# REPORTS

OF

# CASES AT LAW AND IN EQUITY,

ARGUED AND DETERMINED

IN THE

# SUPREME COURT OF ARKANSAS,

AT THE

JANUARY AND JULY TERMS, 1855, AND JANUARY TERM, 1856.

**L. E. BARBER, REPORTER.**

VOLUME XVI.

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# OFFICERS OF THE SUPREME COURT.

---

Hon. ELBERT H. ENGLISH, Chief Justice,
" CHRISTOPHER C. SCOTT, } Associate Justices.
" DAVID WALKER,* }
" THOMAS B. HANLY.† }

**Resigned* 31*st December*, 1855.
†*Appointed by the Governor to fill the vacancy occasioned by the resignation of* Hon DAVID WALKER.

---

PLEASANT JORDAN, Esq., Attorney General.
LUKE E. BARBER, Clerk and Reporter.
JOHN C. PEAY, Sheriff.

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## CHANCELLOR:

Hon. HULBERT F. FAIRCHILD,
*Of Pulaski County Chancery Court.*

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## JUDGES OF THE CIRCUIT COURTS:

1ST. Circuit, Hon. GEORGE W. BEAZLEY,
2d. " " THEODORIC F. SORRELLS,
3d. " " BEAUFORT H. NEELY,
4th. " " FELIX J. BATSON,
5th. " " JOHN J. CLENDENIN,
6th. " " ABNER A. STITH.

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# CASES

## ARGUED AND DETERMINED

IN THE

# SUPREME COURT OF ARKANSAS,

AT THE JANUARY TERM, A. D. 1855.

CONTINUED FROM VOL. XV.

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## GAINES ET AL. VS. HALE.

Under the statute, (*Digest, chap.* 60,) a certificate of entry of public land, and payment of the purchase money, is sufficient evidence of a legal title, unless such entry was void, to enable the purchaser to maintain an action of ejectment.

The Register and Receiver of the Land Office having rejected a claim to pre-emption, on appeal to the Commissioner of the General Land Office, the entry was ordered to be allowed, under directions of the Secretary of the Interior, to enable the pre-emption claimant to contest the title with other claimants, for the same land: HELD, That the entry was not void.

A right to pre-emption had accrued under the act of Congress of 29th May, 1830: the pre-emptor was unable to make proof of settlement, &c., as required by law, because the surveys had not been made, and the plats filed in the Land Office; the land was reserved from sale by act of Congress of 20th April, 1832, before the passage of the act of 14th July, 1832, extending the benefits of the act of 29th May to those who were unable to make proof, because the surveys had not been made: HELD, That the rights of the pre-emption claimant were not affected by the subsequent reservation of the land.

*Appeal from the Circuit Court of Hot Spring County.*

Hon. SHELTON WATSON, Circuit Judge.

WATKINS & CURRAN, and GALLAGHER, for appellants.

1. The question presented for the consideration of this court, is, whether the papers, offered in evidence, show such *prima facie* title in the plaintiffs as authorized them to maintain ejectment. That they do show sufficient title, and were competent evidence, *vide Digest* 454, *sec.* 2; *McClairen vs. Wicker*, 3 *Eng.* 195; *Morton vs. Reeder*; 5 *Miss. R.* 356; *Jackson vs. Wilcox*, 1 *Scam. R.* 344; *S. C.* 13 *Peter's R.* 516; *Bullock vs. Wilson*, 5 *Porter* 328; 6 *Missouri R.* 106; 2 *Porter* 436; 5 *Porter* 245; 1 *Wash. C. C. R.* 207; 2 *ib.* 354, 160, 33; *Coxs vs. Stewart*, 1 *Stewart* 379. The recent case of *Floyd vs. Ricks*, 14 *Ark.* 286, settles the principal question involved in this case; that case goes further, and holds that our statute makes an entry a legal title in *any* action.

If the title we offer is a *legal* title, no *equitable* title could, *in this action*, be set up in opposition to it.

In ejectment, the *legal* title always prevails and an *equitable* title is not regarded.

The *legal* title always prevails in the action of ejectment.

Our statute makes this a *legal title*. It is not necessary that we should contend that it is a *paramount* or *conclusive* title; it is sufficient that it is *prima facie*, and good against the world except the United States. *Jackson vs. Wilcox*, 13 *Peters* 516; *Bagnell vs. Broderick*, *ib.* 436.

2. The decision of the Circuit Court in this case, seemed to be based upon the ground that, as the act of 20th April, 1832, reserved this land from sale, the acts of the Executive Department, in permitting this entry, were void.

It is a sufficient response to this, to say: that the entry was

permitted under the pre-emption act of the *29th May*, 1830, and our title has *relation to that day*—which was long before the reservation act of 20th April, 1832. That the title has *relation* to its inception, vide *McAfee vs. Keirn*, 7 *Smedes. & Marsh. Rep.* 780; *Taylor vs. Brown*, 5 *Cranch Rep.* 234; *Polk's lessee vs. Windell*, 9 *Cranch Rep.* 87; *Fenley vs. Williams*, 9 *Cranch* 164; *McArthur vs. Bowden*, 4 *Wheat. Rep.* 488; *Isaacs vs. Steele*, 3 *Scam. Rep.* 97; *Benner vs. Monlove*, 3 *Scam. Rep.*

The case of *Lytle et al. vs. The State and others*, *Howard Rep.; S. C.*, 7 *Eng. Rep.* 9, is directly in point upon this question.

ENGLISH, and TRAPNALL, for appellee.

1. The appellee submits that the pretended certificate of entry, relied on by the plaintiffs, was issued contrary to law, and is a mere nullity, and conferred upon them no right to recover the land from the possession of defendant. The other documents are merely copies of the correspondence between the public officers, serve to show how this certificate came to be issued; but added nothing to its validity.

The *3d section* of the act of Congress, of *April 20th*, 1832, is in these words: "That the Hot Springs in said Territory (of Arkansas,) together with four sections of land, including said Springs, as near the centre thereof as may be, *shall be reserved* for the *future disposal* of the *United States*, and *shall not be entered, located*, or *appropriated for any other purpose whatever*." *Public Lands—Laws, Inst., and Op., vol.* 1, *p.* 495.

The public lands belong to the United States. Congress has the exclusive power of providing for the disposal of them, and the act *reserving* the land in question from *entry*, &c., was binding upon every officer of the Government, from the President down. It *tied* the *hands* of the *Secretary* of the *Interior*, as well as of the Commissioner of the General Land Office, and the Register

and Receiver, and the pretended *entry* of the plaintiffs is as illegal and void as if it had been permitted without the instructions of the Secretary. *Wilcox vs. Jackson*, 13 *Peters R.* 498; *Hunter vs. Hemphill*, 6 *Mo. Rep.* 106; *Sarpy vs. Rapin*, 7 *Mo. Rep.* 503; *Stoddard et al. vs. Chambers*, 2 *Howard U. S. Reports* 284.

2. The plaintiffs claim a pre-emption to the premises, under the act of May 29th, 1830. *Public Lands—Laws, Inst. and Op., part* 1, *p.* 473. But this act remained in force for but one year. See *sec.* 5, of the act. The certificate of entry offered in evidence by them, bears date 15*th Dec.*, 1851, some ten years after the act ceased to be operative, and they offered no evidence in connection with the certificate to show that they availed themselves, or attempted to avail themselves, of its provisions whilst it was in force. Nor did they show, or offer to show, that they came within the provisions of the *act of* 14*th July*, 1832, *same book*, *page* 511; or of the *act of March* 2, 1833, *same book*, *page* 529, each of which acts extended the benefits of the *Act of May* 29, 1830, for one year, not generally, but in special cases therein designated. The certificate was, therefore, for this additional reason, no evidence of title in the plaintiffs, and was properly excluded from the jury.

Mr. Justice WALKER delivered the opinion of the Court.

This was an action of ejectment, brought in the Hot Spring Circuit Court, by the heirs of Ludovicus Belding, deceased, to recover possession of the South-west quarter of section thirty-three, in township two South, of range nineteen west. The case came on for trial, upon the general issue, and the plaintiffs, to sustain the issue on their part, (the hand writing and signatures of the officers, respectively, being admitted,) offered, in evidence, to the jury, a receipt of the Receiver of the United States Land Office, at Washington, Arkansas, and a transcript, certified by the Register of said Land Office, which are as follows:

"No. 6545. *Receiver's Receipt.*

RECEIVER'S OFFICE, AT WASHINGTON, ARK., *December 19th*, 1851.

Received, of Maria Gaines, (wife of William H. Gaines, formerly Maria Belding), Albert Belding, Henry Belding, and George Belding, the heirs and legal representatives of Ludovicus Belding, deceased, of Hot Spring county, in the State of Arkansas, the sum of two hundred dollars, in full, for the South-west quarter of section thirty-three (33), in township two (2) south, of range nineteen (19) west, containing one hundred and sixty acres (160), according to the return of the Surveyor General, at $1 25 per acre."

According to instructions, I note that this entry interferes with the New Madrid location of Francis Langloise, on the same lands; and, also, that it embraces lands, directed to be reserved, by the act of Congress of 20th April, 1832, and is only permitted to be made, under the decision of the Secretary of the Interior, under date of November 21st, 1851, and the instructions of the Commissioner of the General Land Office, under date of the 25th of November, 1851, in accordance with said decision.

B. F. HEMPSTEAD, *Receiver.*

*Register's Transcript.*

GENERAL LAND OFFICE, *November 25th*, 1851.

GENTLEMEN: The papers accompanying your letters of the 18th and 24th March last, in reference to the claim of the Hot Springs, in Arkansas, having been submitted to the Secretary of the Interior, for his action on the legal point in the case, to wit: the reservation of the land by the act of Congress; they were returned to this office, for its decision, on the respective merits of the pre-emption claims, irrespective of this question.

On the 26th of August last, this office returned the papers, with its decision, adverse to the claim of the heirs of John Percifull,

and in favor of that of the heirs of Ludovicus Belding, deceased, it agreeing with you both as to the establishment of the facts of cultivation, in 1829, and possession on the 29th May, 1830, and regarding the objections of the Receiver, founded upon the opinion, that those acts were performed as the tenant of another, as not affecting the validity of the claim.

On the 14th ult., this office received the opinion and decision of the Secretary of the Interior, dated the 10th of the month, in which he sustains the existing validity of the act of the 20th of April, 1832, it not having been repealed, or affected by any subsequent law; and that, therefore, none of the claims, preferred for the land, are of any legality.

On the 16th ult., an application was made, by the attorney of the heirs of Belding, for permission to make an entry of said claim, in order that they may be placed in a proper position, for the assertion of their rights, hereafter, in the courts, stating that, of course, under the decision of the Secretary, they should not ask for a patent. This was refused by this office, and an appeal, from that action, taken to the Secretary of the Interior, who, on the 21st inst., addressed to this office, a letter, a copy of which is herewith enclosed.

In accordance with the direction of the Secretary, therein contained, you are instructed to permit the heirs of Ludovicus Belding to make payment of the South-west quarter of section thirty-three, T. 2 S., R. 19 W., as containing one hundred and sixty acres; and, in addition to the ordinary entry thereof, upon your books, and the return to this office, you will note the fact of its interference with the New Madrid location of Langloise; of its embracing land directed to be reserved by act of 20th April, 1832; and that said entry is permitted, under the Secretary's decision of the 21st of November, 1851. Similar annotations will be made on the Receiver's receipt, and Register's certificate.

Respectfully, your ob't. serv't.,

J. BUTTERFIELD, *Commissioner.*

*Register and Receiver*, Washington, Ark.

DEPARTMENT OF THE INTERIOR,
*Washington, Nov. 21st*, 1851.

SIR: Upon consultation with the Attorney General, and after full consideration of the application of A. H. Lawrence, Esq., attorney for the heirs of Ludovicus Belding, one of the claimants to the Hot Springs, of Arkansas, on appeal from your decision, of the 15th ultimo, against permitting said heirs to make an entry, under the act of the 29th of May, 1830, and 14th of July, 1832, I have concluded, that it will be proper, and in accordance with precedents, to permit them to do so: and you will, therefore, instruct the Register and Receiver accordingly. Said entry will remain subject to the same power of revision and control by the General Land Office, and this department, as may be lawfully exercised over any ordinary entry. The Government will still hold the ultimate power of protecting its own right, while the claimants will be merely placed in a position, to contest the adverse claims of others, to the same land.

I am, sir, very respectfully,
Your obedient servant,
ALEX. H. H. STEWART, *Secretary*.

To the Commissioner of the General Land Office.

LAND OFFICE, WASHINGTON, ARKANSAS,
*December 19th*, 1851.

No. 6645.

We, Maria Gaines, wife of William H. Gaines, late Maria Belding, Albert Belding, Henry Belding, and George Belding, heirs and legal representatives of Ludovicus Belding, deceased, of Hot Spring county, Arkansas, do hereby apply to purchase the South-west quarter of section thirty-three (33), in township two (2) South, of range nineteen (19) West, containing one hundred and sixty (160) acres, for which we have agreed, with the Register, acting under instructions from the Commissioner of the Gene-

ral Land Office, bearing date the 25th of November, 1851, to give at the rates of one dollar and twenty-five cents per acre.

A. BELDING,
MARIA GAINES.
HENRY BELDING.
GEORGE BELDING.

I, William H. Etter, Register of the Land Office, at Washington, Arkansas, do hereby certify, that the tract above mentioned, is sold, as containing one hundred and sixty acres, as mentioned above, and the price agreed upon, is one dollar and twenty-five cents per acre.

WM. H. ETTER, *Register.*

NOTE—In accordance with instructions, I note the interference of this entry, with the New Madrid location of Langloise; of its embracing land, directed to be reserved by act of 20th of April, 1832, and that the entry is permitted to be made, under the decision of the Secretary of the Interior, of the 21st of November, 1851, transmitted to this office, by the Commissioner of the General Land Office, under date of the 25th of November, 1851.

WM. H. ETTER, *Register.*

REGISTER'S OFFICE, WASHINGTON, ARK., *January 19th*, 1853.

I, William H. Etter, Register of the Land Office, at Washington, Arkansas, do hereby certify, that the foregoing pages contain a true copy of the letters received from the Commissioner of the General Land Office, the application filed, and the annotation on the tract book in this office, under said instructions.

WILLIAM H. ETTER, *Register.*

To the introduction of which, the defendant objected, and the court sustained the objection, and refused to permit the same, or any part thereof, to be read in evidence.

This was the only evidence of title, offered by the plaintiffs. They offered, however, to make proof of the locality of the land; that defendant was in possession at the commencement of the suit; and that plaintiffs were the children, and only heirs at law, of Ludovicus Belding, deceased, which the court refused to permit them to do. Exceptions were taken; and, after verdict and judgment for the defendant, the plaintiffs appealed.

The whole question at issue, turns upon the admissibility of the certificate of entry, made with the Register and Receiver of the Land Office, at Washington, Arkansas.

Our statute, (*Digest, ch.* 60, *sec.* 2,) provides, that the action of ejectment may be maintained, in all cases, where the plaintiff claims the possession of the premises, by virtue of; *first*, an entry made with the Register and Receiver of the proper Land Office, of the United States; *Second*, a pre-emption under the laws of the United States; *Third*, when an improvement has been made by him, on any of the public lands of the United States, whether the lands have been surveyed or not, and where any person, other than those to whom the right of action is given by the preceding clauses of this section, is in possession of such improvement.

*Sec.* 11. "To entitle the plaintiff to recover, it shall be sufficient for him to show, that at the time of the commencement of the action, the defendant was in possession of the premises, and that the plaintiff had title thereto, or, had the right to the possession thereof, as is declared by this act to be sufficient to maintain the action of ejectment."

The plaintiffs in this case, claim title to the premises, under the first clause of the second section, which gives a right of action to any one, who has made an entry of the land with the Register and Receiver of the proper Land Office.

To sustain the issue on their part, the plaintiffs offered a duly certified transcript of the certificates of entry, and payment of the purchase money, under the official certificate of the Register.

This evidence was, upon motion of the defendant, excluded from the jury, solely upon the ground, that under the circumstan-

ces of the case, the entry was void. If it was void, then it was evidence of nothing, and was, of course, properly rejected; if not, then under the statute it was admissible, even though erroneously made.

The objection taken by the defendant, rests upon two prominent grounds: *First*, That the entry was made before the Register and Receiver, who had decided against the validity of the claim, upon the arbitrary and unauthorized direction of the Commissioner of the General Land Office, in obedience to instructions from the Secretary of the Interior. *And Second*, That after the expiration of the pre-emption act of the 29th May, 1830, and before its provisions were extended by the act of the 14th of July, 1832, to that class of settlers on the public lands, who were entitled to pre-emptions under the act of 29th of May, 1830, but were prevented from availing themselves of the benefit of the act, because the land had not been surveyed, and the plats returned into the proper office, before the act expired by limitation. That this particular tract of land was, by the act of Congress of the 20th of April, 1832, expressly reserved from entry or sale; and that, therefore, any sale or disposition of it, attempted to be made by the land officers, was void.

The application to enter the land was made within one year next after the plats were returned into the office, and the Register and Receiver, upon due consideration of the evidence adduced before them, decided, that it was sufficient to establish the fact of cultivation in 1829, and actual residence on the land on the 29th of May, 1830; but refused to allow Belding's heirs a pre-emption, because it appeared to them, that Belding occupied and cultivated the land, as a tenant; and we may presume, from the letter of the Commissioner to the Register and Receiver, of 25th November, 1851, that they, at the same time that they rejected the claim of Belding's heirs, decided in favor of that of John Percifull, another pre-emption claimant to the land, and submitted their decision to the Commissioner of the General Land Office, who referred the matter to the Secretary of the Interior, for his

action touching the reservation of the land, by the act of Congress of the 20th April, 1832. Without deciding that question, the papers were sent back to the Commissioner for his decision upon the respective merits of the pre-emption claims, irrespective of the question of the reservation of the land from sale. The Commissioner decided adversely to the claim of Percifull, and in favor of that of Belding's heirs, concurring in opinion, with the Land Officers, at Washington, Arkansas, as to the sufficiency of the proof of cultivation and residence, and holding that the question of tenancy did not affect their right to a pre-emption. This decision was certified to the Secretary of the Interior, who decided that, notwithstanding the sufficiency of the proof, to entitle Belding's heirs to a pre-emption, none of the claims to this land were valid, because it was exempt from sale, by virtue of the act of Congress of the 20th of April, 1832.

Subsequently, upon the application of the attorney for Belding's heirs, the Secretary of the Interior directed the Commissioner to permit Belding's heirs to enter the land, under their pre-emption, they desiring to do so, in order to place themselves in a position to assert their right to the land, in the courts. This, the Commissioner directed to be done, and that it should be noted upon the books of the office; and, also, upon the certificates of entry, that such entry interfered with the New Madrid location of Francis Langloise, and embraced lands, directed to be reserved from sale, under the act of the 20th April. And the land was accordingly entered, on the 19th of December, 1852, at which time, certificates in the usual form issued, with notes of such interference.

Under this state of case, we have no doubt but that there was a sufficient adjudication of the claim of Belding's heirs, to authorize the instructions given by the Commissioner of the General Land Office, to the officers at Washington, Arkansas. The claim had been favorably adjudicated by the Land Officers in the first instance, so far as cultivation and subsequent actual residence were necessary to entitle them to a pre-emption; and, the only point

of difficulty, with them, was, that Belding was, at the time, a tenant. This was held to be no valid objection to the claim, by the Commissioner, who, at the same time, decided adversely to the claim of Percifull. Suppose, then, that the act of the 20th of April, had not raised other grounds of objection, it is very evident that the Commissioner would, at once, have instructed the Register and Receiver to allow the claim, and that, without further proof, they would have done so, unless the claim of Langloise had prevented, (which, however, seems not to have been considered in connexion with those of the pre-emption claimants). Such orders and directions are not to be considered as being unauthorized. On the contrary, when the act directed to be done, is such as the officer, so directed, may be required, by virtue of his office, under the law, to perform, it is but an ordinary and proper exercise of power, for the officers at the head of the Department to advise and direct its subordinate officers, in respect to the performance of their official duties. The direction may be unwise, but when obeyed, the act done, is not, for that reason, the less obligatory. In this case, it is true, that there is but little apparent necessity for placing one of the claimants in a position to contest at law, with the others, the merits of their respective claims, if all that could result from it would be to determine the merits of the claims; because, that had already been settled, and the only point of difficulty was, as to the effect of the act of 20th April, upon the claims; not upon one, but upon all the claims.

It is, therefore, but fair to presume, that when the Secretary granted the request of Belding's heirs, to permit them to enter the land, so that they might be placed in a situation to contest with other claimants, their right to it, he supposed that in doing so, the proper construction to be given to the act of the 20th of April, would be involved in the controversy, and settled by the courts. And that when this was done, with the aid of the decision of the court upon the law, and a fuller investigation of the merits of the respective claims to the land, the department would proceed to affirm the entry of Belding's heirs, grant the

right of entry to some more meritorious claimant, or adhere to its previously expressed opinion and reject them all.

For this purpose, it was necessary that the entry should be complete and perfect, to communicate title to the heirs of Belding. And this is evident, from the letter of the Secretary, in the concluding part of which he said: "Said entry will remain subject to the same power of revision and control by the General Land Office, and this Department, as may be lawfully exercised over any ordinary entry." Thus expressly putting this upon the same footing of an ordinary entry, announcing, in advance, the right to withhold a patent, which could as well have been done without, as with such announcement. And the note directed to be made of the interfering claims, and also of the law, shows that it was intended only to identify this, as the contested claim, and the ground upon which the contest rested. But in no respect could it change the legal effect of the entry when made. We must, therefore hold that the first ground of objection to the validity of the entry, is not well taken.

The second and main ground of objection to the validity of the entry, is, that the particular tract of land entered, was, by a special act of Congress, reserved from sale or entry; and was, therefore, withdrawn from the jurisdiction or power of disposal, of the Land Officers, as completely as if the land had been beyond the limits of the district, for which they are commissioned to act, or as if, by a sale of the land, it had become private property.

Conceding to Congress the most unqualified power to dispose of the public unappropriated lands, or to reserve them from sale, and admitting it to be true, as contended for by the defendant, that when such is the case, a sale of the land would be void, which would seem to be questionable, unless in a case where the United States was a party, which is, perhaps, the greatest extent to which the decision in *Wilcox vs. Jackson*, 13 *Peters* 498, would go, still, when the claim, which is asserted to the lands, goes behind the act reserving it from sale, it becomes a question of fact to determine, whether the land, at the time of the reservation,

was or not incumbered with these existing rights, which the Land Officers must necessarily consider and determine, in allowing or refusing to recognize the validity of those rights, and being a matter within their legitimate power and jurisdiction, whether determined correctly or not, their decision is not void.

The decision in *Wilcox vs. Jackson*, was made upon a very different state of case from that before us. There, the land in dispute was reserved as a military post, as early as 1824, and was, at the time of the suit, in the actual possession of the United States, by one of its officers. The claim of the plaintiff was under the pre-emption act of 1834, ten years after the land had been reserved, and where there were no facts to be considered, tending to show a previous appropriation of the land.

The case of *Lytle et al. vs. The State et al.*, *9th Howard U. S. Rep.* 314, is decidedly in point, and the opinion is entitled to high consideration, from the fact, that the claim set up, by the complainant, originated under the same law that the plaintiff's in this case did; and, also, under circumstances, in many respects, strikingly similar. In that case, Cloyes' heirs claimed title to a fractional quarter section of land, adjoining the city of Little Rock, by virtue of a pre-emption, under the act of Congress of the 29th May, 1830. They made proof of their pre-emption, before the land officers, at the Lawrence Land District, which was by the Register and Receiver, deemed sufficient; and, thereupon, the claimant offered to pay for that, and some adjoining fractions, amounting in all, to less than 160 acres, but the land officers refused to receive the money. The plats, at that time, had not been returned to the office. By letter of instructions, dated 7th of February, 1831, proof was allowed to be taken of the cultivation and residence of the claimant, in case the plats had not been returned into the office: but no payments were allowed to be made until the plats were so returned, or until further instructed. The plats were not returned into the office until the first of December, 1833.

On the 15th of June, 1832, Congress passed an act, granting to

the Territory of Arkansas, one thousand acres of land, contiguous to, and adjoining the town of Little Rock, to be selected by the Governor. On the 30th of January, 1833, the Governor located this land, as part of the donation, granted the 15th of June, 1832. On the 5th March, 1834, Cloyes," the pre-emptor, having died, his heirs were permitted to enter the land, by virtue of their pre-emption, under the act of 29th May, 1830, and the Receiver was instructed to note the fact that the entry interfered with the location made by the Governor, under the grant of the 15th of June, 1832.

It will be perceived, that, in this case, as in that of Belding's heirs, the act, which donated the land to the Territory, was passed after the act of 29th May had expired, and before the passage of the act of the 14th July, extending the time for making proof and entry of lands, to such claimants as were entitled to the benefits of the act of 29th of May, but had been prevented from making the proof and entry of the same, because the survey had not been made, and the plats returned in time for them to do so, before the act expired by limitation.

This, then, was not merely a reservation of lands from sale, but an actual donation of them to the Territory of Arkansas, and at a time when the act of 29th of May, had expired. Judge McLEAN, who delivered the opinion of the court, in reference to this particular question, said: "Did the location of Gov. Pope, under the act of Congress, affect the claim of Cloyes? Before the grant was made by Congress, of this tract, the right of Cloyes to a pre-emption had not only accrued under the provision of the act 1830, but he had proven his right to the satisfaction of the Register and Receiver of the Land Office. He had, in fact, done everything he could to protect his rights: no fault or negligence can be charged to him."

It is true, that in the case of Cloyes' heirs, proof of the pre-emption was made before the act of 29th May expired, and the money was tendered. They were enabled to make the proof, and identify their claim, because the survey had been made, although the

plats had not been returned into the office, but by express instructions, the officers were forbid to receive the purchase money. So that, in fact, to make the proof, was all that they did, of merit, more than was done by Belding's heirs, and they, or Belding, under whom they claim, could not properly identify the claim, because the surveys were then not made. Each of these claimants may, therefore, be said to have done nothing to forfeit their right to a pre-emption, at the time the act of 29th May expired, and both of them would have been cut-off from all the benefit of the act, but for the passage of the act of the 14th of July, 1832: which the Supreme Court, in the case of *Lytle vs. The State*, says: "Is a supplement to the act of 29th of May, and extended the benefit of that act to Cloyes' heirs." The court, in that case, evidently rests the equitable rights of Cloyes' heirs, upon the ground, that the act of the 29th of May conferred upon them rights, which they had not forfeited by neglect on their part. When commenting upon the nature of this right, the court says: "The claim of pre-emptor is not that shadowy right, which by some it is considered to be. Until sanctioned by law, it has no existence as a substantive right, but when covered by law, it becomes a legal right, subject to be defeated only by the failure to perform the condition annexed to it."

Under this view of the nature of the claim, it became the duty of the Government of the United States, who conferred the right of pre-emption upon a meritorious class of citizens, pioneers in the unsettled Territory of the United States, to afford them an opportunity for making the necessary proof and paying for their lands; and, in compliance with this obligation, the act of the 14th July was passed, to give them an opportunity to avail themselves of the benefits of the act. The court says upon this subject, "that it is a vested right, which Congress is not to be presumed to have intended to impair."

It is, however, unnecessary to discuss, at greater length, the effect of the act of the 14th July, upon that of May 29th, or of the act of 20th of April, upon the rights of Belding's heirs, under these

acts: Because, the question, which we are here to decide, is not whether Belding's heirs were in fact entitled to a pre-emption, but whether under the state of case presented before the Register and Receiver, their action was, or not, extra-judicial and void. And in order to determine this, we have been led to enquire, whether the facts presented a question of doubt, as to existing rights, in the heirs of Belding, at the time the land was reserved from sale. That the facts of the case show it to be such, we are satisfied; and, consequently, however erroneous their decision may be, under the instructions of the Commissioner of the General Land Office, their acts in obedience to it, are not void, nor can they be questioned, when brought up collaterally for consideration; unless, possibly, it may be done, in a proceeding between the United States and the claimant. *Wilcox vs. Jackson; Hunter vs. Hemphill*, 6 *Mo. R.* 118; *Sarpy vs. Papin*, 7 *Mo.* 506.

The certificates of entry, offered in evidence, were admitted to be genuine, and properly authenticated by the Register. We have held, that they were not void. Whether granted upon sufficient evidence, or what the effect of the act of 20th April is upon the merits of the claim, we are not now to determine. Under our statute the certificates of entry were legal, competent evidence of title in the plaintiffs, for the purpose of maintaining the action of ejectment. Nor was the certificate of entry subject to be impeached by the introduction of evidence, tending to show that no pre-emption should have been allowed to them, or that there were other and better equitable titles to the land. These facts may well be shown in a suit in equity, upon a proper averment of facts, but nothing less than a superior legal title will avail, in a defence at law. This point is discussed in *Bagnell vs. Broderick*, 13 *Peters R.* 450, where an attempt was made to show a superior equity to the legal title held under a patent. The court said: "We are bound to presume, for the purposes of this action, that all previous steps had been taken by John Robinson, jr., to entitle him to the patent; and that he had the superior right to obtain it, notwithstanding the claim set up by Byrne, and having obtained

the patent, Robinson had the best title, known to a court of law. If Byrne's devisees can show him to have been the true owner of the 750 arpens of land, relinquished because injured by earthquakes, and that the patent issued to John Robinson, jr., by mistake, then the equity side of the Circuit Court is the proper forum, and a bill the proper remedy to investigate the equities of the parties."

This opinion sustains the conclusions, at which we have arrived in this case, which are, that although a certificate of entry is conclusive as against all persons who cannot show a better legal title, still it is competent for any one, having a superior equity, to set it up in a suit in equity, in which the validity of the claim, as well as the law, under which it is asserted, will be brought into review, and decided upon. Whether when made, it will be conclusive upon the parties, we are not now called upon to decide, and prefer to confine our decision to the questions of law, legitimately presented upon the record.

The Circuit Court erred in excluding the plaintiffs' evidence from the jury; and, for this error, the judgment must be reversed, and the cause remanded for further proceedings therein, to be had according to law, and not inconsistent with the opinion herein delivered.

Before Mr. Justices SCOTT and WALKER, and Hon. THOMAS JOHNSON, Special Judge.

Mr. Chief Justice ENGLISH not sitting in this case.

## BURKE VS. GAINES ET AL.

For the questions involved and principles decided, see the preceding case of *Gaines et al. vs. Hale.*

*Appeal from the Circuit Court of Hot Spring County.*

Hon. JOHN C. MURRAY, Circuit Judge.

PIKE & CUMMINS, for the appellant.

WATKINS & CURRAN, and TRAPNALL, for appellees.

Mr. Justice WALKER, delivered the opinion of the Court.

The plaintiffs brought ejectment to recover possession of lands, which they claimed to hold by virtue of an entry made under a right of pre-emption, granted by an act of Congress, approved 29th May, 1830. Upon the trial, the certificate of entry was offered in evidence, and permitted, by the court, to go to the jury over the objection of defendant. The other facts necessary to entitle the planitiffs to recover, were admitted by the defendant. The defendant then proposed to prove that there were adverse equitable claims, upon the same land; that the plaintiffs were not, in fact, entitled to a pre-emption, and that no adjudication was had by the Register and Receiver, who permitted the entry to be made.

For the purposes of the trial, the plaintiffs admitted the fact to be true, but objected to the evidence as irrelevant and incompetent, under the issue in this case, and the objection was sustained and the evidence excluded. Several instructions were asked by the defendant to be given to the jury; the effect of which was to impeach the validity of the entry, upon the ground

that it was void. Judgment was for the plaintiffs. The Circuit Court decided correctly, upon all of the questions of law arising upon the exceptions taken in the the case; according to the decision of this court, at the present term in the case of *Gaines et al. vs. John C. Hale*, in which the same entry was considered, and held to be valid. And that evidence, such as was offered by the defendant in this case, was inadmissible in an action of ejectment, in which the plaintiff claims title under the certificate of entry, which, under our statute, is made sufficient evidence of title, to entitle the plaintiff to recover against any one who cannot show a superior legal title.

Such defence, if available to the defendants, must be made in equity, not at law. Let the judgment be affirmed.

Before Mr. Justices SCOTT and WALKER, and Hon. THOMAS JOHNSON, Special Judge.

Mr. Chief Justice ENGLISH not sitting in this case.

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## CARMICHAEL AD. VS. SAINT.*

A duly certified transcript, from the record of a Probate Court in a sister State, of the orders granting to the plaintiff as sheriff, letters of administration, and the certificate of the judge of such court, that such letters of administration had been granted to him, and that he was duly qualified and authorized to administer said estate, are sufficient *prima facie* evidence of his representative character, without proof that he had taken an oath of office, or given an administration bond.

*This cause was argued and submitted at the July Term, A. D. 1854.

*Writ of Error to the Circuit Court of Phillips County.*

Hon. CHARLES W. ADAMS, Circuit Judge.

ENGLISH, for the plaintiff. The statute requiring no formal pleading in the Probate Court, the objection to the prayer of the petition, will be treated as having the legal effect of a plea of *ne unques administrator*. Under such issue, the plaintiff's title, as administrator, may be proved by the letters of administration, or by the original book of acts, which directs the grant of the letters, with the *surrogate's fiat*. 1 *Sanders Plead. and Ev.* 504; *Elden ad. vs. Keddell*, 8 *East* 187; 2 *Stark. Ev.* 145; 2 *Phill. Ev.* 361; *Davis vs. Williams*, 13 *East* 232.

The grant of letters of administration, or testamentary, is *prima facie* evidence of a compliance with every pre-requisite, and matters in avoidance must be pleaded and proven by the party impeaching them. *Diamond vs. Shell et al.*, 15 *Ark.*; *Newton Ex. vs. Cocke Ex.*, 5 *Eng.* 169; 1 *Greenl. Ev.*, *sec.* 550, *p.* 662; 10 *Pick.* 515; 1 *Binney's Rep.* 63.

Hon. THOMAS JOHNSON, Special Judge, delivered the opinion of the Court.

It appears, from the transcript sent into this court, that the defendant in the court below, waived all other objections to the proceeding, except the single one questioning the sufficiency of the authority of the plaintiff to maintain the suit. The evidence offered by the plaintiff, to establish his right to sue in this case, consists of a certified transcript from the record of the Probate Court of Madison county, in the State of Alabama, which exhibits orders of that court, granting letters of administration to him, as sheriff of said county, upon the estate mentioned in his petition; and, also, certificates of a judge of that court, that letters of administration had been granted to the plaintiff, sheriff of said county, and that he was duly qualified as such, and authorized

to administer said estate. These orders and certificates are then certified by another judge of the same court, who, it seems, was *ex-officio* clerk of the court, to be a true and perfect transcript of the record of the letters of administration granted to the plaintiff. The question now to be decided, and the only one raised by the record, is, whether the showing, made by the plaintiff, was sufficient to enable him to prosecute this suit. The 4th article of the constitution of the United States, sec. 1st, declares, that "Full faith and credit shall be given, in each State, to the public acts, records, and judicial proceedings of every other State, and that the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect thereof."

Congress, under the authority of this provision of the constitution, by an act of the 26th of May, 1790, enacted as follows, to wit: "The records and judicial proceedings of the courts of any State shall be proved, or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are, or shall be taken."

The transcript offered, in this case, to show the representative character of the plaintiff, and his right to prosecute this suit, is authenticated in strict accordance with the act of Congress, upon the subject; and is, consequently, entitled to the same faith and credit in this court, as it would have in the courts of Alabama. This being the case, it is clearly *prima facie* evidence of the plaintiff's right to sue; and, as such, fully sufficient, unless successfully attacked and avoided by legitimate matter of defence introduced by the defendant.

The court below refused to grant the prayer of the petition

filed by the plaintiff, upon two grounds: *First*, that no oath of office had been shown; and, *secondly*, that no administration bond was made to appear. This court at the January Term, 1854, in the case of *Diamond vs. Shell et al.*, held the following language, to wit: "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 pre-supposes 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 exr. vs. Cocke exr.* (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 pre-requisites 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. Upon the same general principle it may be presumed, until the contrary be shown, that the laws of Alabama, under which these proceedings were had, have been complied with. True it is, that the paper offered as evidence of the plaintiff's representative character, does not correspond in form with that prescribed by our statute, but it having been certified by the proper officer to

be a true and perfect transcript of the record of the letters of administration, we are to presume that it is in accordance with the law of that State. We entertain no doubt of the sufficiency of the proof to establish the plaintiff's right to sue, and that consequently the court below erred in ruling otherwise.

The judgment of the Circuit Court of Phillips county, herein rendered, is consequently reversed, and the cause remanded, to be proceeded in, according to law, and not inconsistent with this opinion.

Before Mr. Justices SCOTT and WALKER, and Hon. THOMAS JOHNSON, Special Judge.

Mr. Chief Justice ENGLISH not sitting in this case.

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## STATE, USE OF THE STATE BANK VS. COLLINS, AD.

An affidavit, by an officer of a corporation, in the form prescribed by the statute, omitting the words: "that the sum demanded is justly due," is sufficient to authenticate a claim against the estate of a deceased person.

*Writ of Error to the Circuit Court of Pulaski County.*

Hon. WILLIAM H. FEILD, Circuit Judge.

S. H. HEMPSTEAD, for the plaintiff. The affidavit is a substantial compliance with the statute. When the debt is stated, and

the further fact that all credits are given, to say that "the amount demanded is justly due," is only stating a conclusion of law from facts already stated. *Digest*, 127.

Mr: Justice SCOTT delivered the opinion of the Court.

This was an action of debt, upon the official bond of Euclid L. Johnson, deceased, in which John Brown, and others were co-obligors, conditioned for the faithful performance of the duties of Bank Attorney. The declaration is in the usual form, setting out the bond, and conditions, and assigning ten specific breaches of the latter, in the receipt of divers sums of money on account of the Bank, and the failure to account for them to which is appended an affidavit, in the terms following, to wit:

"I, John M. Ross, Financial Receiver of the Bank of the State of Arkansas, do solemnly swear, that I have made diligent inquiry, and examination, and do verily believe that nothing has been paid to the Bank, towards the satisfaction of the sums mentioned in the foregoing declaration, and that the sum with which Euclid L. Johnson, late Bank Attorney, stands charged on the books of the bank, amounts to two thousand seven hundred and sixteen dollars and nine cents. ($2.716 9.)

JOHN M. ROSS,
*Financial Receiver.*

Sworn to, and subscribed before me, this 28th April, 1852.

J. A. HUTCHINGS, *J. P.*

At the return term of the writ, the defendant filed a motion for a judgment of non-suit, against the plaintiff, on the ground, that the affidavit was insufficient, specifying that the insufficiency consisted in the failure of the affiant to state, "That the sum demanded is justly due," and the court having allowed the motion, rendered a judgment of non-suit, from which the plaintiff below sued out a writ of error.

It is true, that the affidavit fails, to the extent of the words pointed out in the motion, to conform to the letter of the statute, in

which a form is prescribed for affidavits, when made by an officer of a corporation, that is declared, "shall be sufficient;" (*Digest, ch.* 4, *sec.* 91,) but this court said, in the case of *Beirne and Burnside vs. Imboden et al., admrs.*, 14 *Ark. R.* 244, where the whole subject is fully examined, that the form prescribed by the statute, was evidently but a general form applicable, in its precise terms, to debts at maturity, upon which there may be credits endorsed; and is, of course, to be often varied in its terms, so that the substance is preserved, to correspond with cases where the debt may not have matured; may have no credits; where the claim may sound in damages; (*Dig., p.* 125, *sec.* 80,) be uncertain in amount, for want of the settlement of complicated accounts, sought by proceedings in court to be settled; in which latter cases, the party could only swear to the best of his knowledge and belief, to some specified amount of damages, or balance due him." And we cannot doubt but that that view was correctly taken, and in the spirit of this construction of the statute, which as to the form of the affidavits required, was but directory—we think the affidavit in question was sufficient.

Let the judgment be reversed, and the cause remanded to be proceeded with.

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JONES ET AL. VS. GATLIN.

A party excepting to the finding of the court or jury, without a motion for new trial, must specify the error of law as to any ruling or decision of the court below. *State Bank vs. Conway*, 13 *Ark.* 344.

*Appeal from the Circuit Court of Ouachita County.*

Hon. SHELTON WATSON, Circuit Judge.

STITH, for appellants.

CURRAN & GALLAGHER, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

This cause having originated in a proceeding before a justice of the peace, for a recovery upon a promissory note, was taken, by appeal, to the Circuit Court of Ouachita county, where both parties having appeared, and by consent, submitted the case to the court sitting as a jury, there was a general finding for the plaintiff, and judgment rendered accordingly. Whereupon, the defendants tendered a bill of exceptions, setting out, that the plaintiff read the note in evidence and closed his case, and that then the defendant, upon the plea of no-consideration, introduced certain testimony, which is detailed; and that after hearing the same, and the argument of counsel, the court, to whom the cause had been submitted, (neither party requiring a jury) found for the plaintiff: "to which finding and judgment therein, the defendant excepted." And then, in the language of the bill of exceptions, "because none of the said matters of exception to the opinion and decision of the said court, do appear upon the record of the said trial, therefore, &c."

So explicit is this record, that there can be no doubt but that this case is entirely within the rule settled by this court after a review of the previous decisions upon the point, in the case of *The State Bank vs. Conway*, 13 *Ark. R.* 344; that where a party merely excepts to the finding of the court or jury, setting out the testimony, without any motion for a new trial, and without any exceptions, whereby he shall put his finger upon the alleged error

of law as to any ruling or decision of the court below, there is no case presented for the consideration of this court on error or appeal.

This judgment will, consequently, have to be affirmed, with costs.

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## McDONALD ET AL. VS. WILLIAMS AS AD.

The cases of *Hemphill vs. Hamilton, ad.*, 6 *Eng.* 425, and *Anderson et al. vs. Wilson*, 13 *Ark.* 409, as to the right to sue in the representative or individual capacity, approved.

*Appeal from the Circuit Court of Sebastian County.*

Hon. FELIX J. BATSON, Circuit Judge.

WALKER and GREEN, for appellants.

PIKE & CUMMINS, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

This was an action of debt, by the appellee in his representative character, on two money bonds, made by the appellants, payable to Alfred Wallace, and by him assigned by a full endorsement to the appellee, as administrator of Benjamin L. Moore, deceased. To the declaration, in due form, ending with the ordinary profert of letters of administration, the defendant below interposed a demurrer; setting up for cause, that the cause of action in question, was in the individual, and not in the representative right of the

appellee. The court overruled the demurrer, and the appellants saying nothing further, but electing to rest, judgment was rendered against them, for the debt and damages, and they appealed, entering into a recognizance to stay the execution.

The question raised by the demurrer, was settled by the court in the cases of *Hemphill vs. Hamilton adr., &c.*, 6 *Eng. R.* 425, and *Anderson et al., vs. Wilson*, 13 *Ark.* 409.

The judgment must be affirmed, and five per cent. damages will be awarded on the amount of debts, and damages adjudged in the court below.

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## STRAUGHAN ET AL. VS. THE STATE.

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| 16 | 37 |
| 58 | 163 |
| 16 | 37 |
| 62 | 304 |

Upon the failure of the County Court to make out, and deliver to the sheriff, a list of sixteen persons qualified to serve as grand jurors, and of the sheriff to select and summon the requisite number himself, as prescribed by the statute, the Circuit Court has the implied constitutional power to direct the sheriff to summon, forthwith, the requisite number of qualified persons to serve as grand jurors for the term.

In criminal cases, though several persons concerned in the same offence, may be jointly indicted and tried together, the verdict and judgment against them, should be several: that is, fix the fine or punishment to be paid or suffered by each.

And where the jury return a verdict, fixing a joint fine against all the defendants, the court should send them back with directions to assess a separate fine against each: but if the verdict be received and recorded, the judgment should be arrested and a *venire de novo* awarded.

*Appeal from the Circuit Court of Independence County.*

Hon. BEAUFORT H. NEELY, Circuit Judge.

FAIRCHILD, for the appellant, Jeffrey.

FOWLER, for appellants, Straughan and Barnett. The law requires the *County Court*, at its *first* term, after the adjournment of the Circuit Court, to make out a *list* of *sixteen qualified* persons to serve as grand jurors, and to deliver it to the sheriff, which persons the sheriff is required to summon, &c. And that if no such term of the County Court is held, it is the *duty* of *the sheriff*, within 20 days after the time when it ought to have been held, to summon *sixteen* persons *so qualified*, &c. And if the *sixteen* persons *so summoned*, do *not attend*, on the first day of the Circuit Court, then *such court* shall order the sheriff, forthwith, to summon a *sufficient* number of *qualified* persons, &c. *Ark. Dig. Stat.* (*ed. of* 1848,) *p.* 628, *secs.* 4, 2, 3.

Now this statute neither gives the *Circuit Court, at any time*, the power to order a *venire* for an entire grand jury, nor to the sheriff, at any time, *except within the* 20 *days* after the adjournment of a Probate Court, which, under the general law, must necessarily be more than three months before the commencement of the Circuit Court.

The *Circuit Court* has *no power at all*, in the premises, *but merely* to *fill vacancies*—none *primarily* to order an *entire jury*, even on the failure of others to perform their duty. It is *only after* the *County Court had done* its duty, or the sheriff *has done* his, and the jurors *fail* to come in, that the power of the Circuit Court arises—and *not* where the County Court and sheriff both *fail* to do their duty altogether. And, this is no technical objection: because, the law requires the grand jury to be summoned so long before they are called upon to act—that persons interested in the empannelling of the grand jury, or liable to be indicted by it, may find out whether each person summoned is *qualified* or not, so that if need be, he may *challenge* for *cause*, or for *favor*, individually, or to the *array*. See 13 *Ark. Rep.* 743, 744, *Stewart vs. The State;* 1 *Chitty's Crim. Law*, 307, 308, 326.

The *verdict* and *sentence*, in this case, is a most extraordinary transposition of a rule, deemed almost universal in the common law, and among civilized nations, that *each* individual shall answer for his *own crime only*, and never be held responsible for the criminal act of *others*—and this, even whether their acts violating the law be separate or in concert. Here a *joint* penalty is inflicted. Instead of finding that *each* defendant should pay a fine of $100, or of $300, or of any other given sum, the *joint fine* of $300 is imposed on all three, either one of whom may be made to pay it. On such an irregular *verdict*, a new trial ought to have been granted. 6 *Johns. Rep.* 69, *Root vs. Sherwood;* 1 *How.* (*Mis.*) *R.* 24, *Beall vs. Campbell; Ib.* 31, *Wolfe & George vs. Martin;* 9 *Ark. Rep.* 67, *Hammond vs. Freeman;* 1 *Hill*, (*N. S.*) *Rep.* 344, *Germond vs. The People;* 2 *How.* (*Miss.*) *Rep.* 771, *Dixon vs. Richards;* 5 *Yerg. Rep.* 308, *McDonald vs. McDonald.*

CLENDENIN, Attorney General, contra.

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

The grounds of this appeal will appear, from the following statement of facts:

At the September term, 1852, of the Independence Circuit Court, the following order was made:

"It appearing to this court, that the County Court, in and for the said county of Independence, failed to order the sheriff to summon a grand jury, to serve for the present term of this court. On motion of the State, by her attorney, it is ordered by the court, that a venire issue, commanding the sheriff to proceed to summon a panel of grand jurors, to serve for the present term of this court, returnable forthwith." (Sept. 6th.)

RECORD ENTRY, Sept. 7th.

"This morning appeared in court, Ambrose Alexander, sheriff, &c., and returned into court, a panel of grand jurors, to enquire

in, and for the county of Independence, during the present term of this court; who being called, the following came, to wit: Joab H. Peel, (who was by the court appointed foreman,) Joseph H. Egner, Charles M. Waugh, George W. Adrian, George W. Davis, James M. Jones, Thomes Elms, James P. Carter, Francis I. Capps, James H. Collum, John W. Engles, Robert Morris, and Henry Bales, making sixteen good and lawful men, of the county of Independence, who being empannelled, sworn, and charged, to enquire in, and for the body of said county, retired to consider of their duty.

It appears, that, during the term, the grand jury returned an indictment, against Carney C. Straughan, James M. Barnett, and Jesse Jeffrey, for false imprisonment of one Lewis Merritt. At a subsequent term, the defendants entered a joint plea of not guilty —were jointly tried by a jury, and joint verdict and judgment rendered against them for $300 fine.

Motions for new trial, and in arrest of judgment, were made and overruled.

The defendants took a bill of exceptions; from which it appears, that, on the trial, the State proved the imprisonment, as charged in the indictment, by H. N. Merritt and Lewis Merritt, and proved, by one Ireland, that the place of imprisonment spoken of by the other witnesses, was in Independence county.

The defendants then proved, by several witnesses, who were acquainted with the general character of H. N. Merritt, that his character was bad generally, and bad for truth and veracity, and that they could not believe him on oath. Some witnesses stated that the character of Lewis Merritt was not good for truth and veracity; and others stated that they had not heard much against him, and could not say but that they would believe him on oath.

The State, then, offered to prove, by one Gray, what the defendants had said to him, about having imprisoned or taken Lewis Merritt, to which the defendants objected, on the ground, that the State could only introduce rebutting testimony as to the character of the impeached witnesses, but the court overruled the ob-

jection. Gray then stated, that Barnett and Jeffrey, or one of them, had told him that they had been down to H. N. Merritts, and taken two of the boys, but that one of them had escaped, one of the boys taken being Lewis Merritt.

The bill of exceptions does not set out, in detail, the testimony of each witness, but states, in general terms, what was proven by the witnesses as above.

The defendants asked the court to charge the jury, "that if they should find, from the testimony, that H. N. Merritt and Lewis Merritt were not worthy of belief on oath, they should entirely disregard their testimony, and that if they found, from the testimony, that H. N. Merritt and Lewis Merrit had sworn falsely and corruptly in one point, they should disregard their whole testimony."

The court refused so to instruct the jury, but charged them, "that the whole testimony and facts were before them, and that they should give to each, and all testimony, such credit as they thought it deserved."

The defendants excepted to the admission of Gray's testimony; and the refusal of the court to charge the jury, as moved by them.

The record states, that the defendants moved for a new trial and that it was overruled, but the motion does not appear, in the record before us, nor the grounds of it; nor does it appear, that defendants excepted to the decision of the court, overruling the motion.

1. It is urged, for the appellants, that the indictment was invalid, because the grand jury, who preferred it, were illegally summoned; that the court had no power to order the sheriff to bring in a panel for the term, because the County Court had failed to furnish the sheriff with a list, or he had failed to summon them. That where grand jurors are summoned for the term, as directed by the statute, and fail to attend, the court can order *vacancies* in the panel supplied, but where none are summoned, the court cannot order an original panel.

It seems to be well settled, in most of the States, that an objection

to the qualifications of grand jurors, or to the *mode of summoning*, or *empanneling* them, must be taken by plea in abatement, and that after plea in bar, and conviction, it is too late to raise such objections. *Whart. Amer. Cr. Law* 172, 3; *People vs. Griffin*, 2 *Barbour's Sup. Ct. Rep.* 427; *The State vs. Herndon*, 5 *Blackf.* 75; *Vather vs. The State*, 4 *ib.* 73; *The State vs. Freeman*, 6 *ib.* 248; *The State vs. Williams*, 3 *Stewart R.* 461; *Collier vs. State*, 2 *ib*, 388; *The State vs. Pile*, 5 *Ala. R.* 73. This court has made several decisions to the same effect. *Fenalty vs. The State*, 7 *Eng. R.* 630; *Beverly Brown vs. The State*, *ib.* 623; *The State vs. Wm. Brown, jr.*, 5 *Eng. R.* 78; *Brown vs. State*, *ib.* 607.

In *Stewart vs. The State*, 13 *Ark. R.* 744, Mr. Chief Justice WATKINS said, "It would seem that the objections to a grand juror, or to the array, which must be pleaded in abatement, and are waived by pleading to the indictment, are such as do not appear upon the record of the court, and have to be brought to its notice by plea."

Without determining whether this distinction is well taken or not, as the objection to the mode in which the grand jurors were summoned in this case, appears upon the face of the record, we will consider its validity.

It is made the duty of the County Court, at its first term after the adjournment of the Circuit Court, to make out, and deliver to the sheriff, a list of sixteen persons, qualified to serve as grand jurors, and the sheriff is required, within twenty days thereafter, to summon them to appear, at the next term of the Circuit Court of the county. *Dig.*, *ch.* 94, *sec.* 2. If the term of the County Court, at which grand jurors should be selected, is not holden, the sheriff is required, within twenty days thereafter, to select and summon the requisite number himself. *Ib. sec.* 3.

"If the sixteen persons, summoned to serve as grand jurors, shall not attend on the first day of the Circuit Court, such court shall order the sheriff, forthwith, to summon a sufficient number of persons qualified to serve as grand jurors, to supply the deficiency." *Ib. sec.* 4.

It may be inferred, from the record in this case, that there was not a failure to hold the term of the County Court, at which the grand jurors should have been selected, but a neglect of the court to make out the list, and deliver it to the sheriff, who adhering to the letter of the law, perhaps deemed himself unauthorized to select and summon them in such case.

If the Circuit Court looked alone to the statute, for its power to supply the omission, and were compelled to stick to its letter, it might not have been warranted in ordering the sheriff, as it did, to summon a grand jury. But the Constitution confers, upon the Circuit Courts, original jurisdiction of criminal cases, and the bill of rights, (*sec.* 14) declares, that no man shall be put to answer any criminal charge, but by presentment, indictment, or impeachment. A presentment, or indictment, must be made, or preferred by a grand jury. *Eason vs. The State* 6 *Eng. R.* 482. The Legislature have prescribed the number, qualifications, and mode of selecting and summoning grand jurors. If any, or all of the jurors summoned, fail to attend, the court is expressly authorized, by the letter of the statute, to "supply the deficiency;" and, we think, it may safely be said, that if by failure, or neglect of the County Court, or sheriff, no jurors are summoned, the Circuit Court would have the implied constitutional power to direct the sheriff, as was done in this case, to summon forthwith, the requisite number of qualified persons to serve as grand jurors for the term. And the exercise of this power would, also, well comport with the spirit and intention of the legislation on the subject. *Dig., ch.* 94. If this power were denied to the court, the administration of the criminal law might not unfrequently be greatly delayed, by the casual or wilful failure of sheriffs, &c., to discharge their duties. In support of this position, see *Whart. Cr. Law* 168; *United States vs. Hill et al.*, 1 *Brock* 156; *Shaffer vs. The State*, 1 *How. Miss. R.* 238; *Woodsides vs. The State*, 2 *ib.* 655; 1 *Meig's Digest*, 382.

2. In the caption sent up with the indictment in this case, the names of but *thirteen* grand jurors, appear. If there were in

fact, but thirteen persons, impannelled as a grand jury, the law requiring *sixteen*, no indictment found by them, would be valid.

In the case of *Lavillian vs. Lane & Co.*, 3 *Eng. Rep.* 374, this court, by JOHNSON, C. J., said: "The record states, that twelve good and lawful men returned the verdict; but upon inspection, it appears, that there were but *eleven* names recorded. The record is contradictory in this respect, and whenever that is the case, the presumption is, that that portion of it is true, and sustained by the facts of the case, which is in accordance with, and answers the requirements of the law, unless the contrary shall be clearly made to appear, by exceptions taken at the time, or in some mode by which the matter may be brought before this court."

In the case now before us, the *caption* states, that there were *sixteen good and lawful men*, &c., though but thirteen names are transcribed. The only difference between this case and the one above quoted, is, that this is a criminal case, and the objection relates to the grand jury, and that was a civil action, and the objection relates to the traverse jury. Whether the same reasoning applies to both cases, need not now be decided.

There is a reasonable presumption in this case, that the clerk made an omission in transcribing the names of the grand jurors, in preparing the transcript for this court, and if this were the only error, appearing upon the record, a special *certiorari*, would be sent down, in accordance with the practice of this court, to bring up a perfect transcript of the *caption*. *Beverly Brown vs. The State*, 7 *Eng. R.* 623; *Stewart vs. The State*, 13 *Ark R.* 744; *Cornelius vs. State*, 7 *Eng. R.* 797.

3. In criminal cases, though several persons, concerned in the same offence, may be jointly indicted and tried together, unless they or the State elect to sever, (*Digest*, *ch.* 52, *sec.* 96,177, 210,) yet each one is answerable for his own criminal conduct, and not for his associates, and the verdict and judgment against them should be several: that is, should fix the fine or punishment, to be paid, or suffered, by each—but the judgment for costs may

be joint. *Calico & Drake vs. The State*, 4 *Ark.* 430; *Whart. Cr. Law* 156, 694; *March vs. The People*, 7 *Barbour Sup. Ct. Rep.* 393; *State vs. Gray*, 10 *Missouri Rep.* 440.

In this case, when the jury brought in their verdict, fixing a joint fine against the defendants, the court should have sent them back, with directions to assess a separate fine against each; but the verdict having been received and recorded, the judgment should have been arrested, and a *venire de novo* awarded. 1 *Chitty Cr. Law* 547, 8; *State vs. Arrington*, 2 *Murph. R.* 571.

4. The exceptions to the admission of the testimony of the witness Gray, and the refusal of the court to charge the jury, as moved by the defendants, were both waived by the motion for a new trial, it not appearing, in the record before us, that these exceptions were made grounds of the motion for a new trial, and reserved by bill of exceptions to the decision of the court overruling the motion. It is, therefore, not necessary to consider them.

For the error of the court, in refusing to arrest the judgment on the objection, that the verdict and judgment were for a joint fine, and not for several fines, the case must be reversed, and the cause remanded, for further proceedings according to law, and not inconsistent with this opinion.

Mr. Justice SCOTT not sitting.

## IGLEHART VS. MOORE.

Nothing less than actual notice, or a waiver of it, would give such validity to a judgment against a non-resident, as to make it obligatory upon him: and so a judgment rendered in Tennessee, on motion without notice, against the principal in an injunction bond, then a citizen of Arkansas, in favor of a security, who had paid the debt after the dissolution of the injunction, is not of such validity as to constitute the foundation of an action in this State; although, at the time of the execution of the bond, the parties all resided in Tennessee, and the laws of that State provide for such a judgment against the principal in such case.

*Appeal from the Circuit Court of Independence County.*

Hon. BEAUFORT H. NEELY, Circuit Judge.

FOWLER, for the appellant. The law of the land in force, where a contract is made, enters into every contract, and becomes a component part thereof: and more especially a particular statute, providing for a particular class of contracts to be made a part of a record and of a judicial proceeding, enters into such contract.

Such a contract is not only a *virtual*, but an express waiver of notice; and, also, a full power and authority for rendering up the judgment—as much so as a power of attorney to confess a judgment. It is an *agreement* on the *record*, in the proceeding in which that bond is filed, that upon a certain contingency, the court, on motion, shall render a particular judgment against the obligors: and is as binding on the party as the confession of a judgment on the record.

And *Moore* cannot legally extricate himself from the conclusive effects of the judgment, on the ground that he resided in Arkansas, *at the time it was rendered only*—when it is clearly shown,

that he had submitted himself to the jurisdiction of the court of *Tennessee, when he resided in that State.*

If the judgment here sued on was *conclusive* in Tennessee, it is equally so in Arkansas: and no defence can be set up to it here, unless such defence would have been sustainable, also, in Tennessee. See *Barkman vs. Hopkins*, 11 *Ark. R.* 162; *Hunt vs. Mayfield*, 2 *Stew.* (*Ala.*) *R.* 129; *Hampton vs. McConnell*, 4 *Con. R.* 243; *Westerwelt vs. Lewis*, 2 *McLean R.* 513; *McElmoyle vs. Cohen*, 13 *Pet. R.* 326.

Such bonds, given under statutes of Tennessee, draw even the *sureties* into the cause, in which the bond is given, and make them so far *parties* to it, as to give the court *jurisdiction* to render *judgment* against them. See *Black vs. Caruthers*, 6 *Hump. R.* 91; *Hubbard vs. Cole*, 9 *Yery. R.* 503.

In such cases, the act of Assembly, under which the bond is given, gives the *sureties* sufficient *notice* of the motion for judgment. And no notice, *in fact*, of such motion is necessary. *Kinchin's exr. vs. Brickell*, 2 *Hayw. Rep.* 50; *Turner vs. Greer*, 4 *Hayw. R.* 239; *Newman vs. Campbell, Mart. & Yerg. Rep.* 65.

By entering into the *bond* under the *statute*, the *surety submits* to the summary judgment. See *Love vs. McCool*, 1 *Tenn. R.* 337; *Reardon Ex parte*, 9 *Ark. Rep.*

CURRAN & GALLAGHER, for the appellee. The only question presented in this case, is, whether a *non-resident* of a State can be concluded by the adjudications of that State, founded upon *constructive notice.*

That such a judgment rendered in Tennessee would not be conclusive in this State, and that the facts stated in the replication to the third plea are no avoidance, it is sufficient to refer to *Barkman vs. Hopkins et al.*, 6 *Eng. R.* 157; *DeArcy vs. Kitchum et al.*, 11 *How.* (*S. C.*) *Rep.* 165, and the cases there cited by the courts and counsel.

FAIRCHILD, also, for appellee. A judgment in Tennessee will have the same effect here as there, only after it is established that the Tennessee court had proper jurisdiction by notice or waiver of notice, to give judgment. See, in addition to the two cases cited by other counsel, *Borden vs. Fitch*, 15 *J. R.* 125; *Shumway vs. Stillman*, 4 *Cow.* 295; *Rogers vs. Coleman, Hardin* 416; 5 *Wend.* 162; 13 *ib.* 415.

Special forms of statutory notice have no extra-territorial force. *Cow. & Hill's Notes* 912; *Buchanan vs. Rucker*, 9 *East* (*new ed.*) 104; *Earthman vs. Jones*, 2 *Yerg.* 484; *Kelly vs. Hooper*, 3 *Yerg.* 394.

Executing the injunction bond was not the beginning of the action in which the judgment sued on was obtained. The motion, on which judgment was rendered, was the beginning of the suit, and void here, because no notice was given.

Mr. Justice WALKER delivered the opinion of the Court.

The action was debt, upon the record of a judgment, rendered in Tennessee. The defence, relied upon, is, that the court, rendering the judgment, had not, by notice, or otherwise, acquired jurisdiction over the person of the defendant, who was, at the time the suit was instituted, and the judgment was rendered, a non-resident of the State of Tennessee.

To this plea, the plaintiff filed the following special replication:

*Precludi non*, because, he says, that he, the said Charles Moore, was, on the 7th day of April, 1840, and had been for a long time, continuously next before that day, and continued to be, for a long time continuously next thereafter, a citizen, and resident of Perry County, and State of Tennessee, and being such resident citizen, and then and there so domiciliated, he, the said defendant, and one William K. Waddy, who was also then and there a resident citizen of, and domiciliated in the said county of Perry, and State of Tennessee, exhibited, and filed, their certain bill in chancery, commonly called an injunction bill, with and before

the chancellor of the Western Division of the said State of Tennessee, in the court of chancery, then, and afterwards holden at Huntingdon, in said State, said court, then and there, having jurisdiction thereof, in which bill, they, the said Charles and William K., were the complainants, against William and Cornelius Fellows, defendants thereto, praying, in said bill, amongst other things, a writ of injunction, enjoining and restraining the said W. & C. Fellows from enforcing and collecting a certain judgment at law, rendered previous to that time, in, and by the Circuit Court of said county of Perry, in favor of the said W. & C. Fellows, against the said Charles and William K., as partners for a debt of nine hundred and ninety-eight dollars. And that the said Charles and William K., then being so domiciliated, on the 7th of April, 1840, solicited the said Michael to become their security in, and to, an injunction bond, for the purpose of obtaining said writ of injunction against the said judgment at law, and on their earnest solicitation, especially of Charles Moore, the said Michael consented to become such security for them, and thereupon, then and there, the said Charles Moore, and William K. Waddy, principals, and the said Michael, security, executed their bond of that date, whereby they bound themselves unto the said William and Cornelius Fellows, in the sum of nineteen hundred and ninety-six dollars, for the payment whereof, they thereby, then and there, bound themselves, their heirs, &c., jointly and severally. The condition of which bond and obligation, was, that whereas the above bound Charles and William K., had that day filed their bill of complaint in the clerk's office of the chancery court at Huntingdon, for the Western Division, composed of the counties of Perry, &c., against the said William and Cornelius Fellows, and had prayed for, and obtained an injunction upon the matters set forth in said bill, then should the said Moore and Waddy prosecute their suit on said bill with effect; or, in case they fail therein, should pay to the said William and Cornelius Fellows, all such costs and damages as might accrue in consequence thereof, and to stand to, perform, and abide by, such order, judgment,

and deeree, as might be made by said court, touching said injunction, then that obligation was to be void, else to remain in full force and virtue. Which said obligation and bond, on the same day of the date thereof, was filed with the said bill, in the office of the clerk of said court of chancery, at Huntingdon aforesaid, in said State of Tennessee, and thereby became a record of said chancery court, and a part of the proceedings in said suit in chancery, where the same still remains on file as such record, and, therefore, cannot be now here in court shown, and thereupon in pursuance of an order, previously made by the said chancellor, the said judgment at law was enjoined and stayed in conformity with the statute in such cases made and provided. And, afterwards, such proceedings were had in the said court of chancery, at Huntingdon, upon the said injunction bill, that, on the 2d day of August, 1842, in the said court of chancery at Huntingdon aforesaid, before the said chancellor, it was, by him, the said chancellor in the said court of chancery, ordered, adjudged, and decreed, that the said bill be dismissed, and the injunction theretofore granted dissolved; and it was, then and there, further considered, by the said court of chancery, that the said defendants, William and Cornelius, recover, of the said complainants, the said Charles and William K., and of the said Michael, their security in said injunction bond, the sum of twelve hundred and ninety-one dollars and sixty cents, the amount of the judgment enjoined, with interest up to that time; also, the costs in that behalf expended. All of which will more fully, and at large appear, by the record thereof, still remaining in said court of chancery at Huntingdon aforesaid, in the said State of Tennessee, and which decree and judgment, so then and there rendered, was in conformity with the statute and laws of the said State of Tennessee, in such cases made and provided. Whereby, and by the execution of said injunction bond, as aforesaid, the said Charles and William K., so being, then and there, resident citizens of, and domiciliated in said county of Perry, in the State of Tennessee, by force of the statute of said State of Tennessee, in such cases made and provided, as princi-

pals in the said injunction bond, and the said Michael, their security, submitted themselves, voluntarily, to the jurisdiction of said court of chancery, at Huntingdon aforesaid, and then and there, virtually consented, and agreed, by the execution of said injunction bond, according to the form of the statute of said State of Tennesse, in such cases made and provided, and then in full force, and as such entering into the contract, so made by said injunction bond, and becoming, and constituting a part thereof, that upon such dissolution of said injunction, the judgment last aforesaid, should be so rendered against them, the said Charles and William K., and Michael, for the amount of the principal, interest and costs of said judgment at law, so enjoined as aforesaid, and that the said Charles and William K., by the execution of the said injunction bond, then and there as aforesaid, thereby, then and there further consented, and agreed, that, according to the form of the statutes of the said State of Tennessee, in such cases made and provided, and then and there in full force, and as such entering into and constituting part of the contract and obligation of the said injunction bond, upon the dissolution of such injunction, so granted, and upon such judgment so being rendered against them, and the said Michael as aforesaid, upon such injunction bond, and that upon the said Michael, as their security as aforesaid, paying the amount of said judgment last aforesaid, or any part thereof, that he, the sale Michael, as such security, might obtain and recover a judgment, by motion, against them, the said Charles and William K., as such principal obligors in said injunction bond, for the full amount of whatever might be so paid by the said Michael, as such security, with interest thereon, on such judgment so rendered upon the dissolution of the injunction against them, in said court of chancery, where said last mentioned judgment was rendered as aforesaid, and thereby, then and there, voluntarily, submitted themselves to the jurisdiction of said court of chancery, for that purpose, and fully waiving any, and all other notice of such motion, and fully authorizing the said court of chancery, upon the payment of such sum of money, by the said Michael, so

adjudged against them, as their security, or any part thereof, and upon the mere motion of the said Michael, without any other notice whatever, to render up a judgment against them, the said Charles and William K., in favor of the said Michael, for the amount of money so paid, by the said Michael, with interest thereon, or for which he might be bound by said joint judgment. And he, the said Michael, says, that, after the entering up of the said judgment against the said Charles and William K., and Michael, as aforesaid, that he, the said Michael, as such security, before the rendition of the said judgment in said declaration mentioned, to wit: on the first day of September, 1842, paid to the said William and Cornelius, on said last mentioned judgment, rendered in their favor, the sum of eleven hundred and three dollars, and forty-four and a half cents, and the interest on which sum, up to the date of the rendition of the judgment in said declaration mentioned, amounted to the further sum of two hundred and thirty-four dollars and fifty cents; whereupon, he, the said Michael, by motion without writ, as in his declaration is alleged in that behalf, and for said sum of money, so paid by him, with interest, before the same court of chancery, at Huntingdon aforesaid, in said State of Tennessee, obtained, against the said Charles and William K., the identical judgment which is in his said declaration mentioned, as he had a lawful right to do, according to the form of the statute of the said State of Tennessee, in such cases made and provided, and then and there still in full force, and according to the tenor and the legal obligation of the said injunction bond, and said proceedings so had thereon as aforesaid, as will appear by the record thereof, still remaining in the said court of chancery, at Huntingdon aforesaid, as is in the said declaration alleged. Wherefore, and by which means, he, the said Michael, says, that the said Charles had legal notice of the pendency of said suit by motion, in which the said judgment, in the said declaration mentioned, was rendered against them, the said Charles, and the said William K. Waddy. And this, the said Michael, is ready to veryify, &c."

To this replication, the defendant demurred. The special causes of the demurrer, present two grounds. *First*, That the replication is argumentative. *Second*, That the matter set up is not a sufficient reply to the defence set up in the plea. The Circuit Court sustained the demurrer, and rendered final judgment thereon for the defendant.

The first ground of demurrer is of minor importance, going only to the form of the replication; and concede it to have been well taken, which we incline to believe the case, it might have been disregarded as surplusage, if the substantial averments presented a sufficient reply to the plea, which we will proceed to consider.

It is admitted, by the replication, that Moore, at the time the motion was made, and the judgment in favor of Iglehart was rendered, was a resident citizen of Arkansas; and, therefore, under the decision of this court, in the case of *Barkman vs. Hopkins*, was not affected by a judgment rendered upon constructive notice; (whatever may be the effect of a judgment so rendered as between resident citizens of the State, in which the judgment is rendered); but the replication is based upon the ground, that, notwithstanding this, Moore is bound by the judgment, because, by the tenor and legal effect of the injunction bond, which was executed by him whilst a citizen of Tennessee, he submitted himself to the jurisdiction of the court in which the suit was pending; and, thereby, expressly waived the necessity of notice, and agreed to abide the summary proceeding by statute, which dispensed with the necessity of notice.

If we concede that such was the effect of the injunction bond, and that Moore, by executing the same, did really consent that upon the dissolution of the injunction, judgment should be rendered against him, without notice, not only in favor of the obligees in the bond, but, also, in favor of the security, in the event that he should pay the penalty of the bond, or the damages by reason of its breach, then, no doubt, the replication would be sufficient; because, a party may, without notice, make himself a

party to a suit by entering his voluntary appearance, or he may, by agreement, waive his right to notice, but the very fact of waiving, pre-supposes a knowledge that the suit has been brought, or an anticipation that it may be brought; and, therefore, when such agreement is made, it is either with a knowledge of the fact, or in anticipation of it, an admission that he will, at his peril, take notice of the proceeding, and abide by the judgment rendered.

But the question is, was the agreement made? The counsel for Iglehart contends that it was, by force of the bond, in connection with the statutes of Tennessee.

The authorities which he cites, only tend to show the construction given to the statute in Tennessee, and the validity of a judgment rendered under it in that State. As between the citizens of the State of Tennessee, we will not say but that such would be the effect of a judgment so rendered. But in actions *in personam* the rule laid down in *Mills vs. Durgee*, 7 *Cranch* 481, only extends to judgments in which the court has acquired jurisdiction of the person of the defendant by actual notice, by his appearance to the action, or his waiver of the necessity of notice, or where the said defendant is a resident citizen of the State in which the judgment is rendered, at the time the suit is commenced, and has had constructive notice, and not to judgments rendered upon constructive notice against non-resident defendants. Such was the construction placed upon the decision of the Supreme Court of the Unitad States, in *Mills vs. Durgee*, by this court, in *Barkman vs. Hopkins*, 6 *Eng.;* and such, also, is the construction given to it by the Supreme Court of the United States in a late case, (*DeArcy vs. Ketchum*, 11 *How. Rep.* 175,) in which it was held that an action would not lie upon a judgment against a non-resident defendant, who had not been served with actual notice of the suit. *Fowler vs. Parks*, 3 *Mason Rep.* 280, and *Pickett vs. Swan*, 5 *Mason Rep.* 42, substantially affirm the same qualification of the rule laid down in *Mills vs. Durgee*. See, also, *Williams vs. Preston*, 3 *J. J. Marsh.* 601.

The authorities relied upon by counsel, which hold a judgment

in Tennessee valid upon constructive notice, and under the rule in *Mills vs. Durgee*, equally so in every other State, do but affirm the general rule, when the judgment is rendered upon actual notice, without affecting the rule in *Barkman vs. Hopkins*.

As regards an express agreement to waive the necessity of notice, or an implied agreement, when considering the statute of Tennessee, and the injunction bond together whilst we admit that judgment might well be rendered upon the dissolution of the injunction, upon the bond without notice, we are not prepared to go further, and concede that, by the terms of the bond, or the law under which it was executed, there was any agreement between Iglehart, the security, and Moore, the principal in the bond; that in the event that Iglehart, after the judgment upon the bond, should pay the same, or any part of it, that Iglehart should take judgment against Moore for such sum, without notice of the suit or motion for that purpose.

The right of action, in favor of Iglehart, against Moore, arose after the rendition of the judgment, and upon the payment of the money, as security for Moore. And whether he elected to proceed by an ordinary action in assumpsit, or by motion under the statute of Tennessee, no judgment could properly be rendered without proof that the money was so paid. The defendant had as much right to contest this, in the one form of action, as the other; and unless the defendant had been, at the time the suit was commenced, a resident of the State of Tennessee, he could not be reached or affected by constructive notice, because, the Legislature of Tennessee could neither, by its process, send its officers beyond the limits of the State, nor (for a like reason) send forth its constructive notice, which could not be more effective. We have no reference, of course, to proceedings *in rem*. In them, the court acts upon the thing within its jurisdiction. But in proceedings *in personam*, nothing short of actual notice will make the judgment of the court obligatory upon the non-resident defendant. Judge STORY says, in *Fowler vs. Parks:* "No Legislature can compell any person, beyond his own territory, to be-

come a party to any suit instituted within its domestic tribunals. The principle seems universal, and is consistent with the general principles of justice, that the Legislature of a State can bind no more than the person, and the property within its territorial jurisdiction." And in his *Conflict of Laws, p.* 547, the same judge says: "In respect to suits *in personam*, by a mere personal citation, *viis et modis*, such as by putting up a citation, or by edital citation, there is no pretence to say, that such mode of proceeding can confer any legitimate jurisdiction over foreigners, who are non-residents, and do not appear to answer the suit."

Moore, at the time this proceeding by motion was commenced, was domiciliated in Arkansas, and nothing less than actual notice, or a waiver of notice, would give such validity to the judgment as to make it obligatory upon him.

The statute laws of Tennessee did not enter into, and constitute a part of the contract, by which Moore and Iglehart became bound to Fellows, in the sense in which it is contended for by the counsel of Iglehart. The statute, which they insist, comes in aid of the contract, relates to the remedy, and not to the right. The legal effect of the bond was not in issue. It had performed its office, and been merged into the judgment. The suit was not upon the bond, but upon a cause of action arising after the judgment upon the bond had been rendered. At the time this right of action accrued, Moore was a non-resident of the State of Tennessee.

If Iglehart, as the security for Moore, paid the judgment rendered against him, or any part of it, he is, no doubt, entitled to recover the money so paid, by an action in *indebitatus assumpsit*, but before he proceeds to take judgment against Moore, he must give him notice of the suit, so that he may contest the facts upon which a recovery is sought to be had against him.

We think, therefore, that the demurrer to the replication was properly sustained. Let the judgment be affirmed.

Absent, Mr. Justice SCOTT.

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## HEMPSTEAD VS. THE AUDITOR.

The Swamp Land Agents, elected under the act approved 12th January, 1853, are entitled to their salary from the time fixed by law for their offices to go into operation, and their official duties to commence; which was upon their Districts being laid off by the commissioners, and the maps and plats of the lands in their respecttive Districts being furnished by the Auditor, and not from the date of their commissions.

*Appeal from the Circuit Court of Pulaski County.*

Hon. WILLIAM H. FEILD, Circuit Judge.

S. H. HEMPSTEAD, for the appellant. 1. That the appellant, having been elected Swamp Land Agent, given bond, taken the oath of office, and received a commission, was entitled to compensation from the date of his commission.

2. That the 6th section of the swamp land act does not deprive him of compensation: but merely increases his powers on reciving "books &c.," as therein provided.

3. That there is no such anomaly in our law as an officer without any right to compensation.

Mr. Attorny General CLENDENIN, for the Auditor. The relator in this case was not entitled to a mandamus. His duties as State Land Agent did not, and could not, commence until he was furnished with the books, maps, or plats of the Swamp Lands in his District. See sec. 6 of the act entitled "An act amendatory of existing laws regulating the landed interests of this State," approved January 12th, 1853.

And the existing laws of the State were not changed in regard to the office of Land Agent until he was furnished by the Auditor with the maps and plats. See section 38 of same act above referred to.

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

On the 12th of December, 1853, Bernard F. Hempstead filed a petition for mandamus against the Auditor, in the Pulaski Circuit Court, alleging in substance, that he was elected, by the General Assembly, at the sesison of 1852–53, Land Agent, for the Washington District, under the provisions of the act of the 12th January, 1853, "*amendatory of existing laws regulating the landed interest of this State.*" That, on the 14th of March, 1853, after his election, he took the official oath, and executed the bond, prescribed by the 5th section of said act; and, on the 17th of the same month, was duly commissioned by the Governor. Certified copies of the oath, bond and commission, are exhibited.

That he thus became one of the five Swamp Land Agents, elected and qualified under said act, and as such, entered upon the duties of his office, and from thence forward continued to act as such, and ever had been, and still was ready to discharge all the duties incumbent on him by virtue of said act, and claimed to be entitled to receive a salary and compensation, as such Swamp Land Agent, at the rate of eight hundred dollars per annum, payable in the manner specified in said act.

The petition continues as follows:

"Your petitioner further represents, that he procured a well bound book, wherein to enter each location or purchase of land; and in discharge of what he then, and still conceives to be his duty, sold swamp land, from time to time, as such Swamp Land Agent, and received Swamp Land Scrip or certificates therefor, and made report to the Auditor of Public Accounts, in accordance with the 16th section of said act, touching the operations of his office, for the year 1853, ending on the 30th day of June, 1853, whereby it was made manifest that 7,427.84 acres of 1st class,

2,847.63 of 2d class of swamp lands, had been sold, and entered at that office, and for which was received by your petitioner, properly assigned to the State, according to the law in that behalf provided, 14 Treasurer's Certificates, amounting to $1,851 54; 32 pieces of 1st class Swamp Land Scrip, for 160 acres each; and 17 pieces of 2d class Swamp Land Scrip for 160 acres each; and which scrip and certificates were cancelled according to law; all of which more fully appears, by a copy of the report of your petitioner, ending the 30th June, 1853, marked *Exhibit C.*, and prayed to be taken as part of this petition, the original having been returned to the petitioner, by the Auditor of Public Accounts, the said Auditor not considering the petitioner as Land Agent, until the maps and plats were furnished to your petitioner; and the Auditor also returned to him the land scrip sent with said report, and which was afterwards paid, and deposited with the Treasurer, as hereinafter shown: and which return will show the date of the purchase, by whom purchased, residence of the parties, section or part of section, township and range, the number of acres of swamp land of the 1st class and 2d class, and the locality thereof, in the Washington District, up to the 30th June, 1853, amounting, in dollars, up to the last mentioned time, to $6,651 54; and which swamp land certificates and scrip have been deposited and turned over to the State Treasurer, by your petitioner, in accordance with law; as well as scrip received the half year ending with the 31st December, 1853, without any reservation of salary, compensation, or fees; and that the petitioner has received nothing since his qualification as Swamp Land Agent, and entering upon the duties of his office, and which deposits and payments to the Treasurer will more fully appear by reference to the certificate of John H. Crease, Treasurer of Arkansas, dated 7th December, 1853, marked *Exhibit D.*, and prayed to be taken as part hereof."

"Your petitioner represents that the Auditor of Public Accounts, although requested, has refused, and still refuses, to make settlements with your petitioner, and draw his warrants on the

Treasurer, for the salary of your petitioner, quarterly or otherwise, howsoever, payable out of the lands sold, or the proceeds thereof, when in truth, and in fact, your petitioner, under the said law, is well and legally entitled to the same."

Prayer for writ of mandamus against Christopher C. Danley, as Auditor, &c., requiring him to audit the account of petitioner, as Swamp Land Agent, at Washington, for his salary, at the rate of $800 per annum, from the 17th of March to the 30th September, 1853, and to draw his warrant on the Treasurer therefor, or that he show cause, &c.

The court, on the presentation of the petition, ordered an alternative writ of mandamus to issue, to which the Auditor made the following response, in substance:

That he did refuse and still refuses, to make settlement with the petitioner as Swamp Land Agent, for the office at Washington, and to draw his warrant, as such Auditor, on the Treasurer, for the salary of petitioner as Swamp Land Agent, quarterly or otherwise, in manner as set forth in said writ, because respondent was advised that by the law of the land, the petitioner was not, on the said 30th day of September, 1853, in office as such Land Agent, and could not legally discharge any of the duties appertaining to his said office of Land Agent, and because the petitioner had not, on the said 30th day of September, 1853, been furnished with the *books, maps and plats* of the lands of the State, in the district of lands for which the said office at Washington was created, as required by law: and because Lambert J. Reardon was, on the 30th day of September, 1853, the Land Agent of this State, by virtue of law, having been elected such by the Legislature, and, as such, entitled to the salary of said office; and that if respondent were to obey the mandate of said writ, it would be a violation of the duties imposed upon him by law as such Auditor, and subject him to grievous losses and penalties; wherefore, &c.

The petitioner demurred to the response, on the following grounds.

1. That the said response places the right of the petitioner to compensation, on the fact of receiving the maps, plats, &c., whereas, by the law of the land his salary commenced from the 17th day of March, 1853, (the date of his commission.)

2. That by the law of the land, the said Lambert J. Reardon was not Land Agent of this State, after the said Swamp Land Agents were commissioned as such.

3. The respose is in other respects informal and insufficient, &c.

The Auditor joined in the demurrer: the Court adjudged the response to be sufficient, overruled the demurrer thereto, refused to order a peremptory mandamus, and the petitioner appealed to this Court.

The petitioner claimed his salary, as Swamp Land Agent for the Washington District, from the 17th of March (the date of his commission,) to the 30th September, 1853, the close of the current fiscal year of the State, down to which time he had not been furnished by the Auditor, with the maps, plats, &c., of the lands of the State embraced in his district: and the question presented for the decision of this court, is, whether the petitioner was entitled to his salary from the date of his commission, or from the time he was furnished with such maps, plats, &c.

The law under which he was elected, does not, in express terms, fix the time when the salaries of the Swamp Land Agents were to commence, and the question is one of construction, to be determined from the scope of that act, and other acts bearing upon the same subject matter.

By act of 20th December, 1844, a land office was established at Little Rock, to be held by an officer called the Land Agent for the State, to be elected by the General Assembly, commissioned by the Governor, to hold his office for two years, and until his successor was elected and qualified, and receive a salary of $500 out of the Internal Improvement fund. By this, and subsequent acts, it was made the duty of such Land Agent to sell, under prescribed regulations, the Internal Improvement and

Seminary lands previously donated to the State by Congress. *Digest, chap.* 97, *Art. II–III.*

This court judicially knows that Lambert J. Reardon was elected to this office at the successive sessions of 1844, 1846, 1848, 1850, and held the office at the time of the passage of the act of 12th January, 1853, "*amendatory of existing laws regulating the landed interest of the State.*" 1 *Greenlf. Evidence, sec.* 6.

By act of January 6th, 1850, (*Pamph. Acts* 1850–51, *p.* 77,) the Governor was required to appoint three persons to act and be known as a board of Swamp Land Commissioners, whose term of office was fixed at two years, and until their successors were elected and qualified. By the same act, and a supplement thereto, approved 11th January, 1851, (*Pamph. Acts* 1850–51, *p.* 136,) it was made the duty of these commissioners to ascertain and report to the Governor, lists of the Swamp and Overflowed Lands, granted to the State, by act of Congress of 28th September, 1850; and he was required to file these lists in the office of the Surveyor General, &c. The board of Commissioners were also empowered to classify, fix the value of, and *sell these lands;* and to contract for, and superintend the making of the levees and drains necessary to reclaim them, as contemplated by the act of Congress granting them to the State. Commissioners were accordingly appointed by the Governor, and entered upon the discharge of their duties.

Such, substantially, were the existing legal regulations when the Legislature assembled in November, 1852—the Land Agent of the State being empowered to sell the Internal Improvement and Seminary lands, and the board of Swamp Land Commissioners, to sell the Swamp and Overflowed Lands. At that session, the "*existing laws regulating the landed interest of the State,*" were amended, by an act of *forty-four sections*, approved 12th January, 1853, (*Pamph. Acts* 1852–3, *p.* 161,) the provisions of which, bearing on the question under consideration, are substantially as follows:

SECTION 1 declares that the entire landed interest of the State

shall thereafter be controlled and managed as thereinafter provided.

SEC. 2 requires the Auditor to procure, and keep in his office, a well bound set of books and correct plats, separately, of each class of lands belonging to the State; that is to say, of the "*Internal Improvement lands*," the "*Seminary lands*, the *Saline lands*," and the *Swamp and Overflowed lands*," making four distinct classes.

SEC. 3 directs the Auditor to make out for each township in the State, embracing any of the above lands, *township maps*, upon which he should carefully class and discriminate the several kinds of lands aforesaid; and to *furnish* such *maps or plats* to the *Land Agents* of the *several Districts* thereinafter provided for.

SEC. 4. "There shall be established for the *sale* and *entry* of the lands of this State, as enumerated in *section two*, five offices, to wit: one at *Dardanelle*, one at *Jacksonport*, one at *Washington*, one at *Helena*, and one at *Pine Bluff*."

SEC. 5. "The General Assembly shall, at its present session, and every two years thereafter, elect one competent person to fill each of the offices named in section four, who shall act and be known as Land Agent; and who shall keep his office at the point in the District for which he shall have been elected, designated in section four; and who, *before entering upon the discharge of his duties*, shall take an oath, &c., and shall enter into bond, &c., with security, to be approved by the Governor, in the sum, &c., conditioned," &c.

SEC. 6 provides "that *after* the said Land Agents *shall have been furnished* with the *books*, *maps or plats*, as hereinbefore provided for, they shall possess the like power and authority, be governed by the same rules and restrictions, and be guided by the same requirements of law, which *now control* the action of the State Land Agent in the *sale and disposition*" of the *Internal Improvement* and *Seminary lands*—and also empowers them to sell the Saline lands, if thereafter ordered to be sold, in the manner subseqently to be prescribed by law.

SEC. 7. "And the said Land Agents shall have full power, &c., to sell" the *Swamp and Overflowed lands*, "but in making such sales shall be governed by the rules, provisions and regulations now in force, and hereinafter provided, or which may exist, by law, at the time of such sale."

SEC. 8. provides, "that the said Land Agents, *upon receiving the maps and plats herein provided for*, shall immediately, and without delay, *proceed to advertise the Swamp and Overflowed land for sale*, taking the *books and maps furnished by the Auditor for their guides* with regard to what LANDS are *so owned by the State*." This section proceeds, also, to prescribe the mode and time of publishing the advertisement, fixes the place of sale at the office of the respective Land Agents, and then declares that on the day fixed for such sale, "they shall proceed to offer the said lands for sale to the highest bidder for cash, or Swamp Land Scrip: *Provided*, That no such lands shall be sold at such public sale for a less price than $1 25 per acre;" and that "such sales shall continue from day to day until all the Swamp and Overflowed lands shall have been sold, or offered for sale, by the respective Agents."

SEC. 9 requires the lands to be offered for sale by quarter and half quarter section.

SECS. 10 *and* 37, secure pre-emptions to actual settlers, provided they are proven up before the day of sale, and require the several Land Agents to notify them of their rights, under the act, in their advertisements; and *section* 11 allows pre-emptions to subsequent settlers upon the lands remaining unsold after the public sales.

SEC. 12 provides "that all lands not sold at the time appointed for such *public sale* shall be liable to be entered at any time thereafter, for swamp land scrip, &c., and the Land Agent shall give the purchaser a certificate of such entry, in which he shall specify the lands entered, and the amount received for such entry, and shall also *note* such *entry* on his *township maps*, and in his book to be kept for that purpose."

SEC. 20 requires the Auditor to furnish the several Land Agents with forms of entries, locations and certificates of entry, which forms the Agents are required to pursue in the disposal of the lands, and to discriminate the class to which the lands sold by them belonged.

SEC. 15 directs that "in addition to the memorandum of *sales* or *entry*, of lands to be made upon the *maps or plats* furnished by the Auditor, the several Land Agents shall each procure a well bound book, in which he shall enter each location or purchase of lands, specifying the tract sold, to whom sold, the date of the sale, the price, and how paid."

SEC. 16 makes it the duty of each of the Land Agents to make out a detailed report of the transactions of his office at the end of every six months, and transmit the same to the Auditor; and at the like periods to make settlements with the Auditor, and pay over to the Treasurer the amount of money and land scrip which may be found chargeable against him, and file the Treasurer's receipt for the same in the Auditor's office.

SEC. 14 provides "that each of the Land Agents herein provided for, shall receive, in full compensation for his salary, the sum of eight hundred dollars, to be paid equally out of the *different lands sold*, and in *porportion* to the amount of *each class* of the *lands controlled* by them."

SEC. 22 makes it the duty of the Auditor to prepare patents for all lands sold by the several Agents, after the same shall have been paid for, which patents, with other evidences of payment, are to be submitted to the Governor for his signature, and when signed by him, are to be recorded in the Auditor's office, &c.

SEC. 25 provides for the election, by the General Assembly, at its then present session, and every two years thereafter, of the board of Swamp Land Commissioners, &c.

SEC. 26 makes it the duty of the Swamp Land Commissioners, to divide the State into five convenient Districts, having as near as may be, the same quantity of swamp land in each, which Dis-

tricts were to be laid off with a view to the convenience of business from the offices of the five Land Agents, as located by the act.

Other sections of the act make it the duty of the board of Swamp Land Commissioners to carry forward the work of reclaiming the Swamp Lands, by the construction of levees, drains, &c.

SEC. 43 requires the expenses accruing on account of the several classes of lands, to be paid out of the fund arising from the sale thereof, respectively.

SEC. 38 is in these words: "That nothing in this act shall be construed so as to alter or change existing laws until the election and qualification of the officers herein provided for; *and until the Auditor shall make out and furnish* the several Land Agents herein provided for the several land Districts, with the *maps and plats*, as required to be furnished by him as aforesaid, which he shall furnish without delay."

These are the only provisions of the act bearing materially upon the question before us. Some of the sections have been transposed for the purpose of bringing them more immediately in connection with others relating to the same subject matter.

Prior to the passage of this act, as we have above stated, the Land Agent for the State, holding his office at Little Rock, was empowered to sell the Internal Improvement, and the Seminary lands; and the board of Swamp Land Commissioners, holding their office at such point in the State as they might designate (*Act of 11th Jan.*, 1851, *sec.* 3,) were authorized to sell the swamp lands (*Act of Jan. 6th*, 1851, *sec.* 8).

For greater public convenience, it may be supposed, the Legislature, by the act of 12th January, 1853, made provision for the division of the State into five districts (*sec.* 26,) and established a land office, to be held by an agent, in each of these districts (*sec.* 4). These agents were designed to act in the place of the Land Agent for the State, in the sale of the Internal Improvement and Seminary lands, and instead of the Board of Swamp

Land Commissioners in the sale of the swamp lands, lying in their respective districts (*sec.* 4, 6, 7, 8, 12). After the act went into full operation (*sec.* 38) the office of the Land Agent for the State, was to cease to exist, and the Board of Swamp Land Commissioners were to superintend the reclamation, and not the sale, of the Swamp Lands (*sec.* 25 *to* 44). It is manifest, from the scope of the act, that the five district land offices were created for no other purpose, than the *sale* of the lands of the State, and the five agents were charged with no other duties than such as were incident thereto.

