the complainants' proof that Mary Vaugine held under this deed, she must be taken, in the absence of proof to the contrary, to have held in accordance with its legal effect: and this being adverse to any rights of the complainants, her possession was consequently adverse to any claim of theirs, and necessarily let in the statute bar, unless displaced by proofs, which would bring the complainants, or any of them within the savings of the statute, which have not been made. We think, therefore, that this ground of the defence must prevail against all of the complainants; and this without any regard to the nature of the title that was in fact vested in Joseph Vaugine by the deed, which, it must be borne in mind, vested title, so far as it did so at all, not in a trustee for his use and benefit, but in himself. And we are free to say, that

if this slave really belonged to the estate of Francis Vaugine, deceased, as the complainants allege in their bill, and adults and minors were entitled to equal distributive shares in her, it would be difficult to see how, in a land of laws, the deeds of the adults, before distribution under authoritiy of some proceeding in the proper court, could operate to vest title in the grantee to any specific property, otherwise than by way of estoppel as against the grantors. But like several other questions mooted, to which we have alluded, it is not necessary to decide this; and it is mentioned only to show more distinctly that the conclusion, at which we have arrived, as to the allowance of the defence of the statute bar, had no necessary connection with it.

Upon the whole case, we are of the opinion, that the entire decree of the court below ought to be reversed. And for as much as a portion of the property that was in litigation in this cause, to wit: the slave Monnette, and her children, and the hires and profits of the same pending this suit, are in the hands of a receiver of the court below, it seems most proper that the final decree should be entered in that court. It will, therefore, be ordered that this cause be remanded. with instructions to the court below, to call the receiver to account, and cause him to deliver said slaves to the custody of the party, or his or their legal representative, from whom they were taken by the process of that court, and to pay over the hires and profits accrued in his (the receiver's) hands, or which ought to have accrued, to the same: that as to so much of the complainants' bill as relates to the lands of which Stephen Vaugine died seized or possessed, and to which a portion of the complainants are entitled, as we have held, subject to the rights of the defendant Matilda Marshall, which vested in her, under the Territorial laws, as the widow of the said Stephen Vaugine, deceased, that the same be dismissed, without prejudice to the rights of such of the said complainants as are so entitled to inherit said lands, so encumbered; and, as to the residue of complainants' bill, that it be dismissed absolutely, all at their costs.

INDEX.

ACTION, FORM OF.

1. An action on the case for deceit in falsely warranting a chattel to be sound, is maintainable, though assumpsit or covenant on the express contract of warranty would, at this day, be the more appropriate remedy. *Johnson & Grimes vs. McDaniel*, 109.
2. In either form of action, the rules governing and the results to be obtained, are substantially similar; so that, in the action on the case, it is necessary, in setting out the contract, to describe it correctly, and prove it as alleged. *Ib.*

See, also, *Master & Slave*, 3, 4.

ACTION, RIGHT OF.

See *Vendor and Vendee*, 1, 2.

ADMINISTRATION.

1. A will, though fully proven and established, confers no other power on the executor than for the burial of the deceased, and the preservation of his estate: the authority of the executor to act as such, is derived from the letters testamentary, and his appointment must be confirmed by the Probate Court. *Diamond Ex. vs. Shell et al.*, 26.
2. On grant of oyer, the letters testamentary, or a certified copy of them, without the proof establishing the will, is sufficient *prima facie* evidence of the authority of the executor to sue. *Ib.*
3. An executor is not entitled to a credit in the annual settlement of his accounts for payments, without order of court, to legatees or distributees: such payments are at the peril of the executor; and though valid as between him and the legatee or distributee, not so as to others, having paramount rights in the estate. *McPaxton Ex. vs. Dickson et al.*, 41.
4. Where a portion of the heirs and distributees of an estate employ an attorney, to contest the settlement of the executor, the Probate Court has no power to direct the payment of the attorney's fee, by the executor, out of the residuary fund of the estate: if it be a proper case for contribution by all interested in the estate, the remedy is in chancery only. *McPaxton Ex. vs. Dickson et al.*, 97.

ADMINISTRATION—CONTINUED.

5. The heirs or representatives of a deceased person, cannot, as a general rule, regularly maintain a bill in equity for the personal assets due his estate, and which would descend to or be destributed to them—for the recovery of choses in action, an administrator or executor, only, can sue at law or in equity. *Lemon's Heirs vs. Rector et al.* 436.

See, also, *Claims against Estates: Limitation*, 1; *Practice*, 3, 4.

ADMISSIONS—See *Estoppel*, 1; *Master and Slave*, 5.

AMBIGUITIES—See *Conveyances*, 17, 18, 19.

APPEAL—See *Chancery*, 5.

ASSIGNMENTS—See *Bills and Notes.*

ASSUMPSIT.

1. In an action of assumpsit for work and labor, proof of work done by the plaintiff for a third person, may be given under the common indebitatus count for work and labor done for the defendant, where the work was done, at the request and upon the credit of the defendant. *Clark vs. Roop*, 172.

ATTACHMENTS.

1. According to what seems the proper construction of the statute concerning attachments, the claimant of personal property, seized under the writ, and who has not been summoned as garnishee, may prosecute his claim to the property as an independent proceeding, the determination of it not affecting the right of property as between the defendant in the attachment and the claimant, or third person: and so where a garnishee, in answer to the plaintiff's allegations, claims property in his hands. *Hershey vs. The Clarksville Institute*, 128.
2. Though the owner of the property, not choosing to interplead, may obtain redress in damages, for the injury he has sustained: or may perhaps follow his property in the hands of a purchaser, if he elects to assert his claim by interplea, he, as well as the plaintiff, ought to be bound by the determination, and either may appeal from the judgment. *Ib.*
3. An attachment levied upon land, which has been struck off to the State for non-payment of taxes, only binds such interest as the owner had at the time, which is a right of redemption within two years. *Merrick & Fenno vs. Hutt*, 331.
4. An attachment on land does not divest the owner of his general property, but con-

ATTACHMENTS—CONTINUED.

stitutes a lien from the time of the seizure; of which all persons are bound to take notice: it is, however, subject to all liens existing at the time. *Ib.*

AUDITOR'S DEEDS—See *Tax Titles*, 1, 2.

BANK AND BANK NOTES.

The notes of the Bank of the State of Arkansas, issued in the years 1838 and 1839, are receivable for taxes due to the State of Arkansas. *Danley vs. Pike*, 141; *Crease vs. Danley*, 183.

The Bank was not restricted by its charter to dealing in promissory notes only as collateral security. *The State Bank vs. Criswell*, 230.

See, also, *Chancery*, 15.

BILLS AND NOTES.

1. The liability of an endorser, according to the law merchant, is conditional upon due presentment and notice of non-payment; and, in an action against him by the holder of a promissory note, payable to order, and at a future day, the allegation of notice of non-payment is indispensable, and the omission of it in the declaration a fatal defect, for which no valid judgment could be rendered even after verdict. *Anderson vs. Yell*, 9.
2. The allegation of presentment on the day of maturity, is insufficient: for, if treated as commercial paper, it is entitled to days of grace. *Ib.*
3. A prior endorser, being a party to the record, but having suffered a default, is a competent witness for the holder in a suit against a subsequent endorser. *Ib.*
4. Parol evidence is inadmissible to prove that it was the intention of the parties that one of the endorsers should become bound as maker; and, on the admission of such evidence, it was error to permit the plaintiff to change a blank endorsement, as given on oyer, into one waiving demand and notice. *Ib.*
5. The obligor, or maker of assignable paper, being notified that one or more of the assignments, through which a plaintiff deduces his title to the instrument, are forged, ought, for his own protection, as against the true owner, to interpose the defence; but he cannot deny the assignment for any purpose, so as to put the plaintiff on proof of it, unless the plea be supported by the kind of affidavit prescribed by the statute. *Dickinson et al. vs. Burr*, 372.
6. The assignment of a writing obligatory to an agent for collection, does not divest the assignor of his interest in the instrument; but is merely an authority to the agent to receive payment and the assignor, in such case, may sue in his own name, striking out or disregarding the assignment, or show that the endorsement was merely for collection, where no injury would result to the defendant. *Block vs. Walker*, approved: *contra*, *Brown vs. Purdy & Taylor*, 4 *Ark.* 535. *Ib.*

BILLS AND NOTES—CONTINUED.

7. Under the statute of assignments, the maker of a note or obligation, being sued by an assignee, and having notice that one or more of the assignments are forged, ought for his own justification, and the protection of the rights of the real owner, to interpose the defence. *Herndon vs. Higgs*, *Ad.*, 389.

8. But his position may be a hazardous one, and the defence at law not being complete or adequate, he may elect to submit to judgment, and obtain relief in equity, by bringing all the parties in interest before the court. *Ib.*

9. And in such case, if the obligor has in good faith paid the debt to an intermediate assignor or holder of the instrument, he may pray for and obtain alternative relief: that the amount so paid be refunded to him in case it was wrongfully claimed and received by the person to whom he paid it. *Ib.*

10. After the endorser has become fixed by demand, protest and notice, mere forbearance by the holder, not based on any obligatory contract with the drawer for day, and which does not impair any of the substantial rights or remedies of the endorser, cannot work his discharge. *Ashleg Exr. vs. Gunton et al.*, 415.

11. To charge the drawer or endorser of a bill, by notice of non-payment and protest left at his place of business, or residence, it should be delivered to a clerk, if there be one, at the former place, or to some proper person at the latter, if any such there be, or it should be certified that no one could be found on application at such places. And so, it is not sufficient to charge an endorser, to show that the notary left the usual notice of non-payment at the hotel where the endorser resided, and addressed said notice to him, and left the same at said hotel—it not appearing whether the endorser was at the hotel when the notary called, whether the notary enquired for him, or handed the notice to any person to be delivered to him, or whether any person was at the hotel or not. *Ib.*

12. Under our statute of assignments, a blank endorsement and delivery of a writing obligatory payable in property, or in money upon a contingency, constitutes such a transfer of the interest in the paper as to vest in the transferee a right of action and recovery against the maker—the commercial law giving the rule as to the form and mode of making assignments of such paper. *Worthington vs. Curd & Co.*, 492.

13. In order to charge an endorser, it is necessary to prove, on the trial, that payment was demanded of the maker, within a proper time, and refused, and that the endorser had due notice thereof, or, that the endorsee had used legal diligence to make such demand, and give such notice, or that they were waived. *Nevill vs. Hancock & Ewing*, 511.

14. Where suit is instituted against the maker and endorser of a note, jointly, and the plaintiff fails to make out his case against the endorser, for want of proof of demand and notice, such failure does not enure to the benefit of the maker. *Ib.*

15. A blank assignment, and delivery of a bond, vests the legal interest in the assignee and all subsequent holders. *Ib.*

See, also, *Demand.*

BILLS OF SALE—See *Principal and Agent.*

BOATS AND VESSELS.

1. Where one steam boat is sunk by collision with another, and she contributes to such collision by her own carelessness or unskilful management, or the collision was the result of inevitable accident, and not occasioned by negligence or want of skill on the part of either boat, the owners of the other boat would not be responsible for any damage sustained by the sunken boat. *Duggins vs. Watson et al.*, 118.
2. The shipper of goods on such boat, lost by the collision, is bound by the same principles of law, as would be applicable to an action, by the owners of the sunken boat, for the injury done to her, and could recover, in such case, only as they would be entitled to recover. *Ib.*
3. But if the collision was produced by the wilful act of the officers and agents of the other boat, then engaged in the service of the owners, though without orders or against orders, the owners would be liable to the freighter for any injury to his property. *Ib.*

BONDS.

1. An attachment bond, with the condition written under the signatures and seals of the obligors, held sufficient: and that if an objection to such bond could be taken in the Circuit Court on appeal from a Justice of the Peace, it must be by plea in abatement, and not by motion to dismiss. *Melvin vs. S. B. General Shields*, 207.

CERTIORARI, WRITS OF.