When were these offices to go into active operation? When were the duties of these agents to commence?

The Auditor was made, as it were, the head of the Land Department of the State. He was required to procure and keep in his office, separate books and plats of all the several classes of lands belonging to the State (*sec.* 2). He was required to furnish *maps or plats* of these lands to the several agents (*section* 3); they were to note the sales and entries thereon (*sec.* 15); to make semi-annual reports of the transactions of their offices to him (*sec.* 16, 17, 18), and he was to prepare patents for the lands sold, submit them for the Governor's signature, and when obtained, record them in his office (*sec.* 22). Thus the books, plats, &c., kept in his office, were doubtless designed to constitute checks upon those kept in the offices of the agents to prevent errors and frauds. It is, therefore, manifest, that the agents could not commence the sale of these lands, or advertise them for sale, until such *maps* or *plats* were furnished them by the Auditor (*sec.* 3, 6, 7, 8, 12, 15, 20, 38); because they could not legally know what lands they were authorized to sell, or advertise for sale, until they were furnished with such *maps* or *plats.*

Before the Auditor could furnish such *maps* or *plats* to the agents, he had necessarily to procure correct lists of the lands, and cause duplicate plats to be made out, one copy for his own office, and one for the agents; and before he could deliver them to the agents, the Board of Swamp Land Commissioners had to divide

the State into districts (*sec.* 26), that the Auditor might know what townships were embraced in the district of each agent, and thereby be enabled to furnish him with *maps* or *plats* of such townships (*sec.* 3). This, it may be well supposed, was a labor of some magnitude, and, in order that the sales of the public lands might not be suspended, while the Auditor was preparing such plats, the Legislature deemed it expedient to continue in operaiton the existing regulations for the sale of such lands, until such "*maps and plats were furnished to the several Agents*," (*sec.* 38). Until such maps, &c., were furnished by the Auditor to the Agent for the Washington district, (the petitioner,) it would seem to have been clearly the intention of the Legislature, that the Land Agent for the State should continue to sell the Internal Improvement and Seminary lands; and the Board of Swamp Land Commissioners to sell the swamp lands, embraced within the limits of the Washington district, and so with the other districts. When such *maps*, &c., were furnished to the agent of any one of the districts, his power to sell the lands would commence, and the authority of the other officers would cease within his district. No other hypothesis will harmonize with all the provisions of the act.

The fact that the same General Assembly, which passed the act in question, elected Reardon, the Land Agent for the State, one of the Board of Swamp Land Commissioners, does not militate against the hypothesis above assumed, because both offices belonged to the Executive Department of the State, and the acceptance of the latter, did not necessarily vacate the former which it is but fair to presume the Legislature understood; and that they intended him to continue to discharge the duties of State Land Agent, until the district agencies went into operation and his office ceased to exist, may be inferred from the fact that they elected no other person in his place. The district agents were to succeed him in the powers and duties of his office, when they were *legally qualified* to do so, according to the provisions of the act in question.

The district land offices having been created for no other purpose than the sale of the public lands; and the agents charged with no duties except such as were incident to the making of such sales; inasmuch as they could not commence the discharge of these duties until their districts were laid off by the Board of Commissioners, and the requisite *maps* or *plats*, &c., were furnished to them by the Auditor, it follows that until then they had no official act to perform—their offices did not go into operation—though previously created, they were until that time, in an *inchoate* state.

The petitioner doubtless had the right to take the necessary oath, enter into bond, and, perhaps, to receive his commission from the Governor, at any time after his election, and thereby to place himself in an attitude of authority to receive from the Auditor the requisite *maps* or *plats*, *&c.*, appertaining to his district in order that when they were ready for delivery, he might legally receive them, and enter upon the discharge of the duties of his office. If the Auditor had unnecessarily delayed the preparation or delivery of such *maps*, &c., the petitioner might, perhaps, have quickened the performance of his duty, by mandamus.

But was the petitioner entitled to the salary attached to the office, until the office went into operation—until he entered upon the discharge of its duties—until he had some labor to perform, and responsibility to incur? If it was any burthen or inconvenience to him to take the oath, enter into bond, and obtain his commission, there was no obligation upon him to take these preliminary steps, until he ascertained that his district was laid off, and the *maps*, *&c.*, prepared for him. If he is entitled to his salary from the 17th of March, the date of his commission, as he supposes, he could as well have qualified, and obtained his commission, on the day after his election, in the previous January, and thereby, by his own act, entitled himself to his salary from that time, instead of from a later period. Had the office been in full being when he was commissioned, and had there been duties incident to it, which he might have been called upon presently to

perform, the commission would have placed him in an attitude of readiness to perform such duties, and, doubtless, his salary would have commenced from the date of his commission. But we have seen that until the *maps, &c.*, were furnished him by the Auditor, his office was in an *inchoate* state; there were no official duties for him to perform, and until then, other officers were authorized to continue in the exercise of the powers which were to attach to his office, when it went into operation.

The 14th section of the act provides that each of the Land Agents, &c., shall receive a salary of $800, "to be paid equally out of the different *lands sold*, and in *proportion* to the amount of *each class* of *lands controlled* by them."

The State holding each class of the lands in trust for particular public purposes, the Legislature doubtless designed to charge upon each class, the expenses incident to the sale, &c., thereof. (See, also, *section* 43).

The demurrer to the response of the Auditor, admits that to the 30th Sept., 1853, the *maps, &c.*, of the lands in the District of the petitioner had not been furnished to him; and the petition does not even show that the Board of Commissioners had laid off the Washington District; and this being an act to be done by them *in pais*, we cannot judicially know that it had been done.

When the petitioner demanded his salary, or the part claimed to be due, as alleged in his petition, if the Auditor had to look to the amount and class of lands *sold* by him, to determine upon what basis to audit it, as would seem to have been contemplated by sec. 14, the Auditor could not legally know that he had sold any lands, because the furnishing of the *maps or plats, &c.*, was to precede such sales. True, the petitioner alleges that after getting his commission, he procured a book, &c., proceeded to sell lands, &c., and report the transactions of his office to the Auditor. But how did he ascertain what lands of the State were embraced in his District, what remained unsold, and the class to which they belonged? The law under which he was elected, provided but one mode by which he was to be informed of the necessary facts

upon which to base the transactions of his office—this mode is plainly manifested upon the face of the statute—he was to look alone for such information to the official *maps or plats, &c.*, which the Auditor was required to furnish him. The law did not authorize him to go out, upon his own responsibility, and seek information from other sources.

If the Auditor, in auditing the salary of the petitioner, was not to be governed by the sales made by him, but might have looked alone to the "amount of each class of land controlled by him," the objection is still not removed, because there were no lands under the control of the petitioner, in contemplation of law, until such *maps or plats, &c.*, were furnished to him.

The salaries of the officers of the State generally, are paid quarterly, (*Digest, chap.* 142, *sec.* 11), but it was perhaps the intention of the Legislature that the salaries of the Land Agents should be paid semi-annually, inasmuch as they are required by *section* 16, to make a report to, and settlement with the Auditor at the end of every six months, and pay over to the Treasurer the amount of money and land scrip "found chargeable against them;" and inasmuch as the Auditor, in auditing their salaries, would have to look to these reports, from time to time, to ascertain the quantity and class of the lands sold by them, and the proportions of the several classes of lands remaining under their control, as seems to have been contemplated by *section* 14.

However commendable may be the disposition manifested by the petitioner, to enter promptly upon the discharge of his official duties, after his election, we think he has clearly shown that he was in advance of the provisions of the law; and that he is not entitled to his salary from the date of his commission, but from the time fixed by law for his office to go into operation, and his official duties to commence.

The judgment of the court below is affirmed.

## SNIDER VS. GREATHOUSE ET AL.

Where a surety pays a debt, on default of his principal, there is such an implied assent, on the part of the principal, as will entitle the surety to maintain an action against him for money paid.

One of the distributees of an estate filed his bill, in a sister State, for his distributive share, against the administrator and his sureties in the administration bond, setting out the bond and all the proceedings in the administration. The administrator was a non-resident, and no actual notice was served upon him, nor did he appear to the suit: a decree was rendered against the heirs of a deceased surety, for their proportional part of the sum due. Execution was issued against the heirs, and returned satisfied, with a receipt thereon: HELD, That though the record of the proceeding and decree would not be valid as the foundation of an action against the administrator, for want of notice, it was admissible in an action against him, by the heirs, for money paid, as *prima facie* evidence of the sum due by the administrator, of the obligation of the heirs to pay, of the assent of the administrator to the payment, and of the actual payment of the money.

Where a joint judgment is rendered against several heirs of a deceased surety, and the money paid by them, they are entitled to maintain a joint action against the principal debtor for the sum paid.

*Appeal from the Circuit Court of Crawford County.*

Hon. A. B. GREENWOOD, Circuit Judge.

WALKER & GREEN, for the appellant. To sustain the count for money paid, it is necessary, 1st. That money should have been paid or expended by the plaintiff: 2d. That the defendant requested the plaintiff (expressly or impliedly) to pay the money for his use; and 3d. That the money should have been paid for a debt for which the defendant was originally or primarily liable to the third party. *Chitty on Con.* (7 *Amer. Ed.*) 592; *Morrison vs. Barkley*, 7 *Serg. & R.* 238; *Miller vs. Howry*, 3 *Penn. Rep.*

380; *Gardner vs. Cleveland*, 9 *Pick.* 337. Where several sureties join in a suit for the recovery of money paid for their principal, it is necessary for them to prove that the money paid was a joint fund, or raised on their joint credit. *Pearson vs. Parker*, 3 *N. Hamp. Rep.* 366; *Jewett vs. Conforth*, 3 *Greenleaf*, 107; or they should sue severally. *Gould vs. Gould*, 8 *Cowen* 168.

A decree or judgment is always admissible with a view to the proof of the judgment itself, *as a fact*, and its legal consequences; but not to prove the facts upon whose supposed existence the judgment or decree was founded, (3 *Cow. & Hill's notes to Phil. on Ev.*, *p.* 820, *note* 582; 2 *Stark. Ev.* 183–4,) unless the party against whom it is offered in evidence, had notice of the suit, or an opportunity of making a defence.

Judgments or decrees obtained against persons resident abroad, without notice to them, and an opportunity of defending, are not admissible against them as evidence of indebtedness or as operative in any measure *in personam*, when offered in a neighboring State. *Cow. & Hill's Notes*, 3 *vol.*, *p.* 908. Notice by publication in a newspaper, is not sufficient. *Miller's Ex. vs. Miller*, 1 *Bailey's Rep.* 242; *Moren vs. Killibrew*, 2 *Yerger Rep.* 376; *Cone vs. Cotton*, 2 *Blackford's Rep.* 82; *Rogers vs. Coleman*, *Hardins Rep.* 413. See, also, the cases of *Stevens vs. Jack*, 3 *Yerg. Rep.* 403; *Sanders vs. Hamilton*, 2 *Hayw. Rep.* 226; *Jacob vs. Pierce*, 2 *Rawle's Rep.* 204; *Maupin vs. Compton*, 3 *Bibb* 214.

Mr. Justice WALKER delivered the opinion of the Court.

The facts necessary to a proper determination of the questions of law in this case, are, that Frederick Snider, of Hancock county, Kentucky, died intestate, and that Nicholas V. Board, and Cornelius Snider, were appointed administrators of his estate, and executed bond for the faithful performance of their duties as such administrators, with Rodolphus B. Greathouse, and Henry W. Williams, as their sureties.

Thereafter, Cornelius Snider resigned his administration, and, by an order of the County Court of said county, Board, the other

administrator, executed another bond, for the faithful performance of his duties, with Philomon Dawson, John Wood, and Robert C. Beauchamp, as his sureties.

Subsequently Robert C. Beauchamp, who was appointed guardian for the heirs of Frederick Snider, filed a bill in chancery, in the Hancock Circuit Court, in Kentucky, against Cornelius Snider, Nicholas V. Board, and their securities, for an account for money, alleged to be due, upon the settlement of the administration, to the heirs of Frederick Snider, deceased.

At the time this suit was commenced, both the administrators had removed from the State of Kentucky, and no personal service of notice of the suit was had upon them, nor did they appear to the action. After personal service upon the securities, and constructive notice by publication upon the administrators, such proceedings were had, that a decree was rendered against John L. Greathouse, William L. Greathouse, Joseph L. Greathouse, and Isaac N. Greathouse, heirs of Rodolphus B. Greathouse, one of the sureties on the administration bond, for the sum of one hundred and fifty-seven dollars and fifty-two cents, their proportional part of the whole sum due by the sureties and decreed to be paid, with a like proportion of the costs.

Upon this decree, an execution issued against the defendants, heirs of Rodolphus B. Greathouse; and, under the statute of Kentucky, the debt was replevied with William S. Bates as security, in the replevin bond; said bond having the force and effect of a judgment: execution issued thereon, on the 4th day of October, 1850, against said defendants and Bates, their security. Which, as appears from the sheriff's return, was levied upon a negro, the property of John H. Greathouse. The return shows no disposition of the slave, and from the fact that within five days after the levy, the execution was returned, endorsed "satisfied in full," it is fair to presume that it was not satisfied by the sale of the negro, but by whom it does not appear; nor is it shown, in the receipt of the complainant, Beauchamp, who acknowledges the receipt of the full amount of the debt, by whom the money was paid.

To recover this money paid as security for the administrators under this decree, the heirs of Greathouse, the security upon the bond, brought this action in assumpsit in the Crawford Circuit Court, against Cornelius Snider and Nicholas V. Board. The declaration contains the usual money counts. The action was discontinued as to Board, who was not served with process. Cornelius Snider pleaded the general issue and the statute of limitation, upon which issue was taken, and the case submitted to the court sitting as a jury—the transcript of the record from Kentucky being the only evidence adduced. Judgment was rendered for the plaintiffs. The defendant moved for a new trial, upon the ground that the evidence was not sufficient to sustain the finding of the court in favor of the plaintiffs. The motion was overruled, and the defendant excepted and appealed.

The main question presented is, is the transcript of the record from Kentucky sufficient evidence to fix upon the defendant a legal liability to the plaintiffs for the sum of money, claimed to have been paid by them, on account of the security-ship of their father, for the defendant.

The objection to the admissibility of the record, or rather of the extent to which it may be used, and to fix the liability of the defendant to pay, is, that the decree was rendered upon the bond without actual notice to the defendant; he being at the time the suit was commenced, a non-resident of the State of Kentucky: and it is also contended that giving the record the full force and effect, contended for by the plaintiffs, that still it does not show a joint payment of the money by them; and, consequently, no joint right of action against the defendant.

To entitle the plaintiffs to recover, they were required to prove the payment of the money by them, and an express or implied assent, on the part of the defendant, to such payment. In this case there was an implied assent growing out of the legal liability of the security to pay.

STARKIE says, "The defendant's assent is implied in all cases, where the plaintiff is under a legal obligation to pay the money,

through the default of another, as when a security is compelled to pay money on the default of his principal." 2 *Stark. Ev.* 101.

To establish the implied assent to the payment, and also to show what amount the security was required to pay, the transcript of the record was introduced as well as to show by the return of process that the money was paid. The bonds, the amount of the estate which came to the defendant's hands, and the balance due them; as well as the decree, the execution and the return showing that it had been paid, all appear in the transcript. But the defendant objects that it is not evidence against him, because he was not, by actual service, made a party to the suit.

If the action had been debt upon the record, the objection would have been good, as held by this court at the present term in *Iglehart vs. Moore.* But as the suit was assumpsit, and the sole purpose of the record was to show an implied assent growing out of the legal obligation to pay the money which had been paid as security, through the default of the principal to pay, the question is, does the same rule apply as if the suit had been upon the judgment? We think not. It is very evident that the security might have been sued alone upon this bond. Such was held to be the case in *The People vs. Metter and Sims*, 1 *Scam.* 83.

In such suit, the court determines the liability of the security to pay: the breach is for the non-performance of the duty of the administrator: the damages, the sum ascertained to be paid. No doubt but that this sum may be coerced by law from the security; and shall we say that if it imposes a legal obligation upon him to pay the debt of his principal, that it is not sufficient evidence to raise an implied assent to such payment, and an assumpsit to refund the money so paid to the security. We should say not: nor do the decisions cited, and relied upon by the counsel for the defendant, when properly restricted to the state of facts, under which the decisions were made, deny the validity of the record for such purpose.

In the leading case, (*Maupin vs. Compton*, 3 *Bibb* 214,) Comp-

ton, the assignee, brought suit in Virginia, against Ellis, the maker of the note; and, upon the trial of the case, the jury found that the debt had been paid to Maupin, the assignor, before he assigned the note to Compton, and judgment was rendered in favor of Ellis. Compton then sued Maupin the assignor. On the trial of this suit, the only evidence introduced was the transcript of the record of the suit between Compton and Ellis in Virginia; of which suit, however, Maupin, the assignor, had no notice; the question arose upon the admissibility of the record as evidence. The court said: "In the present case, no suit was necessary against the obligor (if the demand was paid before the assignment) to authorize a recovery against Maupin, the assignor. The cause of action accrued virtually upon the assignment being made, nor was the fact of payment matter of record, but extraneous from it. The same necessity does not, therefore, exist in this, that did in the former case, to make the record evidence."

It will readily be perceived that the record was excluded as evidence in this case, because the payment having been made to Maupin before the assignment, a right of action accrued at the time the assignment was made, wholly independent of the determination of the suit in Virginia. But, in the case before us, the obligation to pay, on the part of the principal, arose upon the assessment of the damages by reason of the breach of the condition of his bond, and the payment of the money for him by his securities.

There is another class of cases in which notice has been held necessary, in order to make the record evidence sufficient to entitle the plaintiff to recover, relied upon as authority. They are where suit is brought upon the warranty of title upon eviction by a paramount title. The decisions go to the extent that the record of the eviction is sufficient evidence of an eviction, whether the grantor had notice of the suit, under which the eviction was had or not, but not of paramount title. In both these classes of cases, the legal liability upon the assignor and the grantor, are contingent, and arise solely upon the contingency that the money

cannot be made out of the payor, or that the grantee has been evicted by a paramount title.

But the liability of the security upon the bond is joint and several, and although he cannot have his recourse over against his principal, until he has paid the debt, still he is liable over to the creditor in the first instance; and, upon the payment of the debt, after it becomes due, if it is liquidated, or after its liquidation, if not so, according to the terms of the contract, whether by process of law or not, an obligation is raised to pay the same. Suppose the bond had been for the payment of a specific sum of money: after the bond fell due, an obligation would rest both on the principal and the security to pay, and the security might do so without suit. In that event, he would have to prove the execution of the bond, by which he became security for the defendant, and the payment of the money to the obligee. But where the obligation was to perform a duty, upon a failure to do which a legal liability accrued in damages for a breach of duty, if the security should undertake to pay what might be claimed as damages, without a suit, we presume he would do so at his peril; and would be required, in a suit against the principal, not only to show that he was security upon the bond, but also that the damages were really due. When sued, however, and his liability and character as security brought into question, as well as the amount which he shall be required to pay, it would seem but just that the record evidence, which was held sufficient to impose a legal liability on him to pay, and his actual payment under the process of the court, would, if not conclusive, at least be *prima facie* evidence of his liability to pay, and that he was such security. Suppose the principal be dead with no legal representative, or that he has absconded to parts unknown, and his security has been sued and made to pay his debt, if we were to hold that the security could not hold his estate liable, upon the recovery, had against him as security, he would not only be required to prove that he had paid the money, but also that the damages assessed were properly due and chargeable. The result would be, that these facts must again

be submitted, for re-investagation, to some other court or jury, who, under a new or different state of facts, arising upon the evidences then adduced, might determine that the principal was chargeable with a less sum, than that recovered against him, and if he is to be bound by this, the security would, in good faith, under the judgment of the court, be compelled to pay money which he could never recover from his delinquent principal. In view of the equitable nature of the demand of a security against his principal for money paid, we cannot hold such to be the law, and in support of the conclusions at which we have arrived upon principle, there are several adjudged cases to which we will briefly refer.

In *Scott vs. Cleveland*, 3 *Mon. R.*, *p.* 62, it was held, in an action of assumpsit by the assignee of a note against the assignor, that the transcript of a judgment, rendered in the State of Indiana, in favor of the maker, was admissible evidence in a suit against the assignor.

In *Barr vs. Gratz*, 4 *Wheaton*, 213, Judge STORY takes the distinction between the admissibility of the record, when the right claimed is founded upon the record recovery, and when introduced as part of a chain of evidence in the case, he says: "It is true that, in general, judgments and decrees are evidence only in suits between parties and privies. But the doctrine is wholly inapplicable to a case where the decree is not introduced as, *per se*, binding upon any rights of the other party, but as an introductory fact to a link in the chain of the plaintiff's title."

And Mr. GREENLEAF, in his work on evidence, *Vol.* 1, *page* 527, says: "A judgment when used by way of inducement, or to establish a collateral fact, may be admitted, though the parties are not the same. Thus, the record of a conviction may be shown, in order to prove the legal infamy of a witness; so it may be shown, in order to let in the proof of what was sworn at the trial, or to justify the proceedings in execution of the judgment. So it may be used to show that the suit was determined, or, in proper cases, to prove the amount which a principal has been com-

pelled to pay for the default of his agent, or the amount which a surety has been compelled to pay for the principal debtor: and, in general, to show the fact that the judgment was actually rendered at such a time, and for such amount."

These authorities clearly show that the record is admissible for such purpose, without reference to the fact, as to whether it should be considered as conclusive or only *prima facie;* probably the latter, as would appear from several decisions directly in point. *Haggerty vs. Bradford*, 9 *Ala. R.* 571, was a suit in assumpsit by the endorsee against the endorser, after a failure to recover of the maker of the note, the assignor having had no notice of the suit against the maker. GOLDTHWAIT, Judge, after considering the question in cases where notice has been given to the assignor, proceeds: "But what is the rule when no notice has been given. In *Scales vs. Wilson*, 9 *Leigh.* 473, the assignee of a bond in Virginia, submitted his action against the obligor to arbitration, and it was awarded in favor of the obligor, on account of set-offs against the assignor. On a suit against the assignor, he insisted that he was not bound by the judgment on the arbitration, but the court held it was *prima facie*, obligatory upon him. In *Trust vs. Gould*, 5 *Pick.* 380, one not connected with a suit had undertaken to indemnify an officer for a levy, and he was held, *prima facie*, bound by a judgment against the officer, although obtained without notice to the indemnitor. These cases (says the Judge) will authorize us in the conclusion that the judgment in favor of the maker, upon the merits of the note, is in all cases *prima facie* evidence against the endorser, and that it rests with him to show the defence then interposed was invalid.

In the case of *The State of Ohio vs. Colerick*, 3 *Ham. R.* 488, the court said: "We take the distinction to be, that where the securities have notice of the suit, and may or do make defence, the judgment against the principal is conclusive against them. When such notice is not given, the judgment against the principal is *prima facie* only. It may be impeached for collusion or

mistake; but, until so impeached, it is sufficient to entitle the plaintiff to recover the amount for which it is rendered."

In *Cobb vs. Haynes*, 8 *B. Monroe* 137, the precise question came up that is presented in this case. It was a suit in Kentucky to recover part of the sum paid by another security, who had been sued and compelled to pay the whole amount decreed to be due from the administrator to the heirs of the intestate. The first question was whether the record was evidence; that the defendant was a co-security upon the administration bond with the complainant, and it was held that the copy of a record from a court in Virginia, properly certified and containing a copy of the bond, purporting to be signed by the defendant, and not denied otherwise than by stating his want of recollection that he had ever signed it, should be taken as conclusive evidence of the fact of his signature, and touching the effect of the judgment upon the rights of the parties. It was further held, that the record was evidence of the pendency of the suit in Virginia, and the decree thereon rendered, is *prima facie* evidence of the extent of the liability of the co-security, and of the liability of the party sued in Kentucky, as co-security in the administration.

The record in the case before us, contains a copy of the bond and all the proceedings in the administration; and, was in our opinion, *prima facie* at least, sufficient evidence of the sum found due by the defendant as such administrator, and which the plaintiffs, as securities, were required to pay. And also of every other fact necessary to raise an implied assent, on the part of the defendant, to the payment made by the plaintiffs: and we are further of opinion that the process of execution, and the return and receipts upon it, sufficiently show the actual payment of the money.

The remaining question to be considered, is, whether such payment was a joint payment, or such as will entitle the plaintiffs to maintain a joint action for the sum paid.

These plaintiffs were the heirs of Rodolphus B. Greathouse. Their liability to pay arose upon the fact, we must presume, that his estate came into their hands: otherwise, they would not

have been responsible. It was their joint debt, then, as his heirs. The judgment was against them, and although the execution also issued against their security in the replevin bond, it is but just to presume that the money was paid by the principals, and as they were jointly liable, that it was a joint payment. Chief Justice SAVAGE, in *Gould vs. Gould*, 8 *Cowen* 170, remarks: "It is nothing to the defendants whether the funds, out of which the debt was paid, be joint as between securities, or several as to each. That is the concern of those only who own the fund."

And the doctrine laid down in *Siter vs. Howry*, 2 *Ham.* 211, and in 3 *Metc. R.* 169, sustains this view of the question, and shows that the objection is not well taken.

This question comes up upon exceptions to the opinion of the court, upon motion for a new trial, and upon a fair consideration of the whole case, we think substantial justice has been done. Affirmed.

Absent, Mr. Justice SCOTT.

## BONE AS ADM. VS. TORRY.

A judgment or decree in a suit against a surety, is sufficient *prima facie* evidence of the liability of the security and of the liability of the principal over to him. *Snider vs. Greathouse, ante.*

And if the proceedings and judgment or decree, in such case, do not show that the plaintiff was the security of the defendant for the debt for which such decree or judgment was rendered; the fact may be proved by the other evidence.

This court cannot take judicial notice of the laws of other States: and, in the absence of proof of the fact, will not presume that a judgment, in favor of a Bank, for a specific sum of money, was payable in depreciated Bank paper.

A security, against whom a decree was rendered, pays the amount in cash and a note with security, which are received by the creditor in full discharge of the decree: and satisfaction entered of record: this is such a payment as will entitle the surety to maintan an action against the principal.

*Appeal from the Circuit Court of Chicot County.*

Hon. JOHN C. MURRAY, Circuit Judge.

PIKE & CUMMINS, and TRAPNALL, for appellant. The Planters Bank of Mississippi was the owner of the note, and her paper, which she was bound to receive in payment, was depreciated, and the surety, if he chose to pay the debt, should have paid it in such paper, for the benefit of his principal. *Woodruff vs. Trapnall*, 10 *How. U. S. Rep.* 409; *Niagra Bank vs. Rosevelt*, 9 *Cow.* 409; *Jordan ad. vs. Adams*, 2 *Eng.* 348; *State, use Chicot County vs. Rives et al.*, 7 *Eng.* 721.

As there was no notice to Moore, either in the suit at law or in chancery, the records are evidence of the *naked facts* that such judgment and decree were rendered; but *they are no proof whatever* of the truth of the facts on which they are based, or the

justice of the demands, or their existence at all. 3 *Cow. & Hill's Notes to Phil. Ev.*, 815 *to* 820.

Mr. Justice WALKER, delivered the opinion of the Court.

On the 21st of April, 1852, George G. Torrey filed the following claim for allowance, in the Chicot Probate Court, to wit:

"*Estate of Allen Moore,*

TO GEORGE G. TORRY, *Dr.*

To amount of money paid John Bacon, Alexander Symington, and Thomas Robins, assignees of William T. Irish, Volney Stamps, and James H. Murray, of a note executed by said Allen Moore, dated January the 4th, 1840, payable on the first of January, 1841, for the sum of fourteen hundred dollars, which said note was signed by said George G. Torrey, as security for said Allen Moore, and for eight per cent. interest per annum, and on a judgment previously had thereon, and a decree was rendered against said George G. Torry and others, in the vice Chancery Court, held at Natchez, State of Mississippi, on the 29th of December, 1849, for the sum of twenty-five hundred and sixteen dollars and eighty cents, together with interest, from said date, as aforesaid, and costs amounting to the sum of, for principal and interest to 29th of May, 1851, $2,802 03."

This account was sworn to in the usual form, and after several continuances had, the claim was allowed by the Probate Court of Chicot County, and ordered to be classed for payment. Exceptions were filed to the decision of the Probate Court, and an appeal prayed and taken to the Circuit Court of said county.

At the April Term, 1853, of the Chicot Circuit Court, the case came up for hearing, upon the assignment of errors and exceptions taken to the judgment, and decision of the Probate Court; and it was upon consideration, held by the Circuit Court, that there was no error, in law, or fact, in the records and proceedings of the Probate Court; and the judgment of said court was, in all things, affirmed, with costs. From which judgment and decision, the administrator of the estate of Moore, has appealed to this court.

The whole case turns upon the sufficiency of the proof adduced before the Probate Court to establish the claim against the estate.

In order to entitle Torry to a judgment of allowance of this claim, against the estate of Moore, it devolved upon him to prove that he was the security for Moore, and that, as such, he actually paid the sum claimed.

It is objected that the transcript of the record of the judgment from Mississippi, against Torrey, and the decree also rendered in the vice Chancery Court against him, were not sufficient evidence to establish this fact: because, Moore was not a party to either of these suits, nor does it appear, from the record in either suit, that Moore was a party to the note sued upon.

Upon examination of the record, this objection appears to be well taken in fact, and we apprehend, as this is the case, that the record would, of itself, be insufficient, to connect Moore as a party, bound in the original contract, either as principal or as security. But the claimant did not rely alone upon the record, but introduced evidence to prove, and we think did sufficiently prove, that this judgment was rendered upon a note executed by Moore, as principal, and Torrey as security. The attorney, who brought the suit, testifies to this, as well as the agent for the plaintiffs in interest in the suit. The attorney says that he brought the suit against Torrey, the security, alone; because, as is his impression, Moore was beyond the reach of process at the time. Moore himself recognized his liability as principal, and proposed to the agent to compromise the debt, by paying 70 or 75 cents on the dollar: he complained that the consideration had failed, and that it was a hard case on him. From the time when this conversation took place, it may be inferred that it was after the judgment at law, and perhaps about the time of the rendition of the decree. It is objected that there is no evidence of the assignment; and, therefore, if the payment was made, it is not shown to have been made to the creditor. The testimony of both the agent and the attorney, shows that there was a blank endorse-

ment upon the note, and this we have held to be sufficient. This seems to have been made after the commencement of the suit at law, and before judgment. But, independent of this, Moore himself fully recognized the right of the plaintiffs, by proposing to compromise and settle with them.

Torrey defended the suit at law, and judgment went against him. The reason why the money was not collected upon the judgment, seems to have been, because the charter of the Planter's Bank, in whose name the suit had been commenced, had been declared forfeited, and the assignees filed their bill to have the money collected and paid over to them. It is true that in the chancery suit he withdrew all defence, and this seems to have been done by agreement to give time to him to pay. It is not shown what defence he might have made; indeed, after the judgment at law which was defended, it is not very clear that any defence could have been interposed. It is true that Moore complained that the consideration had failed, but there is no evidence that Torrey was aware of this. But whether so or not, and although we do not question but that, if there had been collusion between the security and the creditor, whereby the judgment was taken for a larger amount than was really due, the principal might, notwithstanding the judgment, show that fact. But we have held, at the present term, in the case of *Snider vs. Greathouse*, that the record was *prima facie* evidence of the liability of the security, and of the liability of the principal over to him, to pay the amount recovered and paid by him. This, the administrator has not done; and, therefore, the decree must be held sufficient evidence of the true amount due to the creditors.

The administrator contends that this debt might have been discharged with the paper of the Planter's Bank of Natchez, which was only worth about 50 cents on the dollar; that the security should have looked to this, and have bought in the paper at the market price. We are not aware of any statute of Mississippi, that would compel the creditors to take depreciated Bank paper in discharge of that debt. We are not required to take judicial

notice of the statutes of a sister State, and there is no evidence upon the subject. The judgment was for dollars, and the payment, so far as the facts are before us, could only have been made in gold or silver, the constitutional coin.

The next question is, was the money paid, or was the debt so satisfied and discharged, as to amount to a payment?

From the proof, it appears, that one thousand dollars were paid in a draft, which was cashed, and that on the first day of December, 1851, the time of the final settlement of the decree, Torrey executed his note with security, to the creditors, for $1,782 80, payable five months after date, in full satisfaction for the decree, but the notes, up to the date of the examination of the witness, had not been paid. The decree was entered of record fully satisfied, and receipts showing the payment thereof given.

As a general rule, a surety cannot support an action against the principal debtor for money paid for the principal, if he has merely given security for payment. 2 *Stark. Ev.* 1060, *Morris vs. Berkey*, 7 *Sergt. & Rawle*, 238.

But where the creditor, by express agreement, receives a note in payment of a debt, or Bank paper, or property, there would certainly be no good reason, why such payment, so accepted, would not be a complete satisfaction of a judgment debt; because, as between the debtor and creditor, it is for the creditor to say when he has received a full compensation in satisfaction of his debt.

But as between principal and security, where the security pays or satisfies the debt of his principal, by the execution of a new security, or by the payment of property, or depreciated paper currency, there would seem to be more doubt; because, the liability of the principal to pay the security, is founded upon a payment or satisfaction of the debt by the security, and the liability of the principal is limited to the actual loss sustained by the surety by reason of his surety-ship.

If the surety pays the debt, in depreciated paper currency, or in property, the real value of the paper, or property, would be

the extent of the loss to the surety; and, consequently, of the liability of the principal over to him, unless by express contract with the creditor, he is subrogated to all the rights of the creditor. *Hickman & Pearson vs. McCurdy*, 7 *J. J. Marsh. R.* 560.

In the case before us, there was no payment, either in depreciated paper or property. The decree was paid by a draft for $1000, which was cashed, and a note with security for the balance. Was that note equivalent to cash, or is it such a satisfaction of the decree as to raise an implied promise to pay, on the part of the principal debtor?

That the decree was fully and completely discharged and satisfied, and that, too, by the security, there can be no doubt, and it is equally clear, that such discharge was as effectual for the principal, as if paid by himself. This payment of an approved note, by which the surety bound himself to pay the amount in cash, must, we think, be held *prima facie* equivalent to a payment in cash. In *Cornwall vs. Gould*, 4 *Pick. Rep.* 444, it was held that a surety, who had extinguished the debt by giving a separate promissory note for it, might maintain *indebitatus assumpsit* against his security. Such was, also, the decision of the Supreme Court of New Hampshire, in *Pearson vs. Parker*, 3 *N. H. Rep.* 366.

In *Stone vs. Porter*, 4 *Dana*, 207, it was held, that a payment in Bank notes by a surety, would entitle him to maintain an action of *indebitatus assumpsit;* and Judge ROBINSON, who delivered the opinion, remarked that if individual bills or notes had been received by the creditor, in payment of his demand, the surety might maintain *indebitatus assumpsit.* Such, too, was the decision of the Supreme Court of New York, in *Witherby vs. Mann*, 11 *John. R.* 518. And the Supreme Court of Kentucky, in *Robinson vs. Maxey*, 7 *Dana*, 105, reviewed its former decisions, and those of several of the sister States; and, in answer to the objection that the money must be, in fact, paid before assumpsit can be maintained, said: "The law will not speculate on such remote contingencies. On the contrary, it will consider the

substituted bond as equivalent to the amount of it in money, because it was so considered by the parties to it, and may be, and probably is, a full equivalent."

The presumption that the note was so received, may no doubt be repelled by evidence, showing that it was accepted by way of compromise, and was not taken, or held as equivalent to the nominal amount in money; but, in the absence of such proof, the better opinion would seem to be, to treat the substituted note as cash. None of the objections can well arise here, that have been urged in some of the cases, that the proof must correspond with the allegation, and that proof of a note executed, will not sustain a money count, because, in this case, there were no formal pleadings, and we only look to the substance of the issue.

No valid objection can be raised to the amount of the allowance by the Probate Court. That was evidenced by the decree of the vice Chancery Court, at Natchez, and as we have held, was at least *prima facie* evidence of the amount really due upon the claim.

Let the judgment of the Circuit Court be affirmed.

Absent, Mr. Justice SCOTT.

## HILL VS. ROBINSON.

To entitle the plaintiff to recover in an action of replevin, he must not only have title, but must also have a right to the possession at the time his action is commenced. *Britt vs. Aylett*, 6 *Eng.* 476.

Where there are several joint owners of a divisible chattel, in the possession of one, replevin will not lie by another joint owner for his share, until a division of the property.

Replevin will not lie for property legally in the possession of another, who has a lien upon it for charges, until such charges be paid; nor until after demand and refusal, or conversion.

*Quere:* Is a declaration in replevin "for fifteen hundred pounds of seed cotton," without other description, sufficient.

*Writ of Error to the Circuit Court of Sevier County.*

Hon. SHELTON WATSON, Circuit Judge.

PIKE & CUMMINS, for plaintiff in error. The defendant had a lien on the property for services, and it could not be removed until tender or payment; and, of course, replevin would not lie. *Wheeler vs. McFarland*, 10 *Wend.* 318; *Sharp vs. Whittenhall*, 3 *Hill* 576.

Replevin will only lie for a thing capable of clear identification, and of specific delivery. 2 *Saund. Pl. & Ev.* 760; 1 *Ch. Pleadings.*

Parties here were co-tenants or partners: and for this reason, replevin would not lie. *Whitesides vs. Collier*, 7 *Dana* 283.

GALLAGHER, contra. Action will lie for recovery of seed cotton already picked: it comes under the definition of goods or chattels. *Dig., ch.* 136, *sec.* 1, *Title Replevin.*

The evidence showed title in the plaintiff; and the property could be divided by weight. The testimony was sufficient for the jury to presume that Hill claimed the property of the plaintiff by virtue of the garnishment. *Prater ad. vs. Frazier*, 6 *Eng. Rep.*

Mr. Justice WALKER delivered the opinion of the Court.

This was an action of replevin, brought by Robinson against Hill, to recover fifteen hundred pounds of seed cotton. The declaration is in the detinet, and no other description of the cotton is given, or where it was, whether in bags, a pen, or a house, or whether it was separated from, or in a pile with other cotton.

The defendant pleaded *non-detinet;* which, under our statute, puts in issue, as well the title to the property, as the wrongful detention of it.

The jury found a verdict for the plaintiff, and after motions in arrest of judgment, and for a new trial, were made and overruled, the defendant excepted, and has brought the case here upon writ of error.

From the nature of the goods sought to be recovered, it is not to be expected, that any very definite description could be made by the pleader. "*Fifteen hundred pounds of seed cotton*" is sufficiently descriptive of the article; and, also, of the quantity, but, as the officer was required to take it into his possession, it is very doubtful whether some further identification of the particular cotton, sought to be recovered, should not have been made, such as, that it was at a certain place, in a pen, or house, or in a pile; such, at least, would seem to be the rule held in 6 *Hill's R.* 418.

But aside from all objection to the declaration, it is very clear, that in order to entitle the plaintiff to a verdict, he should show a right to the property, and to the possession of it, at the the action was commenced. *Wheeler vs. Train*, 3 *Pick.* 255 *Walcot vs. Pomroy*, 2 *Pick.* 121; *Dickson vs. Thatcher*, 14 *Ark. R.* 114.

He must not only have title, but must also have a right to the possession at the time his action is commenced. So, in the case of *Britt vs. Aylett*, 6 *Eng.* 476, this court held, that to sustain replevin, the plaintiff must be entitled to the immediate possession, and could not recover property hired, until the expiration of the term of hiring. Nor can a recovery be had by one who has a joint interest in the property with the defendant, who is in possession. *Whitesides vs. Collins*, 7 *Dana* 283, *Coke Littleton* 200. Nor where the defendant in possession has a lien upon the property, as where a warehouse-man has commissions for storage, or a mechanic for repairs. Until these be paid, not even the original owner of the property could remove them, much less one who holds by purchase under him. *Wheeler vs. McFarland*, 10 *Wend.* 318; *Stamps vs. Whittershall*, 3 *Hill R.* 576.

In this case, it seems, that in the year 1850, there was a crop of cotton, then growing in the field, which belonged to McGraw, (defendant) Hill, and Woods: one-half of which was Hill's, and the other half belonged equally to McGraw and Woods. Thus standing, and before any division of the crops, it was agreed, between the parties in interest, that Hill was to pick out the cotton, haul it to the gin, and pay himself for picking and hauling the cotton, and then divide it, keeping for himself one-half, giving one-fourth to Wood, and the other was McGraw's. McGraw being in debt to Robinson, agreed to let him have his interest in the cotton; provided, he would give as much for it as any one else. Hill was present when the contract between McGraw and Robinson was made, and agreed to let Robinson have the interest of McGraw, upon the terms above mentioned. Some six months after this, Robinson paid McGraw for the cotton, three dollars per hundred: does not recollect how much was paid; of which, however, Hill had no information.

Hill gathered the crop, threw it up in a pile, no division had been made, nor was this cotton separated from Hill's own cotton. The cotton was then not all gathered—6000 pounds in the pen, and about 1000 still in the field unpicked.

Hill claimed, at the time the officer came to replevy the cotton, that he was to be paid for picking and hauling it. No division was made, nor was there any demand prior to the commencement of the suit. The officer seized upon 1500 lbs. of the cotton in obedience to his writ.

It is also in proof, that Hill had, previously to that time, been garnisheed by a judgment creditor of McGraw's, to answer with regard to this cotton.

Under this state of case, it is manifestly clear, that Robinson could not recover in this action, until a division of the crop had been made. It was the joint property of all the claimants. McGraw himself could not have recovered it in this form of action, until a division had been made; nor even then, until Hill had been paid for picking it out and hauling it. A part of the crop was still attached to the freehold, and was not subject to be replevied. And even when divided and set apart, unless in sacks, bales, or so situated as to be identified and distinguished, it is very questionable whether replevin would lie. Proof of a demand and refusal or conversion, was also necessary in this form of action. *Beebe vs. DeBaun*, 3 *Eng.* 510. The whole of the instructions asked by the defendant, although not very concisely stated, should have been given. And as there was a total want of sufficient evidence, in the several particulars enumerated, to entitle the plaintiff to recover, a new trial should have been awarded.

The judgment must therefore be reversed, and the cause remanded, with instructions to the court below to grant a new trial, and for futher procedings therein to be had, not inconsistent with the opinion herein delivered, and according to law.

Absent, Mr. Justice SCOTT.

## POND ET AL. VS. OBAUGH ET AL.

A party conveys property by deed, duly recorded in another State, to a trustee for the benefit of his wife and children; afterwards, upon the death of his wife, he removes to this State, and sells the property to a third person: the purchaser connot defend as "an innocent purchaser," when it appears that he was informed that the children had a claim to the property, and was referred to one who could give further information.

*Appeal from Hot Spring Circuit Court in Chancery.*

Hon. JOHN C. MURRAY, Circuit Judge.

TRAPNALL, for the appellants.

WATKINS & CURRAN and GALLAGHER, for appellees.

Mr. Justice WALKER delivered the opinion of the Court.

On the 8th of January, 1833, William Pond, a resident of Edgefield District, South Carolina, by deed conveyed to Albert Rambo, in trust for the use and benefit of his wife and the complainants, their infant children, a negro woman, Maria, and her three children, Stephen, Emily, and Harriet, to be held exclusively for the benefit of his wife during his life, or in case of his death, her widowhood: and, at the death or marriage of the wife, to be equally divided amongst her children.

The deed was, on the 8th of April, 1833, duly acknowledged and entered of record in the Recorder's Office of said District. In the autumn of the year 1839, Mary Pond, the wife of William Pond, died in said District and State, and within a few weeks

thereafter, William, the father of complainants, removed with his family of children, to Hot Spring county, Arkansas, and brought with him all of said slaves, and the increase of the woman Maria, (except Stephen, who was mortgaged or left to secure the payment of a debt in South Carolina), where he continued to reside, and kept the slaves in his possession until August or September, 1844, when he sold to defendant, Barkman, the slaves Emily, Harriet, Tom, and Peter, children of Maria, for the sum of $900, and retained the other slaves in his possession.

James H. Obaugh married Matilda, one of the children of the defendant, William Pond, and they, with the other children, to whose use the property had been conveyed in trust, on the 18th of August, 1846, filed their bill in chancery, to enjoin the further sale or removal of said slaves, and to recover the whole of them, or their value.

The grounds for equitable relief, are not seriously controverted, and if the facts of the case show that the complainants are entitled to a decree, the decision of the court below was evidently correct.

It is clearly proven, that William Pond, (who was a dissipated man, and had already wasted, or made way with other property received by his wife), bought the woman Maria and her children, and paid for them by exchanging a negro man and other property received from his wife's relatives, and to prevent them also from being sold in one of his drinking sprees, conveyed them to Albert Rambo, in trust, for the sole use and benefit of his wife and children, his children to succeed their mother in the use of the property. At that time, William Pond was not in debt; and, although he denies that this woman and children were paid for with property that came to him in right of his wife, he substantially admits the execution of the deed, and taking his account of the purpose, for which it was executed, as true, it could not change the legal effect of the deed. But, upon all these points, the proof, we think, clearly in favor of the complainants. The deed of trust was not only proven by the transcript of the

record from South Carolina, where it had been recorded, but the original was exhibited and proven by the subscribing witness.

By the terms and legal effect of the deed, at the death of their mother, Mrs. Pond, the slaves were to become the property of the complainants. This is conclusive upon William Pond. Barkman claims as an innocent purchaser under him without notice. In order to make this defence good, a defendant who relies upon it, must, in his answer, not only deny notice at the time of his purchase, but also down to, and at the time of, the payment of the purchase money. *Byers & McDonald vs. Fowler et al.*, 6 *Eng.* 220. This Barkman has not done. Indeed, his answer is not a positive denial of all notice prior to his purchase: but, even if it did, and also until after the payment, we think the proof sufficient to overturn the answer in this particular. It is in proof, that he made inquiry, and was informed that complainants had a claim to the slaves, and although his informant could not give him certain information as to the validity of the claim, he was referred to one who could give further information. Barkman seems, before this, to have had sufficient information to put him upon inquiry, and was then endeavoring to ascertain the facts. Upon receiving further information, said he would not buy the negroes. So that in any event the notice was fully sufficient to put him upon inquiry, and as he is thereby deprived of this defence, he stands in no better condition than William Pond, of whom he purchased.

Under all the circumstances and facts of the case, we are satisfied that the complainants were clearly entitled to recover the slaves, or if made way with, their value.

The decree of the court below in favor of the complainants against Barkman for the value of the slaves, which it seems, he had made way with, and against William Pond for the slaves in his possession, is well sustainted by the evidence under the case made by the bill. Let the decree be affirmed.

Absent, Mr. Justice SCOTT.

## ROBINSON VS. MACE.

The law requires much strictness in pleas of set-off, and the plea should contain not only all the requisites essential to the validity of other pleas in bar, but must describe the debt intended to be set-off with the same certainty, as in a declaration; and so, must aver that the debt set-off was a subsisting demand, not only at the commencement of the action, but at the time of plea pleaded.

A witness has such a direct interest in the event of a suit, as will disqualify him, if the record would be the instrument of securing to him some advantage in a future proceeding; as where he is called to prove the value of work done by the plaintiff for defendant, and discloses that he was employed by plaintiff to assist him in such work, and was to receive one-half of the sum paid by defendant.

Where a party enters into a contract to make and burn brick, he will be held to skill and diligence in the execution of his undertaking; and upon failure to make and burn the brick in a workmanlike manner, the damages may be recouped in an action by him for the value of the work and labor.

*Writ of Error to the Circuit Court of Prairie County.*

This was an action of *assumpsit* for $300, instituted by Mace against Robinson, for work and labor in making and burning brick, and determined in the Prairie Circuit Court, at the February Term, 1853, before the Hon. WILLIAM H. FEILD, Circuit Judge.

The defendant pleaded *non assumpsit* and *set-off*: the plea of set-off "alleged that, at and before the commencement of his said action plaintiff was indebted to the defendant in the sum of seventy-four dollars and eighty cents, a greater amount than he is indebted to said plaintiff." A demurrer to this plea was sustained. The defendant gave the plaintiff notice that on the trial of the cause, he would prove his set-off; but the notice was stricken from the files, because it was signed neither by the defendant nor his

attorney: a motion by defendant to amend the notice in this respect, was overruled and he excepted.

The defendant gave the plaintiff the following notice: "I shall introduce proof to show the character in which you contracted, and your contract to mould, set, and burn a kiln of an hundred thousand bricks for me in the summer and autumn of the year 1850, for the price of one dollar and fifty cents per thousand, and to show that care and skill were to be bestowed by you thereon, and that good bricks were to be made. Also, to show that there was neither care or skill used by you in the moulding, setting and burning of the kiln, you pretended to burn for me; that the said kiln did not contain one hundred thousand, but only seventy-nine thousand bricks, and that said bricks were worthless," &c.

The verdict and judgment being for the plaintiff, the defendant moved for a new trial, which was overruled and he excepted, setting out the testimony, which conduced to prove that the bricks were badly burned, and that but a small portion of the kiln was of good brick. The bill of exceptions states that the defendant asked the court to instruct the jury: "That if the jury believe, from the proof in the cause, that the plaintiff took charge of the job of brick-making, as brick mason, and head workman, for the purpose of making and burning a kiln of brick, the position he assumed, threw upon him, the duty of bestowing the skill and diligence necessary to the right construction and burning of the kiln. And in such case, if the defendant sustained damages by reason of the want of proper skill and diligence in the plaintiff, the damages sustained thereby on the part of defendant, may be deducted by the jury from the amount of the verdict that they may find for the plaintiff." This instruction, the court refused to give in charge to the jury, but charged the reverse. And the court, also, charged the jury, amongst other things, as follows: "That in this action they would consider all the evidence in the case, and if the plaintiff was entitled to recover, he was entitled to recover the full value of his services in this matter of brick making, and of this, the jury will judge from the evidence."

ENGLISH, for the plaintiff. It is submitted: 1st. That the court erred in admitting McKnight to testify; it appearing that the amount he was to receive of the plaintiff for his services, depended upon the amount which the plaintiff recovered from the defendant. He was, therefore, interested in enlarging the amount of recovery, or at least in a full recovery of wages for the plaintiff. 1 *Greenl. Ev.*, *secs.* 386 to 403.

2d. The court erred in refusing to charge the jury, as asked by Robinson: that he had a right to recoup any damages he may have sustained by reason of the want of skill or diligence, on the part of Mace, in making and burning the brick kiln, against the demand of Mace for wages. See *Ive vs. Epps*, 22 *Wend.* 155; *McAllister vs. Rob*, 4 *Wend.* 483; *S. C.* 8 *Wend.* 109; *Hill vs. Bannister*, 8 *Cow.* 31; *Battlerman vs. Peirce*, 3 *Hill* 171; *Van Epps vs. Harrison*, 5 *Hill* 63; *Wheat, use &c. vs. Dotson*, 7 *Eng.* 699.

Such damages could not be made the subject of set-off, and the modern doctrine is not to drive the defendant to a cross action. See authorities above cited.

BERTRAND, for the defendant.

Hon. THOMAS JOHNSON, Special Judge, delivered the opinion of the Court.

The points presented in this case, are brought before this court, by the motion for a new trial, filed in the court below by the plaintiff in error. The first that is considered material to determine, relates to the sustaining of the demurrer to the plea of set-off, interposed by the plaintiff. The plaintiff, upon filing his plea of set-off, sent out a notice to the defendant, to apprize him of the fact that he intended to introduce, upon the trial, evidence to establish his demands as set up in his plea. The court, upon the motion of the defendant in error, struck out the notice for the want of the signature of the plaintiff; and this is assigned for error. We do not conceive it necessary to investigate this

ground of objection, since it is in no way legitimately involved. A set-off may be given in evidence under the general issue, or pleaded in bar. But when it is intended to be insisted on in evidence, notice shall be given, at the time of pleading the general issue, of the demand so intended to be insisted upon, and upon what account the same became due. See *Dig.*, *p.* 938, *sec.* 4. The plaintiff has not confined himself to his notice, but pleaded specially his plea of set-off; and, consequently, if that plea were good with a legal notice, it would be equally so without it. The question then recurs as to the sufficiency of the plea, considered without reference to the notice. If two or more persons are mutually indebted to each other by judgments, bonds, bills, notes, bargains, promises, accounts, or the like, and one of them commence an action against the other, one debt may be set-off against the other, although such debt may be of a different nature. See *Dig.*, 937, *sec.* 1. There can be no doubt but that the matter set up in the plea, is such as may be offered by way of set-off, it being an actual subsisting indebtedness, and not a mere possibility and sounding in damages, which are wholly unliquidated. But there exists more doubt in relation to the form of the plea interposed in the present instance. The law requires much strictness in pleas of this nature, as they constitute a sort of new case brought for the first time by the defendant against the plaintiff; and, consequently, the party pleading takes upon himself all the responsibilities of one who, for the first time, puts the law in motion. He not only undertakes to defend against a claim preferred against him by the plaintiff, but he also attempts to thwart him in his recovery; and, in some instances, to recover against him by producing an entirely new case, and one that has no connection with the one sought to be enforced against him.

In point of form the plea of set off should not only contain all the requisites essential to the validity of other pleas in bar, but must describe the debt intended to be set-off, with the same certainty as in a declaration for the like demand. See *Chit. plead.*, *vol.* 1, *p.* 562. The plea under consideration, simply avers that

the plaintiff was indebted to him, the defendant, in the sum of seventy four dollars and eighty cents, at, and before the commencement of the suit, but is utterly silent as to whether it was due and owing or not, at the time of the plea pleaded. It most unquestionably would not suffice for a declaration simply to allege an indebtedness, at a time prior to the institution of the suit, and to remain silent as to the existence of that fact at that period. Pleading the plea of set-off is the first presentation of the claim of the defendant against the plaintiff, and if not due and owing at the time it is introduced, in contemplation of law it is utterly unfounded; and, consequently, affords no defence against the action. The demands set up by way of set-off, may have been due and owing from the plaintiff to the defendant at the time of the institution of the suit, and yet the last cent may have been paid and discharged before the filing of the plea. Indeed, this is the legal presumption, as he has failed to charge otherwise in his plea; it being a rule of law that the construction is to be taken most strongly against the party pleading, upon the supposition that he has made the most favorable case for himself that the circumstances would permit. We think it clear, therefore, that the plea was demurrable for this reason; and that, consequently, the Circuit Court committed no error in sustaining the demurrer to it. It is also contended, that the court below erred in permitting the defendant in error to read a paper, purporting to be a bill of particulars, and a judgment of a justice of the peace, founded upon it, rendered in favor of the plaintiff and against the defendant. This was manifestly error, for there was no issue between the parties, under which the evidence could have been admissible. The plea of set-off under which the plaintiff proposed to introduce the bill of particulars, as appears from his notice, had been swept from under him by the demurrer; and, consequently, the defendant had no legal presumptions to rebut by introducing the judgment.

The next enquiry is, as to the competency of the witness, McKnight, to testify in behalf of the defendant. The objection was made at the trial, and overruled by the court. Where the inter-

est is of a doubtful nature, the objection goes to the credit and not to the competency of the witness. A party has such a direct and immediate interest in the event of a cause as will disqualify him, when the necessary legal consequence of a verdict will be to better his situation by either securing an advantage or repelling a loss: he must either be gainer or loser, by the event. A witness is also interested, if the record would be the instrument of securing to him some advantage, or of repelling some charge against him, or claim upon him, in a future proceeding. See *Stark. Ev., vol.* 2, *p.* 747–8. The witness stated, upon his *voir dire*, that he first went to the defendant's to assist Mace in the business of brick-making, under an agreement with Mace, and for no certain wages; that he worked under that agreement about two weeks, when he and Mace changed it, so that he (witness) instead of wages for time, was to have the half of the amount to be paid from Robinson for the making of the brick. Here is an interest, that is direct and certain, and the record of the judgment, if for Mace, would most clearly have been an instrument by which an advantage would have been secured to the witness. He was to have the one-half the amount which Robinson should pay, and the object of introducing his testimony, was to fix and determine that amount. The court, therefore, erred in permitting him to testify in the cause.

We now come to consider of the last objection, which we conceive to be material, and that relates to the instruction of the court in reference to the question of skill and diligence. It appears, from the testimony of McKnight, that Mace, the defendant in error, bossed the job, and had charge of it as a brick-mason. It is questionable whether the term "brick-mason," is sufficiently comprehensive, properly and technically speaking, to embrace brick makers and brick burners: yet it is obvious, from the expression used, and the other evidence in the cause, that the defendant held himself out to the plaintiff as a man fully competent to make and burn brick; and, if so, the law is well settled that he will be held to skill and diligence in the execution of his undertaking. This

being the case, it follows, as a necessary consequence, that if he did not use such skill and diligence as were necessary to make the brick, and to set and burn them in a proper and workmanlike manner, he was guilty of a breach of the contract, on his part, and that he could be held liable in a cross action for damages commensurate with the injury thus sustained by the plaintiff. But he has not seen fit, on this occasion, to resort to his cross action; but, on the contrary, has introduced his proof, and claims, as a defence to the present action, that he has a right to recoup the damages which he may be entitled to for a breach of the stipulations on the part of the defendant. This he most clearly had a right to do. The damages claimed for a failure to exercise proper skill and diligence in the making and burning of the brick, are not sought to be recovered by way of set-off, but by way of recoupment. Recoupment differs from set-off, in two essential particulars: that is to say, in being confined to matters only arising out of and connected with the contract, upon which the suit is brought, and in having no regard to whether or not such matters be liquidated or unliquidated. See 7 *Eng. R.* 703; *Wheaton, use &c. vs. Dotson.*

We entertain no doubt of the right of plaintiff in error to recoup any damages which he may have sustained, by reason of a breach of the contract concerning the making and burning of the bricks in question; and that, consequently, the court erred in otherwise instructing the jury. In respect to the propriety of striking out the notice for want of the signature of the plaintiff in error, or of his attorney, we will merely remark, that that was a matter of practice, and within the sound discretion of the Circuit Court, and as there is nothing indicating an unwarrantable or arbitrary exercise of that discretion, it cannot be regarded as error.

The bill of exceptions in this case, has been very inartificially framed, and has given the court much trouble and extreme labor, to ascertain the true position of the parties, and to apply legal principles to the facts therein presented. We are of opinion that error has intervened in the court below, and that the cause ought

to be, and is hereby reversed, and remanded to be proceeded in, according to law, and not inconsistent with this opinion, and that both parties have leave to amend their pleadings, if they shall desire to do so.

Before Mr. Justice WALKER, and Hon. THOMAS JOHNSON, Special Judge.

Mr. Ch. Justice ENGLISH not sitting in this cause.

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## BOOTHE VS. ESTES.

The proceedings of a justice's court, to be valid, must show affirmatively that the subject matter of the suit is within the jurisdictional limits prescribed for the court; but when the judgment and proceedings are brought collaterally in question, and the jurisdiction of the subject matter and person or thing, affirmatively appears, they will not be held null and void for such irregularities as would merely be grounds of reversal.

An account against the defendant in favor of the plaintiff, for an "account bought of the estate" of a deceased person, held to be a sufficient foundation of a suit by attachment before a justice — as the plaintiff might by proof on the trial, have established a direct liability on the part of the defendant for the amount of the account.

A judgment in attachment, when questioned collaterally, will not be held null and void, because, the affidavit stated that the defendant *"conceals or absents himself,"* &c.

The correct practice, on a judgment in attachment, is for the execution to direct the officer to sell the property taken in the attachment: but though the execution be generally against the goods, &c., of the defendant, the informality will not avoid the sale, if the officer sells the property attached and none other.

Where property is left with another under an agreement to deliver it when demanded, or *account for it*, even if the bailee had the right to elect to retain and pay for it, his refusal to deliver, and denial of the bailor's title, show a conversion of the property, and not an election to retain and pay for it.

*Appeal from the Circuit Court of Lawrence County.*

Hon. BEAUFORT H. NEELY, Circuit Judge.

FAIRCHILD, for the appellant. That the refusal to deliver the cow and calf on the written demand of Boothe, and the reasons given for such refusal, were a conversion. 2 *Saund.* 47 *f.*, 47 *p.*; *Parker vs. Goden*, 2 *Str.* 813; *Grant vs. King*, 14 *Verm.* 367.

The account upon which the judgment in the attachment was rendered, might have been the ground of a good cause of action against Tarter for Mrs. Crawford; she may have purchased it at his request and on his promise to pay: Tarter's liability to her on the account was a matter of evidence.

That the affidavit for the attachment was sufficient. *Slicker vs. The State*, 13, *Ark.* 397; *Castillan vs. Jones*, 1 *Seld.* 164.

The Circuit Court had no right to determine in this collateral way, upon the jurisdiction of the justice of the peace.

BYERS & PATTERSON, for the appellee. From the evidence, it is clear that Boothe could not maintain the action of Trover, as it appears that the defendant, under his contract, had a right to retain the property, and upon demand of the delivery being made and his refusal, he became liable, under his contract, to account for its value; and his election to retain and pay for the property, was made upon the demand and refusal to deliver, and Boothe's remedy was upon the contract for the value.

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

TROVER, brought by Boothe againsts Estes, for the conversion of a cow and calf. The cause was tried upon the pleas of not guilty and limitation; verdict for the defendant, and brought up

on exceptions taken by the plaintiff to instructions given by the court to the jury. The evidence upon which the instructions were based, is, in substance, as follows:

Boothe claimed the property, by virtue of a purchase at a constable's sale, under proceedings by attachment, before a justice of the peace, in favor of Letitia Crawford, against Robert Tarter, and introduced a transcript thereof as evidence. From this, it appears, that on the 29th day of February, 1848, Letitia Crawford filed for suit before a justice of the peace of Lawrence county, an account as follows:

1846. "*Robert Tarter*,

To LETITIA CRAWFORD, *Dr.*

Account bought of the estate of Colby Crawford, deceased, $47 50."

On the same day, the following affidavit was filed before the justice:

"I, Ferguson Boothe, being duly sworn, do depose and say, that Robert Tarter is justly indebted to Letitia Crawford, in the sum of forty-seven dollars and fifty cents, which sum is now due and owing, and that the said Robert Tarter, as I believe, so *conceals or absents* himself that the ordinary process of law cannot be served on him; and that unless an attachment shall be issued, there is reason to believe that said debt will be lost or greatly delayed."

Thereupon, the justice issued an attachment against the goods, *&c.*, of Tarter, with a clause of summons for him, and garnishment against one Faulkenburg, under which the constable attached the cow and calf in controversy, executed the process on the garnishee, and returned *non est* as to Tarter.

On the return day of the attachment, (11th March, 1848,) the justice fixed the 7th of April following, as the day of trial, made an order for the defendant to appear on that day, and answer the

plaintiff's demands, &c., and delivered a copy thereof to the plantiff, to be posted up in public places, &c., as required by the statute. *Digest, ch.* 16, *sec.* 10, 11, 12.

On the day fixed for the trial, it appears, that the plaintiff in the attachment appeared, and proved that the notice had been duly posted, and the defendant in the attachment failing to appear, the justice proceeded to render judgment against him for $47 50, the amount of the plaintiff's demand; and, also, rendered judgment against the garnishee, upon his answer of indebtedness to Tarter, for $18.

Afterwards, the plaintiff in the attachment filed with the justice a bond of indemnity to Tarter, as required by *sec.* 36, *ch.* 16, *Digest;* and, thereupon, the justice issued an execution upon the judgment against Tarter, commanding the constable to levy the debt and costs "*of the goods and chattels of the said Tarter, according to law.*" The execution was against his goods generally, and not specifically to sell the property attached.

Under this execution, the constable levied upon, and sold the cow and calf in controversy, and Boothe, the plaintiff in the action of Trover, purchased them for $10, on the 11th May, 1848.

Lasater, the constable, testified, that when he attached the cow and calf, he found them in the possession of Estes, who was the father-in-law of Tarter, and who pointed them out as the property of Tarter. That he, (the witness,) permitted them to remain in the care of Estes, after they were attached, until the day of sale under the execution, when Boothe bought them.

That Boothe appeared as the agent of Mrs. Crawford, at the trial of the attachment suit before the justice, and managed the case for her, and on the morning of the day of sale, the witness received a note from her directing him to pay the proceeds of the sale to Boothe.

The constable further testified, that after Boothe had purchased the cow and calf, which were sold at the house of Estes, a conversation occurred between Boothe and Estes, to the effect following:

Estes said that the cow was one that he had given to his daughter, the wife of Tarter. That Tarter was then gone, but would soon be at home, and that Tarter would not take fifty dollars for the cow if he were there.

Boothe replied that he did not want the cow, that she could stay there until Tarter got back, when, if he chose, he could pay the money due Mrs. Crawford, on a judgment she had against him, and if he did not do so, Estes could *deliver* the *cow* to Boothe, *or account for her*, when called upon by Boothe thereafter, to which Estes assented, and the cow was left with him by Boothe, and her calf was also left upon the same condition. They were worth $10.

Tucker, a witness for plaintiff, testified that in the winter of 1849, he took an order from Boothe to Estes, for a certain cow and her increase, and presented it to him. Estes refused to give up any cow or cattle, and said that Boothe had no cattle there. That a cow had been left there by him, which once belonged to Tarter, and was sold, as his property, to Boothe, under an execution, in favor of Mrs. Crawford, but that Tarter had been back, got a new hearing of the case, and the cattle had been decreed to be returned to him. Witness requested Estes to protest the order, to protect him (the witness) in his dealings with Boothe. Estes told witness to do what he pleased with the order, and he then, in the presence of Estes, and with his consent, endorsed upon it, "*Protested*—THOMAS ESTES." Witness did not demand of Estes pay for the cow and calf, or their value, but presented the order to him, copied below, and he refused as above stated, &c.

The plaintiff read the order to the jury, which follows:

"Mr. THOMAS ESTES: *Sir*—Send me the cow and yearling that I purchased at the sale of Robert Tarter, under the execution, and left with you, and all the increase, by Mr. Henry G. Tucker; and, in so doing, you will oblige yours, &c.,

F. BOOTHE."

*Dec. 20th*, 1849.

Endorsed, "Protested, THOMAS ESTES."

The court charged the jury, in effect, that the whole proceedings in the attachment suit, were null and void, and that the plaintiff (Boothe) derived no title to the cow and calf, by virtue of his purchase, under them.

This conclusion is based upon three objections, which are specified in the instructions of the court.

1st. That the account filed before the justice as the foundation of the attachment suit, imported, on its face, no legal liability on the part of Tarter to Mrs. Crawford—no cause of action between them.

2d. That the attachment affidavit being in the alternative, that is, that Tarter *concealed* or *absented* himself, was no affidavit at all, and did not authorize the issuance of the attachment.

3d. The execution ran against the goods of Tarter generally, and not specifically against the property attached.

Three of the instructions given by the court to the jury, were upon another point in the cause, and to this effect:

That, if by agreement between the parties, Boothe left the cow and calf with Estes, to be surrendered by him when thereafter demanded, or *accounted* for, this gave to Estes the right when the demand was made, either to return the cattle to Boothe or retain them, and account for their value: and that having refused to surrender them when demanded, he thereby made his election to keep them, and pay their value; and hence, Boothe could not maintain Trover, but would have to resort to an action upon the contract, for the value of the cattle. In other words, upon the state of the proof, the action should have been *ex contractu*, and not *ex delicto*.

It is well settled, by the decisions of this court, that presumptions are not to be indulged in favor of the jurisdiction of a justice's court. It being a court, not of general, but of special and limited jurisdiction, its proceedings to be valid, must affirmatively show that the subject matter of the suit is within the jurisdictional limits prescribed for the court. *Reives vs. Clark*, 5 *Ark.* 28; *Anthony ex parte*, *ib.* 366; *Pendleton vs. Fowler*, 1

*Eng. R.* 41; *Levy vs. Sherman, ib.* 182; *Latham vs. Jones, ib.* 372; and subsequent cases based upon these decisions.

But surely where the judgment and proceedings of a justice's court are brought collaterally in question, and the jurisdiction of the subject matter and person or thing, if the proceedings be *in rem*, affirmatively appear, they are not to be held null and void for such irregularties, as would merely be grounds of reversal, &c., in a direct proceeding to review them. See *Evans & Black vs. Percifull*, 5 *Ark. R.* 428, and authorities cited.

In the attachment suit, introduced collaterally as evidence in the case before us, the foundation of the action was a money demand upon an open account, for a sum less than one hundred dollars, and within the jurisdiction of the justice of the peace. It appears, also, that the property attached, in its character, was subject to such attachment, and found within the territorial limits of the jurisdiction of the justice.

The jurisdiction of the subject matter, and of the *thing* affirmatively appearing upon the face of the proceedings, are the objections urged against their validity, mere errors; or, are they such as to render the whole proceedings utterly null and void?

1st. The first objection is, that the account, filed as the foundation of the suit, imports, upon its face, no legal liability on the part of Tarter to Mrs. Crawford.

In *Levy vs. Sherman*, 1 *Eng.* 182, and *Latham vs. Jones, ib.* 371, (in both of which cases the validity of the proceedings were directly questioned on appeal) this court held that the account, or instrument filed with the justice, as the foundation of the suit, must disclose, upon its face, a right of action in the plaintiff against the defendant, or be such as to admit of evidence *aliunde* of such right of action.

In this case, the demand filed with the justice, was made out in the name of Mrs. Crawford against Tarter, and purports to be for the amount of an account bought by her of the estate of Colby Crawford, deceased, upon Tarter.

Accounts not being assignable by law, so as to vest the legal

right of action in the assignee, had the original account been filed in the name of Colby Crawford, or his administrator, against Tarter, the suit being in the name of Mrs. Crawford, as plaintiff, a different question would have been presented for consideration than the one before us.

But it seems that the original account was not filed, but a new account made out in the name of Mrs. Crawford, for the gross amount of the original account. Could she, by any possible proof, have established upon the trial a liability on the part of Tarter, directly to her, for the amount of the account? Most unquestionably she could. Had she proven, for example, that she purchased of the estate of Colby Crawford an account upon Tarter for $47 50, and that he afterwards undertook, and promised to pay the amount of it to her, his liability to her would thereby have become direct, and the discharge of his liability to the original creditor by her, would have been a sufficient consideration to make his promise to her legal and binding upon him. The case, therefore, is within the rule laid down in the decision above referred to.

2d. To authorize an attachment to be issued by a justice, the statute (*Digest. ch.* 16, *sec.* 1,) requires an affidavit to be made by the creditor, or some one for him, that the defendant is indebted to him in a sum not exceeding $100, "that there is reason to believe that the defendant is about to remove himself, or his effects, out of the State, *conceals* himself so that the ordinary process of law cannot be served on him, or is a non-resident of the State, &c.

The affidavit in question is substantially in the form prescribed by the statute, except in this, that it states that Tarter "*conceals or absents himself*," &c. There is a material difference between *concealment* and *absence;* and had Tarter, or any one for him, appeared before the justice before judgment, and presented this objection in the proper mode, or had it been raised in any direct proceeding to review the judgment of the justice, it might, perhaps, have been held to be an error, but surely the whole pro-

ceedings are not to be held null and void when questioned collaterally, on account of such irregularity.

3d. It is objected that the sale under the execution was void; because it ran against the goods generally of Tarter, and not the particular property attached. The proceeding by attachment is a proceeding *in rem*, (when the defendant is not served with process) to condemn the property attached to the satisfaction of the debt of the plaintiff. It is doubtless the correct practice for the execution to direct the constable to sell the property taken in the attachment, because when the judgment is exclusively *in rem*, no other property could legally be sold under the execution. But, in the case before us, although the execution was against the goods of Tarter generally, the constable sold the attached property, and none other, and the informality of the process would not be sufficient to avoid the sale.

We think all the instructions given by the court to the jury in regard to the validity of the attachment proceedings, were incorrect in not taking the proper distinction between that which is null and void, and that which is merely erroneous.

4th. The three instructions given by the court to the jury, in reference to the agreement between Boothe and Estes, were also erroneous. According to the evidence, Boothe left the cow and calf with Estes for the purpose of allowing Tarter to redeem them, when he returned home, by paying the amount due upon Mrs. Crawford's judgment. If he did not choose to do so, Estes was to deliver the cattle to Boothe, when thereafter demanded, "*or account for them.*"

Let the testimony be put in the strongest view for Estes—let it be assumed that his agreement to return the cattle to Boothe, *or account for them*, gave him the right of election, when the demand was made, to restore the cattle, or keep them and pay their value, as contended by his counsel. When Tucker, the agent of Boothe, made the demand, did Tarter make his election? Did he say that he had concluded to keep the cattle and pay for them? Not at all; but, on the contrary, he merely pro-

tested the order of the plaintiff, declaring that he had no cattle there, and refusing to give up any, saying that Tarter had returned, obtained a new hearing and a decree, that the cattle be restored to him, but no evidence of such decree was introduced.

The refusal of Estes to deliver the cattle, when demanded, and his denial of the title of the plaintiff, surely did not conduce to prove that he elected to keep them, and pay the plaintiff for them under his agreement, but conduced to show such conversion of the cattle, on the part of Estes, as to entitle Boothe to maintain Trover.

The judgment is reversed and the cause remanded for a new trial, &c.

Absent Mr. Justice SCOTT.

## DICKSON VS. RICHARDSON AD.

R., by written contract, sold to D. his improvement on unsurveyed public land, binding himself to prove up his pre-emption right to a quarter section, embracing his improvement; and if obtained, make a valid title to D. Previous to the written agreement, R. stated to D., who made a personal examination of the land, and was aware of R's. rights, that he claimed the adjoining lands, supposed to be 640 acres, to conditional lines: and that by common understanding, this claim would be respected. The claim to the adjoining lands was not respected, and the quantity fell short of that supposed: the pre-emption was not proved up by R., who applied to do so, because, by the sale to and possession by D., he alone had the right of pre-emption, which he proved up. HELD, 1st. That there was no such deceit or misrepresentation as would affect the validity of the contract: 2d. That as D. obtained the right to a pre-emption through his purchase from R., it was equivalent, in equity, to a proving up of the pre-emption by R., and transfer of the title to D.

As failure of consideration is a good defence at law, a bill in equity to enjoin a judgment at law, on such plea, should allege that no defence, whatever, was made at law. *Arrington vs. Washington*, 14 *Ark.* 218.

*Appeal from the Circuit Court of Lafayette County in Chancery.*

Hon. SHELTON WATSON, Circuit Judge.

PIKE & CUMMINS, for the appellant.

CONWAY, for the appellee.

Mr. Justice WALKER delivered the opinion of the Court.

The pleadings and proofs in this case, when fairly considered, present the following state of case:

In November, 1841, Henry Richardson resided on Red River, in Lafayette county, Arkansas, and was the occupant and owner

of a small improvement, consisting of the ordinary log-cabins for a family residence, and out-houses, and some twenty or thirty acres of cleared land; and, by a neighborhood arrangement, claimed not only the immediate tract on which his improvements were situated, but also the adjoining lands to conditional lines, recognized by the adjoining settlers. The public lands were then unsurveyed, and it was not known what quantity there was embraced within this claim, but it was supposed to be about 640 acres, or more.

John Dickson, a resident of the State of Louisiana, desired to purchase a tract of not less than 640 acres, on which to open a cotton farm, and came to Richardson's to purchase his improvement. He examined the improvement, and the adjoining lands, within the bounds of the claim, and was assured by Richardson, that, by common understanding in the neighborhood and country around, that this claim would be respected: but Richardson did not pretend that he had any legal or equitable right to more than the immediate claim on which his improvement was situated. On that, he claimed to be entitled to a pre-emption right, under the laws of the United States. Relying upon this, and after a personal examination of the land, its quality, situation, and quantity, as well as the nature of Richardson's claim to the lands within the conditional lines, as shown him, Dickson consented to buy the claim, and thereupon he and Richardson entered into the following written agreement:

"Know all men by these presents, that Henry Richardson, of the county of Lafayette, and State of Arkansas, of the first part, and John Dickson, of the Parish of East Feliciana, in the State of Louisiana, of the second part, witnesseth: that the said Henry Richardson of the first part, for, and in consideration of the sum of four thousand eight hundred and eight dollars, to him to be paid by the said John Dickson, as hereinafter stated, have this day granted, bargained, sold, and delivered, unto the said John Dickson, his heirs, or assigns, all my right, title, claim, interest and possession, I have to a certain improvement on the public

lands of the United States, situate, lying, and being in the county of Lafayette, on the west side of Red River, being known as the place and improvements on which I, the said Richardson, now reside. And the said John Dickson, of the second part, promises and binds himself, his heirs, &c., to pay to the said Henry Richardson, for the consideration aforesaid, the sum of two thousand dollars, in good merchantable cotton, on the bank of the Mississippi River, at Port Hudson, to be valued at ten cents per pound, on the first day of January, 1842, and the remainder of two thousand eight hundred and eight dollars, the said Dickson promises, and obligates himself to pay to the said Richardson, in two equal instalments, in cotton, delivered at said place, on the Mississippi River, to say, fourteen hundred and four dollars the first day of January, 1843, and fourteen hundred and four dollars, on the first day of January, 1844, in merchantable cotton, at nine cents. per pound.

And the said Henry Richardson, for the consideration aforesaid, binds himself, his heirs, executors, and administrators, to prove up his pre-emption right to a quarter section of land, embracing the aforesaid improvement, and if obtained from the United States, to make, or cause to be made, to the said John Dickson, his heirs, or assigns, a good and valid title in law, to said land. In witness whereof, the parties aforesaid have hereunto set their hands and seals, this 19th of November, 1841.

(SIGNED) HENRY RICHARDSON, [SEAL.]
JOHN DICKSON, [SEAL.

In pursuance of this agreement, Richardson delivered to Dickson possession of said improvement, upon which Dickson entered and enlarged the improvement.

After the lands were surveyed and became liable to entry, Richardson offered, and attempted to prove up a pre-emption, in virtue of his settlement and improvement upon the land, but was unable to do so, for the reason, that by transferring his claim to Dickson, he was unable to take the necessary oath to entitle him to enter the land; but Dickson, who succeeded him in possession,

was entitled to a pre-emption, and under it, entered the land on which the improvements were situated, upon the same terms, and at as little expense as if the pre-emption had been proven up in the name of Richardson, and transferred to him.

Dickson paid to Richardson the first note for two thousand dollars, and the sum of two hundred and fifty-two dollars and twenty cents on the other note, but refused to pay the residue of the two last payments, for the recovery of which a suit at law was commenced, and judgment rendered thereon in favor of Richardson.

To enjoin this judgment, Dickson brought this suit, and contends that he was deceived with regard to the quantity of the land; that he would not have purchased it, if he had known that there was, within the bounds of the claim, only about 465 acres. That the adjoining claimants did not adhere to the conditional lines shown him by Richardson, but that he has been compelled to buy in some of these claims, in order to protect his claim; that Richardson failed to comply with his agreement to prove up a pre-emption, and that by these means he has been deceived, and the consideration, for which he has executed said notes, has, to that extent, failed.

In this case, the contract was entered into with a full knowledge of the extent and nature of the claim that Richardson had to the improvement, and to the adjoining lands. There was no concealment or misrepresentation of facts which could affect the validity of the contract. The misrepresentations necessary to effect this, must relate to some matter of inducement to make it, in which, from the relative position of the parties, and their means of information, the one must necessarily be presumed to contract upon the faith and trust which he reposes in the representations of the other, on account of his superior information and knowledge with regard to the subject of the contract. For if the means of information are alike accessible to both, so that with ordinary prudence, the parties might respectively rely upon their own judgment, they must be presumed to have done so, or if they have not so informed themselves, must abide the consequences of their inattention and carelessness. *Yates vs. Pryor*, 6 *Eng.* 58.

The boundary of the claim was correctly given. The common understanding with regard to the respect paid to settlers' conditional lines, true. The land had not been surveyed, and the quantity embraced within the bounds of the claim, was mere matter of opinion, of which Dickson could inform himself as well as Richardson. But the truth is, that there was nothing sold by Richardson but his improvement and claim. The advantages which might result to the purchaser on account of the extent of the claim beyond the particular tract on which the improvement was situated, and the neighborhood agreement, no doubt entered largely into the consideration and inducement, on the part of Dickson, to buy; but this he took at risk, upon full information, and if he had been compelled to pay ten dollars per acre for the balance of the tract, within the bounds of the claim, we can not see how that could affect the validity of the contract. Richardson did not warrant against this, but Dickson knew, at the time, that it was public lands, and must be subjected to sale; and, consequently, he must risk the chances of buying it. The sale was made according to the written agreement, and we must look to that alone for the contract. It was the sale of a possessory right to an improvement on public lands, with an agreement to prove up a pre-emption on 160 acres, embracing the improvement. This was a valid contract, sanctioned and upheld by the repeated adjudications of this court, and recognized as property, and subject to be sold by the express legislation of our State.

This was not a contract, *not* to bid for public lands or to stifle competition, as is argued by counsel; and, therefore, the authorities cited are inapplicable. There was no agreement to forego bidding, or stifle competition, but there was merely the expression of an opinion, that, according to a common assent and understanding amongst the settlers upon the public land, they would respect the rights of each other, and whether adhered to or not, was solely the risk of Dickson, the purchaser, who must be presumed to have known that any one would have a right to buy or enter the lands, notwithstanding any express contract or agreement by Richardson to the contrary.

But the truth is, that with the exception of about 33 acres, Dickson did enter this whole claim, at $1 25 per acre, the Government price; and it is highly probable that he was enabled to do so by reason of his settlement claim bought of Richardson. It is true, that Richardson did contract to prove up a pre-emption on the land; and it is also true, that he did not do so: but the evidence abundantly shows that he was willing to do so, and did apply, at the proper land office, for that purpose, and was prevented from doing so for the sole reason that he had sold to Dickson, who succeeded to his rights, as a settler, and proved up his pre-emption, and entered the land in his own name. So that, notwithstanding Richardson did not make the proof, Dickson was in no wise the loser thereby, and got the land upon the very same terms, and as perfect a title as if Richardson had entered the land and conveyed it to him. Dickson, therefore, by his purchase, succeeded to rights which Richardson lost; and although the improvement made by Richardson on the land, and sold to Dickson, if estimated by the costs for making it, was comparatively small, compared to that given by Dickson for the claim; still, Richardson, by his sale, no doubt, lost not only his pre-emption, but his chance to secure a valuable tract of land, all of which was secured by Dickson, perhaps in value far above the price given for it by Dickinson. So that upon the whole equity of the case, we think the decree of the Circuit Court should be affirmed.

But there is, over and above this, another ground upon which this decree should be affirmed. The leading feature of this case, is, a failure of consideration. This defence could as well have been made in the suit at law as in equity. *Wheat vs. Dotson*, 7 *Eng.* 699.

The bill is silent as to whether such defence, or any defence was made or not; no exhibit is made of the record of the proceedings at law. It was the duty of the complainant, in stating his case, to have averred that he made no defence at law, or to have shown such facts as would excuse him for coming into chancery, notwithstanding such defence. *Arrington vs. Washington*,

14 *Ark. Rep.* 218. But the defendant avers that there was a defence to the action at law, made by the defendant in the suit at law, and no matter what that defence was, whether a plea of failure of consideration, abatement, or even a demurrer, the rule is, that by offering such defence, the defendant elects the tribunal before which he will make his defence, and, from that time, he must make his entire defence in that court, if such as may be heard by the court. *Arrington vs. Washington.*

Upon this ground, therefore, as well as upon the merits of the defence as offered in this court, we think the decree of the Lafayette court in chancery, should be affirmed.

Absent, Mr. Justice SCOTT.

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## PENNINGTON ET AL. VS. WARE & MILLER.

The application to file additional pleas, or amend pleadings, after the return term, is addressed to the sound discretion of the court; which will not be controlled, unless there be a palpable abuse.

In no case should a party, upon leave, be permitted to file an insufficient plea.

*Appeal from Bradley Circuit Court.*

Hon. THEODORIC F. SORRELLS, Circuit Judge.

YELL, for appellants.

PIKE & CUMMINS, contra.

Mr. Justice WALKER delivered the opinion of the Court.

This case came before us at the January term, 1851, (6 *Eng.* 745,) and it was then held, that the defence set up of a failure of

consideration, was insufficient, and the cause was remanded for further proceedings.

Upon the return of the case to the court below, an amended plea of failure of consideration was filed, to which a demurrer was interposed and sustained. But the demurrer of the plaintiffs to the defendant's third plea, was overruled, and the plaintiffs electing to rest upon their demurrer, judgment was rendered against them upon that plea. From this judgment the plaintiffs appealed; and, on the consideration of the case, (5 *Ark. Rep.*) it was held, that the plea was insufficient; and, consequently, that the Circuit Court erred in overruling the demurrer to it.

The decision of the Circuit Court was reversed, and the cause remanded. When the case came up for hearing, upon the mandate of this court, the defendants moved the court to permit them to file an additional plea, but the Circuit Court denied the defendants permission to file such plea, and thereupon the defendants withdrew the pleas then on file, and final judgment was rendered for plaintiffs; from which the defendants appealed.

The plea, offered to be filed, is made part of the record by bill of exceptions, and upon examination of which, it is found to be substantially, if not literally, the same plea heretofore interposed, and upon demurrer, held to be insufficient.

An application for permission to file additional pleas, or to amend pleadings, after the return term, is addressed to the sound discretion of the court below, and as we have repeatedly held, it is only where there has been a palpable abuse of such discretion, that this court would entertain error to limit or control it. But, in this case, the discretion was properly exercised. In no case should a party, upon leave, be permitted to file an insufficient plea: the tendency would only be to delay the time of the court, and impose additional labor and costs upon the litigants. Let the judgment be affirmed.

Absent, Mr. Justice SCOTT.

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## HARRIS VS. KING.

A vendor of real estate receives payment of the purchase money, executes a bond to the vendee for title, and either remains in possession, or after delivery of possession to the vendee, is constituted his agent in respect to the land: he holds the naked legal title in trust for the vendee, and the statute of limitations is no bar to an action for a specific performance of the contract, after ten years from the time of its execution, if the vendor has done no act inconsistent with the vendee's title.

A purchaser of the vendor's interest in such real estate, at a sale by his administrators after his death, with a knowledge of the vendee's purchase, stands in the same situation as the vendor would if contesting the title of his vendee.

*Appeal from the Circuit Court of Randolph County in Chancery.*

Hon. BEAUFORT H. NEELY, Circuit Judge.

FAIRCHILD, for the appellant. To entitle a party to a decree for specific performance, all the material facts must be clearly proven. A stronger case must be made to establish a right to a decree than will be sufficient to resist the claim of specific performance. 2 *Story's Eq., sec.* 693, 742, 769; 12 *Ark.* 551, 552.

The complainant was barred from recovery by lapse of time.

The complainant's action was barred by the statute of limitations.

King, by bidding at the sale, is estopped from setting up any title in opposition to it, or paramount thereto.

Mr. Justice WALKER delivered the opinion of the Court.

Thomas O. Marr, a resident of the town of Pocahontas, Arkansas, sold to Samuel King, a citizen of the State of Missouri, two lots of land, situate in said town; and, thereupon, executed to King a penal

bond, in the sum of four hundred dollars, conditioned (after reciting the contract) to be void, if he, the said Marr, should make, or cause to be made, a good and sufficient title to the lots of land to said King. The bond bears date the 13th of March, 1841, and it does not appear, from the recitals in it, what the price, agreed upon for the lots, was, or whether paid or not. In the year 1849, Marr died intestate, and administration upon his estate was granted to John H. Imboden, and John P. Black, who, in obedience to an order of the Probate Court, on the 13th of May, 1851, offered said lots of land for sale to the highest bidder, and they were sold to the defendant, Henderson H. Harris, to whom they conveyed the right, title, and interest, of their intestate in said lots.

On the 11th of June, 1851, King filed his bill in chancery, setting forth the bond, and averring the payment of the whole of the purchase money, at the time it was executed. He claims title to the lots under his purchase from Marr, and charges that he expressly notified both the administrators and Harris, the purchaser, before and at the time the lots were sold, that they were his.

It is also alleged, that, at the time he made the purchase of the lots, they were delivered up to him, and that he constituted Marr, his agent, to rent the lots, (there being a small building upon one of them) and to pay the taxes.

The relief sought, is, that the sale to Harris may be set aside, his deed canceled, and that a title be decreed to him in accordance with the conditions of his bond.

The defendant Harris, who is alone contesting with the complainant for title, in his answer, admits that he purchased after notice of the claim of the complainant; but was encouraged to bid for the property by the after conduct of plaintiff, who was a bidder at the sale, and run the property up on him to near the amount bid by him for it. He denies all of the other allegations, and requires proof, and expressly relies upon the statute bar of limitation of ten years.

The bond was exhibited, and its execution proven, and a wit-

ness was called at the trial, who stated that he had heard Marr say that he was acting as agent for King, and paid taxes for him on town property, in Pocahontas, but did not learn what property it was, which, together with the bond, was the whole of the evidence.

This brief history of the case will suffice to present fairly the only question of law presented in the case, which is, whether the right of action was, or not, barred by limitation.

The suit was brought for a specific performance of a contract, which had been executed more than ten years before the suit was commenced, and as there was, by the terms of the contract, no money to be paid nor any precedent duty on the part of King to be performed before a deed from Marr was to be made, King's right of action to enforce a specific performance, was perfect from the date of the contract; and was, therefore, clearly barred by limitation, unless from the relative position of the parties and the nature of the contract, it is excepted out of the general rule, that courts of equity act in analogy to courts of law, in applying the statute bar to proceedings in equity, so that if the party had lost his remedy by a legal bar, he can have no remedy in equity upon the same cause of action.

One of the exceptions to this rule arises upon a distinction taken between cases which are exclusively within the jurisdiction of courts of equity, and such as over which the courts of law and equity have concurrent jurisdiction, leaving the former to depend upon the nature of the equity, as for instance, whether there is a trust involved in the issue, whilst in cases of concurrent jurisdiction, the same statute bar, applicable to the case, if brought at law, will be applied in bar to the remedy in a suit in equity. See *Kane vs. Bloodgood*, 7 *John. Ch. R.* 114.

And with regard to trusts, it would seem to be the settled doctrine, that the statute of limitation may be pleaded to implied trusts, but as regards express trusts, whilst the general rule would seem to be, that the statute bar could not be pleaded as to them, still, there seems to be a well founded distinction as to them.

In cases of continuing direct trusts, so long as the trustee continues to act under the trust, and the *cestui que trust* to recognize or sanction such acts, there would seem to be no limitation, because the acts done under the trust, are so many renewed and repeated acknowledgments of its existence, and of the rights under the trust. This is in analogy to the saving clause of the statute, which makes part payment, or a new promise sufficient evidence to repel the presumption of payment by the lapse of time, and to fix a new point from which the statute bar will begin to run. Chancellor KENT, in *Kane vs. Bloodgood*, said: "It does not bar, so long as the trust is a continuing and an acknowledged trust," and in *Raymond vs. Simonson*, 4 *Blackf.* 81, the court said: "So long as such a trust as that, (referring to direct continuing trusts,) is continuing as a trust, acknowledged or acted upon by the parties, the statute cannot apply. But so soon as the trustee denies the right of his *cestui que trust* and his possession becomes adverse, lapse of time from that period, may constitute a bar in equity."

Upon the same principle, it is held, that although the statute bar of twenty years may be pleaded to a bill to redeem a mortgage, yet still if within that time the mortgagee treat it as a mortgage, the statute bar is removed. *Story Eq. Pl., sec.* 757.

But with this and one other exception, to which we will presently refer, in cases of direct and continuing trusts where the trustee ceases to act, or has done no act, after the acceptance of the trust, to indicate the character or right in which he holds, if the equitable title is not sued upon until after the time within which a legal title of the same nature ought to be sued upon, to prevent a bar by the statute of limitations, courts of equity, acting by analogy to the statute, will not entertain it. *Story Eq. Pl., sec.* 757; *Moore & Cail vs. Anders*, 14 *Ark.* 640.

But with regard to trusts of this nature, there is one class of cases, which, from their nature, seem to have been excepted out of the rule, and against which the statute bar does not attach. It is the case of a trustee, who holds possession of an estate, where

such possession is not inconsistent with the title of the claimant. Lord REDESDALE, in *Hovensden vs. Lord Annesley*, 2 *Sch. & Lef.* 607, held: "That if the trustee is in possession of an estate, and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust*, and if the only circumstance be that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title. As in the case of a lessee for years, though he does not pay rent for 59 years, his possession is no bar to an ejectment, after the expiration of the term, because his possession is according to the right of the party against whom he seeks to set it up;" and this case is cited with approbation by Judge KENT, in *Kane vs. Bloodgood.* Such, also, was the decision in *Raymond vs. Simonson*, 4 *Blackf.* 82. And in *Graham's heirs vs. Nelson's heirs*, 5 *Humph.* 611, where the question arose upon a covenant for title, as in this case, the court said: Nelson's claim was not adverse to, but consistent with, the right of the complainants. "He had sold the entry 1121 to them, and in considering the right to the land in the present controversy, as being derived from that entry, he must be considered as their vendor of this land. The rule is, that after a sale, and before the conveyance of a legal title, the vendor is a trustee for the vendee, and whilst his possession can be reasonably supposed to be in accordance with the trust, it will be construed for the benefit of the *cestui que trust*, and the act of limitations will not operate."

We have thus briefly reviewed this interesting question, that we might show the distinct ground upon which (we apprehend), from the facts of the case before us, it must be decided.

The legal effect of the bond, conditioned to make a deed for the lots, as held by this court in *Smith vs. Robinson*, 13 *Ark.* 533, and *Moore & Cail vs. Anders*, 14 *Ark.* 634, imported a present sale which passed the ownership and beneficial interest in the land to the purchaser, and this court has repeatedly held, that the vendor held only the naked legal title in trust for the benefit of the vendee. In the case of *Walton vs. Coulter*, 1 *Mc-*

*Lean R.* 132, where a bond for title was executed, and the vendee had entered upon the land after the lapse of more than forty years, it was held, that the statute bar did not prevent a recovery. The court, in that case, expressly recognized the relation of trustee and *cestui que trust*, and said: "When the relation of trustee and *cestui que trust* exists on the death of the trustee, nothing but the legal estate descends to the heir. The equity is with the vendee, he has paid the consideration, and may be in the possession of the premises; would it not then be a most extraordinary rule that would bar the equitable claimant from obtaining the legal right—a right divested of all equity? Such a right is not within the mischiefs, against which the statute of limitations is designed to guard."

According to these authorities, Marr was a mere trustee, and held the legal title as such. It is not pretended that he asserted any title to the property after his sale to King. And it was altogether consistent with King's purchase, that he should at once have taken possession of the property, which, it appears, was not at the time tenanted. The bill expressly charges that the lots were delivered to King, at the time they were purchased, and that being a non-resident of the State, he made Marr his agent, to take care of the lots, and pay taxes upon them; and although this allegation is not admitted by Harris, the purchaser, the fact is of such a nature that he could not be presumed to know any thing of it, and is clearly within the rule that requires less strictness of proof to overturn it, than when the defendant answers touching a matter in regard to which he is presumed to be informed. The evidence of the only witness who was called, was, that Marr had admitted that he was the agent for King, and paid taxes for him on lots in Pocahontas. Taking the whole of the facts together, the residence of Marr at Pacahontas, where the lots were situated, the non-residence of King, and the nature of the answer and evidence, we incline to believe the evidence sufficient to establish an agency, and when that is the case, even if it had been shown that Marr did exercise acts of ownership over

the property, it is fair to presume that it was in his character as agent.

Under the circumstances of the case, as long as Marr did no act evidencing a claim or title adverse to King's, whether he held it as agent, after delivering it up to King, or retained the possession with the mere naked title in trust for King, we are of opinion, that the right of King to enforce a specific execution of the contract for a deed for the land, was not barred by limitation, even though more than ten years had elapsed between the execution of the bond and the commencement of the suit.

The administrators expressly declared, and gave notice, that they only sold such interest as Marr had, and Harris with a full knowledge of King's purchase, bought the interest of Marr; he, therefore, stands in no better situation than Marr himself would, if alive, and defending against the claim of King.

Entertaining these views, it follows, that the decree of the Circuit Court was correct, and should be, in all things, affirmed.

## SULLIVAN VS. HADLEY ET AL.

Although a deed of trust confers upon the trustee the power to sell, upon failure of payment, he may resort to equity to foreclose and sell the trust property; and perhaps that would be the more appropriate course, where, by a removal of the property, the notices of sale prescribed by the trust deed could not be given.

Where the complainant's remedy is barred by limitation on the face of the bill, and he fails to allege any matter in avoidance of the defence of limitation, and the answer contains a demurrer to the bill, the objection will be fatal on the hearing.

It is a general rule, that where there is a legal and an equitable remedy, in respect to the same subject matter, the latter is under the control of the same statute bar as the former.

Where a mortgage or trust is upon slaves, and the mortgager continues in possession after default of payment, the mortgagee or trustee has the same time to bring a bill to foreclose and sell, that is allowed him, under like circumstances, to commence an action at law for the possession of the slaves: and the limitation to such action is three years.

*Appeal from the Union Circuit Court in Chancery.*

Hon. SHELTON WATSON, Circuit Judge.

CARLETON, for the appellant. This deed in trust conveyed the legal title to James Hadley, and, by construction, possession also of said slaves, and his remedy at law, by replevin or detinue, was complete to get possession, had he been deprived of it, and in such case equity has no jurisdiction. *Story Eq. Pl.* 473; *Mitf. Eq. Pl.* 123; *Cooper Eq. Pl.* 124.

He cannot found the right to come into this court on the ground alone that an advertisement in the paper mentioned in the trust, *would be ineffectual*, without an allegation, that he had applied

to defendant for his permission to publish in some newspaper published here that would be effectual, and defendant refused. Especially as defendant had, as the trustee alleges, removed from Tennessee to this State with his knowledge and implied assent.

Said note or bond, and the said trust deed, were procured by fraud and falsehood. (This point was argued at some length).

Defendant pleads and relies on the statute of limitation. The *11th section of Revised Code, chap.* 41, *p.* 528, which went into force 20th March, 1839, and which was in force at the date and maturity of this contract, says: "All actions not included in the foregoing provisions shall be commenced within five years after the cause of action shall have accrued." Under this provision, a right of action on the bond and deed in trust in this case, was barred in five years from the 20th December, 1842, the date of the maturity of the bond or note, and deed in trust. *Watson vs. Higgins*, 2 *Eng.* 475; *Dickerson vs. Morrison*, 1 *Eng.* 264; *Baldwin vs. Cross*, 5 *Ark.* 510; *Couch vs. McKee*, 1 *Eng.* 484; *Campbell vs. Hawkins, ib.* 513; *Lucus vs. Tunstall, ib.* 443; *Dave ex., use, &c., vs. Sullivan*, 2 *Eng.* 449; *Walker vs. Bank Miss., ib.* 503; *Clark vs. Same*, 3 *Eng.* 220; *Wilson vs. Kelley & Co., ib.* 507; *Hensley et al. vs. Moore*, 4 *Eng.* 69; *Calvert use of Lawson vs. Lowell*, 5 *Eng.* 117.

James Hadley's right to sue in detinue or trover on his title, created by said deed in trust for said slaves, was barred by the same clause: "all other actions not included in the foregoing provisions," &c., and by parity of the reasoning in the above authorities.

And all his legal rights to sue being barred, his equitable one is also. *Kane vs. Bloodgood*, 7 *John. Ch. Rep.* 90; *Allen et al. vs. Beal's heirs*, 3 *A. K. Marsh.* 554, (*side page*); *Breckenridge vs. Churchill, &c.*, 3 *J. J. Marsh.* 12; *Nurry et al. vs. Coster*, 20 *John. Rep.* 576; *Roosevelt vs. Mark*, 6 *John. Ch. R.* 266; *Sims vs. Canfields ex.*, 2 *Ala. N. S.* 555; *Humphrey vs. Terrell, ib.* 651; 2 *Story's Eq., sec.* 1520, *and notes and authorities there cited*, (*4th Edition*).

MARR & HARDY, for appellees. That complainants had a right to resort to a court of equity, for the purpose of foreclosure and sale, notwithstanding the power of sale conferred on the trustee by the terms of the trust, we refer to the cases of *McGowen vs. Bank of Montgomery*, and *Marriott vs. Givens*, decided by the Supreme Court of Alabama, at the January and June terms, 1845, in 8 *Ala. N. S.*

The statute of limitation is alone pleaded to the writing obligatory, and not to the trust: hence, though the bond is barred, or even if the trust itself is barred, the decree on this point must be for complainants. Complainants may proceed alone upon the trust, as sufficient evidence of the debt, and need not, for any purpose, resort to the bond. The trust itself, independent of the bond, is an admission, under seal, of the debt. There was no necessity for producing the bond in evidence at all. Appellant must be held to his pleading, and since he has elected to insist upon the statute as to the bond only, and not as to the trust—he must fail. 1 *Ala. N. S.* 741, 742, *Duvall's heirs vs. McLosky:* 2 *ibid.; Inge vs. Boardman* 331, 5 *S. Marsh.* 651.

The statute of limitation does not extinguish the debt, but merely bars the remedy—in other words, it simply destroys the effect or evidence of the particular instrument to which it is pleaded; the debt or duty still remains, and if there is other evidence to which the statute is not pleaded, plaintiff may resort to it. 1 *Ala. N. S.* 741, 743; *Doe ex., dem., Duval's heirs vs. McLosky; Inge vs. Boardman*, 2 *ib.* 331; 5 *Smede & Marsh.* 651; 10 *Yerg.* 146; 19 *Pick.* 535; *Thayer vs. Mann*, 2 *Cox* 123; *Wassell vs. Reardon*, 6 *Eng.* 705; 2 *Smede & Marsh.* 687; 9 *Mass.* 242; 2 *Conn. R.* 161; 6 *ib.* 388.

A trustee has something more than a mere security for his debt; he has both a *jus ad rem* and a *jus in rem*, coupled with a specific lien; hence, the decisions in regard to liens, after the statute has run against the debt, are applicable. 1 *Ala. N S.* 742, *et seq.*; 5 *Smede & Marsh.* 651; 19 *Pick.* 535; 2 *Cox* 123.

The authorities seem to be conclusive, that although the debt secured by a trust or mortgage, is barred, yet the latter is not barred. The mortgagee or trustee has three remedies: one on the note or bond, one at law for the recovery of the possession of the property conveyed, and one on the mortgage or trust, in equity to foreclose it, and the barring of one remedy does not affect the others. 1 *Ala. N. S.* 741, *et seq;* 5 *Smede & Marsh.* 651; 19 *Pick.* 535; 2 *S. & M.* 687, and authorities *passim.*

There is no such thing as an action at law on a trust. A party's only remedy on a trust is in equity. The statute of limitation does not apply where the remedy is alone in equity. 9 *Pick.* 242, *et seq.; Farnam vs. Brooks,* 3 *Yerg.* 201; *Armstrong vs. Campbell,* 7 *John. Ch. R.* 87; *Kane vs. Bloodgood et al.*

An express trust is such as is created by the direct act of the parties, by some writing, deed or will. Implied trusts are all those called constructive and resulting trusts. 2 *Story Com. Eq., sec.* 980. The deed of trust in this case, is an express trust, but the statute of limitation does not apply to express trusts; therefore, the statute, if pleaded to the trust in this case, would not benefit the appellant; and *a fortiori* since it is not pleaded to the trust, he cannot be benefited by it. 2 *Story's Eq.* 467, 472; 7 *J. C. R.* 89; 20 *J. R.* 576; 9 *Pick.* 242; 1 *Yerg.* 296; *Pinson & Harkins vs. Ivey.*

When a party's remedy is concurrent at law and in equity, and the remedy at law is barred by the statute, his remedy in equity is also barred. In this case, complainants had *no* remedy *on the trust* at law, but only in equity: the remedy was, therefore, not concurrent. 3 *Yerg.* 201; 2 *Eq. D., p.* 209, *sec.* 28; 215, *sec.* 27.

The answer of Sullivan shows that he has not held *adversely* to the trustee. It is clear that if Sullivan's possession was not adverse, he held under the trustee, and the statute does not apply. The trustee, under the circumstances of this case, might, when the bill was filed, have brought his action at law to recover the possession of the trust property from Sullivan. 1 *Yerger* 296, *and authorities cited.*

PIKE & CUMMINS, for appellant. We need hardly say, that the complainant here can alone succeed upon the right disclosed in the bill. There is a general demurrer in the answer of Sullivan, which presents upon the hearing directly for consideration, every insufficiency in the bill, and in the facts, then appearing, which could prove fatal to the rights of appellee. Obviously no aid to the bill, or to the facts, can be derived from the answer or cross-bill. *Story's Eq. Pl., sec.* 17, 28, 42, 257, 260, 261, 496, *and cases cited; Meux vs. Anthony et al.*, 6 *Eng.* 421; *Cook vs. Bronaugh et al.*, 13 *Ark. R.* 183.

At law ordinarily as to choses in action, where the statute of limitations is held to bar the remedy only, the statute must be *specially pleaded.* At *law* even where the lapse of time *vested title* in the holder, the statute need *not* be specially pleaded. The party could treat his title as perfect by law, and prove it as any other title. In ejectment, this always has been the law. *Pillow vs. Roberts*, 7 *Eng.* 822; 5 *Eng.* 151; 6 *Cond. R.* 350; 3 *Hen. & Munf.* 57; 5 *Cranch* 358; 4 *Yerg.* 407; 1 *Munf.* 101; 3 *J. J. Marsh.* 268; 5 *Munf.* 435; 3 *Call* 362; 6 *Litt. R.* 437.

Our own statute, upon its face, declares the effect to be to *vest* an *absolute property* upon the lapse of the time prescribed. *Act December* 19*th*, 1846, (*Rev. Stat., p.* 943, *sec.* 3, 4.)

By this act the limitation as to negroes was *five* years, prior to that, it was *three.* *Sec.* 7, *ch.* 99, *Rev. St., p.* 696; *Payne vs. Bruton*, 5 *Eng.* 53. Of course the limit of *three* years controls this case.

If this were a mortgage, the statute of limitations would begin to run from the forfeiture, as between mortgagor and mortgagee. There is no *direct* trust as between them. 2 *Story Eq., section* 1028*a*, 1028*b*, 1520. *Hovenden vs. Lord Annesley*, 2 *Sch. & Lef.* 607, *and cases reviewed; Lawrence vs. Bridleman*, 3 *Yerg.* 496; 3 *Pet.* 52; 6 *Pet.* 65; 5 *Mass.* 143; 17 *Ves.* 96; 2 *Story Eq., sec.* 1520.

This must be true, for all our statutes are *positive bars*, and

rest not on mere presumption. In effect, they are like the modern English statutes. *Coote's Mort.* 449, 450, 66, 67, 518.

If it is treated as a deed of trust, perhaps the only difference is, that Hadley had a right to sue for the negroes *instantly* on the execution of the deed—was entitled to immediate possession. The statute would, in that case, attach one year earlier than if treated as a mortgage. There never was a doubt that the statute does not run as between trustee and *cestui que trust.* Here Sullivan, if trustee at all, was only so by implication, not directly. The *trustee* was Hadley himself, and the *cestui que trust*, were the creditors, secured. Except, as between them, the statute would run. *Hill on Trus., p.* 503; 8 *Humph.* 563; 6 *Ham.* 96; *Doe ex., dem., &c. vs. Lightfoot*, 8 *Mess. & Wel.* 553; 1 *Bro. C. R.* 554; 17 *Ves.* 87.

It is a mere perversion of all principle to say that where property is conveyed in trust to pay debts, the statute never attaches upon the *property.* That is only true as between trustee, and *cestui que trust.* It is not true, as between persons not standing in a fiduciary relation to each other. *Hill on Tr.* 503. As between trustee and *cestui que trust*, it is true, neither the debt can be barred, nor title to the property transferred by statute. But the statute does attach, even in cases of trusts, *wherever there is a remedy at law.* 7 *J. C. R.*, 110, 111; 1 *Watts & Sergt.* 118; 15 *Wend.* 302; *Robinson vs. Cook*, 4 *Mas.* 150, *&c.*; *Serwood vs. Sutton*, 5 *Mas.* 146, *&c*; *Denton's ex. vs. Embry vs. Young*, 5 *Eng.* 228.

There was a perfect remedy *at law*, all the while for all *relief*, complainant *now seeks* or *can have.* There never has been any obstruction to such remedy.

The idea of a *tenancy* and holding under mortgagee, when mortgagor is in possession, is mere *fiction*, and only prevails for *some* purposes. *Christophers vs. Sparke*, 2 *Jac. & W.* 234; *Cholmondeley vs. Clinton*, *ib.* 179; *Jackson ex. dem. vs. Wood*, 12 *J. R.* 242; *Angell on Lim., p.* 490, 1, 2; *Coote on Mort.* 518.

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

This was a bill to foreclose a trust deed, or mortgage, with a power of sale.

The bill was filed on the 4th day of September, 1850, in the Union Circuit Court, by James Hadley, the trustee, against Lee Sullivan, the maker of the deed, and alleges, in substance, as follows:

That, on the 20th December, 1841, in Tipton county, State of Tennessee, Lee Sullivan, then (as well as complainant) a resident of said county of Tipton, executed to complainant as trustee, a deed of trust, by which, after reciting that the said Lee Sullivan was indebted to John L. Hadley, of Green county, Alabama, in the sum of $629 88, due by writing obligatory of that date, to O. H. P. White, by two notes for about $21, and by open account, due first January, 1842, for about $30, and to sundry other persons in small sums, by notes, accounts, &c., the names of whom, and the sum due to each, being stated; and the said John L. Hadley, and the other creditors named, being willing to wait twelve months longer, with the said Lee Sullivan, upon having their debts and interest secured, and the said Lee Sullivan being willing to give them a certain assurance that their money should be paid at the expiration of twelve months from the date of the trust deed, he, the said Lee Sullivan, as well in consideration of securing his said creditors, in the payment of their demands, with interest, as for the further consideration of one dolllar, &c., granted, bargained, sold, assigned, tranferred and set over, unto the complainant, his heirs and assigns, the following property, then in the possession, and under the control of said Lee Sullivan in said county of Tipton, to wit: a negro woman *Easter*, and her five children, Hardy, Gabriel, William, Sarah, and Rossilla, slaves for life, &c., one sorrell horse, a bay mare, all his household and kitchen furniture, one wagon, carryall, barouche, and six spinning machines: to have and to hold said slaves and other property unto said complainant, his heirs and assigns forever,

*in trust however* and to the intent and purpose, that if all the claims set forth in said deed of trust, with lawful interest, should not be paid off, and fully discharged by the said Lee Sullivan, or some other person for him, before the expiration of twelve months from the date of the execution of said deed of trust, that complainant should, in the execution of the trust conferred upon him by the deed, and accepted by him, advertise said property, for twenty days, in a newspaper published in Memphis, Tennessee, (*Memphis Enquirer*), and by posting up written notices at four of the most public places, in said county of Tipton, for sale to the highest bidder for cash, &c.

That it was further stipulated in said deed, that if said debts, &c., were not paid on the day appointed for such sale, complainant, as such trustee, should proceed to sell the trust property to the highest bidder for cash, and make bills of sale thereof to the purchasers, conveying to them all the right and title of the said Lee Sullivan, his heirs, &c., therein: the deed of trust to be void, and of no effect, if the debts secured thereby should be paid off before the day of sale. That the trust deed was duly acknowledged on the 27th day of December, 1841, and on the same day recorded in the Register's Office of Tipton county, Tennessee, and on the 26th day of August, 1844, duly recorded in the office of the Recorder of Union county, Arkansas.

The deed, with the several certificates of acknowledgment and registration thereto attached, is exhibited with the bill.

The bill further alleges, that said John L. Hadley and the other creditors of Lee Sullivan, named in the deed of trust, reside beyond the limits of this State. That in the month of October, 1844, complainant, out of his own means, paid to O. H. P. White, one of the creditors, $16 05 on the claims of said White, secured by the deed, which sum with interest, complainant submits that he is entitled to have refunded to him out of the trust fund. White's receipt is exhibited.

That in the year 1843, O. H. P. White, an execution creditor of Lee Sullivan, caused one of the slaves, included in the trust

deed, to be levied upon, and that complainant believing it to be his duty to protect the trust property, filed a bill for injunction, and procured a release of the slave from execution, and was obliged to pay counsel therefor a fee of $25, which sum, with interest, complainant claims that he is entitled to have re-imbursed to him out of the trust fund: as well as $1 95 paid by him for acknowledging and recording the trust deed. The receipt of the counsel for the $25 is exhibited.

That, after the expiration of the twelve months forbearance, mentioned in the deed, the notice and sale therein required, were not given or had, because the creditors of defendant were unwilling to harrass him, and were willing to, and had indulged him, and continued to indulge him to the time of filing the bill.

That, in February or March, 1844, the defendant removed from the State of Tennessee to the county of Union, in this State, and brought with him the property mentioned in the deed, by the implied consent and sufferance of complainant; and that defendant, by consent of complainant, and under said trust, had retained and still kept possession of the property. That in consequence of the removal of the property, as well as of complainant and defendant, to the county of Union, it was inconvenient, and would fail to accomplish the object of the parties to the trust deed, for complainant to give notice of sale, at the several places, and in the manner required by the terms of the trust; and hence, complainant applied for the aid of the court of chancery.

That, since the removal of the property to Union county, Pierce, a judgment creditor of defendant, on the —— day of ——, 1845, caused an execution to be levied upon one of the slaves embraced in the trust deed. That complainant, as in duty bound, and at the instigation of defendant, by an attorney, who acted at the request of both complainant and defendant, caused the sale of said slave to be forbidden, and notified the sheriff of the claim of complainant to the property. That defendant had repeatedly, and at divers times, within the last five years, acknowledged the said trust, and particularly the debt due to John L. Hadley, and

had been holding the property subject to said trust, and had kept off his other creditors from collecting their claims out of his property, by means of said deed of trust.

That the creditors mentioned in the deed of trust, and particularly John L. Hadley, were unwilling longer to indulge the defendant, and insisted upon the collection of the several claims; and that John L. Hadley had particularly instructed complainant to take steps necessary to close said deed of trust as soon as possible. That the debts mentioned in the deed of trust, with the sum paid White by complainant, and also the sums of money paid by complainant, out of his own funds, together with a considerable arrear of interest thereon, remained unpaid, and the trust unsatisfied, and still in force. And the complainant being desirous of having the claims paid off, and the trust discharged, had several times applied to the defendant for payment thereof, as had also the said John L. Hadley, but the defendant had failed to pay the same, although he had repeatedly promised to do so, and had several times, within the last five years, acknowledged that he owed the said debts, and had but recently, and after complainant was instructed to close the trust, pretended that said debts, and particularly that due to John L. Hadley, was unjust, and refused to pay the same.

Prayer, that defendant be required to answer, &c., and particularly whether he had not repeatedly acknowledged verbally, and by letters, the debt due to John L. Hadley, and promised to pay the same, within the last five years, &c. That an account might be taken of what was due, principal and interest, to John L. Hadley, the other creditors, and to complainant for money advanced, expenses of the trust, &c., and that defendant be decreed to pay the same, with costs, &c., by a day to be fixed, and that in default thereof, the trust property be sold for that purpose, and for general relief.

The defendant, Lee Sullivan, admits in his answer to the bill, the execution and registration of the trust deed, as alleged by the complainant. He avers that the obligation to John L. Had-

ley, mentioned in the deed, was obtained from him by misrepresentation, fraud, and without consideration, setting forth the facts upon which this allegation is based. The pleadings and evidence in reference to this feature of the defence, constitute the principal portion of the record. The answer is made a cross-bill against John L. Hadley, &c., who positively denies that the obligation was procured by such misrepresentation, fraud, &c., and states the consideration upon which it was executed. His version of the transaction is sustained by the decree of the court below, and we think by the preponderance of the testimony; and with this remark, this branch of the defence may be dismissed from further consideration.

Lee Sullivan further answers, that he executed the notes; and, at the time of the making of the trust deed, owed the accounts, mentioned in the deed, and insists that they shall be produced and filed for cancellation upon the final decree, and that all the trust creditors were necessary and proper parties to the bill.

He avers, that he had paid all the trust debts, except the obligation to John L. Hadley, which was fraudulent, &c.

And this defendant further says and avers, that the cause of action arising on the said several notes and accounts in the said deed of trust specified, did not accrue to the said John L. Hadley, &c., (naming each of the creditors), "within five years next before the said complainant exhibited, and filed his bill of complaint, and commenced his suit herein."

"And this defendant further says and avers, that he did not promise and undertake to pay to the said John L. Hadley," &c., (naming each of the other creditors) "the said several notes and accounts in the said deed of trust specified, within five years next before the said complainant exhibited his said bill, &c., and that said *cestui que trusts*, are all residents of Alabama and Tennessee."

Avers that if complainant paid White the $16 05, he did it without authority, and in his own wrong, because the whole of White's debt had been paid by defendant.

Denies that there was any necessity for complainant to pay the counsel's fee of $25 to protect the trust property from execution, &c.

Does not know that complainant paid for the acknowledgment and registration of the deed, and requires proof thereof, &c. Admits that no notice was given, or sale made in Tennessee, in pursuance of the requirements of the deed of trust, and that the trust had not been closed. Admits that he removed to the county of Union, in the year 1844, and brought with him the slaves, and some of the other property, specified in the deed; but denies that it was with the implied consent, and sufferance of complainant, and avers that it was with his express assent, knowledge, and approbation. Admits that defendant has the property in possession, and waives the necessity of notice, or sale, in Tennessee, in pursuance of the terms of the deed.

Admits that he caused the sale of the slave levied upon, by the the sheriff of Union county, under the execution in favor of Pierce, to be forbidden, and the sheriff to be notified of said deed of trust, as alleged in the bill, but insists that he did not thereby, recognize the justness of said deed of trust as between defendant and said John L. Hadley, or waive any right as against him.

Admits that he may have, within the last five years, acknowledged the existence of the deed of trust, but denies that he had, at any time within that period, acknowledged the justness of the deed of trust, and the debt supposed to be due to said John L. Hadley, and held his property subject to said trust, and kept his creditors from collecting their debts by reason thereof.

Denies that any of the trust creditors except Hadley had instructed or desired complainant to file the bill, and again avers that all the creditors had been paid, but Hadley, whose claim was fraudulent.

Avers that complainant is indebted to him in about the sum of $400, and pleads this as a set-off against any sum that may be allowed complainant, exhibiting a bill of particulars.

"And this defendant further says and avers, that the said com-

plainant has not made or stated such a cause in and by his said bill of complaint, as entitles him to any such relief, as he, by his said bill, has prayed from and against this defendant, and he prays that, upon the final hearing of this cause, he may have the same advantage, as upon demurrer interposed in due form."

The answer is made a cross-bill against complainant and the trust creditors, with a prayer that they be compelled to answer, &c., for decree against complainant for any excess of indebtedness, that may be found to be due from him to defendant, and that the trust creditors be perpetually enjoined from further proceedings upon the trust deed, &c. Special interrogatories are propounded to complainant, in reference to his alleged indebtedness to defendant and to John L. Hadley, in relation to the consideration upon which the obligation to him was executed.

John L. Hadley was made a party to the bill by consent. None of the other creditors were made parties.

He states, in his answer to the cross-bill, that he was the uncle of the defendant, Lee Sullivan. That the obligation specified in the trust deed as due to him, was executed for costs, attorneys fees, expenses, &c., incurred by him in prosecuting a claim to some slaves at the instance and for the benefit of Lee Sullivan; that the trust deed was taken in good faith to secure the payment of the debt, and that he had indulged Sullivan in consequence of his being a relation, &c.

He submits that the note is not barred, but that it is quite immaterial whether it is or not, that he is pursuing his remedy, on the trust deed, and that his rights are dependant on the statute of limitation applicable to it.

He insists that he had three remedies: a suit upon the note, an action at law for the trust property, and a bill to foreclose, and that the statute of limitations, applicable to any one of his remedies, had no application to the other. That the statute of limitations is only a bar to the remedy, and not a destruction of the debt, but mere evidence of it. That the trust deed is evidence of the debt without resort to the note, and that any bar to

the note in no wise affects the debt, or bars evidence under seal of its existence.

That the bar interposed by Sullivan, is to the note only, and not to the trust deed. That Sullivan had, within five years, promised to pay the note.

The draftsman of the answer seems to have been under the impression that the *note* referred to, was not under seal, but it is a writing obligatory, due 20th December, 1841, the date of the trust deed.

The answer of James Hadley to the cross bill, denies that he is indebted to Lee Sullivan in one cent—on the contrary, he avers, that they had a full settlement of all their matters in March, 1844, and Sullivan was found to be indebted to him, &c.

No written acknowledgment of, or promise to pay the debt of John L. Hadley, by Lee Sullivan, subsequent to the date of the trust deed, was proven.

*R. W. McHenry's* deposition was taken by the parties on the *9th of April*, 1852. He states as follows: "He heard Lee Sullivan say, that in consequence of a heavy law suit he lost, he had become involved in debt, and that Dr. Hadley (John L.,) his uncle, had advanced him money, (witness understood Dr. Hadley lived in Alabama), for which he had given him a mortgage on his property, and if he could make one or two good crops, he could pay out, as that was about all he owed. All this conversation took place some three, four, or five years ago; not exceeding five years ago, from this time."

*Harriet McHenry* testified that Lee Sullivan moved to Arkansas, in the year 1844, and that he left Tennessee with his negroes, with the knowledge, and in company with James Hadley. That in 1846, she heard Lee Sullivan say that he was doing all he could to pay the amount due on Dr. Hadley's deed of trust. That in the year 1841, John L. Hadley and defendant met at James Hadley's, in Tennessee, for the purpose of getting him to act as trustee in the deed of trust, &c.

*Holmes* testified, that about the 9th March, 1843, an officer of

Tipton county, levied an execution upon one of the slaves embraced in the trust deed, in the absence of Lee Sullivan and his white family, and that at the instance of James Hadley, the trustee, witness, as an attorney, filed a bill to enjoin the execution, for which he charged $25, and Hadley gave him his note for the amount, which he afterwards paid, with interest, on the 30th December, 1844.

A letter from Lee Sullivan to John L. Hadley, dated July 11th, 1846, was made part of the evidence in the cause. In this letter Sullivan gives a detailed account of his pecuniary affairs, prospects, &c., but makes no reference to the trust deed, or to Hadley's debt. There is no other evidence in the cause, material to the defence of limitation, which is the main question to be determined.

The court decreed, upon the bills, answers, exhibits, replications, and depositions, that the cause of action was not barred, &c.; that Lee Sullivan was indebted to John L. Hadley, upon his trust debt, principal and interest, from the 20th December, 1841, in the sum $1064 49; and to James Hadley in the sum of $25, for so much money, necessarily and properly advanced by him, on the 9th March, 1843, in the protection of the trust property, with $15 50 interest, making $40 50, and that Sullivan presently pay the sums, so found due with the costs of the suit, or that the slaves mentioned in the trust deed, be sold for that purpose, &c., authorizing the issuance of process, to obtain possession of the slaves, &c. Sullivan appealed from the decree.

Though the trust deed conferred upon James Hadley, the trustee, the power to sell the property, on the failure of Lee Sullivan to pay the trust debts, at the end of twelve months from the date of the deed, yet it seems that the trustee might resort to equity to foreclose and sell; and the removal of the property from Tipton county, Tennessee, where, according to the terms of the deed, the notices of the sale were to be posted up, &c., perhaps rendered the application for the aid of the chancellor the more appropriate course. *Bennett et al. vs. Union Bank et al.*, 5

*Humph.* 612; *Ford vs Russell, Freem. Ch.* 42; *Marriott et al. vs. Givens*, 8 *Alabama R.* 706; *McGowan et al. vs. Br. B. Mobile*, 7 *Ala. R.* 823; *Dig. Stat. Ark., ch.* 110, *sec.* 4.

There is nothing, therefore, in the objection, that the court below had no jurisdiction in the cause.

Was the right to foreclose the deed, and sell the property, for the payment of the debt of John L. Hadley, the only trust creditor, for whose benefit the bill appears to have been prosecuted, barred by the statute of limitations?

The remedy is sought in our forums, and by our laws it must be governed. No statute of Tennessee, where the contract was entered into, is proven, or relied upon as affecting the rights of the parties in any way.

When a mortgage is executed upon land, and the mortgager remains in possession of the property, on the maturity of the debt, the mortgagee has three remedies: 1st. A suit at law upon the bond, bill, note, account, or other evidence of debt. 2nd. An action of ejectment, to obtain possession of the mortgaged premises, and take the rents and profits until the debt is thereby extinguished: and 3d. To bring a bill in equity to foreclose, &c. *Smith et al vs. Robinson*, 13 *Ark. R.* 538; *Earle et al. vs. Byrd et al.*, 14 *Ark. R.* 499; 1 *Alabama R.* 744; *Price vs. State Bank*, 14 *Ark. R.* 50.

If the mortgagee bring an action upon the bond, bill, note, account, or other evidence of debt, the limitation to the action would be governed by the grade of the instrument sued upon as the foundation of the action. If he resort to an action of ejectment, to obtain possession of the land, the limitation applicable to such action, would be the bar, which, under our general statute, is ten years. *Digest, ch.*, 99, *sec.* 1, *&c.*

But if he bring a bill to foreclose the equity of redemption, and sell the land for the satisfaction of the debt, secured by the mortgage, what is to be taken by the court of equity as the period of limitation, when there is no statute expressly fixing the lapse of time, which shall bar a suit to foreclose?

As a general rule, the court of equity would hardly adopt, as the period of limitation, that which is applicable to the action at law upon the debt, because that may be evidenced by an unsealed instrument, while the mortgage, upon which the bill to foreclose is founded, and which is also evidence of the debt, is under seal, and an instrument of a higher grade. See *Miller adm. vs. Helm. et al.*, 2 *Sm. & Marsh.* 687; *Miller vs. Trustees of Jefferson College*, 5 *ib.* 651; *Doe ex. dem. Duval's heirs vs. McLasky*, 1 *Ala. Rep.* 744, *and cases cited; Inge et al. vs. Boardman*, 2 *ib.* 331. These cases stand upon the principle, that when a party has two remedies, one of which is barred, and the other is not, he may successfully pursue that which is not barred.

But it seems to be settled that the courts of equity have adopted, as the period of limitation to a bill to foreclose and sell land, the length of time which is allowed the mortgagee to bring ejectment in order to obtain possession of the land and satisfy his debt out of the rents and profits. 4 *Kent. Com.* 189, 190; 2 *Story's Equity*, *sec.* 716; *Hughes vs. Edwards*, 9 *Wheat. R.* 497; *Doe ex. dem. Duval's heirs vs. McLasky*, 1 *Ala. R.* 745, and the same period is allowed the mortgager to redeem.

So in *Moore & Cail adm. &c. vs. Anders*, 14 *Ark. R.* 629, where the limitation on the bond was five years, Mr. Chief Justice WATKINS held, that, inasmuch as our statute allowed the mortgagee ten years to bring ejectment, he had a like period to foreclose, &c.

But the mortgage or trust deed, in the case before us, is not upon land, but upon slaves, and other personal property. The decree was for the sale of the slaves only. What statute of limitations is to be regarded as applicable to the remedy here sought in equity? The debt to John L. Hadley is evidenced by a writing obligatory, dated and due on the 20th December, 1841. The limitation applicable to an action at law upon it, was five years. *Revised Statutes*, *ch.* 91, *sec.* 11; *Baldwin vs. Cross*, 5 *Ark.* 510; *Dickinson vs. Morrison*, 1 *Eng. R.* 264; *Lucas vs. Tunstall*, *ib.*

443; *Couch vs. McKee*, *ib.* 484; *Hawkins vs. Campbell*, *ib.* 513; *Davis ex., use, &c. vs. Sullivan*, 2 *ib.* 449; *Bird vs. Smith*, 3 *ib.* 368; *Calvert, use, &c. vs. Lowell*, 5 *ib.*

It follows, that on the 4th day of September, 1850, when the bill was filed, and process issued, an action at law upon the bond was barred. The pleadings and evidence in the cause show no part payment upon the bond, and no written promise to pay, or acknowledgment of the debt, subsequent to the execution of the trust deed, on the part of Lee Sullivan. Verbal acknowledgments and promises would not extend the period of limitation, or revive the debt. *Dig.*, *ch.* 99, *p.* 698, *sec.* 18, 19; *Ringgold & Hynson vs. Dunn*, 3 *Eng. R.* 497; *Grant adm. vs. Ashley*, 7 *Eng.* 762; 5 *ib.* 134; 4 *ib.* 450; 5 *ib.* 638; 6 *ib.* 29.

It seems that John L. Hadley was a non-resident of this State when the bond was executed, and so continued to the 4th September, 1850. But the exception in favor of non-residents, made by the 13*th section*, *Revised Statutes*, *chapter* 91, was repealed by act of 14th January, 1843, and the limitation ran against his debt from the date of the repealing act, (*Watson vs. Higgins*, 2 *Eng. R.* 475) in the absence of any showing to bring it within the exceptions made by the act of December, 14th 1844. *Dig.*, *ch.* 99, *sec.* 12, 13, 14, 15. See, also, *Calvert use Lawson vs. Lowell*, 5 *Eng. R.* 147; *Brian vs. Timms*, *ib.* 597.

But to return to the question, as to what statute of limitation is to be regarded as applying to the remedy sought in this case in equity.

It is a general rule, that where there is a legal and an equitable remedy, in respect to the same subject matter, the latter is under the control of the same statute bar as the former. *Kane vs. Bloodgood*, 7 *John. Ch. R.* 117; *Harris vs. King*, present term.

*Humphries vs. Terrell*, 1 *Ala. R.* 650, was a bill by a mortgager to redeem slaves from the possession of the mortgagee. The defendant relied upon the limitation applicable to the action of detinue, as a bar to the bill. GOLDTHWAIT, Judge, said: "The com-

plainant seeks to avoid the plea of the statute of limitations on the ground, that the defendant is a mere trustee; and, as such, unaffected by the lapse of time. The only cases which are not barred by lapse of time, are those which arise out of trusts, which are, peculiarly and exclusively, the creatures of a court of equity." *Maury's adm. vs. Mason's adm.* 8 *Porter* 211. After stating the relation which exists between the mortgager and mortgagee, and the nature of the contract, he proceeds:

"It is equally true, however, that equity will not always listen to a claim to redeem. If a mortgager, &c., lies by, and will make no attempt to redeem within the period, within which any title, however good, will be barred by lapse of time, a court of chancery cannot, indeed, it ought not, to relieve; this is the well settled rule with respect to real estate, and if a moatgagee has been in possession of the mortgaged premises for twenty years," (*ten in Arkansas.* See *Moore & Cail vs. Anders*, 14 *Ark.* 628) "taking the profits without any account, or act done by which he admits himself to hold them as a qualified estate, the equity of redemption will be presumed to be extinguished, or to have been abandoned by the mortgager, and a bill to redeem will not be entertained by a court of equity.

This rule is adopted by courts of equity, not in obedience to the statutes of limitation, but in analogy to them, and from the obvious necessity which exists that some lapse of time should quiet the possession. All the reasons of the rule apply with as much force to personal as to real estate, and if it has been considered judicious to make a shorter period of time applicable, as a limitation to a suit for the former, it is the duty of a court of equity to adapt its decisions to the recognized rules of law. A claim to personal estate is barred at law after the lapse of six years, no matter how imposing it may be; and what reason is there that a court of equity should open its doors to relieve a suitor, who, under similar circumstances, is banished from a court of law? We know of none. And it may be added, that an equitable claim not resting on a trust *exclusively*, the *creature* of a *court of equity*, which has not

had sufficient merit to induce a prosecution within six years, ought, after that period, to rest forever."

In *Sims vs. Canfield exr.*, 2 *Ala. R.* 555, which was also a bill to redeem slaves, and the limitation applicable to detinue was relied upon as a bar, it was held that where slaves have been possessed under a claim of title for a period analogous to the statute of limitations, the possession operates not only as a bar, but also invests the possessor with the absolute title. That the action of detinue (in Alabama) is the only one at law, analogous to a bill to redeem a specific chattel, and so far as the statute of limitations can have any bearing on such a bill, it is to be considered precisely as if it was an action of detinue at law.

In *Fenwick vs. Macey's exrs.*, 1 *Dana* 276, the court being divided, the same doctrine is, to some extent, recognized, and to some extent disavowed; but the disavowal is based upon a dissent from the rule, that equity adopts the statute of limitations applicable to ejectment, in fixing the period allowed for a bill to foreclose and sell land, or to redeem. The current of decisions, however, sustains this doctrine, and we have seen that this court has adopted it in *Moore & Cail vs. Anders.*

Assuming, therefore, by analogy to the rule applicable to mortgages upon land, that where the mortgage, or trust deed is upon slaves, and the mortgager continues in possession, after default of payment, that the mortgagee or trustee, has the same time to bring a bill to foreclose and sell, that is allowed him, under like circumstances, to commence an action at law for the possession of the slaves, we shall proceed upon this hypothesis to determine whether the bill in this case was barred by such limitation.

The trust deed was executed by Lee Sullivan to James Hadley, as trustee, 20th December, 1841, to secure the payment of the debt to John L. Hadley and others, with power to sell the property for the satisfaction of the debts, after the expiration of one year, on default of payment. The maker of the deed remained in possession of the property; and, from the nature of the instru-

ment, it was, doubtless, the intention of the parties, that he should continue in possession until he was in default. After the expiration of the year, Sullivan failing to discharge Hadley's debt, the trustee had the right to take possession of the property, and sell so much of it as was necessary to pay the debt, &c. If it was necessary, he had the right to bring an action at law for the possession of the slaves, &c., to enable him to sell them, and transfer them to the purchaser; and no demand, it seems, need have been made before suit; (*Smith et al. vs. Robinsin*, 13 *Ark.* 538; *Evans et al. vs. Merriken*, 8 *Gill & John.* 47,) and, in such action, the trust deed would have been evidence of his title; or he had a right, as we have seen, to resort to a court of equity to compel the surrender of the property, and obtain a decree for its sale to satisfy the debt.

The right of action accrued on the default, 20th December, 1842, *Pickard vs. Low*, 15 *Maine R.* 48; *Ingraham vs. Martin*, *ib.* 373. There is no allegation in the bill or evidence, that Sullivan remained in possession of the slaves, after default, under any new agreement or contract with the trustee, or *cestui que trust*, for delay of payment or sale. The bill puts it on the ground of indulgence, on the part of John L. Hadley, prompted by a disposition not to harrass Sullivan. The trustee seems to have acted, finally, under instructions from the creditor, to take steps to close the trust, given shortly before the filing of the bill.

Such is the inference from the allegations of the bill. Mere indulgence, on the part of the trustee or creditor, would not prevent the running of the statute, in the absence of any act, on the part of Sullivan, to prevent it.

On the default, the trustee might have brought replevin or detinue for the slaves. Three years was the limitation to the former action. *Revised Statutes, chap.* 91, *sec.* 6; *Digest, chap.* 99, *sec.* 7; *Payne vs. Bruton*, 5 *Eng. R.* 54. Upon principle, the same period was the limitation to detinue.

In the absence of any act, therefore, on the part of Sullivan, recognizing the right of the trustee to the slaves after the default,

three years would have barred their recovery, by the act of limitation then in force.

The bill alleges, and the answer admits, that Sullivan brought the slaves to Union county, in February or March, 1844, with the knowledge and consent of the trustee, where the deed was recorded in August of the same year; but, at whose instance, does not appear. That, in the year 1845, (the month is not stated) one of the slaves was levied upon by the sheriff of Union county, under an execution, in favor of a creditor of Sullivan, and that the trustee, at the instance of Sullivan, notified the sheriff of the existence of the deed, and forbid the sale of the slave. Though such verbal recognitions of the trust would not remove the bar to an action on the bond for the debt, as we have seen, yet they tended to show that Sullivan was not, at that time, holding the slaves adversely to the right of the trustee, and had the bill been filed within three years afterwards, our inclination would be to hold that it was not barred, though the effect of such verbal admissions would be greatly weakened by the decision of this court in *Prater adm. vs. Frazier and wife*, 6 *Eng. R.* 249, if applicable to such case in equity. But it does not appear that the bill was filed within even *five* years after the sale of the slave was forbidden by the interposition of the trustee, at the instance of Sullivan; nor is there any allegation in the bill, that Sullivan, in any way, verbally or in writing, recognized the claim of the trustee to the slaves, or that they were held subject to the trust at any time within *three* years next before the bringing of the bill. The answer contains a demurrer to the bill; and, on the hearing, this objection was fatal. *Meux vs. Anthony et al.*, 6 *Eng. R.* 425; *Cook vs. Bronaugh et al.*, 13 *Ark.* 183; *Story's Eq. Plead.*, *sec.* 28, 257, 260, 496, 523, 751.

Nor is the bill aided by the proof in the cause. Harriet McHenry stated that, in 1846, she had heard Sullivan say "he was doing all he could to pay the amount due on Dr. Hadley's deed of trust."

R. W. McHenry deposed, that he heard Sullivan say that he

had given Dr. Hadley a mortgage on his property, and if he could make one or two good crops, he could pay out—that "this conversation took place some *three*, four, or *five years* ago, not *exceeding five years ago from this time*," (9th of April, 1852.)

If these declarations could be held as a recognition of any right in James Hadley, the trustee, to the slaves under the deed, the witnesses do not prove that they were made at any time within three years before the filing of the bill, (4th Sept. 1850.)

The memory of the last witness swept over too many years to be relied upon in the settlement of important legal rights, and such loose testimony shows the propriety of the policy of our legislation, and the course of our decisions, which tend to disallow verbal admissions, or promises, to remove the bar, and revive debts, or divest property acquired by lapse of time.

It is not insisted in the argument for Hadley, that the act of December 19th, 1846, (*Digest, chap.* 153, *art.* 1, *sec.* 3-4,) making the possession of slaves for five years after its passage, a bar to any action for them, would have applied to an action of detinue or replevin, brought for the slaves in question, on the 4th of September, 1850. There is nothing in the pleadings or evidence that could make this statute applicable, and the course of decisions of this court forbids its application. See the cases above cited, as well as *Calvert, use, &c. vs. Lowell*, 5 *Eng.* 147; *Biscoe et al. vs. Stone et al.*, 6 *ib.* 39; *Mason vs. Howell*, 14 *Ark.* 199; *Bank of the State vs. Gray et al.*, 13 *ib.* 39; *State Bank vs. Conway, ib.* 344; *Woods vs. State Bank*, 7 *Eng.* 693.

It would seem, therefore, from the pleadings and evidence in this case, that on the 4th September, 1850, when the bill was filed, the right of John L. Hadley to maintain an action upon the bond, and of James Hadley, the trustee, to bring an action for the possession of the slaves, was barred by the statutes of limitation, applicable to such actions.

STORY says: (*Eq. Plead.*, *sec.* 716,) "If an equitable title is not sued upon until after the time within which a legal title, of the same nature, ought to be sued upon, to prevent a bar by the statute of

limitations, courts of equity, acting by analogy to the statute, will not entertain it. For, in courts of equity, lapse of time is emphatically an ingredient in regard to entertaining suits for relief. If the party be guilty of such laches in prosecuting his equitable title, as would bar him, if his title were solely at law, he will be barred in equity," &c.

In determining the period allowed to the trustee to bring his bill for foreclosure and sale of the slaves, if the court of equity is to be governed by the statute, applicable to the action upon the bond, the remedy in chancery was barred on the 4th September, 1850.

If the court is to be governed by the limitation, applicable to the action of replevin, or detinue for the possession of the slaves, the remedy in equity was equally barred.

If the court is to look to the deed of trust, as a sealed instrument, and as evidence of the debt, it is of no higher grade than the bond: it was executed at the same time, and although it matured a year afterwards, if it could have been made the foundation of an action at law, the same statute of limitation which applied to the remedy upon the bond, would have applied to it. There is no ground, therefore, upon which the case can be put, so as to maintain the right of the trustee to resort to equity, after such delay, to compel Sullivan to surrender the slaves to be sold for the satisfaction of the debt of John L. Hadley.

This may, perhaps, be one of the cases in which the enforcement of the statute of limitations works a hardship upon an indulgent creditor, but general rules of law cannot be warped for the purpose of excepting individual cases. "Partial evil" may be "universal good."

The objection of Hadley's counsel, that limitation was pleaded to the debt, and not to the bill to foreclose, is rather technical than substantial. The object of the bill was to enforce the payment of the debt, by a sale of the slaves, and the defendant manifestly intended to interpose the statute bar to the relief sought. But if the objection were good, it does not aid the complainant's bill, which we have stated was demurrable.

The $25 paid by James Hadley, the trustee, in 1843, for the protection of the trust property, as he alleges, was paid, not for the benefit of Sullivan, but for the benefit of the *cestui que trust*, and the remedy upon the trust deed, to enforce the payment of the claim of the creditor, being barred by lapse of time, it follows that the demand of the trustee, for expenses, falls as an incident.

The decree of the court below is reversed, at the costs of the appellees, and the cause remanded, with instructions to dismiss the bill for want of equity, and that the costs which accrued at the instance of John L. Hadley, in the attempt to enforce the collection of his debt, be taxed to him; that the costs incurred at the instance of James Hadley, to enforce his individual demands, be taxed to him; but as the record has been much encumbered by Sullivan, in an unsuccessful attempt to avoid the debt of John L. Hadley, on the grounds of fraud and want of consideration, it is deemed but just that he should pay all costs accruing on account of this branch of the defence, and the chancellor will so decree.

## CARTER ET AL. VS. CANTRELL ET AL.

Where the personal property of the wife is not reduced to possession by her husband during the lifetime of the wife, upon her death, it descends to her heirs or representatives, and not to her husband. *Cox et al. vs. Morrow*, 14 *Ark.* 617.

Disabilities, which bring a party within the exceptions of the statute of limitations, cannot be multiplied: as where, at the time of the accrual of the cause of action, the party entitled was a female infant, she cannot, after that disability is removed, set up coverture to avoid the statute bar.

If the wife be entitled to personal property, and a sufficient time has elapsed for the statute of limitations to constitute a bar to a recovery, the coverture of the wife will not avoid the statute in a suit by the husband and wife—it could only do so in a suit by the wife after the death of the husband.

*Appeal from the Circuit Court of Jefferson County in Chancery.*

Hon. SHELTON WATSON, Circuit Judge.

FOWLER, for the appellants.

PIKE & CUMMINS, for the appellees. We are really at a loss to know on what ground this suit was brought. It seems, from the allegations of the bill, to have been imagined that where a specific legacy is made to a woman, during her coverture, and she dies before her husband has reduced the legacy into actual possession, leaving him surviving, the legacy belongs not to *him*, but to her heirs or representative. And, if that *be* the ground, it is one as strikingly erroneous as any position we ever knew assumed. *Whitaker vs. Whitaker*, 6 *J. R.* 117; *McQueen on Husband and Wife* 19, 22, 46, 47; *Milner vs. Milner*, 3 *T. R.* 627; *Commonwealth vs. Manly*, 12 *Pick.* 175; *Halbrook vs. Waters*, 19 *Pick.* 354; *Wheeler vs. Bowen*, 20 *ib.* 563; *Fitch vs. Ayer*, 2 *Conn.* 143; *Griswald vs. Penniman*, *ib.* 564; *Hayward vs.*

*Hayward, id.* 517; *Schuyler vs. Hoyle*, 5 *J. C. R.* 206; *Hassgood vs. Houghton*, 22 *Pick.* 484; *Wallace vs. Taliaferro*, 2 *Call* 447; *Woelper's Appeal*, 2 *Barr* 72; *Caxton vs. Exers. of Haig*, 4 *Dessau.* 343; *Dald vs. Geiger*, 2 *Grattan* 102; *Lowry vs. Houston*, 3 *Howard Miss. Rep.*; *Stewart vs. Stewart*, 7 *J. C. R.* 244; 2 *Dev.* 260; 14 *Conn.* 102; 1 *Munf.* 98; 5 *Sm. & Marsh.* 772; *Yerby vs. Lynch*, 3 *Grattan* 469, 488; 6 *Har. & John.* 31; 1 *Har. & Gill* 88; *Lasseter vs. Turner*, 1 *Yerg.* 414; *Bowman vs. Tucker*, 3 *Humph.* 648; *Brown vs. Brown, ib.* 128; *Pattie vs. Hall*, 2 *B. Mon.* 462; 12 *ib.* 42; 10 *ib.* 412.

Moreover, the statute of limitations of Tennessee was three years when this right accrued. The only disability in the complainants, at the time, was *infancy*. No subsequent disability could be added. 6 *J. C. R.* 360; 3 *J. C. R.* 129; 17 *Pet.* 37; 7 *Mon.* 59; 17 *Verm.* 165; 2 *Brock.* 436; 9 *Dana* 391; 4 *Yerg.* 232; 258; 7 *Monr.* 59; 3 *Conn.* 227; 12 *Wend.* 602; 1 *Pennsylvania* 6.

Their mother *died* about February, 1816, and of course they must all have been of age in February, 1837. The negroes remained in Tennessee more than three years after that.

The running of the statute of limitation confers an absolute right on the possessor. *Calvert use &c. vs. Lowell*, 5 *Eng.* 151; *Shelby vs. Grey*, 6 *Con. R.* 350; *Newby vs. Blakey*, 3 *Hen. & Munf.* 57; *Brent vs. Chapman*, 5 *Cranch* 358; *Hardeson vs. Hays*, 4 *Yerg.* 507; 3 *J. J. Marsh.* 363; 5 *Munf.* 435; 3 *Call* 362.

Both D. W., Landon D. Carter, and James D. Rea, are barred. The whole of complainants are barred for this reason. *Mrs. Rea* has no right at all in the negro, unless she survives her husband. He alone has the absolute life estate. If she survives, of course, the statute would not affect her. Now it does affect the husband, who has the only present interest. And this position the foregoing authorities prove. 1 *Dev.* 321; 10 *Ohio*, 11, 135; *Litt. Sel. Cas.* 296; 294; 5 *Day* 211; 4 *Day* 265, 310, all show that where several are interested in property, and one is barred, all are so.

Certainly this is so as to those not under disability. 7 *Cranch.* 156; 2 *Brock.* 436.

Mr. Justice WALKER delivered the opinion of the Court.

This is a suit in chancery, brought by the complainants, as heirs of Matilda M. Carter, to recover certain slaves and their hire.

The bill charges, that on the 5th of November, 1814, in Tennessee, Susanna Wendell, by will, devised to her daughter, Matilda M. Carter, a negro girl named Harriet. That the testatrix died in 1816, and her daughter, Matilda M. Carter, within a few weeks thereafter, without having reduced the negro Harriet to possession, and without any knowledge of the bequest. That Robert Searcy, the executor, proved the will, but his health being bad, he delivered the girl Harriet to Stephen Cantrell, as his agent, or in trust for the owners, or in some trust and fiduciary character. That although Matilda M. was, at the time of the bequest, the wife of Alfred M. Carter, (father of the complainants) the property in the slave never vested in him, but remained in the wife, and, at her death, passed directly to the complainants, her heirs. That Harriet was the mother of a family of children of much value; that she and her children have been kept in the employment of defendants, and that their hire is of great value. That complainants were at the death of their mother, infants, and resided more than three hundred miles from Nashville, the residence of their grand-mother, Mrs. Wendell, and of defendants, who thus became possessed of the property. That defendants always knew of complainants' rights, but fraudulently concealed from them the fact that they had any title or claim to the slaves, and that complainants never had any knowledge of their rights until shortly before their suit was brought. The bill was filed on the 13th of February, 1851.

The defendants answer, and admit the execution and validity of the will. That the complainants are the children and heirs of Matilda M. Carter, to whom the girl Harriet was bequeathed. That

they were infants, at the death of their mother, and resided in Carter county, Tennessee, some three hundred miles from Nashville, the residence of Mrs. Wendell, and of defendants.

But they positively deny all fraud or concealment, and all knowledge of complainants' rights, or that under the will, they ever had any rights, or that the slave Harriet ever came to the hands of them, or either of them, in trust for the owners, or others. But, on the contrary, assert, that the slave Harriet, was the property of the father of complainants, that he did reduce her to possession, and sold her for the valuable consideration of $500, to Stephen Cantrell, on the 11th of November, 1819, and exhibit a bill of sale of that date for Harriet; and also a letter written by the father, (Alfred M. Carter) as early as the 23d of March, 1817, from which it appears that he had been informed of the bequests, and had received from Stephen Cantrell a proposition to buy Harriet.

The answers then set up a chain of title through several persons to the defendant, G. M. D. Cantrell, in 1840 or 1841, and that as the slaves, from 1819 to 1832, were held in the State of Tennessee adversely by Stephen Cantrell, all the parties then being residents of Tennessee, and from 1832 to 1842, still in said State, by G. M. D. Cantrell and others, and from 1842 until the 13th of February, 1851, the time when this suit was brought, in Arkansas. The defendants set up, and insist upon the statute of limitations in bar of the complainants' right of action.

After a careful examination of the allegations and the evidence on both sides, the questions at issue are, substantially, but two.

*First.* Did the title to the girl Harriet, upon the death of Mrs. Matilda M. Carter vest in Alfred M. Carter, her husband, or did it descend to her children, the complainants?

*Second.* If the title to the slave did pass to the complainants, (her children) have they lost their right of action by the statute bar of limitation?

In proceeding to the investigation of the first point, it may suffice to say, that there is no doubt, from the allegations, the ad-

missions of answers, and the proofs, but that Mrs. Wendell made a valid bequest of the slave to Mrs. Carter, which took effect a very short time before her death. There is no positive evidence of the time when Mrs. Wendell died. The testimony of the witnes Thomas Washington, who was an old and intimate friend of Mrs. Wendell, comes nearest fixing the time; and, from his statement, it was in the winter of 1816, and but for the allegation that she died a few weeks before Mrs. Carter died, it would be a question of some doubt which of them died first. Mrs. Carter, as it is clearly shown, died on the 4th February, 1816, and it is highly probable, from all the circumstances in evidence, that she was not, at that time, aware of the death of Mrs. Wendell, or of the bequest of the slave. They resided something more than three hundred miles from each other, and at a time when comparatively but few facilities for communication were afforded; nor is there any evidence, nor do the facts tend to raise any presumption that Alfred M. Carter, her husband, was, at the time of her death, aware of the bequest in favor of his wife. The first knowledge of that fact, traced to him, was a letter from him to Stephen Cantrell, dated 23d March, 1817, in which he alludes to a proposition from Stephen Cantrell to him to purchase the girl. This letter pre-supposes a communication from Cantrell to him, on the subject of the purchase of the girl, but when it was made, does not appear, nor is it a matter of importance, from the view which we take of the case, whether he was so informed before or after his wife's death; because, if his title to the slave was perfect under his marital rights, from the time his wife took under the will, without reducing her to actual possession before the death of his wife, then such legal title would draw with it the right of possession, and he could reclaim the property, or dispose of it by sale, without reducing it to possession, and this brings up the precise question now to be considered. Because it is not pretended that he ever did reduce the girl into actual possession, at any time, unless it was formally at the time of his conveyance to Stephen Cantrell, which was some three years after the death of his wife.

The question is one of much difficulty, and there are not wanting highly respectable authorities, which would seem to sustain the validity of the husband's title to the personal property belonging to the wife, but which he did not, until after her death, reduce to actual possession.

Upon a careful examination of them, however, it will be found that these decisions were for the most part, made in cases where the wife had a clear legal title to the property, which, although not reduced to possession during the life time of the wife, was nevertheless not held under any adverse claim, and being subject to immediate possession, or held by one as bailee, or agent for the husband and wife, it became rather a question of fact, as to whether the property was, in effect, not in the possession of the husband although no acts of ownership had been asserted by him.

It is, however, unnecessary to refer particularly to them, because most of them were cited and relied upon by the counsel in the case of *Cox vs. Morrow*, and were carefully examined by the court, at the time that opinion was delivered, and the additional authorities gotten up with much care by the counsel for the appellee, are not stronger, or more favorable to the doctrine for which they contend, than those heretofore examined.

The right of the husband to the property of the wife, by the common law, is founded upon duties and liabilities incurred by the marriage or growing out of it. He is tenant by courtesy of the wife's real estate, after the birth of a living child, because he is chargeable with the care, education, and support of the child. And he acquires a title to the personal property of the wife, because, upon his marriage, he, with other responsibilities, becomes liable for the payment of her debts. As regards the tenancy, that survives the death of the wife, because the charge to maintain the child is not removed by her death: but after the death of the wife, as the husband is relieved from all liability to pay the debts contracted by her before marriage, there ceases to be any reason why he should recover the property, but there is a manifest reason why he should not do so: which is, that if there are debts

still unpaid at the wife's death, the property should go to her administrator, to be applied to their payment, and the surplus, if any, to her heirs, which in the absence of any statute in Tennessee giving the property a different direction, would pass to her children, the complainants. Such, in effect, was the decision of this court in *Cox et al. vs. Morrow*, 14 *Ark. Rep.* 617.

It is true, in that case, that Mrs. Morrow held a life estate in the slaves, which had not terminated until after Mrs. Williams, who held the remainder, died; and, therefore, in that case neither the husband or the wife had either the possession, or the right of possession at the death of Mrs. Williams; but the grounds upon which the decision was made, went to deny the right of the husband to any personal property of the wife, not reduced to possession by him before her death. This question, as to what is, or is not an actual possession of the husband, must necessarily depend upon the circumstances of each particular case. If this property had been in the possession of the wife, or of any one under her, at the time of the marriage, there is but little doubt that the title, by virtue of the marriage, would have passed to him without any formal delivery or actual exercise of ownership. In that case, the possession of the wife would be the possession of the husband also, but where the wife has a legal title to the property, whether acquired before or after marriage, but has never reduced the property to possession, unless it is done by the husband, before the death of the wife, he can never do so afterwards, because the considerations which come into existence with the marriage, and conferred the right to recover and appropriate the property, ceased to exist at her death.

In the case now under consideration, if it had been shown that the executor of the will of Mrs. Wendell had delivered this property to Mrs. Carter, or to her husband, or to any one for them, before the death of Mrs. Carter, we would not say that this would not be sufficient, because a delivery to the wife, or to any one for her, would be a delivery to the husband.

Such, we have seen, was not the case here. There is no evi-

dence that this slave ever came to the hands of the executor until after Mrs. Carter's death, and even if she had, Mrs. Carter, if living, could not have recovered the slave from the executor, until the debts were paid, or at least until time had elapsed for their payment, because she takes the bequest under the will, subject to the payment of the debts, and the whole estate of the testator passes to the executor, in the first instance, for that purpose.

In *Refeld ex. vs. Billette*, 14 *Ark. Rep.* 158, this precise question came up, and it was there held, that the right of the legatee to his legacy, is suspended until by the assent of the executor, or the lapse of time for the settlement of the estate, the suspension is removed. Indeed, this principle has gone further, and it has been held that even where the slave bequeathed was, at the time the bequest took effect, in the possession of the legatee, the executor might recover hire for the period of one year after the grant of letters testamentary, he having until that time to examine into and settle the estate. *King vs. Cooper*, *Walker Miss. R.* 389.

Mrs. Carter therefore had, at the time of her death, neither the possession, nor the right to possession, and of course her husband, who could only succeed to her rights by marriage relations, had not. Entertaining these views of the rights acquired to the slave, under the will of Mrs. Wendell, it follows, that upon the death of Mrs. Carter, her children, the complainants, succeeded to the rights of the mother, as heirs of her estate, and unless barred by lapse of time from asserting their title, must recover the slaves; the proof, in all respects, being clearly sufficient to establish their right to the slaves and to their reasonable hire.

The claim was of more than thirty years standing, and was clearly barred by the statute of Tennessee, where the right accrued, and where the parties and the property remained for more than twenty years; and also, by the statute of Arkansas, where the property, and one of the defendants have been since the year 1842.

The complainants admit this, but contend that their right to recover, is not affected by the statute. *First.* Because, by the

fraud and concealment of the defendants, complainants were kept ignorant of their right of action until within about one year next before the time of bringing their suit. And *Second*, Because they were infants when their mother died, and when the right of action accrued, and one of the complainants contends, that before she was twenty-one years of age, and consequently, before the statute commenced running, she married, and continued in coverture up to the commencement of this suit.

Upon the first ground, (the fraud) it is very true, that complainants were, at the death of their mother, too young to understand, or to protect their rights; and that they resided at too great a distance from their uncle, Stephen Cantrell, and their cousin, G. M. D. Cantrell, to be presumed to know much of their property, or of the title by which it was held. But there is no evidence that either of the defendants, by any means whatever, misrepresented or concealed any facts touching complainants' title from them; but, on the contrary, it is abundantly proven that Stephen Cantrell did communicate the fact of the bequest of this slave to Alfred M. Carter, the father and natural guardian of these complainants; and it is equally well proven that their father sold the girl Harriet to Stephen Cantrell, and received a compensation in cash for her, and although Alfred M. Carter had no right to the slave, not having reduced her to possession during the life time of Mrs. Carter, it is quite probable, under all the circumstances, that the sale was made in good faith, believing, at the time, he had title to the property; and it is more than probable, that Stephen Cantrell thought the property Carter's, or he never would have given five hundred dollars for a girl 12 or 14 years of age, which was a fair price for a sound title.

It may have been the misfortune of these defendants, never to have heard of their title, but as far as individual responsibility is concerned, their father, who lived until about the year 1850, is more chargeable with concealment than any one else. But the truth is, that the evidence of their title was matter of record, and as no effort was made to lull them to repose, and prevent them

from making the necessary examination, it was their misfortune that their residence was so remote, or that they had not been made acquainted with their rights under the will, and not attributable to fraud on the part of the defendants. This view of the question of fraud is fully sustained by the Supreme Court of Tennessee, in *Haynie vs. Hall's ex.*, 5 *Humph. Rep.* 293.

As between the executor, Searcy, and legatees, there was no doubt an express trust, under which this negro was held, and if this suit had been againt Searcy, the executor, there is authority for holding that the statute would not run to bar a recovery against him, at least until after he had ceased to act as executor, or until, by an assertion of title adverse to the legatee, he had betrayed his trust. But this suit is not against Searcy the executor, but Cantrell, who, conceding that he acquired title to the slave under him, would only have been responsible upon an implied trust. Such was expressly held to be the law in *Haynie vs. Hall ex.*, in which case the court said:

"The executor of Elijah Humphrie's will was an express trustee, but when Jesse Haynie received the money from the executor, *he* was placed in a very different relation to complainants, from that in which the executor stood. The law to be sure would turn him into a trustee, but he did not become so by contract, but was such by implication of law, because of his wrongful possession of money, which did not belong to him; nevertheless, he held it in his own right, and for his own benefit, adversely to the complainants."

Such being the nature of the trust, if indeed, there could be said to be any trust in this case, it is such as against which the statute bar may be pleaded. The remaining objection to the statute bar is, that they are exempt from its operation, on account of infancy, and as to one of them, also coverture.

The statute did not commence running during the life of Mrs. Carter, because under the decision of this court in *Refeld vs. Bellette*, the right of action did not accrue against the executor of the will for this bequest until after the payment of debts,

or the settlement of the estate, and consequently, as the complainants were infants at the time of her death, they were clearly within the saving clause of the statute, in favor of infants, *feme coverts*, &c. The youngest of the complainants was born some eight or ten days before the death of his mother, which took place the 4th February, 1816. He was, therefore, of age about the last of January, 1837, and of course his brother and sister, who were older than himself, were, before that time, of age. From that time, therefore, the statute commenced running as to all of them, unless the marriage of the sister may serve to protect her rights, of which we will presently consider: at all events, it commenced as to the two brothers. And the rule is, that when a statute commences running, that it runs out, notwithstanding a change of residence or subsequent intervening disabilities. The removal of the slaves to Arkansas, could, in no respect, change the result, or if it could, their right of action was clearly barred after the removal to Arkansas in 1842, and before the bringing of the suit in 1851.

The last question to be considered, relates to the effect of the statute upon the rights of the complainant, Elizabeth, and her husband, James D. Rea. It is alleged, and we think sustained by the evidence, that she was under the age of twenty-one years when she married, and the question is, as she was an infant when the cause of action accrued, and continued to be such until after her marriage, and up to the commencement of this suit, did the statute bar her right of action; and if not, can she assert it during her coverture, in conjunction with her husband, after the time at which the bar would have attached against her, if she had remained unmarried, or shall she wait until her disability is removed by discoverture?

It has been held upon high authority, that disabilities, which bring the plaintiff within the exceptions of the statute, cannot be multiplied or piled one upon another, but the party claiming the benefit of the exception, can only avail himself of the disability existing when the right of action accrued. *Mercer vs. Mercer*, 1 *How. U. S. Rep.* 37.

And although there is a conflict of opinions of several of the courts upon this point, our statute (*Dig. ch.* 99, *sec.* 28,) is conclusive upon the question in this State. In that section, it is provided, that "No person shall avail himself of any disability in this act mentioned, unless such disability existed at the time the right of action accrued."

Under this statute and the authority above cited, which is sustained by the general current of decisions; inasmuch as coverture was not one of the disabilities, under which Mrs. Rea rested at the time the cause of action accrued, she cannot avail herself of it to avoid the statute bar.

To the reverse of this, is the case of *Crozier vs. Gano and Wife*, 1 *Bibb* 260. The court in that case, when considering the sufficiency of a replication, which set up that defence against the statute bar, said: "The evident design of the replication is to show that the plaintiff, Keziah, from the time her cause of action first accrued, had, at all times, until within five years next before the commencement of the suit, labored under the disabilities of either infancy, coverture, or absence from the country, so as to bring her within the savings of the statute of limitations. If the replication had really shown this, it would have been good, for although one of them (as infancy for example,) had been removed, yet if another of them accrued, as marriage, before the removal of that of infancy, and so on in succession, so that all were not removed at any one time, whereby the statute could attach and begin to run, it would have been a sufficient answer to the plea: this the replication has not done."

Such was also the decision of the same court, in the case of *South's heirs vs. Thomas' heirs*, 4 *Mon.* 60. And in *Neal vs. Robertson et al.*, 2 *Dana* 88, the same rule is stated and approved, but the court held in that case, that notwithstanding the rights of the wife are protected by the continuing disability of infancy and coverture, yet she can only avail herself of it after discoverture, and that neither the husband alone, nor jointly with the

wife, can take the benefit of the proviso, which was intended for her benefit alone during coverture.

After quoting the saving clause of the Kentucky statute, which is substantially like our own, the court says: "There is nothing in the language which does, of itself, constitute a saving in favor of the husband, so as to prevent his being barred. If there be such saving, it must result from the general principles of the law, in order the better to secure and preserve the rights of the wife. We are not aware of any principle that will so operate. It may be, that the interest of the wife would, in some cases, be promoted by a recovery in the life time of the husband, thereby precluding the hazard of the loss of her right, by the loss of the evidence of it. But that is a description of interest not expressly protected by the words of the act, and the hazard referred to may be sufficiently guarded against by a bill perpetuating the testimony. The saving was not intended to guard his interest against the effect of his own laches, but to save hers, so far as they were separate, and disconnected from his. We do not perceive wherein their interests are so intimately blended, as indispensably, or even necessarily, to require an enforcement of her rights in his life time. Their interests are so far divisible, that he can maintain a suit in his own name alone for the land, and can by his separate deed alienate during their joint lives: so where a recovery is had in a suit brought by both, it is still for his sole benefit during his life. As then, the recovery is for his sole benefit, and as his separate alienation bars a recovery, on a demise in the names of both, no good reason is perceived why he should be permitted to avail himself of the saving in favor of the wife, to protect him against the effect of laches in this, more than in any other description of case."

So that giving the complainants the full benefit of these decisions, and leaving out of question the limitation act of December, 1846, limiting the right of action to recover slaves, in which there is no saving clause in favor of any one, and with regard to which we have intentionally declined to express any opinion in this case,

because the counsel have not thought proper to rely upon it, and because the subject is now before the court for determination, it is evident that the right of action would be barred. Because, if the reasons for denying the defendant to recover real estate by joining with his wife, in which he would have but a life estate by courtesy, were sufficiently strong in that case: the same reasons will apply, with increased force, in a suit like this for personal property, because he, in the event of a recovery, gets not a life estate, but an absolute title to the property. It is, therefore, in fact, his suit, prosecuted to recover property for himself under cover of the wife's disability to sue.

He rested under no disability to sue from the time of his marriage, until the statute bar would have attached, if his wife had remained single, and if he suffered the time to elapse for bringing suit without doing so, he must, like other suitors, abide the consequences.

So that in any point of view in which this subject may be considered, whether considering the lapse of time in Tennessee or in Arkansas, and with all the advantages of the saving clause in our general statute, in favor of infants, *feme coverts*, &c., or the decisions of the courts of Kentucky, which allow continued disabilities in case there is no intervening time between disabilities, so that the statute may begin to run, to protect the rights of the *feme covert*, this complainant, as well as all the others, was clearly barred by the statute of limitation.

We are, therefore, of opinion that the Circuit Court did not err in decreeing that the complainants' bill be dismissed with costs. Let the decree be affirmed.

## ASHLEY ET AL. VS. CUNNINGHAM ET AL.

When a cause has been decided by the Supreme Court, and remanded for further proceedings, none of the parties has a right to raise any question, in the inferior court, touching the correctness of the decision of the Supreme Court: and where one of the parties dies, during the pendency of the cause in the Supreme Court, the heir, upon being made a party in the court, to which the cause is remanded, takes the place of the ancestor, and stands in precisely the same situation as any other party

The death of the complainant being suggested, his heirs applied to be admitted parties in his stead, to prosecute the suit to final decree: the defendants objected, and presenting to the court a deed of conveyance for the land in controversy, executed by the complainant before his death, and after the commencement of the suit, suggested that the grantee was the proper party: HELD, That the heirs of the complainant were the proper parties.

The complainant being restricted to a pre-emption of one-half of the quarter section, in consequence of there being another settler upon the same quarter, who was entitled to a pre-emption, though no entry was made under it, is entitled, in the division of the quarter, to the east-half, though that portion embrace the location of the other settler as well as his own—both having settled upon the same subdivision of the quarter.

*Cross Appeals from the Circuit Court of Pulaski County in Chancery.*

Hon. WM. H. FEILD, Circuit Judge.

CURRAN & GALLAGHER, for the appellants.

PIKE & CUMMINS, for the appellees.

Mr. Justice WALKER delivered the opinion of the Court.

This suit was brought in the Pulaski Circuit Court in Chancery, by Matthew Cunningham, against Chester Ashley and Roswell Beebe, in which the complainant set up title to the south-east

quarter of section three, township one north, range twelve west, under the pre-emption act of the 29th May, 1830, which tracts the defendants had entered with pre-emption floats, over the superior equity of complainant. The history of the case, and the several decisions had in this, and the Supreme Court of the United States, will be found reported in 7 *Eng.* 296, and 13 *Ark. R.* 653, 670.

Upon appeal from the decision of this court, (7 *Eng.* 296,) to the Supreme Court of the United States, that court decided in favor of the pre-emption claim of Cunningham, and that the location of the two pre-emption floats, so far as they interfered with rights of Cunningham to a pre-emption of eighty acres, including his improvement on that tract, was void. The court, therefore, reversed the decision of this court, which denied the superior equity of Cunningham's claim, and remanded the case to this court, with instructions to enter a decree in pursuance of their opinion, which was: "That, on a full consideration of the pleadings and proofs in the case, that the two entries of eighty acres each, made in the name of Samuel Plummer, and Mary Louisa Imbeau, on the south-east quarter of section number three, in township one north, and in range twelve west, of the fifth principal meridian, south of Arkansas River, are void, so far as they interfere with the pre-emptive right of Matthew Cunningham, to one-half of the said quarter; and that Roswell Beebe and the heirs of Chester Ashley, deceased, defendants, shall execute a deed of quit-claim to the said Cunningham, on his paying, or tendering to them the minimum price of the public land, with interest from 6th of June, 1838, the time the above entries were made, to one-half of the above quarter section, by east and west, or north and south lines, so as to include his improvement on the quarter section: or, if such a division could not be made, that they convey to him, as aforesaid, a joint interest of one-half in said quarter section.

At the January Term, 1853, the mandate of the Supreme Court having been filed in this court, the defendants appeared and filed

their suggestion, that after the writ of error sued out from the decision of this court to the Supreme Court of the United States, Frances Ann Ashley, one of the defendants, had intermarried with Andrew F. Freeman, and thereafter had died, leaving an infant child, Mary Ashley Freeman, her sole heir, who was then living; and questioned the right of this court to proceed in the cause until she was made a party to the suit.

Before any action taken upon this suggestion, the defendants filed two pleas, setting up the same facts in bar of the right to any action by this court in obedience to the mandate of the Supreme Court of the United States. The complainant moved to strike these pleas from the files of this court.

The ground of objection to the action of this court, in obedience to the mandate of the Supreme Court of the United States, was, that because of the death of Mrs. Freeman, before the decision of the United States Court was made, the decision of the court could not bind her heir; and that she should be made a party, with a right to be heard upon the merits of her defence.

But this court held, that it was its duty to obey the mandate of the Supreme Court of the United States, and to carry into effect its judgment and decision, even though such decision might have been made contrary to law, or under a misapprehension of facts; and that, as regards the particular grounds of objection presented after the submission of the cause, the parties have no right to be heard, and if one of the parties dies after submission, there is no necessity for suggesting his death upon the record, or for bringing his representatives before the court, in order to have a final decision of the questions of law arising upon the record. The practice in such case being to direct the decision to be entered as of a day prior to the death of the defendant, and subsequent to the submission of the cause.

The motion to strike out the pleas was sustained, and this court, in conformity to the decision of the Supreme Court of the United States, and in the language of the decision, decided in favor of the complainants, and directed the Circuit Court to as-

certain the locality of the improvement, and that upon the complainant's paying, or tendering to the defendants the minimum price of the public land, with interest from the 6th of June, 1838, that defendants execute to complainant a deed of quit-claim, to one-half of said quarter section, by east and west, or north and south lines, so as to include complainant's improvement on said quarter section; such division, if practicable, to be made according to the usual legal subdivisions by which the United States divide lands granted by 80 acre grants to pre-emptioners, or if such division could not be made, that the defendants convey to him as aforesaid, a joint interest of one-half of said quarter section.

When the mandate of this court went down to the Circuit Court, with instructions to enter a decree in conformity therewith, the complainant tendered, and deposited in court, $190 10, the minimum price, with the interest thereon, for 80 acres of public land, from the time the entry was made, and moved the court for a decree for the east-half of said quarter section. The complainant also admitted of record, that the improvements, both of Cunningham and Brumback, were exclusively on the north-east quarter of said quarter section, and that both improvements would be included in the north, or the east-half of said quarter section.

The case, under a rule of practice, was for want of notice of the filing of the mandate, to the defendants, continued from the June until the October Term, 1853; at which time the complainant filed a bill of revivor, to revive the suit in the name of Mary A. Freeman, the infant child of Frances A. Freeman, deceased. Process was issued and duly served upon the infant, and a guardian *ad litem* appointed, by whom she answered.

The answer recapitulates the several steps taken in the case, and without showing any cause why she should not be made a party, but fully assuming that she is the heir and representative of her mother, Mrs. Freeman, in interest in the estate, is intended to assail the validity and binding effect of the decision of the

Supreme Court, and of this court, upon the rights of her deceased mother, and consequently upon herself.

The other defendants, by way of suggestions, present the same grounds, as set up in the answer of the infant, and the answer as well as the suggestions, admit that the improvements, of both Cunningham and Brumback, were on the north-east quarter of said quarter section, and would be entirely embraced within the north, or the east-half of said quarter section. They moreover suggest, that both the north and the east-half of said quarter are far more valuable than the south or the west-half, and that no equitable division can be made by giving to complainant either the north or the east-half of said quarter section. In the answer of the defendant, it is also suggested, that Andrew F. Freeman, her father, is living, and should be also made a party to the suit.

The cause was set for hearing at the June Term, 1854, to which time it was continued. During that term, Matthew Cunningham, the complainant, died, and his widow and heirs came in, and suggested that there was not, and would not be any administration of his estate, and moved that the suit proceed in their names, for a revivor against Mary A. Freeman, and for a final decree.

The defendants produced the deed of Matthew Cunningham to Peter Hanger, husband to one of the heirs, and one of the applicants to be admitted as plaintiff, made in 1851, conveying to him his whole interest in the property in controversy, and opposed the application upon the ground, that the heirs of Matthew Cunningham had no such interest in the estate, as to entitle them to proceed with the suit in their names.

But the court overruled the objection, and made the order substituting them as complainants, revived the suit against Mary A. Freeman, and decided that Andrew Freeman was not a necessary party, and decreed that defendants should convey, by quit-claim deed, the east-half of the quarter section to the complainants.

The complainants also moved that an account for rents and profits should be ordered; which motion the court overruled.

From so much of the ruling and decision of the court as refused to order an account to be taken of rents and profits, the complainants appealed: and, from the decree as rendered, the defendants appealed.

This brief reference to the history of the case, from its inception to the present time, has become necessary, to present clearly the points still open for investigation.

Every attempt made by the defendants to go behind the decision of the Supreme Court of the United States, and of this court, was properly disregarded. The validity of the decision of the United States Court upon the rights of the heir of Mrs. Freeman, had been presented upon the return of the mandate of that court to this, and it was held, in all respects, as binding upon her, notwithstanding her death after the supersedeas, and before submission and decision by that court, as if she had been, at the time, alive. *Cunningham vs. Beebe et al.*, 13 *Ark.* 673. And the court then, under a familiar rule of practice, ordered the decision to be entered as of a day prior to the death of Mrs. Freeman, and subsequent to the submission of the cause; which was accordingly done.

This decision conclusively settles the question as to the effect of the decision of the Supreme Court of the United States, upon the rights of Mrs. Freeman. If she had remained in life, when the case was sent back to the Circuit Court, with the mandate of this court to carry into effect its decision, it is very evident that she, no more than Beebe, or any other of the defendants, could have been heard to question the decision of this court, whether right or wrong. All questions submitted to the decision of the Supreme Court, are to be considered as settled, and the mandate of the Supreme Court is obligatory upon the inferior court to carry it into effect. As held in *Fortenberry vs. Frazier*, 5 *Ark. Rep.* 202: "Nothing is before the inferior court for its adjudication but the proceedings subsequent to the mandate."

If then such would have been the effect of the decision of the Supreme Court upon the rights of Mrs. Freeman, if living, it neces-

sarily follows that the effect upon the rights of her infant child, must be precisely the same; because, by reviving the suit in her name, she becomes substituted, as a party, in the place and stead of the mother, and as the successor in rights and interests, just as they existed in the mother at the time of her death.

The doctrine held in *Fortenberry vs. Frazier,* was considered and approved in *Doe dem. Hanly vs. Porter et al.*, 5 *Eng. Rep.* 190, and several other still more recent decisions of this court, and is well sustained by the decision of the Supreme Court of the United States in *Sheller's ex. vs. May's ex.*, 6 *Cranch* 266, and *Ex parte Tobias Watkins*, 3 *Peters Rep.* 193.

And although it would seem in the case of *Nevis vs. Scott et al.*, 13 *Howard* 270, that the first decree was stricken out, and a re-argument had in the case, because one of the defendants, as was made appear to the court, was dead: still, the question seems neither to have been argued, nor any reason assigned for doing so by the court. Indeed, it seems to have been done upon suggestion, and without opposition or reference to authority. And without conceding the correctness of such a practice in the same court where the decision was made, even if such should be the case, it could not be received as an authority to authorize an inferior court to disregard the authoritative mandate of the superior court, and to re-investigate the questions presented before it for decision, and upon which a decision has been made. To tolerate this, would be, in effect, constituting the inferior into the superior court, with power to decide upon the correctness and validity of its decisions. The life and efficacy of the decisions of the Supreme Court would be sapped, if they could be either evaded or questioned by the inferior court. There must be an end to litigation, and a supreme and final arbiter, whose decisions must be respected and obeyed.

Under this view of the question, when the suit was revived in the name of the infant, Mary A. Freeman, she took the place of her mother, and in it stood precisely in the same situation as any other of the defendants; none of whom had a right to raise any

question touching the correctness of the decision of the Supreme Court.

The next question to be considered is, as to the propriety of making Cunningham's heirs parties to the suit after the death of Cunningham, who had, before his death, but after the commencement of this suit, conveyed the land to Peter Hanger, one of the parties, who, by marriage, claimed to be substituted as plaintiff in this suit.

In order more clearly to present this question, we will first consider the effect of the conveyance from Cunningham to Hanger, upon the suit, before Cunningham's death.

Hanger, the purchaser, was affected with notice of the pendency of the suit for this property; because, as remarked by Judge STORY, (*Equity, vol.* 1, *chap.* 405) "Every man is presumed to be attentive to what passes in the courts of justice of the sovereign State where he resides. And, therefore, a purchase made of property, actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice; and he will, accordingly, be bound by the judgment or decree in the suit." In *section* 406, he says: "The litigating parties are exempt from taking any notice of the title so acquired; and such purchaser need not be made a party to the suit." "Hence," he says, "arises the maxim, *pendente lite nihil innovetur;* the effect of which is not to annul the conveyance, but only to render it subservient to the rights of the parties in the litigation. As to the rights of these parties, the conveyance is treated as if it never had any existence, and it does not vary them."

And to this effect was the decision of this court in *Whiting and Stark vs. Beebe et al.*, 7 *Eng.* 564, in which it was said: "A purchaser *pendente lite* acquires no litle by his purchase, which he can set up or assert to the prejudice of the parties litigant, and the suit will be heard and determined upon the merits, as it stood between the parties litigant, perfectly irrespective of any rights which he may have acquired by such purchase: which, if

valid for any purpose, can only be so as between himself and his vendor, to enable him, upon the determination of the suit, to succeed to the rights of such vendor, or perhaps, if a party to the suit, to enable the court, after the determination of the rights of his vendor, favorably, to decree them to him."

That such would have been the effect of the purchase of Hanger, as regards the present suit, if it had been prosecuted to a final hearing and decree, during the life time of the complainant, there can be no question: indeed, this is not seriously controverted by the defendants; but they contend, that by force of this conveyance, he had parted with his title to the property before his death, and that in fact nothing survived to his heirs, but that the title being in the purchaser, he was the sole party in interest, and being such, none other could be substituted. Now we have shown that such was not the effect of the deed, during the complainant, Cunningham's life, but that, as regards this suit, and the rights of the parties in litigation, it stands in suspension as completely as if no such deed had been made: indeed, there are not wanting respectable authorities that hold it to be champertous and void. And if such was not the case, during Cunningham's life, it must have been because, from a prevailing necessity in the administration of the law, the right to litigate, and finally to determine this suit, still remained in him, as fully as if no such deed had been made; and so remaining at his death, might be asserted by his heirs. They succeeded to all the rights of their ancestor, and this was clearly such, because the deed communicated no more perfect title to Hanger by the death of Cunningham than he possessed before his death.

But, in another point of view, there is a manifest propriety in disregarding this conveyance in the progress and final determination of this suit. Will the court permit an issue to be raised between Hanger, the purchaser, and the heirs of Cunningham, as to the validity of his purchase? And if not, shall the heirs be thrust aside, and an intruder, who brings a paper title to the property in suit, step in and take a final decree for the property in

his name? We should say not; and, if not, will the court, after years of litigation between parties, and just at the time when the final decree is to be entered, stop to open a new issue, and protract the final determination of the suit, to an indefinite, if not upon principle (if sanctioned in this instance) to an endless litigation.

But the most remarkable feature in this objection to the substitution of Cunningham's heirs, is, that it should come from the defendants. If Hanger himself claimed to be substituted as sole complainant and party in interest, the defendants might well have said: We have had a tedious and an expensive contest with the ancestor of these complainants, and we are unwilling now to turn aside to scrutinize the pretensions of this intruder, who claims to be his assignee; at the close of so hot a chase, it is not fair to turn in a fresh pack upon us. But so far from this, the complaint is, that the old claimants are not turned off, and this purchaser, who does not himself set up any claim as such, should be made to litigate and contest with them the right to the property, (if indeed at this advanced stage of the case there is anything to litigate, other than what necessarily follows from previous adjudication).

But the truth is, Hanger is already a party by substitution, not in his right as purchaser, but by marriage, and with his wife, and the other heirs of Cunningham, he is a complainant.

The cases in 1 *Barb.* 648, and 9 *Miss.* 605, cited and relied upon by the counsel for the defendant, upon examination, are found not to affect the grounds upon which we think this case must be decided. In the case in 1 *Barb.*, it appeared that an assignment of a judgment, which the party had intended to make after appeal taken, was, in fact, made before the appeal was entered. Upon the question as to whether it was necessary to revive the proceeding on the appeal before proceeding to argument, the court expressly declined giving any opinion. There is no authority cited; and, from the facts of the case, there was no necessity for investigating this question.

In the case in 9 *Miss.*, the question arose upon a bill of review,

not a bill of revivor, and in investigating the case, the court remarked, that if the complainant assigned his interest in the suit *pendente lite*, if the defendant wished to have the suit brought to a termination, his proper course was to apply to the court for an order, that the assignee proceed and file a supplemental bill, in the nature of a bill of revivor, or in the event of his failing to do so, the bill would be dismissed. The only authority cited for this, is 7 *Paige* 287. Upon reference to that case, it would be found that the question arose in a case where an insolvent assigned his estate, *pendente lite*, whereby the insolvent loses his capacity to sue, and the assignee, who takes the estate to be distributed amongst the creditors, is, in fact, the proper and only party interested; for the heir, in such case, gets nothing from the insolvent's estate.

This case is essentially different. Here the heirs succeed to the estate of the father. The contract, *pendente lite*, gives no right to the assignee to obtrude his claims upon the notice of the court, or the litigants. To that extent, his purchase is dormant, and avails him nothing. And even if the case reported in 9 *Miss.* was directly in point, with all due respect to the opinion of that court, we should hesitate to receive it as an authority to be followed, when it stands so strongly opposed to the whole doctrine of claimants, purchasers *pendente lite*. And particularly in a case like this, and where the heirs have all appeared and made themselves parties, and where the purchaser is in fact a party complainant to the suit, electing to take as heir and not as purchaser by deed. Not a shadow of doubt exists, but that the decree rendered as between these parties and defendants, will be final and conclusive upon all the rights at issue in this suit; at least, as far as the defendants are concerned; and such being the case, they have no reason to object to the prosecution of the suit to final hearing with these complainants.

But suppose the names of the heirs of Cunningham should be stricken out as parties complainant, and Hanger substituted as sole complainant—what then? Are not his rights as fully and

definitely settled by the previous decisions in the case as Cunningham's, from whom he purchased, were? or shall the defendants be permitted to open anew, the old issues between them and Cunningham? We think not. And if not, there is no apparent reason for a mere change of names without benefit to the defendants. It is evident, therefore, that this objection was not well taken.

The remaining question, upon the appeal of the defendants, relates to the execution of the mandate of the Supreme Court.

The ground of objection to the decree in this respect, is predicated upon the assumption that Cunningham and Brumback were each entitled to a pre-emption under the same act of Congress, and upon the same subdivision of the quarter; and, consequently, neither was entitled to the tract on which their improvements were made, to the exclusion of the other; and, therefore, that no division could be made which would do justice to them, because whether divided by east and west, or north and south lines, the tract on which both improvements would fall, would be of far more value than the other, and that standing in the relation of tenants in common, as between Cunningham, and Ashley and Beebe, who succeeded by purchase to the rights of Brumback, nothing but a sale of the land and division of the proceeds thereof, would be equitable and just.

Conceding the premises to be well founded, such would seem to be just; but, upon examination, the facts of the case are essentially different in this; that although it was proven that Brumback was entitled to a pre-emption of equal validity with Cunningham's, and on the same subdivision of the same quarter section, and that Ashley was the purchaser thereof, yet still no entry was ever made under Brumback's pre-emption, nor did the defendants claim title to the land by virtue thereof: that claim was lost to them, or if available for any purpose, it was only to pave the way to laying the floating pre-emptions of Plummer and Imbeau. This it was, according to the view taken by the Supreme Court of the United States, which removed the objections to the location of 80 acres under and by virtue of the pre-emption floats;

because, says the court, although not made by Ashley, it was owned by him. It was then the purchase of the improvement, and not the pre-emption of Brumback, that was available to the defendants, and then, not by way of conferring a right to enter the land, but to remove obstacles in the way of an entry under the floating pre-emptions.

Thus it was held, that Cunningham was entitled to enter 80 acres under his pre-emption right of 1829 and '30, and the defendants to 80 acres under their floats: but then these were not held to be claims of equal merit. So far from this, these floats were swept off as void, so far as they affected, or interfered with the rights of Cunningham; and the court directs that the 80 acres to Cunningham shall be laid off "by east and west, or north and south lines, so as to include his improvement," and that if this cannot be done, that defendants convey to him a joint interest of one-half of the land.

The Supreme Court seems to have overlooked the particular locality of Cunningham's improvement, or out of abundant caution, to have so shaped their decision as to secure to Cunningham the full benefit of his pre-emption, and standing as it did, without any rival claim to a pre-emption, or rather to any title under one, there was a manifest propriety in doing so.

The fact as to the particular locality of the improvement of Cunningham, having been admitted by the parties of record, it became the duty of the Circuit Court, in obedience to the mandate of the Supreme Court of the United States, to decree the east-half of the quarter section—it being the usual subdivision made by the United States of its public lands, and Cunningham's improvement being exclusively on that tract.

According to the view of the case thus taken, it follows, that so far as the exceptions of the defendants extend, and for the alleged errors to correct which they appealed, the decree of the Circuit Court was correct, and should be affirmed.

Before Mr. Justices SCOTT and WALKER, and Hon. THOS. JOHNSON, Special Judge.