1. The court will, of its own motion, for the affirmance of the judgment, award a writ of certiorari, to perfect the record, *where the venue has been changed,* to the court in which the cause originated. *Bixby vs. The State*, 395.
2. A writ of certiorari, directed to a justice of the peace, should be delivered to, and returned by him, together with a transcript of the record therein ordered to be certified to the Circuit Court; and not served upon him like a writ of summons. *Foster vs. Foster, use, &c.*, 399
3. The decisions of this court, that, on a writ of certiorari, there should be a judgment of reversal or affirmance with an order remanding the cause if necessary, and not a judgment *de novo* for debt, damages and costs, approved. *Ib.*

See, also, *Roads*, 2.

CHANCERY.

1. One partner files his bill after the expiration of the term of partnership against his copartner for a settlement and share of the profits; the defendant, in his answer, denies

CHANCERY—CONTINUED.

that there were any profits, and alleges that the complainant is indebted to him on the partnership account: HELD, That a court of chancery, having acquired jurisdiction of the cause and parties, will dispose of the whole case and decree for the one or for the other, as the account may stand; for the defendant, if the balance be due him, without driving him to a separate suit. *Saunders vs. Wood*, 24.

2. A testator devised real estate and negroes to be divided between the defendant and his other children: upon a settlement and division between the defendant and one of the devisees, acting for himself and as agent and guardian for the others, the defendant claimed two of the negroes as a gift from the testator: the proof as to the gift, was in direct conflict: and, to settle the matter, it was proposed and agreed to, that a negro belonging to the defendant should be substituted in place of the two negroes in dispute: HELD, That the chancellor correctly decided that the settlement and division ought not to be disturbed. *Campbell et al. vs. Hopkins et al.*, 51.

3. In such case, without proof to the contrary, the court might well presume that the negro of the defendant, thus substituted, was equivalent in value to the two negroes in dispute. But if not of equal value, it was of some value, and the bill for a division of the two negroes was properly dismissed, because the complainants made no offer to restore to the defendant the value of his negro substituted in the former division. *Ib.*

4. A final order, reciting that the cause was argued and submitted; that the Court is of opinion that the complainant's bill be dismissed; that the injunction be continued until the further determination of this cause, is not a final decree. *Moss vs. Ashbrooks*, 169.

5. A prayer of appeal by the complainant, and an order that he have thirty days to file his recognizance, and that the recognizance, when so filed, shall operate as a full and complete supersedeas, is not an express grant of appeal, nor effectully provides for it. *Ib.*

6. Where a chancery cause is tried upon the pleadings and exhibits, this court will not presume, for the affirmance of the decree, that testimony was heard at the trial; as where the cause is so set down for hearing, no oral testimony can be given. *Tatum vs. Hines*, 180.

7. The rule in chancery is, that the admission of incompetent evidence will not vitiate, if there is sufficient competent proof to sustain the decree. 4 *Eng.* 546. *Hardy vs. Heard et al.*, 184.

8. It is a universal rule, that he who submits to answer, must answer fully and fairly all the material allegations and charges of the bill; and has no right to answer that he is not willing to admit any particular fact; nor take shelter behind sweeping and broad denials and vague generalities. *Ib.*

9. Where a defendant fails to answer a statement in the bill, which is neither charged nor presumed to be within his knowledge, such failure is not an implied admission of its truth, (*Blakeney vs. Ferguson*, 14 *Ark.*); otherwise, where it is charged or presumed to be within the defendant's knowledge, or where it is answered evasively. *Ib.*

CHANCERY—CONTINUED.

10. A. sells and conveys a tract of land to B., reserving, in the deed, all pieces or parcels of land granted, bargained and sold to sundry persons in the town of Arkadelphia, in one and two acre lots: HELD, That the reservation in the deed was sufficient to put B. upon enquiry, and affect him with notice as to the persons to whom the lots had been previously sold; and as to the extent, situation and locality of the lots: and that a forfeiture of the lots previously sold, could not enure to the benefit of B. *Ib.*

11. In the absence of all evidence to the contrary, courts are bound to presume that any purchaser of real estate, informs himself of its boundaries, situation and locality, before making the purchase. *Ib.*

12. In a chancery cause, if the existence of a fact upon which the decision must turn, is doubtful, the chancellor should, of his own motion, and it is his duty, if insisted on by either party, to cause the fact to be ascertained by a jury. *Ringgold vs. Patterson*, 209.

13. The finding or determination of the chancellor concerning a material issue of fact, where the issue has not been sent to a jury, and there is a conflict of evidence, is not conclusive on appeal, like the verdict of a jury, or the finding of a common law court sitting as one. *Ib.*

14. Where two complainants are claiming the same property—the one as purchaser at execution sale against the other—their interests are distinct and several, and they will not be allowed to sue together as such for the purpose of divesting the title of a third party, also execution purchaser of the same party. *State and State Bank Ex parte*, 263.

15. The Bank of the State of Arkansas, upon a bill for injunction, will be required to verify the allegations of her bill, and give bond, like other suitors; and will not be allowed to prosecute her suit under cover of privileges which belong alone to the State, by uniting the State with her as complainant. *Ib.*

16. The State, averring in her bill in chancery, that she bid off property at execution sale against the State Bank, but neither alleging that she paid the amount bid, or offered to pay it, but only that she was able and willing to pay, and that the Bank had the means and was able to pay, does not show such title as will warrant the granting of an injunction to restrain a purchaser of the same property, at a subsequent execution sale, from asserting his legal remedies. *Ib.*

17. Amicable and family settlements of the estates of deceased persons, among the several distributees, are to be encouraged; and, when fairly made, strong reasons must exist to warrant the interference on the part of a court of equity. *Pate et al. vs. Johnson et al.*, 275.

18. A court of equity is competent to correct mistakes; but it will not do so on slight grounds, nor mere probabilities; nor unless the mistake be established by the clearest and most satisfactory proof, in case it is not apparent. *Ib.*

19. A complainant in chancery may, upon a rule for that purpose, obtain the testimony of one of the defendant in the cause, saving exceptions as to his interest, &c. *Folsom vs. Fowler ad.*, 280.

CHANCERY—CONTINUED.

20. A party defendant, who disclaims all right to the property in controversy, and holds the legal title only as a trustee for the benefit of others, is a competent witness against his co-defendant—the possible liability for costs not disqualifying him in chancery, where it is discretionary with the Court to adjudge costs against him; but in such case the answer is not evidence against the co-defendant according to the principle decided in *Blackney vs. Ferguson*, 14 *Ark.* *Ib.*

21. An arrangement between two judgment creditors and the debtor, that a slave belonging to the latter be sold under execution, and bought in by the attorney of one of the creditors, who should hold the legal title, but the slave should pass into the possession of the other creditor and remain on hire until the debts were satisfied, with leave to the debtor to redeem in a reasonable time: HELD, That the nature of the transaction was, that the slave be pledged or mortgaged, and that the creditor must account for the slave and all hires after satisfying his debt. *Ib.*

22. Upon a bill in equity by the purchaser of real estate for the rescision of the contract of sale and re-payment of the purchase money, the complainant must show a surrender of the property, or an offer to surrender it to the person entitled, and that the vendor can be placed *in statu quo*. The allegation that he had "abandoned and yielded the possession of the land." is insufficient.. *Davis vs. Tarwater*, 286.

23. A complainant, who seeks the rescision of a contract, must do so in a reasonable time: and so, after more than ten years had elapsed from the date of the contract, and five years after the discovery of the imputed fraud, a court of equity will refuse to rescind the contract. *Ib.*

24. The proprietors, having projected a town, laid it off into blocks and lots according to a survey permanently establishing the initial point and designating the blocks and lots by stakes, and caused a map thereof to be recorded, and proceeded to sell the lots. Afterwards, a mistake in the survey being discovered, a resurvey is made, which is generally acquiesced in by the property holders and accepted by the corporate authorities of the town, though not assented to by the purchaser of lot No. 2, the assignee of the original purchaser—who had bought the lot and was put into possession according to the original survey, but after the resurvey accepted a bond for title describing the lot by number—by the resurvey, lot No. 1 laps several feet over lot No. 2, the entire depth; and lot No. 2 laps over lot No. 3, &c.: HELD, That the lots must conform to the resurvey, and the prior purchasers hold accordingly. *Phelps vs. Henry & Cunningham*, 297.

25. The principle, that quantity shall yield to course and distance in surveys, and that course and distance shall yield to natural objects or artificial monuments, is peculiarly applicable to irregular and large surveys, where quantity is not material: but where land is laid off into compact town lots, quantity is an object of importance and when it is done according to a regular plan, it is expected that purchasers will buy with reference to it. *Ib.*

26. Questions in relation to locations in a new country, and in respect of projected towns,

CHANCERY—CONTINUED.

which have their first existence on paper, may be regarded differently from disputes between adjacent proprietors in cities, where existing foundations have been fixed by long acquiescence. *Ib.*

27. The presumption in a Court of Equity, upon a question of limitation between the owners of adjacent town lots, is that they hold according to their deeds, notwithstanding a mistake in the actual division between them, unless after acquiesence for a long period of years, or the possession becomes hostile. *Ib.*

28. Where a defendant in chancery, avails himself of whatever benefit he could have by means of his sworn answer, without objecting the want of jurisdiction at the hearing; and raises that question for the first time in the appellate court, the court would lay hold of any vestige of chancery jurisdiction before it would dismiss the cause, and send the plaintiff, to begin anew, in a court of law. *Daniels vs. Street*, 307

29. A defendant in chancery, legally served with process to appear, is bound to take notice of any subsequent amendment of the bill, and answer any material allegation, and if he fails to do so, the complainant is entitled to a decree *pro confesso*. *Trustees R. E. Bank vs. Bozeman*, 317.

30. But if the complainant does not prosecute his bill with due diligence against a defendant failing to answer—as where he does not take a decree pro confesso against him, —and proceeds against the other defendant, and upon the merits, he is not entitled to a decree against the defendant answering, the court may well dismiss the bill as to all. *Ib.*

31. A verbal agreement for a division of public land, when either party should enter it, but indefinite as to time, where no trust is created between the parties, and there are no peculiar circumstances that would make it unconscionable for either party to resist a specific performance, is not entitled to favorable consideration, because clearly against public policy. *Baker vs. Hallobaugh*, 322.

32. The Court, in the exercise of an equitable discretion to grant or refuse the specific performance of contracts, should refuse to enforce a voluntary agreement resting in parol, for the sale of land, where the agreement is not clearly and distinctly proved; or where the complainant fails to allege any sufficient equitable circumstances of fraud in the defendant inducing hardship and loss to himself, unless the agreement be specifically performed. *Ib.*

33. It would not be an infringement of the salutary policy of the statute of frauds, to decree a specific performance of a parol agreement for the sale of land, as between the parties to the agreement, to the extent of the admission, in the answer, though differing in some degree from that charged in the bill, where the statute of frauds is not relied upon as a bar to the relief. *Ib.*

34 Under the statute of assignments, the maker of a note or obligation, being sued by an assignee, and having notice that one or more of the assignments are forged, ought for his own justification, and the protection of the rights of the real owner, to interpose the defence. *Herndon vs. Higgs, Ad.*, 389.

CHANCERY—CONTINUED.

35. But his position may be a hazardous one, and the defence at law not being complete or adequate, he may elect to submit to judgment, and obtain relief in equity, by bringing all the parties in interest before the court. *Ib.*

36. And in such case, if the obligor has in good faith paid the debt to an intermediate assignor or holder of the instrument, he may pray for and obtain alternative relief: that the amount so paid be refunded to him in case it was wrongfully claimed and received by the person to whom he paid it. *Ib.*

37. After dissolution of an injunction, the complainant has the right to proceed with his suit to final hearing, and, upon a motion to dissolve, it is a gross irregularity for the court to render a final decree against the complainant, granting affirmative relief to a defendant who has filed no cross bill in the cause. *Ib.*

38. The heirs or representatives of a deceased person cannot, as a general rule, regularly maintain a bill in equity for the personal assets due to his estate, and which would descend to or be distributed to them—for the recovery of choses in action, an administrator or executor, only, can sue at law or in equity. *Lemon's Heirs vs. Rector et al.*, 436.