Mr. Chief Justice ENGLISH not sitting in this case.

## CUNNINGHAM ET AL. VS. ASHLEY ET AL.

(DECIDED AT JULY TERM, 1855.)

If this court reverse a decree and remand the cause to the Circuit Court for further proceedings, that court can only carry into effect the mandate of this court so far as its direction extends: but the Circuit Court is left free to make any order or direction in the further progress of the case, not inconsistent with the decision of this court, as to any question not presented or settled by such decision.

In this case, a right to the rents and profits of the land, during the wrongful and fraudulent disseizin of the complainant, necessarily follows the recovery, as a consequence resulting; and no express claim for rents and profits need have been set up in the bill, but they may be recovered under the general prayer for relief.

Mr. Justice WALKER delivered the opinion of the Court.

This case came before us at the last term of the court upon cross appeals, and an opinion was then delivered. After which, upon petition of the defendants, a re-consideration was granted to that part of the opinion, which decided the questions of law arising upon the appeal of Cunningham's heirs.

The questions of law arising upon the appeal of the complainants, from the decision of the court, grew out of a motion, made by complainants, at the time of taking their final decree for the land, for a reference to the master to take an account of the rents and profits on the land, and to report. This motion was overruled, upon the ground that the allegations in the bill had not laid the proper basis for such account. From which decision, the complainants appealed.

Preliminary to this, the question was made by counsel, whether as this court, in its directions to the Circuit Court, when the

case was before us upon a former appeal, made no reference of the question of rents and profits, that court, upon the return of the cause for further proceedings, in conformity with the opinion of this court, could do more than to carry into effect the specific decree indicated in the mandate to that court.

We think it very well settled, that the Circuit Court could not, so far as the direction extended; but the question of rents and profits was not then presented for our consideration; no question of law was either discussed or settled with regard to it; and, consequently, the Circuit Court was left free to make any order or direction in the further progress of the case, not inconsistent with the decision and direction of this court.

The allegations in the complainant's bill are not very full and distinct, with regard to the extent of the adverse possession held by the defendants, and there is no distinct claim set up by the complainants, in their bill, to rents and profits; nor is there any specific prayer for relief touching the same. So that unless rents and profits result, necessarily, from the decision of the court, upon the allegations of a fradulent and wrongful disseizin in favor of the complainants, and could become the subject of litigation and contest, notwithstanding a decision in favor of the complainants as to the title and the wrongful disseizin, in order to entitle the complainants to recover, it would become necessary to make a distinct averment and claim to rents and profits, which might be decreed under the general as well as under a specific prayer for relief. And the whole question seems to be narrowed down to this enquiry.

The question then is, what is the legal effect of a claim to land, of which the claimant has been disseized? This question has been answered by several decisions, fully in point, to which we will refer.

In *Green vs. Biddle*, 8 *Wheaton* 1, it was held, that at common law, whoever takes and holds possession of land, to which another has a better title, whether he be a *bona fide* or a *mala fide* possessor, is liable to the true owner for all rents and profits which

he has received; but the disseizor, if he is a *bona fide* occupant, may recoup the value of the meliorations made by him against the claim for damages. That equity allows an account for rent in all cases, from the time the title accrued, (provided it does not exceed six years) unless under special circumstances, as where the defendant had no notice of the plaintiff's title, or where there has been laches in the plaintiff in not asserting his title, &c., in which and similar cases, the account for rents is confined to the time of filing the bill; and the court concludes this branch of the case by saying: "A right to land essentially implies a right to the profits accruing from it, since, without the latter, the former can be of no value. Thus a devise of the profits of land, or even a grant of them, will pass a right to the land itself. *Shep. Touch.* 93; *Co. Litt.* 4. For what, say Lord COKE, is the land but the profits thereof."

And so this court held, in *Watkins & Trapnall vs. Wassell*, 15 *Ark.* 92, "that a grant of rents and profits entitled the purchaser to enter upon and take possession of the land itself."

In *Emerson vs. Thompson*, 2 *Pick. R.* 487, it was held, that the right to mesne profits was a necessary consequence to a recovery of the estate.

And Lord ELDON said, in *Pulling vs. Warren*, 6 *Ves.* 87, "when the decree for title or judgment in ejectment is obtained, the plaintiff has all natural justice on his side, both in law and equity, to the possession, from the moment he made the demand, and if so, the mesne profits are consequential upon his obtaining possession."

These authorities show conclusively, that the right to the rents and profits of the land necessarily follows the recovery as a consequence resulting from it; and, if that be the case, it is very evident that no express claim to rents need be set up in the bill; nor indeed can any question arise with regard to rents that might not as well arise with regard to interest upon the rendition of a judgment. When a contract is proven, and judgment rendered upon it, the law, as a consequence, without any averment or demand

for interest, gives the right to take judgment for interest for the detention of the debt. And so in a suit to recover real estate, when it is ascertained that the plaintiff has been disseized of his freehold by the defendant, and that the land is the plaintiff's, the law fixes the right to rents and profits, for the detention and use of the land, as it does for the detention of money due upon a contract. In the latter case, the law fixes the rate of interest: in the first, the value of the rents and profits is left to be ascertained by evidence upon an inquiry for that purpose, having regard to the length of time, the value of the property; and perhaps where the occupant is *bona fide* such, to recoup the value of improvements against damages for rents.

The point of analogy between the case of a judgment in debt and in ejectment, for which we contend, is this, that when the act of indebtedness is ascertained, the right to interest follows, without an averment that it is claimed: and, upon the like principle, when the right to the land and the disseizin are settled, rents and profits for the use of the same are recoverable, as incident to the determination of the right to the land.

There was, therefore, in our opinion, no necessity for a specific allegation in the bill for rents and profits; no distinct issue could have been taken upon it; and whether the question should be considered before the court upon allegations and proof, or before the master, the only question would be the nature of the tenancy, the length of time it was held adversely, and the value of the improvements. These facts being ascertained, the court would determine, upon application of the law arising upon them, what decree it should render, and under the prayer for general relief, decree accordingly.

The case of *Dormer vs. Fortesque*, 3 *Atkins* 124, was not so clear a case as this. In that case, the bill was filed for the discovery of a deed, under which Dormer claimed, and that the same might be forthcoming on the trial at law of an action of ejectment, and for general relief. Nothing was said about rents: it was not even a suit for the recovery of land; but to discover the

title papers to land. The plaintiff subsequently obtained judgment in ejectment, and a supplemental bill was filed to recover rents and profits. Lord HARDWICK said in that case, that the supplemental bill aside, the original bill was sufficient, "and extended to every thing then insisted upon by the plaintiffs, and that he ought not to confine them to the single matter of producing the deeds upon the trial." And the counsel, throughout the argument of that case, conceded that if the bill had been to recover the land, and not to discover the title deed, the right to recover the rents and profits would have been clear, but only contended that as such was not the scope and object of the bill, that the rents and profits were not recoverable in that suit, under the prayer for general relief.

We are satisfied, therefore, that the motion to refer the matter of account for rents to the master, should have prevailed, and for this error, the judgment and decision of the Circuit Court must be reversed, and the cause be remanded, with instructions to entertain the motion, and refer the matter of account for rents and profits to the master.

Mr. Chief Justice ENGLISH not sitting.

## GREENFIELD VS. WRIGHT, WILLIAMS & CO.

In an action of assumpsit for money paid, the plaintiff may prove the payment of money on the drafts of the defendant, without producing or accounting for the drafts.

*Writ of Error to the Circuit Court of Jefferson County.*

Hon. J. C. MURRAY, Circuit Judge.

FOWLER, for plaintiff. The point saved by exception, as to the impropriety of the evidence offered to prove *payment* of the *drafts, &c.*, mentioned in the *account*, without producing the drafts, or showing cause why they were not produced, by proof of their *loss* or destruction, &c., or even proving that *Greenfield* had drawn them; or in any wise authorized their payment, &c., it is insisted, on the part of Greenfield, was well taken in law.

And 1*st*. It is well settled law, that no person can be made the *debtor of another* against his will; but he must voluntarily become the debtor, either by express or implied consent. And *Wright, Williams & Co.*, could not make *Greenfield their debtor*, by paying drafts, or his debts to others, the holders of the drafts, without proving that *Greenfield requested it*, or in some way authorized them to do so. See *Heirs of Emerson vs. Hall*, 13 *Pet. Rep.* 412; *Chrisman vs. Long*, 1 *Carter (Ind.) Rep.* 213; *Hamilton vs. Seaman, ib.* 189; *Young vs. Dibnell*, 7 *Hump. Rep.* 270; *Bartlett vs. Glasscock*, 4 *Missouri Rep.* 70; *Bertrand vs. Byrd*,

5 *Ark. Rep.* 657; *Exall vs. Patridge*, 8 *Term. Rep.* 310; *Oden vs. Elliott's exr.*, 10 *Ben. Mon. Rep.* 315.

2*d.* Parol evidence of any material *fact*, agreement, or writing, cannot be received, when the written evidence exists, and can be controlled by the party. See 2 *Esp. Nisi Prius* 780; 2 *Stark. Ev.* 318; *Stone vs. Waggoner*, 8 *Ark. Rep.* 206; *Sebree vs. Dorr*, 5 *Cond. Rep.* 680; *Renner vs. Bank of Columbia*, 5 *Con. Rep.* 699.

If the plaintiff's below took up *Greenfield's drafts*, or *paid* them, whether drawn on them or a third person, at *his request*, it was their business to preserve and prove the drafts, and their authority for paying them; and failing to do so, they should be held to abide by the consequences.

YELL, for defendants.

Mr. Justice SCOTT delivered the opinion of the Court.

The defendants in error sued in assumpsit, in the Jefferson Circuit Court. The declaration was of three *indebitatus* counts, for money, interest, commissions, merchandise, invoices, work and labor, balance due upon an open account, and upon an account stated; all in the most full and formal manner: the demand being laid as due on the 18th of June, 1852. There was no special count. The pleas were non-assumpsit, payment, and set-off, upon which issues of fact were formed and tried by jury. No bill of particulars was offered or asked. There was no evidence, on the part of the plaintiffs, but that contained in a single deposition, which appears to have been regularly taken on notice, and to which there was no objection made as for irregularity. There was no evidence at all on the part of the defendant, and no motion for a new trial. When the deposition was offered to be read to the jury, the defendant moved to exclude from them, all that part of it which went to prove those items, in the exhibit attached thereto, (which was a detailed account in debits and credits of sundry items,) which charged the defendant for drafts paid: on

the ground that the evidence offered, as to these items, was secondary. But the court overruled his motion, and he took a bill of exceptions. The verdict and judgment having been rendered against him, he sued out a writ of error, and having obtained a supersedeas of the execution in the vacation of this court, has assigned here for error, the overruling of his above mentioned motion.

The plaintiff did not seek to recover upon any written security, but upon an implied parol contract. If the drafts charged to have been paid had been produced, they, of themselves, would not have proved the plaintiffs' allegation of money paid for the defendant, otherwise than by the presumption of that fact, which would have arisen from the possession of them. But although he might have proven this allegation thus—it does not follow that he might not have proven it also by any witness who knew the fact otherwise, as by one who might have seen the money paid, and the drafts taken up. A draft is no written instrument of evidence, designed by the parties to show its own payment by the drawee. It purports no such thing. Much less, then, is it, even in the hands of the drawee, such written evidence of that fact, as to exclude all parol evidence to the same point unless produced, or its loss or destruction be first proven. If the defendant had desired more minute information of the items of the plaintiff's claim against him, he might, doubtless, have obtained it, by asking for a bill of particulars, which, in this case, he did not. If he had feared a fraudulent use by the plaintiff of the drafts in his hands, for the payment of which the latter proceeded against him, doubtless by a timely application, the court would have ruled their production in court, and their surrender at the hearing—and if he had desired more explicit proof, as to whether these drafts were drawn on the plaintiffs, or on a third person, or at his own request, or as to the plaintiffs' authority to pay them, he doubtless might have obtained some light on these points, or on some of them, if he had availed himself of his privilege to attend, when notified, as he was, and had cross-examined the witness. Whether the

verdict and judgment are sustained by the evidence, or whether the jury were misled in any way by instructions of the court, are questions in no way presented on this record. But the only question is, whether or not the court erred in overruling the motion above mentioned: and we do not think it did. The judgment will be affirmed with costs.

Absent, Mr. Justice WALKER.

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## CHASE VS. THE STATE BANK.

The books of the plaintiff, the State Bank, having been brought into court and used by her on the trial, the defendant, to sustain his plea of payment, made application to the court, first laying a foundation therefor, to read an entry, showing a part payment, which was granted, and the entry read. He then, without a bill for discovery or a proceeding in its nature, offered to read in evidence other entries showing a balance to his credit: the plaintiff objected, and the court sustained the objection: HELD, That the court committed no error in refusing permission to read the entry under such circumstances.

*Error to the Circuit Court of Pulaski County.*

Hon. WM. H. FEILD, Circuit Judge.

PIKE & CUMMINS, for the plaintiff.

S. H. HEMPSTEAD, for the defendant.

Mr. Justice SCOTT delivered the opinion of the court.

This was an action of debt, tried by jury upon issues of fact, one of which was on the plea of payment. After the evidence,

on the part of the plaintiff below, had been concluded, the defendant filed his petition, verified by affidavit, alleging a payment of the sum of $112—a loss of the receipt given to him by the proper officer of the Bank for the same—that he had not known of the loss until that day, and was not sure of it until by diligent search among his papers, where he supposed it was, up to a few minutes before the application, he had been unable to find it. And that no delay would be the result of an order of court to allow him to read from a book of the Bank, then on the clerk's table, and just before used by witnesses for the Bank, to refresh their memory, an entry therein which would show that the Bank had given him credit for the payment of $112, which he would have proved by the alleged receipt, but for its having been lost or mislaid as set up.

The court made the order against the objection of the Bank—as for the application being out of time—to which a bill of exceptions was taken, but as the Bank has not complained, that question is not presented.

After the defendant had thus proven the payment of $112, which, it appears by his bill of exceptions, was found and allowed for him, in the verdict of the jury, he offered to read, from the same book of accounts, further entries to prove additional payments by means of an apparent balance in his favor of $874 99, standing on the face of said account, in connection with oral evidence which he offered to produce, that before the commencement of this suit, he had expressly requested and directed the proper officer of the Bank to apply and appropriate as much as was necessary of said apparent balance to extinguish the note sued on, and if the same was insufficient, to apply it nevertheless upon this debt. But the court refused to permit him to do so, and the defendant filed his bill of exceptions.

At the same time that the defendant made this application, the plaintiff on her part offered to show, from the books of the Bank, other than said account book, and to prove that said apparent balance, long before the defendant had given his alleged

directions for its appropriation, had been actually appropriated and applied by the Bank, to wit: on the 11th August, 1846, and the 13th September, 1848, towards the payment of a note of said defendant, with Pike and Walters as his securities therein, payable to the Bank, dated 5th of December, 1843, on which suit was instituted in that court in April, 1853, and all the defendants discharged, at the then present term, upon their plea of the statute of limitations. But the court refused to permit her to do so, and she filed her bill of exceptions.

It appears, from the record, that no further application was made by the defendant, for the production of the books and papers of the Bank, other than that above mentioned in reference to the payment of $112.

Under this state of facts, it is manifest, that it would have been error in the court to have allowed the defendant's application, without the consent of the plaintiff, because the court could not compel the plaintiff to produce evidence against herself, otherwise than through a bill of discovery, or on a proceeding in its nature under the statute, which the defendant adopted as to the credit of $112, but which did not extend to the other and additional payments, which he sought to establish by the Bank's book, in connexion with the other evidence which he offered to produce. If the plaintiff could be held to have waived the objection, that the defendant had not extended this proceeding for the production of books, to the supposed additional payments, by reason of her having offered, on her part, to produce rebutting testimony to what was produced by the defendant, she could only be so held upon the condition that her rebutting testimony was also allowed. And to the refusal of the court either to allow the latter, or to any refusal of the court to allow the whole as one entire proposition, the defendant does not except at all; but only to so much of the ruling of the court as disallowed *his* proposition to produce the testimony on *his* behalf, which he offered.

To have allowed the defendant, under the facts of this case, what he proposed, would have been as unreasonable as to have

allowed him to propound two interrogatories to the plaintiff, or to have enquired as to *two* distinct facts, when he had, by a proper proceeding, applied for, and been granted leave of court to enquire as to *one* only.

We think it clear that the court did not commit any error against the defendant; and, therefore, the judgment will be affirmed, with costs.

Absent, Mr. Justice WALKER.

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LAWSON & CHASE VS. STATE BANK.

Mr. Justice SCOTT said: The facts of this case, so far as they affect the only question of law presented, are substantially the same as those in the case of *Luther Chase vs. The State Bank*, just decided, except that in this case there was no proceeding for the production of the books or papers of the Bank for any purpose, and no order of the court therefor.

Finding no error in the record, the judgment will be affirmed, with costs.

## CRISE EX PARTE.

Upon an application for mandamus to the Auditor to compel him to issue his warrant for the damages assessed under the statute in favor of the owner, upon whose land the Swamp Land Commissioners have located a levee, it must show not only a regular inquisition and assessment of damages, as prescribed by the statute, but also that the levee had been built, was in process of construction, or was under contract.

Application for mandamus to the Auditor, filed during a vacancy in the office of Judge of the Fifth Judicial Circuit; denied, after the election and commission of the judge: upon motions to vacate the order denying the writ and for leave to amend the petition, the court was divided—Mr. Justice SCOTT, against permitting the amendment to be made; Mr. Chief Justice ENGLISH in favor of it.

*Petition for writ of Mandamus.*

SCOTT and WATKINS, for the petitioner.

Mr. Justice SCOTT delivered the opinion of the Court.

On the 12th day of February, 1855, upon the suggestion that there was *then* no judge of the Fifth Judicial Circuit in commission: the truth of which this court knew from the Governor's proclamation to that effect, and for fixing that same day for the election of that functionary, the petitioner was allowed to file an application, in this court, for a rule upon the Auditor of the State, to show cause why a mandamus should not be sent to him, to issue his warrant in favor of the petitioner for swamp land scrip, to the amount of $1558, in pursuance of an inquisition taken by the sheriff of White county, under authority of the Swamp Land Commissioners, and the verdict thereon rendered, and returned into the office of the clerk of the Circuit Court of White county.

On the 26th day of the same month of February, this court refused the petitioner's application, upon no ground touching the

merits of his claim for relief, but upon that, that he had not alleged, in his petition, in addition to his other allegations, either that the levee in question had been built, was in process of construction, or was under contract.

Before this last mentioned day, however, the present acting judge of the Fifth Judicial Circuit, had been commissioned and qualified.

And the petitioner now submits his several motions for the reconsideration of the opinion of this court, touching the aforesaid refusal, for the vacation of the judgment of refusal, and for leave to amend his original petition, so as to make it conform to the views of the court indicated. With regard to that, for re-consideration, although by reason of a temporary absence from the bench, I did not participate with my brother judges in the refusal of the application, yet I have found no sufficient reason to feel clear that the legal ground, upon which they placed it, ought to be departed from. Indeed, in view of the vast door that would be opened otherwise for exhausting the swamp land grant in advance of actual reclamation or practical commencement therefor, at which latter time only real injury to the landed proprietors would begin, there are weighty considerations persuasive to persist in occupying that ground.

As to the other motions, addressed as they are to the sound discretion of this court, although I doubt not but that abundant analogous precedents in courts of regular original jurisdiction, may be found going to their support, yet I am of opinion for their refusal. Because, like considerations with those which make it the duty of this court, so to exert its revisory power of superintending control, as to conflict with its ordinary appellate power, as regulated by law, as little as may be practicably consistent with the stern demands of justice in prevention of irreparable mischief, obviously inculcate that such of the powers of superintending control, as are of the nature of original jurisdiction, should be exerted only to a like restrictive extent to prevent a failure of justice from accidental causes. Else the result would be, that

beyond this, the courts of ordinary original jurisdiction would be improperly diminished of their rightful jurisdiction. *Carnall vs. Crawford Co.*, 6 *Eng.* 617, 618. Indeed, there are additional reasons which would authorize even greater strictness in the latter than in the former class of cases; since in every case where this court should exert powers of original jurisdiction, the losing party would be necessarily diminished of the ordinary right of such a party to have the judgment against him revised in an appellate court. See *Allis Ex parte*, 7 *Eng. Rep.* 108, 9 *and* 116.

During the period when the accidental cause existed, which would have authorized this court to have granted the petitioner the relief sought, he made, nor offered to make, any such *prima facie* case, as, in the opinion of this court, entitled him to relief. And now when he offers to make such a case, as I think he does, that accidental cause no longer exists.

In the exercise of a sound discretion, to which these motions are addressed, I the more readily assume the position taken, because it in no way delays the petitioner of his ordinary remedy, since when he made his original application here, the fall term of the Pulaski court, where he can rightfully seek relief, had already been closed; and, consequently, although the temporary vacancy in the judgship of the Fifth Judicial Circuit, had not occurred, yet until the spring term following, which is now not far off, he could not have been heard. Indeed, so far from being delayed, or in being otherwise injured by this course, he is benefited in so far as this court may have enlightened him, as to allegations in any petition he may present to the proper court. The motion, in my opinion, should be refused.

Mr. Chief Justice ENGLISH: I agree with brother SCOTT, that the amendment which the petitioner proposes to make to the allegations of his petition, would, if allowed to be made, entitle him to an alternative writ of mandamus against the Auditor; but am inclined to dissent from so much of his opinion as places the refusal to allow the amendment to be made, on the ground, that

this court has lost jurisdiction of the matter by the election and qualification of the circuit judge since the application was made for the writ in the first instance. It seems to me, that the court, having rightfully obtained jurisdiction of the cause in the out-set, might well retain it for all the purposes of the application, and that the application to permit the amendment, is addressed simply to the discretion of the court. Under the circumstances of this case, I should be inclined, on the score of discretion, to allow the amendment; but, on this point, the court being divided, and one of the judges absent, the amendment cannot be allowed, nor the writ ordered.

Mr. Justice SCOTT was absent when the mandamus was refused; and Mr. Justice WALKER when the motions were disposed of.

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## FOWLER AS AD. ET AL. VS. BYERS AS AD.

A Circuit Judge is not disqualified to preside, where he is related by affinity within the constitutional degrees, to one of the parties in a cause, who is merely a trustee, and has no interest in the determination of the cause.

A decree of foreclosure of a mortgage should fix some certain time, within which the amount decreed against the property, with interest and cost, might be paid, in default whereof the sale to be made.

*Appeal from the Circuit Court of Independence County in Chancery.*

Hon. BEAUFORT H. NEELY, Circuit Judge.

FOWLER, for the appellants, contended that the circuit judge was disqualified to act by the constitution and the laws. *Kelley et*

*al. vs. Neely*, (*Judge*) 12 *Ark. Rep.* 657. That the decree was rendered for more than was due on the debt. That the decree does not direct that the lands be sold in the order prescribed in the opinion of this court. That the decree should have been, that unless the amount should be paid by a certain day, the morgage be foreclosed, and a sale take place, &c. *Downing vs. Palmateer*, 1 *Mon. Rep.* 67; *Martin vs. Wade*, 5 *ib.* 80; 6 *ib.* 253; *Davis vs. Phelps*, 7 *ib.* 637.

WM. BYERS, for appellees. We insist that this case is not within the spirit or meaning of our constitution and statute: 1st. Because the decree in fact was rendered by the Supreme Court, and the Circuit Court was directed to enter it: 2d. Because Egner had no interest in the suit. He was a mere nominal party without interst.

Mr Justice SCOTT delivered the opinion of the Court.

This cause was decided here, at the July term, 1853, (*Byers adm. vs. Fowler as adm. et al.*, 14 *Ark. R.* 87,) and was remanded to the Independence Circuit Court in Chancery, with instructions to enter up a decree in accordance with the opinion then delivered, and to execute it accordingly. At the March term of that court, the mandate of this court was filed and a decree was entered up on the 20th of that month, against the objection and protest of the defendants, who have brought the case here again by appeal. The objection against the presiding judge was, that his present wife is a niece, to wit: the daughter of the sister of the whole-blood of the present wife of Joseph H. Egner, one of the defendants below.

We thing there is nothing in the objection, because of Egner's want of interest in the controversy; the complainants seeking no decree against him personally, nor against any thing in which he had any interest. He being but a trustee, holding the mere naked legal title of a portion of the lands proceeded against.

The decree, however, is erroneous in failing to conform to the opinion of this court, in several particulars.

1st. It is excessive in amount, by the sum of upwards of $24, by any plausible mode of computing the interest, and by the sum of upwards of $164, by the proper mode, according to the computations of the clerk of this court; which, upon examination, we have found correct.

2d. It fails to direct that the lands conveyed by Fowler and wife to Denton, in trust, (which lands are not included in the mortgage to Cox) shall, in the order of conducting the sale, be first *exposed*. Then *secondly*, all the mortgaged lands, except the tracts conveyed to Ruddell. Then *thirdly*, these last mentioned lands. But the two former are placed upon one common footing: no such discrimination being made between them, as to the order in which they shall be exposed to sale, as was directed by the opinion of this court. But this is in no way injurious to Ruddell, and, therefore, no ground of reversal.

The decree is also defective in failing to fix some certain time, within which the amount decreed against the lands, with interest and costs, might be paid, in default whereof, the sale to be made.

Under this state of things, we feel bound to set aside this decree, at the cost of the appellee, and shall direct a final decree to be entered up in this court, such as the Circuit Court of Independence county ought to have entered up, and cause the same to be certified to that court under the provisions of the statute, (*Digest*, *ch.* 28, *p.* 244) at the costs of the appellants, to be paid out of the proceeds of the sale, like all other costs, except that for this erroneous decree now reversed.

Absent, Mr. Justice WALKER.

## JOHNSON VS. FRANK.

The court may well assess the plaintiff's damages on an interlocutory judgment, in a suit founded upon an instrument of writing, where the demand may be ascertained by the instrument, although the declaration contain a general count, as well as a special count, upon the instrument.

But where a portion only of the demand sued for can be ascertained by the instrument—as where the plaintiff sues for the ten per cent. interest, damages, and protest fees, as well as the amount of a bill of exchange protested for non-acceptance—it is error in the court to assess the damages.

*Error to the Circuit Court of Chicot County.*

Hon. J. C. MURRAY, Circuit Judge.

FOWLER, for the plaintiff. The plaintiff in error contends that the court erred in rendering judgment for a larger amount than appeared, by the bill of exchange, to be due, and that it could not legally find the damages, interest, and protest fees, unless by the consent of the parties, but should have called a jury—especially as one of the counts was on an account stated. *Ark. Digest*, 809, *sec.* 81, 82, *p.* 216, 217.

One of the counts was a *common count*, and, in all such cases, a jury is necessary to assess the damages; and it is error for the court to assume that office. *Starbuck vs. Lazenby*, 7 *Blackf. R.* 268; *Sherman vs. Wilson*, *ib.* 362; 9 *Missouri Rep.* 166.

PIKE & CUMMINS, for the defendant. We suppose, on default, every fact in the declaration is admitted. The law fixes the amount of recovery on the facts, and the court or clerk could ascertain damages. *Witt et al. vs. State*, 14 *Ark. Rep.* 173.

Mr Justice SCOTT delivered the opinion of the Court.

This action of assumpsit, was upon a bill of exchange for $1090, drawn by Johnson, at Belle Point, Arkansas, on George M. Pinkard & Co., at New Orleans, and alleged to have been protested there for non-acceptance. Besides a count on the bill, the declaration contained a common count.

"The defendant below having withdrawn all his pleas, and saying nothing further why judgment should not be rendered against him, and the plaintiff now exhibiting to the court the bill of exchange sued upon and filed in this case, and the court having inspected the same, found for the plaintiff the sum of $1181, the amount of the said bill of exchange, interest and damages thereon, and protest fees; and, thereupon, considered that the plaintiff recover against the defendant, the said sum of $1181, for his damages, so as aforesaid assessed, with interest on the sum of $1090, the amount of said bill of exchange, to be computed at the rate of ten per centum per annum, from the day of the judgment until paid," &c.

We think that the objection made, that where there is a general count and also a special count in the same declaration, that it would be error for the court to assess the damages, is not well taken. Because, under our statute, (*Dig.*, *ch.* 126, *sec.* 128,) where there are several counts, and entire damages are given, the verdict shall be good, notwithstanding one or more of the counts may be defective. And within the reason of this regulation, where there is a general, and also a special count, the finding and judgment of the court, without the intervention of a jury, may be well enough sustained, as referable to the special court only.

But the other objection will have to be held good, because by our statute, (*Digest*, *ch.* 126 *sec.* 81, 82), "Whenever an interlocutory judgment shall be rendered for the plaintiff by default, or upon demurrer, in any suit founded upon *any instrument of writing*, and the demand is *ascertained by such instrument*, the

*court* shall assess the damages, and final judgment shall be given thereon. In all *other cases* of such interlocutory judgments, the damages shall be assessed by a jury," &c.

And in this case only so much of the demand sued for, as appeared on the face of the instrument, could be ascertained by it; and neither the ten per cent. interest, the four per cent. damages, or the protest fees, thus appeared. On the contrary, they arise out of provisions of the statute, (*Digest, ch.* 25, *p.* 216, 217, *sec.* 8, 10), upon proof of the fact, of the alleged protest, which it is for a jury to ascertain, and then assess the damages, according to the clause of the statute above copied—these being all matters *dehors* the bill, and cannot be recovered at all, unless upon proof of the protest, a matter in *pais.*

The judgment of the Circuit Court of Chicot county, must therefore be reversed, and the cause remanded, with instructions to that court, to submit the case to a jury, for the assessment of the damages, unless waived by the parties, and to render a judgment for the plaintiff below accordingly.

Absent, Mr. Justice WALKER.

## BROWN VS. BROWN.

Where an account against a party is delivered to him, and he examines it carefully, and makes no objection to it, or any thing contained in it, it amounts to an indirect admission of the debt—acquiescence or silence, when a demand is made, is equivalent to an admission.

*Appeal from the Circuit Court of Johnson County.*

HON. WILLIAM H. FEILD, Circuit Judge.

WALKER & GREEN, for appellant.

ENGLISH, for appellee.

HON. THOMAS JOHNSON, Special Judge, delivered the opinion of the Court.

This case comes up on a motion for a new trial, and the verdict is assailed upon several grounds: the first of which is, that it is contrary to the evidence. To authorize a new trial upon this ground of objection, the verdict must have been against the weight of evidence: so much so that on the first blush of it, it should shock our sense of justice and right. See *Howell vs. Webb*, 2 *Ark. Rep.* 364, and numerous other cases subsequently decided. In order to determine correctly the question raised by this objection, it will become necessary to look into the testimony, and to see upon which side the scale preponderates. That there was evidence before the jury, legitimate and competent to establish the demand of the appellee, unless successfully overturned by the proof on the other side, there can be no doubt. It is in proof,

that the account sued upon was exhibited to the appellant, that after having heard it read, he took it and examined it carefully, and made no objection to the correctness of it, or to any item contained in it. This amounted to an indirect admission of the debt claimed by the appellant. An admission may be presumed, not only from the declaration of a party, but even from his acquiescence or silence. As for instance, where the existence of the debt, or of the particular right has been asserted in his presence, and he has not contradicted it. But it is objected, and argued with much force and ingenuity, that the item for money advanced, is improperly included in the account, because, as it is contended, it was not loaned to the appellant, but to another and different party. We think that this position is not tenable, or at least that the jury were fully warranted in finding otherwise, upon the whole testimony introduced before them.

Robert Houston, whose deposition was first read, testified substantially, that he resided with the appellee, as a clerk in his store, nearly two years, commencing with the early part of 1849, and ending in the spring 1851, with the exception of about seven months in 1850; that during that time, the appellant kept an open account with the appellee; that appellant frequently bought articles himself, and that one Isaac Brown frequently bought articles, and had them charged to appellant; that during that time, a settlement took place between the appellee and appellant, at which time the appellant paid for all articles charged against him, and which had been purchased by said Isaac; that Isaac never had any account kept against him with the appellee, but that all the transactions he made were in the name of the appellant. He further stated, that about the first of January, 1851, the appellant, said Isaac Brown, and one Young, came to the house of appellee, and that when the said Isaac, and the appellant were both together in conversation with the appellee, either the one or the other, and which of the two it was, he could not then recollect, said he had bought Young's place, and wanted four hundred dollars to pay him, and proposed to appellant, that if he would advance him that sum of

money, that he would deliver his cotton at his gin, let him gin, bale, and ship it, and pay himself out of the proceeds of the cotton; that they, or one of them, said that they were unwilling to take the price of cotton there, and would risk the market. That the appellee then advanced the sum of two hundred dollars, which was charged to the appellant on the appellee's books, in the presence of the appellant, and that appellee agreed to advance two hundred more at some other time.

Levi Macon, another witness, also testified that in a conversation with the appellant, he said that he had been over to appellee's store to have a settlement, and that the cotton had fallen short of the four hundred dollars paid to James Young, and his account for 1850, and that he would have to try and raise the money to pay him; and he also stated, at the same time, that his store account for 1851, when added, would leave him behind over $100.

James Brown, the next witness introduced by the appellee, testified, that about the first of December, 1851, the appellant came to appellee's store, in company with Enoch Wood, and called for his account, when the account sued upon was produced by the appellee, and the appellant, after having heard it read over, took it and examined it carefully himself, that he made no objection to the correctness of it, nor to any item contained in it. He also stated, that in the course of a conversation between Enoch Wood, appellee, and appellant, respecting the price Wood claimed for his cotton, appellant said to Wood: "You ought not to complain of losing on so small an amount, when I have to lose on my cotton," alluding to the cotton credited to him in the account sued upon in this case. And on cross-examination, he stated that the accounts on file, and marked B and C, are in the hand writing of the appellee, and that the items contained in them are the same, or are intended to be the same, as those contained in the account sued upon, with the exception of the money and the cotton.

James Allen, the last witness introduced by the appellee, testified, that after the delivery of the cotton credited in the account sued upon, at the appellee's gin, it was ginned and put away in

the lint-room, and covered over with plank, for want of bagging and rope to bale it; that appellant and Isaac Brown came to the gin, and stated that it was to be baled out to itself, and that they expressed dissatisfaction, saying that they feared the dust from the other cotton would get upon it.

This is the substance of the testimony offered by the appellee. The appellant then produced, and read in evidence to the jury, the two accounts marked B and C, referred to in the testimony of James Brown. He then introduced as a witness, Enoch Wood, who testified, that about the last of December, 1850, Isaac Brown applied to him for his crop of cotton to enable him to obtain an advance upon it from the appellee, so that he might pay one Young for a tract of land that he had bought of him. That he agreed to let him have all his crop, except two loads, and it was agreed between them that he, Isaac Brown, should pay him $2 per one hundred pounds, for the cotton; and, further, that he, Wood, should be entitled to whatever the cotton should bring in New Orleans over and above that sum. That he, witness, delivered two loads of cotton of his own at appellee's gin, in pursuance of a previous arrangement with appellee, and that Isaac Brown got and hauled to the same gin the residue of his crop of cotton, amounting to about 5000 pounds, for which he, the said Isaac, afterwards paid him. That after he heard that appellee had got a return of sales in New Orleans, he and appellant went to appellee's store on Little Piney, that appellant wanted to settle his account, and that when appellee produced his account, a dispute arose between them about the money charged in the account, that appellant said he was willing to pay his store account, that he had nothing to do with Isaac Brown's contracts, and denied that he ever had anything to do with the money advanced by appellee to Isaac Brown; that appellant said to appellee: "I came here with Isaac Brown, when he came to borrow the money, but did I open my mouth to you on the subject," and that appellee replied that he did not, that he knew of; that appellant then asked him what authority he had for charging the money to him, and

that appellee replied that he considered him and Isaac Brown all one, and he wanted to be sure of his money.

James Matthews also testified, that Isaac Brown purchased cotton of him, to enable him, as he said, to get an advance payment from appellee for the purpose of paying Young for the land which he had purchased from him, that he let him have 1400 pounds for $2 per 100 pounds; and also, to pay him all over that price the cotton should bring in New Orleans; and that said Isaac afterwards paid him $2 per 100 pounds for the cotton; that after the cotton was ginned and baled, he and Isaac hauled it to the river to be shipped: that he (witness) told appellee to pay himself $2 per 100 pounds out of the proceeds of his cotton, towards the payment of the money he had advanced said Isaac on it, and to purchase certain articles for him (witness) in New Orleans, and pay for them out of the residue, and that appellee agreed to do so.

Isaac Brown, the last witness introduced by the appellant, testified, that in the fall or winter of 1850, he bought of one Young, a tract of land, for which he paid him $200, and was to pay him $400, it being the residue of the purchase money, in a short time thereafter; that not having the $400, required to complete the purchase, and meeting with the appellee, who was a merchant in the neighborhood, he told him that he was compelled to raise the $400, and asked him if he would advance him the amount on 20 000 pounds of seed cotton delivered at his gin, and that appellee agreed to do so; that he then went to James Matthews and Enoch Wood, two of his neighbors, and got them to agree to let him have enough seed cotton to make up the 20 000 pounds, he having agreed to pay them $2 per 100 pounds, and to let them have whatever it should sell for, over and above that price in New Orleans; that he was to deliver the 20 000 pounds of cotton before the appellee was to be called upon for the $400, but that appellee, upon his request, paid $200 to said Young before any of the cotton was delivered; that in consequence of high water, he was prevented from delivering the cotton at the gin as soon as he ex-

pected, and said Young being on the eve of leaving the county, he went to appellee to inform him of the cause of his failure, and also to apprize him of his necessity to raise the balance of the money, and to get him to advance it before the cotton was delivered; that he saw appellee and told him his situation in regard to the matter, and told him that if he would pay Young the $200 for him, that he would deliver the 20 000 pounds of cotton as soon as the creek should fall; that appellee agreed to do so, and accordingly paid over the remaining $200 to Young; that the agreement between himself and appellee was, that appellee should advance the $400 to pay Young for his land: that he would deliver 20 000 pounds of seed cotton at his gin; that appellee would gin, bale, and ship the cotton to New Orleans, and pay himself out of the proceeds, the $400 he was to advance, and to account for and pay over the residue, if any. That he delivered the 20 000 pounds of cotton at appellee's gin, that it was then worth $2 per hundred; that the 20 000 pounds were hauled to the gin by himself, James Matthews, and Enoch Wood. Upon cross-examination, appellee asked the witness, Isaac Brown, whether he did not bring an order from appellant for the last $200 that he paid to Young for him; to which he replied in the negative, that appellant never did give him an order for the money; that he had nothing to do with it, and had no right to give an order for it. The same question was repeatedly asked him, and he as often denied that he had ever, upon any occasion, taken an order from appellant to appellee for the money paid to Young, or any other person. He was then asked by the counsel, for the appellee, whether he had delivered an order, or other paper writing, which he himself said was signed by the appellant, to appellee at his store, upon a certain occasion when Joseph Mausco was present, on the 10th day of January, 1851, for the last $200, to which he replied that he did not, but that when he went to appellee to get him to advance the residue of the money to Young, he took with him a letter written to appellee by appellant, stating that if appellee would let him (witness) have the money to

pay Young, he, appellant, would guarantee the delivery of the 20 000 pounds of cotton, as soon as the creek should fall; that he showed the letter to appellee, who read it and threw it down, saying he wanted no security, and agreed to pay Young the $200; that when appellee threw down the letter, he (witness) took it up and tore it to pieces; that at the time he was insolvent, and that the appellee well knew it.

Judge Bayless, the next, and his last witness, testified, that before the commencement of this suit, appellee spoke to him about suing appellant on a book account; that he told him that it would be necessary for him to file his account before the writ issued; that appellee spoke of the nature of his demand, and said that the transaction was between himself and Isaac Brown, but that he had never kept an account against Isaac Brown, and had charged the money to the appellant; that he (witness) was a justice of the peace at the time, and appellee said he would make out the account and send it to him.

Here the appellant closed the evidence on his part; when the appellee introduced Joseph Mausco, who testified that he was at appellee's store, on Little Piney, about the 10th January, in company with Isaac Brown and Young, the man who sold his land to Isaac. That Isaac spoke to appellee to let him have some money to pay Young; that appellee remarked that money was scarce, and did not seem inclined to let him have it: that Isaac then pulled out and presented to appellee a paper writing, and said that if he was not good, John Brown, meaning the appellant, was; that appellee shortly afterwards paid $200 over to Young: that the paper handed by Isaac to appellee, was a notice or an order; that he did not read it, nor hear it read, but that Isaac said to appellee, when he handed it to him, that if he was afraid to trust him, he could not be afraid of John Brown, that he was good, and that there was an order, or a notice signed by him for the money. This is, substantially, all the evidence adduced upon the trial in the court below.

The testimony of the several witnesses, introduced by the ap-

pellee, when taken in connection with the tacit admission by the appellant, we think can leave but little doubt, but that the money advanced was properly charged to the appellant. True it is, that the witness, who was present, at the time the contract for the money was made, could not say positively whether it was the appellant, or the said Isaac Brown, who contracted for it. This then, if taken by itself and uncorroborated, might have left room to doubt upon the subject. But when it is considered that the charge was made immediately against the appellant, and in his presence, that the appellee had never kept an account with Isaac, but that his purchases, anterior to that time, had been charged to appellant, and paid for by him without objection; that said Isaac was insolvent, and that appellee well knew it, that the appellant went to the gin before the cotton was baled, and complained that it was not sufficiently protected; that he remarked to Wood that he ought not to complain at his loss, when he had to lose so much upon his cotton, and referring to the cotton upon which the money had been advanced, that the cotton had fallen *short* of the $400 paid to James Young, and his account for 1850, and that he would have to try and raise the money to pay him, and that he sent a notice, or an order, to the appellee for the money: there certainly can be no room for doubt or cavil, unless those who testified to these facts have been shown to be unworthy of credit, or the proof on the part of the appellant is overwhelming and utterly impregnable. Wood, the first witness, introduced by the appellant, testified that Isaac Brown applied to him for his crop of cotton to enable him, as he said, to obtain an advance of money from the appellee to pay for a tract of land which he said he had purchased from one Young, and that he agreed to let him have a portion of his crop. He also testified, that after he had heard that appellee had gotten a return of sales in New Orleans, he and appellant went to appellee's store; that appellant wanted to settle his account; that appellee presented his account, and that a dispute arose about the money charged in the account; that appellant said he was willing to pay his store

account; that he had nothing to do with Isaac Brown's contracts, and denied that he ever had anything to do with the money advanced by appellee to Isaac Brown; that on being asked by appellant, whether he opened his mouth, when he went with Isaac Brown to borrow the money: that he replied that he did not, that he knew of; and that on being asked by what authority he had charged the money to appellant, he replied that he considered him and Isaac Brown all one, and that he wanted to be sure of his money. It will be perceived that all this witness knew, in relation to the contract of lending, he learned from Isaac Brown himself, until he and the appellant went to appellee's store, after a return of the sales of the cotton in dispute, and also of the cotton that the witness claimed, and then it was that he says the conversation occurred between appellant and appellee, which has already been detailed. It appears that the witness, on that occasion, got into a snarl himself with the appellee about the cotton, that he claimed to have hauled to his gin, and what effect this difficulty may have had upon his testimony in this case as tending to defeat the claim of the appellee, connected with other circumstances surrounding the transaction, it was perfectly competent for the jury to decide. The testimony of James Matthews is perfectly consistent and reconcilable, with that offered by the appellee. All that he knew of the contract of lending, he derived from Isaac Brown, and that the appellee agreed to pay himself for the money advanced, whether to Isaac or the appellant, out of the proceeds of witness' cotton, could not raise the slightest presumption that the advance was made to the former. Isaac Brown, it is conceded, testified in positive terms, that the money was advanced to himself, and upon his own responsibility, yet the reluctance which he manifested in disclosing the fact of having borne a letter in respect to the money from the appellant to the appellee, and also the discrepancy between his testimony and that of Mausco, touching its contents, well warranted the jury in disbelieving all that he said in relation to the original contract. We have now passed upon all the testimony, which we conceive

material, and upon a full review, we think that there is clearly nothing in the verdict calculated to shock any one's sense of justice and right.

The next ground of objection to the verdict is, that it is contrary to the instructions of the court. We have not been able to discern any foundation for this objection to rest upon, as there is nothing in the finding that is in any way inconsistent with the instructions. The third and last special ground is, that the court mistook the law in giving in charge the instructions called for by the appellee. The court gave but two instructions at the instance of the appellee. The first was, that if the jury believed, from the evidence, that the plaintiff advanced said sum of $400 in his account charged to defendant, and charged the same to him, that they must find for the plaintiff, as to the amount which might be due. There certainly could be nothing wrong in that, for it is a self-evident proposition. The other was, that if they believed, from the evidence, that the account of plaintiff was presented by him to the defendant, and that the whole account was read to the defendant, and he did not object to the same, or any item thereof, or the balance struck thereon, they should find for plaintiff; this is a circumstance from which the jury may presume its acknowledgment.

If any good objection could be taken to the first branch of this instruction, as being too strong, it is clearly obviated by the last clause, as it most undoubtedly would be a circumstance, and a strong one, from which the jury would have been warranted in finding for the appellee. Indeed, acquiescence or silence, when a demand of a debt is made, is equivalent to an admission, as already held in a previous part of this opinion; and, consequently, the instruction was perfectly right. The fourth and last objection is in general terms, and alleges that the verdict is unjust and unwarranted by the facts in the case. No exception was taken to the action of the court in modifying or refusing to give the instructions asked by the appellant; and, consequently, this court

is not called upon to express any opinion upon that point. See *Carr vs. Crain*, 2 *Eng.* 249.

We entertain no doubt of the correctness of the judgment of the court below, and it is, consequently, in all things, affirmed.

Mr. Chief Justice ENGLISH not sitting.

Absent, Mr. Justice WALKER.

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## RINGGOLD VS. RANDOLPH.

The statute of limitations, prescribing ten years as the period of presumption of payment of a judgment, having been repealed before any vested right of defence under it, had accrued to the defendant, he can derive no benefit from it under his plea of payment.

*Scire Facias to revive a judgment.*

FOWLER, for the plaintiff.

TRAPNALL, for the defendant.

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

At the July Term of this court, 1842, the case of *Ringgold et al. vs. Randolph*, on error to Pulaski Circuit Court, was reversed, and judgment rendered against Randolph, for $15 37 costs.

At the January Term, 1854, on the suggestion of Ringgold, of the death of his co-plaintiffs in error, and that said judgment for cost remained unsatisfied, a *scrie facias* was ordered by the court against Randolph, requiring him to show cause why the judgment should not be revived, and execution issued, in the name of Ringgold, as surviving plaintiff, returnable to July Term, 1854. *Scire facias* was accordingly issued on the 10th of April, 1854.

Randolph pleaded payment, to which issue was taken, and the cause submited at the present term, without any proof of actual payment, the defendant relying upon the presumption of payment arising from lapse of time.

The 30*th section*, *chap.* 91, *Revised Statutes*, which was in force when the judgment in this case was rendered, declares, that "every judgment or decree, which may hereafter be rendered in any court of this State, or elsewhere, shall be presumed to be paid and satisfied after the expiration of ten years from the time of rendering the same," &c.

By *sec.* 5, *act of* 14*th December*, 1844, (*Pamphlet Acts*, 1844, *p.* 25) the above section of the Revised Statutes was expressly repealed. This repeal having been made long before any vested right of defence, under the repealed statute, accrued to the defendant, he can derive no benefit from it, under his plea of payment in this case.

By the common law, the presumption of payment of a judgment, does not arise until after the lapse of twenty years from the date of the judgment. *Woodruff vs. Sanders as admr.*, *July Term*, 1854.

The finding is against the defendant's plea, and the judgment will be revived, and execution ordered, &c.

Absent, Mr. Justice WALKER.

## HOFLER VS. THE STATE.

This court will not entertain an application for a supersedeas of the judgment in a criminal case, unless application be first made to, and refused by the Circuit Court. *Bixby vs. The State*, 13 *Ark.* 286.

*On Appeal from Clark Circuit Court.*

Motion, for supersedeas.

STILLWELL, for the motion.

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

Hofler was convicted, in the Clark Circuit Court, of an assault with intent to kill, &c., and sentenced to the Penitentiary for three years. Whereupon, the record states, he "Filed his prayer of appeal herein, to the Supreme Court, which being considered by the court, it is ordered that the said prayer be granted, and that the defendant have an appeal in this case to the Supreme Court, and that the clerk of this court make, certify, and send into said Supreme Court, a true and complete copy thereof.

Whereupon, on motion of said defendant, Hofler, it is ordered by the court, that the execution of the judgment be stayed for the time and term of twenty days, that said Hofler, in the mean time, may apply to *the Supreme Court for a supersedeas;* whereupon it is ordered by the court, that said defendant be remanded to the custody of the sheriff from whence he came."

The appellant has filed a transcript of the record in this court, and applied for a supersedeas of the sentence of the court be-

low, until the case can be finally adjudicated here upon his appeal.

The appellant was entitled to the appeal as a matter of right. *Digest, ch.* 52, *sec.* 225. He had also the right to apply to the Circuit Judge, for a stay of the execution of the sentence, until the appeal could be heard and determined in this court. *Ib. sec.* 226.

Had he applied to the Cricuit Court for such stay of execution, and the application had been overruled, it would have been the duty of the court, nevertheless, to have stayed the execution of the judgment, except as to costs, for a sufficient time to enable the appellant to make application to this court, or one of its judges, for a supersedeas. *Ib. sec.* 228.

But the appellant having made no application to the court below, for an order staying the execution of the judgment, until his appeal could be heard and determined here, this court cannot grant the supersedeas now asked for by him, according to the decision in *Bixby Ex parte*, 13 *Ark. R.* 286. The rule is, that the application for supersedeas must first be made to the Circuit Court and refused by it, before this court will hear such application.

The appellant is privileged notwithstanding, to prosecute his appeal, but, in the mean time, there can be no stay of execution, on this application, at least.

Absent, Mr. Justice WALKER.

## NEWTON EXR. OF WALTERS VS. FIELD.

Where a party makes a fruitless attempt to interpose a defence at law, which is exclusively an equitable one, and not cognizable by the court of law, he is not thereby debarred from the right to resort to equity.

Watkins obtained a judgment against Johnston, and Walters as his security; issued a writ of garnishment against Field, the debtor of Johnson; before judgment on the garnishment, the original judgment was paid by Walters, but not entered satisfied; execution was issued on the garnishment judgment, for the benefit of Walters; Field filed his bill for injunction, alleging that a judgment had been rendered against him, as the security of Johnston, which he had paid, to a larger amount than his debt to Johnston: HELD,

1. That the garnishment judgment must be considered as *res adjudicata* as between Watkins and Field as to any defence that could have been made at law; but not so in a proceeding between Walters and Field.
2. That when Walters paid the original judgment, it was extinguished at law as between the parties to it.
3. That if the garnishment judgment had been rendered at the time the original judgment was paid, it would also have been extinguished, so far as Watkins was concerned, being but an incident to the original judgment.
4. That if Field had known that the original judgment had been paid, he might have successfully interposed it as a defence to the garnishment suit.
5. That as Field had no legal or actual notice of the payment of the original judgment, and was thereby deprived of interposing that defence to the garnishment suit, he had sufficient grounds to resort to a court of equity to enjoin the execution of the judgment, so far as Watkins was concerned.
6. That though the payment of the original judgment extinguished it, and extinguished the right of Watkins to enforce the garnishment judgment against Field, it did not extinguish the debt which Field owed to Johnson: and so, had the bill of Field been filed to be relieved from the garnishment judgment, exclusively upon the ground of such payment, without any equitable right of his own, equity would not have relieved him without his paying to Walters the debt which he owed to Johnston; or had Walters, by a cross-bill, shown that his equity as security was superior to Field's, the court might well have decreed that Field pay him the amount of the garnishment judgment.
7. That the garnishment judgment having been extinguished by the payment of the

original judgment, and the plaintiff enjoined from proceeding on it, if Walters had any equitable right to collect the money, on the doctrine of subrogation, he could not do so by an execution on the judgment, but would be compelled to apply to a court of equity.

8. Regarding Walters and Field as having equal claims to be protected in equity from loss, a court of chancery would not compel Field to surrender up to Walters an indemnity which he held in his own hands.

*Appeal from the Circuit Court of Pulaski County in Chancery.*

Hon. WM. H. FEILD, Circuit Judge.

WATKINS & CURRAN, for the appellant. So far as the ground of relief set up in the bill, is the same as that set up in the garnishment suit, we insist that the complainant is concluded by the decision made in that case, and that the question is *res adjudicata.* A court of chancery cannot review the supposed errors of a court of law, much less of the Supreme Court, either directly or indirectly. *Watkins ad. vs. McDonald et al.*, 3 *Ark. Rep.* 270.

The allegation that the judgment at law was secretly extinguished, is wholly unfounded. The judgment creditor, pending the garnishment, had coerced payment of Walters, the security; but the effect of that payment was not to extinguish the original judgment and discharge the garnishee.

The rule in England does not appear to be very well settled. See *Copis vs. Middleton*, 1 *Turner & Russell* 231, and 1 *Leading cases in Equity* 60, where this whole subject is fully discussed. *Parsons vs. Briddock*, 2 *Verm.* 608.

But there seems to be but little doubt or conflict of authority in the United States, on this subject. See 1 *Leading cases in Equity, p.* 88, *and the authorities there collected.*

Now, in this case, the garnishment is a distinct proceeding from the judgment, ancillary to it, but nevertheless, a security, which the creditor had acquired, in addition to his judgment against Johnston and Walters; and the payment by Walters did not ex-

tinguish the original judgment itself, but equity would keep it alive, for his protection; so, for instance, as to give him the benefit of any lien of that judgment on the estate of Johnston.

There are many cases where the surety would have to apply to a court of chancery, in order to obtain the benefit or enforcement of assets or securities acquired by the creditor or a co-security. But, in this case, Walters has the legal advantage of the judgment as a subsisting security, susceptible of being enforced at law, and the payment by him is regarded as an equitable assignment of the debt, and of the judgment upon it, so as to authorize him *to sue or issue execution* in the creditor's name for his use. See *authorities collected, p.* 92, 1 *Leading cases in Equity.*

A court of law, at this day, is fully competent to take cognizance of such equities, and will not refuse to protect them.

TRAPNALL, for the appellee. That the security, who pays the debt of the principal, is a favorite of equity, and entitled thereby to be subrogated to the securities held by the creditor, is a familiar principle. But there is a great diversity of authority as to the extent of it.

The English, and a large proportion of the American courts, confine the principle to those *independent collateral* securities which are not extinguished *ipso facto* by the payment: such as mortgages, pledges of personal property, &c. *Copis vs. Middleton,* 1 *Turner & Russell* 229; *Hodgson vs. Shaw,* 3 *Mylne & Keene* 183; *Jones vs. Davids,* 4 *Russell* 227; *Dennis' exr. vs. Ryden,* 2 *McLain* 454; 1 *Story's Equity* 509, 510, 513, 514, 515, *and notes; Bank of the United States vs. Stewart,* 4 *Dana* 28: and assert that the original debt and judgment, and all proceedings, judgments, and securities, incident thereto, are extinguished by the payment, and cannot, in law or equity, be made available to the security. *Story's Equity* 512, 513, 514; *Gammon vs. Stone,* 1 *Vesey,* 339; *Woffington vs. Shaw,* 2 *Vesey* 560; *Hodgson vs. Shaw, ub. sup.;* 2 *Greenleaf* 343, 344, 345; 10 *J. R.* 524.

The security must resort to proceedings in equity to get the benefit of such securities, to prevent the reconveyance of the mortgage, or the assignment and delivery of the securities. *Retten House vs. Levering*, 6 *Watts & Serg.* 190; *Beardsly vs. Warner*, 6 *Wend.* 610; 4 *J. C. R.* 132.

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

On the 15th February, 1847, William Field filed a bill on the chancery side of the Pulaski Circuit Court, against Robert A. Watkins and Ebenezer Walters, to injoin the execution of a judgment at law.

The bill alleges, that on the 12th day of March, 1841, Robert A. Watkins obtained a judgment, on the law side of said court, against John W. Johnston, and Ebenezer Walters, for $970 debt, $19 72 damages, and for costs.

On the 28th of April, 1843, Watkins sued out a garnishment upon said judgment against complainant, alleging that the judgment remained unsatisfied, and that he was indebted to Johnston, &c., returnable to the May Term of said court, 1843, which was executed upon complainant, on the 2d day of May, 1843. On the 29th of the same month, Watkins exhibited his allegations and interrogatories, calling on complainant to state what amount he was owing Johnston, when it was due, &c., to which complainant filed his answer; and, on the 9th of June, 1846, after various intermediate proceedings, judgment was rendered against complainant, as such garnishee, for $831, with costs, which amounted to $15 30. A certified copy of the proceedings and judgment is exhibited.

That, after the rendition of said judgment, complainant was informed, and alleges it to be true, that the original judgment in favor of Watkins, against Johnston and Walters, had been fully satisfied and discharged, by the payment thereof to Watkins, or his attorney. That the payment was not made upon execution, but without process, and though the judgment had been long satisfied, there was no evidence of record of such payment, and no entry of satisfaction of record, as required by law, &c.

That the payment of said judgment had been kept secret among the parties, and a fraudulent combination formed between the defendants, to keep the judgment against complainant alive and in force, for the purpose of coercing the amount out of him, to be appropriated to the reimbursement of Walters, who was the security of Johnston to Watkins, and had the original judgment to pay.

That complainant was not apprized of the payment of said judgment, until shortly before filing the bill, and long after the judgment was obtained against him in the garnishment.

That complainant had applied to Watkins to desist from the prosecution of said judgment, and to enter satisfaction of both of said judgments according to the statute, &c., but he, combining with Walters, to defraud complainant, &c., had refused to do so, and was harrassing him with an execution, &c. A certified copy of the execution is exhibited.

*Prayer* for injunction, restraining all further proceedings upon the execution and judgment; and, that on the final hearing the injunction be made perpetual, &c., and for general relief.

The answer of Watkins admits that he obtained judgment against Johnston and Walters at the time, and for the sums stated in the bill. That a garnishment was sued out upon the judgment against complainant, as a debtor to Johnston, served, returned, and judgment rendered thereon, as alleged in the bill. That execution had been issued, upon the judgment against complainant, and returned unsatisfied. That Walters was the security of Johnston upon the debt, on which the original judgment was recovered, the debt being for the purchase money of a tract of land sold by Watkins to Johnston. Avers that at the time the original judgment was obtained, Johnston was insolvent, or in failing circumstances, and had since become utterly insolvent. That before, and at the time of the maturity of the debt Walters being uneasy as such security, urged respondent to bring suit upon it, and after the judgment was obtained, he gave Walters control of the execution, to enable him, if possible, to protect him-

self by causing the money to be made out of Johnston's property, but no part of it was made.

That Walters represented to respondent, that complainant was indebted to Johnston, and urged him to sue out a garnishment against complainant upon the original judgment, for the benefit of Walters; and upon his agreeing to pay all costs that might be incurred by respondent, in the prosecution of such garnishment, it was sued out, on the 28th April, 1843. That afterwards, on the 2d November, 1843, the garnishment being contested by complainant, and respondent becoming apprehensive of incurring costs, his attorney took from Walters a written agreement to pay all such costs as might be incurred, &c. A copy of which is exhibited.

That, at the earnest solicitations of Walters, respondent delayed coercing payment of the original judgment out of him, until such time as he had secured, or endeavored to secure himself, in respect of such judgment, by means of execution and garnishment aforesaid, out of the property and effects of Johnston; respondent relying upon the promises of Walters to pay said judgment without execution, whenever the necessities of respondent required him to have the money. That accordingly Walters afterwards paid upon said judgment to respondent's attorney $500 on the 23d May, 1844, $500 on the 24th July, 1844, and $182 11, on 21st November, 1844, when respondent gave to Walters a receipt in full, of the debt, damages, and interest, due upon the judgment.

Respondent denies any fraud or concealment on his part, in respect of the matters aforesaid; and avers that when he received payment of the judgment of Walters, as the security of Johnston, he supposed that the operation of it was an assignment and transfer to Walters of the judgment, and of all beneficial interest, which respondent had therein, as against Johnston, and of all liens and securities which respondent had obtained thereon, as against Johnston, by means of execution, and the garnishment aforesaid, and he submits that such was the result, and by operation of law, a substitution of Walters in the place of respondent,

in respect of said judgment, and all securities which respondent had obtained thereon, as between Walters and Johnston, the principal debtor, and which Walters had the right to enforce either at law or in equity. Respondent denies that complainant ever requested him to enter satisfaction of the garnishment judgment, or to desist from further prosecution thereof, and that he ever called upon him to know if Walters had paid the original judgment, which fact respondent had no motive to conceal.

Respondent states that as between complainant and Walters, he stood indifferent in interest, and would desire to see them both saved harmless, &c.; but submits that the operation of the garnishment in question, was a legal transfer to respondent of the indebtedness of complainant to Johnston, at the time of the service of the writ of garnishment which could not be impaired by the subsequent payment of the original judgment by Walters, as the security of Johnston; and the writ of garnishment having been sued out at the instance, and for the benefit of Walters, respondent was bound in equity, to hold, and enforce, for the benefit of Walters, all securities obtained by respondent, from or against Johnston, under the original judgment; and that if he had canceled any such securities, or desisted from the prosecution of said suit of garnishment, he would be liable therefor to Walters; and, therefore, he submits himself to such decree as the court may render in the premises.

Walters, in his answer, makes the same admissions, and states the same facts, substantially, as are contained in the answer of Watkins; and, in addition thereto, sets out more fully the proceedings in the garnishment suit in the court below, and in this court on error, as reported in *Field vs. Watkins*, 5 *Ark.* 672, and *Watkins vs. Field*, 1 *Eng.* 391, which will be noticed in the progress of this opinion.

He submits that the service of the writ of garnishment upon complainant, operated as an assignment to Watkins, of the then indebtedness of complainant to Johnston, which was not divested by the subsequent payment of the original judgment by respon-

dent to Watkins, who was bound to hold, and enforce the garnishment, for the use and benefit of respondent, as the security of Johnston, and that the payment by respondent of the original judgment, was a subrogation in equity of respondent to all the rights of Watkins, in respect of the original judgment, as against Johnston, the principal debtor therein, and of any security previously obtained by Watkins, by means of the service of the writ of garnishment upon complainant.

Denies all fraud and concealment in the payment of the original judgment, and that complainant ever called upon him for information in regard to it. Avers that such payment was known to sundry persons, and that complainant might, if material to his defence to the garnishment, have ascertained the fact by the exercise of ordinary diligence, long anterior to the final judgment therein, &c. That Watkins caused an execution to be issued upon the original judgment, returnable to the November term, 1844, which was levied upon the property of respondent, and he desiring to avoid costs, and the injury of his credit, by the advertizement of his property, made an agreement with Watkins, to the effect, that he would pay the amount due upon the execution before the return day, and that on his failure to do so, the sheriff should sell respondent's property, without advertizement, which agreement was endorsed upon the execution, signed by respondent and the attorney of Watkins, and returned into the clerk's office by the sheriff, and that complainant was bound to have known, on inspection of the execution and return, that the judgment was paid, or that it was at least sufficient to have put him upon inquiry, &c. A copy of the execution and return is exhibited. Admits that no entry of satisfaction of the judgement was made of record, &c.

Insists that the bill should be dismissed for want of equity, and Watkins permitted to enforce the garnishment judgment for his benefit.

Afterwards, the death of Walters was suggested, and Thomas W. Newton, his executor, substituted as a party defendant.

On the 31st July, 1849, complainant filed an amended bill, stating, in addition to the allegations contained in the original bill, that he was the security of Johnston, on a note to the Real Estate Bank, for $2.300 70, dated 14th October, 1840, and due February 16th, 1841. That Johnston, in a short time thereafter, became hopelessly insolvent, and that complainant, as his security, had to pay; and on the 30th October, 1844, did pay to the said Bank $750 on a judgment rendered on said debt, in favor of the Bank, against Johnston and complainant, in the Pulaski Circuit Court, on the 3d December, 1842, which judgment, at the time of such payment, was in full force, and constituted a lien upon the real estate of complainant. A certified copy whereof is exhibited.

That the 21*st section*, 93*d chapter*, *Revised Statutes*, provides, that when a judgment is satisfied, otherwise than by execution, the plaintiff shall, within sixty days thereafter, acknowledge satisfaction before the clerk of the court in which such judgment was rendered; and the 23d section provides, that on failure to enter such satisfaction, the plaintiff shall pay and forfeit to the defendant in such judgment, any sum not less than five, nor more than one hundred and fifty dollars.

Complainant charges that on payment of said judgment to Watkins by Walters, the same was satisfied in law, and the failure to enter satisfaction, was a violation of the law, and of the plaintiff's duty to Johnston, and a palpable fraud upon complainant, and was done by a combination between Walters and Watkins, to injure and sacrifice complainant in the premises.

That if complainant had been aware of the above facts, before judgment was rendered against him in the writ of garnishment, he would have set them up in defence, and shown to the court that his equity in the premises was prior to that of Walters; but these facts were unknown to complainant at the time, and he was not aware of them until long after the judgment was rendered against him on said writ, in favor of Watkins. Prayer, as in the original bill.

Watkins, and Newton, as executor of Walters, filed a joint answer to the amended bill. They profess to have no knowledge of the alleged payment by complainant to the Bank, as Johnston's security, or as to the judgment, upon which it is alleged to have been made, being in force and constituting a lien upon complainant's real estate, and require proof, &c. They aver that if such payment was made, it was made in the notes of the Bank, or other depreciated currency, worth, at the time of the payment, not more than 30 cents on the dollar. They insist that there is no equity in the amended bill, and claim the benefit of a demurrer upon the hearing.

Deny all fraud and concealment in reference to the payment, by Walters, of the original judgment, &c.

The deposition of George C. Watkins was read upon the hearing. He proves that Walters was Johnston's security on the note, upon which the original judgment was obtained; the insolvency of Johnston; the issuance and prosecution of the garnishment against complainant, to indemnify Walters: the payment of the original judgment by Walters, as stated in the answer of Watkins, &c. Witness was the attorney of Watkins, and knew of no fraud or concealment in regard to the payment of the original judgment by Walters.

The court decreed that the judgment in favor of Watkins against Johnston and Walters, having been fully paid before final judgment against Field on the writ of garnishment, no execution could issue thereon against Field; and that the garnishment judgment of Watkins against Field, be perpetually enjoined, &c. From this decree, the executor of Walters appealed. Watkins took no appeal.

1. It is insisted, on the part of appellant, that Field cannot set up his liability as security for Johnston to the Bank, or a payment thereon, as grounds of relief in equity, because he pleaded both the liability and payment as a defence to the garnishment in a court of law, and that the matter is *res adjudicata.*

2. That on the payment by Walters, as the security of John-

ston, of the original judgment, he was subrogated to the right of Watkins to enforce the garnishment against Field for his indemnity; that the payment of the judgment did not destroy the right to proceed upon the garnishment at law, for the benefit of the security who paid it.

3. On the other hand, it is insisted for Field, that the payment of the original judgment extinguished it, and the garnishment being but an incident to the judgment, springing out of and resting upon it, all right to proceed upon and enforce it, ceased upon the payment of the judgment.

4. That even if Walters was subrogated to the right of Watkins to enfore the garnishment, this was in equity, and could not be done by the issuance of an execution upon the garnishment judgment, which at law was extinguished, but that Walters would have to resort to a bill in equity to compel Field to pay the debt for his benefit.

5. That Field being also the security of Johnston, for a larger amount than he owed him, and Johnston being insolvent, a court of equity would not compel Field to surrender to Walters an indemnity which he held in his own hands, and claimed to hold to save him harmless for so much.

1. Watkins having submitted to the decree of the court below, and taken no appeal therefrom, the decree, as to him, is conclusive and final. He is perpetually enjoined from attempting to execute the garnishment judgment against Field. The contest in this court, is between the executor of Walters and Field.

The transcript of the proceedings in the garnishment suit, shows that at the return term, May, 1843, Field set up as a defence in his answer to the allegations, &c., filed by Watkins, that in December, 1842, before the issuance of the writ, the Real Estate Bank obtained a judgment against him, as the security of Johnston, for $2.370, besides interest and costs, which remained in full force, &c.

That Johnston and his co-securities were insolvent, and he would have the debt to pay, &c. The answer was held to be insufficient,

and judgment rendered against him, and he brought error. This court, by LACY, Judge, said:

"Field has no right to set off his demands against Johnston, in this form of action. The authorities on this point are clear. The demands are not between the same parties, nor are they mutual subsisting rights. How far the defendant (Field) may be able to avail himself of this defence in a court of equity, by proving the insolvency of Johnston and his co-securities, is a question not before us, and of course, upon which we express no opinion."

The judgment was, however, reversed for excess, and the cause remanded.

If this defence was exclusively an equitable one, and not at all cognizable by the court of law, surely Field did not debar himself from the right to resort to equity, by a fruitless attempt to interpose the defence at law. The court expressly said that the defence, if good at all, was available in equity only.

On the remanding of the cause, Field, by permission of the court, amended his answer, showing that since the service of the garnishment upon him, he had paid, on the judgment obtained against him by the Real Estate Bank, as the security of Johnston, $750; and therefore, claimed not to be indebted to Johnston, and asked to be discharged. The court thereupon (April Term, 1845,) gave judgment that he be discharged, and Watkins brought error.

This court, by OLDHAM, Judge, said: "The service of the writ of garnishment was a transfer, by operation of law, of the amount due by the garnishee (Field) to the original defendant, (Johnston), to the judgment creditor, (Watkins), for the satisfaction of his judgment, and the right of the creditor to a satisfaction of his judgment out of the debt thus transferred, cannot be defeated by a subsequent payment of the garnishee, whether made voluntarily or by legal coercion. *Watkins vs. Field*, 1 *Eng. Rep.* 391.

The judgment was reversed, the cause remanded, and final judgment rendered against Field, on the 9th June, 1846, which is the judgment injoined by the decree of the court below in this cause.

This court, in the last case, seems to have decided upon the merits of the defence, and makes no intimation that it was properly cognizable or available in equity. If the court meant to decide that the defence was such as could be made at law, but was not a good defence, then this point would be *res adjudicata*, as between *Field and Watkins*, who were the parties to that suit, and contesting that question; though it would seem that if there was anything in the intimation of the court, in the first decision, that the judgment liability of Field, as the security of Johnston, would be available as a defence in equity, such defence would be strengthened by the fact that Field had made a payment upon the judgment equal to his indebtedness to Johnston, as stated in his amended answer to the garnishment.

But, be this as it may, let it be assumed that this point is *res adjudicata*, as between Watkins and Field, and if the original judgment had not been paid to Watkins, and Field had filed the bill to enjoin the garnishment judgment, exclusively on the ground that he had been compelled to pay, after the service of the writ of garnishment upon him, on the judgment against him as the security of Johnston to the Real Estate Bank, an amount equal to what he was owing Johnston, then the court of equity might have held that this defence had been decided against him in the court of law, and was *res adjudicata*.

But the original judgment has been paid to Watkins: the judgment against Field upon the garnishment, was but an incident to the original judgment, and must be regarded as having been paid also, so far as Watkins is concerned. He has been perpetually injoined from collecting it. Walters, who was not a party to the garnishment suit, claims to be subrogated in equity to the right which Watkins had to enforce the payment of the garnishment judgment against Field: but even if he had filed a bill to compel Field to pay to him the debt which was the foundation of the judgment in the garnishment suit, it could hardly be said that the right of Field to withhold from him the debt, on account of his having previously paid the amount to the Real Estate Bank,

as the security of Johnston, was *res adjudicata*, as between him and Walters. Surely the court of chancery would regard the equitable rights of Field as well as of Walters, in such a contest between them.

The 2d and 3d points, made for the parties in the argument of the cause, present for consideration the question, as to the extent of the right of a security, who pays the debt of his principal, to be subrogated to the benefit of securities acquired by the creditor from the principal debtor.

In *Copis vs. Middleton*, 1 *Turner & Russell* 224, it was held, that where a security pays a bond for his principal, he is a simple contract creditor only of the principal—that the bond was extinguished on the payment of it. Lord ELDON said: "It is a general rule, that in equity, a surety is entitled to the benefits of all the securities which the creditor has against the principal, but then the nature of those securities must be considered: when there is a bond merely, if an action was brought upon the bond, it would appear, upon oyer of the bond, that the debt was extinguished: the general rule, therefore, must be qualified by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor: in the case for instance, where in addition to the bond, there is a mortgage, with a covenant on the part of the principal debtor to pay the money, the surety paying the money, would be entitled to say, I have lost the benefit of the bond, but the creditor has a mortgage, and I have a right to the benefit of the mortgaged estate, which has not got back to the creditor."

In *Jones vs. Davis*, 4 *Russell Rep.* 272; 4 *Eng. Ch. Rep.* 278, the surety, who paid a bond for his principal, and took an assignment of it, filed a bill against the heir and executor of the principal to enforce the payment of the bond, and it was decided, that the surety was but a simple contract creditor of the testator—that the payment of the bond extinguished it, and the assignment of it to the surety, gave to him no right of action upon it. The bill

was dismissed for want of equity, on the authority of *Copis vs. Middleton*, and other cases.

To the same effect are *Gammon vs. Stone*, 1 *Vesey Sen.* 339, *Woffington vs. Sparks*, 2 *ib.* 570. In the case last cited, Sir Thomas CLARK said, the assignment would be of no use, "because the bond was given only for the payment of one sum of money, and when once satisfied to the obligee, is *functus officio*. But it is said, though this is so in the case of a bond, a judgment would have been different: consider how this is. Suppose execution had been offered to be taken out upon that judgment: that if judgment was entered up after the money was paid, no doubt but that the King's Bench would have set it aside. I mean a judgment entered up in consequence of a motion for liberty to enter up a judgment on a stale bond by the obligee after such time as he had received the money. But, take it the other way, that the money was not paid when the judgment was entered up, if execution were offered to be taken out upon the money's being paid afterward, it is allowed, relief might be had. I believe there might be an injunction (as it has been said) upon a bill here."

See, also, *Hodgson vs. Shaw*, 3 *Myl. & Keene* 189, sustaining *Copis vs. Middleton*, and *Armitage vs. Baldwin*, 5 *Beav.*, where a creditor sued his principal debtor and recovered a judgment against him, and the bail in the action. The surety thereupon paid and satisfied to the creditor, the amount of the judgments, with interest and costs, and took an assignment thereof. Lord LANGDALE, M. R., held, that the judgment was discharged, and that the surety could not recover on the judgment against the bail; though it seems that a different doctrine had been formerly held by the English Courts of Equity, as in *Parsons vs. Briddock*, 2 *Vern.* 608. See 1 *White & Tudor's Leading cases in Eq., by Hare & Wallace*, 84.

So it was held in England, that where several judgments had been obtained by the creditor against the principal and surety, and the latter had paid the debt on the judgment against him, and then sought an assignment to be made of the judgment against

the principal, the judgment was effectually extinguished by such payment, and the surety would not be permitted to avail himself of it against the principal. *Dowliggin vs. Bourne*, 2 *Younge and Call Exch. Ca.* 462, cited in 1 *Story's Eq.*, *sec.* 499.

STORY, (1 *Equity*, *sec.* 499,) after commenting upon the English doctrine, as held in the above and other cases, that the payment of a bond or judgment, extinguishes it, and that the surety, who makes the payment, is entitled to no assignment, &c. says: "The error of the contrary doctrine, if indeed, upon the principles of enlarged equity, any there be, seems to have arisen from confounding the right of the surety, on payment of the debt, to be substituted for the creditor, and to have an assignment of any *independent collateral* securities, with the supposed right to have the *original debt* assigned. Such independent collateral securities may well be required to be assigned by the creditor in favor of the surety: because, in many cases, the principal would not be entitled to have a re-transfer thereof from the surety, without paying him the sums advanced by him to the creditor, as a matter of equity between the parties. But the assignment of the *debt itself*, which had been already *paid*, would be a *mere nullity* in *equity*, as well as *at law*, since it could not have, in the hands of the surety, any subsisting obligation."

Yet, he continues in the same section, "There are many cases in which a surety paying a debt, will be entitled to stand in the place of the creditor, or to obtain the full benefit of all the proceedings of the creditor against the principal. Thus, for example, if the creditor, in case of the bankruptcy of the principal, has proved his debt before the commissioners, and then the surety pays the debt, the latter will be entitled to the dividends declared on his estate, and the creditor will be held to be his trustee for this purpose. So the surety may compel the creditor to go in and prove his debt before the commissioners, &c., [so when a surety for the purchase money of land, pays the debt, he is subrogated to the vendor's lien on the land for the unpaid purchase money]. In cases of this sort, courts of equity seem to be regulated by the

same principles which govern their interference, in favor of sureties, to compel creditors to proceed in the first instance against the principal for the recovery of their debts." (These quotations are made from the *6th Edition* of the work).

It seems that some of the American courts have gone much further than the English courts in favor of subrogating the surety, paying the debt for the principal, to the rights and securities of the creditor.

*Hare & Wallace*, the American editors of *White and Tudor's Leading cases in Equity*, *vol.* 1, *p.* 87, sum up, as the result of a number of decisions in this country, thus: "As soon as the surety has paid the debt, an equity arises in his favor, to have all the securities original and collateral, which the creditor held against the person or property of the principal debtor, transferred to him, and to avail himself of them as fully, as the creditor could have done; for the purpose of obtaining indemnity from the principal, he is considered as at once subrogated to all the rights, remedies and securities of the creditor, as substituted in the place of the creditor, and entitled to enforce all liens, priorities and means of payment, as against the principal, and to have the benefit even of securities that were given without his knowledge." In support of this summary, they cited, *Lidderdale vs. Robinson*, 2 *Brockenborough* 160, 167; *same case*, 12 *Wheat.* 594, 596; *McMahon vs. Fawcett*, 2 *Randolph* 514, 530; *Hampton vs. Levy*, 1 *Mccord's Chancery* 107, 117; *Perkins et al. vs. Kershaw et al.*, 1 *Hill's Ch.*, 344, 351; *Railroad Co. et al. vs. Clayhorn et al.*, 1 *Speer's Equity* 547, 561; *Loud vs. Sergeant*, 1 *Edwards Ch.* 164, 168; *Lathrop & Dale's Appeal*, 1 *Barr* 512, 517; *Atwood vs. Vincent*, 17 *Conn.* 576, 583; *Hardcastle vs. Commercial Bank of Delaware*, 1 *Harrington* 374, 377, *and note*; *Burk et al. vs. Chrisman et al.*, 3 *B. Monroe* 50; *Cullom vs. Emanuel et al.*, 1 *Ala.* 23, 28; *Brown vs. Lang et al.*, 4 *ib.* 50; *Commercial Bank of Lake Erie vs. Western Bank et al.*, 11 *Ohio* 444, 449; *Miller vs. Woodward & Thornton admr.*, 8 *Missouri* 169, 175; *Hoyes vs. Ward*, 4 *Johnson's Ch. R.* 123, 130.

These were cases where the surety paying the debt for the principal, sought in equity to be subrogated to the securities, liens, &c., of the creditor, and so far as we have been able to obtain access to the books containing the cases, they sustain, to a greater or less degree, the above summary presenting the question in various phases, according to the particular facts of each case.

The same editors say, (*on page* 88, *vol.* 1,) "Payment by one who stands in the relation of a security, although it may extinguish the remedy or discharge the security, as respects the creditor, has not that effect as between the principal debtor and the surety. As between them, it is in the nature of a purchase by the surety from the creditor; it operates an assignment in equity of the debt, and of all legal proceedings upon it, and gives a right *in equity*, to call for an assignment of all securities, and in favor of the surety, the debt and all its obligations and incidents are considered as still subsisting."

In some of these cases, it has been held, that where a judgment constitutes a lien upon the property of the principal debtor, and the surety pays the debt, though as between the principal debtor and creditor, the judgment is extinguished at law; yet, as between the surety and the principal debtor, in equity, it is regarded as still in force, and the surety may, in a court of equity, reimburse himself out of the property on which the judgment constituted a lien, in preference to junior incumbrances.

The question being measurably a new one in this court, the above authorities have been cited to show, to some extent, the state of the decisions on this interesting subject in England, as well as in our own country. It is sufficient for us, however, to decide the case before us in the aspect in which it is presented, without sanctioning or disapproving the abstract general rules above quoted.

In view of all the authorities, which we have been able to examine, we are of the opinion that when Walters paid to Watkins the original judgment, it was extinguished at law, as between

Watkins, in whose favor the judgment was obtained, and Johnston and Walters the defendants therein.

That if the judgment upon the garnishment against Field had been finally rendered at the time of the payment of the original judgment, it would also have been extinguished at law, so far as Watkins was concerned, being but an incident to the original judgment, and Watkins being entitled to but one satisfaction.

That Walters having paid the original judgment before final judgment was rendered upon the garnishment, had Field known that fact, and interposed it as a defence by an amended answer, the court of law could have rendered no judgment againt him in favor of Watkins for the debt which he owed to Johnston.

That on payment of the original judgment, Watkins having failed to enter satisfaction thereof, in the manner prescribed by the statute, and Field being thereby deprived of the legal mode of deriving a knowledge of such satisfaction, and having no actual notice of the payment in any other manner, and judgment having been rendered against him upon the garnishment after such payment, he had sufficient grounds to resort to a court of equity, to enjoin the execution of the judgment, so far as Watkins was concerned.

But though the payment of the original judgment by Walters extinguished it, and extinguished the right of Watkins to proceed upon and enforce the garnishment against Field, at law, yet such payment did not extinguish the debt which Field owed to Johnston, which was a different debt from the one that Walters paid to Watkins.

This being the case, we are inclined to the opinion that had Field filed his bill to be relieved against the judgment, exclusively upon the ground of the payment of the original judgment by Walters, having made Walters a party, the court of equity would hardly have granted him such relief, without his paying to Walters the debt which he owed to Johnston, in the absence of any showing on his part of an equitable right to withhold

such payment, on the grounds, that he who seeks equity, must do equity.

Or, in the case made by Field, in his original and amended bill, had Walters filed a cross-bill and shown that he had a better right in equity to the fund in the hands of Field, than Field had to retain it, in consequence of his own securityship for Johnston, the court might well have decreed, upon the cross-bill, that Field pay the money to Walters. But in this case, the court below granted to Field the relief which he prayed against Watkins—a perpetual injunction against his executing the judgment—and Watkins took no appeal from the decree. Walters having in no cross-bill, no decree was, or could have been rendered in his favor.

4. There was no decree against the executor of Walters in the court below but for costs. Suppose we were to reverse the decree, as the counsel for appellant thinks should be done, of what avail would that be to the executor of Walters? The execution of the judgment against Field by Watkins, in whose favor it stands upon the record of the law court, is perpetually injoined. At law, as a judgment in favor of Watkins, it is extinguished by the payment of the original judgment, to which it was but an incident. If execution is taken out upon it, it must be done in the name of Watkins, whose hands are tied up by the injunction. Can the executor of Walters, holding an equitable right to collect the money of Field on the doctrine of subrogation, without any decree of a court of chancery to enable him to enforce such right, put into motion an execution in the name of Watkins, who is enjoined from moving in the matter, upon a judgment enjoined, and extinguished at law, for the purpose of coercing satisfaction out of the property of Field? We think not. It seems to us that the doctrine of subrogation belongs to the courts of equity, and that such rights of sureties must be enforced by the decrees of these courts, upon proper cases made for their interposition, by parties claiming such rights.

5. But on the other hand, it may be supposed that the appeal of

Walter's executor brought up the entire decree of the court below, and that the whole case is open for review. Walters and Field were both the securities of Johnston, an insolvent principal. At the time Walters paid the judgment of Watkins, the Real Estate Bank had obtained a judgment against Field, as the surety of Johnston, for an amount largely over what Field owed him. After Watkins ceased to have any claim upon Field for the amount which he had garnisheed in his hands, Johnston could not himself have coerced Field to pay to him the debt without indemnifying Field against loss as his security. *Abbey vs. Van Campen*, 1 *Freeman's Ch. R.* 273. Could Walters do more? Regarding Walters and Field as having equal claims to be protected in equity from loss, surely the court would not compel Field to surrender up to Walters an indemnity, which he held in his own hands. The Bank obtained her judgment against Field before Watkins took out the garnishment, and his claim to indemnity in equity, was hardly cut-off by the proceedings at law in the garnishment suit, where he was not permitted to interpose an equitable defence.

Upon any view of the case, we think the decree of the court below, should be affirmed.

Absent Mr. Justice WALKER.

## SANDEFUR EX. VS. MATTINGLEY.

Where but two witnesses are examined as to a fact, and they disagree in their statements, the finding of the court sitting as a jury, one way or the other, is conclusive, there being no motion for a new trial.

Where one receives a note from another, to be used in some purpose of his own if it will answer the purpose, and if not to return it, and he loses it, the inconvenience resulting to the owner of the note from its loss, is a sufficient consideration to support a promise, made by the party who thus obtains and loses it, to pay the amount of it to the owner.

Where one receives of another a note for collection, and is afterwards called upon by the owner of the note to know if he has collected it, and replies that he has not, but has lost it, and would pay the amount of it himself, if he should not find it—the owner of the note, after the lapse of a reasonable time, may bring an action against the party making such promise, without further demand, and if further demand were necessary, the party making the promise having died, a demand upon his executor, in legal form, is sufficient.

Where a party is thus sued for the amount of the note so lost by him, he could not require strict proof of its identity, having by his own negligence, placed it out of the power of the plaintiff to identify it, by losing it.

The claim being based upon the promise of the party to return the note if it did not answer his purpose, the loss of it by him, his failure to return it, and his promise to pay the amount of it, the plaintiff was not required to prove that the note could have been collected by proper diligence, as in cases where a note is placed in the hands of an agent for collection, and the suit is simply for the failure to collect.

*Appeal from the Circuit Court of Hempstead County.*

Hon. SHELTON WATSON, Circuit Judge.

CURRAN & GALLAGHER, for the appellant. The note was deposited by the appellee with deceased for collection, and there is

no proof that he ever collected the money, or failed to do so, through gross negligence or mismanagement. No proof was introduced showing that any demand had ever been made of deceased for the same, *either note or money*. See *Ashley & Ringo vs. Taylor & Southmayd*, 3 *Ark.* 75; *McLain et al. vs. Cummins*, 3 *Ark.* 402; *Taylor vs. Speers*, 1 *Eng.* 38; *Warner vs. Bridges*, *ib.* 385.

There was no proof that the note was of any value, or that it was a subsisting debt, and that maker was solvent. *Pennington's ex. vs. Yell*, 6 *Eng.* 215.

There is no proof tending to the identification of the note; no witness knows who was the maker of it, nor in reality the amount of it.

PIKE & CUMMINS, for appellee.

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

At the January Term, 1854, of the Probate Court of Hempstead county, James Mattingley filed for allowance and classification, against the estate of James H. Dunn, a claim as follows:

"JAMES H. DUNN,

*To James Mattingley*, *Dr.*,

*May*, 1842.

To note on Thomas C. Porter, for sixty-five dollars, had and received by you, and due when received. $65 00."

To which was attached the affidavit of Mattingley, made before a justice of the peace, 10th of January, 1854, that nothing had been paid or delivered towards the satisfaction of the demand, and that the sum of $65, with interest, was justly due.

Upon which was an indorsement of John B. Sandefur, as executor of Dunn, dated 10th January, 1854, showing that the claim had been presented to him for allowance and rejected.

The allowance of the claim was contested in the Probate Court

by the executor, and the judge decided against the claimant, on the following testimony:

SHAW testified, that he was present when Mattingley handed a note to the deceased, Dunn, who took the note, and said it would answer his purpose, or words to that effect. Mattingley said to Dunn he thought the note was good, and Dunn said if it did not answer his purpose, he would return it. Witness did not remember the amount of the note—he read it—something was said about interest on the note, but no calculation was made.

Witness could not recollect all that was said between the parties, nor the amount of the note, nor to whom it was made.

REID testified, that he heard Mattingley ask Dunn if he had collected the note. Dunn said he had not collected it, and had looked for the note, a few days after Mattingley handed it to him, but could not find it. Said he wanted to write below. Dunn looked for the note on the day witness saw him, and said he could not find it—Dunn then said, if he could not find the note, Mattingly should not be the loser, he would pay the note himself. Witness did not know the amount of the note—as well as he recollected, both Dunn and Mattingley said the note was for sixty-five dollars. Witness did not know by whom it was given, nor whether it was due. Mattingley said to Dunn, it was hard that he should lose the note—Dunn then said he hoped that neither of them would lose the note, but if either of them lost it, he, Dunn, would lose it himself. Witness understood from both parties, the note was placed in Dunn's hands for collection.

Mattingley took a bill of exceptions, setting out the evidence, &c., and appealed to the Circuit Court of Hempstead county, where the judgment of the Probate court was reversed, a trial *de novo* awarded, and the cause submitted to the court sitting as a jury, upon the above testimony and finding, and judgment in favor of Mattingley for the amount of the claim, with interest, &c.

The executor of Dunn took a bill of exceptions, setting out the evidence, and stating that "this being all the evidence intro-

duced by the parties on the trial anew in this court, said appellant thereupon moved, and prayed the court, to decide and declare that the law, arising upon the testimony aforesaid, was for the appellee, and that said appellant was not entitled to recover in this suit, but the court refused so to declare, and decided that the law arising upon said facts, well entitled appellant to recover, to which opinion and decision of the court, said appellee excepted," &c.

The executor of Dunn appealed to this court:

1. It is insisted for the appellant, that the note was placed in the hands of Dunn for collection, and that there was no proof that he had collected the money, or failed to do so by gross negligence or mismanagement.

From the testimony of one of the witnesses, it may be inferred, that Dunn received the note of Mattingley to be used in some purpose of his own, and if it did not answer that purpose, to return it. The other witness understood, from the parties, that Dunn received it for collection. What the truth of the matter was, we cannot tell; but, this was a fact to be passed upon by the court below, sitting as a jury. And there being no motion for a new trial, the finding of the court, as to matters of fact, is not to be reviewed. If the court below believed the statement of the first witness, that Dunn received the note to use it, for his own benefit, and to return it, if it did not answer his purpose, the inconvenience to Mattingley, resulting from the loss of it, was a sufficient consideration for the promise made by Dunn to pay the amount of it to Mattingley, as proven by the second witness.

2. It is furthermore insisted for appellant, that Dunn received the note in the character of a bailee, and that his estate could not be made liable, without proof of a demand, &c.

The second witness testifies, that sometime after Dunn had received the note, Mattingley called upon him to know if he had collected it. Dunn said he had not, but had lost it, and if

he could not find it, he would pay the amount of it to Mattingley.

It seems to us, that if Dunn had continued in life, that no further demand would have been necessary on the part of Mattingley, but that if, after waiting a reasonable time, Dunn had not returned the note to him, he might well have sued him upon his promise, for the amount of it. But if a further demand was necessary, what other demand could Mattingley have made than he did? He probated his claim for the note, in due form, and presented it to the executor of Dunn, after his death, for allowance, and it was rejected. He could make no demand of the dead, and he made his demand upon the executor, in the mode pointed out by law.

3. The third point made for appellant, is that the records do not identify the note.

Mattingley sufficiently identifies the note in his account, the name of the maker, and the amount of it are stated. It is also stated that it was due when Dunn received it. The account is made out for the amount of the note as of May, 1852.

The witness, who was present when the note was delivered to Dunn, could not recollect the amount of the note, to whom payable, or when due. The second witness stated the amount of the note. Whose fault was it that Mattingley was unable to identify the note more particularly upon the trial? The fault of Dunn, most assuredly, in whose hands the note had been placed, and who had lost it.

It was, by his act, that Mattingley was deprived of the means of identifying the note, and he, nor his executor, could take advantage of this. The amount of the note was proven, and this was the matter in controversy.

4. Had the note been placed in the hands of Dunn simply for collection, and the action been brought against him, or his executor, for failing to collect it, it might have been necessary for Mattingley to have proven that the money could have been collected by the use of such diligence as was incumbent upon Dunn, from the

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nature of his undertaking But the claim in this case is based upon the promise of Dunn to return the note, if it did not answer his purpose, the loss of it by him, the consequent failure to return it, and his promise to pay the amount of it.

Upon the facts proven, we think the law warranted the court below in rendering judgment for the appellee, and the judgment is affirmed.

Absent, Mr Justice WALKER.

# CASES

## ARGUED AND DETERMINED

IN THE

# SUPREME COURT OF ARKANSAS,

AT THE JULY TERM, A. D. 1855.

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16 243
64 466

### WHEAT AT AL. VS. MOSS ET AL. USE, &C.

It is a general rule (but with exceptions, *Watson et al. vs. Palmer et al.*, 5 *Ark. Rep.* 501,) that, where a general replication is put in to an answer in chancery, all the allegations, which are responsive to the bill, shall be taken as true, unless disproved by two witnesses, or by one witness with pregnant circumstances: and, also, that every allegation, not directly responsive to the bill, but stating matter in avoidance, or in bar of the plaintiff's claim, must, under such circumstances, be fully proved, or it will have no effect.

The charges in a bill by a judgment creditor of one of the defendants, to subject certain real estate to the payment of his judgment, were, that such defendant had purchased the real estate with his own money, but had caused the title to be made to his co-defendant to delay and defraud his creditors: The answer stated that he did not purchase with his own money, but with money in his hands as administrator, and that the deed was executed to the co-defendant, to hold in secret trust for the benefit of the heirs: HELD, That so much of the answer was responsive to the bill.

But the answer proceeding further to state that, at the time of the purchase, the co-defendant advanced a portion of the money, which she borrowed, and executed a mortgage on the property to secure the payment, and afterwards borrowed money to pay off such mortgage, and executed a second mortgage to secure the payment thereof: HELD, that this was a distinct transaction, not responsive to the bill, but new matter in avoidance.

An administrator is not authorized to invest in real estate or otherwise, the balance in his hands, as such; but should distribute it to the representatives of the intestate, if known; and, if unknown, put it out at interest, under the direction of the Probate Court, until called upon to pay it over.

Where an administrator purchases property with money in his hands, due to the estate of his intestate, and causes the title to be made to another—there being a judgment and execution against him at the time, and no property of his own out of which to satisfy the judgment—the court may well presume, as between the judgment creditor and the parties to the purchase, that the administrator had converted the assets to his own use; that the purchase was made for his individual benefit, and that the transaction was intended to delay his creditors.

A prior incumbrancer may properly be made a party to a bill to subject real estate to sale; but he is not a necessary party.

*Appeal from Hempstead Circuit Court in Chancery.*

Hon. SHELTON WATSON, Circuit Judge.

S. H. & B. F. HEMPSTEAD, for appellants. 1. Where a general replication is put in to an answer, and the parties proceed to a hearing, the statements in the answer responsive to the bill, are to be taken as true, unless disproved by two witnesses, or one witness and strong corroborating circumstances. 1 *Gill & J.* 270; 3 *Gill & J.* 425; 2 *Blackf.* 324; 1 *Paige* 239; 3 *Wend.* 532; 4 *Eng.* 550.

The bill charges fraud, and sought discovery, and the answer was conclusive. 1 *Bibb* 253; 1 *Day* 156; 1 *Wend.* 583; 3 *Paige* 557.

In this case, the answer denies the fraud alleged; and there was no proof in support of the bill. Fraud may be proved by circumstances, but it is not to be presumed. 4 *Eng.* 485.

2. Nance, a mortgagee, ought to have been made a party; and advantage may be taken of that at the hearing or on error.

3 *Ark.* 364; *Cooper's Eq. Pl.*, 33, 185; *Mitf. Eq. Pleading* 180; 6 *Vesey Jr.* 573.

CURRAN & GALLAGHER, contra. The defendants below admit that the lots were paid for with money furnished by the judgment debtor, Samuel C. Wheat, but set up in avoidance that it was in fact held by him as administrator of McCormick's estate. Where a party admits a fact, and insists on a distinct fact, by way of avoidance, he must prove it. *Hart vs. Ten Eyck* 2 *John. Ch. R.* 65, *and the cases there cited; Roberts vs. Totten*, 13 *Ark. Rep.* 609.

Another strong circumstance showing that the property was held in trust for Samuel C. Wheat, is that the answer states, that when Salome B. Wheat borrowed the money from Nance to pay Gibson, she at the same time assumed, and included in the mortgage to Nance, a debt due from Samuel C. Wheat to Nance.

If it had been proven that the money belonged to Samuel C. Wheat, *as administrator*, the heirs, by proving that their money had been used in the purchase, might, *as against the administrator*, enforce their lien on the property; but could they do so as against creditors and third persons? If they could, they are not bound to do so—they could proceed against the administrator on his bond.

True, the defendants deny fraud; but they, at the same time, admit such facts as show that the property is liable for the debts of Samuel C. Wheat.

Nance might have been made a party, but was not a necessary party. It is not necessary to make prior incumbrancers parties—the only effect of omitting them, is that they are bound by the decree. *Rose vs. Page*, 2 *Sim. Rep.* 471; *Delabere vs. Harwood*, 2 *Swanst. Rep.* 144; *Wilson vs. Trustees of Real Estate Bank*, 6 *Eng. Rep.* 44.

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

In October, 1851, William Moss, and Matthew Moss, (for the

use of the latter,) filed a bill on the chancery side of the Hempstead Circuit Court, against Samuel C. Wheat, and Salome B. Wheat, alleging, in substance, as follows:

That, in June, 1845, complainants obtained a judgment on the law side of said court, against Samuel C. Wheat, for $332 74 debt, $13 68 damages, and for costs, &c.; the debt bearing ten per cent. interest. On the 11th August, 1845, an execution was issued upon the judgment, and a tract of land levied upon and sold for one dollar, and the writ returned unsatisfied as to the residue of the debt, &c. On the 1st April, 1846, another *fi. fa.* was issued, levied upon lands, which were sold for $10, and returned unsatisfied as to the residue, &c. On the 9th June, 1847, another execution issued, levied upon two lots in the town of Washington, sold for $15, and returned unsatisfied as to residue, &c. Another *fi. fa.* issued the 20th September, 1851, which was returned, no property found. A transcript of the judgment, several executions and returns, is exhibited.

That about the 1st of March, 1849, Samuel C. Wheat purchased of one James Gibson, lots one and two, in block thirty-one, situate in the town of Washington, of the value of $1200, being, at the time, indebted to complainants as aforesaid. That he paid for said lots out of his own individual money; but intending to hinder, delay, cheat, and defraud complainants, combining and confederating with Salome B. Wheat, caused Gibson and wife to convey the lots, by deed bearing date 1st March, 1849, to the said Salome B. Wheat, who since held the title thereto.

That the conveyance of the lots to Salome B. Wheat, was merely voluntary on the part of Samuel C. Wheat, and without any valuable consideration whatever, passing from her to him; and that she held the title to the lots, in trust, and as a trustee for complainants, as creditors of said Samuel C. Wheat.

*Prayer*, for decree subjecting the lots to the satisfaction of the amount remaining due upon the judgment at law.

The defendants filed a joint and several answer. They admit the recovery of the judgment, and the issuance of executions there-

on as charged in the bill. They also admit that Samuel C. Wheat purchased the lots of Gibson, as in the bill alleged, but deny that said lots were purchased with the means of the said Samuel C., and for the purposes as in the bill charged. But, on the contrary, they aver the facts to be, that said Samuel C., at the time the purchase was made, was, and still is acting as the administrator of one Terence McCormick, late of said county of Hempstead. That there had come to his hands, as such administrator, the sum of $500 belonging to said estate. That the price agreed upon with Gibson, for the lots, was $700, and Salome B. being doubtful of the propriety of said Samuel C., appropriating said sum of $500, belonging to the estate of McCormick, she and he consulted in regard to it, when it was finally agreed and understood between them, that if the purchase was made, the conveyance should be taken to her, as trustee, to hold in secret trust for the use and benefit of the heirs and distributees of McCormick. That on this understanding, Samuel C. closed the trade with Gibson for the lots, paying him the $500 belonging to the estate of McCormick, and Gibson and wife conveyed them to said Salome B., as alleged in the bill. Whereupon, she executed to Gibson her writing obligatory for $200, balance of the purchase money, payable at twelve months, and made him a mortgage back upon the lots to secure its payment, which was duly acknowledged and recorded.

Salome B. further answers, that on the maturity of the mortgage debt, she was unable to procure the money to pay it, and Gibson pressing her for payment, and being about to proceed for foreclosure and sale of the lots, she caused application to be made to Ezekial Nance for money to discharge the mortgage. That he agreed to let her have the means, provided she would assume the payment of a small sum due him, from said Samuel C. Wheat, and then secure the payment of the whole, by a mortgage upon the lots. That finding that she could do no better, rather than have the lots sold to pay Gibson's debt, she accepted the terms proposed by Nance, who furnished her with the money to pay

Gibson, and he entered satisfaction upon the record of his mortgage. That said Samuel C. Wheat was indebted to Nance in about the sum of $150 00, which, added to the sum advanced by him, to discharge Gibson's mortgage, made $375 00, for which said Salome B. Wheat, on the 1st day of May, 1850, executed to Nance, her obligation, payable on the 1st day of January, 1851, with interest, at ten per cent.; and, at the same time, gave him a mortgage upon the lots in question to secure the debt, upon which nothing had been paid, and the mortgage continued in full force.

Respondents further absolutely deny that said Samuel C. paid for said lots out of his own individual means, and had the same conveyed to said Salome B., to hinder and delay his creditors, but they aver the truth to be, that the lots were paid for, in part, as before stated, and that the sum received from Nance remained unpaid. They further deny that said Salome B. held, or ever held said lots, in secret trust, for the use and benefit of said Samuel C., or subject to his control or disposal; or that she ever held them in trust, as a trustee, for the use and benefit of the complainants, as creditors of said Samuel C. But Salome B. avers, that if she held in trust for any one, it was for the heirs and distributees of the estate of McCormick, and no other person, or persons: first paying, however, the debt due to Nance, and secured by the said mortgage to him. The answer is verified by the affidavits of both defendants.

At the May term, 1852, the cause was submitted for hearing, and the court being of the opinion that Nance had an interest in the subject matter of the suit, ordered the complainants to amend their bill, so as to make him a party, and serve him with process, returnable to the next term. The defendants objected to Nance being made a party, after the cause had been submitted. At the May term, 1853, it appearing to the court that complainants had failed to amend the bill so as to make Nance a party, in accordance with the order previously made, it was, on motion, and by consent, decreed that the order be vacated, &c., and that the

cause proceed to final hearing, between the original parties to the bill.

The cause was accordingly submitted upon bill, answer, and replication, and a transcript of the Probate Court record of the settlement of the estate of McCormick by Samuel C. Wheat, as administrator, offered as evidence by complainants; and copies of the mortgages executed to Gibson and Nance, by Salome B. Wheat, offered as evidence by the defendants.

The transcript from the Probate Court record, shows that Samuel C. Wheat made application for letters upon the estate of McCormick, on the 10th of February, 1849, stating in an affidavit made by him at the time, that some three years prior thereto, the deceased had a brother living in the State of Maryland, whose name he did not know, nor whether he was yet alive, nor where he resided.

The transcript also contains an account filed by Samuel C. Wheat, as administrator, in the Probate Court, perhaps about the 10th of October, 1851, (judging from the time to which interest on some of the items is counted) for settlement; in which he charges himself with assets amounting to $813 44, deducts $81 34 for his commissions, and exhibits in his hands a balance of $732 10, of which he states $599 10 is in cash, and the residue in an uncollected note. He also states, that but one claim for $18 50, had been established against the estate, "and the estate not being indebted, as appears from the foregoing statement, the amount now on hand is ready, and subject to the order of this honorable court."

The mortgages to Gibson and Nance upon the lots, bear date, and appear to have been made to secure the sums, as stated in the answer of the defendants. Upon the pleadings and evidence, the court below was of the opinion, and found that there remained due and unpaid, upon the complainants' judgment at law against Samuel C. Wheat, $605 84; that he purchased the lots in question on the first day of March, 1849, and paid for them out of his own individual money, and procured them to be conveyed to de-

fendant, Salome B. Wheat, thereby intending to hinder, delay, and defraud his creditors; and that they were conveyed to her without any good or valuable consideration, either in law or equity, and that the same was merely voluntary on the part of said Samuel C., and that the lots and premises ought to be subject to the debt of the complainants. It was, therefore, decreed by the court, that the defendants pay to the complainants, the amount of their said judgment, with costs, and that in default thereof, the complainants should have execution upon the decree, and levy upon the lots, &c., for satisfaction, &c. The defendants appealed from the decree to this court.

1. It is insisted by the appellants, that the matters set up in the answer, are responsive to the allegations of the bill, and should have been disproven by two witnesses, or one with strong corroborating circumstances; the answer being under oath.

The appellees submit, that appellants admitted in the answer, that the money with which the lots were purchased of Gibson, was furnished by Samuel C. Wheat, and that the additional statement that he used in the purchase, a fund held by him as administrator of McCormick's estate, was matter in avoidance, and to be proven by appellants.

The office of the answer, like a plea in a suit at law, is to deny and put in issue, the allegations of the bill, or to confess and avoid them.

It is a general rule, that where a general replication is put in, and the parties proceed to a hearing, all the allegations of the answer which are responsive to the bill, shall be taken as true, unless they are disproven by two witnesses, or by one witness, with pregnant circumstances. It is also a general rule, that every allegation of the answer, which is not directly responsive to the bill, but sets forth matter in avoidance, or in bar of the plaintiff's claim, is denied by the general replication, and must be fully proved, or it will have no effect. *Hagthorp use et al. vs. Hooks ad*, 1 *Gill & Johnson's Rep.* 280. The first of the above general rules, is subject, of course, to such exceptions as are referred

to by this court in *Watson et al. vs. Palmer et al.*, 5 *Ark Rep.* 501.

The following quotation from the opinion of the court in *Green vs. Vardiman*, 2 *Blackf. Rep.* 328, is applicable to the question before us: "It is a general rule, that an answer is to be taken as true, unless disproved by two witnesses, or by one witness and corroborating circumstances; and when the term answer is taken in its strictest sense, we believe there are no exceptions to this rule: but an answer in this sense, is not what a defendant may say in his own behalf, but what he says directly responsive to the charges in the bill. Matters, however, that are set up in avoidance, that are not responsive to the bill, when in issue, must be proved by the defendant, for if the answer admits a fact, but insists on a *distinct fact* in avoidance, the defendant must prove this fact. *Hart vs. Ten Eyck*, 2 *John. Ch. Rep.* 62. On this part of the subject, there are many nice distinctions and cases that it is difficult to reconcile. An executor, in his answer to a bill by the creditors for an account of the personal estate, stated that he had received £1100; that in making up his accounts, he gave his bond for £1000, and that the testator gave him the other £100 for his trouble and pains in his business. It was held, that this answer did not discharge the defendant of the £100; the gift by the testator being a fact *distinct from what he was required to answer*, and so in avoidance of the demand against him. *Gilb. Ev.* 57; *S. C., cited also in Bull. N. P.* 237, and in 1 *Stark Ev.* 292. But it was held, that if it had been one fact, as that the testator gave him £100, it ought to have been allowed. *Ib.* So in *Ridgeway vs. Darwin*, 7 *Ves.* 404, an executor charged by his answer, is not permitted to discharge himself by affidavits of payment made to the testator in his lifetime. So, a party charging himself in a schedule to his answer, cannot discharge himself in another schedule showing disbursements. *Boardman vs. Jackson*, 2 *Ball & Beat.* 385. And a party charged by his answer, cannot discharge himself by it, unless the whole is stated as *one transaction;* as that, on a particular day, he received a sum and

paid it over; not that on a particular day he received a sum, and on a subsequent day he paid it over. *Thompson vs. Lamb*, 7 *Ves.* 587. Also, to a bill by the assignee of a note, stating that he gave a valuable consideration for the note, and requiring an answer to the whole bill, the answer stating that the note was signed for a usurious consideration, requires proof. *Green vs. Hart*, 1 *John. Rep.* 580. There are many similar cases which seem to render it doubtful what matters in an answer require proof, and what are supported by the answer itself: and those cases that turn on the unity of the transaction, which creates a charge and discharge, are peculiarly perplexing. But we cannot conceive that any of those cases are intended as exceptions to the general rule: that the answer, so far as it is strictly such, being directly responsive to the bill, is to be taken as true. For, when the bill requires a disclosure of such matters as may discharge the defendant, he is compelled to answer and disclose those matters; and if the disclosure amounts to a discharge, he is entitled to the full benefit of it. But although the bill might not require a disclosure of the matters set up in avoidance, yet if the charge and discharge arise from one *indivisible transaction*, and the answer sets forth that transaction, the defendant shall have the full benefit of the discharge. But we conceive the principal difficulty in all these cases turns on the question, what facts in the answer are responsive to the bill, and what are set up in avoidance. Such was the point on which the case of *Green vs. Hart*, and some others, evidently turned."

The learned judge, delivering the opinion of the court, concludes upon this review of authorities, by stating the following as a general rule: "We are, therefore, of opinion, that where the answer is confined to such facts as are necessarily required by the bill, and those that are inseparably connected with them, forming a part of the same transaction, the answer is to be taken as true, when it discharges, as well as when it charges the dedendant."

In the case of *Whiting & Slark vs. Beebe et al.*, 7 *Eng. R.*

588, this court, by Mr. Justice WALKER, said: "Where an answer admits the receipt of money at one time, and sets up that at another time, and in another adjustment, it was re-paid, the repayment is the affirmance of a new fact, and must be proved." See, also, on the same subject, *Roberts vs. Totten*, 13 *Ark. R.* 609.

Testing the case at bar by the general rules above stated, and which appear to be well sustained by the authorities, there is but little difficulty in arriving at a correct result. The substance of the bill is, that Samuel C. Wheat being a judgment debtor of appellees, purchased the lots of Gibson, with his own money, and caused them to be conveyed to Salome B. Wheat, to hold in secret trust for his benefit, in fraud of the rights of his creditors.

The answer admits that Samuel C. was indebted to appellees; that he purchased the lots of Gibson, and caused them to be conveyed to Salome B., as charged in the bill, but denies that they were purchased with the individual means of Samuel C., and, on the contrary, states, that the price of the lots was $700; that Samuel C. used $500 in the purchase of them, which he had in his hands, as administrator of McCormick; that Salome B. executed her obligation to Gibson for the balance of the purchase money; the conveyance was taken to her, and she gave a mortgage back to secure to Gibson the payment of the obligation; that it was agreed between her and Samuel C., that she was to hold the lots in secret trust, for the benefit of McCormick's heirs, and that there was no design in the transaction to hinder, delay, or defraud the creditors of Samuel C. Wheat.

Beyond question, this portion of the answer is directly responsive to the bill. It would be surely unfair to take as true the naked admission, that the lots were purchased by Samuel C. of Gibson, and conveyed to Salome B., and treat as matter in avoidance the further statement made directly in connection with the admission, and in reference to the same transaction, the denial that they were paid for out of his individual means, and the averment of the truth to be, that the cash payment was made with

money held by him in trust, &c., and that there was a deferred payment, secured by mortgage, &c.

The subsequent transaction with Nance, the borrowing money of him upon a new mortgage to discharge Gibson's incumbrance, was a separate and distinct transaction from the original purchase enquired of by the bill, occurring at a different time; and so much of the answer as relates to this transaction with Nance, was not responsive to the allegations of the bill, but new matter in avoidance.

But though an answer may be responsive to the bill, yet it may, in detailing the circumstances of the transaction charged and denied to be fraudulent, overcome and destroy the force and effect of its own denial. *Barraque and wife vs. Siter, Price & Co.*, 4 *Eng. R.* 551; *Cunningham vs. T. & G. Freeborn*, 3 *Paige Ch. R.* 557.

The answer of the appellants, in detailing the circumstances of the transaction in question, presented several features which could hardly have failed to strike the attention of the chancellor; and which, perhaps, materially influenced his decision. The bill charges, the exhibits prove, and the answer admits, that at the time the lots were purchased of Gibson, and for some time before, the appellees had a judgment against Samuel C. Wheat, which they had been making almost fruitless efforts to satisfy by execution. The answer states that $500 used in the purchase of the lots, was not the money of Samuel C. Wheat, but that it was a trust fund which he held as an administrator. Taking this to be true, and how does he stand upon the record, and with what claim to the favor and protection of the chancellor, does he make the admission? He took an oath, faithfully and according to law, to administer and pay over the assets of the estate of McCormick, which might come into his hands or possession. *Dig.*, *ch.* 4, *sec.* 12. The first duty of an administrator is to collect the assets, and pay the debts of his intestate, and then to distribute the residue (deducting expenses) to the heirs of the deceased. The debts are paid, and the estate distributed under the direc-

tion of the Probate Court. The estate of McCormick not being indebted, according to the account current filed in the Probate Court by Samuel C Wheat, as his administrator, it was then his duty, under the order of the court, to distribute the money shown to be in his hands, to the legal representives of the intcstate; and if they were non-residents, unknown, incompetent to receive and give acquittance for it, or did not appear and claim it, &c., it was the duty of the administrator, to put the money at interest, under the sanction of the court, and so employ it for the benefit of the persons entitled to it, until such time as he was legally called upon to pay it over. He had no right to use the money for his own private purposes, and the law gave him no authority to vest it in town lots, or other speculations, for the benefit of the distributees, or for his own use or profit. *Digest, ch.* 4, *sec.* 141. Any such appropriation was a conversion of it to his own purposes, and rendered him and his securities liable to the distributees for the money, with interest. They would not be bound to receive from him, or resort to, the property bought with the money, though they might do so.

But it is stated in the answer, that Salome B. being doubtful of the propriety of the appropriation by Samuel C. of the $500 held by him as administrator, it was agreed and understood between them, that the lots should be conveyed to her as trustee, to be held by her in *secret trust*, for the benefit of the *heirs* of *McCormick*. It may be asked, in all fairness, if the parties really, and in good faith, intended to vest the money in the purchase of the lots for the use and benefit of the heirs of McCormick, and not for the private advantage of Samuel C. Wheat, why this purpose should be kept secret? Why was Salome B. to hold the lots in secret trust? Why not make an open transaction of it, and recite in the deed from Gibson to her, that the money was furnished by the administrator, and that the property was conveyed to her in trust for the benefit of the persons, whose money was used in the purchase?

Again, it may be remarked, that the answer shows that, by

the mortgage to Nance, the lots were incumbered with a private debt of $150, due from Samuel C. Wheat to Nance. Moreover, the lots were purchased of Gibson in March, 1849. Some time after this, Samuel C. Wheat, it appears, filed his account for settlement with the Probate Court, as administrator of McCormick, in which he stated that the balance in his hands was "*ready and subject to the order of the court.*" No statement was made to the court that the fund had been vested in town lots, which were conveyed to Salome B. Wheat, for the benefit of the heirs.

Taking into consideration all the statements made in the answer, in connection with the fact that Samuel C. Wheat was a judgment debtor of appellees at the time, and that they were seeking satisfaction by executions, and the conclusion follows with a certainty, admitting of no reasonable doubt, that he converted a trust fund to his private purposes, and that the real object, on his part at least, of covering up the property in the name of Salome B. Wheat, was to shield it from execution by his creditors.

Whatever may be the rights of the heirs of McCormick to resort to property, so purchased with money coming to them by their trustee, instead of proceeding upon his bond, they are not before us now—they are not parties to this contest, and we cannot know that they ever will claim to resort to the property. As between appellants and appellees, we think the court below, under all the facts of the case, was warranted in treating the lots as the private property of Samuel C., and subject to the satisfaction of appellees' judgment.

2. Nance was not a necessary party to the bill, though it would have been proper to have made him a defendant, he appearing to be a prior incumbrancer. But not being a party, the decree will not affect any rights he may have, under his mortgage, upon the lots. The objection, however, that he was not made a party, does not come with a good grace from the appellants, as it appears that they objected to his being made a party, after submis-

sion, and finally, consented for the cause to be heard between the original parties.

Upon the whole record, we cannot conclude that any injustice has been done by the decree of the court below, and it is affirmed.

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## CLARK AS AD. VS. HOLT.

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In passing upon a question of law arising upon a demurrer to a plea in the court below, this court will look alone to the plea and the declaration to which it responds. Allegations or denials contained in other pleas, upon which no question arises on the appeal, are not to be regarded, in determining the sufficiency of the plea demurred to.

By the common law, the powers of executors, administrators, and guardians, as such, did not extend beyond the limits of the local government, in which they were appointed, for the purpose of bringing suits, and our statute was designed to enlarge their powers.

The disposition of the personal estate of any one deceased, is determined by the law of the domicil; and if he has effects in a foreign jurisdiction, and administration be there granted on his estate, it is merely ancillary or auxiliary to the administration of the domicil, so far as regards the collection of the effects and the proper disposition of them, but subservient to the rights of creditors, legatees and distributees, who are resident in the country where the ancillary administration is granted.

Where letters of administration have been granted on the estate of a deceased person, by the proper authority in one State, and afterwards his will probated in another State, the place of his domicil, and letters testamentary granted by the proper authority, the letters of administration, previously granted, are not thereby vacated.

Where slaves, held by an ancillary administrator in another State, have been taken from his possession, or pass to the possession of the defendant, by virtue of a bailment, such administrator would have the right to institute an action for their recovery in this State, although there may be a principal administration in some other State.

*Appeal from the Circuit Court of Pulaski County.*

Hon. WILLIAM H. FEILD, Circuit Judge.

FOWLER, for the appellant. The plea tendered no *material* issue. It does not show that letters testamentary were granted to *anybody*. If it had done so, it could not affect *Clark's* letters granted in *Tennessee*, or his right to sue, as administrator, under our statute.

If *letters testamentary* had been granted in *Kentucky*, under general principles of law, they would have been *wholly inoperative* in *Tennessee*. See *Fendwick vs. Sear's admr.*, 1 *Pet. Cond. Rep.* 310; *Dixon's ex. vs. Ramsey's ex.*, 1 *Pet. Cond. Rep.* 548; *Kerr vs. Moon*, 5 *Pet. Cond. Rep.* 685; *Story Conflict of Laws, sec.* 511, 512; *et seq.* 523.

*But*, the mere *statement* of a *probate* falls far short of *displacing* an administrator, even in the *State* where the *probate* is made. *Newton ex. vs. Cocke ex.*, 10 *Ark. Rep.* 176.

Our *statute* expressly authorizes any foreign *executor* or *administrator*, to *sue*, and if half a dozen of them had been appointed in as many *different States*, any one of them would have a *right* to sue here; and the one who *first commenced the suit* could not be interfered with at law, by any of the others, or by a *defendant*. Such a proceeding would be a virtual nullification of the statute. See *Ark Digest*, (*edition of* 1848,) *p.* 147, *ch.* 7, *sec.* 1; *Story Conflict of Laws, sec.* 521.

Even, if the *probate* of the *will* (or a *grant* of letters, had such been the fact) would have operated in *Kentucky* as a revocation of letters of administration in *that State*, such *revocation* could not extend beyond the *territorial limits* of *Kentucky* into *Ten-*

*nessee* or *Arkansas.* See *Story Confl. of Laws, sec.* 7, 22, 23, 33 *to* 37, *sec.* 98.

CURRAN & GALLAGHER, for the appellee. It has become a settled principle of international jurisprudence, and one founded on a comprehensive and enlightened sense of public policy and convenience, that the disposition, succession to and distribution of personal property, wherever situated, is governed by the laws of the country of the owner's or intestate's DOMICIL, at the time of his death, and NOT by the CONFLICTING LAWS of the various places where the goods happened to be situated. 2 *Kent's Com., page* [*marginal*] 429, *et seq.*

"To hold that the *lex loci rei sitæ* was to govern as to personal property when the domicilium of the intestate was in a different country, would be a gross misapplication of the *jus gentium* ["per Lord THURLOW, in the case of *Bruce vs. Bruce*, 2 *Boss. & Pull.* 229 *note.*] *Ib.* 430.

Personal property is governed by the *lex domicilii*, real property by the "*lex rei sitæ.*" *Story Con. of Laws, sec.* 464.

"It is a clear proposition, not only of the law of England, but of every country in the world where law has the semblance of a science, that personal property has no locality. The meaning of this is not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner; both with respect to the disposition of it and with respect to the transmision of it, either by succession or by the act of the party, "*it follows the law of the person.*" Lord LOUGHBOROUGH, (*Sill vs. Worswick*, 1 *H. Black.* 690,) and Judge STORY commenting on the above, says: "And this doctrine has been constantly maintained both in England and America, with unbroken confidence. *Story's Con. of Laws, sec.* 380; 2 *H. Black.* 402; *Holms vs. Remsen*, 4 *John Ch. R.* 460; *Piper vs. Piper, Ambler Rep.* 25; 2 *Bell. Com.*, 2 *to* 10; *Greer vs. O'Daniel*, 2 *Bin. R.* 349.

Probate is not the foundation, but only the authenticated evidence of the executor's title, for he derives all his interest from

the will itself, and the property of the deceased vests in him from the moment of the testator's death. 1 *Williams on Ex., p.* 172; *Henslie's case*, 9 *Co.* 380; *Graysbrook vs. Fox, Plowd.* 281; *Comber's case*, 1 *P. Wms.* 767; *Smith vs. Miller*, 1 *T. R.* 480; *Wolley vs. Clark*, 5 *B. & A.* 744; *S. C.*, 1 *Dowl. & Ryl.* 409. Hence, the probate when produced, is said to have relation to the time of the testator's death. *Ib. Graysbrook vs. Fox, Plowd.* 381; *Went. Ex.* 81; 2 *Starkie on Evidence* 616.

On proving the will, letters of administration previously granted, *are* VOID. *Toller L. of ex.* 113; 1 *Com. Digest*, 368; 14 *Peters* 39; 1 *Sterne* 429; 2 *Ld. Raymond* 829.

If the grant of letters of administration are void, the mesne acts of the administrator done between the grant and its revocation, shall be of no validity: as if administration be granted on the concealment of a will, and afterwards a "will" appear, inasmuch as the grant was void from its commencement, all acts performed by the administration in that character, shall be void equally, nor can they, although the executor should refuse to act, be made good by relation. 1 *Williams ex.* 400; *Abram vs. Cunningham*, 2 *Lev.* 182; *S. C., Freeman* 445; 1 *Vent.* 363; 2 *Mod.* 146; *T. Jones* 72; 3 *Keb.* 725.

So in *Graysbrook vs. Fox, Plowden* 276, an action of detinue was brought by an executor against the defendant, who had purchased goods belonging to the testator, from one to whom the ordinary had, immediately after the testator's death, and before the executor had proven the will, granted administration; and it was holden that the executor, who sued after probate, might recover. *Ib* 301.

So, if administration be granted before the refusal of the executor, a sale by the administrator of the testator's effects, shall be void, although the executor aforesaid appear and renounce. *Ib. Abram vs. Cunningham*, 2 *Lev.* 182. Or if the executor omit proving the will, whereby administration is granted to a debtor, the executor may afterwards prove it, and then sue the administrator for the debt which is not extinguished by the ad-

ministration. *Ib. Baxter & Boles case*, 1 *Leon* 90; *O. K. vs. Needham*, 1 *Brownl.* 69.

A release by an administrator, under a void grant, is invalid. *Throckmorton vs. Hobby*, 1 *Brown* 51.

Wherever a grant of letters of administration is in derogation of the rights of an executor, it is void. *Ib.* 404. *Semme vs. Semme*, 2 *Lev.* 90; *S. C., T. Raymond* 224; *Syme vs. Syme.*

We suppose that it is a point beyond caviling, that neither by the *jus gentium*, nor by the common law, is a foreign executor or administrator entitled to maintain a suit in our courts, in virtue of his original letters of administration: (2 *Story on Conflict of Law, sec.* 515, *et seq.*,) but derives such right from our express statutes alone: but inasmuch as our statutes are in derogation of the common law, they must be strictly construed.

Where there are different administrations granted in different countries, those which are in their nature ancilliary, are, as we have seen, generally held subordinate to the original administration. *Story's Con. of Laws, sec.* 518.

The right of the foreign executor or administrator to take out such new administration, is usually admitted, as a matter of course, unless some special reasons intervene, and the administration is treated as merely auxiliary to the original foreign administration, so far as regards the collection of the effects and the proper distribution of them. *Ib., sec.* 513; *Harvey vs. Richards*, 1 *Mason Rep.* 381; *Stevens vs. Gaylard*, 11 *Mass. Rep.* 256; *Case of Miller's estate*, 3 *Rawl. Rep.* 312; *Dawes vs. Royston*, 9 *Mass.* 337; *Selectmen of Boston vs. Boylston*, 4 *Mass.* 318, 384; *Richards vs. Dutch*, 8 *Mass.* 506; *Dawes vs. Head*, 3 *Pick.* 128; *Hooker vs. Olmstead*, 6 *Pick.* 481; *Davies vs. Estey*, 8 *Pick.* 475; *Jamieson vs. Hapgood*, 10 *Pick.* 77.

One of two persons, both subjects of, and domiciled in the same foreign country, dies indebted to the other, and an original administration is granted in the foreign country, and an ancillary one here, held that such debt, though it may have been contracted here, must be referred for settlement to the original admin-

istration. *Thomas Dawes Judge, &c. vs. Joseph Head et al.*, 3 *Pick. Rep.* 127.

These cases are analogous to the case now before the court, because there is no question concerning the payment of any debts, but solely who is entitled to receive the property.

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

In Nov., 1849, Bennett G. Clark, as administrator of John Clark, deceased, brought an action of replevin in the Pulaski Circuit Court, against Mrs. Jane J. Holt, for the recovery of six slaves; making profert of letters of administration, granted to him by the Circuit Court of Davidson county, in the State of Tennessee. The declaration contained one count in the *cepit*, and one in the *detinet*.

At the return term, the defendant filed fifteen pleas in bar, to some of which, in the progress of the pleadings, issues were taken, demurrers sustained to others, and others stricken from the record.

At the December term, 1851, the court permitted the defendant, on showing cause, to file two additional pleas: 1st. *Ne unques administrator*, to which the plaintiff took issue.

2d. *Actio non*, "because she says that said John Clark made and published his last will and testament, in due form, and the same was in full force, and not in any manner revoked, vacated or annulled at the time of his death. That said John Clark resided, and was domiciled, at the time of his death, in Allen county, in the State of Kentucky, and after the said grant of administration to said plaintiff, as in said declaration is supposed, that said last will and testament of said John Clark, deceased, was in due form of law, proved, established, and probated before and admitted to record by the county court of said county of Allen, in the State of Kentucky, being the court, which by the law of said State of Kentucky, had exclusive jurisdiction and cognizance of such matters. Which said proceedings of said county court still remain in full force, not in any manner reversed or set aside; and this, said defendant is ready to verify, wherefore he prays judgment, &c.

To this plea, the plaintiff demurred, on the grounds: 1st. That it neither tendered a material issue, nor stated any fact upon which a material issue could be formed.

2d. That the probate of the will in Kentucky, as alleged, could not affect the administration granted to the plaintiff in Tennessee, or impair his right to maintain this suit, under the statutes of Arkansas, &c.

The court overruled the demurrer, the plaintiff rested, final judgment was rendered for defendant, and the plaintiff appealed.

The sufficiency of the plea copied above upon demurrer, is the only question now presented for the decision of this court. In passing upon this question, we are to look alone to the plea, and the declaration to which it responds. Allegations or denials contained in other pleas in the cause, and upon which no question arises on this appeal, are not to be regarded in determining the sufficiency of the plea demurred to. It must stand upon its own allegations.

*Section* 1, *chap.* 7, *Digest*, provides: "That administrators, executors, and guardians, appointed in any of the States, Territories, or districts, of the United States, under the laws thereof, may sue in any of the courts of this State, in their representative capacity, to the same and like effect as if such administrators, executors, or guardians, had been qualified under the laws of this State."

By the common law, the powers of executors, administrators, and guardians, as such, did not extend beyond the limits of the local governments in which they were appointed, for the purpose of bringing suits, and this statute was designed to enlarge their powers. How far it enlarges the powers of ancilliary administrators, is an interesting and an unsettled question in this State.

Reference to some general principles of the common law may enable us to determine the object and effect of this statute, as far as required in this case. It is a general and well settled rule, that the disposition of the personal estate of any one deceased, is de-

termined by the law of his domicil. *Crofton vs. Ilsby*, 4 *Greenlf. Rep.* 138.

STORY says, be the origin of this doctrine what it may, it has so general a sanction among all civilized nations, that it may now be treated as a part of the *jus gentium. Story's Conflict of Laws, sec.* 380, (*2d edition.*)

Lord LOUGHBOROUGH said, in *Sill vs. Worswick*, 1 *H. Black.* 690, "It is a clear proposition, not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality; but that it is subject to that law which governs the person of the owner; both with respect to the disposition of it, and with respect to the transmission, either by succession, or by the act of the party. It follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country, in which the property is, but the law of the country of which he was a subject, that will regulate the succession."

Lord Ch. J. ABBOTT, *in Doe on dem., Burtwhistle vs. Vardill*, 5 *Barn. & Cress.* 351, said: "Personal property has no locality. And even with respect to that, it is not correct to say that the law of England gives way to the law of the foreign country, but that it is part of the law of England, that personal property should be distributed according to the *jus domicilii.*"

STORY, after quoting from these decisions, remarks, that "the same doctrine has been constantly maintained, both in England and America, with unbroken confidence, and general unanimity." *Story's Confl. Laws, sec.* 380. See the authorities cited, in support of this remark by STORY, and cases cited in 2*d American Edition to Jarmin on Wills, by Perkins, p.* 3, *note* 2. This rule is understood, of course, to be subject to such modification as may be made by the legislation of any State within whose jurisdiction the personal property may be situated. *Story's Confl. Laws, sec.* 383, 390.

"In regard to the title of executors and administrators, derived from a grant of administration in the country of the domicil of the deceased, it is to be considered that that title cannot, *de jure*, extend as a matter of right, beyond the territory of the government which grants it, and the movable property therein. As to movable property, situated in foreign countries, the title, if acknowledged at all, is acknowledged *ex comitate*; and, of course, it is subject to be controlled or modified, as every nation may think proper, with reference to its own institutions and its own policy, and the rights of its own subjects. And here the rule, to which reference has been so often made, applies with great strength, that no nation is under any obligation to enforce foreign laws, prejudicial to its own rights, or those of its own subjects. Persons, domiciled and dying in one country, are often deeply indebted to foreign creditors, living in other countries, where there are personal assets of the deceased. In such cases, it would be a great hardship, upon such creditors, to allow the original executor or administrator to withdraw those funds from the foreign country, without the payment of such debts, and thus to leave the creditors to seek their remedy in the domicil of the original executor or administrator, and perhaps there to meet with obstructions and irregularities in the enforcement of their own rights from the peculiarities of the local law. *Ib.*, *sec.* 512.

"It has hence become a general doctrine of the common law, recognized both in England and America, that no suit can be brought or maintained, by any executor or administrator, or against any executor or administrator, in his official capacity, in the courts of any other country except that from which he derives his authority to act, in virtue of the probate and letters testamentary, or the letters of administration there granted to him. But if he desires to maintain any suit in any foreign country, he must obtain new letters of administration, and give new security, according to the general rules of law, prescribed in that country, before the suit is brought." *Ib.*, *sec.* 513.

"The right of a foreign executor or administrator to take out

such new administration, is usually admitted, as a matter of course, unless some special reason intervene to vary or control it; and the new administrator is treated as *merely ancillary or auxiliary to the original foreign administration, so far as regards the collection of the effects, and the proper distribution of them.* Still, however, the new administration is made subservient to the rights of creditors, legatees, and distributees, who are resident within the country where it is granted, and the residuum is transmissible to the foreign country, only, when a final account has been settled in the proper tribunal, where the new administration is granted, upon the equitable principles adopted by its own law, in the application and distribution of those assets found there." *Ib., sec.* 513; *Dawes vs. Head*, 3 *Pick. R.* 128.

Moreover, says the same author, (STORY): "It is exceedingly clear that the probate, and grant of letters testamentary, or of administration in one country, give authority to collect the assets of the testator or intestate only in that country, and do not extend to the collection of assets in foreign countries, for that would be to assume an extra-territorial jurisdiction or authority, and to usurp the functions of the foreign local tribunals in those matters." *Confl. Laws, sec.* 514.

In *Doolittle vs. Lewis*, 7 *John. Ch. R.* 45, 47, Mr. Chancellor KENT, said: "It is well settled that a party cannot sue or defend in our courts, as executor or administrator, under the authority of a foreign court of probate. Our courts take no notice of a foreign administration; and before we can recognize the personal representative of the deceased, in his representative character, he must be clothed with authority derived from our law. Administration only extends to the assets of the intestate within the State where it is granted; if it were otherwise, the assets might be drawn out of the State, to the great inconvenience of the domestic creditors, and be distributed perhaps on very different terms, according to the laws of another jurisdiction."

Again, STORY says: "Where there are different administrations granted in different countries, that is deemed the prin-

cipal or primary administration, which is granted in the country of the domicil of the deceased party; for the final distribution of his effects among his heirs or distributees, is to be decided by the law of his domicil. Hence, any other administration, which is granted in any other country, is treated as in its nature ancillary merely, and is, as we have seen, generally held subordinate to the original administration. But each administration is nevertheless deemed, so far independent of the others, that property received under one cannot be sued for under another, although it may, at the moment, be locally situate within the jurisdiction of the latter." *Confl. Laws, sec.* 518.

It is alleged in the declaration and conceded by the plea, that letters of administration upon the estate of *John Clark*, deceased, were granted to the plaintiff by the county court of Davidson county, in the State of Tennessee, and we must presume in view of the above general principles of law, that though *John Clark* was domiciled in Kentucky, at the time of his death, as is also alleged by the plea, the administration was granted in Tennessee for some legal purpose in regard to his estate there.

The plea further alleges, that John Clark made a will, and that after his death, and after grant of letters of administration to the plaintiff, in Tennessee, the will was duly established, probated and admitted to record, before the county court of Allen county, in the State of Kentucky, according to the laws of that State.

It is argued by the counsel of the appellee, as the legal effect of the plea, that on the probating of John Clark's will in Kentucky, where he was domiciled, the letters granted to the plaintiff in Tennessee, became void by operation of law.

It seems by the common law, that if there be an executor, and administration be granted before probate and refusal of the executor to act, it shall be void on the will's being afterwards proved, although the will were suppressed, or its existence were unknown, or it were dubious who was executor, or he were concealed, or abroad, at the time of granting the administration. In such case,

it seems, the administration is a mere nullity, the ordinary having no power to divest the executor's interest. *Toller on Executors*, 120, 121; *Kane vs. Paul*, 14 *Peters* 33.

Whether the will of John Clark named an executor or not, or whether on the probate of the will, letters testamentary or of administration with the will annexed, were granted by the county court of Allen county, to any one, does not appear from the plea. But, putting the case in the strongest attitude for the appellee, let it be supposed that the allegation in the plea, that the will was duly *probated* according to law, &c., implies the grant of authority to some one to execute it, and then what is the legal effect of the matter pleaded, upon the rights of the appellant, as alleged in his declaration?

If administration had been granted upon the estate of John Clark by the proper court in Kentucky, where he was domiciled, and afterwards his will had been duly probated, &c., it seems, by the common law, the administration would at least have been thereby vacated, if not void. What the local laws of Kentucky on this subject are, we do not judicially know. By our statute, in such case, it is made the duty of the probate court to revoke the letters of administration. *Digest, ch. 4, sec. 27.*

But can it be said, that the probate of the will in Kentucky, *ipso facto*, revoked and annulled letters of administration previously granted to the appellant by a competent court in Tennessee, without any application to that court to probate the will there, and for authority to act under it, within that jurisdiction, and enforce its provisions?

We are not to suppose that the county court of Davidson county, Tennessee, granted letters to the appellant for the purpose of authorizing him to administer such of John Clark's estate as was in Kentucky, where he was domicilled, or in any other State, but for the purpose of taking charge of, and administering such of his assets, rights, credits or effects, as were found within the jurisdiction of that court; and this, we have seen from the general prin-

ciples of law above quoted, that court had the right to do, and no local law of Tennessee to the contrary is averred.

On this hypothesis, there would be no necessary conflict between the administration in Kentucky, and that granted to the appellant in Tennessee, though the latter would be ancillary to the former, and the appellant would have finally to account to the executor or administrator, with the will annexed, appointed in Kentucky, that being the domicil of John Clark, and the laws of the domicil controlling the disposition of his estate, subject to the provisions of his will.

We cannot conclude, therefore, that the allegations of the plea are sufficient to show that the letters of administration, of which the appellant makes profert in his declaration, have been rendered null and void, and his right to sue, as such administrator, at all cut-off.

Again it is argued by the counsel of the appellee, as a legal question presented by the plea, that even if the probate of the will, &c., in Kentucky, did not *ipso facto* annul and make void the grant of letters in Tennessee, yet that the administration in Tennessee must be regarded as having been granted for local and not general purposes; that it could be but ancillary to the principal administration in Kentucky, and that the slaves in controversy being in Arkansas, our statute would authorize the executor or administrator of the domicil to sue here, for their recovery, and not the ancillary administrator appointed in Tennessee: that he would have no right to recover or control any assets except what was found within the local jurisdiction of the authority under which he derived his power to act.

Whatever may be the construction proper to be put upon our statute, as to the rights of ancillary administrators, appointed in other States, to sue as such in our courts generally, the particular question presented by the argument of the counsel, does not legitimately arise upon the demurrer to the plea in question.

There are two counts in the declaration: The first, in legal effect, charges the defendant with taking the slaves from the

plaintiff, as administrator of John Clark, deceased, and with unlawfully detaining them from him. The second alleges, a bailment of the slaves by the plaintiff, as such administrator, to the defendant, and an unlawful detention of them by her, after demand, &c.

Though other pleas filed in the cause put the material allegations of the declaration in issue, yet the plea demurred to, and which is to stand, as we have above remarked, upon its own allegations, when met by demurrer, is purely a plea in confession and avoidance. It does not deny the allegations of the declaration; but, in legal contemplation, confesses them, and seeks to avoid them by new affirmative matter.

If it be true that the defendant took the slaves from the plaintiff, as such administrator, or received them from him, or any one else acting on his behalf, and unlawfully detains them from him after demand — if he had a legal right to the possession of them, by virtue of his administration in Tennessee, and the slaves have been brought into Arkansas in violation of that right, he certainly would have a right to follow them up; and, by virtue of our statute, sue for and recover them in our courts.

If the plea had alleged, in addition to the averments which it makes, that the slaves were in Arkansas when John Clark died, and that they never were in the possession, or under the rightful control of the plaintiff, by virtue of his ancillary administration in Tennessee—that they did not constitute part of the assets, within the jurisdiction which granted to him his letters—or, perhaps, if such facts were proven upon the trial, under the issues to the declaration, then the question would properly arise, whether he could maintain the action upon any title which his intestate had to them, or whether the executor or administrator of the domicil, should not bring the action for them here. But, on this interesting question, we do not consider it proper to express any opinion now, nor do we mean to be understood as deciding, in advance, the particular mode in which such questions should be presented by the pleadings or evidence; it is sufficient for us

to decide now, upon the validity of the plea, and we have already indicated that, in its present form, it is no bar to the action.

The judgment is reversed, and the cause remanded, with leave to the parties to amend the pleadings, and that the cause progress, according to law, and not inconsistent with this opinion.

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## HEMPHILL VS. MILLER.

Where depositions taken under a commission in a chancery cause have been filed and published several years, without objection, to allow exceptions after such a lapse of time, and such gross laches, upon the ground that "the witnesses were not properly sworn, nor the depositions certified according to law," could not fail greatly to surprise the opposite party, and would be gross unfairness.

It is error to suppress depositions, upon a motion to suppress them, because the evidence was incompetent and irrelevant, and inapplicable to the issues, where a portion of them is relevant and applicable to the issue, and the motion is general, without discriminating between such of the depositions as are, and such as are not relevant.

It is clear, that where exceptions to a part of the answer are filed and sustained, all of the answer not affected by such exceptions, is left standing in the cause.

Where a vendor of real estate remains in possession under a subsequent contract to make certain improvements, such subsequent contract is a distinct and independent agreement, and is binding upon the parties.

A party sells an improvement upon the public land, and remains in possession under a parol agreement to make certain improvements, for which, together with the price

of the land, he is to be paid at a certain day; the vendee fails to comply with his part of the contract at the time stipulated: afterwards the vendor sells to a third person at an advanced price: HELD, That it would be improper to decree a specific performance, not only because it had become impossible by a subsequent sale of the public lands by the United States, but because of the laches of the purchaser: and that the vendor will be considered as a trustee for the vendee for the advanced price; and that such subsequent sale be ratified.

*Appeal from Lafayette Circuit Court in Chancery.*

Hon SHELTON WATSON, Circuit Judge.

PIKE & CUMMINS, for appellant. The depositions could not have been suppressed on account of the first ground stated in the motion to suppress. They were taken in 1839, are marked *filed* 3d March, 1842, on which day the record shows they were opened and published, and the cause was that day heard upon them, the complainant having leave to present exceptions to them in a written argument, which he never did. It was too late, *nine years and seven months afterwards*, to raise a question as to whether the witnesses were properly sworn, and the depositions properly certified.

This is a bill for specific performance of a parol contract. We will not argue, that such being the case it may be shown to have been varied, modified, abandoned, or rescinded, by parol. Admitting the premises, nobody will dispute this conclusion.

For, even as to *sealed* contracts, the rule laid down by the court, when the case was here before, is made only in cases at common law. *Kage vs. Waybrant*, 1 *Paige*, 428; *Suydam vs. Jones*, 10 *Wend.* 180; *Barnard vs. Darling*, 11 *Wend.* 30; and *Delacroix vs. Buckley*, 13 *Wend.* 71, cited and relied on by the court, were cases at common law. And so were *Preston vs. Christmas*, 2 *Wils.* 86, *Blake's case*, 6 *Co.* 43, *Alden vs. Blague*, *Cro. Jac.* 99; and *Shows vs. Frankleyn*, *Latch* 108; opposed to which (*meliore ratione*, we think), are *Munson vs. Perkins*, 9 *Pick.* 298; *Ratcliff vs. Pemberton*, 1 *Eq.* 35; *Latimore vs. Harsen*,

14 *J. R.* 330; *LeFevre vs. LeFevre*, 4 *Serg. & R.* 241; *Dearborn vs. Cross*, 7 *Cowen* 48; *Fleming vs. Gilbert*, 3 *J. R.* 531.

It does not necessarily follow, because a contract is valid, and equity would not rescind it or relieve against it, that therefore it will decree it to be specifically performed. Sometimes damages may be recoverable at law for a breach of a contract, of which equity would yet not decree specific performance; and sometimes damages may *not* be recoverable at law, and yet relief would be granted in equity. 2 *Story Eq.*, *sec.* 741; *Weale vs. West Middlesex Water Works' Company*, 1 *Jac. & Walk.* 370. The interference of courts of equity in this way, is discretionary. They will not so interfere, except where it would be strictly equitable to make decree for specific performance. If the parties have so dealt with each other, in relation to the subject matter of a contract, that the object of one party is defeated, while the other is at liberty to do as he pleases, in relation to that very object, equity will not grant relief, but will leave the parties to their remedy at law. 2 *Story Eq.*, *secs.* 742, 750.

It will not decree specific performance, where, from a change of circumstances or otherwise, it would be unconscientious to enforce it. *Id.*, *sec.* 751.

It requires a much less strength of case on the part of the defendant, to resist a bill to perform a contract, than it does on the part of the plaintiff to maintain it. The agreement must be CERTAIN, FAIR, and JUST, in all its parts. *Id.*, *sec.* 769. The party applying for performance must show that he has been in no default, and that he has taken all proper steps towards performing on his part. *Id.*, *sec.* 771.

If the court holds that the contract was not expressly waived or abandoned, still we contend that the unexplained neglect and delay of Miller, will avoid his claim for specific performance: that, if the court does not so think, and holds that Hemphill had no right to sell, still the decree is erroneous, because it denies any allowance for improvements, and because the court below suppressed the depositions proving these improvements and their value.

And we submit, with great confidence, that so much of the depositions as proved the parol agreement, made the day after the purchase, was admissible, because this is a suit to enforce a parol agreement, or, at least, an agreement resting partly in writing and partly in parol: and that so much as proved a subsequent waiver and abandonment by Miller—so much as proves the message he sent to Hemphill, was admissible, because the whole contract *might* well be so abandoned; and, even if not, yet after such acts on his part, if gross neglect or delay would put an end to his right to specific performance, *a fortiori*, an express refusal to comply with his contract would do so. Neglect and delay do not, strictly speaking, *destroy* the sealed or written contract in any case: but leaving it to stand, it forms a breastwork against it, by making it inequitable for the party to claim to enforce it. The court denies specific performance of many agreements which it would not, on a bill for the purpose, rescind; but leave the parties, each to his remedy, if he has any, at law.

On this ground, the testimony was clearly admissible, and its admission is perfectly consistent with the former decision of the court. It would be singular, indeed, if it were not admissible, in a case where, by proceeding for compensation in the room of specific performance, the plaintiff claims what is due to him, *ex æquo et bono*. It would be indeed strange, if the defendant could not show that it is a fraud in the plaintiff to claim damages or compensation, in consequence of an act which he authorized to be done, and, therefore, is absolutely estopped to complain of.

WATKINS & CURRAN, for appellee. Hemphill admits the original agreement with Miller, and his subsequent sale to Carson, as charged in the bill; but, in his answer, he sets up a parol agreement in avoidance: and when the matter came before this court (4 *Eng. Rep.* 488) on exceptions to the answer, it was held, that the matter could not be set up, and the exceptions to the answer were sustained. This decision, whether right or wrong, is the law of this case; and settles and concludes every question now presented.

No new question is presented by this record. The only error that can possibly be assigned in this appeal, is as to the depositions. As to this assignment, we submit: 1st. That a party will not be allowed to prove what he cannot plead—if the answer was exceptionable, certainly the depositions cannot be admitted. 2d. The depositions were irregular and informal, and were, for that reason alone, properly suppressed.

As to the error relied upon, that Hemphill was not allowed anything for improvements alleged to have been made by him between the time of the sale to Miller and the sale to Carson, we submit: 1st. That, by examination of the previous decision of this court, it will be seen that the statement about the improvements, was coupled with, and constituted part of the parol agreement which was reached by the exceptions to the answer. 2d. That even if not reached by the exception, it was matter in avoidance; the proof of which devolved upon Hemphill, and the depositions being excluded, there was no proof. And 3d. That he could not, in any event, be entitled to a deduction for improvements.

TRAPNALL, for the appellee. There was no notice of the time and place of the taking of the depositions, nor any appearance by Miller or his counsel; nor were the witnesses sworn to testify the whole truth; nor were the depositions reduced to writing in the presence of the officer before whom they were taken, nor were they certified according to law. *Digest, ch.* 55, *secs.* 6, 7, 13, 15.

The depositions relate to the subsequent verbal agreement between the parties, which since the decision of this case in 4 *Eng.* 488, can no longer be considered a part of the defence.

Miller had full power to ratify the sale to Carson by Hemphill, and hold Hemphill as trustee, bound to him for the purchase money. 2 *Story's Eq.* 506, *sec.* 1262; 2 *J. C. R.* 441; 1 *J. C. R.* 581.

So much of Hemphill's answer being struck out as related to

the subsequent parol agreement, by virtue of which Hemphill made the improvements, if any, and claims an allowance for the same, there was nothing upon which the court could have grounded the decree allowing for the value of improvements.

Mr. Justice SCOTT delivered the opinion of the Court.

This cause was heard on appeal in this court, during the January term, 1849, (4 *Eng. R.*) and was sent back to the court below for further proceedings. After its return to that court, Miller moved to suppress the depositions of Hemphill, which had been on file and published for nearly ten years before, upon the ground: 1st. That the witnesses were not properly sworn, nor the depositions certified as required by law. 2d. That they were incompetent and irrelevant, and not applicable to the issues. This motion was granted and the depositions ruled out, to which Hemphill took a bill of exceptions. The cause was then heard on the bill and exhibits, answer and replication, and the court being of opinion that it was impossible for Miller to have a specific performance of the agreement for which he proceeded, and that Hemphill ought to be charged as trustee for Miller, and compelled to account for the amount of the sale to Carson with interest, less the amount of the writing obligatory executed by Miller to Hemphill, with interest from the time it fell due until the 1st of April, 1836, decreed accordingly for the sum of $3.217, which, upon computation, was found to be balance of principal and interest up to the date of the decree.

Hemphill appealed to this court, and, afterwards, upon application here, the execution of the decree was, upon the usual terms, suspended by the order of this court, until his appeal could be heard. The complainant below prayed for specific performance of a contract set out in his bill; and, in the alternative, that he might be decreed, the price for which the land in question was sold by Hemphill to Carson, and that Hemphill should account for the same, and for rent for the year 1835.

The case made by the bill, and accompanying exhibits, was

that on the 6th of December, 1833, "or thereabouts," Miller purchased of Hemphill "a certain improvement, or parcel of land," situated in the county of Lafayette, on the public unsurveyed lands of the United States, of which Hemphill was the owner, for the sum of $500, to be paid the 1st day of January, 1835, for which sum Miller executed to Hemphill his *sealed* note, and Hemphill executed to Miller a deed for "*said improvement or land*," with covenants of warranty against all persons except Mexico and the United States. "That, at the time of the sale, and conveyance aforesaid, it was futher *verbally* agreed between the parties," that Hemphill should enter into, and upon the land and improvement so sold and conveyed, and take, and hold possession thereof, *under* Miller, and raise a crop thereon in the year 1834, and "*restore*" the possession thereof to Miller, in the month of November, 1834, or at any time thereafter, when Miller (who then lived in the State of North Carolina,) should come and demand possession. That, at the time Miller expected and intended to have removed to said land and improvement by November, 1834, but that by "unavoidable delay, he was hindered and prevented from doing so." That afterwards, (but when it is not stated) when Miller had disposed of his property in North Carolina, and was on his way to Arkansas, with a view to take possession of, and settle upon the improvement and land in question, he heard, for the first time, in the State of Tennessee, (where in consequence he remained for some time afterwards) that Hemphill had disposed of said improvement and land, and would refuse to restore possession to Miller, in accordance with the verbal agreement above alleged. That, on or about the 30th of April, 1835, Hemphill sold and conveyed "*the said improvement and land*" in question, "with some other improvements of very small value," to Samuel P. Carson, for $3.750, $1000 of which was paid down, and the residue to be paid on the 1st of January, 1836. That Carson knew of Miller's previous purchase, and of the conveyance to him, and acted in confederacy with Hemphill to defraud Miller. That on the 16th of November, 1835, Miller, at Lafayette

county, tendered to Hemphill the amount of the sealed note, and all interest that had accrued upon it, and demanded possession of Hemphill, who refused to take the money, and to restore the possession, unless, in addition to the amount of the sealed note, Miller would also pay the further sum of $3.750. A few days afterwards, Miller filed his bill.

Hemphill, in his answer, admitted the sale and the execution of the sealed note, and the deed for the improvement and land, as stated in the bill, but in responding to the contemporaneous verbal agreement alleged in the bill, denies that he was to enter into and upon the improvement, and hold possession *under the complainant*, and to restore the possession in the month of November, 1834, or at any other time thereafter, when he should demand it, as alleged in the bill, and charges the truth to be, that he was "to have and hold the possession, use and cultivation," from the time of contract, "until the 1st day of November, 1834, for his own use and benefit," and that in addition to these terms of that verbal agreement, he was, in the year 1834, to crib for Miller, on the improvement, 1000 bushels of corn, which Miller was to receive on the 1st day of November, 1834, (as well as the possession of the improvement on that day) and pay him fifty cents a bushel for the same. That he did crib the corn, and was ready and willing to deliver it, as well as the possession of the improvement, at the time agreed upon, but the complainant failed to come to receive them at that time, or any time before. He denies all knowledge of the matters alleged to have transpired in North Carolina and Tennessee, and states his unbelief of them all. He denies that Miller, either on the 16th day of November, 1835, or at any other time, ever tendered him any sum of money for any purpose whatever, or ever demanded of him the possession of the improvement in question, or that he ever refused to give Miller possession unless he would, in addition to the amount of the sealed note, also pay the further sum of $3.750, as is alleged in the bill. But he admits that about the 15th November, 1835, he did say to Miller, that there was no other way in which the mat-

ters in difference between them in the premises could be settled, except that Miller should surrender the deed aforesaid, and receive his sealed note in exchange for it, "agreeable to the contract," which Hemphill had before stated in his answer, and of which we will presently speak; and then, that Miller might, by arrangement with Carson, make the same payment to Hemphill, as Carson had, and was to make, and thus be placed in his stead.

He denies the sale to Carson, upon the terms stated in the bill, but admits, that about the 30th of April, 1835, he sold to him the improvement in question, together with a certain other improvement, known as "Hemphill's Bend," for the aggregate sum of $3.700, of which, the price of the improvement in question was $2.200, and not more, and that upon the execution of the deed to Carson for both improvements, he paid the respondent $1000, and executed to him his writing obligatory for $2.750, payable in the month of April, 1836: $50 of which sum was for five cows and calves, and that he gave Carson possession the 1st January, 1836. The residue of the answer, needful to be noticed, is as follows, to wit: "But it is true, and so this respondent charges the truth to be, that some time after the sale of said improvement to said complainant as aforesaid, to wit: on or about the 7th day of December, in the year 1833, it was verbally agreed between this respondent and said complainant, that said complainant should pay this respondent a reasonable compensation for all necessary improvements which this respondent might think proper to make on said improvement, by building necessary houses and cribs, and opening and enclosing land, and fitting the same for cultivation, and repairing and clearing the well on said premises; that said complainant would cause to be delivered to this respondent, in time to make a crop in the year 1834, a negro man slave, not under twenty, nor over twenty-three years of age, not having a trade, to be of the value of six hundred dollars, which said negro man slave, this respondent was to receive in payment of the aforesaid one thousand bushels of corn, and the overplus to be applied to the pay-

ment of such improvements as this respondent should have made upon said improvement.

And it was *then and there further* verbally agreed between this respondent and said complainant, that the said complainant should leave the deed executed and delivered by this respondent to the complainant as aforesaid, with Richard Pryor, of the county of Hempstead, in the Territory of Arkansas, and that in case said complainant did not come into the county of Lafayette aforesaid, on or before the said first day of November, 1834, and receive the possession of said improvement from this respondent, and the 1000 bushels of corn to be cribbed by this respondent as aforesaid, and pay this respondent the value of all necessary improvements as aforesaid, over and above the value of the said negro man slave, to be delivered to this respondent by said complainant as aforesaid, then the said deed for said improvement, made and delivered by this respondent to said complainant as aforesaid, was to be delivered up to this respondent by the said Richard Pryor, and become null and void; and that this respondent should deliver up the note, executed and delivered to this respondent by said complainant as aforesaid, and the same to be null and void, and that all contracts made and entered into between this respondent and said complainant, should be canceled and dissolved, as well verbal as written. And this respondent avers," &c.; (the answer then proceeding to negative, in detail, the several matters undertaken on the part of Miller, and affirming his own readiness and willingness to comply on his part, and Miller's failure.)

Before replication, the complainant filed exceptions to the answer, in the following terms, to wit:

"And the said complainant, *as to so much of the answer* of the said defendant, Andrew Hemphill, as sets forth that it was verbally agreed between the defendant Hemphill, and the complainant, that said complainant should leave the deed, executed and delivered by said defendant Hemphill, with Richard Pryor, of the county of Hempstead, and that in case said complainant did

not come into the county of Lafayette aforesaid, on or before the 1st day of November, 1834, and receive possession of said improvement from said defendant Hemphill, and comply with the conditions of said supposed verbal agreement, as in the answer of said Hemphill is alleged, then, that the said deed for said improvement, made and delivered by said Hemphill to said complainant as aforesaid, was to be delivered up to said Hemphill by the said Richard Pryor, and become null and void, and that said Hemphill should surrender up the note executed and delivered by said complainant to said Hemphill, to said complainant, and that the same be null and void, and that all contracts entered into between said Hemphill and said complainant, should be canceled and dissolved, as well verbal as written. *This defendant excepts:* 1st. Because the same is not responsive to the allegations of the bill. 2d. Because when said deed was delivered by said defendant to complainant, it became, and was absolutely, the deed of said defendant, and no subsequent verbal agreement could make it an escrow. 3d. Because a verbal agreement cannot vary a deed: and 4th. Because the said supposed parol agreement alleged in said answer, appears, upon its face, to be a naked agreement, made without any consideration. The complainant, therefore, prays that the said exception be sustained, and that he be decreed his reasonable costs.

These exceptions were overruled, and afterwards, replication was filed to the answer, and the case was set for hearing. Afterwards it was heard, on the 30th of March, 1842, submitted and taken under advisement, as it was at the next three succeeding terms. On the 10th of October, 1845, the bill was dismissed for want of prosecution, and a decree rendered. On the 10th of April, 1846, on motion sustained by affidavits, the case was re-instated, and on the 30th September, 1846, an appeal was granted to the complainant, on petition, by one of the judges of the Supreme Court; and at the January term, 1849, the case was, as already stated, reversed here and remanded. In the mean time, Miller, by his counsel, had taken other steps in the court below,

by an original bill, in the nature of a bill of review, supplemental bill, and bill to execute a decree, which it is unnecessary to notice, as they seem to cut no figure in the case we have to decide.

The first question to be considered is, whether or not the court below erred in granting the motion to suppress the depositions. They were all taken in the year 1839; Hall's and White's, under an order of court made in March, 1836, and Clark's, under an order of court made in March, 1839; and having been filed, were, by leave of court, opened and published, on the 30th of March, 1842, and the cause was that day heard upon them; when, by express leave of the court, the complainant was allowed to present exceptions to them in a written argument, and to have the same benefit thereof at the succeeding term, "as if the said exceptions were now formally made out." It does not appear that any exceptions were ever presented, although the cause remained in that court, some four years afterwards, until those we are now considering, which were filed the 4th of November, 1851. To allow exceptions after such a lapse of time, and such gross laches, upon the first ground taken, *that is to say*, "because the witnesses were not properly sworn, nor said depositions certified according to law," could not fail greatly to surprise the opposite party, whose witnesses might, in the mean time, have departed this life, or to parts unknown, to say nothing of the gross unfairness of such a course in lulling the opposite party into security by such long seeming acquiescence.

In order to determine the validity of the other objection taken, to wit: That the evidence was incompetent and irrelevant, and inapplicable to the issues, it will be necessary to look into the depositions and into the state of the pleadings.

*William Clark* states, that he came from and went back to Tennessee in company with Miller, and was present on the 6th of December, 1833, when the contract between Miller and Hemphill was made. Hemphill sold for $500, payable the 1st of January, 1835, and Miller was to pay him for all improvements he

should make on the place from that time, until he (Miller), should move to the country, which, he said, would be in January, 1835. Miller engaged 1000 bushels of corn of Hemphill, and was to let him have a negro man. The price of the corn he did not recollect, and the price of the negro he did not know. He was called on by both to witness, that if Miller did not move to the country by January, 1835, and pay Hemphill $500 for the place, and also for all labor Hemphill should do on the premises, such as clearing, fencing, breaking up land, building negro houses, corn-cribs, stables, &c., from the date of the contract until he should move to the country, the contract, both written and verbal, should be null and void, and the deed and note to be given up. In February, 1835, witness left the State of Tennessee for Arkansas, and Miller authorized him to call on Hemphill, and say to him, that he might consider the contract at an end, and that he would have sent the bill of sale, and gotten up his note, but that he did not have the former with him, and to tell Hemphill that he would enclose it to some friend in Arkansas to make the exchange. That after the suit was brought, he had a conversation with Miller, in which he said, that he thought he had the advantage of Hemphill, and if he could make five or six hundred dollars out of him, he thought it was well enough; and said, also, that when he demanded the improvement of Hemphill, he agreed to let him have it, provided he would pay him the five hundred dollars, and for all the labor he had done on the premises, in accordance with the contract, but he said he would not take the place because Hemphill had done labor to the value of $1500 or $2000 on it.

*Durant H. White* stated, that he was present on the 6th day of December, 1833, when the trade between Miller and Hemphill, in regard to the improvement, was made. That Miller was to pay Hemphill $500 within one year, or thereabouts, from that time, for the improvement, and also to pay him for all improvements he should make on the place, such as clearing, fencing, breaking up ground, and building houses, such as kitchens, stables, corn-cribs, negro houses, &c., and for the enclosing and put-

ting land in cultivation, he was to pay Hemphill at the rate of $10 per acre, for all that Hemphill thought proper to clear and fence for his own use. That as to the buildings, there was no agreement as to the price, or as to the number to be built, only that he was to pay what they were worth. That Hemphill built ten houses, sunk a well on the premises, and enclosed and put in cultivation 120 or 125 acres. All the labor thus done, the witness estimated to be worth $1500 or $1600. Miller also engaged 1000 bushels of corn of Hemphill, to be delivered on the premises in the following November, at the rate of fifty cents per bushel, and was to let him have a negro man not over 25 years of age, for which Hemphill was to pay him $600 in the way of labor done on the premises. That the next day a conditional contract about the premises sold by Hemphill to Miller, and the work to be done on the same, was made, and the witness was called on by both parties to witness, that if Miller failed to pay Hemphill for all his labor done on the premises, and for 1000 bushels of corn in the month of November, that "Hemphill *mout* know that he had declined moving to the country; and, in that event, all contracts, both written and verbal, should be void, and the deed and the note to be given up."

*Jesse H. Hall* stated, that there were between 120 and 140 acres of land cleared, fenced, and put in cultivation, on the place for which this suit was brought, for which $1500 or $1600 would be a reasonable value for the labor bestowed.

With regard to the state of the pleadings, it may be assumed as entirely clear, that all of the answer is left standing that was not cut out by the ruling of this court, when this cause was here before, to the effect that the complainant's exceptions to the answer should be allowed. Those exceptions, together with all those portions of the answer, which, upon any hypothesis, there would be any color whatever to suppose were affected by them, we have copied above, *in haec verba*. The first part of the answer so copied, sets out under a *vide licet*, a verbal agreement, that Miller should pay Hemphill a reasonable compensation for specified improvements

to be made, and that Miller should deliver the negro to pay for the 1000 bushels of corn, and the residue of his price to go in part payment of the improvements to be made. And the second part beginning with, "and it was then and there further verbally agreed, &c," sets out that the deed should be left in the hands of Pryor and in case Miller did not come, on or before the 1st day of November, 1834, and receive the place, and the 1000 bushels of corn, and pay the value of all additional improvements to be made over and above so much of the value of the negro man, as was to go to pay for the corn, then Pryor to deliver up the deed to Hemphill, and Hemphill to deliver up the note, and all contracts, both written and verbal, between Miller and Hemphill, to be dissolved.

The exceptions are in terms to so much of the answer, &c., as sets forth that it was verbally agreed, &c., that the deed should be left with Pryor, &c., and in case Miller did not come "on or before the 1st November, 1834, and receive possession of said improvement, and comply," &c., that the deed should be delivered up, and also the note, and all contracts, verbal and written, between Miller and Hemphill, to be canceled and dissolved.

The substance of the whole then is, that the first part of the above copied answer, set out a subsequent verbal agreement in terms. The second part set up an additional agreement, that if these stipulations (repeating them) were not complied with by Miller, within a specified time, that not only *these*, but all *previous* contracts, both verbal and written, between the parties, were to become thereby dissolved. The exceptions, it is plain, were to the second part only, submitting that the legal effect of the *subsequent verbal* agreement, was not to dissolve the *prior* agreements between the parties made under *seal;* that the law would not allow such an agreement to have such an effect. In connection with the exceptions to the answer, this was the only question argued and submitted to this court, when this case was here before, and that was the only question considered, and decided in reference to the exceptions. This court in the opinion delivered, after announcing that

the remaining question related to the complainant's exceptions to the defendant's answer; and, in brief and general terms, stating the substance of the two verbal agreements, and what the complainant *insisted upon* as to the second verbal agreement, which was, "that it could not have any legal effect to defeat the original contract, executed by the deed of conveyance by the one party, and the execution of promissory note payable the 1st January, 1835, by the other party," proceeds to hold that position to be well taken, for the several reasons there distinctly given: and then remarking that, "even if this was *not the true ground* upon which to place this case, and it were to be placed on the ground of a sealed executory contract," proceeds to show that the legal result would be the same, and that it could not in *that* view, work a *discharge* of the *sealed contract*," and concludes that "in any legal view then of the case, it is clear that the court below erred in overruling the complainant's exceptions to the defendant's answer."

The exceptions then which were thus sustained, *going only to so* much of the answer as set up, in substance, that by the subsequent agreement, the deed was to be deposited with Pryor, &c., and if Miller did not comply with all the several stipulations between the parties, the deed and note were to be delivered up, and all contracts were to be dissolved and canceled, necessarily *left standing* in the answer, all the first part, above copied, in which it is set up that Miller was to pay a reasonable compensation for the specified improvements to be made; and as much of the depositions suppressed tended directly to sustain *this part* of the answer; and was, therefore, relevant and applicable to the issues, and the motion to suppress was general, and did not discriminate between such parts of the depositions as were relevant and applicable to the issues, and such as were not, the motion ought to have been refused instead of being allowed, as it was by the court below.

For this error, the decree must be reversed. And upon looking into the whole case as now presented, with a view of proceeding to make such decree, under the provisions of the statute, as the

Circuit Court ought to have made, to be certified to that court, and to be entered up and executed as the decree of that court, we are of opinion, that specific performance ought not to be decreed, as well because the sale of the public lands by the government, upon which the improvement in question was situated, since the commencement of this suit, has rendered it impossible; as because the complainant, not having shown himself prompt and ready by accounting in any reasonable manner for his apparent laches, it does not appear proper.

But, under the circumstances of the case, he may be allowed to ratify the sale to Carson, and hold Hemphill to account, as a trustee, for the purchase money received by him. And in taking this account, inasmuch as Miller never paid the $500, due the 1st January, 1835, interest should be computed upon that sum from that day until the 30th of April, 1835, and the aggregate deducted from the sum of $1000, that day paid Hemphill by Carson. Upon this balance, interest should be computed against Hemphill for twelve months, and added to the balance, and to that aggregate, the sum of twelve hundred dollars should be added, being the residue of the $2.200, which Hemphill admits in his answer to have received in April, 1836, as the price of the improvement in controversy. Then from the last aggregate, the sum of sixteen hundred dollars must be deducted as a reasonable compensation for the improvements Hemphill had made after the sale to Miller, and before that to Carson; the use of the premises during that time, being regarded as equivalent to interest on the $1600. Then upon the balance found, interest to be computed up to this day, and a decree rendered for Miller against Hemphill for the aggregate, with costs.

## ROBARDS VS. COOPER.

Upon a bill to foreclose a mortgage given to secure the payment of a promissory note for the purchase of real estate, sold and conveyed by deed of warranty, it is no defence to set up, that at the time of the sale there was an incumbrance on the real estate, and that the vendor promised to remove the incumbrance before the note became due, and has failed to do so—such promise forming no part of the contract.

*Appeal from the Phillips Circuit Court in Chancery.*

Hon. CHARLES W. ADAMS, Circuit Judge.

FOWLER, for appellant. To a cross-bill, filed by a defendant against the complainant, who himself has brought the defendant into the forum, a demurrer for want of equity in such cross-bill, should never be permitted or sustained. *Mitf. Eq. Pl., p.* 64, 65; 1 *Hoffm. Ch. Pr.* 356; *Head vs. Perry*, 1 *Mon. Rep.* 258.

The matter set up by the cross-bill—the incumbrance on the land, and the agreement to discharge it, was a part of the same transaction and proper for the interference of the chancellor.

S. WILLIAMS, for appellee. The only questions to be determined to sustain or reverse the decision below, were, 1st. Was the answer sufficient? That it was not, see 2 *Danl. Ch. Pl. & Pr.* 339, *note;* 4 *J. Ch. R.* 437; *Story's Eq. Pl.* 863; and secondly, whether the court correctly sustained the demurrer to cross-bill. As to parol evidence being inadmissible to vary or contradict written evidence, see *Jordan vs. Fenno*, 13 *Ark. Rep.* 594.

The demurrer was rightly sustained, because the plaintiff on cross bill had a complete remedy at law in case of disturbance from Ringo's mortgage, by resorting to the covenants of his deed.

It would certainly be necessary to aver in the cross-bill the insolvency of Cooper. *Rawle on Cov. for Title*, 518; 2 *J. C. R.* 520; 2 *Edward's Ch. R.* 37.

Mr. Justice WALKER delivered the opinion of the Court.

On the 12th of February, 1853, Robards executed to Cooper his deed of mortgage for certain negro slaves, to secure the payment of a promissory note of that date, executed by Robards to Cooper, for fifteen hundred and fifty dollars, payable on the 1st day of January next thereafter. After the note fell due, Cooper filed his bill in chancery in the Phillips Circuit Court, to foreclose the mortgage and subject the slaves to sale. Robards in his answer admitted the execution of the note and mortgage, and that part of the note still remained unpaid; but set up by way of cross-bill, that the note was given in consideration of a tract of land sold by Cooper to Robards, and conveyed to him by deed, with covenants of warranty of title, &c. That at the time of the purchase of the land, and the execution of the deed, the land was incumbered by a deed of mortgage executed by Cooper to William H. Ringo; that he (Robards) was apprised of the existence of the mortgage to Ringo, at the time of his purchase, and that Cooper promised that he would satisfy and discharge the same, and thereby remove said incumbrance before the note fell due, but that in fact said incumbrance, has not been removed, and that he is apprehensive that the land may be sold to pay the same. The complainant is made defendant to the cross-bill, and called upon to answer with a prayer, that complainant be enjoined from proceeding to collect said mortgage debt, until such incumbrance is removed.

The complainant demurred to the cross-bill. The ground of the demurrer was, in effect, that the affirmative matter set forth in defendant's answer, was insufficient to entitle him to the relief sought. The court below sustained the demurrer; the defendant declined all further defence, and a final decree was rendered for complainant, from which the defendant has appealed.

There can be no question, but that the demurrer to the cross-bill was properly sustained. The verbal promise of Cooper, that he would remove the incumbrance before the note became due, added nothing to, and formed no part of, the contract. If it had been the intention of Robards to withhold the purchase money until the incumbrance was removed, he should have so qualified his written promise to pay. The mere fact that there was an incumbrance upon the land at the time of his purchase, whether known or not, will neither entitle him to a rescission of the contract, nor to arrest the recovery of the note, executed for the payment of the purchase money, until the incumbrance is removed. Having entered into possession of the land purchased, the defendant must rely upon his covenants of warranty of title and quiet possession. Such is the general rule upon the subject, sustained by numerous decisions, collected by Mr. RAWLE, in his work on *Covenants*, page 640 to 657.

There is, in this case, no allegation of fraud, of eviction, or even that suit has been brought to recover possession, nor any other circumstances alleged, upon which to base an exception to the general rule. Ringo, who is alleged to hold the prior lien, has asserted no right to it, and may never find it necessary to do so. Cooper's ability to pay the sum due to Ringo, is not questioned, nor is there any circumstance developed by the pleadings to entitle the defendant to the relief sought in his cross-bill. Let the decree be affirmed.

Mr. Chief Justice ENGLISH not sitting in this case.

## CHIPMAN VS. FAMBRO.

A transcript of the judgment rendered against a security, is evidence in an action by the security against his principal to recover back the money paid by the security, although the principal was not a party to the suit, nor notified of the suit against the security. *Snider vs. Greathouse*, 15 *Ark. Rep.*

A sheriff has no authority to receive payment of a judgment, after the return day of an execution which was not levied.

The receipt of a sheriff, given without process in his hands, for the amount of a judgment, and the receipt of the plaintiff to the sheriff for such amount, are no part of the record of the cause; and though copied into the transcript, they are not record evidence of payment, in an action by the security against the principal for money paid.

*Appeal from the Circuit Court of Union County.*

Hon. SHELTON WATSON, Circuit Judge.

CARLETON, for the appellant. The record from Georgia, unless the defendant had been party thereto, or been notified thereof, by the plaintiff, was not legal evidence against him. *Duchess Kingston's case*, 11 *St. Tr.* 261; 20 *How. St. Tr.* 538, 1 *Phil. Ev.* 326, 3 *Ib.* (*Cow. & Hill's notes*,) 803.

A record is not evidence to prove the facts upon which a recovery was had, as between persons not parties to such recovery. *Lovel vs. Cunold*, 2 *Mun. Rep.* 167; *Hollingsworth vs. Barbour*, 4 *Pet. Rep.* 466; 4 *Hawk. Rep.* 34; 2 *Rand.* 313; 3 *Yeate's* 128.

The transcript of the judgment was not evidence of a breach of the sheriff's bond, nor of the amount of damages, nor that the plaintiff had paid any part of the judgment.

LYON, for appellee. The transcript was evidence to prove that judgment was obtained in the Supreme Court of Georgia against appellee et al., as security on appellant's sheriff's bond, and the amount of said judgment, cost, &c., and that the same, or a part thereof, had been paid by appellee, and that he was legally bound to pay the same. 1 *Phill. on Ev.* 332; 3 *ib.* 821, *n.* 583; 12 *Mass. R.* 166; 7 *J. R.* 168; 17 *ib.* 142; 9 *Cowen* 154; 10 *Ala. Rep.* 849.

The transcript was *prima facie* evidence on all points established by it. *Train vs. Gould*, 5 *Pick. Rep.* 380; 5 *Binn. Rep.* 184; 2 *Rand. Rep.* 313; 1 *Gilman's Rep.* 235; 2 *Leigh's Rep.* 393; 1 *Wash. Rep.* 31.

Mr. Justice WALKER delivered the opinion of the Court.

This was an action of *indebitatus assumpsit*, brought by Fambro against Chipman, to recover money alleged to have been paid by Fambro upon a judgment rendered against him in the State of Georgia, as the security of Chipman upon a sheriff's bond. The general issue was pleaded; and, upon the trial of the case, the plaintiff offered a transcript of the judgment as evidence, to sustain the issue on his part. To the admission of which, the defendant objected, upon the ground, that he was not a party to the record, nor had he any notice whatever of the suit upon his official bond; and, also, because the receipts copied into the record, were properly no part thereof, and were inadmissible as such. But the Circuit Court overruled the objection, and permitted the entire record to be read as evidence to the jury, and this, with evidence to identify the defendant as the same person, upon whose official bond the judgment had been rendered, was the whole of the evidence given to the jury; and, thereupon, at the instance of the plaintiff, and against the objection of the defendant, the court instructed the jury that the record evidence was, of itself, sufficient to entitle the plaintiff to a verdict, unless repelled by rebutting evidence from the defendant.

After a verdict for the plaintiff, the defendant moved for a new trial, which was overruled, and the case comes up, on exceptions to the opinion of the court, in overruling the motion for a new trial.

The legal sufficiency of the record as evidence, is the only question to be determined.

The first objection to it was, that the defendant was not a party to the suit, and had no notice of the same. This precise question came before us at the last term of this court; (*Snider vs. Greathouse*,) and, after a full investigation of authorities, it was held, that where the liability of the security was contingent, and to be ascertained by an assessment of damages, a transcript of the judgment, and proceedings against the security, with proof of payment of the money so recovered against the security, was competent evidence in a suit brought by the security against the principal, to recover the money so paid, even though the principal may not have been sued, or notified of the suit against the security: at least that it was *prima facie* evidence, sufficient to entitle the security to a judgment against his principal, for money paid, &c.

But we think the second ground of objection well taken. The receipts copied into the record, properly formed no part thereof. They were certainly not record evidence of payment. The execution issued upon the judgment, bears date, the 13th of January, 1850, and was made returnable on the first Monday in March, next thereafter. It does not appear that this writ ever came to the hands of the sheriff whilst it was in force. It was never levied, nor is there any return or endorsement upon it, other than a receipt, purporting to be for the payment of one hundred and fifty-three dollars and seventy-five cents, dated the 24th of January, 1851, and signed "B. H. YEULLER, *sheriff*." This receipt, bears date more than ten months after the return day of the execution. The writ not having been received by the sheriff, and acted upon whilst it was in force, it conferred no authority upon the sheriff to receive the money, nor could he

make any return whatever upon it. *Newton vs. State Bank*, 14 *Ark. Rep.* 1. The receipt upon the execution, thus made and copied into the record, is no part thereof, but is the copy, perhaps, of the receipt of the sheriff acting in his private, not his official capacity; and even if the original receipt had been produced, and its due execution proven, it would have been no evidence of payment to the plaintiff in execution, unless power to receive it had been proven, or that it had been paid over by the sheriff to the plaintiff in execution, and accepted, which would have been a ratification of the authority to receive. There was a receipt also copied into the record from the plaintiff to Yeuller, but it was no more record evidence than that from the defendant in execution to Yeuller.

The Circuit Court, therefore, erred in permitting these receipts, thus copied into the record, to go to the jury as record evidence of payment; and, also, in instructing the jury, that the record was, of itself, sufficient evidence to entitle the plaintiff to recover, because although the record was sufficient evidence of the liability of the security to pay, it was no evidence whatever of payment, and without this proof, the plaintiff could not recover.

Let the judgment be reversed, and the cause remanded, with instructions to grant a new trial, and for further proceedings, &c.

## CHIPMAN VS. SIMMONS.

*Appeal from the Circuit Court of Union County.*

CARLETON, for the appellant.

LYON, contra.

Mr. Justice WALKER delivered the opinion of the Court.

This case is in all respects like that of *Chipman vs. Fambro*, just decided. Simmons was the other security upon the sheriff's bond, and was sued jointly with Fambro; and, after judgment, claims to have paid half the money. The decision of the case against Fambro, is, in all respects, decisive of this case.

Let the judgment be reversed, and the cause be remanded, with instructions to grant a new trial, and for further proceedings, &c.

## VISER VS. BERTRAND.

Where instructions have been refused, in the words asked for, though legal and appropriate to the case, yet the party has no cause of complaint if the court give other instructions, the same in substance.

Where a question arises, in an action of assumpsit for money paid, whether the payment was on account of an agreement to compound a divorce suit, or for the purpose of settling the rights of the parties to the divorce, to property, the defendant, having proved the fact of divorce, is entitled to an instruction, that upon a divorce, legally obtained, the wife is entitled to all the property which came to her husband by the marriage.

An authority or power coupled with an interest, or given for a valuable consideration, unless there is an express stipulation that it shall be revocable, cannot be revoked by the party executing it: as where the husband makes an appointment or constitution of an agent to take charge of certain property and hire it out and appropriate the proceeds to the use of his wife and daughter.

A power of attorney, executed by a husband to an agent to receive certain property and hire it out for the benefit of his wife and daughter, is admissible in evidence in a case where the question is, whether money was advanced for the wife, and paid to the husband, solely on account of his interest in such property, or whether an agreement to compound a divorce suit constituted any part of the consideration of the payment to the husband.

*Appeal from Pulaski Circuit Court.*

Hon. WILLIAM H. FEILD, Circuit Judge.

The facts in this case are stated in the opinion of the court, at a former term. See 14 *Ark.*, *p.* 268. It is only deemed material to state, more fully than in the following opinion, the instrument of writing upon which the fourth instruction asked for by defendant, was based: which, purports to be a deed of trust, executed by A. F. Viser, to William Brown, reciting that by virtue of

his marriage with the defendant, he was invested by law with the authority and power to control and appropriate the hire and proceeds of certain negro slaves, the separate property of his wife, the defendant, and her daughter; and he being desirous of absenting himself from his family for the purpose of pursuing his own business, and appointing some person to manage the slaves and appropriate the hires to the support of the defendant and her daughter, and proceeds as follows: "Now, therefore, in consideration of the sum of one hundred dollars, to me in hand paid, the receipt whereof I do hereby acknowledge, I do hereby appoint and constitute the said William Brown, senior, a trustee, to perform all the duties I ought to perform in the premises, and to hire out and appropriate the proceeds of said negroes, when hired, to the benefit of said Mary E. B. Viser, and her daughter, Eglantine E. Hamilton, as it appropriately belongs, and hereby investing him with all the power I possess, by virtue of my marriage for that purpose, and hereby requiring that he shall be responsible for the execution of this trust to the said Mary E. B., and to the proper guardian of the said Eglantine, at all proper times, and no other person whomsoever, and not, in anywise, responsible to me."

Before the Hon. C. C. SCOTT and DAVID WALKER, Judges, and Hon. THOMAS JOHNSON, Special Judge.

FOWLER, for the appellant. Assuming the instrument to be a mere power of attorney, as the legal witness supposed it to be, and as the court below must have supposed it to have admitted such evidence, still, and notwithstanding, *it is well settled law*, that *such a power cannot be revoked* by the *principal* alone, or with the *renunciation* of him who is to execute it.

This power was to act and receive hire and preserve property, for the exclusive benefit of Mrs. Viser and her daughter; and was, therefore, not revocable by Viser—they had a vested right in its execution, which he could not take away from them. See *Story on Agency*, *sec.* 477, 485, 488; *Wassell vs. Reardon*, 11

*Ark. Rep.* 712; *Hunt vs. Rousmanier*, 5 *Cond. Rep.* 403, 404, 406; 2 *Livermore on Agency*, 308, 309; *Story on Contracts, sec.* 339.

Nor could the agent Brown *renounce* the agency, so as to deprive them of their vested rights. *Story on Agency, sec.* 477; *Wassell vs. Reardon*, 11 *Ark. Rep.* 712.

And the deed of trust to Brown was read in evidence by Mrs. Viser, without objection; and was proper evidence to rebut the case attempted to be established by Bertrand, though an utter failure, that the *relinquishment* of Viser's claim to the negroes was the sole consideration of the $300, and not the *unlawful agreement to let a decree for the divorce pass without opposition.* See *McLain vs. Churchill*, 5 *Ark. Rep.* 243.

The refusal to give Mrs. Viser's instructions, couched in proper language, and enumerating the true rules of law, and then giving modified and evasive instructions, were acts well calculated to, and doubtless did, *mislead the jury.* And all such refusals and charges are erroneous, and entitle the aggrieved party to a new trial or reversal, as the case may be. See *Samuel vs. Cravens*, 10 *Ark. Rep.* 396; *Jones vs. Talbot*, 4 *Missouri Rep.* 285; *Hickman vs. Griffin, ib.* 43; *Yocum vs. Polly*, 1 *Ben Monroe Rep.* 360; *Elling vs. The United States Bank*, 6 *Condensed Rep.* 220.

BERTRAND, contra.

Hon. THOMAS JOHNSON, Special Judge, delivered the opinion of the Court.

This is the second time this case has been in this court, and we are relieved from the necessity of investigating several questions of law that were originally presented. The most serious objection urged against the first verdict and judgment, was, that the appellant being a *feme covert* at the time of the original promise, was not legally bound by her subsequent promises. The decision of this court, as collected from a majority of the opinions

delivered, was to the effect, that the original promise to pay the item of three hundred dollars, was binding upon her separate property in equity, and that consequently she was legally bound by her subsequent promise based upon such consideration, in the event that the contract rested alone upon Viser's interest, or supposed interest, in her separate property, and was not, in any way, affected by the taint of collusion, in compounding the suit instituted by the appellant against Mr. Viser for a divorce. See 14 *Ark. R.* 267, *et seq.* When the cause was remanded, and put before the jury a second time, the same evidence originally introduced, with an addition by A. W. Webb, was again submitted; and, under an express and positive instruction, that in case the taint of collusion entered into the consideration of the contract, for the item of three hundred dollars, the plaintiff could not recover as to that. They found the entire sum claimed in his favor, and he had judgment accordingly.

But, it is insisted, that the court erred in refusing certain instructions; and, also, in giving others against the objection of the appellant; and, also, in permitting illegal evidence to go to the jury. The objections taken to the refusal of the instructions offered, when the case was before the jury the first time, are now waived, as they were virtually overruled by this court when it was here before; and, consequently, they are now out of the case. The first instruction, submitted upon the last trial before the Circuit Court, and which is now insisted upon, is, that: "If the proposition to pay the $300 spoken of by the witness, to Viser, the husband, was in any way coupled with the withdrawal of defence or opposition to the divorce case, the contract was void, and the plaintiff cannot recover." The second is of a precisely similar import, and, therefore, it is not necessary to transcribe it into this opinion. The third was that Mrs. Viser was entitled, on a divorce legally obtained, to have decreed to her and delivered into her possession, all property which she inherited, or got from her father, and which came to him by the marriage, and Viser had no right thereto, upon and after said divorce. The fourth and

last, is, that the "deed of Viser read by defendant, could not be revoked, and upon the facts admitted, upon a legal divorce obtained by Mrs. Viser, her husband could have held none of the negroes." The appellant was clearly entitled to the benefit of the two first, and in case they shall not have been substantially given, her right to a reversal is equally undeniable. But after the court refused the four instructions submitted by her, it proceeded upon its own motion, and against her objection, to give in lieu thereof, the following, to wit:

"If the $300 claimed by plaintiff, or any part of it, was promised by defendant, in consideration of the husband Viser, withdrawing his opposition to the divorce case, then plaintiff cannot recover." And 2d. "If the $300 was paid by plaintiff for the sole purpose of divesting the husband of all rights of his to the negroes, then the plaintiff may recover, if the jury is satisfied that the money was paid for her, and for her benefit."