39. Under the rule that it requires two witnesses, or one witness and strong corroborating circumstances, to overturn a positive denial in the answer; the testimony of a witness, that he was intimately acquainted with a party, and believed that she was a native of the Chickasaw tribe of Indians, without stating upon what facts the belief rests, or that it is common reputation, is not sufficient to establish the fact against the positive denial of the answer. *Dyer et al. vs. Bean et al.*, 519.

40. Inconsistencies and evasions in an answer, as well as direct contradictions by the evidence, are entitled to consideration in estimating the weight of evidence necessary to overturn such answer. *Ib.*

41. Imperfect voluntary gifts will not be enforced in chancery, no matter how manifest the intention of the party to perfect the gift. *Ib.*

42. Under a prayer for general relief, the court may grant any that the facts stated will warrant, although it may be inconsistent with the special relief prayed. (*Cook vs. Bronaugh*, 13 *Ark.* 183;) *Kelly's Heirs vs. McGuire and wife et al.*, 555.

43. Where property in litigation, is placed in the hands of a receiver, during the pendency of a bill for its recovery, the court should, before the final decree, require the receiver to report his acts and doings under the appointment, and render an account, that the court may ascertain the condition of the property placed in his hands and be enabled, in its final decree, to settle the rights, and do justice to all the parties in a conclusive manner. *Ib.*

44. A bill in chancery continued at two successive terms, by consent, with leave to the defendants to answer—at the third term, no steps were taken, nor the case called up —at the fourth term, the complainants, at the calling of the cause, moved for a decree *pro confesso;* but the court dismissed the cause for want of prosecution: HELD, That the court erred. *Guthrie vs. Field et. al.*, 662.

CLAIMS AGAINST ESTATES OF DECEASED PERSONS.

1. Although no affidavit is required for the legal exhibition of a claim against the estate of a deceased person, upon which an action was pending at the time of his death; yet such action must be revived against the administrator, or executor within two years from the grant of letters, or the claim will be barred, like any other not legally exhibited. *State Bank vs. Tucker ad.*, 39.
2. All claims against the estates of deceased persons must be exhibited, duly authenticated, to the administrator or executor, within two years after the grant of letters, as decided in *Walker ad. vs. Byers*, 14 *Ark.* 246. *Bennett et al., vs. Dawson et al.*, 412.
3. And such claim must be so exhibited, although the cause of action had not accrued at the date of the grant of letters of administration. If the cause of action arises at so short a time before the expiration of the two years, as to make the exhibition impracticable, the effect is not to let in the claim as against the administrator, but against the heir or distributee. *Ib.*
4. It is the duty of the executor or administrator, at his official peril, to give the notice to creditors prescribed by the statute, but this is not a condition precedent to the exhibition of claims within the required period. *Ib.*
5. It is no objection to the final order of the Probate Court, allowing a claim against the estate of a deceased person, that the claimants, endorsees of a bill of exchange, had failed to fill up a blank endorsement at some time previous to the final order of the court. *Ashley Ex. vs. Gunton et al.*, 415.
6. The affidavit of one of several joint claimants, is sufficient to authenticate a claim against the estate of a deceased person. *Ib.*

CONSIDERATION.

1. An agreement to assign a judgment against a third person, is a valuable consideration for a writing obligatory. *Ware & Miller vs. Peninngton et al.*, 226.
2. A plea, to an action upon a bond, setting up as the consideration of the bond, a sale and conveyance by the husband in the name of himself and wife, under a power of attorney from the wife, of her interest, as heir, in a pre-emption right to public land, shows that the bond was wholly without consideration. *McDaniels vs. Grace et al.*, 465.
3. Where the vendee takes a deed for land without covenants of warranty, and the title fails, he cannot, on that account, avoid the payment of the purchase money, unless fraud, or its equivalent, has been practiced upon him. But where he has taken a deed with general covenants of warranty, and there is a total failure of title and an eviction, or its legal equivalent, the purchaser may avail himself of the plea of failure of consideration. *Ib.*
4. Where a note or bond is executed without consideration, or upon a consideration that has failed; and, subsequently, another security for the same debt is given in exchange or substitution, the original want or failure of consideration follows and attaches to the new security. *Ib.*

CONSIDERATION—CONTINUED.

5. A plea to an action upon a writing obligatory by an assignee, that it was executed by the defendant in consideration of certain lands, for which he had received from the obligee a deed of conveyance with warranty of seizin, freedom from incumbrance, and for quiet enjoyment; but that there was, at the time of the purchase, and still is an incumbrance on a part of the lands to a greater amount than the writing sued on, is demurrable. *Worthington vs. Curd & Co.*, 492.
6. And so, of a plea that the assignees did not receive the instrument sued on in the usual course of trade, or on any legal or valid consideration, and that it was delivered to them in payment of a bet, and upon no other consideration. *Ib.*

CONSTITUTIONAL LAW.

1. The act of the Legislature, exempting the debtors of the State Bank from process of garnishment, declared constitutional; and the decision in *The State et al. vs. Curran*, (7 *Eng.* 322,) as to this point, re-affirmed. *Danley et al. vs. State Bank*, 16.
2. The act of the Legislature, approved January 11, 1853, conferring upon the corporation of Fort Smith jurisdiction over criminal cases, and providing for a grand jury, is not contrary to the spirit of the bill of rights; but the 34th section of the act must be so restricted that the grand jurors can serve as an inquest for only so much of the county of Sebastian as may be included within the corporate limits of the city. *Rutzell vs. The State*, 67; *Rogers vs. The State*, 71.
3. The legislature can pass any law, not prohibited by the legitimate operation of any of the limitations imposed upon it by the powers delegated to the federal government, or by the restrictions in the constitution. *State vs. Fairchild*, 619.
4. The act, approved the 15th January, 1855, establishing a separate Chancery Court for the county of Pulaski, declared to be constitutional. *Ib.*
5. The usage of the government, continued from the adoption of the constitution, is entitled to regard in the determination of doubtful constitutional questions. *State vs. Sorrells*, 664.
6. The enactments of the Legislature are to be upheld by the courts in the absence of any clear and manifest repugnance to the constitution; and there is no such repugnance in the law providing for an election to fill, for the unexpired term, a vacancy in the office of Circuit Judge. *Ib.*
7. Under the constitution, as amended, Circuit Judges are elected for a term of four years; and, upon the happening of a vacancy, the election is for the unexpired portion of the term, and not for a full term of four years. *Ib.*

See, also, *Criminal law*, 4; *Fines and Forfeitures.*

CONSTRUCTION OF STATUTES.

1. It is a general rule of construction, that a statute should be so considered as that

CONSTRUCTION OF STATUTES—CONTINUED.

every clause, sentence, or part, shall stand, if possible; and that general words or clauses, may be restrained by particular words or clauses in the same statute; and when there are different provisions in the same statute, expressed in different words, they ought to be so construed as to avoid inconsistency. *Kelly's Heirs vs. McGuire & Wife et al.*, 555.

2. It would be unsafe to construe a statute according to mere grammatical rules, or to rely on punctuation, as any material aid in ascertaining the true meaning. Neither bad grammar nor bad English will vitiate a statute. *Ib.*

CONTRACTS AND AGREEMENTS.

1. An infant is personally responsible for necessaries purchased by him; but his father is not liable in such case, unless upon a contract, express or implied, to pay for them. *Lefils & Christian vs. Sugg*, 137.
2. Such contract will not be implied from the fact that the father had given authority to his son to purchase an article of clothing, and had paid the amount of an account for goods sold the son, but which was not presented to and approved by him. *Ib.*
3. C., the purchaser of an improvement on public land subject to entry, and L., who is security for the purchase money, enter into a parol agreement that L. shall advance the money to enter the land, and shall enter it, and hold the legal title as security for his advance and for his securityship: L. makes the entry accordingly: HELD, That he holds the land as trustee, and equity will enforce the performance of the agreement. *Cain vs. Leslie*, 312.
4. A sale of an improvement on public land, is recognized by statute, and the purchaser acquires a possessory right, which the law protects, and which is good against everybody but the government or its grantee. *Ib.*
5. A verbal agreement for a division of public land, when either party should enter it, but indefinite as to time, where no trust is created between the parties, and there are no peculiar circumstances that would make it unconscionable for either party to resist a specific performance, is not entitled to favorable consideration, because clearly against public policy. *Baker vs. Hallobaugh*, 322.
6. The court, in the exercise of an equitable discretion to grant or refuse the specific performance of contracts, should refuse to enforce a voluntary agreement resting in parol, for the sale of land, where the agreement is not clearly and distinctly proved or where the complainant fails to allege any sufficient equitable circumstances of fraud in the defendant, inducing hardship and loss to himself, unless the agreement be specifically performed. *Ib.*
7. It would not be an infringement of the salutary policy of the statute of frauds, to decree a specific performance of a parol agreement for the sale of land, as between the parties to the agreement, to the extent of the admission, in the answer, though

CONTRACTS AND AGREEMENTS—CONTINUED.

differing in some degree from that charged in the bill, where the statute of frauds is not relied upon as a bar to the relief. *Ib.*

8. The defendant proposed to the plaintiffs to repair his carriage, and enquired as to the cost, and terms of payment: the plaintiffs replied that it would not cost less than $125, nor more than $150; and that the terms were cash, or 12 months credit if he gave his note: the work was commenced, but the carriage taken away before it was quite completed, and no offer to give the note: HELD, That there was no special contract, but if so, it was abandoned by the parties; and that the plaintiffs were entitled to recover the fair value of the repairs actually put upon the carriage, upon its completion or acceptance by the defendant. *Prince, Chase & Co. vs. Thomas*, 378.

9. W. and T. entered into a contract, some time in the month of January, that T. was to oversee for W. that year, at the rates of five hundred dollars per annum: HELD, That this was not a special contract for a definite time, and at a fixed price, the complete performance of which was a condition precedent to a right to compensation; and that the contract being performed, though, in some respects, differently from the terms of the agreement, indebitatus assumpsit will lie for such compensation as the overseer is entitled to. *Wright vs. Morrison Ad.*, 444.

10. A contract, that the overseer shall not carry a horse, or dogs upon the plantation of his employer, and if he does, that he shall forfeit his wages: the penalty is waived by the employer, if upon the horses and dogs being carried there, he agrees to receive compensation for keeping the horse, and merely requests that the dogs be taken off, instead of promptly discharging the overseer. *Ib.*

11. A contract, under such employment, that the overseer shall make a "fair average crop," means that the crop should be a fair average one, making due allowance for the season and unforeseen events beyond the control of a prudent, faithful overseer; and not that the crop shall be an average one, at all events. *Ib.*

12. Upon ascertaining the compensation due, in such case, to the overseer, the jury may, in their discretion, allow interest. *Ib.*

13. A party, to be charged in a contract, must not only express his assent that he will be bound, but he must be endowed with such degree of reason and judgment, as to enable him to comprehend the subject; and he must execute it freely and understandingly, with a full knowledge of his rights, and of the consequences of the act. *Kelly's Heirs vs. McGuire et al.*, 555.

14. If a person, although not positively *non compos* or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition, or to resist importunity or undue influence, a contract, made by him under such circumstances, will be set aside. *Ib.*

15. The opinions of the subscribing witnesses to a deed or contract, are competent in all cases, where the object is to prove capacity or incapacity to make a contract, when the facts or circumstances are disclosed on which the opinion is founded. *Ib.*

See, also, *Rescision of Contracts; Conveyances*, 17, 18, 19; *Vendor and Vendee.*

CONVEYANCES.

1. The case of *Trapnall vs. Richardson, Waterman & Co.*, (13 *Ark.* 543,) deciding that a levy upon land, within three years from the date of the judgment, will not continue the lien of the judgment, approved; and a deed of trust executed subsequent to a judgment, but before a levy within and a sale after the expiration of, three years, held good against the purchaser at such sale. *Pettit et al., vs. Johnson et al.*, 55.

2. A deed of trust, for the benefit of creditors, conveying to the trustees the legal and equitable estate of the grantor, having been given, no estate remains in the grantor which can be levied upon and sold upon execution at law. *Ib.*

3. Where a minor executes a deed of conveyance of real estate, and, upon arriving at age, jointly with his grantee, executes a deed of mortgage, to secure a debt of the grantee: such act is an affirmance of the deed of conveyance. *Watkins & Trapnall vs. Wassell*, 73.

4. If one sells and conveys real estate, to which he has no title, or an imperfect title, at the time of the sale, and subsequently acquires a perfect title, it enures to the benefit of the grantee; and, if between the date of the conveyance and the acquisition of the perfect title, a judgment is rendered against the grantor, the title of the grantee is prior to the lien of the judgment. *Ib.*

5. A conveyance of real estate to the grantee, without the word heirs, or other words of inheritance conveyed only a life estate, at common law, and under the territorial statute of 1804. *Steele & McCamp. Dig., Title Conveyance, sec.* 1. *Patterson vs. Moore ad.*, 224.

6. And such deed does not operate to pass the fee by way of estoppel; because the grantor, in his deed, "doth warrant and defend from himself, his heirs, executors and assigns forever" the estate conveyed. *Ib.*

7. The recital of the consideration money, and its payment in a deed, is only prima facie evidence, and parol proof is admissible to contradict it—as where the ricital is relied upon as evidence of a sale to a child instead of a gift. *Pate et al. vs. Johnson et al.*, 275.

8. A deed, sufficiently formal as a deed of conveyance, with *habendum* clause, declaring that the grantee shall have and hold the lots and appurtenances to his heirs and assigns forever, but with a covenant to make a good and sufficient deed with warranty of title when required, is a present conveyance of the fee, with a covenant for further assurance, and not a mere agreement to convey. *Davis vs. Tarwater*, 286.

9. It is a general principle of the common law, that the laws of the place, where real property is situate, exclusively govern in respect to the rights of the parties, the mode of transfer, and the solemnities, which should accompany them: and so, a married woman, residing in Louisiana, can convey lands in Arkansas only in the manner prescribed by the statute: *Chapter* 37, *Digest of Arkansas. McDaniels vs. Grace et al.*, 465.

10. If a married woman can make a power of attorney, authorizing her husband to execute a deed for her, conveying her interest in land situate in this State, the execution of the power should be acknowledged by the wife, in the same mode in which the statute requires her to acknowledge the execution of a deed. *Ib.*

CONVEYANCES—CONTINUED.

Quere: Can a wife constitute her husband an agent to sell and convey her estate in land? *Ib.*

11. It is necessary that a power of attorney to authorize the execution of a deed by an agent should be under seal. *Ib.*

12. A deed of conveyance of the wife's land, executed by the husband in the name of himself and wife, under a power of attorney from the wife, without seal, and not in express terms authorizing the conveyance of any land or interest in land, is null and void, as an act of the wife, and does not pass to the grantee any interest of hers whatever in the land. *Ib.*

13. The husband is entitled to curtesy in the wife's real estate, only where there is issue born alive, and a seizin in fact as well as in law, except in the case of waste, uncultivated lands not held adversely; and so, the husband would not have curtesy where the land is held by another adversely, and is the subject of litigation until after the death of the wife. *Ib.*

14. The right of the husband to curtesy has been extended by modern decisions; and it is now settled in equity, that he shall have curtesy of a trust as well as in a legal estate; of an equity of redemption, a contingent use, or money to be laid out in land: but not in a pre-emption right of the wife in the public lands of the United States. *Ib.*

15. A plea, to an action upon a bond, setting up as the consideration of the bond, a sale and conveyance by the husband in the name of himself and wife, under a power of attorney from the wife, of her interest, as heir, in a pre-emption right to public land, shows that the bond was wholly without consideration. *Ib.*

16. Where the vendee takes a deed for land without covenants of warranty, and the title fails, he cannot, on that account, avoid the payment of the purchase money, unless fraud, or its equivalent, has been practiced upon him. But where he has taken a deed with general covenants of warranty, and there is a total failure of title and an eviction, or its legal equivalent, the purchaser may avail himself of the plea of failure of consideration. *Ib.*

17. Where a purchaser of a portion of the lands, donated, by the United States to this State, for purposes of internal improvement, situate in Jackson county, and for which he had executed his notes as prescribed by law, but received no certificate of purchase, conveyed by deed "all his right, title, or claim of, in, and to any improvement or improvements on public land, that are situate in Jackson county," parol testimony, or the facts and circumstances under which the deed was executed, are admissible to explain the meaning and intent of the conveyance, and to show that the deed was for the conveyance of the grantor's interest in the land so purchased of the State. *Glanton vs. Anthony et al.*, 543.

18. When parties have deliberately put their agreement in writing, in such terms as import a legal obligation, without any ambiguity as to the object or extent of the agree-

CONVEYANCES—CONTINUED.

ment, all oral testimony of conversations or declarations, before or at the time of the execution of the contract, or afterwards, should be rejected. *Ib.*

19. But parol evidence may be introduced, the more perfectly to understand the intent and meaning of the parties; and, whatever indicates the nature of the subject, is a just medium of interpretation of the language and meaning of the parties, and is also a just foundation for giving the instrument an interpretation, when considered relatively, different from that which it would receive, if considered in the abstract. *Ib.*

20. No distinction can exist between an interest in an improvement on public land, and an interest in the land itself; and so, by a deed conveying all the grantor's interest in such improvement, all his interest in the land, which can only be equitable or possessory, passes by the deed to the grantee. *Ib.*

21. The acknowledgment of a deed is valid, if taken before a judge or justice of the peace, within the limits of the State in which he is commissioned to act—it being a ministerial, not a judicial act. *Biscoe et al. vs. Byrd et al.*, 655.

22. Upon division of property among heirs, and settlement of the widow's claims upon the estate, the heirs execute a deed, to which the widow, who is the grandmother of A. is a party, by which they convey to A. a slave, then in the possession of the grandmother, with the proviso that, "In the event of his death, before he come to the age of twenty-one years, or has heirs of his own, then to revert and become the joint property of the grantors;" and declare the grandmother trustee and guardian of the minor to take and keep possession of the slave for his use; the grandmother continues in possession of the slave, during the lifetime of A., some fifteen years: HELD, That the conveyance created an absolute estate in the grantee: that the proviso is repugnant to the deed and void: that if the grandmother held under the deed, she held according to its legal effect, and not as trustee for the benefit of the grantors; that her possession was adverse, and the statute of limitations a bar to their recovery of the slave. *Scull et al. vs. Vaugine et al.*, 695.

See, also, *Deeds of Gift.*

CRIMINAL LAW.

1. An indictment, charging that the defendant, with others, "bet the sum of twenty-five dollars, upon a certain unlawful gambling device, commonly called a raffle," does not describe an offence, within the meaning of any statute heretofore enacted against gaming. *Norton vs. The State*, 71.

2. An affray, and assault and battery, are offences of the same class; and, though the higher offence may include the less, yet on an indictment charging generally that the defendants "did make an affray by then and there fighting, to the terror," &c., they cannot be convicted of an assault and battery. *Childs et al. vs. The State*, 204.

3. The whole scope of the first seven sections of the statute against gaming, is to prohibit what was then known and specified as banking games and all devices of the

CRIMINAL LAW—CONTINUED.

like kind, and does not embrace the game of Rondo: nor is the betting at such game, a common law offence. *The State vs. Hawkins*, 259.

4. Where a defendant, indicted for a misdemeanor, punishable by fine only, has been tried and acquitted, and on appeal or writ of error to this court, the judgment reversed, and the cause remanded, he may be tried again, without any violation of the constitutional provision, "that no person shall for the same offence, be twice put in jeopardy of life or limb." *Jones vs. The State*, 261.

5. In the examination of a witness in a criminal case, he may be asked whether he had stated to certain persons that he was going to the trial "to have the prisoner hung, that he had lived long enough." *Bixby vs. State*, 395.

6. Exceptions taken to the admission or exclusion of testimony in a criminal case, are waived by a motion for new trial, not incorporating the matter of such exception as cause for the motion: but although such cause be assigned in the motion for new trial, this court will not reverse the judgment for such error, if there be other testimony sufficient to warrant the verdict. *Ib.*

7. In motions for new trial, upon the ground of newly discovered testimony, some discretion is vested in the judge presiding at the trial, who has an opportunity of judging whether they are made for delay or in good faith. They ought to show that the newly discovered testimony would induce a different result; and the application ought to be corroborated by the affidavit of some disinterested witness. *Ib.*

8. Upon a change of venue, the original indictment remains in the court where it is preferred, and a transcript of it sent to the court to which the cause is removed. *Pleasant vs. The State*, 624.

9. The allegation, in an indictment against a negro for an assault, with intent to commit a rape, upon a white woman, is material, and must be proved; and the woman herself is competent to testify as to that fact. *Ib.*

10. The prosecutrix, in a trial for an assault, to commit rape, cannot be interrogated as to her criminal connection with any other person, or be compelled to answer questions that tend to criminate and disgrace her; nor can her chastity be impeached by evidence of particular acts of unchastity, though it may be, by general evidence of her reputation, in that respect. *Ib.*

11. A witness may testify as to the appearance of the prosecutrix, immediately after a rape has been committed upon her, or attempted, on his examination in chief, or, on his recall, as rebutting testimony: but not as to the particular facts she may have related to him, except to confirm her testimony after her credit has been impeached. *Ib.*

12. It is the province of the judge, at the trial, to confine the examination of witnesses to matters relevant to the issue, and to exercise a sound discretion in excluding irrelevant and foreign matter: and where a question does not, in its terms, manifest a relevancy to the issue, its object should be stated. *Ib.*

13. A witness is privileged from answering questions that would disclose his connection

CRIMINAL LAW—CONTINUED.

with another and distinct offence from the one on the trial of which he is called to testify. *Ib.*

14. Though a State's witness, in a criminal prosecution, break the rule and converse with another witness, this would not be absolute cause to exclude him from testifying—his conduct would go to his credit. *Ib.*

15. The rule in *Clark adx. vs. Moss et al.*, 6 *Eng. Rep.* 741, as to what constitutes a leading question, approved. *Ib.*

16. The practice has prevailed in this State, and will not be disturbed, of impeaching the character of a witness for truth and veracity, by permitting the witness to give his own opinion as to the credibility of the person impeached, founded on general reputation, after showing that he has the requisite knowledge of such reputation. *Ib.*

17. On a trial for rape, or an assault, with intent to commit a rape, evidence may be given that the prosecutrix is a "lewd woman, a strumpet, or prostitute," if founded upon her general reputation; but not upon the personal knowledge of the witness. *Ib.*

18. Where the court arrested the further examination of a witness, this court will presume that it exercised a sound discretion, in the absence of any showing that some further material fact was proposed to be proved by him. *Ib.*

19. The master is a competent witness for his slave in a case affecting his life, (*Austin vs. State*, 14 *Ark.* 555); and where such owner is excluded from testifying, and the grounds of his exclusion are not stated, this court may presume, in a case involving the life of a human being, that the judge supposed him to be incompetent by reason of his interest. *Ib.*

CURTESY.

See *Husband and Wife*, 8, 9.

DAMAGES.

See *Trespass*, 3; *Boats and Vessels*, 1, 2, 3.

DEED OF GIFT.

1. The acknowledgment of a deed of gift of slaves, before the clerk of a court, without the attestation of his official seal, is insufficient to admit it to record; nor is it evidence to prove the title of the donee—the possession remaining in the donor. *Blagg vs. Hunter*, 246.

2. The failure of the clerk of a court to attest, under his official seal, the acknowledgment of a deed of gift of slaves, executed and recorded prior to the passage of the act of 5th January, 1843, was not cured by that act. *Ib.*

3. If a person, under the influence of intoxication, so as to deprive him of the exercise of his understanding, makes a deed of gift of slaves, such deed is voidable at his elec-

DEED OF GIFT—CONTINUED.

tion, or of any one claiming under him; but if he acknowledges the deed after regaining his reason, such act is a ratification of the deed. *Ib.*

4. The current report and understanding in the neighborhood, that a donor had made a deed of gift of slaves when drunk, and disavowed it when sober, is not admissible as evidence in an action for the slaves between the donee and one claiming under the donor; but the subsequent acts and declarations of the donor promptly made and persisted in upon a return of reason, repudiating the deed, would be competent to go in evidence with other attendent circumstances illustrative of his mental condition.. *Ib.*

DELIVERY.