These last two, and which were given in charge, were the same, in substance, as the two that were refused, touching the same question; and, consequently, the error is cured, and no room is left for dissatisfaction or complaint. The third instruction asked and refused by the court, should have been given. The fact that a divorce had been pronounced, was established by the testimony: and the appellant was entitled to a declaration of the law from the court, as to the effect of such decree, upon the interest that Viser had in the negroes. The fact that any interest of Viser's in the negroes would cease *eo instanti*, upon the dissolution of the marriage tie, is a circumstance from which the jury would be authorized to infer that the divorce might have had more or less influence upon her mind, either as a preferred mode of acquiring his interest, or as an additional or double security co-operating with the purchase. That the legal effect of the divorce would have been to restore to her the sole use and control of all her separate estate which was undisposed of at that time, there can be no doubt: and, consequently, she was entitled to the sense of the jury upon the question, whether

she relied in whole or in part, for the enjoyment of such interest, upon the decree for a divorce; and, consequently, whether it formed any part of the consideration of the contract for the three hundred dollars. If the contract entered into between the appellant and Viser, her husband, was even void in law, for want of consideration, yet the appellee's right to recover, in the present action, in the absence of fraud or collusion, could not be questioned; or to be more explicit, although the contract for Viser's interest in the negroes might not be enforcible, either in law or equity, for want of consideration as between themselves, yet this suit, being founded upon another and different contract, could not be, in the slightest degree, affected by it.

The only question, then, that was presented under the state of case as made out, was whether the compounding of the divorce suit entered into the consideration of the contract, as between the appellant and Viser, her husband, for the three hundred dollars.

This brings us to the consideration of the fourth and last instruction. This ought also to have been given. Where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is a part of a security, there, unless there is an express stipulation that it shall be revocable, it is, from its own nature and character, in contemplation of law, irrevocable, whether it is expressed to be so upon the face of the instrument conferring the authority or not. See *Story on Agency*, 616. The instrument under consideration is not expressed upon its face to be revocable; and, consequently, if it falls within either of the descriptions here enumerated, it could not be revoked. It is manifest that it cannot be regarded as a deed of trust, in a strict technical sense, since it does not contain the operative words of grant, bargain and sell, or any other words of like import; but on the contrary, it shows a mere appointment or constitution of an agent, to take charge of the property designated, and to hire it out, and to appropriate the proceeds to the use of the appellant and her daughter. But it is a power foun-

ded upon a valuable consideration; and, consequently, not revocable, since there is no express stipulation for that purpose. If this be the correct construction to be given to the deed in question, it follows of necessity, that the parol evidence of its revocation, was improperly received. The instrument was clearly competent evidence to rebut the presumption that the interest of Viser in the negroes constituted the sole consideration of the promise to pay him the three hundred dollars. It furnished a circumstance, but of what weight, the jury alone were competent to decide. The deed showed that the whole interest of Viser, whatever it may have been, had passed out of him, and vested in the appellant and her daughter, prior to the date of the contract for the three hundred dollars sued for; and, as a matter of course, she was entitled to have the benefit of their judgment, in ascertaining whether she was satisfied with such title as had already been conferred upon her by the deed; and the divorce being the only other consideration, whether she did or did not base her promise upon such consideration. If the jury should have believed that she was not satisfied with her title under the deed, or that she doubted whether, under the circumstances, and in view of the relation then subsisting between herself and Viser, any title either had or could pass to her, or whether she supposed that, by making the purchase again, and that in her own name, and in her individual right, she could enjoy her property more quietly, and be freed from any apprehended annoyance from Viser, or from any other imaginable cause, that she looked wholly and solely to the interest in the negroes, and not in the minutest degree to any benefit which she might derive from the divorce, she was most clearly and unquestionably, entitled to the benefit of it. The Circuit Court, therefore, erred in receiving the parol evidence going to revoke the deed, because the jury were thereby authorized to disregard it; and, consequently, to deprive the appellant of such presumptions as it might have raised to repel the case attempted to be established against her. We think, that for these errors, the

judgment ought to be, and the same is, hereby reversed, and remanded to be proceeded in, according to law, and not inconsistent with this opinion.

Chief Justice ENGLISH not sitting in this case.

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## McMECHAN vs. HOYT.

The defendant in attachment pleaded in abatement, that the plaintiff did not file an attachment bond before suing out his writ; the plaintiff replied, setting out a bond purporting to be executed by S. and C., the defendant rejoined that the bond was not the deed of said C.: the proof showed that the bond was the deed of C. alone, but sufficient to indemnify the defendant: HELD, That the true issue was, whether a good and sufficient bond had been filed, and not whether it was the bond of S. and C.

*Appeal from the Sebastian Circuit Court.*

Hon. FELIX J. BATSON, Circuit Judge.

S. F. CLARK, for appellant. One responsible obligor to the bond is sufficient—the statute does not require two. See *Digest, ch.* 17, *sec.* 5; and a bond is good, executed by securities alone. See *Taylor vs. Richards*, 4 *Eng.* 378. The substance of the issue, viz: the sufficiency of the bond, was therefore sustained by proof of its execution, by one of the obligors; even if the

rejoinder was good without being sworn to. But it was objected that the issue upon the traverse of the rejoinder excluded such proof, and made it obligatory upon the plaintiff to prove its execution by both the obligors; and such was the decision of the court below; for the proof shows, conclusively, that the bond was executed by one of the obligors, and that he was abundantly responsible. Whether the issue could have been found in accordance with the proof, or not, the judgment of the court was erroneous; for if it could, the judgment ought to have been for the plaintiff upon the evidence, and if not, then it ought to have been that the parties replead.

Mr. Justice WALKER delivered the opinion of the Court.

This is an action of assumpsit by attachment. The defendant pleaded in abatement of the suit, that it was brought without first having filed a bond to indemnify the defendant against loss or damage, by reason of suing out the writ of attachment, as required by statute. To which, the plaintiff filed three replications: the first and third of which were stricken out. The second replication set forth a penal bond, conditioned as required by the statute, purporting to be executed by James P. Spring, and Solomon F. Clark, as securities for the plaintiff, and averring that it was their deed, accepted and filed by the clerk, before the writ issued, and that such securities were solvent, and well able to pay the penalty of the bond, or any damages that might accrue to the defendant by reason of a breach of the conditions thereof.

To this replication, the defendant rejoined, that the bond set forth in plaintiff's replication, was not the deed of said Clark & Spring, and concluded to the country. The issue thus made, was submitted to the court, by consent of parties, sitting as a jury, upon the following evidence:

Plaintiff offered to read a paper, purporting to be the bond of Clark & Spring, and which in all respects, appeared to be a good statute bond, filed in proper time; but the defendant objected to

the reading of the bond, as evidence, until the execution thereof was proven. Which motion, the court sustained; and, thereupon, the plaintiff introduced James P. Spring as a witness, who testified, that the names of Solomon F. Clark, and James P. Spring, subscribed to the bond, were in the handwriting of the said Clark; that witness and Clark were partners in the practice of law: that he, witness, had given Clark permission to subscribe his name to attachment bonds, whenever he saw fit, and that he and Clark were in the habit of signing each other's names to such bonds. That witness and Clark were attorneys in the case, and prosecuting the suit. That first before the suit was commenced, Clark had stated to witness that this suit was about to be commenced, and that it would be necessary for witness and himself to become bound in such bond, as securities for the plaintiff, and that witness then gave Clark full, express, and legal authority to execute the bond and sign his name to it. That he, witness, was not present when the bond was executed and filed in the clerk's office, nor did he see the bond until some time after; that he, at all times since, and yet does recognize it as his bond, executed in pursuance of the authority given to Clark. That witness and Clark were always abundantly sufficient securities in the bond, and responsible for the whole amount of the penalty of the bond: and that Clark alone was abundantly sufficient and responsible for the amount of the penalty of the bond.

Upon this evidence, the Circuit Court decided, that the bond was not the deed of Clark & Spring; and, therefore, that the bond could not be received in evidence, and disregarding the same, adjudged that the writ be quashed, and that defendant go hence, with costs, &c.

The plaintiff moved for a new trial, which was overruled; and, thereupon, excepted.

The Circuit Court seems to have decided against the plaintiff upon the ground, that inasmuch as the plaintiff had replied and set up a bond executed by both Spring & Clark, and as the defendant had rejoined, denying the execution of the bond by

them, it devolved upon the plaintiff to produce, and prove, a bond executed by both of them, to sustain the issue on their part; and because, in the opinion of the Court, whilst there was abundant and clear proof that it was the deed of Clark, and that he, without Spring, was amply sufficient security, the proof was not sufficient to prove the execution of the bond by Spring also; and, for that reason, that the bond was inadmissible under the issue. In this, we think the Circuit Court was mistaken. The defence was, that the plaintiff had filed no sufficient bond before suing out his writ of attachment. Whether those executing the bond were many or few, or whether, by principal and securities, or by securities alone, was wholly immaterial, if the security was sufficient. *Taylor vs. Hoffman*, 5 *Eng.* The sufficiency of the bond, the valid security, was the substance of the matter. And it is very well settled, that in a suit upon the bond, even if it had turned out upon an issue upon a plea of *non est factum*, by one or more of the defendants, that it was not their deed, and that they were not bound by it; still, judgment in their favor, upon such issue, would not discharge the other defendants. Such was the express decision of this court in *Ferguson et al. vs. Bank*, 6 *Eng.* 512. Our statute placing joint contracts, and joint and several contracts, upon the same footing, has changed the common law rule, and makes joint contractors severally liable. If, then, upon a direct suit upon this bond, declaring upon it as the deed of all the parties, the proof, in this case, would have been sufficient to entitle the plaintiff to recover against Clark, and he is shown to be good, can it be said that the same evidence is not sufficient in this case to prove that there was a valid, sufficient bond filed before suit brought? We think not.

When the defendant complained that no bond had been filed, as required by statute, the plaintiff replied that such bond had been filed, and set it forth. The defendant was therefore left no alternative, but to take issue upon the replication, and that, too, according to the defence set up by himself. From that, he could not depart. The true issue was, bond or no bond, and not

whether it was executed by Clark & Spring, or by Clark alone. The same strictness in describing the instrument, if sued upon, is not required in replying to a plea, denying the existence of a bond; because, the reasons, which require such strictness, do not apply. The question of former recovery can never arise; but, even if tested by the strictest rules of pleading, the evidence would still have been sufficient; because, the number of the securities in this instance, was not a material matter in the issue.

It is laid down by CHITTY, (*Pleadings, vol.* 1, *p.* 685,) that if the plaintiff vary in his replication from his count, or the defendant in his rejoinder from his plea, in time, place, or other matter, when immaterial, it is not a departure. As if, in a declaration, a promise be stated to have been made twenty years ago, and when the defendant pleads the statute of limitations, the plaintiff replies that the defendant did undertake within six years, it was held not to be a departure; because, in the case stated, time in the declaration was immaterial. So, in the case of a deed, or other instrument, the plaintiff may reply or show in evidence, that it was really made on a day different from the day of the date. And so in this case the whole scope of the rejoinder was to put in issue the existence of a valid statute bond, filed before the writ of attachment issued; and, if such was not its effect, then it tendered an immaterial issue, which, when found by the verdict of the court, would not determine the merits of the controversy, and would leave the court at a loss for which of the parties to give judgment. See 1 *Chitty's Pleadings* 692.

The rejoinder put in issue the existence of a sufficient bond. It denied that Clark & Spring executed such a bond. If the bond of either of them, and sufficient, it was a sufficient bond, and the plaintiff sustained the issue on his part. See 1 *Saunders Rep.* 312, *note* 5; *Cobb vs. Byrne*, 3 *Bos. & Pul.* 348. The case, when thus considered, presents no difficulty. The issue was fully sustained by the proof, because, although not the bond of both Clark & Spring, it was the bond of Clark; and being formal, and approved by the clerk, and filed in proper time, and he being

solvent, and of himself sufficient security, the court should have permitted the bond to be read in evidence; and, under the evidence, there can be no doubt, but that the decision and judgment of the court should have been for the plaintiff.

The Circuit Court, therefore, erred in refusing to set aside the verdict and finding of the court, and to grant the plaintiff a new trial; and, for this error, the judgment must be reversed, and the cause remanded, with instructions to grant a new trial to the plaintiff; and for futher proceedings to be had, according to law, and not inconsistent with the opinion herein delivered.

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## BIZZELL VS. BOOKER ET AL.

It is a general rule, that where a party is doing an illegal act, he is liable to other persons injured thereby, regardless of intention to do the injury, or care manifested to avoid it.

Persons encamping and hunting upon the public lands, in a "wilderness" district, are not guilty of such an illegal, mischievous, or wanton act, as would render them liable, at all events, for any injury that may result therefrom to others, regardless of any diligence, care, or prudence, on their part, to prevent such injury.

Where one is doing a lawful act—or an act not mischievous, rash, reckless, or foolish, and naturally liable to result in injury to others—he is not responsible for damages resulting therefrom by accident or casualty, while he is in the exercise of such care and caution as a prudent man would observe, under the circumstances surrounding him, to avoid injury to others: but he is answerable for damages resulting from negligence, or a want of such care and caution on his part.

If parties fire-hunting, or encamped in the woods or prairies, covered with combustible matter, suffer or permit, otherwise than in consequence of *unavoidable accident which*

*could not be prevented by proper care*, the fire to communicate to such combustible matter, they are liable for all property destroyed thereby.

If the parties in such case are not guilty of *negligence*, they are not responsible for the property destroyed: but it is error to instruct the jury that they are not liable if they used *ordinary diligence*.

A party is entitled to have the jury pass upon the facts with a correct understanding of the law applicable to them: and, where this is not done, and the jury might, if correctly instructed as to the law, have rendered a different verdict, this court will award a new trial.

*Writ of Error to the Circuit Court of Sevier County.*

Hon. SHELTON WATSON, Circuit Judge.

PIKE & CUMMINS, for the plaintiff. This case is as strong against the defendants as any of those cited below:

1st. Because the parties were doing an *illegal* act in encamping upon and making a camp and raising a fire on government land, (as is presumable,) or, at all events, upon other than their own lands: or, were doing a voluntary, unnecessary act, liable to result in injury to plaintiff or others, which in law would place them in the same position as if the act were illegal; and, at all events, imposed on them the duty of exercising the *utmost* diligence and care—extraordinary diligence to prevent injury.

2d. Because they chose to use a dangerous element, in a place where it was almost impossible to prevent injury: and this, of itself, imposed the duty of exercising extraordinary care. *Chuley vs. Thompson*, 3 *New Hamp.* 1; *Beckwith vs. Shordike & Hatch*, 4 *Burr.* 2092; *Dixon vs. Bell*, 5 *Maule & Selw.* 198; *Michael vs. Alestree*, 2 *Lev.* 172; *Rush vs. Stieman*, 1 *Bos. & Pul.* 404; *Smith vs. Pelah*, *Str.* 1264; *Gregory vs. Piper*, 9 *B. & C.* 591; 3 *Kent* 229, 230, 231; *Vandenburg vs. Truax*, 4 *Denio* 464; *Gaadner vs. Heartt*, 3 *Denio* 166; *Underwood vs. Hewson*, 1 *Str.* 596; *Cole vs. Fisher*, 11 *Mass* 137; *Moreton vs. Hardan et al.*, 4 *B. & C.* 223; *Harlow vs. Humiston*, 6 *Cowen* 189; 17 *Cond. Rep.* 288, 402; *Knight vs. Abut*, 6 *Penn. State Rep.* 472;

*Ralph. vs. Ferris*, 7 *Watts & Serg.* 367; *Wakeman vs. Robinson*, 1 *Binn.* 213; *Vincent vs. Stinelburn*, 7 *Verm.* 62.

We know of no law forbidding fire-hunting, in any manner, or punishing a man for either the act of hunting, or any act connected with it. The above authorities give the reason. If not punishable, it is *illegal*, by the common law, and upon principles of general morals and policy, for a party to do any act (not impelled thereto by express commands of the law, or duty, or force,) which may result in injury to others. Hunting at all, or camping in the woods for the purpose, falls within the same principle.

The degree of diligence necessary to free a party from liability, even in discharge of legal duties, varies according to the facts of the case. For instance, a person doing business in a cotton gin, or powder magazine, should use extraordinary diligence and prudence, if it were necessary to use fire therein.

Could a person make any excuse at all, where he carried fire into such a place merely for sport and amusement? Could he say he used the care usual with those who were compelled to use fire therein? The court would assuredly hear nothing from such party, but the excuse of some extraordinary and unavoidable force, or unusual accident over which he had no control—as some force by which the fire was driven into the combustible matter.

From these cases, we insist it is clear that the second instruction asked on the part of plaintiff below, ought to have been given. Indeed, it was not so strong for the plaintiff as the law would have warranted. We doubt whether, as the parties were in the woods unnecessarily with a camp-fire, if the wind or a storm had driven the fire an unusual distance, and the destruction of property was the result, the parties could have set that up as an excuse. But the instruction did not go that length. It gave defendants the full benefit of all unavoidable accidents.

The third instructions of defendants differ, very immaterially, from each other. They all amount to this: that if defendants used *ordinary diligence* to prevent injury, defendants were excused. This is in direct conflict with plaintiff's second instruction. But

if there were no conflict, the instructions given for defendants were not the law of the case.

CURRAN & GALLAGHER, for the defendants. In the first place, the instruction asked for by the plaintiff, and refused by the court, was, in itself, contradictory, and calculated to mislead the jury. It first sets out with the assertion that defendants were liable, unless the destruction of the cotton was by "unavoidable accident," and then continues, "which could not be prevented by *proper care.*" Now, unavoidable accident is one that cannot be guarded against by the utmost or most extrordinary diligence or care; whereas, proper care would of course be such care as a prudent man would use in preserving his own property, and by which his property could be saved from destruction; and proper care in itself only means ordinary diligence, as fully defined by STORY in his *Treatise on Bailments, sec.* 11, *et seq.;* and the court thereupon had a right to refuse the same, for, inasmuch as the said instruction was, to say the least, bad in part and contradictory, even admitting that it was good in part, yet it was no error in the court refusing to give the same. *Vide Stanton vs. The State*, 13 *Ark. Rep.* 317. In fine, the whole case turns upon the point, whether the defendants, by being engaged in hunting, were doing an unlawful act, (i.e., were trespassers upon the public lands of the United States, as alleged by plaintiffs,) and whether, under the facts of the case, defendants were bound to use more than ordinary diligence. In the first place, there is no evidence that the land upon which defendants encamped belonged to the United States, or was not the property of the defendants, at all events, it was unenclosed *wild* land; and, therefore, no matter if the same had been the property of the plaintiff, (which was not the case,) the defendants would not have been trespassers by merely camping on the same, as the case of *Knight vs. Abert*, 6 *Pen. State Rep.* 472, referred to in plaintiff's brief, sufficiently proves.

But admitting, for the sake of *argument*, that the lands upon which the defendants encamped, were public lands of the United

States, and that defendants were engaged in hunting, was it an unlawful act on their part? Clearly not. And all that was required on their part, was to prevent any injury to others by their want of diligence or care.

But what degree of diligence or care should be taken by them to prevent the fire they have made from spreading and injuring other persons' property? We maintain that they were only bound to use ordinary diligence or care, such as a prudent person would use to protect his own property. At this point, the questions naturally arise, what constitutes *ordinary diligence*, and by what rules are we to be governed in coming to the conclusion whether it has been used or not? "Common or ordinary diligence, is that degree of diligence which men in general exert in respect to their own concerns. It may be said to be the common prudence which men of business and heads of families usually exhibit in affairs which are interesting to them. And, in every community, it must be judged of by the actual state of society, the habits of business, the general usages of life, and the dangers as well as the institutions peculiar to the age." *Story on Bailments, page* 15, *sec.* 11. "So that it may happen that the same acts which, in one country, or in one age, may be deemed negligent acts, may, at another time, or in another country, be justly deemed an exercise of ordinary diligence." *Ib., p.* 16, *sec.* 13.

This is the true rule by which we are to be guided, and by applying this rule to the cases cited by the opposite party, the position we assume will, we think, appear clear, and perfectly tenable.

In conclusion, we think that unless the position assumed by the opposing counsel is a true and tenable one, to wit: That the defendants were doing an illegal act by camp-hunting, there is not a shadow of a reason why the second instruction prayed for by them and refused, should have been given, and we submit that we have fully shown the fallacy of said position. That a person may be liable for an act committed in one locality or place, when he would not be liable for the same act when committed

by him in another place, we have shown to be the law. Thus, the throwing of a lighted squib in the midst of a crowd of persons, the firing off a gun near a public highway, the sending of ungovernable horses to be broken in a public place, where people are constantly passing to and fro on business, and other cases cited by plaintiffs, were all cases that showed in the person who caused the damage to be done, such a disregard of the life, safety, or personal security of others as made him, in the eyes of the law, a wilful tort-feasor, or as guilty of such gross negligence as to be almost equivalent thereto, and from the locality and publicity of the place, the person must have known at the time, that there was every probability that some accident would happen through his agency, which knowledge would be calculated to make any prudent man refrain from doing the same; but, in the present case, the defendants were encamped a long distance from the cotton, a creek of running water was between them, and there was nothing in the fact of their encamping and building a fire where they did, to denote that there was any probability that the fire would spread and consume the cotton, or to excite such a suspicion in the breast of a prudent man. We think the said second instruction of plaintiffs was properly refused; and, if so, the instructions prayed on the part of the defendants, were properly given.

FOWLER, also, for defendants. The refusal of the plaintiff's instruction complained of, was no error, but a proper exercise of duty. As a whole, it is utterly unintelligible; and perhaps no two of the jury would have put the same construction upon it. For this reason alone, it was properly refused. It was, therefore, well calculated not only to mislead, but to confuse the jury: and it is never error to refuse such instructions. See *Andrews vs. Pond*, 13 *Pet. Rep.* 80; *Doe ex. vs. Ring's heirs*, 3 *How.* (*Miss.*) *Rep.* 143; *Samuel vs. Cravens*, 10 *Ark. Rep.* 396.

The defendants' instructions moved and given, are strictly consistent with both law and reason: but even were it true that the

action of the court, in refusing plaintiff's instructions, and giving those of the appellees, might be subject to verbal or technical criticism, yet, as the jury could not properly have given any other verdict, and as the verdict and judgment are clearly right, upon the whole record, they should not be disturbed. See *Newman vs. Lawless*, 6 *Misso. Rep.* 302; *Finney vs. Allen*, 7 *ib.* 419; *Vauly vs. Campbell*, 8 *ib.* 227; *Sanders vs. Johnson*, 1 *Bibb. Rep.* 322; *Joice vs. Handley*, 3 *ib.* 226; *Elliott vs. Fowler*, 1 *Litt. Rep.* 202; *Clark vs. Boyd*, 6 *Mon. Rep.* 295; *Morton vs. Lawson*, 1 *Ben Monroe Rep.* 46; *The State vs. Lawson*, 14 *Ark. Rep.* 122; *Gibbons vs. Dillingham*, 10 *Ark. Rep.* 17.

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

This was an action of trespass on the case, brought by William H. Bizzell, in the Sevier Circuit Court, against Paul R. Booker, John W. Jones, James H. Walker, jr., and James F. Johnson.

There are eleven counts in the declaration, charging substantially, with variations of form, that on the 9th of November, 1851, the plaintiff was the owner of thirteen bales of cotton, which were deposited under a shed, at Shaw's Landing, on Red River, in Sevier county, waiting for a rise in the river, so that they could be shipped to New Orleans for sale. That the defendants knowing that the cotton was thus stored, on the 5th of November, camped in the woods adjacent to the shed, for the purpose of hunting, and by improper, careless, and negligent management of their camp-fire, fire-pans, and fire-arms, set the woods on fire, which burned up to the shed, fired and consumed the plaintiff's cotton, which was of the value of $40 per bale.

The cause was submitted to a jury upon the general issue, and verdict for defendants. No motion for a new trial was made, but the plaintiff brought up the case on exceptions to the charge given by the court to the jury.

It appears from the bill of exceptions, that the plaintiff asked the court for the following instructions to the jury:

1st. That parties, who purposely or negligently set fire to the

woods, prairies, or open lands, whether the soil be public or private property, are responsible for the natural consequences produced by such fire, and the destruction of all property caused thereby.

2d. That if parties fire-hunting, or encamped in the woods or prairies, covered with combustible matter, suffer or permit, otherwise than in consequence of unavoidable accident, which could not be prevented by proper care, the fire to communicate to such combustible matter, they are liable for all property destroyed thereby.

3d. That the jury might find any one or more of the defendants guilty, and assess entire damages, and others not guilty.

Two other instructions were asked by the plaintiff, about which there is no controversy here.

The court gave all the instructions moved by the plaintiff, except the second.

At the instance of the defendants, the court instructed the jury as follows:

1st. "That unless the jury believe, from the evidence, that defendants were guilty of negligence, even though the cotton was burned by the fire that started from their camp, they are bound by law to find for the defendants.

2d. That it was not unlawful for defendants to be engaged in hunting, and that if the jury believe they used ordinary diligence to prevent injury to others, and were not guilty of negligence, they must find a verdict for defendants.

3d. The plaintiff must prove, in order to maintain his action, that the burning of the cotton was caused by the negligence and improper conduct of the defendants."

The plaintiff excepted to the refusal of the court to give the second instruction asked by him, and to the giving of each and all of those moved by the defendants.

The evidence introduced upon the trial, is set out in the bill of exceptions, but it need not be noticed, further than is necessary to determine whether the instructions in question, if found to be

law, were applicable. There being no motion for a new trial, the correctness of the verdict is not impeached. The plaintiff complains only of the action of the court in settling the law of the case for the jury.

The plaintiff introduced evidence conducing to prove his title to the cotton, and its value. That Shaw's Landing, where the cotton was deposited under a shed, was a public landing, and the usual place of shipment for the neighborhood. The shed was among the forest trees, without enclosure or clearing about it. The ground was covered with dry leaves, grass, &c., extending up to the cotton, and the cotton was subject to be burned if the woods were fired. The plaintiff resided some 8 or 10 miles from the landing. The woods were unusually dry during the fall of 1851, and subject to be burned. The defendants camped about a half mile from the shed in the woods. There was a road and a small creek, with a little water in it, between the camp and the shed. The woods were burned from the camp to the shed, and the cotton consumed. The wind was blowing for several days, about the time the fire occurred, from the direction of the camp to the shed. The plaintiff's evidence does not show that the fire started from the camp, but the witnesses seem to have been of that opinion, from the appearance of the burnt woods, and the range of the fire. The woods were not on fire when the defendants came there to camp, but were burning for several days after they decamped, before the cotton was destroyed.

On the part of the defence, it was proven, that all of the defendants resided in Hempstead county but one, who lived in Sevier county, but remote from Shaw's Landing. That they came to the vicinity of Shaw's Landing on a camp-hunt. The evidence conduces to show that they encamped on Sabbath, and left on the following Tuesday, and that the cotton was burned on the succeeding Sabbath. That at the time they pitched their camp, they burnt the leaves around it for some thirty or forty feet, and then extinguished the fire to prevent fire from spreading from the camp. One of the

witnesses, who was present at the time, says they used great precaution. Another says they burnt the leaves off for three or four steps around the camp, and then extinguished the fire. That he did not think fire could have spread from the camp to the leaves after this precaution. These witnesses hunted with the party one night—they set out no fire, and were cautious to prevent the communication of fire to the woods.

Some of the witnesses speak of the place, where the defendants were encamped, as a *wilderness*—others, as the *woods*. There was no testimony as to whether the lands were public or private property. Without stating the testimony of each witness in detail, it is sufficient to remark, upon the entire evidence, that none of the instructions asked by either party could be regarded as abstract, or inapplicable, if correct in other respects.

No case has been cited by the counsel, on either side, like the one at bar. There are several reported cases, however, somewhat analogous, in which general principles of law have been announced, which are applicable to the peculiar features of this case, in some degree.

In *Vandenburg vs. Trux*, 4 *Denio* 464, BRONSON, Ch. J., delivering the opinion of the court, said: "It may be laid down as a general rule, that when one does an illegal or mischievous act, which is likely to prove injurious to others, and when he does a legal act, in such a careless and improper manner, that injury to third persons may probably ensue, he is answerable in some form of action, for all the consequences which may directly and naturally result from his conduct; and, in many cases, he is answerable criminally, as well as civilly. It is not necessary that he should intend to do the particular injury which follows: nor, indeed, any injury at all. If a man, without a just cause, aim a blow at his enemy, which, missing him, falls upon his friend, it is a trespass upon his friend, &c. Or, if in attempting to steal or destroy the property of another, he unfortunately wound the owner, or a third person, he must answer for the consequences, although he did not intend that particular mischief. And al-

though no mischief of any kind may be intended, yet, if a man do an act, which is dangerous to the persons or property of others, and which evinces a reckless disregard of consequences, he will be answerable civilly; and, in many cases, criminally, for the injuries which may follow: as if he discharge a gun, or let loose a ferocious or mad animal in a multitude of people, or throw a stone from a house top into a street where many are passing; or keep a large quantity of gun powder, near the dwelling of another. In these, and such like cases, he must answer for any injury which may result from his misconduct, to the persons or property of others."

In the following cases, the general rule as above laid down, is recognized. *Guille vs. Swan*, 19 *John R.* 381; *Vincent vs Stinebour*, 7 *Vermont R.* 62; *Vaughan vs. Menlove*, 3 *Bingham N. C.* 468, (32 *Eng. Com. L. R.* 221;) *Phares & Herndon vs. Stewart*, 9 *Porter R.* 336; *Wakeman vs. Robinson*, 1 *Bingham* 213; *Dolph vs. Ferris*, 7 *Watts & Serg.* 367; *Gregory vs. Piper*, 9 *Barn. & Cres.* 593; *Jordan vs. Wyatt*, 14 *Grattan* 151; *Burton vs. McClellan*, 2 *Scam.* 434; *Shrieve vs. Stokes*, 5 *Ben Monroe* 453; *Amich vs. O'Hara*, 6 *Blackf.* 258.

Assuming, upon the weight of these authorities, as a general rule, that where a party is doing an illegal act, he is liable to other persons injured thereby, regardless of intention to do the injury, or care manifested to avoid it, it may be first inquired, whether the plaintiff proved in this case that the injury of which he complains, resulted as a consequence of an illegal act on the part of the defendants.

The evidence shows that the defendants encamped in the wood, or *wilderness*, as some of the witnesses term it, for the purpose of hunting wild game, and made a fire at their camp, for the purpose of cooking, and for light at night, it may be supposed. The testimony does not show whether the plaintiff, the defendants, or other persons, owned the lands upon which the defendants encamped and hunted. Let it be assumed, however, that the lands were a part of the public domain, as supposed by the counsel of

the plaintiff, and was it an illegal act for the defendants to go into the public forest for the purpose of hunting? Were they trespassers? Not upon any right of the plaintiff's, surely. But was the act illegal? We know of no statute forbidding it. Was it in violation of any rule of the common law, as applicable to the condition and inhabitants of a new country like ours?

In *Broughton vs. Singleton*, 2 *Nott & McCord's R.* 338, Mr. Justice JOHNSON said: "Our ideas of those injuries, for which the action of trespass will lie, are principally derived from the English authorities, and I am disposed to think they are followed, without a proper regard to the vast difference between the situation of the two countries, so that in pursuing the letter, we lose sight of the principle. There, almost every foot of soil is appropriated to some specific purpose; here, much the greater part consists in unenclosed and uncultivated forest, and a part in exhausted old fields, which have been abandoned, as unfit for further cultivation, in which the cattle of the citizens feed at will. There, it is as practicable as necessary to protect the occupant against those petty trespasses: here, it is wholly impracticable; and, I think, unnecessary. The attempt to give this protection to unenclosed land, would overwhelm us in a sea of petty litigation—destructive of the interest and peace of the community. Upon this principle, it was determined in the case of *McConico vs. Singleton*, 2 *Con. Rep.* 244, that hunting on unenclosed lands, was not such a trespass as would sustain an action," &c.

In *Knight vs. Abert*, 6 *Penn. Rep.* 472, GIBSON, C. J., said: "In this, and perhaps every other American State, an owner of cattle is not liable to an action for their browsing on his neighbors' unenclosed wood land. But it follows not, that because such browsing is excusable as a trepass, it is matter of right. It is an immunity, not a privilege: or, at most, a license revocable at the will of the tenant, who may turn his neighbor's cattle away from his grounds at pleasure. Their entry is, in strictness, a trespass, which, for its insignificance, is not noticed by the law, probably on the foot of the maxim, *de minimis*; or, perhaps, because it is

better that all waste lands should be treated as common without stint. It certainly saves vexatious litigation. The particular loss from it is unappreciable, even as a subject of nominal damages, and would probably be held so, even in England, where waste land is altogether worthless."

In the settlement of a new country, hunting with fire-arms is almost indispensably necessary, for the purpose of destroying wild animals, which prey upon such as are domesticated, and endanger the safety of the settler and his family. Drafts upon the forest game, are also often required to supply the wants of the pioneer, under the contingencies and inconveniences of a sparsely inhabited country. After the country is more densely populated, hunting becomes rather an amusement, than a necessity, but is not, on that account, to be condemned where it does not lead to the neglect of more useful employments.

We cannot hold, therefore, that in encamping and hunting upon the public lands, in a "*wilderness*" district, the defendants were guilty of such an illegal, mischievous, or wanton act, as to render them liable at all events, for any injury that may have resulted therefrom to the plaintiff, regardless of any diligence, care, or prudence on their part, to prevent such injury.

The liability of the defendants to the plaintiff, for the destruction of his cotton, would depend, first, upon the proof whether it resulted from their act; and, secondly, whether it was a consequence of negligence on their part, or a want of that prudence and care which the law required them to observe, while doing an act not strictly illegal.

What constitutes such negligence or want of care and prudence as will render a party liable for an injury resulting to another from an act not unlawful in itself, depends upon the circumstances surrounding the party at the time. Greater care and prudence, of course, are required under some circumstances than under others. The following are cases in which the question of negligence has been discussed and adjudicated, in various aspects:

In *Jordan vs. Wyatt*, 4 *Grattan R.* 151, the facts were, that the plaintiff cut wood upon the land of defendant, with his consent, and, while it was lying thereon, the defendant, with the view of clearing another part of the land, set fire to the rubbish, which spread to, and burned the plaintiff's wood, and he brought trespass against the defendant therefor. On the trial, the defendant moved the court to instruct the jury as follows: "If the jury should believe, from the evidence, that the plaintiff's wood was cut off the defendant's land with his consent, and was lying thereon, and the defendant, with a view of clearing another part of the land, set fire to the rubbish on the last mentioned part of his land, and not with the intention of burning the plaintiff's wood, and the fire escaped from him, and passed on to the part of the land where the plaintiff's wood was lying, and consumed it, that this action will not lie, and the jury must find for the defendant."

This instruction, the court refused to give, and the defendant excepted. The plaintiff obtained judgment, and the defendant appealed to the court of appeals of Virginia. BALDWIN, J., delivering the opinion of the court, said: "It will be seen, that the proposed instruction did not assert that the fire was kindled with due precaution and circumspection, or that it escaped from the defendant without his default, or that he made the proper efforts to arrest it. It cannot be doubted, therefore, in the case supposed, that the plaintiff is entitled to redress," &c.

After commenting upon the proper form of the action to be brought in such case, the judge further remarks, that "It is no ground of defence to this action, that the defendant was engaged in a lawful pursuit, and intended no harm, and that his act would have been harmless, but for his carelessness or negligence. He was not the less a trespasser: and, in truth, his only ground of defence, in this or any proper form of action, would have been that he was, in no wise careless or negligent, but had proceeded with due caution and circumspection, and that the injury done by his act, was occasioned by unavoidable accident. A man is

bound so to conduct himself, as to avoid doing damage to the person or property of another, and slight default will render him responsible; as where he is uncocking a gun, and it goes off, and accidentally wounds a by-stander; or, if turning around suddenly, he were to knock another down, whom he did not see, without intending it; or, where he accidentally drives a carriage against that of another, though no otherwise blamable than in driving on the wrong side of the road on a dark night; or, in driving a horse too spirited; or, in pulling the wrong rein; or, using imperfect harness. *Wakeman vs. Robinson*, 8 *Eng. Com. L. R.* 300." The judgment was affirmed.

In *Burton vs. McClellan*, 2 *Scammon* 434, the facts seem to have been, that a prairie was on fire, which was approaching the defendant's premises. He, at a time when the statute of Illinois did not authorize him to fire the prairie, set a fire in the prairie around his enclosure, burning a strip of land around it for the purpose of protecting it and his fences from the approaching prairie fire, and the fire thus set by the defendant perhaps spread over the intervening prairie, and extended to and destroyed the plaintiff's stacks of grain, which were surrounded by grass, and exposed to be burnt by such fires.

Mr. Justice SMITH delivering the opinion of the Supreme Court, said:

"First, if an illegal act be done, the party doing, or causing the act to be done, is responsible for all consequences resulting from the act. *Secondly*, If an act be done from evident necessity, and justified by such necessity, but which, without such necessity, would otherwise be illegal, it must appear that such necessity existed at the time, and that every possible diligence and care were taken in the manner of the execution of the act, to avoid injury being done to others, or their property."

It is argued for the plaintiff, that the defendants, in encamping in the woods for the purpose of hunting, were doing an unnecessary and voluntary act, and were therefore liable to the plaintiff for any injury he may have sustained thereby, resulting from

carelessness or *accident;* and in support of this proposition *Vincent vs. Stinsour*, 7 *Vermont Rep.* 66, is cited: where WILLIAMS, Chief Justice, says: "Where a person is doing a *voluntary* act, which he is under no *obligation to do*, he is held answerable for any injury which may happen to another, either by carelessness or *accident.*"

Taking this sentence apart from the context, it is liable to misapprehension and a wrong application, but when considered in connexion with the whole opinion, it is unobjectionable. It is a *voluntary* act, for example, for a man to ride out in a carriage for pleasure, amusement, or exercise—he is under no particular obligation to do so—but it is, nevertheless, lawful, and while he would be answerable for any injury resulting therefrom to another, by any negligence, imprudence, or want of proper care on his part, yet, as Chief Justice WILLIAMS himself held in the above case, he would not be responsible for any injury, occurring unavoidably, or without blame or fault on his part.

The facts in the case of *Guille vs. Swan*, 19 *John. Rep.* 381, were, that the defendant ascended in a balloon, which descended into the plaintiff's garden, near where it had gone up, and a crowd of people seeing the defendant hanging out of the car in great peril, rushed into the garden to relieve him, treading down the plaintiff's vegetables and flowers. The balloon also dragged along over his potatoes and radishes, in descending. The plaintiff brought trespass against the defendant, for damages thus occasioned to his garden. SPENCER, Chief Justice, said: "I will not say that ascending in a balloon is an unlawful act, for it is not so; but it is certain that the aeronaut has no control over its motion horizontally; he is at the sport of the winds, and is to descend when and how he can; his reaching the earth, is a matter of hazzard. He did descend upon the premises of the plaintiff. Now, if his descent, under such circumstances, would ordinarily and naturally draw a crowd of people about him, either from curiosity or for the purpose of rescuing him from a perilous situation; all this he ought to have foreseen, and must be responsible for."

Chief Justice BRONSON, in commenting on this case, in *Vandenburg vs. Trux*, says: "For the wrong done by the crowd, as well as for the injury done by himself, the defendant was held answerable as a trespasser. Although the ascent was not illegal, it was a *foolish* act, and the defendant ought to have foreseen that injurious consequences might follow."

In *Vaughan vs. Menlove*, 3 *Bingham's N. C.* 468; 32 *Eng. Com. L. R.* 219, the defendant made a hay rick on, but near the boundary of, his own premises. The hay was in such a state when put together, as to give rise to discussion on the probability of fire, though there were conflicting opinions on the subject; yet, during a period of five weeks, the defendant was repeatedly warned of his peril. His stock was insured; and upon one occasion, being advised to take the rick down to avoid all danger, he said "he would chance it." He made an aperture or chimney through the rick, but in spite, or perhaps in consequence of this precaution, the rick at length burst into flames, from the spontaneous heating of its materials; the flames communicated to the defendant's barn and stables, and thence to the plaintiff's cottages, which were entirely destroyed, and he brought case.

PATTERSON, J., before whom the cause was tried, told the jury that the question for them to consider, was whether the fire had been occasioned by gross negligence, on the part of the defendant: adding that he was bound to proceed with such reasonable caution, as a prudent man would have exercised, under such circumstances.

The verdict being for the plaintiff, a new trial was moved for, on the ground that the jury should have been directed to consider, not whether the defendant had been guilty of gross negligence, with reference to the standard of ordinary prudence—a standard too uncertain to afford any criterion—but whether he had acted *bona fide* to the best of his judgment; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence.

TINDAL, Chief Justice: "There is a rule of law which says you

must enjoy your own property so as not to injure that of another; and, according to that rule, the defendant is liable for the consequence of his own neglect; and though the defendant did not himself light the fire, yet, mediately, he is as much the cause of it as if he had put a candle to the rick; for it is well known that hay will ferment and take fire if it be not carefully stacked. It has been decided that if an occupier burns weeds so near the boundary of his own land, that damage ensues to the property of his neighbor, he is liable to an action for the amount of injury done, unless the accident were occasioned by a sudden blast which he could not foresee. *Turberville vs. Stamp*, 1 *Salk.* 13. But, put the case of a chemist making experiments with ingredients, singly innocent, but when combined, liable to ignite; if he leaves them together, and injury is thereby occasioned to the property of his neighbor, can any one doubt that an action on the case would lie? It is contended, however, that the learned judge was wrong in leaving this to the jury as a case of gross negligence, and that the question of negligence was so mixed up with reference to what would be the conduct of a man of ordinary prudence, that the jury might have thought the latter the rule by which they were to decide; that such a rule would be too uncertain to act upon, and that the question ought to have been whether the defendant had acted honestly and *bona fide* to the best of his own judgment. That, however, would leave so vague a line as to afford no rule at all; the degree of judgment belonging to each individual being infinitely various; and though it has been urged that the care, which a prudent man would take, is not an intelligible proposition as a rule of law; yet, such has always been the rule adopted in cases of bailment, as laid down in *Coggs vs. Bernard*, 2 *L. Raym.* 909, though in some cases, a greater degree of care is exacted than in others, &c., &c. The care taken by a prudent man, has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say, whether taking that rule as their guide, there has been negligence on the occasion in question. Instead, therefore, of saying

that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires, in all cases, a regard to caution, such as a man of ordinary prudence would observe. That was, in substance, the criterion presented to the jury in this case, and therefore the rule [*for new trial*] must be discharged.

PARK, Judge, said: "I entirely concur in what has fallen from his lordship. Although the facts in the case are new *in specie*, they fall within a principle long established, that a man must so use his own property, as not to injure that of others." And after citing the case of *Turberville vs. Stamp*, as applicable, he further remarks: "As to the direction of the learned judge, it was perfectly correct. Under the circumstances of the case, it was proper to leave it to the jury, whether with reference to the caution, which would have been observed by a man of ordinary prudence, the defendant had not been guilty of gross negligence. After he had been warned repeatedly, during five weeks, as to the consequences likely to happen, there is no color for altering the verdict, unless it were to increase the damages."

VAUGHAN, Judge, concurring, said: "It was, if anything, too favorable to the defendant to leave it to the jury, whether he had been guilty of gross negligence, for when the defendant, upon being warned as to the consequences likely to ensue from the condition of the rick, said he "would chance it," it was manifest he adverted to his interest in the insurance office. The conduct of a prudent man has always been the criterion for the jury, in such cases, but it is by no means confined to them," &c.

From the above authorities, it may be safely stated as a general rule, that where one is doing a lawful act, or an act not mischievous, rash, reckless, or foolish, and naturally liable to result in injury to others, he is not responsible for damages resulting therefrom by accident or casualty, while he is in the exercise of such care and caution as a prudent man would observe, under the circumstances surrounding him, to avoid injury to others; but that he

is answerable for damages resulting from negligence, or a want of such care and caution on his part. The degree of care and caution which a prudent man would observe, as above indicated, would naturally vary with the circumstances surrounding him—would be greater in some situations than in others. Such a man, for example, going into a place with fire, or a light, where there are combustible materials, would of course observe great care, and proceed with much more caution than he would find necessary in places where there are no such materials; or driving a carriage, or riding a horse through a public street where people are constantly passing, he would move with greater care than if driving or riding in places not so much frequented by others. Other examples might be put, but these are sufficient to illustrate the principle.

Fire, though a dangerous element, is necessarily used for domestic purposes, and in almost every branch of business. It is made available, as a useful and powerful agent, in all the industrial pursuits of life. Every man has a right to use it, for necessary or convenient purposes, but in the exercise of this right, he is responsible for injuries resulting to others from negligence or fault on his part, and we know of no better standard by which to determine such negligence or fault, than that furnished in the case of *Vaughan vs. Menlove.*

By the general rules, which we have endeavored to deduce from the authorities above cited, the questions presented in the case at bar, may be tested.

The second instruction asked by the plaintiff, and refused by the court, "That if parties fire-hunting, or encamped in the woods or prairies, covered with combustible matter, suffer or permit, otherwise than in consequence of *unavoidable* accident, which could not be prevented by proper care, the fire to communicate to such combustible matter, they are liable for all property destroyed thereby:" in its evident sense and import, we think was substantially correct, and should have been given, though subject to verbal criticism.

The word "*unavoidable*," taken in its strict sense, though used in several of the cases from which we have quoted above, is a strong expression, but when qualified by the words "*which could not be prevented by proper care*," and understood as it is ordinarily used, was not so objectionable, as to render the instruction, taken as an entire proposition, objectionable.

The first instruction given for the defendants—"unless the jury believe, from the evidence, that defendants were guilty of *negligence*, even though the cotton were burned by fire that started from the camp, they are bound by law to find for defendants," was right. Where a party is using fire for any lawful purpose, and is guilty of no *negligence*, he is not responsible for accidents occurring without fault on his part.

The second instruction—"that it was not unlawful for defendants to be engaged in hunting; and if the jury believed they used *ordinary diligence*, even though the cotton were burned by fire that started from the camp, they are bound by law to find for defendants," was improperly given in that form. The words "*ordinary diligence*," were too general and indefinite, and may have misled the jury. The instruction furnished the jury with no standard by which to determine what was meant by *ordinary diligence*. The diligence to be observed by a party in doing a lawful act, as we have seen, is to be greater or less, according to the circumstances surrounding him, and the nature of the agents which he is using at the time; fire being a dangerous agent, when employed in a place where there is combustible materials, and where it may escape from the party, and do damage to others, without great care, much greater diligence is required of him under such circumstances, than in situations where the danger from the use of fire would not be so great. The court should have told the jury that such diligence or care was required of the defendants, as a prudent man, in such a situation and under the circumstances surrounding them, using fire, would have observed to prevent its getting into the woods and doing damage to others.

The third instruction—"that plaintiff must prove the burning

of the cotton, was caused by the *negligence* and *improper conduct* of the defendants," was, perhaps, right enough. Of course, if they were guilty of no *negligence* or *improper conduct*, they were not responsible for an accident occurring without fault on their part.

But it is argued for the defendants, that even if the court erred in refusing or giving instructions, the judgment should not be reversed, because the plaintiff was not entitled to the verdict upon the evidence; that upon the whole record, there is no error. Conceding that the authorities cited sustain the legal proposition submitted, yet, we think it is not applicable in a case like this. We cannot tell what influence the action of the court had upon the minds of the jury in coming to the conclusion which they did. Possibly, the jury would have come to the same conclusion, had the court charged them correctly, as to the law of the case, but we cannot undertake to say that they might not have rendered a different verdict. The plaintiff was entitled to have them pass upon the facts with a correct understanding of the law applicable to them, and when this is done, their decision is final.

The case made by the plaintiff against the defendants, is by no means a clear one, and but for one feature in it the judgment might be affirmed, under the rule referred to above. The proof does not show that defendants knew that the plaintiff's cotton was deposited in the vicinity of their camp. It appears, however, that they encamped about half a mile from it, in a *wilderness* country, that there was a road running between their camp and the cotton, also a small creek, with some running water in it, but a good deal of drift-wood. The evidence conduces to show proper care on their part in removing the leaves from around the camp, before they kindled their fire, to prevent the communication of it to the woods. Also, as far as the witnesses had any knowledge, that defendants set out no fire, and were cautious to permit none to get into the woods when hunting.

But, perhaps after they left their camp, the woods got on fire—they burned for several days, and finally, reached and destroyed

the cotton. Whether the fire occurred from the camp, was a question for the jury. If it did, perhaps the defendants might have left the camp without extinguishing their fire; and the wind may have blown sparks or coals into the leaves; or it being the fall of the year, and the leaves falling, as the witnesses state, the ground around the camp, from which the defendants had burnt the leaves, might have been re-covered and taken fire. If so, it would be a question for the jury to determine, whether proper diligence on the part of defendants—such as a prudent man would have observed under the circumstances—would not have required them to extinguish the camp-fire before they decamped and returned to their homes.

In passing upon all these facts, it would also be proper for the jury to take into consideration the conduct of the plaintiff in taking care of his property. He resided, it seems, some eight or ten miles from the landing where the cotton was placed. Though it appears from the evidence, that there were some persons residing within a mile or two of the landing, there is no proof that the cotton was placed under the care of any one. It was put under a shed, in the forest, surrounded by leaves, &c., and subject to be burned if the woods were fired. The woods were seen on fire for several days before the cotton was burned, but no one it seems was charged with the protection of it. Did the plaintiff take such care of his property as a prudent man would take under such circumstances? Whether he did or not, is a question for the jury, and if he did not, how far that would affect his right to hold the defendants liable for any negligence on their part, resulting in the destruction of the cotton, is a question of law which we are not now called upon to determine. It would be a hardship upon the plaintiff to lose his cotton, and equally hard upon the defendants to have to pay for it, but such hardships are of frequent occurrence.

The remarks which we have thought proper to make in reference to the evidence, have been made in response to the argument that the judgment should be affirmed, regardless of any

error committed by the court, and not to intimate any impression, as to what verdict the jury should have rendered upon the facts. We think, however, that a jury should pass upon the evidence, with a correct understanding of the law, and therefore reverse and remand the cause for a new trial.

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## VANDEVER VS. CLARK ET AL.

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A release of one of several obligors, is a release of all. *Frazier vs. State Bank*, 4 *Ark.* 510; *Ferguson vs. State Bank*, 6 *Eng.* 513.

Where a note sued upon, is described as bearing interest at a certain per cent. *per annum;* and a release pleaded in which the note is copied as bearing the same per cent. *per amount*, but the note is described in the release as bearing the interest *per annum;* there is no such variance as will render the release inoperative.

In copying a note and an assignment endorsed upon it, there is no variance if the copy omit calculations of interest endorsed upon it.

*Writ of Error to Sebastian Circuit Court.*

Hon. FELIX J. BATSON, Circuit Judge.

WALKER and GREEN, for plaintiff. Upon the subject of variance, a distinction is now fully established between allegations of matter of substance, and allegations of matter of description. The former require to be substantially proved—the latter must

be proved literally. *Phil. Ev., vol.* 5, *p.* 2; *Rossiter vs. Marsh*, 4 *Con. R.* 196; *Saxon et al. vs. Johnson*, 10 *J. R.* 419; 7 *Ib.* 223; 4 *Pick.* 508; *see note* 3, *p.* 1, *Cowen & Hill's Notes to Phill. Ev., vol.* 5, *and authorities cited.*

The note sued upon calls for interest at 8 per cent. *per annum;* the note released, calls for 8 per cent. *per amount.* Here is such a substantial variance as will make it fatal in all cases of description. *Adams vs. Brown*, 4 *Litt. R.* 7, 8; 3 *J. J. Marsh.* 590; *Thomas ad. vs. Thomas*, 1 *Ch. Pl.* 306, 307; 7 *Yerger* 526; 3 *Wend.* 374; 5 *Hill's N. Y. Rep.* 143; 1 *Smith's Leading cases* 464.

S. H. HEMPSTEAD and S. F. CLARK, contra. In this case, no question has been made or reserved, and it falls within the rule laid down in *State Bank vs. Conway*, 13 *Ark.* 344.

A release to one of several obligors, is a release to all. 2 *Eng.* 328; 2 *Saund.* 48 *a*; 7 *John* 207; 8 *Term Rep.* 168.

Mr. Justice WALKER delivered the opinion of the Court.

This was an action of debt upon a writing obligatory, executed by the defendants to William H. Norton, and by him, on the 1st day of April, 1854, endorsed to Joseph W. Vandever, (the plaintiff.)

The defendant pleaded payment and release, upon which issue was taken; and upon the trial of the case, which was by consent submitted to the court in place of a jury, the defendants offered in evidence the following, which purports to be a copy of the writing obligatory sued upon, with the endorsements thereon; the latter of which was executed under the seal of said Norton, on the 19th day of January, 1854.

"$400.

One year after the date hereof, we, or either of us, promise to pay to William H. Norton or bearer, the sum of four hundred dollars, with interest on the same, at the rate of eight per cent.

per amount from date, for value received. Given under our hands and seals, this 18th day of July, A. D. 1851, at the city of Fort Smith.

S. F. CLARK, [SEAL.]
G. E. BUMFORD, [SEAL.]
G. G. SHUMARD, [SEAL.]
J. R. KENNEDY, [SEAL.]
S. D. McDONALD." [SEAL.]

Upon which is endorsed:

"NOVEMBER 17TH, 1852.

Received of S. F. Clark, two hundred dollars of the principal of the within note, and twenty dollars and fifty cents as interest." And also: "Received of G. E. Bumford, and Geo. G. Shumard, by the hands of Aaron Clark, the sum of two hundred dollars, the balance of principal due, on the annexed and foregoing bond made to me or bearer, on the 18th day of July, 1851, by S. F. Clark, G. E. Bumford, George G. Shumard, J. R. Kennedy, and S. D. McDonald, for the sum of four hundred dollars, with interest on the same at the rate of eight per cent. per annum from date, and upon which suit has been instituted upon said bond against the said G. E. Bumford and George G. Shumard, to the August term, 1853, of the Circuit Court of the county of Sebastian, and is still pending in said court. Now therefore, I, William H. Norton, do release, for and in consideration of the sum of two hundred dollars, so paid by the said Aaron Clark as aforesaid, the said G. E. Bumford, and George G. Shumard, from the said sum of two hundred dollars, and do order and direct the clerk of the Circuit Court of Sebastian county to dismiss said suit, and enter this release as a satisfaction upon the record of said court, upon the said Bumford and Shumard, paying all costs of suit herein. Given under my hand and seal, this 19th day of January, 1854.

WM. H. NORTON." [SEAL.]

*Endorsed*—filed in my office, January 19th, 1854.

JOHN CARNALL, *Clerk.*

The foregoing instrument was offered in evidence by the defendants, to sustain the issue upon the plea of release, but the plaintiff, after admitting the due execution thereof, objected in general terms to the introduction of said instrument as evidence, but the court overruled the objection, and permitted it to be read in evidence; and thereupon, found the issue for the defendants, and rendered judgment accordingly.

The plaintiff moved the court for a new trial, which was overruled, and he excepted, and now relies upon his objection to the introduction of the paper purporting to be a release as evidence. Indeed, this is the only question presented or argued by the counsel.

The plaintiff pointed out no specific objection to the evidence at the time it was offered, but giving him the fullest benefit of his objection, and allowing him to show any available grounds of exception, as fully as if pointed out and relied upon at the time when the objection was made, we will proceed to determine whether there is such material variance between the bond declared upon and that released, as contended for. That the release, if a good defence for defendants, Bumford and Shumard, is also, under the issue formed, good for all of the defendants, is a question definitely settled by the repeated decisions of this court. *Frazier vs. State Bank*, 4 *Ark. Rep.* 510, *Ferguson vs. State Bank*, 6 *Eng.* 513. Indeed, the counsel for the plaintiff have not insisted upon a different rule, but they rely upon several discrepancies between the deed of release in the description of debt released, and that declared upon, which they contend, amounts to substantial and fatal variance.

The only ground for variance, that has the semblance of substance, is the second, in which it is insisted, that the instrument described in the deed of release, differs from the bond declared upon, in this; that in the deed of release, it is described as a bond for four hundred dollars, with eight per cent. per *amount*, whilst that sued upon is for eight per cent. per *annum*. These words, when written in haste, and when the letters are imperfectly for-

med, much resemble each other, except perhaps the last letter in *amount;* and when taken in connection with the balance of the sentence, no one can doubt what was intended to be written. The sense of the sentence requires such understanding, but we are not left to inference upon this point, because, in the afterpart of the deed of release, the rate of interest is referred to, and repeated, in connection with a full description and reference to the bond, from the payment of which the defendants were released, and it is there described as a debt for four hundred dollars, with eight per cent. per annum, fully corresponding with the bond sued upon, and it is very evident that this being in the same instrument, and part of it enters into, and forms a part of, the description of the bond. This is the only matter of substance pointed out and insisted upon.

As to the figures and calculations of interest, found upon the back of the bond, they were merely private memorandums, and formed no part of the bond or material endorsement upon it. Concede, as argued, that it was unnecessary to copy the endorsement on the deed of release, and notwithstanding that if copied, it must be done correctly, or the variance will be fatal; still, it does not follow that because those attempted to be copied must be correctly copied, that if one is so copied, every other letter or figure on the bond must also be copied; and that is the ground of objection in this instance. That the instrument was or not in suit, formed no part of the instrument itself.

These are the grounds relied upon to exclude the release from the court as evidence, and we are satisfied none of them are well taken, and scarcely one of them worthy of serious consideration. Let the judgment of the Circuit Court be affirmed.

## JONES VS. AUSTIN.

A writ made returnable at a time other than that fixed by law, is irregular, and may be abated. *Murphy vs. Williams*, 1 *Ark. R.* 333; *Featherston vs. Wilson*, 3 *Ark.* 387; *Ferguson vs. Ross*, 5 *Ark.* 518.

All original writs must be made returnable to the first regular term thereafter, unless they be issued within fifteen days of the first term; and not to a term held under *sec.* 5, *ch.* 47, *Digest.*

The act (*sec.* 5, *ch.* 47, *Digest*,) authorizing the judge to hold court at a subsequent day, on failure at the regular term, is a general law, and applies as well to courts whose terms may be subsequently prescribed, as to those whose terms were fixed at the passage of the act.

*Appeal from the Circuit Court of Drew County.*

Hon. JOHN C. MURRAY, Circuit Judge.

PIKE & CUMMINS, for appellant. The court erred in sustaining the demurrer to the plea:

1st. Because act of December 28th, 1840, (*sec.* 5, *chap.* 47, *Rev. St.*,) is not a general law. It only warrants terms 8 weeks after regular terms, on failures at the times fixed in that act—not where failures occur under subsequent acts.

2d. There can be but two return terms in the year. *Chap.* 47, *Rev. Stat.*, *p.* 302; *sec.* 4, *ch.* 126, *Rev. Stat.*; *sec.* 9, *chap.* 67, *Rev. Stat.*

3*d. Section* 5 *ch.* 47, declares the judge shall hold court 8 weeks after regular terms in certain cases; and, in other cases, the judge shall fix the time himself. It is the same in both cases as if the judge had met at regular terms and adjourned to a particular

day, under *sec.* 20, *ch.* 50, *Rev. Stat. Dunn vs. State*, 2 *Ark.* 229; 2 *How. Miss. Rep.* 422; 2 *Mass.* 435; 6 *Yerg.* 395.

FOWLER, for appellee. For Austin, it is insisted, that the demurrer was rightfully sustained; and there is no other question presented by the record.

Mr. Justice WALKER delivered the opinion of the Court.

This was an action of assumpsit, commenced in the Drew Circuit Court, by Austin against Jones. The writ issued on the 30th of March, 1854, and was made returnable at the court-house, in the town of Monticello, in the county of Drew, on the first day of the next May term of the Circuit Court for said county, it being the 22d day of May, A. D. 1854. It appears that there was no May term of the court held in that county; but, at the September term, 1854, the defendant appeared and filed a plea in abatement, upon the ground, that by law, there was no May term of the Circuit Court appointed to be held in said county, but that the true and regular terms for holding court in said county, were the fourth Mondays in March and September. To this plea, the plaintiff demurred, and the court sustained the demurrer, and rendered final judgment in favor of the plaintiff, from which the defendant appealed.

That a writ made returnable at a time, other than that fixed by law, is irregular, and may be abated, is a question well settled by this court. *Murphy vs. Williams*, 1 *Ark. Rep.* 383; *Featherston vs. Wilson*, 3 *Ark. R.* 387; *Ferguson vs. Ross*, 5 *Ark. R.* 518.

The only question is one of fact: was the writ in this case made returnable to a term of the court prescribed by law. *Sec.* 4, *ch.* 126, *Digest Statutes*, provides, that "Every original writ shall be dated on the day it issues, and shall be made returnable to the first term of the court thereafter, unless such first term be within fifteen days thereafter; then such writ shall be made returnable to the first day of the second term." And by the act of the 8th

of January, 1849, the Circuit Courts of Drew county were directed to be held on the fourth Mondays in March and September. This act was in force when this writ issued, and as these are the only regular return terms fixed by law, it follows, that the writ in this case made returnable to the May term, was not made returnable at the time prescribed by law; unless the plaintiff could claim the benefit of the *5th sec. of the 47th chap., Digest*, which provides, "That whenever, for any cause, any judge of the Circuit Court shall fail to hold any of his courts, at the terms hereinbefore provided for, he shall hold a term of said court to commence on the eighth Monday thereafter, unless the term of some other court, in the same circuit, shall fall on said eighth Monday; and then, and in that case, said judge shall fix upon some convenient time for holding a term of said court," &c.

The writ in this case, seems to have been made returnable to a time, eight weeks after the time fixed by law, and perhaps for the reason that there was no regular term of the Drew Circuit Court, held on the fourth Monday in March, 1854.

It is contended by counsel, that this section has direct reference to the act of 1846, 1847, fixing the time for holding courts in Drew county, which has since been repealed by the act of 1849, which fixes a different time for holding said courts. In this, we think the counsel mistaken. This is a general provision applicable to all the courts, and might well stand, notwithstanding a change in the time of holding the courts in said county. But giving to this section full effect, and conceding that the court was not held in that county at its regular term, (of which we are uninformed) and that the writ in this case was made returnable eight week thereafter; the question is, did the Legislature intend, by this section, to establish another regular return term for the court, or was this adjourned term only intended to try the cases then on the docket; and which, by reason of such failure, remained undetermined. That such was the intention of the Legislature, we think most probable. It was not for the purpose of affording an opportunity to hear and determine new suits, but to

dispose of those already brought, the trial of which had been delayed by some unavoidable occurrence, and to perform the other necessary business incident to the regular term.

A different construction would not harmonize with several other provisions of the statute, which provide for the return of writs, and in case the writ should be issued within fifteen days of any regular term, that it should be made returnable to the second term of the court.

In view, therefore, of the several sections of the statute, and the probable intention of the Legislature, we are of opinion that the writ in this case should have been made returnable to the next regular term of the Circuit Court, and not the special term, (if indeed there was any failure to hold the court at the regular term, and if there was no conflict between such special term, and some other regular term of another of the courts in that circuit,) and should have been abated.

The Circuit Court, therefore, erred in sustaining the demurrer of the plaintiff to the defendant's plea in abatement; and for this error, the judgment must be reversed, and the cause remanded for further proceedings therein to be had, according to law, and not inconsistent with this opinion.

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## HAMILTON ET AL. VS. FOWLKES ET AL.

Where a contract respecting real estate is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it, as it is for a court of law to give damages for the breach of it.

A contract in writing between two settlers upon the unsurveyed public lands, that an agreed line dividing their respective improvements, shall be the permanent line between them, and that upon the sale of the public lands by the United States, and the purchase of their respective improvements, each will convey to the other, at cost, the land by each respectively purchased or secured, that might be found upon the survey to be within the improvement of the other, is *certain, fair in all its parts, for an adequate consideration, capable of being performed, and mutual and reciprocal*, and will be enforced in a court of equity.

Though an agreement in relation to land be not put upon the public records of the county where the land is situated, a subsequent incumbrancer or purchaser thereof, with notice of the agreement, will be bound thereby.

And so, although in such case, he have no actual notice, but has only heard that there was some agreement between the parties thereto in relation to their lands, yet if one claiming under such agreement be in the open and visible occupancy and cultivation of the land, it is sufficient to put the purchaser upon enquiry, and charge him with constructive notice.

Where a person claiming title to land under an agreement, not recorded, has been in the actual, open, and visible possession and occupancy thereof, and has been cultivating the same for several years, a subsequent purchaser will be held to notice, although he may not have had actual knowledge of such possession and cultivation.

*Appeal from Lafayette Circuit Court in Chancery.*

Hon. JOHN QUILLIN, Circuit Judge.

WATKINS & CURRAN, for the appellants. It is certainly good law, that a court will not enforce the specific performance of a contract, unless it is *certain, fair, and just*, in all its parts, and

a requisite of all such contracts is that the remedy must be *mutual* and *reciprocal*, for one party as well as the other. This agreement is not only "certain, fair, and just," but the remedy is *mutual* and *reciprocal*.

It is certainly true that this agreement does not show, upon its face, the exact quantity, or the particular description of the land to be conveyed by Carrington, or the aggregate amount to be paid by Hamilton.

But the true rule is, that if the agreement, either in itself or by reference to any other rule, furnishes the means of ascertaining the thing, or if the thing be not now certain, or capable of certainty; yet, if the rule be given by which it may hereafter be specified and reduced to certainty, the court will not refuse to decree a specific performance. *Vide Prater vs. Miller*, 3 *Hawk's (N. C.) Rep.* 628; 2 *Vern.* 416; 1 *Ves. Junr.* 135; 3 *Br. Chan. Rep.* 168; 3 *Ves.* 184; 1 *Mad. Chan.* 136.

As regards the mutuality and reciprocity of the contract, we insist that the objections taken by Fowlkes are not tenable, for several reasons:

1. The two instruments being made at the same time, in relation to the same subject, constitute but one contract. It is a well established principle, that even in the absence of any positive proof to that effect, several instruments in writing, made at the same time, between the same parties, in relation to the same subject, will be construed as *one* agreement. *Strong vs. Burnes*, 11 *Verm. Rep.* 221; *Duncan vs. Charles*, 4 *Scam.* 561; *Reed vs. Field*, 15 *Verm.* 672; *Makepeace vs. Harvard College*, 10 *Pick.* 302; *Selby vs. Holden*, 10 *Pick.* 250; *Hunt vs. Livermore*, 5 *Pick.* 295; *Newal vs. Wright*, 3 *Mass.* 138; *Rodgers vs. Neeland*, 13 *Wend. Rep.* 114; *Jackson ex. dem. vs. Dunsbough*, 1 *Johns. Cas.* 91; *Stone vs. Tifft*, 15 *Johns. Rep.* 458; 2 *Con. Rep.* 218; *Watson vs. McKinney*, 3 *Wend.* 233; *McDowell vs. Hall*, 2 *Bibb* 60; 3 *Bibb* 11; 3 *Littell* 294; 4 *ib.* 319; 7 *Monr.* 347; 7 *Mass.* 496; 4 *ib.* 266.

If the two instruments in writing are to be construed as one,

we do not presume that any sane man will contend that the agreement was not *mutual* and binding upon both parties.

2. The instrument delivered to Hamilton, taken by *itself* without any connection with the one delivered to Carrington, shows upon its face a mutual and valid contract. It was signed by both parties, and shows that Hamilton was bound to take all the land on his side of the fence, and pay such price as it should cost Carrington. It is said that Carrington could not have compelled Hamilton to take the land and pay the cost; but we cannot understand why he could not do so. The legal effect of the instrument is the same as if Hamilton had expressly covenanted to take such part of his improvement as Carrington might enter, at the price it cost Carrington.

3. Carrington covenanted that the fence should be the permanent line; consequently, he and those claiming under him, would be estopped to claim any land on Hamilton's side; and as Hamilton signed the instrument in which Carrington recited that the fence had been established as the line, he would be estopped thereby, even though he did not make any express covenant to that effect. The estoppel would operate alike upon both.

Another conclusive answer to all the objections taken to this contract, is that it was an agreement for the *settlement of boundaries and conflicting* claims — the consideration being mutual on each side. The consideration of settling doubtful rights and boundaries, is not only good, but highly favored in law. *Zane's Devisees vs. Zane*, 6 *Munf.* 406; *Taylor vs. Patrick*, 1 *Bibb* 168; *Fisher vs. May's heirs*, 2 *Bibb* 448; *Mills' heirs vs. Lee*, 6 *Mon.* 97; *Mitchell vs. Long*, 5 *Litt.* 71; *Moore vs. Fitzwater*, 2 *Rand.* 442; 1 *Ves. Sr.* 444; 1 *P. Williams* 727; 1 *Atk.* 10.

We venture to assert, that no principle is more firmly established by the American authorities, than that actual possession of land, is, of itself, implied or constructive notice, to the whole world, of the title of the possessor. That a person who buys land is bound *by law* to know, whether he in *fact* knows or not, *who* is in possession of it at the time of his purchase — possession be-

ing sufficient to put a subsequent purchaser on inquiry as to the actual rights and nature of the claim *of such occupant*, and is constructive notice of the nature and extent of those rights. *Vide* 2 *J. J. Marsh.* 180, 434; 1 *Litt. Rep.* 352; 4 *Monroe* 196; 1 *Monroe* 201; 1 *Smed. & Marsh.* 70, 443; 1 *Smed. & Marsh. Chan. Rep.* 338; *Freeman's Chan. Rep.* 85; 6 *Smed. & Marsh.* 345; 7 *Smed. & Marsh.* 456; 6 *Wend.* 213; 11 *Wend.* 442; 2 *Paige* 300; 3 *Barb. Chan. Rep.* 315; 2 *Mass.* 508; 3 *Mass.* 575; 6 *Mass.* 24; 10 *Mass.* 60; 1 *Pick.* 174; 3 *Pick.* 149; 4 *New Hamp.* 262; 2 *Ohio Rep.* 264; 1 *Stewart's* (*Ala.*) *Rep.* 233.

It is well settled, both in England and the United States, that actual and unequivocal possession *is notice*, not so much because possession is evidence of *actual* notice, as because it is the duty of one who is about to purchase real estate, *to ascertain by whom, and in what right it is held or occupied*, see *Sailor vs. Herlzoq*, 1 *Wharton* 269; *Wood vs. Farmer*, 7 *Watts* 385; *Chesterman vs. Gardner*, 5 *John. Chan. Rep.* 29; *Macon vs. Sheppard*, 2 *Humph. Rep.* 335; *Hardy vs. Summers*, 10 *Gill & John's. Rep.* 316; *Burt vs. Cassity*, 12 *Ala. Rep.* 734; 8 *Ala. Rep.* 382; *Johnson vs. Gloney*, 4 *Black* (*Ia.*) 94; *Webster vs. Maddox*, 6 *Maine Rep.* 256; *Landers vs. Brant*, 10 *How.* (*S. C.*) *Rep.* 348.

*Fowlkes admits that he had motice of the agreement.* He admits that *before* he took the mortgage, he had *heard that some contract had been entered into between Hamilton and Carrington in relation to some lands situated, or supposed to be situated, in Lost Prairie, but of what character he could not ascertain.* Now this admission, of itself, is all that we ask to charge him with notice. Any notice sufficient to put a party upon inquiry is sufficient. *Sigourney vs. Munn*, 7 *Conn.* 324; 9 *Idem.* 286; 3 *Idem.* 146; *Pitney vs. Leonard*, 1 *Paige* 461; *Hawley vs. Cramer*, 4 *Cowen* 717; *Sugden on Vend.* 498; 1 *Atk.* 489; 2 *Atk.* 54, 174; 2 *Ves. Jun.* 440.

Thus, notice of a lease is notice of its contents. *Hall vs. Smith.* 14 *Ves. Rep.* 426.

PIKE & CUMMINS, for appellees. The first question in the case, is whether the agreement signed by Carrington was enforceable against him. The second whether, if it were, it is enforceable against Fowlkes.

It does not necessarily follow, because a contract is valid, and equity would not rescind it or relieve against it, that therefore it will decree it to be specifically performed. Sometimes damages may be recoverable at law for breach of a contract, of which equity would yet not decree specific performance; and sometimes damages may *not* be recoverable at law, and yet relief would be granted in equity. 2 *Story Equity*, *sec.* 741; *Weale vs. West Middlesex Water Works Company*, 1 *Jac. and Walk.* 370. The interference of courts of equity in this way, is discretionary. They will not so interfere, except where it would be strictly equitable to make decree for specific performance. If the parties have so dealt with each other, in relation to the subject matter of a contract, that the object of one party is defeated, while the other is at liberty to do as he pleases, in relation to that very object, equity will not grant relief, but will leave the parties to their remedy at law. 2 *Story Equity*, *secs.* 742, 750.

It will not decree specific performance, where, from a change of circumstances or otherwise, it would be unconscientious to enforce it. *Ib.*, *sec.* 751.

It requires a much less strength of case on the part of the defendant, to resist a bill to perform a contract, than it does on the part of the plaintiff to maintain it. The agreement must be CERTAIN, FAIR, and JUST, in all its parts. *Ib.*, *sec.* 769. The party applying for performance, must show that he has been in no default, and that he has taken all proper steps towards performing on his part. *Ib.*, *sec.* 771. A contract, to be specifically enforced, must be founded on a consideration valuable in contemplation of law. *Ib.*, *sec.* 793*a*.

The first great requisite of all such contracts, is that the remedy

must be MUTUAL and RECIPROCAL, for one party as well as the other. This rule is invariable. *Ib.*, *secs.* 723, 790.

"The remedy here must be mutual for purchaser and vendor." *Withy vs. Cottle*, 1 *Sim. & Stu.* 174.

"It has been settled by repeated decisions, that the remedy in equity must be mutual; and that where a bill will lie for the purchaser, it will lie also for the vendor. *Adderley vs. Dixon*, 1 *Sim. & Stu.* 607.

In the present case, there was no contract on Hamilton's part to pay for the land, and no time of payment fixed. If, when surveyed and the lines run, it had been found that Carrington had title to only so much of the land within Hamilton's fence as was swampy, and of little or no value, he could not have compelled Hamilton to pay for it. If it had cost him $50 an acre, the latter could have declined paying that price.

If that be so, the contract is not mutual.

It is true, that "the settlement of boundaries, and peace and quiet, is a mutual consideration on each side; and, in all cases, makes a good consideration to support a suit in this court for settling boundaries," as Lord HARDWICKE said in *Penn vs. Lord Baltimore*, 1 *Ves. Sr.* 444. And where there is a contest as to boundaries, and a line is agreed on; or where there are conflicting patents, or citations, or claims to the land, and a division is agreed on, it will be maintained. *Ib. Cann vs. Cann*, 1 *P. Williams* 727; *Stapleton vs. Stapleton*, 1 *Atk.* 10; *Moore vs. Fitzwater*, 2 *Rand.* 442; *Zane's Devisees vs. Zane*, 6 *Munf.* 406; *Taylor vs. Patrick*, 1 *Bibb* 168; *Fisher vs. May's heirs*, 2 *Bibb* 448; *Mills' heirs vs. Lee*, 6 *Mon.* 97; *McIntyre vs. Johnson*, 4 *Bibb* 48; *Irvine vs. Scobee*, 5 *Litt.* 71.

But in this case there were no conflicting claims at all, nor any dispute about boundaries. It is a mere agreement on the part of Carrington that he would sell to Hamilton any part of the land in his possession which he might subsequently purchase.

But if the court should be of opinion that the agreement relied on in this case, was mutually binding on the original parties

thereto, and that as between them, specific performance would be decreed; let us next examine whether such notice is established of Hamilton's equity, as will, under the circumstances, compel Fowlkes to perform.

Fowlkes absolutely denies any notice whatever, knowledge, suspicion, or belief, of the existence of the agreement, or of Hamilton being in possession of any part of the land, or of any part of it being included in his plantation, or within his fence, at any time. There is no proof whatever to the contrary, or in any degree shaking this explicit and unqualified denial.

But it is urged that the mere fact that Hamilton had in possession the land claimed under the agreement, was of itself notice, whether Fowlkes knew of that possession or not. This is the ground principally relied on.

The general doctrine as to *notice*, is thus stated by Chancellor KENT: "It is difficult to define, with precision, the rules which regulate implied or constructive notice, for it depends upon the infinitely varied circumstances of each case. The general doctrine is, *that whatever puts a party upon inquiry*, amounts, in judgment of law, to notice: *provided* THE INQUIRY BECOMES A DUTY, as in the case of purchasers and creditors, *and would lead to the knowledge of the requisite fact*, by the exercise of ordinary diligence and understanding. So notice of a deed is notice of its contents, and notice to an agent is notice to his principal. A purchaser with notice, from a purchaser without notice, can protect himself under the first purchaser, who was only authorized to sell, and a purchaser without notice, from a purchaser with notice, is equally protected, for he stands perfectly innocent. There is this further rule on the subject, that the purchaser of an estate in the possession of tenants, is chargeable with notice of the extent of their interests as tenants; FOR, HAVING KNOWLEDGE OF THE TENANCY, he is bound to inform himself of the conditions of the lease. So a purchaser of real estate cannot hold against a pure equitable title, *if he have notice of the equity before the payment of the purchase money, or the execution of the deed.*

STORY, in his *Commentaries on Equity Jurisprudence*, discusses the doctrine at far greater length. He says that where a person purchases with full notice of the legal or equitable title of other persons to the same property, he will not be permitted to protect himself against such claims, but his own title will be postponed and made subservient to theirs. It would be gross injustice to allow him to defeat the just rights of others by his own iniquitous bargain. He becomes, by such conduct, *particeps criminis* with the fraudulent grantor; and the rule of equity, as well as of law, is *dolus et fraus nemini patrocinari debent.*" *Sec.* 395. *The same principle* applies to cases of a contract to sell lands, or to grant leases thereof. *If a subsequent purchaser has notice of a contract*, he is liable to the same equity, and stands in the same place, and is bound to do the same acts which the person who contracted, and whom he represents, would be bound to do. *Sec.* 396.

He says again, quoting Lord HARDWICKE's remarks in *Le Neve vs. Le Neve*, 3 *Atk.* 646: "That the taking of a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser; and not that he is not a purchaser for a valuable consideration in every other respect. This is a species of *fraud* and *dolus malus* itself; *for he knew* the first purchaser had the clear right of the estate, and *after knowing that*, he takes away the right of another person, by getting the legal title."

And this exactly agrees with the definition of the civil law of *dolus malus.* "Now if a person does not stop his hand, but gets the legal title, *when he knows the equity is in another, machinatur ad circumveniendum.*" *Sec.* 397.

*Constructive* notice is, in its nature, no more than *evidence* of notice, *the presumption of which is so evident*, that the court will not even allow of its being controverted. *Sec.* 399. Whatever is sufficient to put the party upon inquiry, (that is, *whatever has a reasonable certainty as to time, place, circumstances, and persons,*) is in equity held to be good notice to bind him. "So, if a person should purchase an estate from the owner, KNOWING IT

TO BE IN THE POSSESSION OF TENANTS, he is bound to inquire into the estate which these tenants have; and therefore, he is affected with notice of all the facts as to their estates. *Sec.* 450.

We see, therefore, that according to the views of these eminent commentators, a prior equity prevailing against a subsequent purchaser with notice of it, does so on the ground that he has been guilty of a fraud: that he *machinatur ad circumveniendum:* that if there be no evidence of actual notice, there must be something which the law considers conclusive *evidence* of such notice, and that possession of a tenant is so, because, and only because, *knowing* the fact of their possession, the purchaser is bound to inquire, and held chargeable with a knowledge of the terms of their tenancies, which by inquiry he might have ascertained. Is this view as to the effect of possession sustained by the authorities? *Taylor vs. Stibbert*, 2 *Ves. Jr.* 440; *Daniels vs. Davidson*, 16 *Ves.* 249; *Hall vs. Smith*, 14 *Ves.* 426; 17 *Ves.* 433; *Crofton vs. Ormsby*, 2 *Sch. & Lef.* 596; *Hanbury vs. Litchfield*, 2 *Mylne & Keene* 629; *Eyre vs. Dolphin*, 2 *Ball & Beatt.* 301; *Walter vs. Maunde*, 1 *Jac. & Walk.* 181; *Allen vs. Anthony*, 1 *Merio.* 282; *Meux vs. Maltby*, 2 *Swanst.* 281; *Heirn vs. Mill*, 13 *Ves.* 120; *Miles vs. Langly*, 1 *Russ. & Mylne* 39; *Flagg vs. Mann*, 2 *Sumner* 555; *Hewes vs. Wiswell*, 8 *Greenl.* 94; *Hardy vs. Summers*, 10 *Gill & John.* 317; *Gouverneur vs. Lynch*, 2 *Paige* 300; *Chesterman vs. Gardner*, 5 *J. C. R.* 29; *Grimstine vs. Conter*, 3 *Paige* 421; *Prescott vs. Heard*, 10 *Mass.* 60.

The law requires proof of notice to be *clear.* "In order to fix this fraud, the proof of notice must be clear. *If it be merely doubtful*, a presumption of fraud will not be made." *Curtis vs. Lunn*, 6 *Munf.* 44.

The whole proof of notice in this case, is: 1st. Actual possession by Hamilton. 2d. Knowledge of the agreement by the settlers in the Prairie. 3d. That Fowlkes had heard that Hamilton and Carrington had made some contract about some lands in the Prairie, but could, on inquiry, learn nothing more; and 4th. That he never lived nearer the Prairie than Spring Hill, and how much further off is not known.

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

This was a bill for specific performance, brought on the 2d December, 1847, in the Lafayette Circuit Court, by William F. Hamilton and others, devisees of *Robert Hamilton*, deceased, against *Edward B. Fowlkes*, a purchaser, and Priscilla S. Carrington and others, heirs at law of Robert Carrington, deceased.

The bill charges, that many years before the district of public lands situated in said county, and known as Lost Prairie, was surveyed, *Robert Hamilton* and *Robert Carrington* settled, enclosed, and cultivated, adjoining plantations in said prairie, which were separated by a dividing fence; and continued to possess and cultivate the same until they died, each holding undisputed possession of his improvement, and being considered the owner of the land enclosed by him, as against all persons except the government.

That after the lands were surveyed, it was found that the plantations were so situated, that neither Hamilton nor Carrington could, according to the legal subdivisions, enter the land included in his improvement without including a portion of the land embraced within the inclosure of the other. Whereupon, neither of them wishing to enter, or in any way interfere with the improvement of the other, and both of them desiring to adjust the difficulty, in a fair and equitable manner, it was mutually agreed between them, that when the lands came into market, each of them should proceed to enter and acquire title to the land including his own improvement, without regard to whether, in so doing, he encroached upon the improvement of the other or not; and that so much of any tract so entered by one, as should be included within the claim of the other, should be deemed to be for his benefit, and should be conveyed to him: it being understood that the fence then dividing their plantations, should be considered the true line, notwithstanding a part of the land claimed by one of them, should be entered by the other. And in pursuance of this agreement, and for the purpose of making it

binding, a memorandum thereof was reduced to writing, signed and delivered by the parties, each to the other, bearing date 29th May, 1842. That delivered to Hamilton, is exhibited, and is as follows:

"Memorandum of an agreement entered into, this 29th day of May, 1842, between Robert Carrington of the one part, and Robert Hamilton of the other part, *witnesseth*, that the fence which now divides and separates the plantations of the above said parties, thence a stright line to Red River, is, and hereafter shall be, a permanent line between the parties aforesaid. The said Robert Carrington hereby covenants and agrees with the said Robert Hamilton, that should he hereafter acquire any title by right of pre-emption, purchase, or otherwise, to any land lying in the plantation of the said Robert Hamilton, or within the line near the corner of the fence to Red River, in part of the plantation of the said Robert Hamilton, to make him a title in fee simple for the same, so soon as the said Robert Hamilton shall pay to the said Robert Carrington the cost of the aforesaid land. Witness our hands, this day and year above written.

*Signed:* ROBERT CARRINGTON,
ROBERT HAMILTON."

The bill alleges that the instrument delivered to Carrington was like the one copied above, except that the covenants to convey were made by Hamilton, the two instruments being mutual and dependant, one upon the other, and constituting but one agreement.

That afterwards, in pursuance of this agreement, Carrington purchased of the United States the *N. W. qr. of sec.* 2 *T.* 15, *S. R.* 26 *W.*, at $1 25 per acre; a portion of which tract was on Hamilton's side of the dividing fence, and had been for many years, and continued to be a part of his plantation.

That Carrington also, in pursuance of the agreement, caused the *N. E. quarter of sec.* 3, of the *same township and range*, to be selected and located for the State of Arkansas, as part of the 500,000 acres of land granted to the State by Congress for Inter-

nal Improvement purposes: and then purchased it of the State, under the act of 31st December, 1842, at $2 00 per acre, for which he executed his obligations, payable in ten annual installments, and obtained the Governor's certificate, covenanting to make him a deed on payment of the purchase money; a portion of which tract was also included in Hamilton's plantation.

That in like pursuance of said agreement, Hamilton entered, and obtained title to the *W. frac. half* of the *N. E. quarter* of said *sec.* 2, *west of Red River*, at $— per acre; a portion of which tract was on Carrington's side of the dividing line; and which part was purchased by Hamilton, for the use and benefit of Carrington, and was held by the complainants subject to said agreement.

On the 21st January, 1845, Carrington and wife conveyed his plantation, including the two tracts which extended across the dividing line into Hamilton's place, and forty slaves, in trust, to Hannah and Baldwin, to secure to Fowlkes the payment of a debt of $10,708 34, which Carrington owed to him, evidenced by notes dated the 16th April, 1841, due at one day, and upon which Pryor was security. The deed provided for the payment of the debt by installments in one, two, and three years, with power of sale to the trustees on default. It described the lands by the surveys, and "granted, bargained, sold, and conveyed" them to the trustees, &c., "with all and singular the houses and appurtenances thereunto belonging, all the right, title, and estate of the said Carrington and wife therein."

That in February, 1845, Carrington died, letters of administration upon his estate were granted to his widow, by the Probate Court of Hempstead county; who, on the 22d of January, 1846, obtained an order of said court, to sell all the right, title and interest of Carrington in the lands, &c., embraced in the deed of trust, for the payment of his debts. She made the sale in pursuance of the order, and Rust, the son-in-law of Carrington, became the purchaser of the plantation and slaves for $500, and obtained the deed of the administratrix therefor. Rust and wife, conveyed

them to Fowlkes, by quit-claim deed, on the 8th of June, 1846, for $8,626 54; and he entered into possession thereof, and claimed the whole of the lands, including the portions of the two tracts which extended into Hamilton's plantation; and which he, and his representatives had possessed and cultivated continuously, before and ever since they were surveyed, &c.

The bill further avers, that the line agreed upon as aforesaid, was always recognized and observed by Carrington, during his life, and by his heirs and legal representatives, after his death; and that it was the intention of Carrington to convey the lands by the deed of trust, subject to said agreement, and that such intent was manifested by the fact that he only conveyed his "right, title, and estate therein," without any express warranty; the true intent and meaning of the deed of trust, as understood by the parties thereto, being that Carrington conveyed his plantation, &c., lying north of Hamilton's; and that neither of the parties intended or believed that any part of Hamilton's plantation was conveyed by the trust deed; and that Fowlkes did not, at the time the deed was executed, believe or have the remotest idea that he thereby obtained or secured a lien upon any part of the lands, included within Hamilton's inclosure.

That in the summer of the year 1845, Hamilton died, having bequeathed his estate to complainants, one of whom had duly qualified and obtained letters as his executor, and taken possession of his plantation, for the purpose of paying his debts, &c., according to the provisions of his will, &c. That after Fowlkes had purchased the plantation of Rust, he paid the amount due upon the obligations given by Carrington to the State, for the *N. E. qr. of sec.* 3, and obtained the Governor's deed therefor, reciting Carrington's location and purchase thereof, and purporting to be made to Fowlkes, in consequence of the sale by the administratrix to Rust and of the conveyance of Rust and wife to Fowlkes, and the payment by him of the purchase money to the State. The deed of the Governor bears date August 3d, 1846.

That the fence dividing the two plantations had remained in

the same position it occupied when it was established as the permanent line by the agreement between Carrington and Hamilton, and all the lands south of the fence, and included within the plantation of Hamilton, had from thence continuously remained in the uninterrupted possession of Hamilton, or his executor, and a crop had been annually produced thereon by them: and that a portion of the *W frac. half* of the *N. E. qr. of sec.* 2, purchased by Hamilton, as above stated, was at the date of the agreement, and had continued since to be included in Carrington's plantation, and had been possessed and cultivated by Fowlkes ever since he obtained possession of said plantation.

The bill further alleges, that Fowlkes had refused to recognize or perform the agreement made between Carrington and Hamilton, pretending to be an innocent purchaser of the lands for a valuable consideration, without notice, &c., but complainants charge, that before he acquired any title to, interest in, or lien upon said lands, or entered into negotiation therefor, he, or his agent, well knew, or had reason to believe, that the lands claimed by complainant, were in the actual, uninterrupted, and undisputed possession, occupancy, and cultivation of Hamilton. That Fowlkes, or his agent, had been upon both of said plantations, had seen or knew where the dividing fence was situated, and knew, or had reason to believe that the plantation on the south side of the fence was possessed, claimed, and cultivated by Hamilton.

That in consequence of the lands in said Lost Prairie being valuable, and there being other planters, who had in like manner opened farms in that neighborhood before the lands were surveyed, between whom similar difficulties had arisen, which had been adjusted by similar agreements, it was a notorious fact, generally known and understood throughout that section of country, that such agreement had been entered into between Carrington and Hamilton, and that said fence was the established line, and that if any part of the plantation of one had been, or should be entered by the other, he would be entitled to have the same

conveyed to him, upon the payment of the entrance money; and that Fowlkes, or his agent, before acquiring any title to, or lien upon the lands, had notice of such agreement, or had good reason to believe that it existed, &c., and that even if Fowlkes did not have such notice, he did not, when he acquired such title or lien, think or believe that Carrington's plantation extended south of the dividing fence, or that he, by any conveyance from, or under Carrington, acquired any interest in, or lien upon the lands south of the fence, and within the enclosure of Hamilton.

A plat of a survey of the lands is exhibited with the bill, showing the dividing line agreed upon between Carrington and Hamilton, and the quantity and boundaries of the lands entered by each, which extended into the plantation of the other.

That Fowlkes not only refused to perform the agreement aforesaid, but had brought an action of ejectment against the overseer of Hamilton's executor, for the possession of said *N. E. qr. of sec.* 3, and, on the 9th of July, 1847, obtained judgment by default, and was threatening to bring ejectment for so much of the *N. W. qr. of said sec.* 2, as was south of the line.

The bill further avers, that inasmuch as said lands were situated in the county of *Lafayette*, the Probate Court of Hempstead county had no authority to order the sale thereof by Carrington's administratrix; that the sale was illegal; and the legal title to the lands was in Carrington's heirs.

That part of Hamilton's improvement being upon the said *N. E. qr. of sec.* 3, it could not, under legal regulations, &c., have been entered by Carrington, but for the agreement between him and Hamilton.

That Hamilton, during his lifetime, was ready and willing, on his part, to perform said agreement, and his devisees and representatives had also been, were still, and offered in the bill to perform the same specifically, &c. That Fowlkes, though requested so to do, had refused, &c.

The bill prays that an account be taken of the cost of the lands

entered by Carrington and Hamilton, under the agreement, with an offer and tender of the amount which may be found due from Hamilton, and that the contract may be specifically performed.

A guardian *ad litem* was appointed for Carrington's minor heirs, and a formal answer interposed for them.

The answer of Fowlkes admits that Hamilton and Carrington settled, opened, and cultivated adjoining plantations upon the unsurveyed public lands in Lost Prairie, which were, and continued to be separated by a dividing fence, until their deaths; and were cultivated by them respectively, and those holding under them; and that each of them claimed to be the owner of, and to hold title to his plantation, against all persons except the United States. That after the lands were surveyed, such was the form of their plantations, that neither Hamilton nor Carrington could enter all the lands included within their respective plantations, according to the subdivisions, without purchasing some portion of a tract extending into the plantation of the other.

"The defendant has been informed, and believes it to be true, but does not know the same of his own knowledge, and does not admit the same to be true," that Carrington and Hamilton made, and entered into the agreement, in reference to the purchase of the lands, stated in the bill; and that, on the 8th day of May, 1842, they executed the written contract and agreement exhibited with the bill, but he insists that it was not such a contract for the sale of lands, &c., as Hamilton in his lifetime, or the defendant, could be required to execute and perform.

He had been informed, believed it to be true, but did not admit it, that at the same time another written agreement was executed by Carrington and Hamilton, similar to the one exhibited with the bill, in which the covenants to convey were made on the part of Hamilton, but he insists that they were not mutual and dependant, constituting but one contract, as alleged in the bill, but were separate and distinct agreements, &c.

He admits that Carrington did purchase of the United States, and obtain title to the *N. E. qr. of sec.* 2, at $1 25 per acre; and

contracted with the State for the *N. E. qr. of sec.* 3, at $2 00 per acre; but whether he made these purchases in pursuance of said agreement, defendant has no knowledge, information, or belief, other than what is contained in the bill.