See *Sales*, 1; *Vendor and Vendee.*

DEMAND.

1. In an action upon a writing obligatory payable in property on a certain day, no demand is necessary, on the part of the holder, to entitle him to maintain an action against the maker. (*Cockrell vs. Warner*, 14 *Ark.* 352). But if the allegation in the declaration, that demand was made, renders proof of demand necessary, and there be any evidence of demand, the jury are the judges of its weight. *Worthington vs. Curd & Co.*, 492.

2. If the authority of the person making a demand does not sufficiently appear, the authority to make it will be considered as conceded by the defendant, where he makes no objection to the want of authority, but places his refusal on another ground specially. *Ib.*

See, also, *Practice at Law*, 3; *Trusts and Trustees*, 2.

DEMAND AND NOTICE.

See *Bills and Notes.*

DEPOSITIONS.

See *Practice at Law*, 16.

DESCENTS AND DISTRIBUTIONS.

1. The true construction of our statute of Descents and Distributions, (*chapter* 56, *Digest*,) is:

1st. That, as to both real and personal property, it was the design of the Legislature, when there were descendants of the intestate, to send down both to them, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, without any regard to the fact as to how the estate was acquired.

DESCENTS AND DISTRIBUTIONS—CONTINUED.

2d. That, as to personal property, it was the design, where there were no descendants, that it should go to collaterals, in the same way it would have gone to descendants, if there had been any; that is to say, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, and without inquiry as to how the property was acquired by the intestate.

3d. That, as to real estate, it was the design of the Legislature, where there were no descendants, to point out the lines of the succession, and that this is to depend on the fact whether the inheritance is ancestral or new; and, if ancestral, then whether it come from the paternal or maternal line.

4th. If the inheritance was ancestral, and come from the father's side, then it will go to the line on the part of the father, from whence it came, not in postponement, but in exclusion of the mother's line; and so, on the other hand, if it come from the mother's side, then to the line on the part of the mother, from whence it came, to the exclusion of the father's line.

5th. If the inheritance be not ancestral, but a new acquisition, then, after a life estate reserved in succession to the father and mother, if alive, it will go in remainder, first, to the line of the intestate's paternal uncle and aunts, and their descendants, in postponement of the mother's line, until the former becomes extinct; and then to the line of the intestate's maternal uncles and aunts, and their descendants; unless there should be kindred lineal or collateral, who, either in right of propinquity, or by right of representation, stand in a nearer relation to the intestate than the uncles and aunts: in which case, such nearer kindred would take the inheritance to the exclusion of both of these collateral lines; and, in their hands it would become an ancestral estate, and afterwards go in the blood of the relative from whence it came, in the ordinary course of descent prescribed for ancestral inheritances. *Digest, secs.* 10, 11, *p.* 437.

6th. That, when the inheritance is fixed, by these facts, in any given line, it will pursue that line until it becomes extinct, and the objects of bounty, and the order in which they succeed one another, and the proportion they take, are to be ascertained by the first section, which is to be considered as the general table of descent. The father, mother, brothers, sisters, and so on, mentioned in that section, are those who are to be considered when counting from any propositus, whether the propositus of a single line only, or the concurrent propositus of both lines, as the intestate is as to personal property.

7th In all cases, where the inheritance is in any one line, it there goes in succession *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, precisely as if the other line was extinct, and precisely as the inheritance of a bastard would take a course in his mother's line, he having no father's line at all.

8th. The half-blood and their descendants, take personalty, as well as realty, equally with the whole blood, except that they are excluded from real estate, when ancestral, if they lack the blood of the transmitting ancestor. *Kelly's Heirs vs. McGuire and wife et al.*, 555.

DESCENTS AND DISTRIBUTIONS—CONTINUED.

2. A testator directs that his real estate be sold by his executor, and the proceeds divided among his children: such proceeds are personal property; and, upon the death of the children without issue, will be distributed to their mother as next of kin. *Kelly's Heirs vs. McGuire et al., ante. Loftis vs. Glass Ex.*, 680.
3. Where lands are devised by a maternal ancestor, the devisee, though he acquires the land by purchase, holds them as an ancestral estate *ex parte materna;* and, upon his death, without issue, those only of his heirs who are of the blood of such maternal ancestor, can inherit. (*Kelly's Heirs et al. vs. McGuire et al., ante.*) *West et al. vs. Williams et al.*, 682.
4. The construction of the statute of descents and distributions, as to real estate acquired by descent, and as to personal property, in the case of *Kelly's Heirs et al. vs. McGuire et al., ante*, approved. *Scull et al. vs. Vaugine et al.*, 695.

DEVISES AND BEQUESTS.

1. A devise to A. for life, with remainder to B., does not lapse by the death of A., in the lifetime of the testator, but vests immediately in B. on the death of the testator *West et al. vs. Williams et al.*, 682.
2. Where lands are devised by a maternal ancestor, the devisee, though he acquires the land by purchase, holds them as an ancestral estate *ex parte materna;* and, upon his death, without issue, those only of his heirs who are of the blood of such maternal ancestor, can inherit. *Kelly's Heirs et al. vs. McGuire et al., ante.*
3. Where lands and personal estate are both devised, charged with legacies, the personal estate must first be exhausted in the payment of the legacies, before resort can be had to the land. *Ib.*

DISCOVERY AT LAW.

1. The defendants in a suit at law, seeking discovery in aid of their defence, must, at least, use such reasonable diligence as would be required in procuring the testimony of an ordinary witness, who was known to them as such, and of the materiality of whose testimony they were apprized: and the petition comes too late, when filed at the third term, and it appears that the plaintiffs are non-residents, and the defendants were aware of the existence of the facts, as to which the discovery is sought, before the institution of the suit. And where the discovery is sought in aid of a defence as to part of the demand sued for, no order for the discovery and injunction of the proceedings ought to be granted, unless the defendants bring into court so much of the debt as is admitted to be due. *Hill & Co. vs. Cowthon & Co.*, 29.
2. A petition for discovery, must show, not only that the discovery is material, that the defence would be difficult or doubtful without it, but that the material facts relied upon are not susceptible of proof by witnesses, or the ordinary sources of defence in suits at law. *Ib.*

ENDORSER AND ENDORSEE.

See *Bills and Notes.*

ESTATE OR INTERST IN LAND.

See *Conveyances*, 17, 20.

ESTOPPEL.

1. Where a party, having title to land, neither misrepresents nor suppresses any fact connected with his title, but, under a misapprehension of his legal rights, supposes that another has a prior lien to his own, and expresses such opinion, he is not estopped from setting up his title against a purchaser, under the supposed prior lien, having a full knowledge of all the facts. *Pettit et al. vs. Johnson et al.*, 55.
2. The Real Estate Bank brought an action at law, on a protested foreign bill of exchange, against the acceptor and endorsers, who pleaded *non assumpsit*, but afterwards filed their plea, *puis darrien continuance*, that the plaintiff had assigned the bill to certain Trustees. Upon a bill in chancery by the Trustees, for the recovery of the bill of exchange: HELD, That the endorsers were not estopped by the plea, *puis darrien continuance* in the case at law, from objecting want of notice of non-payment and protest. *Trustees R. E. Bank vs. Bozeman*, 316.

EVIDENCE.

1. In a civil suit against the master to recover damages for an unauthorized act of the slave, proof of his admissions or statements—certainly those not accompanying or explanatory of the act done—cannot be admitted against the master. *Ridge vs. Featherston*, 159.
2. The acknowledgment of a deed of gift of slaves, before the clerk of a court, without the attestation of his official seal, is insufficient to admit it to record; nor is it evidence to prove the title of the donee—the possession remaining in the donor. *Blagg vs. Hunter*, 246.
3. The current report and understanding in the neighborhood, that a donor had made a deed of gift of slaves when drunk, and disavowed it when sober, is not admissible as evidence in an action for the slaves between the donee and one claiming under the donor; but the subsequent acts and declarations of the donor promptly made and persisted in upon a return of reason, repudiating the deed, would be competent to go in evidence with other attendant circumstances illustrative of his mental condition. *Ib.*
4. The leading idea of the statute, (*Digest*, TITLE, *Evidence, sections* 7 *and* 8,) making the book of accounts of a deceased person, when proved to be regularly and fairly

EVIDENCE—CONTINUED.

kept, evidence for his executor or administrator, is that the books of original entries shall in all cases be produced. *Mathews vs. Sanders, ad.*, 255.

5. The mere judgment, without the entire record, in respect to the right of property, may be conclusive, against the plaintiff in the action, as to the right of property at the time of the judgment, but not as to any previous time. *Sexton vs. Brock*, 345.

6, The *ex parte* affidavit of one of several plaintiffs of the loss of the instrument sued on, is competent evidence to prove the loss. *Worthington vs. Curd & Co.*, 492.

See, also, *Bills and Notes*, 4; *Administration*, 2.

EXECUTIONS.

1. It is definitely settled that, until a subsisting levy, whether upon real or personal estate, is discharged, it is erroneous to make a second levy; and, if it be made, it may be set aside; but if no objection be made for such irregularity, and a sale take place under the second levy, the title of a bona fide purchaser will not be divested. *Pettit et al. vs. Johnson et al.*, 55.

2 The case of *Trapnall vs. Richardson, Waterman & Co.*, (13 *Ark.* 543,) deciding that a levy upon land, within three years from the date of the judgment, will not continue the lien of the judgment, approved; and a deed of trust executed subsequent to a judgment, but before a levy within, and a sale after the expiration of, three years, held good against the purchaser at such sale. *Ib.*

3. A deed of trust, for the benefit of creditors, conveying to the trustees the legal and equitable estate of the grantor, having been given, no estate remains in the grantor which can be levied upon and sold upon execution at law. *Ib.*

4. Mere inadequacy of price, without additional circumstances, is not sufficient to invalidate a sale under execution, when fairly and legally made. *Heard vs. Hardy et al.*, 184.

5. The omission of the advertisement of an execution sale, or the failure of the sheriff to make a literal compliance with that provision of law, would not vitiate a sale to an innocent purchaser, and if the sale take place without notice or advertisement by the consent and agreement of the execution debtor, it is valid as to him. *Ringgold vs. Patterson*, 209.

6. An execution sale, privately held by agreement of the debtor, at a time or place not appointed by law, may not be void; but, even where fraud is not alleged, the purchaser being ignorant of the want of notice, it would be *reasonable* to hold that it is voidable at the election of any junior incumbrancer or creditor, who had no notice. *Ib.*

7. The knowledge by the purchaser at execuion sale, that it is made without advertisement and by private agreement, though it might not be conclusive evidence of fraud, is always a circumstance, and in connection with other attendant circumstances—such as apparent concert between the purchaser and execution debtor:

EXECUTIONS—CONTINUED.

material misrepresentations as to the property by the latter in the presence of the former, who is presumed to know the truth, calculated to deceive the plaintiff; the acceptance of a conveyance of the same lands from the debtor on further advances made—may be a forcible one, from which collusion between the purchaser and the execution debtor is to be inferred. *Ib.*

8. Where a sheriff sells property, levied upon under an execution, and the purchaser refuses to pay the money bid, it is not such a sale, within the meaning of *sec.* 70, *chap.* 67, *Dig.*, as would make the sheriff responsible for the amount. *State, use of Jones, Woodward & Co. vs. Borden et al.*, 611.
9. A sheriff is not responsible, as for neglect or refusal to make sale of the property levied upon under execution, where, by his return, it appears that he had not time to sell on the day appointed by law for making sales, because other sales required by law to be made on that day, consumed the whole time within which sales may lawfully be made. *Ib.*
10. An officer derives his power to levy upon and sell property from the judgment and the writ: and a sale, after the return day of the writ, would be void. *Ib.*

See, also, *Judgment Liens*, 4.

EXECUTORS AND ADMINISTRATORS.

See *Administration.*

FAMILY SETTLEMENTS.

See *Chancery*, 17.

FINAL DECREE.

See *Chancery*, 4.

FINES AND FORFEITURES.

1. The Governor has the power to remit fines under the provisions of the Constitution; although the Legislature has failed to regulate the exercise of such power. *Baldwin et al. vs. Scoggin, use, &c.*, 129.
2. And he may remit a fine, although the act of the Legislature declare that the fine, when collected, be paid into the county treasurer, for the use of common schools. *Ib.*
3. A sheriff has no power or discretion to receive a note or property, in payment or satisfaction of a fine adjudged against a defendant in a criminal prosecution; nor has the county treasurer and *ex officio* treasurer of the common school fund, to whom such fine is directed to be paid, any such power or discretion; a note so given, and received in such case, being no payment or satisfaction, the fine had not passed beyond the pardoning power of the Governor. *Ib.*

FRAUDS, STATUTE OF.

See *Chancery*. 32, 33.

GARNISHMENT.

See *Practice*, 6, 7; *Attachments*

GIFTS.

See *Chancery*, 41; *Deeds of Gift*.

HABEAS CORPUS.

See *Practice in Supreme Court*, 8.

HUSBAND AND WIFE.

1. At common law, and under the general law of this State, where personal property comes to the wife by distribution, the title vests in the husband, and the property is liable for his debts; and if, in such case, the wife sets up a separate estate in the property, under the statute of another State, such statute is a matter of fact to be established by competent evidence. *Tatum vs. Hines*, 180.
2. Whenever a perfect title, according to the laws in force in the State in which it is made, vests property in the wife, or in trustees for her use, such title remains in her notwithstanding any change of the residence of the husband, who may exercise an apparent control and ownership of the property, ar any act of fraud or negligence on the part of the trustee or the husband; nor is she required to do any act to protect her title—such as recording in this State the evidence of her title. *O'Neill vs. Henderson*, 235.
3. Where the separate property of the wife was levied upon and sold for the husband's debts, no demand is necessary to entitle the trustee to recover against the purchaser in an action of detinue. *Ib.*
4. A gift to a trustee, in trust for the use of a married woman and her increase forever to their use, &c., of a negro woman and her increase, without other words, becomes at once a use executed, passing the legal and beneficial interest to the *cestui que use*; and the marital rights of the husband attach immediately. *Roane exr. vs. Rives*, 328.
5. It is a general principle of the common law, that the laws of the place, where real property is situate, exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities, which should accompany them: and so, a married woman, residing in Louisiana, can convey lands in Arkansas only in the manner prescribed by the statute: *Chapter* 37, *Digest of Arkansas*. *McDaniels vs. Grace et al.*, 465.
6. If a married woman can make a power of attorney, authorizing her husband to execute a deed for her, conveying her interest in land situate in this State, the execution of the power should be acknowledged by the wife, in the same mode in which the statute requires her to acknowledge the execution of a deed. *Ib.*

HUSBAND AND WIFE—CONTINUED.

Quere: Can a wife constitute her husband an agent to sell and convey her estate or interest in land?

7. A deed of conveyance of the wife's land, executed by the husband in the name of himself and wife, under a power of attorney from the wife, without seal, and not in express terms authorizing the conveyance of any land or interest in land, is null and void, as an act of the wife, and does not pass to the grantee any interest of hers whatever in the land. *Ib.*
8. The husband is entitled to curtesy in the wife's real estate, only where there is issue born alive, and a seizin in fact as well as in law, except in the case of waste, uncultivated lands not held adversely; and so, the husband would not have curtesy where the land is held by another adversely, and is the subject of litigation until after the death of the wife. *Ib.*
9. The right of the husband to curtesy has been extended by modern decisions; and it is now settled in equity, that he shall have curtesy of a trust as well as in a legal estate; of an equity of redemption, a contingent use, or money to be laid out in land: but not in a pre-emption right of the wife in the public lands of the United States. *Ib.*
10. By the common law, the husband and wife cannot contract with each other; nor can the husband make a grant or gift to his wife, nor the wife have personal estate to her sole and separate use. But, in this State, such property may be conveyed directly by the husband, or a third person, to the wife; and, in such case, the husband will take the legal interest, and be treated in equity as a trustee for the wife.

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Quere: Has the wife any equitable interest in the money arising from the sale of her real estate, after the proceeds of the sale have come into the hands of her husband? *Dyer et al. vs. Bean et al.*, 519.

INFANTS.

See *Contracts and Agreements*, 1, 2; *Conveyances*, 3.

INSTRUCTIONS.

1. The object of instructions by the court, is to settle the law upon controverted points; and none need be given as to facts that are proven, and about which there could be no controversy. *Pleasant vs. State*, 624.
2. Where instructions have been given, sufficient to guide the jury in coming to a conclusion as to the credibility of a witness, and the weight to be attached to his testimony, the court may decline to give others in relation to the same points. *Ib.*

See, also, *Practice in Supreme Court*, 1, 2.

INTERPLEADING.

See *Attachment*, 2.

INTEREST.

See *Contracts and Agreements*, 11.

JUDGMENTS.

1. A judgment in the words, "It is *ordered, adjudged* and *decreed*, by the Court," &c., is not a nullity; the words used being of fully equivalent import to the words, "It is considered," &c. *Ware & Miller vs. Pennington et al.*, 226.
2. An agreement to assign a judgment against a third person, is a valuable consideration for a writing obligatory. *Ib.*
3. Where one of several defendants pleads to the action, and the plaintiff replies, and on motion of a co-defendant, the original writ of summons is quashed, and judgment "that he go hence," there is no final judgment in favor of the defendant pleading, to which a writ of error will lie. *State Bank vs. Roddy*, 401

JUDGMENT LIENS.

1. The lien of a judgment on real estate is not displaced in favor of subsequent liens or contracts by the mere delay of the judgment creditor to sue out execution: nor by an order of the plaintiff, to return the execution without a levy, or without a sale of the property levied upon. *Watkins & Trapnall vs. Wassell*, 73.
2. If one sells and conveys real estate, to which he has no title, or an imperfect title, at the time of the sale, and subsequently acquires a perfect title, it enures to the benefit of the grantee; and, if between the date of the conveyance and the acquisition of the perfect title, a judgment is rendered against the grantor, the title of the grantee is prior to the lien of the judgment. *Ib.*
3. The interest of a judgment creditor, under his lien, in the real estate of the debtor, is limited to the actual interest of the debtor at the time the lien attaches, and he holds it free from subsequent alienations or incumbrances, but subject to all prior alienations or incumbrances. *Ib.*
4. A vendee of real estate, holding under a bond for title, has such an interest in the land as is subject to a judgment lien and to sale under execution; subject to the legal and equitable rights of the vendor for the unpaid purchase money. *Hardy vs. Heard et al.*, 184.
5. Where an execution is issued to another county, and levied upon land, and the defendant dies and the execution is returned without a sale of the property, it is necessary to revive the judgment before the lien can be enforced. *State Bank vs. Etter*, 268.
6. A judgment creditor, after levy of his execution upon the lands of the debtor in another county, and the death of the debtor, orders the execution to be returned without sale; but neglects to revive his judgment against the representatives of his debtor, or pursue his lien for two and a half years: HELD, That the judgment creditor, under the circumstances, has displaced his lien, and cannot set it up against

JUDGMENTS—CONTINUED.

the title of one who had in the mean time purchased the property at a sale, under the statute, by the administrator of the judgment debtor. *Ib.*

JURISDICTION.

1. A justice of the peace has jurisdiction to render judgment for each installment of interest, as it falls due, or any number of installments not exceeding a hundred dollars, in any one suit for the interest payable semi-annually on a bond due at a future day. *Walker as Com. vs. Ryrd et al.*, 33.
2. It was the intention of the Legislature (*secs.* 46, 47, 48, *ch.* 4, *Dig.*,) to invest the Probate Court with jurisdiction to compel a discovery on oath, &c., where persons were intrusted, in the lifetime of the deceased, with custody of his effects, or at or about the time of his death, or soon afterwards, they came into their possesion either casually or by design, and they continue to hold the same quietly and secretly, without color of lawful authority: but not to invest the Probate Court with jurisdiction of contested rights, and matters of litigation, as to the title to property, between the executor or administrator and others. *Moss vs. Sandefur exr.*, 381.

See, also, *Roads; Chancery* 28; *Constitution Law.*

LANDLORD AND TENANT.

1. A tenant, who enters under the title of his landlord, cannot continue to hold over, and yet contest his landlord's title to the premises, or to the rents, by setting up an adverse after acquired title to the premises in himself, though he had given notice to the landlord of that fact, and that he would no longer hold under him or pay him rent. *Clemm vs. Wilcox ad.*, 102.

LEADING INTERROGATORIES.

See *Practice*, 14.

LEGACIES.

See *Devises and Bequests*, 1, 3.

LIENS.

1. The owner of a house and lot, being in possession, contracts with a mechanic for repairs, and grants the rents and profits to accrue, in payment thereof: the attorney of a judgment creditor, whose lien is prior to the contract for repairs, with full knowledge of all the facts, sues out execution, while the work is in progress, and purchases the house and lot: HELD, That he must pay for such repairs as were put upon the house

LIENS—CONTINUED.

after his purchase, until he gave notice to the contractor that he would not be responsible or pay for the work. *Watkins & Trapnall vs. Wassell*, 73.

2. A contract with a mechanic for the repair of a house, that he shall receive the rents until he is fully paid, is not a mere security for the payment, but a transfer or grant of the rents and profits. *Ib.*

3. An attachment on land does not divest the owner of his general property, but constitutes a lien from the time of the seizure; of which all persons are bound to take notice: it is, however, subject to all liens existing at the time. *Merrick & Fenno vs. Hutt*, 331.

See also *Vendor's Lien*, 1.

LIMITATION.

1. Although no affidavit is required for the legal exhibition of a claim against the estate of a deceased person, upon which an action was pending at the time of his death; yet such action must be revived against the administrator, or executor within two years from the grant of letters, or the claim will be barred, like any other not legally exhibited. *State Bank vs. Tucker ad.*, 39.

2. The true construction of the act of 5th March, 1838, in force 20th March, 1839, (*Rev. Stat., ch.* 51,) is, that as to judgments rendered *after* the passage of that act, the presumption of payment was conclusive, after the expiration of ten years, unless repelled by part payment or a written acknowledgment; while, as to judgments rendered *prior* to the passage of that act, the presumption should be repelled, not only by those means, but by all the other means allowed at common law. *Woodruff vs. Saunders ad.*, 143.

See, also, *Claims against Estates*, 1, 2; *Chancery*, 27; *Conveyances*, 22.

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, the important inquiry is, whether the defendant, at the time of the arrest, had reasonable or probable ground of suspicion that the plaintiff had committed the crime imputed to him. *Sexton vs. Brock*, 345.

2. There is a wide difference between a felony and a trespass, and if one has reason to believe that another took or retained property openly and under color of claim, not used as a pretext for larceny, a charge of stealing is without probable cause, and raises a presumption of malice. *Ib.*

MASTER AND SLAVE.

1. The statutory enactments in this State, in relation to the liability of the master for the tortious acts of his slaves, are modifications of the general law, which does not hold

MASTER AND SLAVE—CONTINUED.

the master liable unless such acts were done by his orders, or with his privity, or were sanctioned by him: and, therefore, the liability of the master, for acts of his slaves, in which he did not participate, must be restricted to those trespasses which are indictable offences, or, not being so, are specified in the statute. *McConnell vs. Hardeman*, 151.

2. In an action against the master for a trespass committed by his slave in killing an animal belonging to the plaintiff, the declaration should aver that the killing was wilful and malicious. *Ridge vs. Featherston*, 159.
3. The act of killing a horse, done wilfully and maliciously, is one of those indictable offences enumerated in the statute; and, for which, if committed by a slave, the master is made responsible in damages to the party injured. *Ib.*
4. The action may be in case or trespass, according as the one or the other is the more appropriate remedy with reference to the common law distinctions between these forms of action. *Ib.*
5. In a civil suit against the master to recover damages for an unauthorized act of the slave, proof of his admissions or statements—certainly those not accompanying or explanatory of the act done—cannot be admitted against the master. *Ib.*
6. In an action by an inhabitant of one township against members of the patrol company of another, for whipping his slave, evidence that such company was invited by some inhabitants of the former township to attend therein and disperse an unlawful assemblage of slaves, is not admissible under the plea of justification. *Hervy vs. Armstrong*, 162.
7. Although the battery of a slave, without excuse or provocation, by one not having authority to correct him, is an indictable offence, the master cannot recover in a civil action for whipping his slave, unless he proves special damage or injury to the slave resulting in a loss of service. *Ib.*

See, also, *Criminal Law*, 14.