He positively denies, that at the time Carrington and wife executed the mortgage to him, he knew, or had been informed, or had any reason to believe, that any such contract or agreement, as that alleged in the bill, had been made or executed between Carrington and Hamilton, in relation to the said *N. W. qr. of sec.* 2, and the *N. E. qr. of sec.* 3, as alleged in the bill, or that any part, or portions of said *sections two and three*, were in the plantation of Hamilton, or on the south, or any other side of any dividing line agreed upon between Carrington and Hamilton; or that Hamilton then had, or pretended to hold any claim of any nature or character whatever, to the said *N. E. qr. of sec.* 3, and the *N. W. qr. of sec.* 2.

Admits that it may be true that Hamilton purchased the title to the *W. frac. half* of the *N. E. qr. of sec.* 2, but knows nothing of his own knowledge, and does not admit it to be true; but whether Hamilton purchased said tract, in pursuance of said supposed contract, defendant had never been informed and did not know, except from the statements in the bill.

Denies at the time he received the mortgage from Carrington and wife, he knew, or had been informed, or had any reason to believe, that the supposed agreement mentioned in the bill, had been made or executed between Hamilton and Carrington, in relation to the last named tract of land.

Admits the execution of the mortgage or trust deed, to him, by Carrington and wife; the death of Carrington, the grant of administration to his widow; the order of the Probate Court of Hempstead county, for the sale of Carrington's interest in the mortgaged property, to pay his debts, and the sale and conveyance thereof to Rust, as alleged in the bill.

Admits that on the 8th June, 1846, he purchased of Rust the plantation and slaves specified in the mortgage, and took the quit-

claim deed of Rust and wife therefor, entered into possession thereof, and had since held possession of the same, "except so far as certain portions of said *sections two* and *three* were adversely held by Hamilton in his lifetime, and are now adversely held by complainants." And insists that he is the owner of the whole of said *N. W. qr. of sec.* 2, and the *N. E. of sec.* 3, whether the same were in or out of the Hamilton plantation.

Has not been informed, and does not know whether supposed line charged to have been established by Carrington and Hamilton between their plantations, was always recognized by Carrington during his lifetime, and by his heirs and legal representatives since his death.

Denies that it was the intention of Carrington, in and by said mortgage, to convey said lands to defendant, subject to the supposed agreement, or that such intention is evidenced by the deed; Carrington and wife by the words "grant, bargain, and sell," having expressly covented with defendant, that they were seized of an estate in fee simple in and to said lands, free from incumbrance done or suffered by them.

Denies (again) that at the time the mortgage was executed, he knew, or had ever been informed, or had any reason to believe that any portion or quantity whatsoever, of the said *N. E. of sec.* 2, and the *N. W. of sec.* 3, was in the plantation of Hamilton, or that the same, or any other portion of the land specified in the deed, had been in the possession of, or claimed or cultivated by Hamilton, or those who claim under him; but, on the contrary, defendant avers, that he then believed that Carrington held a good and valid superior legal title to the lands in the said deed specified against all persons, the State of Arkansas excepted; and that he, by said mortgage, obtained and secured a valid lien and charge upon all the lands therein specified.

Admits the death of Hamilton in the summer of 1845, the probate of his will, bequeathing his estate to complainants, and the possession of his plantation, &c., by his executor, &c., as charged in the bill.

Admits that after defendant had obtained from Rust and wife a deed for Carrington's plantation, and paid the State his obligations for the purchase money of the *N. E. quarter section* 3, defendant procured the Governor's deed therefor, as alleged in the bill.

Has no knowledge when the dividing fence, if ever, was agreed upon as a permanent line between the two plantations, nor how long it has occupied its present position. Admits that it was the dividing fence when he took possession of the Carrington place, and had so continued; and that Hamilton, and those holding under him, had annually made a crop on the Hamilton plantation, and had uninterrupted possession thereof, against all persons, as far as defendant knew or believed, until he sued for possession of the *N. E. of* 3.

Admits that he refused to recognize, and insists that he is not bound to execute, the supposed agreement between Carrington and Hamilton; that he is an innocent purchaser, for a valuable consideration, without notice of the supposed agreement, and avers that the mortgage was executed to him to secure a pre-existing debt, &c.

Denies that he, or his agent, had any notice, or reason to believe that the lands specified in the deed, and now claimed by complainants, or any portion thereof, had been, or were in the possession of Hamilton before, or at the time defendant acquired said lien, &c.

Denies that he, or his agent, had been upon the plantations, and seen or knew the locality of the fence, before he acquired title, &c., or that he had any knowledge, information, or belief, that Hamilton was in possession of, or cultivated the plantation on the south side of the fence; or that defendant knew, or had seen, or been informed, where any fence stood or was situated, which had divided, or was supposed to divide the plantations.

Denies all knowledge or information, as to whether other planters in that section had made similar contracts, or that difficulties

of like kind had arisen amongst them, or that the existence of such difficulties and agreements was notorious in the neighborhood, or that it was notorious there or elsewhere, that Carrington and Hamilton had made such agreement, or that the fence was the dividing line between their plantations, as alleged in the bill.

Denies also, that at the time he contracted with Rust for the equity of redemption, or received his conveyance, or paid him the purchase money, he, defendant, knew or had been informed, or received any intimation, or had any reason to believe or suppose that said agreement, or any agreement of the kind, had been made between Carrington and Hamilton, or that any portion of the land extended into Hamilton's plantation, or that any fence was the dividing line between them.

Admits that he had heard that some contract, but of what character he could not ascertain, had been made between Carrington and Hamilton, in relation to some land situated, or supposed to be situated, in or about Prairie.

Avers that he was never informed, or had any reason to believe, that any part or parts of the lands specified in the mortgage, extended into the plantation of Hamilton, until after defendant had purchased of Rust, when Rust, for the first time, informed defendant that a portion of the lands extended into the cultivated enclosure of Hamilton, and Rust then designated to defendant the said supposed dividing fence between the plantations.

Admits that the lands were situated in *Lafayette* county, and insists that if the sale, under the order of the Probate Court of *Hempstead* county, was irregular, defendant had a valid title, as against complainants, by virtue of his mortgage.

Insists that Carrington could have purchased the *N. E. of* 3 of the State, notwithstanding Hamilton's improvement thereon, regardless of said supposed agreement; and that defendant obtained the title from the Governor thereto, without any knowledge that Hamilton ever objected, or intended to object to its purchase by Carrington.

Insists that there is no equity in the bill; claims the benefit of

the statute of frauds, in relation to the agreement between Carrington and Hamilton; that he is an innocent purchaser, &c., and not bound thereby; interposes a demurrer, &c.

The cause was heard on the 1st November, 1850, upon bill and exhibits, answers, replications, and the depositions of Pryor, Crenshaw, and Finn.

The counsel agree, as part of the facts and evidence in the case, that on the 3d of June, 1848, one of the trustees named in the deed of trust from Carrington, (the other having died,) sold the lands and negroes mentioned in the deed, after due advertisement, at public auction, and that Fowlkes purchased at that sale for $15.000

And that after the bill in this case was filed, and process served upon Fowlkes, he filed in Lafayette Circuit Court his bill in chancery against the heirs and representatives of Carrington, setting forth the deed of Rust, and his two purchases, and praying decree for title thereunder, in which case, at October term, 1850, (30th October,) he obtained a decree confirming his title as against said heirs and representatives.

The plat of the survey of the two plantations, exhibited with the bill, shows that 75 20-100 acres of the *N. E. of* 3, and 68 80-100 acres of the *N. W. of* 2, purchased by Carrington, making in all 144 acres, extended across the dividing fence into Hamilton's plantation; and that 42 14-100 acres of the tract purchased by Hamilton, extended across the line into Fowlke's plantation.

Pryor deposed that he had known the two plantations ever since they were first settled by Carrington and Hamilton. His plantation adjoined Hamilton's. He was familiar with the dividing fence. It remained in the same position it occupied in January, 1842—had not been changed.

Hamilton, during his lifetime, and his representatives since his death, held possession of the land south of, and below the fence, and annually cultivated and raised a crop thereon, since January, 1842. Did not know whether Fowlkes, or any one representing him, was on said plantation prior to January, 1845. Be-

fore the survey of the lands in Lost Prairie, it was agreed between Hamilton and Carrington, in the presence of the witness, that said fence was to be the dividing line between their plantations; that if, when the lands came into market, Carrington obtained title to any part of the land included within Hamilton's plantation or inclosure, he was to convey it to him, and if Hamilton acquired title to any within Carrington's enclosure, he was to convey it to him, each paying to the other such sum as the lands should cost. That the reason for making this agreement, was that it was supposed that when the lands were surveyed, one of them could not enter his own improvement by legal subdivisions, without including part of the improvement of the other. An agreement similar to this, for the same reason, was made among most of the planters, who owned improvements in that neighborhood. Could not say whether the existence of these arrangements and understandings was a matter of general notoriety or not, but it was known to all persons having improvements in said prairie. The agreement between Carrington and Hamilton was reduced to writing by the deponent, and is made an exhibit to the bill. A similar instrument was at the same time executed by Hamilton, and delivered to Carrington, with similar stipulations on the part of Hamilton in relation to the lands on Carrington's side of the fence. The agreement exhibited with the bill expresses substantially the understanding between Hamilton and Carrington, and was signed by them in the presence of deponent. The lands in the prairie are valuable.

Crenshaw deposed that he had been acquainted with the two plantations, and the position and course of the fence dividing them, since January, 1842. Had been in charge of the Hamilton place part of the time as an overseer—the fence had not been changed—Hamilton and his representatives had possessed and cultivated the lands south of, and below the fence, ever since January, 1842. It was the general understanding in the neighborhood, that all the planters in said prairie and vicinity, had, before the survey of the lands, entered into agreements that the

fences dividing the farms should be the lines; and if one, in entering his improvement, in consequence of having to take it in legal subdivisions, should take part of the improvement of another, the other should have it. Witness was present when *Jett* made a survey of the said fence in the summer of 1847. He made two surveys, one at the request of Hamilton, and the other at the request of Fowlkes; and the fence then stood as it did in January, 1842, and as it has continued to stand since Fowlkes took possession of the Carrington place. Deponent never heard of any claim adverse to that of Hamilton's to the lands south of the fence, until after Fowlkes took possession of the Carrington plantation. Deponent knew nothing of Hamilton's title, other than that he was in possession.

*Finn* also proves the possession and cultivation of the lands south and below the dividing fence, by Hamilton and his representatives, for and during ten or twelve years prior to the time he deposes. Deponent owned a farm in said prairie before the lands were surveyed. It was generally understood, that such an agreement as that stated in the bill, had been made between Hamilton and Carrington, and it was generally understood that such agreements existed between all the planters in the neighborhood. Deponent had entered a large quantity of land in the said prairie, and when any of his land extended into the inclosures, or upon the improvements of any other persons, he held himself ready, and intended to convey the same to them—held himself ready to comply with the general understanding.

*Fowlkes* had been in possession of the Carrington place for two or three years. Deponent understood from Carrington, before the lands were surveyed, that it was agreed between him and Hamilton, that the fence should be the line between them.

Fowlkes never resided nearer the said prairie than *Spring Hill.* He never had any farm or settlement in the neighborhood, until he took possession of the Carrington plantation. After Carrington's death, Rust was in possession for about a year before Fowlkes took possession, and Fowlkes had a farm in Hempstead

county, not on the river. Prior to his taking possession of the Carrington place, he never had any farm on Red River until that time.

These depositions appear to have been taken 27th October, 1849.

The court was of the opinion that the said agreement was not binding and valid, as between the original parties thereto, for the want of mutuality; and that there was not sufficient proof of notice, to charge Fowlkes therewith, and dismissed the bill for want of equity.

Complainants appealed to this court. The validity of the contract between Hamilton and Carrington, and the sufficiency of the proof of notice to charge Fowlkes therewith, were the only questions submitted to the chancellor, and other matters were left to be settled by reference to the master, should the decree be in favor of complainants.

1. The first question to be determined, is whether the agreement between Carrington and Hamilton, was valid and binding upon them, and of a character that could have been enforced between them in equity?

Where a contract respecting real property is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it, as it is for a court of law to give damages for the breach of it. And, generally, it may be stated, that courts of equity will decree a specific performance, where the contract is in *writing*, is *certain*, is *fair in all its parts*, is for an *adequate consideration*, and is *capable* of *being performed;* but not otherwise. 2 *Story's Equity*, *sec.* 751. The remedy must, also, be *mutual* and *reciprocal*. *Ib.*, *sec.* 723, 790. The form of the instrument by which the contract appears, is wholly unimportant. *Ib.*, *sec.* 751.

It is understood, of course, that there are verbal contracts respecting the sale of lands, which may be enforced in equity, notwithstanding the statute of frauds, but the consideration of such

contracts, is not now involved, the agreement in this case being in writing.

*The contract must be certain* The written instrument must contain all its terms, so that the court may not be left to ascertain the intention of the parties by mere conjecture or guess, or to supply any of the terms of the contract by a resort to parol evidence, because the admission of such evidence would let in all the mischiefs intended to be guarded against by the statute of frauds. As, for example, where the memorandum of the contract does not show the price to be paid for the land, this omission, it seems, cannot be supplied by parol. *Parkhurst vs. Van Cortlandt*, 1 *John. Ch. Rep.* 280; 2 *Story's Equity, sec.* 767; *Blagden vs. Bradbear*, 12 *Vesey Jr.* 467.

Chancellor KENT, in *Parkhurst vs. Van Cortlandt*, said: "Unless the essential terms of the bargain and sale can be ascertained from the writing itself, or by a reference *contained in it*, to *something else*, the writing is not a compliance with the statute of frauds."

The master of the rolls, in *Blagden vs. Bradbear*, said: "The proposition, that the auctioneer's receipt may be a note or memorandum of an agreement, within the statute, is not denied: but for that purpose, the receipt must contain in itself, or by *reference to something else must show*, what the agreement was."

In *Prater vs. Miller*, 3 *Hawks Rep.* 628, the rule as to certainty in the contract, is stated thus: "A court of equity can afford no relief on a contract or agreement which is uncertain; by this is meant, however, uncertainty in its *terms:* for when an agreement to do a thing, either in itself or by reference to any other rule, furnishes the means of ascertaining the thing, or if the thing be not *now* certain, or capable of certainity, yet if a rule be given by which it may hereafter be rendered certain, equity will interfere."

Testing the contract between Carrington and Hamilton by these rules, has it the requisite certainty?

The quantity of land to be conveyed by one to the other, is

not stated in the agreement, but the contract furnished the rule by which the quantity could be easily ascertained in future. The fence was agreed upon as the dividing line between the two plantations. By reference to it, and the legal subdivisions of the public surveys, the number of acres of any tract purchased by one, which extended across the fence into the field of the other, could be readily determined, and thus the quantity of land to be conveyed by one to the other, under the terms of the contract, ascertained.

Nor is the *price* to be paid by one, for land conveyed to him by the other, stipulated in the contract, but it was agreed that it should be transferred at *cost*, by which the parties doubtless meant the entrance money, the lands being public, and thus the contract furnished the criterion by which the price could be easily determined.

The conveyances were to be executed by one to the other, after the entries, on payment of the purchase money, or cost of the land; the *time* of making such payment is not agreed upon, but the rule is, that where a definite time is not fixed for doing a thing agreed to be done, the court of equity will require it to be performed in a reasonable time. When it is said that parol evidence cannot be resorted to, to supply omissions in the *terms* of a written contract, it is not meant that such evidence is excluded as to the nature, locality, and circumstances surrounding the *subject matter* of the *contract*, and the situation of the parties entering into it. A full knowledge of these is often necessary, as in this case, to enable the court properly to interpret the contract, and ascertain the *intention* of the parties. 1 *Greenlf's. Evidence, sec.* 286, 287.

The agreement in this case, when interpreted in the light of the surrounding circumstances, existing at the time it was entered into by the parties, as established by the pleadings and evidence in the cause, contains no such want of *certainty* in its *material terms*, as to preclude a court of equity from enforcing its performance.

*The contract must be fair in all its parts.* There is nothing in any feature of the agreement between Carrington and Hamilton, that does not appear to be fair, reasonable and just. The importance of, and the national and social advantages arising from, the opening, subduing and settlement of the uninhabited and wilderness districts of this country, and the hardships, deprivations and difficulties attending such settlements, have induced the policy of encouraging by legislation, the pioneer in the appropriation and occupancy of the public lands. Carrington and Hamilton, it seems, settled, opened, and put into cultivation, adjoining plantations, upon unsurveyed lands. Finding, when the lands were surveyed, that each could not enter the lands embracing his own improvement, by the legal subdivisions, without including a portion of the improvement of the other, they agreed upon a fence separating their places, as the dividing boundary line, and mutually covenanted that each would purchase, when the lands came into market, such tracts as his improvement covered, and then convey to the other at cost, so much of any such tract as extended into his plantation. It seems to us, that this agreement was fair, just, and highly commendable, and tended to prevent rivalry, contention, disputation, and perhaps litigation between them in their efforts to purchase and secure the lands embraced by their respective plantations.

"An agreement," says Judge STORY, (2 *Equity Com., sec.* 769,) "to be entitled to be carried into specific performance, ought (as we have seen) to be *certain, fair*, and *just, in all its parts.* Courts of equity will not decree a specific performance in cases of fraud or mistake, or of hard and unconscionable bargains; or where the decree would produce injustice; or where it would compel the party to an illegal or immoral act, or where it would be against public policy; or where it would involve a breach of trust; or where a performance has become impossible; and generally, not in any cases where such a decree would be inequitable, under all the circumstances."

It is not perceived that the agreement between Carrington

and Hamilton is subject to any of the objections above enumerated.

Moreover, *the contract must be upon an adequate consideration.* By which is meant, that it must be founded upon a valuable, or at least a meritorious consideration, for courts of equity will not carry into specific execution any merely *nude pacts* or *voluntary* agreements, not founded upon some valuable or meritorious consideration. 2 *Story Eq.*, *sec.* 787.

It will hardly be contended, that the situation of the parties, the motives which induced them to enter into the contract, as above stated, the advantages arising to each therefrom, and the inconvenience which might have resulted to them had they not made such agreement, do not furnish a sufficiently meritorious consideration to uphold it.

*The remedy upon the contract must be mutual.* It is manifest, from the deposition of Pryor, that the two instruments of writing, executed by Carrington and Hamilton, at the same time, in reference to the same subject matter, constituted but one contract, and contained mutual and reciprocal covenants to be performed by the parties. Each agreed to convey to the other, such portion of any tract of land entered by him as might extend into the plantation of the other, at cost; and, in this respect, there could be no pretence that the remedy upon the contract would not be mutual.

It is argued by the learned counsel for Fowlkes, that "in the present case there was no contract on Hamilton's part to pay for the land, and no time of payment fixed. If, when surveyed, and the lines run, it had been found that Carrington had title to only so much of the land within Hamilton's fence, as was swampy, and of little or no value, he could not have compelled Hamilton to pay for it. If it had cost him $50 an acre, the latter could have declined paying that price. If that be so, the contract is not mutual."

In reference to the time of payment, we have already remarked, that where no time is fixed for the doing of a thing agreed to

be done, equity will compel its performance within a reasonable time.

It may be further remarked, in reference to this part of the argument of the counsel, that an application to compel the specific performance of a contract is addressed to the sound discretion of the chancellor, and that each case must rest upon its own peculiar facts, (2 *Story's Equity*, *sec.* 742,) and is not to be decided by imaginary or supposititious cases presenting hardships. If the facts in this case were, as it is supposed by the counsel they might have been, the argument of want of mutuality would possess some force; but no such state of case is here presented.

It is manifest that the primary object of the parties, in making the contract, was to secure to each the unobstructed privilege of entering the lands embraced by his plantation, and then to convey to the other so much thereof as extended into his enclosure, and was cultivated by him, or designed for cultivation, and which he was desirous to have, willing to pay the entrance money for, and impliedly bound himself, by the terms of the contract so to do, on the making of the conveyance to him.

The validity of agreements, somewhat similar to the present, has been several times recognized by the decisions of this court. See *Cain vs. Leslie*, 15 *Ark. Rep.* 312; *Baker vs. Hollobaugh*, *ib.* 322; *Dickson vs. Richardson*, *January term*, 1855.

In *Zane's Devisees vs. Zane*, 6 *Munford* 406, the specific performance of a contract resembling the one now under consideration, in several of its important features, was decreed against some of the objections urged against the validity of the contract in this case.

All the features of the contract considered in connection with the surrounding circumstances established by the pleadings and evidence, we think it was valid and binding upon the original parties thereto, and such as a court of equity might well have enforced between them.

2. Do the pleadings and evidence make such a case, as to entitle the devisees of Hamilton to a decree for a specific perfor-

mance of the contract by Fowlkes, who holds the lands under Carrington?

Though the agreement was not upon the public records of the county where the land was situated, yet, if Fowlkes became the incumbrancer or purchaser thereof, with notice of the agreement, it is well settled that he is bound thereby.

On the other hand, it is equally well settled, that if he was an innocent incumbrancer or purchaser, for a valuable consideration, in good faith, without notice of the agreement, he is in no way to be bound, nor is he to be prejudiced thereby.

These are familiar rules of law, requiring no reference to authority to sustain them.

It is alleged in the bill, but positively denied, and not proven, that Fowlkes purchased with notice of the existence of the agreement.

It is also alleged that Hamilton and his representatives were in the actual and open possession of the land in controversy; that it was within his inclosure, constituted part of his plantation, and was annually cultivated by him and his representatives from a period anterior to the date of the agreement, until the filing of the bill. This is not denied by the answer of Fowlkes, and if it were, it is abundantly proven.

It is moreover alleged, positively denied, and not proven, that when Fowlkes obtained the mortgage from Carrington, and when he purchased the equity of redemption of Rust, he knew, or had good reason to believe, that Hamilton and his representatives were so possessed of the land.

It is submitted as a legal proposition by the counsel for the appellants, that Hamilton being in the actual and open possession of the land, is sufficient, though Fowlkes might not in fact have known it. That he was bound by law to take notice of Hamilton's possession, and enquire by what title he held the land. This proposition is disputed by the counsel for Fowlkes, and is the important issue in the cause.

The English, and the current of American authorities, warrant

the conclusion that if Fowlkes had *known* that Hamilton was in the actual and open possession of the land, that it constituted part of his plantation, and was, and had been for years, cultivated by him, this would have been sufficient to put Fowlkes upon inquiry, as to the nature and extent of Hamilton's title; and therefore, constructive notice of such title as he had. *Taylor vs. Stibbert*, 2 *Vesey Jr.* 438; 1 *Story's Equity*, *sec.* 400; *Daniels vs. Davidson*, 16 *Vesey Jr.* 249; *Haubury vs. Litchfield*, 2 *Mylne & Keen* 629; *Hiern vs. Hill*, 13 *Vesey Jr.* 114; *Flagg vs. Mann*, 2 *Sumner* 555; *Hewes vs. Wiswell*, 8 *Greenl.* 94; *Hardy & Talburtt vs. Summers and wife*, 10 *Gill & John.* 316; *Governor vs. Lynch*, 2 *Paige* 300; *Chesterman vs. Gardner*, 5 *John. Chan. R.* 29; *Tuttle vs. Jackson*, 6 *Wend.* 213; *Farnsworth vs. Childs*, 4 *Mass.* 639, and other cases cited by the counsel for both parties.

In *Flagg vs. Mann*, Judge STORY said: "I admit that the rule in equity seems to be, that where a tenant or other person is in possession of the estate at the time of the purchase, the purchaser is put upon inquiry as to his title; and if he does not enquire, he is bound in the same manner as if he had enquired, and had positive notice of the title of the party in possession." He says, however, that the American courts have been reluctant to give effect to this doctrine of constructive notice from possession, even in its most limited form, referring to *Scott vs. Gallagher*, 14 *Serg. & R.* 333; *McMechan vs. Griffing*, 3 *Pick. Rep.* 149; *Hewes vs. Wiswell*, 8 *Greenlf.* 94, and further remarking that "These cases do, as I think, admonish courts of equity in this country, where the registration of deeds, as matters of title, is universally provided for, not to enlarge the doctrine of constructive notice, or to follow all the English cases on this subject, except with a cautious attention to their just application to the circumstances of our country, and to the structure of our laws." And he concludes that the purchaser is only put upon inquiry as to the title of the party in possession, and not as to the title of others, under whom he may hold, which it seems, from other cases cited above, is the correct rule.

Mr. KENT says: "It is indeed difficult to define, with precision, the rules which regulate implied or constructive notice, for it depends upon the infinitely varied circumstances of each case. The general doctrine is, that whatever puts a party upon inquiry amounts, in judgment of law, to notice, *provided the inquiry becomes a duty*, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the *exercise of ordinary diligence* and understanding. There is, also, this further rule on the subject, that the purchaser of an estate, in the possession of tenants, is chargeable with notice of the extent of their interests as tenants: *for having knowledge of the tenancy*, he is bound to inform himself of the conditions of the lease." 4 *Com.* 179.

But to return to the point directly at issue: was it necessary to show that Fowlkes had *actual knowledge of the possession* of Hamilton?

In *Buck vs. Halloway's Devisees*, 2 *J. J. Marsh.* 180, Judge UNDERWOOD said: "The only sensible rule is, that actual residence upon the land, is notice *to all the world* of every claim which the tenant may legally assert in defence of his possession. It was in consequence of such residence, that we were induced to regard Buck as a purchaser with notice. Notice in such cases is a legal deduction from the fact of residence."

Nothing is said about Buck's knowledge of such possession, but the remark of the judge, that residence upon the land was "*notice to all the world*," would seem to imply that he considered the application of the rule to be general.

In *Knox vs. Thompson*, 1 *Littell* 351, the court said: "It is proven, that when the first deed was made to Thompson, and for some time previous thereto, Knox had part of the land in actual cultivation and possession, and has continued that possession and cultivation ever since. And were there no other evidence of notice, the mere circumstance of Knox being possessed of, and cultivating the land, would be sufficient to justify the inference of Thompson knowing of his claim before the date of his deed: *for*

*it is not to be presumed that when about to purchase, Thompson failed to ascertain whether or not the land was under cultivation*, and after finding Knox in the possession, he would naturally be induced, from the connexion that exists between the title and possession of land, to enquire for Knox's claim. If, however, after knowing, *as he must be presumed to know*, that Knox had the possession and cultivation of the land, Thompson failed to enquire for his title, he ought to be subject to all the consequences of a purchaser with notice; for the fact of the land being in the cultivation of Knox, was sufficient to put Thompson on the search for his claim, and any circumstance that puts another on the search, is sufficient to convict him of notice."

In *Barbour vs. Whitlock*, 4 *Monroe* 196, Chief Justice BIBB said: "Possession under an equitable claim, infects the purchaser of the legal title with notice of that equity." This rule is stated in general terms, but the facts of the case show that the ancestor of Barbour knew of the possession of Whitlock, and those under whom he held. See, also, 1 *Monroe* 201.

In *Dixon & Starkey vs. Doe ex. dem. Lacoste*, 1 *S. & M.* 107, Chief Justice SHARKEY said: "Possession by the vendee, is evidence to creditors and purchasers of the conveyance; or, at least, is so strong a circumstance that it is now uniformly regarded as sufficient evidence of notice. This results necessarily from the nature of the act, it being a substitute for livery of seizin." He cites 10 *Mass. R.* 60; 6 *Wend.* 213; 11 *Wend.* 242; 3 *Paige* 421; 10 *Vermont* 452.

To the same effect are *Wilty vs. Hightower*, 6 *Smed. & Marsh.* 345; *Walker vs. Gilbert et al.*, 7 *ib.* 456; *Walker vs. Gilbert et al.*, 1 *Freeman's Chan. Rep.* 85.

In *Jenkins vs. Bodley*, 1 *Smed. & Marsh. Chan. Rep.* 338, the bill charges open and notorious possession. The defendant admits that such was true, but denies that he knew it until after he became the purchaser. The chancellor said: "That denial of *knowledge* cannot impair the effect of the fact of possession. It seems now to be very generally admitted, that where a person is

in open and actual possession of land, even though he claim by an equitable title, that possession is sufficient to put a subsequent purchaser upon inquiry, as to the actual rights, and the nature of the claim of such occupant; and is constructive notice of the nature and extent of those rights."

In *Chesterman vs. Gardner*, 5 *John. Chan. Rep.* 30, Chancellor KENT states the doctrine in general terms, that possession of a tenant is notice to a purchaser of the actual interest of the tenant, and of the extent of that interest. But the facts of the case show that the purchaser (assignee of a mortgage) knew of the possession of the tenant.

In *Governeur vs. Lynch*, 2 *Paige* 300, Chancellor WALWORTH said: "If a vendee is in possession of land, under a contract to purchase, a subsequent purchaser or mortgagee has constructive notice of his equitable rights, and takes the land subject to his prior equity." It does not appear from the report of this case whether the subsequent incumbrancer had knowledge of the possession or not.

In *Grimstone vs. Carter*, 3 *Paige* 423, the vice chancellor recognizes the doctrine that possession is constructive notice, or sufficient to put the purchaser on inquiry; but then it appears that the purchaser had knowledge of the possession.

In *Tuttle vs. Jackson*, 6 *Wend.* 213, the same doctrine is recognized, and nothing is said about knowledge of the possession.

In *Parks vs. Jackson*, 11 *Wend.* 463, Senator SEWARD said: "Was not their possession notorious: and is it not a well settled principle of law, that possession of land is *notice to all the world*, requiring those who would concern themselves in it, or litigate for it, *to take notice not only of the possession itself*, but of the right, title, and interest, whatever it may be, of the possessor?" See, also, 5 *Barb. Chan. Rep.* 316.

In *Norcross exrx. vs. Widgery*, 2 *Mass. Rep.* 506; *Reading of Judge Trowbridge*, 3 *Mass. Rep.* 575; *Marshall vs. Fish*, 6 *Mass.* 30; *Prescott vs. Heard*, 10 *Mass. Rep.* 59; *McMechan vs. Griffing*, 3 *Pick. Rep.* 155; *Farnsworth vs. Childs*, 4 *Mass.* 639;

*Dudley vs. Sumner*, 5 *Mass. R.* 457, *and* 1 *Pick. Rep.* 174, it is held, that where one becomes the purchaser of land, enters upon it, and follows the entry by a visible improvement of the land, and taking of the profits thereof, it is such an evidence of an alteration of the property, as will amount to implied notice thereof. In some of these cases, it appears from the facts reported, that the subsequent purchaser had knowledge of the possession, but none of the cases are made to turn upon the fact of such knowledge.

In *Miles vs. Langley*, 1 *Russ. & Mylne* 39, the MASTER OF THE ROLLS seems to have made the effect of possession turn upon the knowledge of the purchaser; but we have been able to find no other case where it was held that *open*, *actual*, and *visible* possession of land, was insufficient to put subsequent purchasers upon inquiry, as to the title of the possessor, unless an actual knowledge of such possession was brought home to them: and after a careful examination of the authorities cited by the counsel for both parties, this branch of the subject may be concluded by a quotation from the opinion of Judge GOLDTHWAIT, in *Scroggins vs. McDougald et al.*, 8 *Alabama Rep.* 384. He says: "The admissions of the counsel for McDougald, as well as the evidence, &c., establish that the complainant and Bagly, under whom she claims, had the actual possession of the lot at the time when McLean assigned the certificate of the commissioners to McDougald, by means of which he subsequently obtained the title. The only question, therefore, in this aspect of the case, is whether the possession so held was a sufficient matter to put the defendant, McDougald, on inquiry as to the title of the occupants, and thus affect him with notice, *although in point of fact, he had no information that the possession was thus held.* It is laid down very generally in the books, that whatever is sufficient to put the purchaser upon inquiry, is good constructive notice. *Atk. on Mark. Titles*, 573; 2 *Sug. on Vend.* 290. It is difficult to conceive what circumstance can be more strong to induce inquiry, than the fact that the vendor is out of possession and another is in.

Accordingly it has been held, that information to a purchaser, that a tenant was in possession, is also notice of his interest. 13 *Vesey* 120. And if any part of the estate purchased is in the occupation of a tenant, it is considered full notice of the nature and extent of his interest. *Atk. on Mark. Titles*, 574. In the American courts, the rule is very generally recognized, that if a vendee is in possession of lands, a subsequent purchaser or mortgagee has constructive notice of his equitable right. 1 *Monroe* 201; 4 *Litt.* 317; 5 *John. Chan.* 29; 2 *Paige* 300; 3 *ib.* 421. As the complainant in this case was in the occupancy of the land at the time when McDougald acquired it by purchase or transfer from McLean, *it is immaterial whether knowledge* of the *occupancy can be traced to him, because the law casts on him* the duty of *ascertaining how that fact is.* If a different rule is admitted, *a purchaser residing at a distance from the land, would rarely be charged with notice on this account.*

Fowlkes admits that he had heard that there was some agreement between Hamilton and Carrington, about their lands in Lost Prairie, but says he could not ascertain the character of it. He does not state of whom he made inquiry. Had he enquired of Carrington, Rust, or Hamilton, perhaps he might have obtained correct information as to the nature of the agreement.

Vague and indeterminate rumor, or suspicion, is quite too loose and inconvenient in practice to be admitted to be sufficient; (1 *Story's Equity, sec.* 400,) but the fact that Fowlkes had heard that some agreement existed between Carrington and Hamilton, the character of which he perhaps might have ascertained by application to the proper source, taken in connexion with the fact that Hamilton was in the open and visible occupancy and cultivation of the land, must be deemed legally sufficient to put him upon inquiry, and charge him with constructive notice of Hamilton's equity. Had he, in the exercise of ordinary prudence—such as the law expects of every one about to purchase a valuable estate—gone upon the premises, inasmuch as the cultivation of Carrington extended to the dividing fence on the north, and

the cultivation of Hamilton to the same fence on the south, it is but natural that he would have enquired whether the fence was the boundary of the land which he was about to purchase. It is not unreasonable to expect a purchaser to enquire whether his vendor or another is in possession of land which he is about to purchase, and to pay some attention to the extent and lines of the estate.

Moreover, the mortgage to Hamilton purports to convey but his right, title, and interest in the land, and although the lands are described by the legal subdivisions of the surveys, the number of acres conveyed is left in blank. The deed from Rust and wife to Fowlkes, is but a quit-claim. There was nothing, therefore, in either conveyance calculated to induce Fowlkes to dispense with inquiry as to the extent of Carrington's title.

Upon all the facts of the case, we think it is but just and equitable, that the decree of the court below should be reversed, and the cause remanded, with instructions to the court to ascertain the quantity of land to be conveyed by one to the other, state an account between the parties, and decree a specific performance of the contract, in accordance with the prayer of the bill.

16 377;
72 303;

## GRIMMETT AS GUARD. &C. VS. WITHERINGTON ET AL.

The domicil of the father is in legal contemplation, the domicil of his minor children.

Where a father was domiciled, and died in Arkansas, and a guardian was here appointed for his minor children, who by law was entitled to the care and custody of them, they cannot legally change their domicil, so as to divest their guardian of the care and custody of them.

And if such minors remove to another State, and a foreign guardian is there appointed for them, such foreign guardian, without proof that the minors were legally domiciled in such State, cannot recover their property from the domestic guardian, nor their distributive share of their father's estate from his administrators.

But where minors are legally domiciled in a foreign State and a guardian is duly appointed for them there, the Probate Court of this State would have the power, under the act of 12th January, 1853, to order an administrator, having in his hands their distributive share of an estate, to pay the same over to the guardian.

*Appeal from the Circuit Court of Union County.*

Hon. SHELTON WATSON, Circuit Judge.

HARDY & CARLETON, for the appellants.

LYON, for the appellees.

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

In October, 1853, Maclin Grimmett filed a petition in the Probate Court of Union county, representing that he had been appointed by the County Court of Jasper county, in the State of Texas, guardian of Newton S., Alvin M., Lucetta C., and Henrietta R. Witherington, minor heirs of James Witherington, deceased, who died intestate in said county of Union. That he, the petitioner, was the husband of Catherine L., daughter of said James Witherington.

That Augustus L. Witherington, and William A. Ring, were the administrators of said James Witherington, deceased. That the remaining heirs of said James Witherington were four married daughters, whose names, and the names of whose husbands are stated. That several of the heirs had received from their deceased father, certain sums by way of advancement, which are set forth. That the debts of the deceased had beed paid, and that upon the last settlement of the administrators, with said Probate Court, there remained a balance in their hands of $6047 35.

Prayer, that the court order the administrators to pay over to the petitioner, the amount due him as such guardian; and also, the sum due to him in right of his wife, Catherine L.

The petitioner accompanied his petition with a duly certified transcript of the record of the County Court of Jasper county, in the State of Texas, showing his appointment as guardian of said minor heirs.

From this transcript it appears, that on the 30th day of August, 1852, Grimmett presented his petition to said County Court of Jasper county, Texas, praying to be appointed guardian of the persons and estates of Alvin M., Lucetta C., and Henrietta R. Witherington, minors and heirs of James Witherington, deceased; and it appearing to the satisfaction of the court, that said minors were under the age of fourteen years, and legal notice of said application having been given, and there being no exceptions to the petition, it was ordered by the court that Grimmett be appointed guardian of the persons and estates of said minors, on his entering into bond, with good and sufficient securities, in the sum of six thousand dollars, for the faithful performance of his duties, &c. Whereupon, Grimmett executed the bond required, which was approved; he also made the affidavit required, and the court ordered letters of guardianship to be issued to him.

It further appears from the transcript, that on the same day, Newton S. Witherington, a minor, over the age of fourteen years, appeared before said County Court of Jasper county, and made

choice of Grimmett as guardian of his person and estate; and upon Grimmett entering into bond, and making the affidavit required, he was appointed guardian of said Newton S., and letters ordered to be issued to him accordingly.

On the hearing of the cause in the Probate Court of Union county, the court rendered the following decree: "Came Maclin Grimmett, in the right, and as guardian, &c., and presented his petition, praying an order of distribution of said estate, and an order authorizing him to remove the portion of said minor heirs, &c., that should be adjudged to them in said distribution, to the county of Jasper, in the State of Texas, and thereupon filed and exhibited in open court a regularly certified transcript of his appointment and qualification as guardian of said minors, in the county and State aforesaid, where said minor heirs reside: Whereupon, John C. Ring, as domestic guardian of said minors, appeared in open court, and consented that an order and decree of this court should be entered according to the prayer of petitioner; but said Augustus L. Witherington, one of said administrators, objected to the right and authority of petitioner to sue as foreign guardian of said minor heirs, because the said John C. Ring is their regularly appointed guardian in this State; and, after argument of counsel, the court finds that petitioner's right and authority to prosecute this suit in right of his wife, and as foreign guardian of Newton S. Witherington, is sufficient: and it appearing, that under a former order of this court, the slaves belonging to said estate, were ordered to be sold for the purpose of distribution, &c., &c., and that the proceeds of sale, &c., amount to the sum of," &c., &c.

The decree then proceeds to state the sum to be distributed, and the amount ascertained by the admissions of the parties to have been received by the married daughters, by way of advancement, and orders the administrators to pay over, for the benefit of each distributee, the share of the fund ascertained to be due to him or her. And, particularly, that they pay over to Grimmett, in right of his wife, the sum allotted to her; and, also,

that they pay over to him, as foreign guardian of Newton S. Witherington, the portion of the fund due to him, and that he have privilege, as such guardian, to remove the same to Jasper county, Texas.

But it was further decreed, that the administrators pay over to John C. Ring, as domestic guardian of the minor heirs, Lucetta C., Alvin M., and Henrietta R. Witherington, the portions of the fund distributed to them; and Grimmett excepted to so much of the decree, as withheld from him, as such foreign guardian, the shares of these three minors, and took a bill of exceptions, setting out the evidence.

It does not appear, from the bill of exceptions, that any evidence was introduced upon the hearing, but the transcript showing the appointment of Grimmett, as guardian of said minor heirs in Texas; the account current of the administrators showing the balance in their hands, and the proceedings for the sale of the slaves for distribution; together with the admissions of the parties in reference to the sums received by the heirs, to whom advancements had been made.

Grimmett appealed from the decree of the Probate Court, to the Circuit Court of Union county; where, on inspection of the transcript, the decree was affirmed, and he appealed to this court.

It is insisted for the appellant, that under the act of 12th January, 1853, (*Pamph. acts* 1852, 1853, *p.* 206,) he had the right to recover and remove to Texas, the money due his wards from the estate of their father, and that the Probate Court should have so decreed. On the other hand, it is contended for the appellees, that the domestic guardian had the preference to receive and retain the money in his hands.

It may be fairly inferred from the record, that James Witherington was domiciled, and died in Union county, Arkansas; that the Probate Court of said county granted letters of administration to two of the appellees, upon his estate, and appointed the other appellee, Ring, guardian of his minor children, whom

it may be legally supposed were also, at the time, domiciled in Union county; the domicil of the father being, as a general rule, the domicil of his minor children, according to law. How, or by what authority, these minors got into Texas, does not appear from the record.

By the common law, a foreign guardian can exercise, as such, no rights, or powers, or functions over the property, personal or real, of his ward, which is situated in a different State or country from that in which he has obtained his letters of guardianship. But he must obtain new letters of guardianship from the local tribunals authorized to grant the same, before he can exercise any rights, powers, or functions over the same. *Story's Confl. L.*, *sec.* 499, 504, *a* 2d *Ed.*; *Kraft vs. Wickey*, 4 *Gill & John.* 332.

A person appointed guardian of an infant in one State, is not, by the common law, entitled to recover from an executor, or administrator in another State, a legacy or distributive portion left his ward there, without giving security, and obtaining letters from the proper tribunal, where the legacy or portion is situated. *Morrell vs. Dickey*, 1 *John Ch. Rep.* 153; 4 *Cowen's Rep.*, *note*, *p.* 529.

In *Kraft vs. Wickey*, *ubi sup.*, *Marck* died in Baltimore, leaving an estate, a wife, and minor children. The surviving mother afterwards removed the minors to Pennsylvania, where a guardian was appointed for some of them, who applied to the Orphans Court of Baltimore, to revoke the letters of the domestic guardian, which was done, and on appeal to the court of appeals, the decree was reversed; the court holding, that guardians, like executors and administrators, could only sue in the courts of the country from which they derived their power. That they have no extra-territorial authority as guardians. That the domestic guardian having the property was bound to pay for the maintenance and education of the ward. And the foreign guardian having the custody of the ward, could enforce the fulfilment of this requisition, by an application to the proper tribunal; and

that, in such case, the domestic guardian would be regarded as a trustee, &c.

In this State, some of the inconveniences arising from these principles of the common law, have been remedied by legislation.

Thus, by *sec.* 1, *chap.*, 7, *Digest*, foreign guardians (appointed in any of the States, territories, or districts of the United States,) are empowered to sue as such in our courts.

And by the act of 12th January, 1853, entitled "*An act to authorize and allow foreign guardians to remove from this State the property of their wards.*" (*Pamph. acts*, 1852, 1853, *p.* 203, 204,) it is provided: "That hereafter, it shall be lawful for guardians, appointed in any of the States, territories or districts of the United States, whose wards may have any property within this State, on bringing evidence of his or her appointment, and qualification as such guardian, duly certified and authenticated according to law, to apply to the Probate Court of the county in which such property may be situate, for an order authorizing such guardian to remove said property from this State, to the State, territory, or district, in which such guardian shall have been appointed and qualified as such; and such Probate Court, on being satisfied of the authority of such guardian, shall enter up an order authorizing the removal of such property by such guardian."

Had it been shown to the Probate Court of Union county, that the minors in question were legally domiciled in Texas, and a guardian duly appointed for them there, with sufficient bond and security, the court would doubtless have had the power, and it would have been its duty, under the above statute, to order the administrators to pay over to such guardian the portions of their intestate's estate due to his wards. Or if the property had been in the hands of a domestic guardian who was not legally entitled to the custody of the persons of the minors, the court perhaps would be authorized, on proper application, to order him to turn over to the guardian of their domicil entitled to such custody and care of their persons, any personal effects in the hands of the do-

mestic guardian belonging to them, in order that it might be used by the guardian of their domicil, in their maintenance and education.

But, in this case, we have seen that the father of the minors was domiciled and died in Arkansas; that a guardian was here appointed for his minor children; who, by law, was entitled to the care and custody of them, (there being no proof that their mother survived the father), and that the domicil of their father was, in legal contemplation, the domicil of his minor children.

It does not appear from the record, that any proof was made before the Probate Court, that the domicil of the three minors in question had been legally, or for any good purpose transferred to Texas, or by what authority, or at whose instance they got into Texas.

It is not shown that their mother was living, and removed them to Texas, or that their guardian, desiring them to have the care and attention of their sister, the wife of Grimmett, removed them there, or that any relation, by the approbation of their domestic guardian, transferred their domicil.

They being minors, and it seems of tender years, could not legally change their domicil, so as to divest their domestic guardian of his custody and care of them. *Story's Confl. of Laws*, (*2d Ed.*) *sec.* 505, *a. b. c. and note, at p.* 17; *citing Patinger vs. Wightman*, 3 *Meriv. Rep.* 79, 80.

If minors were permitted to abandon their domestic guardians, and go to other States, or if others, without proper authority, were allowed to draw them away, and become their guardians, many evil consequences to them and their estates might follow.

It may be regarded as a favorable circumstance to the claims of the foreign guardian in this case, that the domestic guardian interposed no objection to the making of the order asked by him of the Probate Court; yet, objection was made by one of the administrators, and no matter by whom the objection was interposed, it was the duty of the court to render the proper decree in the case; and in the absence of any showing in the record that

sufficient evidence was introduced to warrant and require the court to make the order sought by Grimmett, the decree must be presumed to have been proper, and the Circuit Court was not authorized to set it aside.

Such decree, however, would not be a bar to a new application sustained by sufficient evidence. The judgment of the Circuit Court is affirmed.

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## THE STATE VS. MORRILL.

This court has the constitutional power to punish, as for contempt, for the publication of a libel, made during a term of the court in reference to a case then decided, imputing to the court, officially, *bribery* in making the decision — such power being inherent in courts of justice, springing into existence upon their creation, as a necessary incident to the exercise of the powers conferred upon them.

The Legislature may regulate the exercise of, but cannot abridge the express, or necessarily implied powers granted to this court by the constitution.

The statute, (*Digest, chap.* 36, *sec.* 1,) so far as it sanctions the power of the courts to punish, as contempts, the acts therein enumerated, is merely declaratory of what the law was before its passage: the prohibitory clause is entitled to respect as an opinion of the Legislature, but is not binding on the courts.

By the common law, courts possessed the power to punish, as for contempt, libelous publications upon their proceedings, pending or past, tending to degrade the tribunals, destroy that public confidence and respect for their judgments and decrees, so essential to the good order and well being of society, and to obstruct the free course of justice.

When the Supreme Court was created by the constitution, and certain judicial powers conferred upon it, the power to punish contempts of its authority, was impliedly given to it as a necessary incident to the exercise of its express powers.

There is no feature in the constitution, or in the character of our free institutions, which denies to this court the power to punish, as for contempt, libelous publications tending to degrade its authority, and destroy public confidence in the integrity of its judgments and decrees.

The fact, that the convention, which framed the constitution, had the subject of contempts before them, and placed a limitation upon the legislative, but none upon the judicial department, to punish contempts, warrants the conclusion that the courts were left to exercise such common law powers on the subject, as might be necessary to preserve their authority, and enforce their legal process, orders, judgments, and decrees.

Any citizen has a right to comment upon the proceedings and decisions of this court, to discuss their correctness, and the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important trusts reposed in them; but he has no right, under the 7th section of the Bill of Rights, to attempt, by libelous publications, to degrade the tribunal, &c.—such publications are an abuse of the liberty of the press, for which he is responsible.

The cases of *Neil vs. The State*, 4 *Eng. Rep.* 263, *and Cossart vs. The State*, 14 *Ark.* 541, quoted with approbation.

*Rule to answer for contempt of Court.*

Mr. Attorney General JORDAN, for the State.

S. H. HEMPSTEAD and W. L. D. WILLIAMS, for defendant.

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

On the 29th of March last, a member of the bar of this court, then in session, addressed a communication to one of its judges, calling his attention to an article in a newspaper, styled the DES ARC CITIZEN, issued on the 24th of that month, purporting to be published by the defendant, reflecting upon a decision made by this court, during that term, apparently impugning its motives, and attributing the decision to extraneous influences. The author of the communication referred to, accompanied it by a copy of the newspaper, giving it, as his opinion, that the court ought to take some notice of the publication, and stating that his position, as a member of the bar, &c., seemed to require, at his hands, an expression of the opinion entertained by him, that the dignity

and usefulness of the court would be upheld, and not impaired, by making an example of the offensive publication.

The publication thus having been brought directly to the notice of the court, by a member of the bar, expressing that interest in the preservation of public respect, for the decisions of a tribunal of final resort, which the worthier members of the profession, as well as all orderly and law-abiding citizens, usually manifest, the court concluded that it was due to the honor and dignity of the State, and its own usefulness, not to pass the matter by without some official action, but to institute an inquiry whether its constitutional privileges had not been invaded by the publication aforesaid. Accordingly, an order was made, reciting the publication, and directing that the defendant be summoned to appear before the court, at its present term, to show cause why proceedings should not be had against him, as for criminal contempt. No attachment but a mere summons, was issued in the outset, because the constitutional power of this court, to punish as for contempt in such cases, had not been determined, and was supposed to be not altogether free of doubt.

The facts upon which the summons was grounded, are briefly these:

One Ellis was lodged in the jail of Pulaski county, on a charge of murder, failing to give the bail required by the committing magistrate. The office of the Circuit Judge of the district in which the offence was committed, being at the time vacant, Ellis applied to this court for a *habeas corpus*, alleging that the bail required by the magistrate, was excessive; that he was unable to give it, and praying the court to inquire into the matter, and reduce the amount of the bail, &c. The writ was accordingly issued, the cause heard on the 20th of February last, upon the testimony produced, and the court being of the opinion that the offence was a bailable homicide, ordered the prisoner to be let to bail upon a recognizance, in the sum of $5000 00, with good and sufficient security for his appearance at the ensuing term of the Prairie Circuit Court, where the offence was cognizable. Failing

to furnish the bail required, the prisoner was remanded to jail, with the privilege of being brought before the court again to enter into the recognizance, should he procure the requisite securities—which he failed to do.

On the 24th of March following, and while the court was still in session, the defendant, it appears, from motives which it is of no consequence to conjecture, published the article in question, directly in reference to the decision of the court, upon the application of Ellis.

The language of the article would seem to intimate, by implication, that the court was induced by *bribery*, to make the decision referred to. It is not an attack upon the private character or conduct of the members of the court, as men, but seems to be an imputation against the purity of their motives while acting officially, as a court, in a specified case. Had the publication referred to them, as individuals, or been confined to a legitimate discussion of the correctness of their decision, in that or any other case, no notice would have been taken of it officially.

In response to the summons, the defendant has filed a plea to the jurisdiction, submitting that the publication is not embraced within the statute, regulating the punishment of contempts, and that the court can punish no act as such not therein enumerated, claiming the privilege of making a further answer, should the plea be held insufficient.

In determining the sufficiency of the plea, to which the Attorney General has interposed a demurrer, it must be assumed that the intimation of bribery contained in the publication, was designed to apply to the court, as such would seem to be the purport of the language employed, though the counsel of the defendant have stated that such was not his intention, and that if required to answer further, he would disclaim upon oath any intention to make such an imputation against the court: remarking, simply, that if such was not the design of the defendant, he was unfortunate in the selection of language, and the construction of his sentences.

The statute, on the subject of contempts, declares that "Every court of record shall have power to punish, as for criminal contempt, persons guilty of the following acts, and no others:

*First.* Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. *Second.* Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings. *Third.* Wilful disobedience of any process or order lawfully issued, or made by it. *Fourth.* Resistance wilfully offered, by any person, to the lawful order or process of the court. *Fifth.* The contumacious and unlawful refusal of any person to be sworn as a witness, and when so sworn, the like refusal to answer any legal and proper interrogatory." *Digest, chap.* 36, *sec.* 1, approved February 28th, 1838.

It is conceded that the act charged against the defendant in this case, is not embraced within either clause of this statute.

It was argued by the counsel for the defendant, that the court must look to the statute for its power to punish contempts, and not to any supposed inherent power of its own, springing from its constitutional organization. That it is controlled by the statute, and cannot go beyond its provisions. In other words, that the will of a co-ordinate department of the government is to be the measure of its power, in the matter of contempts, and not the organic law, which carves out the land-marks of the essential powers to be exercised by each of the several departments of the government.

In response to this position, we say, in the language of Mr. Justice SCOTT, in *Neil vs. The State*, 4 *Eng.* 263, that: "The right to punish for contempts, in a summary manner, has been long admitted as *inherent in all courts of justice*, and in legislative assemblies, founded upon great principles, which are coeval, and must be co-existent with the administration of justice in every country, the power of self-protection. And it is only where this right has been claimed to a greater extent than this, and the

foundation sought to be laid for extensive classes of contempts not legitimately and necessarily sustained by these great principles, that it has been contested. It is a branch of the common law, brought from the mother country and *sanctioned by our constitution.* The discretion involved in the power is necessarily, in a great measure, arbitrary and undefinable, and yet, the experience of ages has demonstrated that it is compatible with civil liberty, and auxiliary to the purest ends of justice, and to the proper exercise of the legislative functions, especially when these functions are exerted by a legislative assembly."

And in the language of Mr. Chief Justice WATKINS in *Cossart vs. The State*, 14 *Ark. Rep.* 541: "The power of punishing summarily and upon its own motion, contempts offered to its dignity and lawful authority, is one inherent in every court of judicature. The offence is against the court itself, and if the tribunal have no power to punish in such case, in order to protect itself against insult, it becomes contemptible and powerless, also, in fulfilment of its important and responsible duties for the public good. It is no argument that the power is arbitrary, though indeed settled by precedents, or limited by them, as rules for the future guidance of the courts. While experience proves that the discretion, however arbitrary, has never been liable to any serious abuse, it would be a sufficient answer to say, that the power is a necessary one, and must be lodged somewhere; and it is properly confided to the tribunal against whose *authority* or *dignity* the offence is committed."

And so, in *United States vs. Hudson et al.*, 7 *Cranch* 32, it was held, that "Certain implied powers must necessarily result to our courts of justice from the nature of their institution. To fine for contempt; imprison for contumacy; enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far, our courts no doubt possess powers not immediately derived from statute."

Without resorting to the English authorities, where one of the

counsel for the defendant supposes a rigorous doctrine prevails on the subject of the power of the courts to furnish for contempts, in consequence of the fiction that the majesty of the king is deemed to be present in all the courts, in the persons of the judges, it might be shown, were it supposed to admit of serious question on the part of even the learned counsel for the defence themselves, that every enlightened jurist in the United States, who has treated of the subject, has held that the power to punish for contempts, is inherent in courts of justice, springing into existence upon their creation, as a necessary incident to the exercise of the powers conferred upon them.

Had the Legislature never passed the act above quoted, or any act at all on the subject, could it be doubted that this court would possess the constitutional power to preserve order and decorum, enforce obedience to its process, and maintain respect for its judgments, orders, and decrees, and as a necessary consequence, punish for contempts against its authority and dignity, without which it could never accomplish the useful purposes for which it was established by the framers of the constitution?

If the General Assembly were to repeal the act, would any lawyer seriously contend that the courts were thereby deprived of the power to punish contempts? One of the counsel of the defendant frankly admitted that they would not, and the admission concedes the position to be true, that the power of this court to punish contempts, is inherent, springing into life along with, and as an incident to, those great judicial powers carved out for its exercise by the constitution.

The Legislature may regulate the exercise of, but cannot abridge the express or necessarily implied powers, granted to this court by the constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government: and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the Federal and State institutions, and a favorite theory in the governments of the American people.

As far as the act in question goes, in sanctioning the power of the courts to punish, as contempts, the "*acts*" therein enumerated, it is merely declaratory of what the law was before its passage. The *prohibitory* feature of the act can be regarded as nothing more than the expression of a judicial opinion by the Legislature, that the courts may exercise and enforce all their constitutional powers, and answer all the useful purposes of their creation, without the necessity of punishing as a contempt any matter not enumerated in the act. As such, it is entitled to great respect, but to say that it is absolutely binding upon the courts, would be to concede that the courts have no constitutional and inherent power to punish any class of contempts, but that the whole subject is under the control of the legislative department; because, if the General Assembly may deprive the courts of power to punish one class of contempts, it may go the whole length, and divest them of power to punish any contempt.

But it was argued by the learned counsel for the defendant, that if it be assumed that a common law power to punish contempts arose upon the creation of our courts, as a necessary incident to the constitutional functions to be performed by them, it follows that the whole of the common law on the subject was adopted: and that such hypothesis would lead to an absurd result; because, under the provisions of the common law, the courts of England *punished* many frivolous acts as contempts, and imposed cruel and degrading punishments.

This argument may be answered in the language of Mr. Justice SCOTT, in *Neil vs. The State,* where he said, in discussing this subject: "It has never been contended, in this country, that the common law, although it is our birthright, and in force among us, without express recognition by our constitution and laws, was ever actually in force in all its length and breadth, but only to an extent that was not wholly inconsistent with those great principles upon which our free institutions, purely American, have been reared and maintained. So, these doctrines, which we are considering, [*power of courts to punish contempts,*] in being re-

cognized by the courts, must be regarded as having received a corresponding abatement of those of its lineaments which are at open war with the nature and character of our constitution, and the actual state of things among us, under its legitimate operation, or it would be an exotic that could not germinate in our soil."

It was further submitted by the counsel for the defence, that the publication of a libel upon the official action of a court, being an out-door affair, was not, by the common law, the subject of contempt, and if it were, it was only so where the publication was made in reference to a cause pending in court; and that inasmuch as the publication in question was made after the case of *Ellis* had been determined by the court; and was, therefore, not *pending*, it does not fall within the definition of common law contempts.

*In Neil vs. The State*, the common law doctrine of contempts was thoroughly examined and discussed by this court, and the rule thus stated as the result: "By the common law, a court may punish for contemptuous conduct toward the tribunal, its process, the presiding judge, or for indignities to the judge while engaged in the performance of judicial duties in vacation, *or for insults offered him in consequence of judicial acts:* but indignities offered to the person of the judge in vacation, when not engaged in judicial business, *and without reference to his official conduct*, are not punishable as contempts."

In the course of the opinion, Mr. Justice SCOTT said: "It is of no importance whether the contumely be used in open court, at the moment when the occasion occurs, or the moment afterwards, when the sheriff has proclaimed the adjournment. The only real question in either case, is *whether it is the official conduct for which the judge is challenged and insulted.*"

Mr. BLACKSTONE (*Book* 4, *p.* 284,) says: "The contempts that are thus punished, are either *direct*, which openly insult or resist the powers of the courts, or the persons of the judges who preside there; or else *consequential*, which (without such gross in-

solence, or direct opposition) plainly tend to create an universal disregard of their authority."

And then after enumerating the classes of contempts punishable by the courts of England, (some of which would not be punished here in consequence of the modifications of the common law, produced by our constitution, and the character of our institutions as above indicated,) he remarks further:

"Some of these contempts may arise in the face of the court, as by rude and contemptuous behavior; by obstinacy, perverseness, or prevarication; by breach of the peace; or any wilful disturbance whatever: others, in the absence of the party, as by disobeying or treating with disrespect the King's writ, or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking *or writing contemptuously of the court or judges, acting in their judicial capacity;* by printing false accounts (or even true ones, without proper permission) of causes then depending in judgment; and by any thing, in short, that *demonstrates a gross want of that regard and respect, which when once courts of justice are deprived of, their authority* (so necessary for the good order of the kingdom) is entirely lost among the people."

The remark of Mr. BLACKSTONE, that it is a contempt to *print true accounts* of causes pending in judgment, is explained by a note of Mr. CHITTY, thus: "We have already seen that the defendant may be punished for disobedience of an order by a court of general gaol delivery, prohibiting the publication of proceedings pending a trial there. 4 *B. & A.* 218; 1 *B & A.* 379."

The offence did not consist in publishing the truth, but in disobeying an order which the court found it necessary to make in order to secure the ends of public justice.

On the trial of *Holmes*, Judge BALDWIN, found it necessary to make an order prohibiting reporters coming within the bar of the court, from publishing the proceedings and evidence in the case, until the trial was concluded, and no one could doubt his authority to punish disobedience to such an order. *U. S. vs. Holmes*,

*Wallace C. C. Rep.* 1. Such orders have been frequently made in important and exciting trials in this country.

In a case reported in 2 *Atkyns*, 469, which was a proceeding, as for contempt, for the publication of a libel, Lord Chancellor HARDWICK said: "Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard. It has always been my opinion, as well as the opinion of those who have sat here before me, that such proceeding ought to be discountenanced.

"But, to be sure, Mr. Solicitor General has put it upon the right footing, that notwithstanding this should be a libel, yet, unless it is a contempt of the court, I have no cognizance of it; for whether it is a libel against the public, or private persons, the only method is to proceed at law.

"*One kind of contempt is scandalizing the court itself.* There may be, likewise, a contempt of this court, in abusing parties who are concerned in causes here. There may be also a contempt of this court in prejudicing mankind against persons before the cause is heard. There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

The counsel for the defence, stated that it was a contempt at common law, for a counsel to print his brief before the cause was heard, arguing from this, the extremes of the common law doctrine on the subject, and citing the above case from 2 *Atkyns*.

Now what Lord HARDWICK said on that point, was this: He was arguing that there was a class of publications which were contempts, though they did not reflect upon the court, but prejudiced the public mind before the cause was heard, and said: "There are several other cases of this kind, one strong instance, where there was nothing reflecting upon the court, is the case of Capt. Perry,

who printed his brief before the cause came on: *the offence did not consist in the printing, for any man may give a printed brief, as well as a written one, to counsel: but the contempt of this court, was prejudicing the world with regard to the merits of the cause before it was heard.*"

Mr. HOLT, in his work on *Libel, chap.* 9, says: "Contemptuous words or writings, concerning courts of justice, or concerning parties engaged in causes therein, with a view of prejudicing judges or jurors, have, in all periods of our law, been visited with exemplary punishment.

"As they obstruct the law, and corrupt the very fountains of justice, the wisdom of the constitution has enabled the courts, who are the subjects of such scandal, with a view to protect themselves and their suitors to proceed immediately against the offenders by the summary remedy of an attachment.

"There are different sorts of contempt—one kind of contempt is scandalizing the court itself, &c.

"It is, therefore, a rule founded on the reason of the common law, that all contempts to the process of the court, to its judges, jurors, officers, and ministers, when acting in the due discharge of their respective duties, whether such contempts be by direct obstruction, or consequentially; that is to say, whether they be by act or writing, are punishable by the court itself, and may be abated *instanter* as nuisances to public justice.

"There are those who object to attachments, (continues Mr. HOLT,) as being contrary, in popular constitutions, to first principles. To this it may briefly be replied, that they are the first principles, being founded on that which founds government and constitutes law. They are the principles of self-defence; the vindication, not only of the authority, but of the very power of acting in a court. It is in vain that the law has the right to act, if there be a power above the law, which has a right to resist: the law would then be but the right of anarchy and the power of contention."

He says, moreover: "It is undoubtedly within the natural com-

pass of the liberty of the press, to discuss, in a decent and temperate manner, the decisions and judgments of a court of justice; to suggest even error; and, provided it be done in the language, and with the views of fair criticism, to censure what is apparently wrong; but, with this limitation, that no false or dishonest motives be assigned to any party."

Any public reflection on the administration of justice, is unquestionably libelous."

Mr. HOLT concludes the chapter, with the following remarks, which meet our entire approval.

"Every mode of administering justice, which encroaches upon the trial by jury, ought to be watched with anxious jealousy. It is necessary, as we have shown, that courts of justice should have the power to punish for contempts: but it is a power which has its justification in necessity alone, and should rarely be exercised, and never, but in those cases where the necessity is plain and evident."

In the case of *Respublica vs. Oswald*, 1 *Dallas* 319, which was a proceeding against *Oswald*, for a newspaper libel, MCKEAN, Chief Justice, delivering the judgment of the court, said: "Having yesterday considered the charge against you, we were unanimously of opinion, that it amounted to a contempt of the court. Some doubts were suggested, whether, even a contempt of the court was punishable by attachment; but not only my brethren and myself, but likewise all the judges of *England*, think that without this power, no court could possibly exist. Nay, that no *contempt* could indeed be committed against us, we should be so *truly contemptible*. The law upon the subject is of immemorial antiquity, and there is not any period when it can be said to have ceased, or discontinued. On this point, therefore, we entertain no doubt."

This case was decided after the adoption of the BILL OF RIGHTS in Pennsylvania, guaranteeing the freedom of the press, and will be referred to again in the sequel of this opinion.

In 1765, a motion was made in the King's Bench, for an at-

tachment against Mr. Almon, for a contempt in publishing a libel upon the court, and upon the Chief Justice. In consequence of the resignation of the Attorney General, the prosecution was dropped, but *Chief Justice Wilmot* prepared an able opinion in the case, which was left among his papers, and published by his son after his death. It is reported in the 8*th vol. of State Trials, p.* 54. After showing that the authority of the courts to punish contempts by attachment was not derived from statute, as seems to have been argued for the defence, he says: "The power which the courts in Westminister Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt to the court, acted in the face of it, (1 *Vent.* 1) and the issuance of attachments by the Supreme Courts of justice in Westminister Hall, for contempts out of court, stands upon the same immemorial usage, as supports the whole fabric of the common law; it is as much the "*lex terræ*, and within the exception of *magna charta*, as the issuing any other legal process whatever.

"I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none: it is as ancient as any other part of the common law. And though I do not mean to compare and contrast attachments with trials by jury, yet truth compels me to say, that the mode of proceeding by attachment stands upon the same foundation and basis as trials by jury do, immemorial usage and practice; it is a constitutional remedy in particular cases, and the judges in those cases are as much bound to give an activity to this part of the law as to any other part of it. Indeed it is admitted, that attachments are very properly granted for resistance of process, or a contumelious treatment of it, or any violence or abuse of the ministers, or others employed to execute it.

But it is said, that the course of justice in those cases is obstructed, and the obstruction must be instantly removed; that there is no such necessity in the case of libels upon courts or

judges, which may wait for the ordinary method of prosecution, without any inconvenience whatever. But where the nature of the offence of libeling judges, for *what they do in their judicial capacities*, either in court, or out of court, comes to be considered, it does, in my opinion, become more proper for an attachment than any other case whatever.

"The arraignment of the justice of the judges, ** excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and the most dangerous obstruction of justice; and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatever; *not for the sake of the judges as private individuals*, but because they are the channels by which the King's justice is conveyed to the people. **

"In the moral estimation of the offence, and in every public consequence arising from it, what an infinite disproportion is there between speaking contumelious words of the rules of the court, for which attachments are granted constantly, and coolly and deliberately printing the most irrelevant and malignant scandal which fancy could suggest, upon the judges themselves, &c., &c.

"The trial by jury is one part of that system, the punishing contempts of the court by attachments is another. We must not confound the modes of proceeding, and try contempts by juries, and murders by attachment; we must give that energy to each which the constitution prescribes."

In *Commonwealth vs. Danridge*, 2 *Virginia cases*, 409, the whole subject of constructive, or out door contempts, is thoroughly and ably discussed. In response to the position of the counsel for the defence, that the publication in question cannot be regarded as a contempt, because it referred to no cause then pending in court, but to a decision previously made, the following remarks of Judge DADE, in the case above cited, are in point."

"Upon this part of the subject, and in reference to the cases which have an indirect bearing on the present question, a dis-

tinction is attempted, for which I can find neither reason nor authority. It is said that the attaching power may be exercised for contempts touching the *prospective* conduct of the judge, but not for such as touch his past conduct. In reason, I see but one pretence for this distinction; threats and menaces of insult, or injury to a judge, in case he shall render a certain judgment, may be considered as impairing his independence and impartiality in the particular case to which the threats refer. And if the power of punishment stop here, a curious consequence may ensue. A man may be attached for *threatening* to do that for which he could not be attached, when actually done. One says of a judge, "if he render a certain judgment against me, I will insult or beat him." For this he may be attached. But if (the judgment having been rendered,) the insult be actually offered, an attachment no longer lies; because the contempt is in relation to the past conduct of the judge, and to a case no longer pending. A recurrence to original principles, the only true test, by demonstrating that the weight, authority, and independence of the court may be equally assailed either way, will prove that this distinction is merely ideal."

In this case, the judge being about to enter the court-house for the purpose of opening court, Dandridge, standing at the door, grossly insulted him, charging him with *corruption* and *cowardice* in delivering an opinion in a cause at a previous term of the court, in which Dandridge had some interest. Proceedings for contempt having been instituted against him, the case was adjourned to the general court of Virginia, on account of its importance, novelty and difficulty; and after full discussion, the conduct of defendant toward the judge was held to be punishable as a contempt.

Had he published the charge of *corruption*, *&c.*, which he made to the face of the judge, in a newspaper, no one can doubt but that the offence would have been aggravated.

The cases above cited (and many more might be cited, if deemed at all necessary,) abundantly show that, by the common law,

courts possessed the power to punish, as for contempt, libelous publications, of the character of the one under consideration, upon their proceedings *pending or past*, upon the ground that they tended to degrade the tribunals; destroy that public confidence and respect for their judgments and decrees, so essentially necessary to the good order and well being of society, and most effectually obstructed the free course of justice.

We have above stated that when the Supreme Court was created by the constitution, and certain judicial powers conferred upon it, the power to punish contempts of its authority, was impliedly given to it, as a necessary incident to the exercise of its express powers. Otherwise, it would have been powerless of self-preservation, and unable to fulfill the useful purposes of its creation. The question now recurs, is there any feature in the constitution, or in the character of our free institutions, which denies to this court the power to punish, as for contempt, libelous publications however flagrant, and however much they may tend to degrade its authority, and destroy public confidence in the integrity of its judgments and decrees? In others words, can it punish no act as a contempt, which is not enumerated in the letter of the statute, for this is the broad issue tendered by the defendant's plea to the jurisdiction in this case? This question was left open in the case of *Neil vs. The State.* See *p.* 269.

Such limitation upon the power of the court, is not to be found in the provision of the Bill of Rights, guaranteeing the right of trial by jury, because we have seen that this right existed at common law, by immemorial usage, in harmony with the power of the courts to punish for contempts by attachment, each applying to its appropriate class of cases; and in *Neil vs. The State* it was expressly held, that this provision of the constitution did not take away from our courts the power to punish for contempts in a summary mode.

The only provisions to be found in our constitution, on the subject of contempts, are as follows:

"Each house may determine the rule of its proceedings, punish

its own members for disorderly behavior; and, with the concurrence of two thirds of the members elected, expel a member," &c. *Sec.* 16, *art.* 4.

"Each house may punish, by fine and imprisonment, any person, not a member, who shall be guilty of disrespect to the house, by any disorderly or contemptuous behavior in their presence, during their session; but such imprisonment shall not extend beyond the final adjournment of that session." *Sec.* 17, *ib.*

These provisions are not to be regarded as a grant of power to the two houses to punish contempts, because they would have impliedly possessed such power without the grant; (2 *Story on the Const.*, *sec* 1503,) but, by the rules of interpretation, usually applied to such instruments, these provisions must be regarded as a limitation upon such power; and under the rule that the expression of one thing excludes another, it is perhaps safe to state, that the two houses would not possess the power to punish, as for contempt, the authors of libelous publications upon their proceedings.

Had the framers of the constitution inserted in it, a provision similar to the one last above copied, in relation to the courts, the question now under discussion would be at an end.

But the fact that the convention, which framed the constitution, had the subject of contempts before them, placed a limitation upon the power of the two houses to punish contempts, but did not think proper to place any such limitation upon the power of the courts, warrants the conclusion that the courts were left to exercise such common law powers on the subject, as, in their sound discretion, might be found necessary to preserve their authority, and enforce their legal process, orders, judgments, and decrees, without which they could not answer the purposes of their creation.

And there is a good reason why the framers of the constitution might well have made this distinction. The legislature is a political body. If its proceedings, and the conduct and motives of its members are unjustly assailed by libelous publications, they

may defend their official conduct, and repel attacks through the press, and upon the "*stump*," but it is not the usage of the country, nor would it comport with the dignity of judicial stations, for judges to resort to newspapers, or the public forum in defence of the integrity of their decisions, &c., and it would be an unwise policy that would drive them to such a course.

Moreover, the fact that judges of this country, or the one from which we have derived the great body of our laws, and the forms of our judicial proceedings, have in the rarest instances abused the power of punishing contempts, furnishes an additional reason why the framers of the constitution did not deem it necessary to make any express limitation upon the power. The delicacy of the power is a safe-guard against its abuse in the mind of any man worthy of a seat upon the bench.

The counsel for the defence supposed that the power of the courts to punish, as for contempt, the publication of libels upon their proceedings, was cut off by the *7th sec.* of the *Bill of Rights*, which is in these words: "That printing presses shall be free to every person; and no law shall ever be made to restrain the rights thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man: and every citizen may freely speak, write and print on any subject—*being responsible for the abuse of that liberty.*"

The last clause of the section, "*being responsible for the abuse of that liberty*," is an answer to the argument of the learned counsel.

It is a well known fact, that the *bench* and the *bar* have been, in this, and all other countries where the law has existed, as a distinct profession, the ablest and most zealous advocates of liberal institutions, the freedom of conscience, and the *liberty of the press;* and none have guarded more watchfully the encroachments of power on the one hand; or deprecated more earnestly tendencies to lawless anarchy and licentiousness on the other. The freedom of the press, therefore, has nothing to fear from the bench in this State. No attempt has ever been made, and we

may venture to say, never will be, to interfere with its legitimate province, on the part of the judiciary, by the exercise of the power to punish contempts.

The object of the clause in the *Bill of Rights* above quoted, is known to every well informed man. Although the press is *now* almost as free in England as it is in this country, yet the time was, in by-gone ages, when the ministers of the crown possessed the power to lay their hand upon it, and hush its voice, when deemed necessary to subserve political purposes. A similar clause has been inserted in all the American constitutions, to guard the press against the trammels of political power, and secure to the whole people a full and free discussion of public affairs.

Any citizen has the right to publish the proceedings and decisions of this court, and if he deem it necessary for the public good, to comment upon them freely, discuss their correctness, the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important public trusts reposed in them, but he has no right to attempt, by defamatory publications, to degrade the tribunal, destroy public confidence in it, and dispose the community to disregard and set at naught its orders, judgments, and decrees. Such publications are an abuse of the liberty of the press, and tend to sap the very foundation of good order and well being in society, by obstructing the course of justice. If a judge is really corrupt, and unworthy of the station which he holds, the constitution has provided an ample remedy by *impeachment* or *address*, where he can meet his accuser face to face, and his conduct may undergo a full investigation. The liberty of the press is one thing, and licentious *scandal* is another. The constitution guarantees to every man the right to acquire and hold property, by all lawful means, but this furnishes no justification to a man to *rob* his neighbor of his lands or goods.

The remarks of Chief Justice McKEAN, in *Respublica vs. Oswald*, above referred to, are in point. He said: "What then is the meaning of the *Bill of Rights*, and the constitution of Pennsylvania, when they declare: 'that the freedom of the press shall

not be restrained, and that the printing press shall be free to every person who undertakes to examine the proceedings of the Legislature, or any part of the government?' However, ingenuity may torture the expressions, there can be little doubt of the just sense of these sections; they give to every citizen a right of investigating the conduct of those who are entrusted with the public business; and they effectually preclude any attempt to fetter the press by the institution of a *licenser*. ** But is there anything in the language of the constitution (much less in its spirit and intention,) which authorizes one man to impute crimes to another, for which the law has provided the mode of trial and the degree of punishment? Can it be presumed that the slanderous words, which, when spoken to a few individuals, would expose the speaker to punishment, become sacred by the authority of the constitution, when delivered to the public through the more permanent and diffusive medium of the press? ** The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society, to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity."

The argument of counsel that the constitution and laws having provided for the punishment of libels by indictment, renders it wholly unnecssary for the courts, in any instance, to treat them as contempts, as well remarked by the Attorney General, if it proves anything, proves too much; because, if a man resist the process of a court, or enter the court-house and assault the presiding judge, he may be punished by indictment therefor, and yet no one questions the power and duty of the court to punish such acts as contempts.

After the impeachment of Judge PECK, Congress passed an act restricting the power of the courts of the United States in the pun-

ishment of contempts, and intended, doubtless to deprive them of authority to treat out-door publications of any character as such. See *4th Statutes at Large*, 487. This act was approved 2d March, 1831. In *United States vs. Holmes*, *Wallace Reports* 1, Mr. Justice BALDWIN, presiding in the Circuit Court of the United States, correctly remarked that the act of Congress referred to, was a limitation upon his power to punish contempts.

The judicial power of the United States is vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. *Constitution of United States*, *art.* 3, *sec.* 1. The Supreme Court was created by the constitution, the district and circuit courts by acts of Congress. When the latter were established, and vested with certain judicial powers, the authority to punish contempts attached as an incident. 2 *Story on the Constitution*, *sec.* 1774. But deriving their existence from Congress, it follows that their power to punish contempts is under its control.

The act above referred to, however, applies, in its terms, to all the courts of the United States, but whether the Supreme Court, deriving its existence and powers from the constitution, has regarded the act as an imperative limitation upon its authority to punish contempts, we have no means of determining, finding no adjudications upon the point by it. Perhaps the Supreme Court has acquiesced in the act, through that respect due to the Legislative will, without inquiry into the question of power. It may be said, to the credit of the press in this country, that it has generally upheld and maintained respect for the judiciary, and instances of libelous publications upon the courts have rarely occurred.

The case of Judge PECK is familiar to the profession. Presiding in the District Court of the United States, for the district of Missouri, in the year 1826, and having decided one of several important land cases pending before him, he published his opinion in the cause. Mr. *Lawless*, an attorney of the court, and engaged in the cases, published a criticism upon the opinion, not

impugning the motives or charging corruption upon the judge, but discussing the correctness of his decision, and pointing out what he deemed to be its errors. The judge treated the publication as libelous, and punished its author as for contempt of court, on the grounds that it tended to prejudice the determination of the remaining causes. Mr. *Lawless* complained to the House of Representatives of the Congress of the United States, of the conduct of the judge, and finally he was impeached for an official misdemeanor; and, on full discussion of the law of contempts, acquitted by the Senate upon a close vote. The impression generally prevailed, however, that Judge PECK exceeded his authority, and this donbtless lead to the passage of the act of Congress above referred to.

But we may venture to remark, that independent of any statutory provisions upon the subject, the distinction between the constitutional freedom, and licentious abuse of the press, is now so well understood in this country, that no American judge would consider himself authorized to punish, as for contempt, authors of publications of the character of that made by Mr. *Lawless*.

A number of the States have passed acts, similar to the one enacted by Congress, and not unlike our own statute, on the subject of contempts, but there are to be found but few adjudications upon them.

The case of *Ex parte Hickey*, to be found in an appendix to 4 *Smed. & Marsh. Rep.*, has been cited by the counsel for the defence. In this case, a gross libel was published upon the presiding judge of Warren Circuit Court, charging him with disregarding his official oath; of officially favoring the escape of a man charged with murder in the court in which he was at the time presiding, and of being a criminal abettor of the accused. The newspaper containing the publication, was printed and circulated in the midst of the community where the cause was to be tried. The judge fined and imprisoned the author of the libel as for contempt of court; he was pardoned and released by the Governor of Mississippi, on the ground that the offence was not

embraced by the statute of contempts; the judge deeming his constitutional province invaded by the pardon, issued a bench warrant for the re-commitment of Hickey, who applied to Mr. Justice THATCHER, one of the judges of the Supreme Court, in vacation, to be released on *habeas corpus*, and was set at liberty. The learned judge concedes that according to the doctrine of the English, and some of the American courts, Hickey was guilty of an undoubted contempt, of [an aggravated character; but when "*tested by the crucible of the constitution*, (of Mississippi,) it was a mere libel upon the functionary, subjecting the party to indictment.

We must be permitted to say, with all due respect for the learning and ability of Judge THATCHER, that so far as he is understood to hold, that the power of the courts to punish contempts is derived from statute, he is at war with the whole current of both English and American decisions and commentators, so far as we have had access to the books; and in sustaining the pardoning power of the Governor in cases of contempt, he is directly at variance upon principle with Judge STORY. *Com. on Constitution, sec.* 1503.

Judge THATCHER supposes that no libel upon the official acts of the judge, however flagrant, can obstruct the exercise of the constitutional powers of a court, and defeat the full and free administration of justice, in a manner to be treated as a contempt.

If an ignorant, or impolite man stalks into a court-house with his hat on, or makes a noise about the door, or disobeys process, all agree that he may be punished for contempt; but if a man has an important cause pending in court, and willing to resort to desperate measures to succeed, publishes, on the eve of the trial, a libel, alleging that the judge has been bribed to charge the jury against him, and that all the witnesses, who are to appear on behalf of the opposing party, have been corrupted, and are unworthy of credit, it is no contempt, and the judge must labor under the embarrassment of sitting in the case, under such circumstances, with his mouth closed! Or if a judgment is rendered against

a man, as soon as the judge leaves the bench, he is met at the door, insulted and assaulted by the party, in consequence of his decision, and then a publication is made in a newspaper charging him with corruption in rendering the judgment, and calling upon the community to disregard, and resist its execution, and yet this is no contempt!

These cases are put by way of illustration; they may be extreme, yet they may occur, and when we are called upon to declare, in effect, that the courts have no power to punish any act as a contempt, which is not enumerated in the statute, as we now are by the defendant's plea, it is well to anticipate the results that may flow from such decision.

In *Stuart vs. The People*, 3 *Scammon* 395, the contempt charged against the printer of a newspaper, consisted in an article remarking upon the conduct of an individual juror, while under the charge of an officer, and in the admission of a communication from a correspondent, calculated to irritate, but in no way *reflecting upon the integrity, or impeaching the conduct of the Circuit Judge.* The Supreme Court of Illinois, properly, no doubt, held that the liberty of the press had not been abused by these publications, and that the printer was guilty of no contempt. The remarks of Mr. Justice BREESE, when applied to the facts of the case before him, are appropriate.

In *Morrison vs. Moat*, 4 *Edw. Chan. Rep.* 25, any intentional contempt and disrespect towards the court were disavowed, though the decision of the court was misrepresented; and the point decided by the chancellor, was that the publication did not come within the provision of the statute providing for the punishment, as for contempt, of the publication of a false, or grossly inaccurate report of the proceedings of the courts. The constitutional power of courts to punish contempts, is not discussed or referred to.

It may be remarked, that though our statute above copied (*Dig.*, *chap.* 36, *sec.* 1,) declares that courts of record shall have power to punish, as for contempt, the acts therein enumerated, *and none*

*others;* yet, at the same session it was declared, that a person attempting to practice law without being licensed, sworn, and registered, should be punished, as for contempt, (*Digest, chap.* 19, *sec.* 7,) and that a clerk failing to return a writ of error, should be deemed guilty of a contempt of this court, (*Digest, chap.* 127, *sec.* 22,) though this was clearly embraced within the general statute, being disobedience of process. And though the general statute (*section* 2,) declares that the fine for contempt shall, in *no case, exceed fifty dollars*, and the imprisonment *ten days;* yet at the same session it was enacted, that courts should have power to fine a person, summoned as a witness, and failing to appear and testify, not exceeding *one hundred dollars*, and to imprison a witness refusing to testify, *until he give evidence as required. Digest, chap.* 171, *sec.* 6, 7. It may be inferred from the unharmonious character of this legislation, that the several provisions on the subject of contempts, contained originally in the *Revised Statutes*, were copied from the statutes of other States, by the *revisers*, and adopted by the Legislature without careful consideration of the whole subject of legitimate contempts.

In the *Matter of Lawson, sheriff*, 3 *Ark. Rep.* 363, the sheriff of Pulaski county was held to be guilty of a contempt of this court, for neglecting to be present at its sitting, and discharge the duties imposed upon him by law, but there is no statute making this a contempt.

It was remarked by counsel, that if the courts could, in any instance, go beyond the provisions of the statute, their power to punish contempts would be undefined and unlimited. But such is not the case. One hundredth part, perhaps, of the great body of laws, by which our people are governed, is not embraced in our statutes. Crimes are punished, wrongs redressed, and rights enforced by such principles of the common law as are consistent with our constitution, the character of our liberal institutions, and sanctioned by the adjudications of our courts. No provision of the common law is enforced here, however, which is in conflict with our statutes, unless it was expressly or impliedly adop-

ted by the constitution. For example, the bill of rights declares, "that the right of trial by jury shall remain inviolate," (*sec.* 6), and the word "*jury*" has been held to have been used in its common law sense, meaning *twelve men*, and the Legislature cannot abridge the number. *State vs. Cox*, 3 *Eng.* 436. So the terms "indictment" and "presentment" are used in the 14th section of the bill of rights, in their common law sense, and the Legislature cannot dispense with a grand jury in their preferment. *Ib.*, and *Eason vs. The State*, 6 *Eng. Rep.* 481. So it is manifest that the Legislature cannot deprive the courts of such common law power to punish contempts as is impliedly conferred upon them by the constitution. And in passing upon the validity of such statutes, the courts must necessarily determine whether their legimate constitutional powers are abridged thereby, being careful never to declare an act unconstitutional unless it is manifestly so.

It was well remarked by counsel, that no court could coerce public respect for its decisions; and we may add that no sane judge would attempt it. If it were the general habit of the community to denounce, degrade, and disregard the decisions and judgments of the courts, no man of self-respect and just pride of reputation would remain upon the bench, and such only would become the ministers of the law, as were insensible to defamation and contempt. But happily for the good order of society, men, and especially the people of this country, are generally disposed to respect and abide the decisions of the tribunals ordained by government as the common arbiters of their rights. But where isolated individuals, in violation of the better instincts of human nature, and disregardful of law and order, wantonly attempt to obstruct the course of public justice, by degrading and exciting direspect for the decisions of its tribunals, every good citizen will point them out as proper subjects of legal animadversion.

A court must naturally look first to an enlightened and conservative bar, governed by a high sense of professional ethics, and deeply sensible, as they always are, of its necessity to aid in

the maintenance of public respect for its opinions. For whatever impulsive remarks counsel may make, in the moment of disappointment of success, prompted by commendable zeal for their clients, and a laudable ambition, and however sincerely they may think the court has erred, yet, upon reflection, they fail not to exert their influence to preserve public respect for the tribunal.

Next to them, the court looks to the sober judgment of all reflecting and intelligent men, and to none with more confidence than the enlightened and liberal conductors of the press, who, as before remarked, have generally manifested a disposition to maintain public respect for the judicial tribunals of the country.

The counsel for the defence remarked that the publication in question was made in an obscure paper, in a moment, perhaps, of inadvertence; that by the unskilful construction of its sentences, its author is made to say more than he meant; that it produced no effect upon the public mind, tending to degrade this court and destroy confidence in the integrity of its decisions; and, therefore, could not be treated as a contempt. All this may be true, and would be duly considered if it came up in the form of a response to the summons; but upon the plea to the jurisdiction of the subject matter, we cannot look beyond the face of the article, and the natural effects of such publications upon the public mind.

Sensible of the delicate position occupied by a court when passing upon the scope of its own judicial powers, and especially in a case like the one before us, and adhering to the repeated decisions of this court, that an act of the General Assembly should never be declared unconstitutional unless it is manifestly so, we are nevertheless not prepared to decide, in advance, that this court may in no case, however flagrant, find it necessary to go beyond the provisions of the statute, in order to preserve and enforce its constitutional powers, by treating, as contempts, acts which may clearly invade them.

The counsel for the defence having discussed this important,

and fortunately for the honor of the State, novel question, with the utmost respect for the delicate position occupied by the court, we have endeavored to respond, not by mere *ipse dixit*, but with argument and authority, which must be an apology for the length of this opinion.

It remains but to announce the conclusion, already indicated, that the demurrer to the plea is sustained, and the defendant privileged to answer further.

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(AT THE JANUARY TERM, 1856.)

Upon sustaining the demurrer to the plea, at the July term, 1855, this case was continued with leave to the defendant to file a response to the charge of contempt. The response having been filed, the case was submitted and the rule discharged.

Mr. Chief Justice ENGLISH said: The defendant, availing himself of the privilege allowed him to answer further, has filed a response to the rule, upon his oath, in which he expressly states, that he did not intend the intimation of bribery made in the publication complained of, to apply to this court or its judges, but to other persons. In confirmation of the truth of this statement, he declares, that he published in his paper, of the 7th April, 1855, and before the rule was issued against him in this case, an editorial paragraph, in which he stated that he did not intend that portion of the article of the 24th March, making the intimation of bribery, to apply to the Supreme Court, but that it was intended for another point of the compass, &c. This explanatory para-

graph is copied in the response. He positively denies all intention to commit a contempt by the publication of the article in question, &c.

The Attorney General suggested, that upon any reasonable interpretation of the language used in the publication supposed to have been libelous, it was not in harmony with the truth of the response.

In response to this we have only to remark that the attention of the court having been directly called to the publication, by a member of the bar, we felt it incumbent upon us, as remarked in the opinion heretofore delivered, to take some notice of the matter, and to enquire into the constitutional power of the court to punish in such cases, as for contempt. Having accomplished this purpose, we are not disposed to take further notice of the matter.

The response being upon oath, we shall treat it as true, and the rule will be discharged.

## WYNN VS. MORRIS ET AL.

Before any claimant can question the sufficiency of the title of a pre-emptor of the public lands of the United States, to whom a patent has been issued by the Government, he must show such title in himself as, but for the interference of such pre-emption, would entitle him to the land in controversy.

Such title is not shown by proof that the claimant, having had the land in possession and cultivation for several years, under a purchase from one to whom the pre-emptor had sold her improvement, after abandoning the land and the country, had made an agreement with the Governor, who had the direction of the selection of the 500,000 acre grant by Congress to this State: that the tract in controversy should be selected by the locating agent, as a part of said grant, and that he should have the privilege of purchasing it upon such terms as the Legislature might prescribe; that the tract was so selected; but afterwards, upon the allowance of the pre-emption, and because of such allowance, the selection was withdrawn by the Governor before the Legislature had prescribed the terms of purchase in such cases, and other lands selected in lieu thereof.

*Quere*: After the vesting of a pre-emption right in the unsurveyed public lands, under the act 29th of May, 1830, and before the act of 14th July, 1832, extending the time in certain cases for making the proof, the settler abandons the land and becomes a citizen of a foreign country, and so continues, is the pre-emption right forfeited? Or would a parol sale of the improvement, in such case, and the continued possession and cultivation of another under such sale, affect the original settler's right to prove up a pre-emption? See *opinions of Mr. Justice Scott and Mr. Chief Justice English.*

*Appeal from the Lafayette Circuit Court in Chancery.*

Hon. SHELTON WATSON, Circuit Judge.

PIKE, for the appellant. Lands selected by the State agents as part of the 500,000 acre grant, vested in the State as soon as selected; or, to avoid any doubt, we will say as soon as the list or evidence of selection was filed with the Register of the proper Land Office.

In June, 1842, if not on the 16th of May, this tract of land became vested in the State, as part of the 500,000 acres, unless the pre-emption of Mrs. Taylor prevented. This selection, however, being made for the benefit of Wynn, and with his consent, under the agreement between him and the Governor, the State was bound to sell him the land, if he should agree to the price and terms to be fixed by her. She held the title as trustee for him. Wynn, therefore, the pre-emption not in the way, had divested the General Government of title, and was himself entitled, in preference to all the world, to buy of the State. There can, consequently, be no question that he has the necessary interest to authorize him in equity to question the pre-emption which prevented the completion of his title. His interest is, at least, equal to that of a pre-emption claimant.

The question in the case, is this:

If a person obtained a pre-emption right under the act of 29th May, 1830, to a particular tract of land, by cultivation in 1829, and possession on the day of the passage of the act, but afterwards, and before survey of the land, and of course before proving the pre-emption, ran away from the country, abandoned the land, sold or gave away the improvement, or voluntarily put a third person in possession, with the intention of never returning, went to Mexico, a foreign country, and there settled and became a citizen of its Province of Texas—could this citizen, first of Mexico and then of Texas, returning for a day or two only, be entitled to prove up and have the benefit of his or her pre-emption, against a person long in peaceable possession of the same land; when, immediately on the abandonment in 1830, the third person to whom he or she sold, or gave, or voluntarily delivered the improvement, took possession, sold it afterwards to her brother, with the consent of her husband, and that brother sold to another, and he to another still, and so onward until it was bought by the person in possession when the pre-emption was proven — these different holders having regularly cultivated the tract from 1831 to 1842, and she never having, in the mean time,

set up any claim to it, or even re-visited the country—and having, when she did return, done so for the sole purpose of proving her pre-emption without intention of remaining, and immediately returned to Texas?