NECESSARIES.

See *Contracts, &c.*, 1.

NEW TRIALS.

See *Practice* 23, 24; *Practice in S. C.* 9, 12.

NON CLAIM.

See *Limitation*, 2.

NON COMPOS, OR MENTAL IMBECILITY.

See *Contracts and Agreements*, 14.

NOTICE TO SUE.

1. The failure of the obligee or payee to sue the principal debtor, within the time prescribed by the statute, will not release the security where the notice to sue, given by the security, under the statute, is served, not upon the obligee or payee himself, but upon his attorney at law, who has the note for collection. *Cummins & Fenno vs. Garretson*, 132.

PARTNERS AND PARTNERSHIP.

See *Chancery*, 1.

PATROLS.

1. The patrol system is a police regulation for the several townships in a county; and the authority of each company of patrol is limited to the township for which it is appointed. *Hervy vs. Armstrong*, 162.
2. In an action by an inhabitant of one township against members of the patrol company of another, for whipping his slave, evidence that such company was invited by some inhabitants of the former township to attend therein and disperse an unlawfnl assemblage of slaves, is not admissible under the plea of justification. *Ib.*

PEDIGREE.

1. Reputation or hearsy, is admissible in all matters of pedigree: and so, the repeated declarations of the father, that he had married, and by the marriage had two children, naming them; his recognition of them as his legitimate children, their recognition of him as their father, and of each other as brother and sister; and the fact, that the marriage and legitimacy of the children were spoken of and known in the family, are sufficient to prove the marriage of the father and the legitimacy of the children. *Kelley's Heirs vs. McGuire et al.*, 555.

PLEAS AND PLEADING.

1. In an action against the master for a trespass committed by his slave in killing an animal belonging to the plaintiff, the declaration should aver that the killing was wilful and malicious. *Ridge vs. Featherston*, 159.
2. An attachment bond, with the condition written under the signatures and seals of the obligors, held sufficient: and that if an objection to such bond could be taken in the Circuit Court on appeal from a Justice of the Peace, it must be by plea in abatement, and not by motion to dismiss. *Melvin vs. S. B. General Shields*, 207.
3. A replication is not subject to the objection of duplicity on account of the statement of several facts constituting but a single reply to the plea; nor where several matters are set up, one of which only is a good reply to the plea; and, as

PLEAS AND PLEADING—CONTINUED.

a general rule, all matters not responsive to the plea, may be struck out as surplusage. *McDaniels vs. Grace et al.*, 465.

4. Where the replication to a plea of failure of consideration states the circumstances under which the bond sued upon was executed, and which are no answer to the plea, but concludes with the averment, "that there was another and different consideration for the execution of the bond than that which is alleged in the defendants' plea; and there was a good and valid consideration in law for the execution of the instrument sued on;" such averment will be treated as an issue to the plea, and all else considered as stricken out as surplusage. *Ib.*

See, also, *Warranty*, 1, 2; *Estoppel*, 2.

POWER OF ATTORNEY.

See *Conveyances*, 10, 11, 12.

PRACTICE AT LAW.

1. A plaintiff in the Circuit Court has the right to take a non-suit, at any time before the jury retires from the bar, or his cause is submitted to the Court for decision; though the defendant file and offer to prove a set-off to an amount larger than the plaintiff's claim. *Fowler vs. Lawson*, 148.
2. When several defendants reside in different counties, separate writs of summons may be issued to the counties where they reside, or may be found, without any averment in the declaration as to their residence. 2 *Ark.* 449; 5 *Ib.* 179. *Byrd et al. vs. State use, &c.*, 175.
3. Where, upon settlement and adjustment of the accounts of an administrator, he is removed by the Probate Court, and ordered to pay over to his successor in administration, the amount so ascertained to be in his hands, no demand is necessary; and, if in an action upon the administrator's bond, a demand on a particular day be averred the plaintiff is not bound to prove it; and a plea denying such demand, tenders an immaterial issue. *Ib.*
4. A plea of general performance of covenant in an action upon an administrator's bond, is demurrable. *Martin vs. Royster*, 3 *Eng.*, 81. *Ib.*
5. In an action of debt upon a penal bond, the recovery of the plaintiff is not limited to the amount of the damages laid in the declaration. *Ib.*
6. Under the statute, title Practice at Law, sec. 6, which should be construed in connection with ch. 17, where a suit by attachment is instituted in one county, a separate writ may be issued to another county, and the credits and choses in action of the defendant attached, as well as his visible, tangible property. *Cross vs. Haldeman*, 200.
7. A garnishee, answering and admitting his indebtedness, as the maker of negotiable paper, without reserve or qualification, does so at his peril. If notified at any

PRACTICE AT LAW—CONTINUED,

time before final judgment that his note had been assigned before the service of the writ upon him, he is bound to apply for leave to interpose the defence. *Ib.*

8. After demurrer to the declaration and the general issue subsequently pleaded, the Court has no discretion to allow a plea in abatement. *Foreman vs. Gibson*, 206.

9. An attachment bond, with the condition written under the signatures and seals of the obligors, held sufficient: and that if an objection to such bond could be taken in the Circuit Court on appeal from a Justice of the Peace, it must be by plea in abatement and not by motion to dismiss. *Melvin vs. S. B. General Shields*, 207.

10. A judgment of the Circuit Court will be reversed, where the record shows that the judge presiding was disqualified to sit. *Hanly vs. Adams*, 232.

11. Where interrogatories are filed under the 9th, 10th, 11th and 12th sections, *ch.* 55, *Dig.*, and notice is given to the adverse party of the application for a commission, he is not entitled to notice of the time and place of taking the depositions. *O'Neill vs. Henderson*, 235.

12. The defendant filed the plea of the statute of limitations, but the record states that the parties went to the jury, "the defendant abandoning his plea of the statute of limitations"—such plea is out of the case, and will be so treated at any subsequent trial. *Sexton vs. Brock*, 345.

13. The interrogatory, "Do you know whether Brock was ever prosecuted for stealing a horse, if so, by whom and where?" is not objectionable as a leading question. *Ib.*

14. A general objection taken to the admissibility of all the testimony, without specifying the grounds of objection, is unavailing, if any portion of it was admissible. *Ib.*

15. One party has no right to read the depositions of his adversary, against his objection which, though filed and published, he had never offered in evidence. *Ib.*

16. The statute authorizing either party to make a witness of the opposite party in suits before justices of the peace, ought to be so construed as to allow such privilege on the trial *de novo*, in the Circuit Court on an appeal from the justice. *Drennen vs. Lindsey*, 359.

17. But if either party shall call his adversary as a witness, he will not be allowed to disprove or impeach his testimony by calling other witnesses. *Ib.*

18. A witness may be discredited by proving that he has testified or stated differently in any material respect on some former occasion, but the witness should first be enquired of concerning such former statement. *Ib.*

19. Although it is i regular to permit a party to read a paper referred to in the depositions taken by the opposite party, but not made a part thereof, yet if it is only corroborative of other competent testimony, it is not ground of new trial. *Dickinson et al. vs. Burr*, 372.

20. In the examiniaton of a witness in a criminal case, he may be asked whether he had stated to certain persons that he was going to the trial "to have the prisoner hung, that he had lived long enough." *Bixby vs. State*, 395.

21. Exceptions taken to the admission or exclusion of testimony in a criminal case, are

PRACTICE AT LAW—CONTINUED.

waived by a motion for new trial, not incorporating the matter of such exception as cause for the motion: but although such cause be assigned in the motion for new trial, this court will not reverse the judgment for such error, if there be other testimony sufficient to warrant the verdict. *Ib.*

22. In motions for new trial, upon the ground of newly discovered testimony, some discretion is vested in the judge presiding at the trial, who has an opportunity of judging whether they are made for delay or in good faith. They ought to show that the newly discovered testimony would induce a different result; and the application ought to be corroborated by the affidavit of some disinterested witness. *Ib.*

23. Instructions that are calculated to mislead the jury, or as to the weight to be given to evidence, or that are asked without any evidence being given on which they can be based, should be refused. *Worthington vs. Curd & Co.*, 492.

24. According to the well settled doctrine of this court, by moving for a new trial, the plaintiff abandoned the exceptions previously taken by him, to the decisions of the court below in refusing and giving instructions to the jury, inasmuch as he did not incorporate the decisions complained of, in the motion, as grounds for new trial. *Nevill vs. Hancock & Ewing*, 511.

See, also, *Instructions*, 1, 2; *Venue* 1, 2; *Bonds*; *Verdict*, 1, 2.

PRACTICE IN SUPREME COURT.

1. If instructions asked by either party, be refused, and he excepts, it devolves upon him to set forth, in his exception, all or so much of the evidence with reference to which it may have been asked, as will present the question of law designed to be made: else the appellate court would have to presume, in favor of the judgment, that the instruction was properly refused; unless the instruction contradicts, or is inconsistent with the pleadings. *Duggins vs. Watson et al.*, 118.

2. Where an instruction is given, purporting to be predicated upon the evidence, as that certain facts shall have been proven to the satisfaction of the jury, the appellate court ought to presume in favor of the court below, that such evidence, not set out in the bill of exceptions, had been adduced. *Ib.*

3. Where no question of law is raised during the progress of the trial, nor motion made for new trial, no question is presented, by an exception overruled to the finding, for the consideration of the appellate court, as decided in *The State Bank vs. Conway*, 13 *Ark.* 344. *Lefils & Christian vs. Sugg*, 137.

4. Where some of the counts of the declaration are bad, and a general verdict is returned, this court will not, under the statute, award a new trial, if it shall appear, from the bill of exceptions, that there was evidence, applicable to the good counts, upon which the jury might have been warranted in finding their verdict. *Sexton vs. Brock*, 345.

PRACTICE IN SUPREME COURT—CONTINUED.

5. Where the bill of exceptions refers to papers with sufficient identification, without incorporating them at full length, they constitute a part of the record. *Ib.*
6. After two successive verdicts, this court will not be inclined to disturb the verdict for excessive damages, unless the record disclosed some evidence that it was the result of passion, prejudice, or corruption on the part of the jury, if there be evidence to support it. *Ib.*
7. The court will, of its own motion, for the affirmance of the judgment, award a writ of certiorari, to perfect the record, *where the venue has been changed,* to the court in which the cause originated. *Bixby vs. The State*, 395.
8. Where there is no subordinate court competent to issue a writ of *habeas corpus*—as where the office of Circuit Judge in the proper county is vacant—this court will award such writ. *Robins, Ex parte*, 402.
9. The decision of the court below, refusing to grant a new trial, upon the grounds that the verdict is contrary to evidence and the damages excessive, will not be disturbed, where there is no total want of evidence to sustain any material allegation in the declaration, and the amount of damages, upon all the facts of the case, does not shock one's sense of justice. *Pleasants vs. Heard*, 403.
10. No objection will be heard in this court to the admissibility of evidence on the trial, on the ground that it was secondary, or not the best that the nature of the case, would admit of, unless such specific objection was taken in the court below. *Ashley exr. vs. Gunton et al*,. 415.
11. Where a general objection is made to the reading of a deposition, which appears regular on its face, this court will not notice any specific objections made for the first time in this court. *Worthington vs. Curd & Co.*, 492.
12. Where there is a total want of evidence to sustain the verdict, this court will award a new trial: as where the jury render a verdict against the defendant, upon proof, that G., being in possession of a house, which defendant had conveyed by deed, not recorded, to G's wife, employed mechanics to repair it, saying, but without authority from defendant, or proof of agency, that defendant would pay for the repairs, if not, he (G.) would pay for them. *Russell vs. Cady surv.*, 541.

See, also, *Trespass*, 2; *Witnesses*, 2; *Criminal Law*, 7, 11.

PRESUMPTION OF PAYMENT.

See *Limitation*, 1.

PRINCIPAL AND AGENT.

1. Where an agent bids off negroes at an administration sale, for and at the request of his principal, who pays for them, and to whom they are delivered, the title of the principal is perfect, without any written conveyance; and no bill of sale subsequently made by the agent to another, can convey any title.. *Dyer et al. vs. Bean et al.*, 519.

PROBATE COURT.

See *Jurisdiction*, 2.

PUBLIC LAND.

1. C., the purchaser of an improvement on public land subject to entry, and L., who is security for the purchase money, enter into a parol agreement that L. shall advance the money to enter the land, and shall enter it, and hold the legal title as security for his advance and for his securityship: L. makes the entry accordingly: HELD, That he holds the land as trustee, and equity will enforce the performance of the agreement. *Cain vs. Leslie*, 312.
2. A sale of an improvement on public land, is recognized by statute, and the purchaser acquires a possessory right, which the law protects, and which is good against every body but the government or its grantee. *Ib.*
3. A verbal agreement for a division of public land, when either party should enter it, but indefinite as to time, where no trust is created between the parties, and there are no peculiar circumstances that would make it unconscionable for either party to resist a specific performance, is not entitled to favorable consideration, because clearly against public policy. *Baker vs. Hallobaugh*, 322.

RENTS AND PROFITS.

See *Valuable improvements.*

REPUTATION.

See *Pedigree.*

RESCISION OF CONTRACTS.

1. Upon a bill in equity by the purchaser of real estate for the rescision of the contract of sale and re-payment of the purchase money, the complainant must show a surrender of the property, or an offer to surrender it to the person entitled, and that the vendor can be placed *in statu quo.* The allegation that he had "abandoned and yielded the possession of the land," is insufficient.. *Davis vs. Tarwater*, 286.
2. A complainant, who seeks the rescision of a contract, must do so in a reasonable time: and so, after more than ten years had elapsed from the date of the contract, and five years after the discovery of the imputed fraud, a court of equity will refuse to rescind the contract. *Ib.*

REVIVAL OF ACTION.

See *Non-Claim.*

ROADS.

1. Where the owner of land, through which a road is located, objects to the proceedings of the commissioners appointed to view and mark out the road, it is immaterial

ROADS—CONTINUED.

whether he was the owner of the land at the time of the view, or succeeded subsequently to the estate of the then owner: it is sufficient that he became the owner before the final action of the county court, and presented a sufficient objection to the establishment of the road. *Roberts vs. Williams et al.*, 43.

2. And where the county court proceeds to make a final order establishing the road, after such owner of land has become a party to the proceeding, he has the right, upon showing that the final order of the county court is erroneous, and that he has lost his right of appeal in the mode provided by the statute, without any fault or negligence on his part, to a writ of certiorari, to bring the proceedings before the Circuit Court for revision. *Ib.*
3. Without the consent of the owner, private property cannot be taken for private use, even under the authority of the Legislature; nor can it be taken for the public use without providing for just compensation, to be first made to the owner. (*Martin, Ex parte*, 13 *Ark.* 198.) *Ib.*
4. It is by virtue alone of the right of eminent domain, that private property is taken for the purpose of being used for a road, and whether the road be a public or private one, it is equally for the public use. *Ib.*
5. No valid and binding order could be made by the county court, establishing a private road where the report of the commissioners failed to advise the county court, in pursuance of the statute, of the ownership of the lands, and of the damages to be sustained by each owner, through whose lands the road was laid out. *Ib.*

SALES.

1. Delivery is essential to the validity of a bill of sale; that is, it must go out of the hands or control of the grantor with the intent that it should go to those of the grantee, and must ultimately go there. Proof that, at some time before or after the death of the wife, it was in the hands of the husband, and was destroyed by him, is not sufficient evidence of a delivery to the wife. *Dyer et al. vs. Bean et al.*, 519.

SCIRE FACIAS.

1. In a scire facias to revive a judgment, it is error to render a new judgment for the debt or damages; also to adjudge that it be revived from the date of the issuance of the writ, where the lien has expired before the suing out of the *sci. fa.* *Hanly vs. Adams*, 232.
2. Under our practice, the scire facias is in the nature of a writ of summons, and may be served as such. *Ib.*

SECURITY.

See *Notice to Sue.*

SHERIFF'S DEEDS.

1. The design of the statute, in requiring the recital of the judgment, execution, &c., in a deed by a sheriff for land sold under execution, was to relieve the purchaser from the necessity of producing the judgment, &c., and to leave to the party, who would contest the sale, to establish its invalidity. *Hardy vs. Heard et al.*, 184.
2. A deed for land sold under execution, not containing the recitals mentioned in the statute, or not showing on its face a compliance with the law, could not be evidence under the statute. But if such deed is in compliance with the statute, it is only prima facie evidence, and may be entirely overthrown by evidence that the sale had never been made, or had not been made in accordance with law. *Ib.*

SLAVES.

See *Master and Slave.*

SPECIFIC PERFORMANCE.

See *Chancery*, 32, 33.

SURVEYS AND RE-SURVEYS.

See *Chancery*, 24, 25.

TAX TITLE.

1. It was not the intention of the statute (*Digest*, 893,) to make the tax-title, derived from the Auditor, valid against all objections; but to make the Auditor's deed *prima facie* evidence of title; and cast upon the assailant of the tax-title, the burden of proving that any requisite of the law had not been complied with. *Merrick & Fenno vs. Hutt*, 331.
2. It is not necessary that the Auditor's deed, for land sold for taxes, should contain recitals: it is sufficient if it describe the property sold and the consideration, and convey to the purchaser all the right, title, &c., of the former owner and of the State. *Ib.*
3. The particular land taxed stands liable for the tax, no matter who may be the owner, or into whose hands it may pass: and the sale is valid, if regular in other respects and the taxes were due and unpaid, no matter in whose name the land may have been assessed and advertised. *Ib.*
4. An attachment levied upon land, which has been struck off to the State for non-payment of taxes, only binds such interest as the owner had at the time, which is a right of redemption within two years. *Ib.*
5. Although a collector execute, deliver, and acknowledge, to a purchaser of land at tax sale, a deed containing recitals of every pre-requisite prescribed by the statute, yet, if the land was misdescribed in the advertisement of the tax sale, the owner is not divested of his title and estate in the land. *Patrick vs. Davis*, 363.

TOWNS AND TOWN LOTS.

See *Chancery*, 24, 25, 26, 27.

TRESPASS.

1. In an action of trespass to personal property, it is necessary that the plaintiff aver that the property, for the taking or injury to which the action is brought, is of some value. *McConnell vs. Hardeman*, 151.
2. The defendant will be made liable for trespass, if it is proved that he came in aid of the person, who committed it, though he took no further part in it; and where there are circumstances in proof, connecting a defendant with the trespass, and the jury find a verdict against him, and the judge, who heard the testimony, refuse to grant a new trial, this court will not disturb the verdict. *Clarke et al. vs. Bales*, 452.
3. When a joint trespass is proved, the jury are to estimate the damages against all the defendants, according to the amount which they think the most culpable of the defendants ought to pay: and where the trespass is an aggravated one, they are not confined to the actual damage, but may give exemplary damages. *Ib.*

Quere: Will the affidavit of a juror, after verdict rendered, that he was induced to consent to the verdict from a misapprehension of the instruction of the court, be admitted as cause for a new trial?

4. It is a general rule that a sheriff, or other officer, who executes a writ of attachment or execution, is bound to take the debtor's goods alone; and that he is guilty of trespass for taking the goods of a stranger. *Overby et al. vs. McGee*, 459.
5. The owner of property levied upon and sold under a writ of attachment against another, may not only recover the property and damages for the detention, from the purchaser, but may also maintain an action of trespass against the officer and plaintiff in attachment, for the taking of the property; although, at the time of the levy and taking, the property was in the possession, *under a loan*, of the defendant in the attachment. *Ib.*

See, also, *Master and Slave*, 2, 3, 4.

TRUSTS AND TRUSTEES.

1. A trustee, who brings suit as such, is not required to offer proof of his acceptance of the trust—the bringing of the suit and acting as such, are sufficient. *O'Neill vs. Henderson*, 235.
2. Where the separate property of the wife was levied upon and sold for the husband's debts, no demand is necessary to entitle the trustee to recover against the purchaser in an action of detinue. *Ib.*

See, also, *Husband and Wife*, 4.

VALUABLE IMPROVEMENTS.

1. A minor son, possessed of real estate, dies without issue; the father enters upon the land, claiming as heir to the son, and makes valuable and lasting improvements: he is entitled, in equity, to set off such improvements against the rents and profits. *West et al. vs. Williams et al.*, 682.

VENDOR'S LIEN.

1. A vendor's lien will not be enforced against a purchaser without notice. *Pettit et al. vs. Johnson et al.*, 55.

VENDOR AND VENDEE.

1. Where by the express terms of a contract for the purchase of timber, lying in the swamp, where cut, it was not to be paid for until after delivery, the delivery was a condition precedent to the vendor's right of action; and nothing short of an acceptance would make the vendee liable upon the common counts for goods sold and delivered. *Gilliam vs. Towles*, 64.
2. If the vendee was bound by his contract to accept the timber by merely having it shown to him in the swamp, he might have become liable under such a contract for refusing to accept it when offered to be so delivered: but he cannot be held accountable for the value of the timber, if by reason of a sudden rise of water, not anticipated nor provided for in the contract, or the adverse possession of other persons, it became equally impossible for the vendor to make, or the vendee to accept, a delivery. *Ib.*

See, also; *Warranty*, 3.

VENUE, CHANGE OF.

1. An order for a change of venue, is sufficient, when it substantially conforms to the requirements of the statute. *Pleasant vs. State* 624.
2. Upon a change of venue, the original indictment remains in the court where it is preferred, and a transcript of it sent to the court to which the cause is removed. *Ib.*

VERDICT.

1. A general verdict of guilty, in an action of trespass for assault and battery, is good, upon issues to the pleas of *not guilty* and *son assault demesne*. *Pleasants vs. Heard*, 403.
2. The affidavit of a juror, after verdict rendered, is inadmissible to impeach and set aside the verdict rendered by him, upon his solemn oath, upon the ground that he with the other jurors, had acted illegally and improperly in the mode adopted by them in agreeing upon the amount of damages: nor can the admissions and statements of a juror be received for such purpose. *Ib.*

WARRANTY.

1. An action on the case for deceit in falsely warranting a chattel to be sound, is maintainable, though assumpsit or covenant on the express contract of warranty would, at this day, be the more appropriate remedy. *Johnson & Grimes vs. McDaniel*, 109.
2. When the declaration in case sets out a contract of warranty, though alleged to have been falsely and deceitfully made, the issue is upon the breach of the special contract, as it would be in assumpsit or covenant: the *scienter* of the defendant need not be proved, nor is it necessary that the plaintiff should have returned the chattel, or offered to do so, or to rescind the contract *Ib.*
3. There can be no doubt of the vendee's right to recover compensation of his vendor for a breach of warranty, upon proof that he has lost, or been deprived of, the beneficial enjoyment of the property, by means of a title paramount, though the property, being negroes and having volition, were seduced away from him, and he was placed in the attitude of plaintiff, instead of defendant. *Daniels vs. Street*, 307.

WITNESS.

1. The trustees of the Clarksville Institute, which is a corporation for a benevolent object, having no personal or pecuniary interest in the property or assets of the corporation, were competent witnesses in a suit to which the corporation was a party, *Hershy vs. Clarksville Institute*, 128.
2. The recognizors in an appeal bond are incompetent witnesses for the appellant, but if no objection be made in the court below for that cause, it cannot be taken in the appellate court. *Ib.*
3. The statute anthorizing either party to make a witness of the opposite party in suits before justices of the peace, ought to be so construed as to allow such privilege on the trial *de novo*, in the Circuit Court on an appeal from the justice. *Drennen vs. Lindsey*, 359.
4. But if either party shall call his adversary as a witness, he will not be allowed to disprove or impeach his testimony by calling other witnesses. *Ib.*
5. A witness may be discredited by proving that he has testified or stated differently in any material respect on some former occasion, but the witness should first be enquired of concerning such former statement. *Ib.*

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