We maintain, *First.* That the *continuance*, as well as the creation, of a pre-emption right, under the act of 1830, was so inseparably connected with, and dependant upon, actual possession by the pre-emptor of the specific land, that if a person, fully entitled to a pre-emption under that law, on the 29th May, 1830, afterwards abandoned such possession, or yielded it to another, his right of pre-emption *eo instanti* expired.

*Second.* That if such person, so entitled, abandon the land and leave it vacant, and another person take peaceable possession, the first holder is forever afterwards *estopped* from setting up his pre-emption right against the other person so in possession, or any other person who may afterwards take possession, if such other person gains title, legal or equitable, to such land from the Government, or a pre-emption right to it, or right of entry.

*Third.* That if a person so entitled to pre-emption, afterwards, and before proving it up, ceased to be a citizen of the United States, and became a citizen of, and resident in a foreign country, he thereby lost his pre-emption right, and certainly Keziah Taylor ceased to be a citizen of the United State before she proved up her pre-emption.

The different pre-emption acts from 1814 to this time, constitute, at least in some respects, a system; are based upon certain principles of public policy and general utility: and, of course, like other laws so circumstanced, they are to be construed with reference to such system and policy.

The object of all these laws is to secure to persons who have labored on, improved, and added value to particular tracts of public lands, the avails of their labor, by preventing other persons from over-bidding them at the public sales, or entering, by superior diligence thereafter, the land possessed

by them: and so ousting them of possession. Continuing posession is essential to give a right to the claim demanded. It is on "settlers and occupants" of the lands, that these laws confer their benefits: the right to the benefit depends upon the *character* of the party. *Acts of 29th May*, 1830, 4 *Stat. at Large* 421; *Act of 14th July*, 1832, *Ib.* 603; *Act of 19th June*, 1834, *Ib.*, 678; *Act 22d of June*, 1838, 5 *Ib.*, 251, *Act of 1st June*, 1840 *Ib.*, 382; *Act of 4th September*, 1841, *Ib.*, 455, 6, 7.

And we insist that the act of 1830 was not in force in December, 1842; that Mrs. Taylor's pre-emption claim was good for nothing; and, at that time, no pre-emption were allowable, except where the claimant *then* actually lived on the lands, and, then only under and in accordance with the act of September 4, 1841.

And that if we are mistaken as to this, still the acts of 1838, 1840, and 1841, expressly confine the benefits of the act of 1830 to actual settlers, being personally on the land when applying to purchase, and cultivating exclusively for their own use and benefit, and certainly not for citizens of foreign countries, domiciled and resident abroad.

It has been insisted on the other side, that if a citizen does change his *status*, and become, in the fullest manner, an alien friend, he does not thereby lose the title to property previously owned by him—that a vested *title* is not thereby divested; and as little will a vested *right* be.

Mrs. Taylor had no *title* to anything on the 29th May, 1830. She had (or would have had if the land had been surveyed,) the *right* to prove up a pre-emption; and, if sale of it had been ordered, the right, under her pre-emption, to purchase and enter the quarter section, at $1 25 per acre.

That law was in force only a year. When it expired, still no survey had been made; and she had, in the mean time, abandoned the land and moved away. At the expiration of the law, on the 29th May, 1831, her right expired, even if she did not lose it by abandonment and removal.

On the 14th of July, 1832, more than a year after she had re-

moved, and when Cryor was in possession of the land, a law was passed which we have already cited.

It was by virtue of the act of 14th July, 1832, alone, if by *any* law, that *any* pre-emption could be proven in December, 1842, under the of 29th May, 1830. In July, 1832, Mrs. Taylor was not a settler and occupant of the public lands. She had ceased to be so more than a year before.

Certainly no such construction of a law intended to encourage settlement on, and cultivation of the public land, increase of population, and enlargement of the National resources, as that it was intended to divide out, at minimum price, these lands, to the citizens and subjects of foreign powers, or to our citizens who chose to abandon our own flag, and assume a new allegiance elsewhere, can be allowed. That would be contrary to the policy of our whole land system; contrary to our National interests, and at variance with the policy of all civilized governments. Above all, it would contravene the very objects of the law, as it does in this case, by enabling an entire stranger and subject of a foreign power, to turn out the actual settler on the public lands, and possess himself of the fruits of his labor; when the law was enacted for the very purpose of protecting such possession, and securing to the settler those fruits. *Smith vs. Brown*, 1 *Yeates* 575; *Magens vs. Smith*, 4 *Binney* 76; *Cluggage vs. Duncan*, 1 *Serg. & Rawle* 120; *Watson vs. Gilday*, 11 *Ib.* 340.

On every ground, Wynn should have been relieved. The State had selected it for him; it was his, she holding as trustee for him, and no further act was needed to pass the land from the United States. This citizen of a foreign Republic comes forward and claims a superior equity, by virtue of an existing pre-emption; she obtains a deed from the Government, but it is apparent that the State, for Wynn, has the elder legal title; and therefore the equities must be compared. In that contest her pre-emption must succumb: because,

To maintain a pre-emption right, there must be continued possession.

The right is a *jus vágum*, which could be abandoned, and she did abandon it, both by going away, and selling or giving the improvement to another.

She is estopped to set up her claim, because she has induced Wynn to buy and settle on the land, and her subsequent assertion of her claim was a fraud.

She ceased to be a citizen of the United States, and became a citizen of a foreign country.

CURRAN & WATKINS and GALLAGHER, for the appellee. Wynn has failed to show any such title in himself as authorizes him to maintain this suit. Even if Morris' patent was set aside, the land would neither vest in Wynn nor the State. No matter how defective or illegal the patent may be, Wynn has no right to call for an investigation of it, until he first shows that if the patent was out of the way, the land would belong to him.

Wynn alleges that the land was located with his assent, as a part of the 500,000 acre grant, with the understanding between him and the Governor, that he should have the right to purchase from the State upon such terms as the Legislature might fix. These selections had to be confirmed by the commissioner of the General Land Office; and the selection of this tract was rejected by him, and the State never acquired any title thereto; nor did Wynn offer to comply with the terms prescribed by the Legislature. If the patent is set aside, the land would neither vest in the State, nor in Wynn. It could not vest in the State, for she abandoned the selection and located other lands in lieu of it, nor could it vest in Wynn as her grantee. This shows that he does not occupy such position as entitles him to be heard. For however fraudulent Morris' title may be, Wynn has no right to call upon the courts to adjudicate in relation to it, unless he first establishes that he has such a title as would hold the land in case Morris' patent was set aside.

The supposed agreement between Wynn and the Governor, was really no agreement or contract, in any sense of the word:

because the Governor had no authority to make it. It was, at the most, a mere understanding—for aught that appears, a parol request or assent on the part of Wynn that the land might be selected, and altogether dependent for its ratification by the Legislature.

If, as alleged in the bill, the State abandoned the selection, because of the allowance of the pre-emption, she had a perfect right with the assent of the United States authorities, to do so, for that or any other cause, or for no cause, and the subsequent act of the Legislature, as far as this selection is concerned, had no application to Wynn whatever. His right to the specific land, was not even inchoate, because there never was any obligation on the part of the State to sell to him.

Though Mrs. Taylor parted with the possession, it is more than doubtful whether she ever *sold* even the improvement, much less her right of pre-emption, which is not pretended. It would be difficult to make out a *sale* of any kind upon the evidence, of which a specific performance could be enforced. But a sale of an improvement on public land, is something very different from the sale of a pre-emption right. *Pelham vs. Wilson*, 4 *Ark.* 289; *Pelham vs. Floyd*, 4 *Eng.* 530, cited in *Brock vs. Smith*, 14 *Ark.* 434. Unless Wynn only bought or acquired the mere improvement or possession, a chattel interest, transferable by parol, it is manifest that he has failed to connect himself with Mrs. Taylor by legitimate proof of any claim of title derived from her.

We submit that if Mrs. Taylor cultivated in 1829, and was in possession on the 29th May, 1830, her right *vested*, subject, only to be divested in the event that she failed to make proof of those facts within the time prescribed by law. That a pre-emption right is a vested right, and overrides all other intermediate claims, and that a continuance of possession is not necessary, see the case of *Lytle et al. vs. The State of Arkansas et al.*, 9 *How. Rep.* 314; in which there was no pretence that Cloyes remained in possession. See, also, *Opn. of Attorney General Berrien, Inst. & Opns. p.* 60, *No.* 42; *Inst. & Opn., p.* 609, *No.* 565.

An attempt is made to draw a distinction between a *right* and a *title* to land. We cannot conceive of a case where a man would have a *right* to land without a *title* of some kind: nor can we perceive the distinction between a *right* and a *title* to property.

Admitting that Mrs. Taylor parted with her right to the possession by valid contract, which the proof fails to show, and that she removed to Texas for the purpose of residing there or of expatriating herself, if under the act of 1830 she had a vested right to the land by the facts of her cultivation in 1829, and possession on the 29th of May, 1830, it was not divested or forfeited by her removal from the land or change of domicil to a foreign country. 2 *Opns. & Inst.*, *No.* 42, *p.* 62; *Ib.*, *No.* 565, *p.* 609, *Ib. No.* 55, *p.* 82; *Murray vs. Fishback*, 5 *B. Mon.* 406. Removal to a foreign country, would no more divest a right, than it would a title to property. Right and title are convertible terms; or one is the substance and the other the form. The right of a pre-emptor is vested, whenever the facts of cultivation and possession bring him within the terms of the law. And the act of 1830 neither requires a continued residence in the State, nor upon the land.

The question of abandonment is peculiarly between the claimant and the Government, and one which when presented, it was the province of the President and his subordinates at Washington City, to decide.

The appellant's counsel argues, at great length, against the validity of the pre-emption of Mrs. Taylor, upon the ground that neither the act of the 14th July, 1832, nor any of the subsequent pre-emption laws, extended the time within which pre-emptors under the act of 29th of May, 1830, could prove up their pre-emptions, where the public surveys were not made and the plats returned, within the life of those laws. We may summarily dismiss this as an exploded theory. *Gaines vs. Bale*, 15 *Ark.*

The possession of public land does not constitute notice of an adverse claim, when the possessor has no vested right as against the Government: nor is the claimant bound to give notice of his

claim either by continued possession or otherwise. The only condition upon which it may be defeated, being the failure to make proof and payment within the time limited by law, actual residence on the tract cultivated and possessed not being necessary.

And as between the claimant and the Government, and as a consequence all persons claiming under the Government, the adjudication of the Land Officers and the decision of the General Land Department awarding the patent, are conclusive upon the whole world, and can only be judicially enquired into at the suit of any individual claimant who shows a prior and vested equitable right *as against the Government itself.*

Mr. Justice SCOTT delivered the opinion of the Court.

Wynn filed his bill in chancery in the Lafayette Circuit Court, praying that Morris, as to the tract of land in controversy, might be declared a trustee for him, and decreed to hold the title as such, and convey it to him upon receiving the sum of three hundred and twenty dollars, together with interest at the rate of six per centum per annum, from the 16th of May, 1842, which he tendered, or such other sum as the court might decree; and for an injunction, which was granted him, against a judgment at law in ejectment obtained by Morris for the land in controversy, and for rents and profits. Upon the hearing, all relief was denied; the injunction was dissolved; $1320 60 decreed to Morris for damages upon the dissolution, and the bill was dismissed at the cost of Wynn, who appealed to this court.

The land in controversy is the north-west quarter of section eighteen, in township sixteen, south of range twenty-five west, in Fisher's Prairie, south of Red River. On the northern boundary line of this tract, and adjoining it, lies the south-west quarter of section seven in the same township and range.

These lands were surveyed by authority of the General Government in the years 1840 and 1841. Up to the year 1842, they remained public lands. On the 16th day of May, in the last named

year, the tract in controversy was selected by one of the duly authorized locating agents for the State of Arkansas, as a part of the 500,000 acres granted by Congress for Internal Improvements, by the act approved 4th September, 1841, and authorized to be selected by the Governor, by act approved the 19th March, 1842. The selection of this tract was made by the concurrent act of Wynn and the locating agent of the State—Wynn assenting to and requesting the selection with the view to secure his improvement, he having the whole of this tract then in cultivation. The Governor having by his memorandum for the locating agent, of the date of the 2d of April, 1842, and by his further instructions bearing date the 15th of that month, proposed to the planters on Red River, to locate their improvements, and such other lands as they might desire to purchase, the terms and price to be fixed by the Legislature at the ensuing session, to begin in November next following. This selection, with others, was reported to the Governor, by the locating agent, the 2d of June, 1842, and by the Governor reported on the 8th day of that month both to the Register of the Land Office at Washington, Arkansas, (in which district the land was situate) and to the Commissioner of the General Land Office at Washington City.

This arrangement, so proposed by the Governor and acceded to by Wynn, who was one of the planters on Red River contemplated, was substantially ratified by the act of the Legislature of Arkansas, approved the 31st December, 1842, entitled "an act for the benefit of such persons as have settled on, or have made improvements on the public lands of this State," &c., (*Pamphlet Acts of* 1842, *p.* 42), by which the Governor was authorized to locate, as part of the 500,000 acres, lands on which persons had made, or might make improvements, on their written assent and request, and application, if such persons would agree to pay the State two dollars per acre, executing bonds for the same, payable in ten equal annual instalments, &c., on which the Governor to issue certificates agreeing to make deeds on full payment. The quantity so to be entered and purchased by any one person, was

limited to 320 acres, and all the benefits of the act were extended to persons settled on any of the lands already selected. And by a supplemental act approved the 4th February, 1843, such persons might have selected and purchased an additional quantity, not exceeding twelve hundred and eighty acres, the price of such additional lands to be at five dollars per acre. *Id.*, *p.* 159.

By these means, had this selection and location been ratified by the authorities of the General Government, Wynn would have obtained the tract of land in controversy at the price of two dollars per acre, payable in ten equal annual instalments, with interest at the rate of six per centum per annum.

But within one year after the plats of survey were returned, as allowed by the act of 1832, to wit: on the 9th of December, 1842, Keziah Taylor appeared in proper person, before the Register and Receiver at Washington, Arkansas, and upon the usual showing of cultivation in 1829, and possession on 29th May, 1830, was allowed to enter and pay out the land at the minimum price of the General Government, and obtained the usual Receiver's receipt therefor, upon which a patent issued in her name on the 22d of February, 1844. This pre-emption entry, in the language of the Commissioner of the General Land Office, "nullified" the previous selection and location made at the instance of Wynn by the State of Arkansas, and constitutes his main grievance.

Keziah Taylor having made her proof and payment, and received her certificate of purchase on the 9th day of December, 1842, on the next day, by her deed of that date, conveyed the land in controversy to William F. Morris, and it is under this conveyance he sets up his claim in the premises. On the 24th of the same month, Wynn wrote to the Commissioner of the General Land Office, alleging that he had "just been informed that Keziah Taylor, a resident of Texas, had appeared before the Register and Receiver, and had made the entry, &c., that she had been absent from the United States some ten or twelve years—had sold the improvement on the lands in question, previous to her leaving, under which by a chain of purchase, he (Wynn) had

obtained the possession, and had been cultivating the land several years without before ever hearing of any adverse claim to it. The Commissioner of the General Land Office, by his letter of the 19th of January, 1843, to the Register and Receiver at Washington, Arkansas, reciting these facts, and suggesting that if Keziah Taylor "ever had any claim, she had sold the same and yielded possession by abandonment of the premises for more than ten years," directed an examination into the alleged facts, and that the evidence should be transmitted to him with the opinion thereon of these officers. Under date of 12th September following, these officers transmitted to the Commissioner the depositions of Cryer, Bales, and Abrahams, touching the facts in controversy, and a deed from Andrew Hemphill to Samuel P. Carson, for the improvement upon the lands in question; and another deed from Buzzard to Wynn, for the same, in which is recited the sale from the executors of Carson to Buzzard. But they give no opinion upon this additional evidence, or that theretofore taken, except as to cultivation in 1829, and possession the 29th May, 1830, which they held well sustained, being of opinion that it was not competent for them to enquire of any other facts, and that "any act of sale, removal, or abandonment could not be enquired into, or the consequences determined by a subordinate branch of the executive department, but should be enquired into by the judiciary, and were "therefore of opinion, from the law and the evidence in the case, that the party aggrieved should seek his remedy elsewhere."

On the 8th of February, 1844, the Commissioner of the General Land Office, "upon a careful examination of the testimony," saw no ground to justify any action in behalf of Wynn, and placed the certificate of purchase in favor of Keziah Taylor on file for patenting.

In reference to occupancy and possession of the tract of land in controversy, the facts appear to be that about the year 1821, William Hemphill settled on the south-west quarter of section seven, and soon after extended his improvement on to the land

in controversy. That in 1824 or 1825, he departed this life, leaving a widow and two children (one of whom died) in the possession of his improvement. His widow, Keziah, now Keziah Taylor, remained there, and in 1826 or 1827, married Thomas Jacobs, who lived there until his death in 1828, after which his widow, Keziah, remained there until after the 29th May, 1830, perhaps until the fall of that year, or until the spring of 1831. Her cultivation of the tract of land in question in 1829—either by herself, or some one for her—and her possession of it on the 29th of May, 1830, may be regarded as fully enough established, her residence all the time being upon section seven.

In the fall of 1830, or spring of 1831, she clandestinely left the United States, expressing her intention never to return again, and settled in Texas, where she soon after married a man named Taylor. When she left the United States, she started late in the evening, and traveled through the woods to elude observation, that she might be enabled to get to the "Spanish country," as she called it, without being stopped. She carried her children with her and a negro girl slave belonging to the estate of her first deceased husband, to avoid, as she said, the surrender of the slave to the administrator of that husband. She also took with her everything she had, except a few articles, which she gave to the witness, who was her pilot through the woods, and until she reached the Sabine river, giving to him also her stock of hogs for his services, leaving her cattle in the range, and the improvement on the land in question, in the possession of Alexander P. Bales, to whom she informed the witness, who was her pilot out of this country, that she had sold it for $50, but would give it to him (the witness) if he would accept of it, as she never intended to return, and Bales had often disappointed her. Bales, however, testifies that she gave him the improvement as compensation for collecting, keeping together and salting the cattle she had left in the range, until the ensuing fall, when he was to drive one-half of them to her in Texas, and was to have the other half for doing so.

Immediately after Mrs. Taylor left, Bales took possession of the

improvement, and resided on it eight or ten months, when Taylor, who had, in the mean time, become the husband of Keziah, came to see him, and desired him to give up to him (Taylor) his interest in the improvement and cattle, which he refused, having, as he alleged, failed to carry one-half of the cattle to Texas in accordance with his agreement, because they had been detained by the sheriff of Lafayette county, on account of some claims againt Mrs. Taylor. But he went with Mr. Taylor to Morgan Cryer, who was the brother of Mrs. Taylor, and upon a compromise, he sold his interest in the improvement and the cattle to Cryer, for fifty dollars, Mr. Taylor being present at the sale and compromise.

Very soon after this, Cryer took possession of the improvement, and sold it to Andrew Hemphill. Hemphill afterwards sold it to Samuel P. Carson, having himself made two crops on it. Carson died in 1837 or 1838; and in 1839 the improvement was sold by his executor, under the statute of Arkansas, as a part of his estate, and purchased by Charles Carson, who immediately sold it to Jacob Buzzard; and he in 1840 sold it to the complainant, Wynn, who has ever since had the whole quarter section in cultivation.

Wynn, in 1835, purchased from Joseph Jones an improvement which Massack H. Jones had sold, in 1833, to Jones, on the north-west and north-east quarters of section eighteen, and on which Jones had lived and cultivated until he sold to Wynn; which, added to his purchase from Buzzard, gave him the peaceable possession of the entire tract of land in controversy, which he held from that time forward.

It thus appears, that from the time of Mrs. Taylor's removal from the United States, until her appearance at the land office to make her pre-emption claim, was a period of twelve years. And there is no evidence that any claim to the land in controversy had been made in her behalf for nearly eleven years. During all this time she had been permanently residing in Texas, having become a *feme covert* there during the first year of her residence.

Under this state of facts, Wynn claims the right to question the

title of Morris to the land in controversy, derived by deed from Mrs. Taylor, the patentee.

From the course of the argument of his counsel, and his tender of two dollars per acre to Morris, with interest from the 16th of May, 1842, (the day when the land was selected as a part of the 500,000 acre grant by the agent appointed by the Governor,) it would seem that he claims this right through the State of Arkansas. And he insists that his interest, thus acquired in the land in controversy, "is at least equal to that of a pre-emption claimant." Because, as he contends, immediately upon the selection by the State's agent, or at least as soon as the list or evidence of the selection had been filed with the Register of the proper land office, (which in this instance was in June, 1842,) the land vested in the State of Arkansas, who, from that time forward, held it as trustee for him, in case he should agree to, and comply with the terms of sale and purchase afterwards to be fixed by the Legislature. The Legislature did afterwards, substantially, ratify the arrangement between the Governor and the planters on Red River, under which the selection in question had been made, by the act approved the 31st December, 1842, and the supplemental act approved the 4th February, 1843, and fixed the terms of sale and purchase, which were provided for in that arrangement; but there is no pretence that Wynn ever complied with these terms, or offered to comply with them, unless his tender to Morris, in his bill of $2 per acre for the land in controversy, shall be deemed equivalent to such compliance or tender, upon the ground that the State had rendered it unnecessary to make an offer of compliance; because, before Wynn had any opportunity to comply, the State had, by her own voluntary act, abandoned the selection in question, and made another for herself in lieu of it, which she did, according to the statement of Wynn in his bill, immediately after the allowance of Mrs. Taylor's pre-emption by the Register and Receiver, and before the ratification of the arrangement by the Legislature, instead of adhering

to the selection, and protecting Wynn, as he alleges in his bill she ought to have done.

If Morris held his title from the State of Arkansas, instead of from the Federal Government and as against the State of Arkansas, as he does, there would be more reason to suppose that this tender to him was equivalent to the performance, on the part of Wynn, of his alleged agreement with the State of Arkansas, under which he claims that his rights in the premises have grown up. But if it should be so held under the facts of this case, as they exist, then the consequence would be, that in case Wynn had the right, under his alleged contract with the State, to insist that the selection originally made should remain, and as a necessary corollary, that the State had no right to remove it, and make another selection in lieu of it, although with the assent of the Federal Government, and Mrs. Taylor's pre-emption claim should be held bad, then Wynn would get the land in controversy at $2 per acre; Morris would receive too much and be trustee for the State of Arkansas, for the 75 cents per acre excess, which he would receive from Wynn beyond what he had paid the Federal Government for the land; the Federal Government would be trustee for the State of Arkansas for the $1 25 per acre received from Morris, and the State of Arkansas would be trustee for the Federal Government for the quarter section of land selected by her in lieu of the land in controversy. And the result would be that there are not enough parties to this suit to enable the court to decree distributive justice.

Hence, the true and first question is, whether or not Wynn did have this alleged right to insist that the original selection should not be withdrawn but adhered to. And as to this, it may be first remarked, that so far from its being pretended that the Governor of Arkansas had, at the time when the alleged agreement was entered into, any authority to bind the State of Arkansas in that behalf, by one of the terms of the alleged agreement itself it was to be dependent for vitality upon the subsequent ratification of the Legislature, which was to give these necessarily admitted un-

authorized acts of the Governor, the force of prior delegated authority. And according to the statements of Wynn contained in his bill, it was before any ratification by the Legislature, and of course before the alleged agreement had any vitality, and when the Governor, so far as the State was concerned, had a perfect right to recede from any unauthorized engagements of his, ostensibly on her behalf, either in whole or in part, that the Governor, (who had authority as to selections under the act of Congress making the grant) withdrew the selection in question, by the assent of the Federal Government subsequently obtained, which of course had relation to the time when the selection in question was actually withdrawn. Consequently, at the time when the selection in question was withdrawn, Wynn had no shadow of right founded upon the supposed agreement, for the simple reason that at that time it had no vitality. And when it was subsequently ratified, it had no vitality as to him, for the reason that when it received vitality from the hands of the Legislature—which of course had relation to the time when it was made—it had nothing to act upon, so far as Wynn was concerned; the selection in question having been in fact, in the meantime, withdrawn under the circumstances mentioned, and left nothing in existence to which the ratification could by law relate, so far as Wynn was concerned. Hence, the result would seem to be, inevitably, that the Governor having equal authority under the circumstances to withdraw the selection at the time he did, that he had to make it originally, the withdrawal nullified the selection. And having receded from his general unauthorized agreement with the planters on Red River, so far as Wynn was concerned as to the tract of land in controversy, before it was recognized by the State, his rescision nullified his opposite stipulation previously made. And the law must therefore contemplate that no selection at all was ever made by the State of the land in question, and that no agreement at all was ever made in the premises, on the part of the State with Wynn.

Hence, Wynn has no base upon which to found his alleged

right to insist that the original selection should not have been withdrawn, but adhered to, even if he had made the State of Arkansas a party to this contest.

As to any rights that he could set up under Mrs. Taylor, it would seem to be at most but the mere right of occupancy of an improvement upon public lands—a chattel interest transferred from her by parol, as the evidence shows him in no otherwise connected with her, giving to it its greatest force in supposing that she sold it to Bales when she first went to Texas.

And this would seem to be manifest from the following considerations. The sale was made in the fall of 1830, or in the spring of 1831, during the life of the pre-emption law out of which Mrs. Taylor's pre-emption right grew. That act, among other things, provided: "That all assignments and transfers of the right of pre-emption given by this act, prior to the issuance of patents, shall be null and void." 4 *Statutes at Large, p.* 421.

Upon this provision of the act, the Supreme Court of Alabama held in the case of *McElyea vs. Haxter*, 2 *Porter's Rep.* 148, that a power of attorney executed by the pre-emptor, granting authority to make titles to a purchaser after the patent should have been issued for the lands entered under this act, was void, as a circuitous mode of evading the act of Congress, and that a conveyance, obtained under such a power, was inoperative.

In January, 1832, an act of Congress was passed authorizing pre-emptors under the act of 1830, to "assign and transfer their certificates of purchase or final receipts, and patents may issue in the name of such assignee, any thing in the act aforesaid to the contrary notwithstanding." 4 *Statutes at Large, p.* 496.

This act has never been held, so far as we know, to have removed the original inhibition upon the sale of pre-emption rights, further than to authorize their sale after entry, instead of after the issuance of the patent, as originally allowed. And upon this question, in the case of *Terison vs. Martin*, 13 *Ala. Rep. p.* 29, where this point was mooted, that court said: "But no case has been found, and we apprehend none exists, where assignments or

sales of pre-emption rights before the entry was made in the land office, have been upheld." And there are other cases to the same effect.

Besides this, it is not at all probable, in point of fact, that Mrs. Taylor intended to sell a pre-emption right to the land in controversy, or that Bales intended or expected to buy such a right. The lands had not then been surveyed by the Government, and whether or not they ever would be, was dependant upon the doubtful matter, whether they would be found within the territorial limits of the United States, upon the running of the boundary line between this country and Texas, which was not done until some ten years afterwards. Nor had she done any act—nor was it in her power to do any such by reason of the want of the public surveys as a means of identifying her land—indicating an election on her part, to accept the gratuity offered her by the Government and thereby change the character of her occupancy from that of a mere squatter to that of lawful possession, under color of a vested legal right.

Nor was the sale of her occupancy and improvement at the time she made it, a sale either of the thing out of which her pre-emption right grew, or in which it lived. That right did not grow out of, or live in any occupancy of, or improvement upon the public lands, which existed after the 30th of May, 1830. Occupancy of, and improvements upon the public land, either prior to the time when the law of 1830 would operate upon them, or subsequent to the 30th of May, 1830, were equally incapable of springing up, or sustaining a pre-emption right under the law of that year. That right grew out of facts that were as incapable of being transferred to, and fixed in a purchaser by sale, as yesterday or last week would be. These facts were a cultivation and possession that were past and gone, not a cultivation and possession now existing.

Supposing then, that when, in 1842, Mrs. Taylor elected to accept the bounty of the Government, offered her by the law of 1830, and the supplements thereto, which extended the time for her election up to the time when she made it: that election would

relate back to the inception of her title, (and no doubt it would) and she would, consequently, be bound by any sale she had made in the mean time: still the law would say she had made no sale at all of her pre-emption right, even if she had in fact attempted to do so; because that attempt, in the face of the law to the contrary, would be nugatory. And if the law had not prohibited her, the sale of an improvement upon her lands, which was not, as we have seen, identical with her pre-emption rights—not the thing itself to which the pre-emption right attached, and in which it inhered—was not the sale of that right. There might have been a question of fact, in such a case, as to what she did sell, to be resolved by getting at the true intention of the contracting parties, as there was in the case of *Glanton and Anthony*, decided at the last term of this court, where the purchaser claimed by deed, (and not by parol, as he would have to do in this case) and by that was granted all the "right, title or claim of, in and to an improvement upon the public lands," which the grantor had, he (the grantor) having at the time a clear equitable right to the land upon which the improvement in question was situated, and was holding possession of that improvement by virtue of that right.

But even if this question as to what she really did sell, had been found by a resolution of the intention of the contracting parties, to have been an intention to sell her pre-emption right, that could have been of no avail, unless, according to the principles of equity, a specific performance of that contract could have been enforced. But it is unnecessary to pursue this inquiry further, because, as we have seen, the law did not sanction such a sale of the pre-emption right; and because, also, the complainant seeming to take the same view of the subject, has not framed his bill sufficiently for any relief in this aspect.

And this being therefore but the sale of a mere improvement upon the public lands, and not a sale of the pre-emption right to, or of any lawful interest in the soil as under title thereto—a distinction recognized by our statute, and by repeated decisions of

this court, (some of which are *Pelham vs. Wilson*, 4 *Ark.* 281; *Pelham vs. Floyd*, 4 *Eng.* 530; *Brock vs. Smith*, 14 *Ark.* 434,) it is clear enough, that unless a settler or occupant upon the public lands has some right to it, vested under law, he has no cause to complain of any disposition whatever that the Federal Government may make of the land, and no ground for relying, as an equitable estoppel, upon any act of omission, commission, or bad faith on the part of the vendee of the Government, which deprives him of his improvement—he having no rights to be invaded, has nothing susceptible of injury. The hardship is but that of the ordinary case of the entry by one man of another man's improvement upon the public lands.

But supposing Wynn to be in a condition to contest the validity of Mrs. Taylor's pre-emption right, and the grant thereon, it would seem to be well enough sustained.

She could not have known with certainty of its existence until the boundary line was run between the United States and Texas, which was not a great while before she appeared at the Land Office to prove it up, although she had been absent so long before.

Her cultivation in 1829, and possession the 29th June, 1830, seem well enough established: indeed, they were admitted by Wynn in his correspndence with the Commissioner of the General Land Office, and seem now to be admitted by his counsel. And her pre-emption right being thus "covered by the law, it became a legal right, subject to be defeated only by the failure to perform the conditions annexed to it." And those which were subsequent were but proof to the satisfaction of the Register and Receiver of the proper land office, and payment within the time prescribed by act of Congress. And this having been rendered impossible by reason of the surveys not having been made and the plats returned on the part of the Government within that time, the act of Congress of the 14th July, 1832, afforded her relief, and enabled her to reap the benefits of that of 1830, under which her rights had vested, to which the act of 1832 was a sup-

plement. *Lytle vs. The State of Arkansas*, 7 *Eng. Rep.*, *at p.* 34; *Gaines and others vs. Hale*, (*ante*)

The further supposed condition of continued actual occupancy and possession under the act of 1830, has never been required by the Commissioner of the General Land Office, whose judgment, in the administration of the land laws, is enlightened by the law officers of the Government. And in the case of *Lytle vs. The State*, 9 *How. U. S. Rep.* 314, already cited, which stood on demurrer, the bill contained no such allegation. Whatever evils or hadships may have occasionally resulted to a second settler upon an apparently abandoned occupancy, or to the purchaser of an improvement upon lands to which a pre-emption right had vested, who might occupy and continue to improve the land in the interval between the accrual of the right and its consummation—often protracted to a great length by the tardiness of the public surveys—the courts are not authorized to remedy them by imposing upon the pre-emptor conditions beyond those imposed by the act of Congress, under which his pre-emption right has vested. Nor are such second settlers or occupiers of improvements—who are no other than trespassers—within the saving influence of equitable doctrines, applicable to those who predicate their rights of occupancy upon law. Some of the evils of the earlier pre-emption laws have been remedied by provisions in later ones, experience having shown such evils, and the wisdom of Congress provided against them for the future; but this can lay no foundation for the courts, when passing upon rights vested under the earlier laws, whose consummation had been for a series of years prevented by the tardy action of the surveying department, to endeavor to provide any like remedies by judicial legislation; especially for such evils as are the natural result of this very tardiness on the part of the Government. These earlier laws, like that of 1830, were of short duration; and when a right accrued under any of them, it was not possible for the land to which it attached to be kept in a dubious condition as to the intention of the pre-emptor to consummate it or not for an inconvenient time. Under these laws, if he did not make

his proof and payment within the short time provided, his right was forfeited. And it is most reasonbly to be supposed that for the advantages that the Government proposed to reap from these laws, she was willing to submit to the inconvenience of extending to the pre-emptor, the privilege of making his election to consummate his right, or abandon it, at his pleasure, up to the last moment. Hence, the only abandonment or forfeiture that was probably contemplated, was that which was evidenced by a failure to make proof and payment within the time prescribed by the law; and the usages in the General Land Office seem to have conformed to this idea. Even in cases where the pre-emptor had equal right, by virtue of cultivation and possession, to several tracts of the public land, he was not held to have abandoned either, until he had made his election, although at the last moment.

The words used in the act in question, "every settler or occupant of the public lands," are sufficiently broad to embrace aliens as well as citizens, and in administering it, the Land Department made no discrimination, and even extended it to free negroes, when the laws of the State, in which they claimed pre-emptions, allowed them to buy lands. And hence, although Mrs. Taylor might have been an alien, when her pre-emption right was consummated by grant, she had, without the aid of any statute, capacity to take and hold lands until forfeiture in office found. But when her right in this case vested, she was indisputably a citizen, and the grant would relate to that time.

And if after the vesting of her right, and before it was consummated by grant from the Federal Government, she, by the double operation of her own will and the assent of the Federal Government, had become an alien, that would not have worked a forfeiture of the right so already vested. This we understand to be the general principle of law, applicable to the point; and in the case of *Murry vs. Fishback*, 5 *B. Mon.* 406, where one of several heirs had left Kentucky and settled, as he supposed, in Arkansas, but on the line being run between the United States

and Texas, it was found that he was within the boundary of Texas, and he had afterwards moved further into the interior, and still resided in that Republic, the court said: "On these facts it was contended that there could be no recovery to the extent of the interest which had descended to him. But although it is a common law principle, that lands cannot pass by descent to an alien, it has never been decided, and we are not prepared to admit that lands, or a right to lands, already vested by descent in a citizen of Kentucky, is *ipso facto* forfeited, or otherwise lost by his removal to a foreign country and continued residence there, though it be for the purpose and with the effect of expatriation. Lands purchased by an alien born, are not forfeited without office found, and even if Fishback should, upon the facts stated, be adjudged to have voluntarily expatriated himself, and to have become an alien, so far as his civil rights are concerned, still it would not follow that his lease of lands, to which he had a vested right while a citizen, would be void, or that his lessee could not recover."

We have been unable to perceive the force of the distinction taken by counsel between a right and a title, as an avoidance of the effect of these principles of law. They are, perhaps, not entirely convertible terms, because the one savors more of the substance, and the other, more of form. The right, however, may exist in equity, while the title, when acquired, would be the legal evidence of the right, and when emanating from the Government, after various acts following the vesting of the right, and all in consummation of it, as in this case, the issuance of the patent would relate to the time of the vesting of the right, as between the Government and the grantee; and so, also, doubtless, as between the grantee and others not having intervening rights founded upon law.

Finding no error in the decree of the court below, it must be affirmed.

Mr. Justice WALKER:

I fully concur with my brother SCOTT, in opinion, that before

Wynn could question the sufficiency of Taylor's title, he must first show such title in himself, as, but for the interference of Taylor's claim, would entitle him to the land.

This, in my opinion, he has wholly failed to do; and, consequently, the judgment of the court must be against him, wholly irrespective of the merits of Taylor's title, with regard to which, I decline to express any opinion.

Mr. Chief Justice ENGLISH:

Dissenting from the conclusion to which my brother judges have arrived in this case, as well as from the principal legal propositions upon which brother *Scott* bases the result, in the opinion just delivered by him, I deem it my duty to express briefly the grounds of non-currence, with all due deference to the judgment of my associates. Understanding, however, that the case will be taken to the Supreme Court of the United States, where the questions involved will be finally and authoritatively settled, I deem it unnecessary to go at any length into the reasons and adjudications upon which my conclusion is founded.

My opinion is, that Morris holds the naked legal title to the land, based upon a supposed pre-emption right in Mrs. Taylor, which, by both sale and abandonment of her improvement, was destitute of legal foundation or merit as to her. That she having sold her improvement, and abandoned the land, and the Territory of Arkansas, and being a citizen of Mexico, when the act of 14th July, 1832, (4 *vol., U. S. St. at Larye, p.* 603,) was passed, and this act applying only to continuous settlers or occupants, who had been unable to prove up their pre-emptions under the act of 29th May, 1830, on account of some one of the obstructions therein enumerated, she was not in a position to derive any benefit from that, or any subsequent act applying to occupants. That she placed herself without the pale of the spirit and policy of the pre-emption system, which was designed to encourage the settlement of the public lands, and the improvement of the country by a resident population.

That this (in my judgment) meritless pre-emption, (as to her)

was thrust in between Wynn and the State to defeat the arrangement which he had made with the Governor to secure title to the land, which was possessed and cultivated by Wynn, and he was thereby prevented from obtaining the legal title through that channel. That upon all the facts of the case, he is entitled, in equity and good conscience, to have the naked legal title held by Morris and based upon Mrs. Taylor's supposed pre-emption right, divested, and transferred to him upon payment of the entrance money.

That the United States having sold the land, and received the entrance money, has no interest in the controversy. That the State is not a necessary party; because, though she selected the land as part of the 500,000 acre grant, and acquired thereby a right thereto, yet in consequence of the sale of it to Mrs. Taylor by the procurement of Morris, other land was selected, it seems, by the State in its stead. The State is not injured. Nothing could be decreed to or against her. Wynn is the only injured party, and Mrs. Taylor and Morris, being the agents who procured the injury, the relief which he seeks may be made full and ample, without other parties than them. It can scarcely be doubted but that Wynn would have procured title to the land, through the State, by means of the arrangement which he made with the Governor, and which was afterwards ratified by the General Assembly, but for the interposition of Mrs. Taylor's unfounded claim to a pre-emption. He having acquired title to her improvement by a succession of transfers, and she having abandoned the land and the country, and permitted him to occupy, cultivate, and improve the same, was thereby estopped from setting up any pre-emption claim thereto for her own benefit. But she and Morris interposing her groundless claim, to defeat the arrangement which Wynn had made to procure title to the land, and which he would doubtless have secured but for their acts, I think it but just and right, and perfectly within the power of the court of equity, to transfer the legal title from Morris to Wynn, under all the circumstances of the case, as made by the pleadings and evidence.

## WYNN VS. GARLAND.

There is no ground to impute fraud to one legally entitled to a pre-emption, on account of failure to give notice of his right to another, who subsequently settles upon the same land, and makes valuable improvements thereon: nor on account of his omission to select, until the last day allowed by law for proof and payment, which of two tracts of land, upon both of which his improvement extended, he will elect to take.

There is no doubt of the regularity and validity of the action of the Land Department in annulling a pre-emption allowed by the Register and Receiver, upon proof of a legal pre-emption right to the same land under a prior law—all entries being *in fieri* until sanctioned by the President by the issuance of the patent.

Where a valid entry is set aside, and the land afterwards sold by the Government to another person, and the patent issued to him, he takes the legal title charged with the trust.

The decision of the Register and Receiver, in allowing a pre-emption, is examinable in a court of chancery, for fraud or mistake, at the suit of one legally entitled to a right of pre-emption in the same land.

And where a patent has been issued in such case, and fraud or mistake is clearly proven: as that the possession and cultivation of the patentee were not on the tract of land to which he proved up his pre-emption, but on an adjoining tract, a court of chancery will grant relief to the injured party.

The admission of a fact, when not operating as an estoppel, is but evidence of the existence of the fact; and when it is established by other evidence, that the fact admitted never had existence, and that the party making it, could have had no personal knowledge of the fact, such admission is not of much weight against him.

*Appeal from Lafayette Circuit Court in Chancery.*

Hon. SHELTON WATSON, Circuit Judge.

PIKE, for the appellant. We apprehend that the counsel opposed to us hardly think of controverting the fact of mistake, at least; but rest their case on the broad position, that the decision of the land officers, as to the facts of cultivation and possession,

is *res adjudicata*, not examinable in equity upon the allegations and proof made in this cause.

The counsel appeared to rely, somewhat, in the court below on some statements of Wynn's, in his letters to the Commissioner of the General Land Office, as admissions of the fact of cultivation by Hemphill. Wynn was not in the country at the time, and had no personal knowledge of the facts of cultivation and possession by Hemphill. Vague confessions and admissions are the weakest of all possible testimony; and when hastily and inadvertently made, without investigation, are not binding. 1 *Greenlf. Evidence, sec.* 200; 17 *Mass.* 27; 3 *Sumn.* 435; 11 *Verm.* 138; 1 *Wend.* 625; 6 *ib.* 268, 277.

There is no dispute in this case as to Wynn's right to a pre-emption under the act of 1838, in case Garland cannot hold the land against him under the pretended pre-emption right of Hemphill.

The next question, therefore, is how far the decision of the Register and Receiver, as to the facts of cultivation by Samuel Hemphill in 1829, and occupancy in 1830, is conclusive. In other words, can the court go behind their decision, and re-examine those questions of fact upon allegations of fraud or clear mistake of fact in the evidence given before them.

By the pre-emption act of 1830, and the subsequent acts as to pre-emptions, the Register and Receiver are constituted a tribunal to receive testimony, and adjudge as between the claimant and the Government. Their proceedings are *ex parte*, without notice, actual or constructive, to individuals or the world.

Admitting that the land officers act judicially, and that they stand on the same high ground as courts of general jurisdiction, what is the rule as to judgments? Are they conclusive as to *facts*—as to the truth of the facts on which they are based, against third persons?

They prove, conclusively, that such a judgment was rendered; and as to parties and privies, they prove conclusively all facts which were directly in issue, and found to be true by the jury or

court; but as to strangers, they are matters *inter alios acta*, and prove nothing whatever. 2 *Stark. Evidence*, 183, 184; 1 *Greenlf. Evidence*, *secs.* 522, 523, 538.

Wynn was no party to this proceeding before the land officers. He was not notified to be present—the proceedings were merely *ex parte*—there was no *lis contestatio*—he had no opportunity to produce witnesses, or cross-examine. And to hold him bound, under such circumstances, would be a total perversion of the principles of justice. 1 *Journ. du. Pal.* 560; 3 *ib.* 125; 19 *ib.* 698; *Pothier Part IV.*, *chap.* 3, *art.* 5, *No.* 900, 901, 902; *Taber vs. Perret*, 2 *Gallis.* 568; *Baring vs. Fanning*, 1 *Paine* 554; 7 *Cranch* 271; 11 *Wheat* 280; 3 *Har. & John.* 13; 6 *ib.* 182; 2 *J. J. Marsh.* 429, 440; 3 *Bibb* 174; *Denison vs. Hyde*, 6 *Con.* 518; *Shafer vs. Gates*, 2 *Ben Monroe* 453; *Englehead vs. Sutton*, 7 *How.* (*Miss.*) *Rep.* 99; *Nason vs. Blaisdell*, 12 *Verm.* 165.

As to the decision of the Register and Receiver in this case, the proceedings before them were not based on any allegation that the right to the land was to be determined between Garland and Wynn, or any other person than Garland and the Government, who were the only parties to the suit; that no notice was sought to be given: that the decision was only that Garland had made such proof as the Government required for its own satisfaction, and so only settled the question as between Garland and the Government; and therefore, was as to Wynn a nullity. *Browler vs. Edridge*, 18 *Conn.* 10; 9 *Cranch* 144; 8 *Sm. & Marsh.* 268; *Bird vs. Ward & Cravens*, 1 *Misso.* 398.

But we proceed further to say, that however conclusive the judgment may be held, and admitting that it stands on the same high ground as the sentence of a prize court, still it may be assailed for fraud, and its effect altogether avoided. *Bradstreet vs. Neptune Insurance Company*, 3 *Sumn.* 604; *Pratt vs. Northam*, 5 *Mason* 103; 1 *Greenl. Ev.*, *sec.* 541; *Sims & Wise vs. Slacum*, 3 *Cranch* 307; *Ammiden vs. Smith*, 1 *Wheat.* 447; *Fairfield vs. Baldwin*, 12 *Pick.* 388; *Borden vs. Fitch*, 15 *J. R.* 145; 5 *Ohio* 547; 11 *Mass.* 265; 3 *Day* 30; 2 *Watts* 180; 2 *ib.* 354; *White vs.*

*Jones*, 1 *Wash.* 116; 1 *Green* 263; 3 *Dessau.* 269; 1 *J. C. R.* 402; 1 *Ves.* 120; *Str.* 666; 2 *Cowen Rep.* 193; 2 *Hen. & Munf.* 136; 3 *J. C. R.* 275; 5 *ib.* 52; 7 *ib.* 182; 2 *Gill* 291; 1 *Har. & John.* 370; 2 *Har. & McHenry* 140, 244; 3 *Grattan* 315; 4 *Howard* (*Miss.*) *R.* 56; *McGill vs. McGill*, 4 *Annual Rep.* 266; 5 *Cranch* 196; 15 *Peters* 105; 7 *Wheat.* 1, 212, 140; 3 *Story* 536; *Ross vs. Lane*, 3 *Sm. & Marsh.* 547; *Niles vs. Anderson*, 5 *Howard* (*Miss.*) 365; *ib.* 562; 10 *Sm. & Marsh.* 295; *Rector vs. Welch*, 1 *Misso.* 335; 1 *Mon.* 256; 3 *ib.* 260; 2 *B. C. Howard* 318; 3 *Robins* 296; 4 *ib.* 79; 2 *Metc.* 138.

If the case were put on the mere ground of mistake, it would be the same. 1 *Story's Equity*, *sec.* 155, 166, 384.

There can be no doubt, that in this case a court of equity is competent to afford relief. As Wynn's right to a pre-emption, under the act of 1838, had accrued and become a vested one, before Hemphill's pre-emption was allowed, and it is clear that Hemphill really never was entitled to a pre-emption on that tract, and proved one either by wilful fraud, or ignorant mistake; and as consequently there was no pre-emption right to it in any one, conflicting with Wynn's, a court of equity will protect his rights.

WATKINS & GALLAGHER, for the appellee. We maintain that the complainant cannot, in this proceeding, impeach the title of Garland, either upon the ground of mistake in proving up the Hemphill pre-emption, or of fraud in procuring it to be done. Odious as fraud may and ought to be, where it exists, the principle applicable in this case to either ground, is, we think, the same.

We never heard it contended for, much less admitted, that the District Land Officers, for the adjudication of pre-emption claims, constituted a court of general jurisdiction, either *in personam* or *in rem*, or that their decisions were entitled to any such respect, infra, or extra, territorially. On the contrary, they form a court of special and limited jurisdiction. They are, if we may so speak, a quasi court—no more so than any board of commissioners, ap-

pointed by authority of law to hear testimony, and adjudicate any matter affecting the rights or interests of the Government. The act of Congress makes no provision for notice to any other parties, or to the world at large, and notice would not be presumed, because impossible. Arguments based on the supposed analogy between judgments *in personam* or *in rem*, and decisions in pre-emption cases, are only calculated to mislead the court, and confound the whole subject. It would be a glaring absurdity to claim that a decision of the land officers concluded any rights but those of the claimant and the Government. *And as against the Government or the claimant, their decision, if within the scope of their jurisdiction,* IS CONCLUSIVE—a proposition in which the common sense usage of the Land Department, and every respectable judicial authority, concur—which is no where denied, and is all we contend for in this case.

When a Government undertakes to dispose of the property of its citizens—to determine private rights, by the judgment or condemnation of its courts, the forms of law, founded in reason and justice, require notice, actual or constructive, before the suitors can become parties to the judicial contract, which disposes of their property and concludes their rights. An act of legislation which professed to deprive a citizen of his property, in possession, or in action, without notice or trial, would be unconstitutional or outrageous oppression, without a constitution. But, when a Government, *for the disposition of its own property, or determination of claims against itself*, by general or special laws, establishes a tribunal, by whose decisions it agrees to become bound, it would be equally preposterous to suppose that any third person, other than the Government and the claimant, has a right to notice, or any pretence for assailing the decision, or impeaching its validity for any cause, much less on the ground that he had no notice of the proceeding.

Recurring now to the usage of the Land Department, entitled to respect and adherence, because important rights to vast amounts of property are connected with, and grow out of it, we find there

has never been a doubt as to the conclusive effect of a decision of the land officers. We refer to the opinion of Mr. BUTLER. 2 *Instructions & Opinions*, *No.* 57, *p.* 85. See, also, *Ib.*, *No.* 64, *p.* 97; *Ib.*, *No.* 88, *p.* 140, *No.* 682, *p.* 729.

The current of judicial decisions to the same effect, has been uniform. *McConnell vs. Wilcox*, 1 *Scam.* 344; *Wilcox vs. Jackson*, 13 *Peter's* 511; *Nicks vs. Rector*, 4 *Ark.* 283; *Finley vs. Woodruff*, 3 *Eng.* 341; *Grand Gulf Railroad Company vs. Bryan*, 8 *Sm. & Marsh.* 268; *Lytle vs. The State*, 9 *Howard U. S.* 333.

Claim to a pre-emption, is essentially a claim against the Government; notice of intention to make proof of it before the Register and Receiver, is not necessary. The fact of cultivation and possession, is a question solely between the claimant and the Government. The act of 1830 made no provision for notice or process of any kind.

A court of chancery sustains and enforces a prior equity against the elder grant perfected by a patent, by means of the doctrine of relation. A court of equity looks to the inception of the title. Where a patent is issued, it has relation to the inception of the title, and, according to that, is upheld or overthrown. Where, by decree overriding the patent, a prior equitable right is sustained, the title so acquired has relation to its inception. The pre-emption acts, like all other laws offering rewards upon conditions, are proffered contracts. *Lytle vs. The State*, 9 *How. U. S. Rep.* 334; *McAfee vs. Keirn*, 6 *Sm. & Marsh.* 789; *Taylor vs. Brown*, 5 *Cranch* 234; *McArthur vs. Brouder*, 4 *Wheaton* 488; *Fenley vs. Williams*, 9 *Cranch* 164; *Isaacs vs. Steele*, 3 *Scam.* 97; *Benner vs. Manlove*, *ib.* 339.

Admitting broadly the right of the United States to proceed to have canceled or vacated a patent which has improperly issued, or been unduly obtained, the proceeding of course implies that there is something to be investigated, some issue to be judicially determined. Admitting that—it is a disgraceful supposition that the Government ever did or would, or can condescend, to assign

or transfer its right or cause of action to impeach its own patent. When a prior pre-emption right is judicially established against a patent, the proceeding is not under the Government, but adverse to it; the suit is against the patentee, and succeeds, because the Government had no real or substantial interest to assign by grant or patent.

We say there are two classes of cases where title would be decreed against a patentee: one, where the complainant had an equity by privity of contract with the patentee, which by relation was an equitable estoppel; and the other, where a senior equity was asserted against a junior equity, improperly ripened into a legal title by patent. In either case, the complainant may show fraud or mistake; as, for example, obtaining the patent in violation of the contract, or in procuring the allowance of the junior claim by undue means, or in having prevented the complainant from obtaining a confirmation of his prior equity against the Government. So far as we are enabled to examine, all the authorities cited for the appellant fall within one or the other of these two classes of cases; and we do not believe that a respectable authority can be produced deciding that a patent, issued upon a senior claim, can be impeached at the suit of a private individual, and for the purpose of letting in a junior claim.

In *West vs. Jarrett*, 1 *Harris. & John.* 539, the title of the complainant was elder in its inception, and superior to that of the defendant. Of the case of *Garrettson vs. Cole*, *Ib.* 370, it may be said that the opinion of the *Chancellor*, so triumphantly quoted from, is altogether unintelligible—was predicated on an erroneous assumption of facts; and lastly, his decision was reversed in the court of appeals. In *Smith vs. Yates*, 2 *Har. & McHen.* 244, the complainant had the elder survey. In the *State vs. Reed*, 4 *Har. & McHen.* 10, the decree was to vacate a patent, which had been obtained by misrepresentation to the General Assembly, for land which, agreeably to an act of the General Assembly, *had been sold* to another person. In *Hagans vs. Wardens*, 3 *Grattan* 315, the complainant had the prior entry. In *Carter vs.*

*Spencer*, 4 *How. Miss.* 42, where Chief Justice SHARKIE said: "The validity of a patent cannot be questioned, either in a court of law or equity, except on the ground of fraud or mistake"—though relief was denied, the case made by the bill was that defendant had fraudulently entered and obtained a patent for lands to which the complainant had a prior vested right of pre-emption. *McGill vs. McGill*, 4 *Annual Rep.* 266, needs no comment. *Bodley vs. Taylor*, before noticed, Chief Justice MARSHALL said "was an appeal from the decree of the court form the District of Kentucky, by which Taylor was directed to convey to Bodley and others a part of a tract of land to which he held an elder patent, but to which Bodley and others claim the better right under a junior patent." In *Brush vs. Ware*, 15 *Peters* 107, the court said: "The controversy in this case, does not arise from adverse entries, *but between claimants under the same warrant.* And it is admitted that Ware, as executor, had no power to assign the military right, which, on the decease of Hockaday, descended to his heirs. It is too clear to admit of doubt that Ladd, by circumvention and fraud, obtained the assignment from the executor, which enabled him to procure the warrant from the Register." In *Polk's Lessee vs. Wendall*, before noticed, the case, or the supposed case, was that the grant was absolutely void by the law of North Carolina. In *Miller vs. Keer*, 7 *Wheaton* 1, the decision was that where a superior equitable title was asserted against a patent, IT *was first open to examination*, and the complainant failed because his supposed prior equity was founded on a mistake. In *Hoffnagle vs. Anderson*, 7 *Wheat.* 212, Chief Justice MARSHALL thought the alleged prior equity was too vague and indefinite to prevail against a patent, though founded on a mistake. In *Bouldin vs. Massie's Heirs*, 7 *Wheat.* 122, where Chief Justice MARSHALL said: "The title of the person who has obtained it (the patent,) is undoubtedly examinable, but no presumption exists against him," the case was that the complainant claimed, as heir of Robert Jouette, to whom a military land warrant had been granted by the commonwealth of Virginia, and the

defendant claimed as assignee of Robert Jouette, and in that character had procured the patent. The complainant denied this assignment, "*on the existence and validity of which, the whole cause depended.*" It was a question of contract, both parties claiming under the same right. In *Niles vs. Anderson*, 5 *How. Miss.* 382, both parties claimed to have purchased a reservation from an Indian. The complainants' purchase, by which they acquired an inchoate equitable title, was prior to that of the defendants, whose purchase was made in fraud. In *Rector vs. Welch*, 1 *Missouri* 335, just where the quotation (in the argument for appellant) ends, the court proceed to say: "In either of which cases, it should be regarded as having no effect against a survey, or a New Madrid location, *made prior to its emanation.* In *Stoddard vs. Chambers*, 2 *Howard U. S.* 318, the case was that the senior claimants had the better right under a Spanish concession, opposed to a title having its inception subsequent to and conflicting with their elder right; and the conclusion of the whole matter was, that the patent of the defendant having issued for land which had been appropriated and reserved, was without authority of law, and *void.* In *Lott vs. Proudhome*, 3 *Robinson La.* 294, the location of the defendant was not made until after the plaintiffs had purchased. *Kitternege vs. Breand*, 4 *ib.* 79, needs no comment. If such authorities as those would aid the complainant's case, others might be added of like import. Thus, *Thredgill vs. Pintard*, 12 *Howard U. S.* 24, was a case of prior equity by contract—and so in *Bagnell vs. Broderick*, 13 *Peters* 450, and *Cromelin vs. Mintum*, 9 *Ala.* 594.

From the necessity of the case, and the uniform usage and construction of the law, making the President the head of the Land Department, and requiring him to see the laws faithfully executed, he acting through his subordinates, there has grown up a right of appeal to and power of revision in the Commissioner of the General Land Office, over the acts and decisions of the district land officers.

Here were two decisions, in favor of claimants, under different

acts, to the same tract, and upon questions of fact admitted to be within the jurisdiction of the land officers. It was the plain duty of the President to grant the patent to the person entitled to it as against the United States. It was no new case, nor a new question concerning the authority of the Commissioner by law and usage, with both adjudications and both claimants before him, to cancel the certificate which had improvidently issued, and award the patent to the claimant under the first law. That much remained for the President to do. *Dickinson vs. Brown*, 9 *Sm. & Marsh.* 136; *Lewis vs. Lewis*, 9 *Misso.* 183; *Miller vs. Ker*, 7 *Wheat.* 1; 3 *Rob. La. Rep.* 295.

We hardly deem it necessary to argue the matter of the alleged mistake. As a minor question, it depends on the other. It will suffice to say that the cases which the counsel for appellant has put by way of illustration, fall short of meeting the question. Various acts of Congress have made provision for the correction of admitted mistakes. This is not such a one. Hemphill and the witnesses were not mistaken about the locality or description of the tract to which they intended to prove up a pre-emption.

The testimony taken in this cause clearly shows that Hemphill was entitled to a pre-emption; and if there were any doubt upon this subject, the complainant himself has furnished evidence, in the face of which he can hardly ask this court to decree against Garland, upon any ground, much less that of intentional mistake or fraud. The counsel on the other side, has cited a long list of authorities to show, what he altogether overlooked in applying that rule to Garland, that proof of admissions is the weakest of all evidence; and he contends that the admissions of Wynn were made under a mistake. The rule stated is no doubt applicable to verbal admissions, where the question is as to the fact of the admission made in conversation. But these admissions of Wynn, *were made by him*—deliberately made in writing, while ingeniously and artfully representing his own case to the Commissioner, on the appeal, and arguing against that of Garland; and we think it demonstrable they could not have been made under a mistake.

Mr. Justice SCOTT delivered the opinion of the Court.

The land in controversy between these parties, is the north-east quarter of section eighteen, township sixteen south, of range twenty-five west. It is on the south side of Red River, in Lafayette county.

The bill was filed in the Circuit Court of that county, by Wynn against Garland, to enjoin him from proceeding at law to recover the possession of the premises, to quiet plaintiff in his possession, and for general relief. Upon the hearing, the injunction before granted, was dissolved; Wynn was denied all relief, his bill dismissed, and Garland decreed damages against him under the statute, to be ascertained by a jury. Wynn then brought the case here by appeal.

The transcript is quite voluminous. Besides lengthy pleadings, swollen by many exhibits, there are numerous depositions. It does not seem necessary to set these out, or State their substance beyond this, to wit:

Wynn claims the land under the pre-emption law of 1838. He made proof and payment under the provisions of that law, and obtained the usual patent certificate, on the 30th of November, 1842. There is no question but that he was entitled to purchase the land from the government, under that law, if no one had a superior right to purchase it under one of the prior pre-emption laws.

Samuel Hemphill, under whom Garland claims, asserted his right to purchase the same land under the pre-emption law of 1830; and, on the 19th of February, 1843, having made his proof under the provisions of that act, and the supplement to the same, to the satisfaction of the Register and Receiver of the proper Land Office, was allowed that day to pay out the land, and received the usual patent certificate for the same. This was regularly assigned to Garland; and, on the 9th of January, 1844, after having examined the testimony filed to sustain these two respective conflicting claims against the Government, the Commissioner of the Gen-

eral Land Office approved the last mentioned entry, upon the ground that the pre-emption right, under which it was made, was fully proven, and being under the law of 1830, must take precedence of Wynn's entry, which, although fully proven also under the provisions of the law of 1838, was subject to the senior right under the prior law; and, upon that ground, canceled the entry of Wynn, and approving that of Hemphill, on the next day, to wit: the 10th January, 1844, the patent was signed by the President, and issued to Garland as assignee of Hemphill, in the usual course.

Thus Garland has the legal title, perfected by patent, which he claims to be supported by an equity of Hemphill, as against the Government, under the law of 1830, while Wynn, upon the foundation of his claim under the law of 1838, denies, *in toto*, the alleged equity of Hemphill, and assails it in divers ways; mainly, however, for abandonment, fraud, and mistake—setting up his own claim under the law of 1838, as being both legal and equitable, and the only true pre-emption right to the land in controversy. There is a vast deal in the record, both in the pleadings and evidence, relating to the improvements upon the public lands, of each of these parties, and of those under whom they claim, as successors, their respective improvements, which seems to be mainly designed to show hardship, that can have no legitimate influence in the decision of the questions involved. And as to such matter, it may be sufficient to remark, that each party having had a pre-emption right under the law of 1830, as assignee of the respective possessors of that year, by virtue of the cultivation and possession of their respective assignors, under which each had the election to take either of two or more tracts of land, upon which the respective cultivation of their several assignors extended in the year 1829, neither could have any equity in *any other tract*, than that *one elected* to be taken, however valuable may have been their several improvements upon the tracts, not covered by their respective pre-emption purchases as located by themselves, for the reason that all such improvements had been

purchased or made at their own risk, like ordinary improvements upon the public lands, made with no reference to the acquiring of a pre-emption right.

And as to all such improvements, neither the Government, nor any purchaser from the Government, whether purchasing by virtue of a pre-emption right, or at auction sales of the Government, or by private entry, is to be held bound to respond to any supposed equity in the owners thereof, as against the Government, and her vendees are but simply intruders and trespassers.

Hence, as to all that class of claimants of the possession of the public lands, who may have thus improved, or purchased improvements upon the public lands, although their claims, while they continue to exist in fact, may be recognized and protected by our own State laws, as chattel interests, until such time as the Government, or her vendee, may assert the paramount title and interest in the soil, (when they at once cease to exist) there is no place for the application of the law of notice, because they have no such interest in, or title to the land as can be affected by any want of notice, unless it could be supposed that a court of equity would recognize, and protect as an equity against the owner, the fruits of an outright trespass upon his lands.

And for a like reason, it can have no place, as between claimants to a pre-emption to the same tract of land, under successive pre-emption laws; as for instance, under the law of 1830, and under that of 1838. Because, if the former exists in fact to a given tract of land, the latter does not exist at all as to that tract. A pre-emption right, under any circumstances, is essentially a claim against the Government; and, under such circumstances, is essentially a unit. To suppose two to exist in fact, under such circumstances, would be as absurd as to suppose that two bodies, each of which was sufficient to fill a given space, could occupy that space at the same time. If the first should not be forfeited by a failure to make the proof and payment within the time prescribed by law, and should be perfected by a compliance with all the requisites of the law, the latter, in contemplation of law, never had, for a

moment, any germ of existence; and, consequently, the occupier of the land, who claimed under the act of 1838, had no greater interest in it, to be affected by a want of notice, than the ordinary squatter, who pretended to no pre-emption claim at all.

So far as he was concerned, the law of 1838 had no more effect than if he had lived on his own land, instead of that of the public; because, in fact, he lived upon land, that had been, in effect, appropriated under the law of 1830; and, consequently, not upon land to which a pre-emption right, under the law of 1838, would attach.

It is true, that if the claimant, under the law of 1830, forfeited his claim, after a pre-emption right had vested in him by virtue of his cultivation in 1829, and possession in 1830, in consequence of a failure to comply with the conditions subsequently prescribed by that law, he (the claimant under the act of 1838,) would be entitled to the pre-emption right to the land; but this, if the forfeiture occurred after the time of the requisite cultivation and possession under the law of 1838, would be so only because the forfeiture, although occurring, in fact, after the requisite cultivation and possession under the law of 1838, would be held in law to relate to a prior time, in favor of the claimant under the law of 1838; so as to make the land unappropriated public land, at the time when his cultivation and possession in fact was had. Thus, in effect, the law would contemplate, that no claim under the act of 1830 ever did in fact exist, even in an inchoate manner.

Nor could the law of notice apply as between claimants under these two laws, although a claimant, under the former one, may have had the option, under its provisions, to select either one of two several tracts of land, and might not have made his election until after the time, when in fact the requisite cultivation, possession, and personal residence upon the tracts selected under the law of 1838, was fulfilled: provided the election was made within the time allowed by the law of 1830, and the supplements thereto; unless a court of equity would interfere in such a case, upon the ground

upon which that court interferes to marshal securities, when one party has a lien or interest in two funds for a debt, and another party has a lien or interest in one only of the funds for another debt, and compels the former party to resort to the other fund in the first instance for the satisfaction of his debt, if that course is necessary for the satisfaction of the claims of both parties. But although this doctrine is applied to judgment creditors, as well as to others holding ordinary securities, there seems no warrant in the authorities to extend it to parties who claim an interest in land, not by *way of security* for a debt merely, but by way of *absolute estate.* And inasmuch as when courts of equity interfere in cases of securities, it is only in those cases where such interference "will not trench upon the rights, or operate to the prejudice of the party entitled to the double fund," (*Story's Eq. Jur., ch.* 13, 633,) it would seem that if the doctrine should be extended beyond securities, by parity of reason, this should be done upon a like condition, and it will not be contended that the frame of this bill has any capacity for relief in that view.

If the election between the tracts of land in this case, was in fact made within the time allowed by the law of 1830, and the supplement thereto, such election was as much "covered by the law," as was the previous cultivation and possession, and the subsequent proof and payment under its provisions.

As between the claimant and the Government it cannot be denied, but that under the act of 1830, there was no other restriction upon the time, when this election should be made, than there was upon the time when proof and payment should be made, and that these were as well made on the last day allowed, as upon any previous one; and that when made, the election—the proof and payment—the patent certificate, and the subsequent issuance of the patent, would all relate to the time of the inception of title by the cultivation in 1829, and possession in 1830, and would necessarily work an appropriation of the land from that time; and, consequently, exclude it from the operation of

any subsequent pre-emption law, which was to allow pre-emption rights against the Government to unappropriated public lands.

And as between a pre-emption claimant under the law of 1830, and another claiming through the Government, under the law of 1838, even supposing he could claim more in the land than the Government could from whom he claims, there could be no more ground to impute fraud to the former, from the fact that he had not made his election until the last day allowed him by the law of 1830, than there would be to impute fraud to a prior purchaser of land, who had failed to have his deed recorded within the time allowed him by law for this purpose; and of a deed, in a case of that kind, it is said, in the opinion of the court in the case of *Clark et al. vs. White*, 12 *Peters Rep.* 198, "that by the common law, it was valid without registration; and where the registry acts require deeds to be recorded, they are valid until the time prescribed by the statute has expired; and if recorded within the time, are as effectual from the date of execution, as if no registry act existed," and the court proceeds to hold, under the circumstances of that case, that because the conveyance in question was not filed for registration until the last day of the six months allowed by law for that purpose, fraud was not predicable upon the mere fact of non-registry, until the end of the time allowed by law.

And in the case of *Shinras et al. vs. Caig & Mitchell*, 7 *Cranch Rep.* 50, which came up from the Circuit Court for the district of Georgia, by the statute of which State a deed is valid, if recorded within twelve months, but any deed recorded within ten days after its execution takes preference of deeds not recorded within that time, or not previously on record, Chief Justice MARSHALL said: "It appears to the court that neither negligence, nor that fraud which is inferred from the mere fact of omitting to place a deed on record, can, with propriety, be imputed to the person who has used all the despatch which the law requires. If subsequent purchasers without notice sustain an injury within the time allowed

for recording a deed, the injury is to be ascribed to the law, not to the individual who has complied with its requisitions."

And the case at bar, in its facts, are much stronger on this point than any case like these could be, even if the neglect of registering a deed had been only for a week, instead of to the last day allowed by law, because whatever hardship may have resulted to Wynn from making or purchasing valuable improvements upon the land in question, prior to the return of the public surveys in 1841, it is utterly impossible to attribute any such hardship to Hemphill, or to Garland, who claims under him, for the simple reason that until the public surveys had been made, it was known to no one, that any part of Hemphill's improvement in the year 1830, was upon the quarter section of land in question.

Hence, neither the purchase of the improvement by Wynn of James, nor the valuable additions made thereto by himself, nor his residence thereon, on which he predicates his claim to a pre-emption under the law of 1838, could have been to any extent superinduced by any negligence or design on the part of Hemphill or of Garland, who succeeded him, in giving notice of that material fact. And indeed, if Wynn's complaint of the want of notice of Hemphill's pre-emption right to the land in controversy, is worth anything; it is so, because he lost a pre-emption right under the law of 1838, in consequence of Hemphill's negligence in giving him such notice. If he simply lost improvements upon the public lands, which laid no foundation in himself for a pre-emption right under any law, he has no cause for complaint, although Hemphill might have been negligent, or have given him no notice at all. Because, as to all such improvements as against the Government or her grantee, he was but a mere trespasser, and it is manifest, that he has no other than the latter ground of complaint, if irrespective of the question of notice, Hemphill's pre-emption right was not only good against the government, but Wynn also; because, neither Hemphill or Garland, who succeeded him, conld have been guilty of any negligence in giving

notice of an intention to claim the land in question, until after the return of the public surveys in 1841. Until then, the difficulty could not have been remedied, although Hemphill had himself continued to reside on his improvement up to the day of the surveys, and had continually made proclamation of his intention to assert all rights accrued, or to accrue to him, under the law of 1830, and the supplements thereto. Up to this time, then, Wynn could have had no other than the squatter's claim to the land, because it was not unappropriated public land, to which a pre-emption right under the law of 1838 could attach, however valuable may have been the improvements he purchased upon it, or those which he himself made in addition thereto. And he never could have obtained a pre-emption to the land, unless it had been subsequently forfeited to the Government, and by relation become unappropriated public land, *as of a date* to allow his cultivation of, and residence upon it in 1838, to spring up a pre-emption right to him, under the law of that year.

Now, supposing it to be conceded to Wynn, in the broadest sense, that Garland was bound to give him notice, at the earliest period practicable, of his intention to claim the land in controversy, and that it would be fraudulent in him, if he did not do so; and hence, an equity would arise in favor of Wynn against Garland, for the full measure of any injury, that such a fraud would work to the lawful rights of Wynn; still, no one will contend that the failure of Garland to give Wynn such notice would work a forfeiture, as against the Government, of Hemphill's pre-emption claim, which Garland may be supposed to have asserted against the Government; and thus let in Wynn to a pre-emption right to the land under the law of 1838. Because, as between the pre-emptor under the law of 1830, and the Government, there is no such condition subsequent to work a forfeiture of the pre-emption right, as that the claimant shall give any notice at all to third persons, as we shall presently see more fully, nor any notice to the Government herself, beyond that which is included in the condition to make proof and payment within the time pre-

scribed by the law of 1830, and the supplement thereto. Hence, the measure of Wynn's equity against Garland, for a failure to give him the notice contended for, would not be the value of the pre-emption right to the land in question, because Wynn did not lose that by that failure on the part of Garland. But the measure of his loss could only have been the value of the improvements put upon the land, in the interval between the making of the public surveys, and the entry of the land under the Hemphill pre-emption, less the value of the use of the land during that time. If, under the state of case we have supposed, it had been practicable for Garland to have given Wynn the notice contended for, in time for him to have gone on to another quarter section of public land, and obtained a pre-emption under the law of 1838, there would have been more ground upon which to suppose that the measure of his equity against Garland would have been the value of the land in controversy; because, in that case, it might be supposed he had lost a pre-emption right to a quarter section of land by such dereliction on the part of Garland. But, as he could have lost nothing, under the facts of this case, beyond the excess of the value of the permanent improvement (over the value of the use of the land during that time,) put upon it, during the interval mentioned; that alone was the measure of his equity, under such supposed state of case.

But in reality he had no equity at all of any measure, predicated upon a failure of Garland to give him notice of his intention to claim the land in controversy, under the Hemphill pre-emption, inasmuch as that failure could not work a forfeiture of that pre-emption, as against the government, and thus let him into a pre-emption right under the law of 1838. Hence, having no right in the premises founded *in law*, he was incapable of injury, however much Garland might have infracted the conventionalities "of good neighborhood," by a failure to give him the notice contended for; his rights in the premises being nothing beyond the "squatter's rights," at the mercy of the first lawful purchaser from the Government. And it is, therefore, unnecessary to insist

upon the principles of law, which we have already cited, applicable as well to pre-emption rights as to the registration of deeds, which refuses to impute fraud, in the holder of an unregistered deed, to the mere fact of non-registry until the last day allowed by law, although the rights of subsequent purchasers, for a valuable consideration, may be thereby injured. Such injury being, in the language of Chief Justice MARSHALL, "to be ascribed to the law, and not to the individual who has complied with its requisites." Neither the pre-emptor nor the holder of the deed being required to do more for the protection of third persons, who must be presumed also to know the law, than is required of them by the law.

It results, then, that Wynn stands upon no other or broader ground of equity, than that which he may have against the Government by virtue of having brought himself within the provisions of the pre-emption law of 1838, so far as cultivation, possession and residence upon the tract of land in question were concerned, and the making of the proof thereof, and payment therefor, that were required by that law, within the time prescribed.

The circumstances that before the presentation of the pre-emption claim of Hemphill, Wynn had been allowed his claim under the law of 1838, and had entered the land by virtue of it, and received the ordinary patent certificate, in no way strengthens his case, or enlarges his basis of equity. Because, that having been allowed by the Register and Receiver, upon the then apparent ground that the land in question was unappropriated public land, to which a pre-emption right, under the law of 1838, would attach, his entry was afterwards set aside by the same officers, under the advice and instructions of the Commissioner of the General Land Office, whose action in the premises was afterwards ratified and approved by the President of the United States in the issuance of the patent to Garland, as assignee of Hemphill, to the same land, based upon the claim of Hemphill under the law of 1830, which had been regularly allowed by the same Register and Receiver, upon proof satisfactory to them

of the validity of that claim under the prior law, which of course was inconsistent with any claim under the subsequent law of 1838, and worked the annulment of the entry, even without the express order for cancelation that was in fact made by the Commissioner of the General Land Office, whose doings were approved by the President in the issuance of the patent to Garland, as assignee of Hemphill.

Without going at large into the subject, we will say, that we have no doubt of the regularity and validity of this action of the Land Department in annulling Wynn's entry. It was consistent with the uniform usage of the Government, as is to be gathered from the orders of the President, the opinions of the Attorney General of the United States, the instructions of the Commissioner of the General Land Office, and the act of Congress providing for the refunding of the purchase money, when entries are set aside. Besides, the power in question is expressly recognized in several judicial decisions. In the case of *Dickinson vs. Brown*, 9 *Sm. & Marsh.* 136, the court used the following language: "But admitting that it constituted a legal title, it was in proof that the certificate of entry had been canceled, and we cannot say that the Register and Receiver, with the approbation of the Commissioner of the General Land Office, had no power to cancel it. On the contrary, it is believed that such power is uniformly exercised. To a certain extent these officers have a discretion in such matters. They are empowered to hear and decide on a pre-emption right. As against the Government, the certificate is but an inchoate or incipient title; the officers discovered that it had been improvidently issued, and canceled it, and issued a complete legal title to another and refunded, or offered to refund, the money paid." See, also, *Lewis vs. Lewis*, 9 *Missouri* 183; *Miller vs. Ker*, 7 *Wheaton* 1. In the case of *Lott vs. Proudhome*, 3 *Robinson Lou. R.* 295, the court said: "It does not appear that these patents have ever been vacated or annulled, nor are we acquainted with any law which authorizes the Commissioner to vacate a patent already issued. We repeat, however, what was said in the

case of *Guidry vs. Woods*, 19 *Lou. R.* 334, that we do not doubt the authority of the Commissioner of the General Land Office to declare void a certificate of purchase of lands which the law forbids to be sold or disposed of."

And indeed such a power would seem to be appropriately incident to that which authorizes the Executive Department to dispose of the public lands, which is founded upon no idea of sovereignty or lordship in reference to them, as resting in this department of the Government, but solely upon the laws of Congress providing for their disposition. Hence, the President and his subordinates, the Secretary, the Commissioner of the General Land Office, and the Register and Receiver of the proper Land Office, can dispose of a tract of land only in accordance with law, and any other disposition of it cannot be conclusive upon the rights of any lawful claimant, as against the Government.

When an equitable title, as against the Government, vests in any lawful claimant, the Government at once becomes a trustee for the legal title, and if that be afterwards improvidently issued to another person, he takes it charged in equity, with the trusts in favor of the equitable claimant.

As the successive steps, in procuring lands by purchase from the Executive Department, under the provisions of law for their sale, are upon the tacit condition that the acts of his subordinates in the premises will be ultimately approved, and sanctioned by the President, its head, the original entry is to be considered *in fieri*, until it receives this sanction by the issuance of the patent, which is *a record.* The disposition of land by the executive under the pre-emption laws, is but one of the modes of sale provided by law, and though at first the supervision of the President through the Secretary and Commissioner, which had always before been exerted as to the other description of sales, was not to the full extent exerted over *this* description of sales, this distinction was soon practically abandoned, and now for a long time, this description of sales has been placed upon the same footing as the others, so far as the supervising control of the Executive Of-

ficers above the Register and Receiver are concerned. And in these sales, as well as in the others, the President, through his appropriate Secretary, or the Commissioner of the General Land Office, exerts this control.

If upon the apparent ground of illegality in an entry, a valid one should be thus set aside, and the same land afterwards sold, in such case necessarily illegally sold, to another person, and patented to him, that person, as we have already remarked, would hold the legal title thus received, charged with the trusts that were upon it: and the injured party would be thus driven into a court of equity, where he would be allowed to set up his equitable title (founded upon his lawful claims to the land, as against the Government,) against the legal title thus illegally obtained. And the chancery courts, supposing such jurisdiction to be within the scope of the general action of a court of equity, affords relief in accordance with the settled principle of that court, as applicable to its general action in affording relief. Such seems to be the ground upon which this jurisdiction rests. Latterly, it has been very often invoked in cases of pre-emption right claimants. And doubtless, this has been stimulated, in no little degree, by the liberal interpretation which the Supreme Court at Washington has felt bound of late years to give to the laws of Congress, out of which these claims grew, in favor of this class of claimants. And scarcely less in the opening, to its greatest width, the door to this jurisdiction.

In earlier years that court said, in the case of *Polk's Lessee vs. Wendell*, 5 *Wheaton R.*, *p.* 302, that "long experience had satisfied the mind of every member of the court, of the glaring impolicy of ever admitting an injury beyond the dates of the grant under which lands are claimed." The cases of latter years would indicate that it had been found impossible under the law to uphold that policy.

What amount of evil, this latter current of decisions will cast upon the land States, and whether State legislation can sufficiently counteract it, remains to be seen. If it shall flow on, unchecked,

a few years longer, it would seem inevitable that much of the confidence hitherto reposed in land titles derived from the Government, must be overthrown; and, as a consequence to be deplored, emigration to the land States cannot fail, in a like ratio, to be lessened.

Upon allegations already indicated, Wynn invokes this jurisdiction; and, to establish his own equity, seeks to show that the sale to Hemphill, which was perfected by the grant to Garland as his assignee, was illegal, upon the ground that the pre-emption right allowed to Hemphill under the law of 1830, was not a valid one; and, consequently, no senior claim appearing in 1838, the land in controversy was in law unappropriated public land, to which his own claim under the law of that year attached.

If this was the true condition of the land at that time, his case for relief would have been made out, inasmuch as there is no dispute as to Wynn's cultivation and possession by personal residence, and as to his proof and payment within the time, under the provisions of the law under which he claims.

And this, although the Government, through its Executive branch, had allowed and sanctioned by grant, the claim of Hemphill under the law of 1830, in accordance with the decision, as to the facts of the cultivation and possession of the latter, of a tribunal by whose decisions it had agreed to be bound in the disposition of unappropriated public land, because the tribunal had no power to decide, and the President no power to sanction by grant, that Hemphill had a pre-emption right to lands to which Wynn had, by law, a vested right.

The objection that Hemphill was under the age of twenty-one years, and was not the owner of the improvement, is not sustained by the testimony. That founded upon his sale of the improvement and removal to Texas, and his taking the oath of allegiance to Mexico, is invalid. Continued residence not having been required of him, under the law of 1830, either to keep in life his pre-emption claim, as between himself and the Government, or as between himself and third persons, as a means of notice to

them. And his having become an adopted citizen of a foreign Government, did *not* work a forfeiture of any rights of his, vested by law, while a citizen of our own, although he had afterwards left this country and taken the oath of allegiance to a foreign Government, with the intent and effect to expatriate himself, as we have held in the case of *Wynn vs. Morris*, decided during the present term.

The validity of the remaining objection, must be determined upon the evidence: that is to say, that the cultivation of Hemphill in 1829, and his possession in 1830, upon the foundation of which his claim to the pre-emption that was allowed him, vested, did not in fact extend to the tract of land in controversy, but was exclusively upon other adjoining lands.

And although we shall not in terms sift out the good from the bad, we shall, in effect, do so, in endeavoring to consider only that evidence which is competent and relevant in ascertaining this point of fact.

In considering so much of it, as is offered upon the part of Wynn, it is impossible for us, after making abatement on the score of credibility for so much of it as is attacked on that ground, to resist the conclusion that the cultivation in question did not, in the year 1829 and 1830, reach to the land in controversy.

Much of this testimony is from individuals who must have had the best opportunity, the nature of the case would admit of, to know the facts and circumstances to which they depose; and their testimony appears to have been given after the most careful inspection of the premises, with reference to natural objects, and actual surveys, which several of them witnessed. And after being thus enlightened, and their memory refreshed, they speak in confident and positive terms. And although there is some discrepancy among them in several particulars: mainly, however, as to courses and distances, measured by the eye, and not tested by the compass and chain, which, in terms, tend to conflict, yet all such is controlled by distinct expressions of the same witnesses, or to the utmost extent of the *western limit* of the im-

provement in question, based upon an actual examination of the premises, which, as they state, afforded data to enable them to speak with certainty as to this, when taken in connection with courses and distances ascertained by the surveys, which most of them witnessed, and their previous knowledge of the locality.

The testimony of Waggoner, on whose supporting affidavit, together with that of Cryer's, the pre-emption claim of Hemphill was allowed by the Register and Receiver, if taken to be worth anything, either for sustaining their decision originally or overturning it now, is far more favorable to Wynn than to the defendant; but we think it utterly worthless, for any purpose, in point of weight on either side. Cryer's testimony amounts to but a carefully expressed opinion by one who had had a reasonable opportunity to be informed with fair accuracy of the matters about which he testified; and would be entitled to much weight in the absence of other testimony equally credible from witnesses who had had a better opportunity to be informed with a higher degree of accuracy. He had never lived or worked on the premises, nor witnessed any of the surveys, nor compared notes with others upon the ground, in reference to natural objects, with which all had been more or less familiar, with a view to refresh his memory, and to abandon or reduce to greater certainty necessarily vague impressions, which he had formed without such careful and minute examination. Almost all his answers indicate vagueness, and want of positiveness in his impressions.

Samuel Hemphill, the pre-emptor, who had never been on his former improvement after the surveys were made by the Government, and thus informed himself whether any part of it extended to the land in controversy, made his affidavit, supported by that of Waggoner and Cryer afterwards; that in the year 1829, he cultivated fifteen or twenty acres, which he "believed, according to the map thereto annexed," (which was a copy of the map in the Land Office, marked with the names of Wynn, Garland, and Mrs. Taylor, on several of the tracts,) to be on the tract of land in controversy. There is the t stimony by Yealoch, to the

effect that he saw Moore, the Government surveyor, run the line between the quarter sections of land in question, and that next east of it, in 1840, and plant the half mile stake in the prairie at the south end of the line between these two quarter sections, and that in the year 1842, that stake had been removed about 100 or 110 yards in a direction north-east from its original position: and by Edwards to the effect that he had seen the same line run several times after the Government survey, by Jett and Conway, and the place for the half mile stake thereby ascertained, (which by other witnesses is shown to have been within a few feet of the spot where Moore planted it in 1840,) and that in the latter part of January, or the first part of February, 1843, Garland pointed out to him a stake in his field as a half mile stake, which he stated to him the surveyor had put there, and requested him (the witness) who was then his overseer, not to let the negroes knock it down, and to keep a mound around it, and that this stake, so pointed out to him, was fixed sixty or seventy yards east, and near fifty yards north of where Jett and Conway found the true place for the half mile stake. It is to be remarked, that whether this stake was removed by design, or had been accidentally knocked down in the cultivation of the land around it by Garland, and planted again in an improper place without any fraudulent intent, it is not made to appear that its improper location led any one astray as to the true line. Wynn does not complain of it in his bill as having led him to make the admissions he did, in his correspondence with the Commissioner of the General Land Office; Waggoner does not put his acknowledged mistake as to the cultivation of the land in controversy on this ground. On the contrary, he says, that the half mile stake to which he went, and from which he looked through the compass, previous to making his supporting affidavit, (which he afterwards ignored by his testimony,) was within a few feet of the true point as afterwards so often ascertained by surveys; and Cryer does not admit that he was mistaken at all. Conceding it to be true, however, in point of fact, it may have had influence, as in that case it would have

almost inevitably, in fixing the impressions upon Cryer's mind, which unlike those made upon Waggoner's, seem never to have been removed, that the cultivation extended westward across the line on to the tract in controversy. Because, according to the whole testimony on the part of Wynn, the actual cultivation did extend westward to a limit within fifty or one hundred yards at most, of the true line between the two quarter sections of land.

And Brinlee, the only other witness who gives it, as his opinion, that the cultivation did extend westward beyond this line, thinks there was but about fifteen acres in all that did so; and that a part of this was upon the south-east quarter, though the larger portion of it was upon the land in controversy. His opinion was founded upon a visit to the premises in December, 1847, in company with Garland, and he states that commencing at the section corner they came down south by the marks on the timber, until reaching the lane in the prairie land in cultivation, and having on that course arrived at the half mile stake, (so often mentioned) then in that lane, they fixed the compass, and he looked both north, and east and west, and upon this examination in connection with his knowledge of the locality, many years before, he based that opinion. It is manifest, therefore, that his opportunity for accurate information as to the extent of the cultivation westward, was far less than that of the witnesses who labored upon it in the years in question; and who, besides, had the advantage in refreshing their memory by interchange of ideas, with those of equal information with themselves upon the ground, in reference to natural monuments, and visible remains of fences, houses, wells, &c., to none of which this witness refers as data for his opinion; although long absent from the locality on which such great changes had, in the mean time, been wrought by the opening of large plantations and the cultivation of prairie land, destitute of timber, where so soon every vestige of the natural production of the soil in its wild state becomes entirely obliterated, rendering it impossible for any one to know, from the appearance of the soil in its then condition, whether it had been cultivated a few

years only, or a longer time, as one would be enabled to do in timbered land, where for many years there would be the remains of trees and other native growth. Hence, as little weight is to be attached to his testimony as to Cryer's, if indeed so much. And all that remains to be considered, is the admissions of Wynn contained in his correspondence with the Commissioner of the General Land Officer.

It is not pretended that Garland has based any act of his upon these admissions of Wynn, which entitled him to insist upon them against him by way of estoppel. And it is manifest that Wynn could not have made them, although deliberately made in writing and several times repeated, upon facts within his own knowledge; because the bill and answer show that although he purchased from Jones in 1835, and at once took possession of the improvement purchased, and kept his slaves thereon thenceforward, and from that time occasionally made visits to the premises, he never actually became a continuous resident thereon, until about the year 1841, while Garland had been cultivating and extending the improvement, he had bought, adjoining, in the year 1834, from that time forward; and in February, 1841, as appears upon the face of the Government plats of survey, had some forty acres of the land in controversy enclosed within his plantation, and had been cultivating for some years the most, if not all of it, as the testimony seems to show. The parties up to that time, and for some time afterwards, perhaps for some two years afterwards, seeming to have been governed in their territorial claims as between themselves by some arbitrary line, that appears to have had its origin many years before, with those under whom they respectively claimed, when the locality had been regarded by the settlers as within the boundary of Texas.

If, therefore, there were any remains of old fences, or other objects to indicate with any probability the extent of the Hemphill improvemement westward, in 1829 and 1830, they were within the plantation of Garland, and not of Wynn, and were not likely to have attracted the latter's notice. And when the surveys had

been made, so much time had elapsed that these remains, under the influence of constant cultivation for so many years upon prairie land, so far as they were calculated te enable one to discrimate between such land cultivated for ten or twelve years, or for six or eight years only, must have been altogether obliterated. And it was not until then that there would be any reason to suppose that Wynn's special attention would have been called to such remains beyond the limits of his own plantation, upon his casual visits there. And it being not until then that he had become an actual permanent resident, it is much more likely that he would have been led into a mistake, upon such a foundation, than even Cryer or Brinlee. The only other sources of information left him, were hearsay, or the vague impressions of the neighbors, necessarily confused and unreliable from the nature of the soil upon which the cultivation was, and the changes made in the appearance of the locality by the improvements and cultivation in progress there, and the affidavits made in the Land Office in support of Hemphill's pre-emption.

At best, the admission of a fact, when not under such circumstances as to work an estoppel against the party making it, is but evidence of the existence of that fact. And when, by other evidence, it is established beyond any reasonable doubt that the fact admitted really never had existence, by witnesses who had the best opportunity, the nature of the case would admit of, to know whether or not it ever did exist, and it is at the same time shown that the party making the admission could not have known the fact admitted of his own knowledge, and had but hearsay to found his admission upon, it would be strange if that admission could weigh at all as evidence against the satisfactory testimony of witnesses who had the best opportunity to know the fact deposed to, and based their evidence upon their own personal knowledge.

Hence, we conclude that Wynn, having made out clearly by the testimony, that the cultivation and possession of Samuel Hemphill, in the years 1829 and 1830, did not extend to the tract of land in controversy, and no testimony having been produced to the con-

trary, sufficient in weight to create any reasonable doubt of the existence of that fact, thus established, we must consider it to be so established. The legal consequence is that the pre-emption right of Hemphill under the law of 1830, did not attach to the land in controversy for want of the cultivation and possession, required by that law.

And when the executive department, which had the power to sell the land to Hemphill only in accordance with law, sold this tract to him under the clear mistake of facts, that he had so cultivated and held possession, that department acted beyond the boundary of its power; and, consequently, as to all persons, who at that time could set up a better vested right to the land, founded upon the statute respecting the disposition of the public lands, as against the Government, that sale was a nullity. Wynn was at that time in a condition to do so, by virtue of his claim to the land in controversy, under the law of 1838, and he preferred and insisted upon that claim, and did all for its support that the law out of which it grew required of him. Here, then, was a case of cotemporaneous conflicting equitable claims to the same tract of land, and both, as against the Government, and preferred at the same time; it being immaterial, as to this latter, whether the prosecution of the one or the other had been in point of fact, first commenced in the District Land Office; because, before either was confirmed by final action of the Executive Department, they were both preferred to that department. And the executive, instead of pursuing the usual course in such cases, when the laws of the State will admit of it, of granting the certificate of purchase to one of the parties, and withholding the patent until the judiciary should have decided which had the better title, decided this judicial question for itself, and set aside the entry of Wynn and confirmed that of Hemphill, by the issuance of the patent to his assignee. Although that decision, as against the Government, may be conclusive in favor of Hemphill's claim, it cannot conclude the rights of Wynn as against Hemphill's claim, who does not claim, as against that, *under* the Government, but *against it*.

The claim of Wynn had already vested in the land before there was any pretence that it had been appropriated to Hemphill by the *forms of law*, and before it had ever been appropriated to him at all in *point of fact*, as we have seen from the testimony. And, therefore, even supposing that although Hemphill never did in point of fact cultivate according to the requisites of the law of 1830, and thereby acquire a valid pre-emption right, nevertheless as the Register and Receiver decided that he did, and thus concluded the Government in his favor on this point, he would thereby be entitled to the land, not only as against the Government, but as against all persons, and henceforward that would be such an appropriation of the land under the forms of law, as would prevent any future pre-emption right, afterwards to arise, from attaching to the same land; because, it would be not thenceforward unappropriated public lands. Yet, this could only be so in a case where there was, at *that time*, in *existence*, no valid pre-emption right to the same land; because, otherwise, it would be to say that the Government could grant a pre-emption right to land that was already appropriated. In other words, that it could give one man a pre-emption right upon the lands of another, or to which that other had a vested legal right, which no one will suppose to be within the power of the executive, although sanctioned by the mighty potency of a decision of the Register and Receiver.

It is beyond controversy that such a valid right of pre-emption did exist in Wynn, at the time when the executive decided in favor of Hemphill upon the ground of his supposed cultivation upon the tract of land in controversy, which is now shown by the evidence to be a clear mistake as to the identity of the tract of land, and as to which point no contestation whatever was ever had.

And the same department decided against Wynn, at the same time, simply and expressly upon the ground that the claim of Hemphill, under the prior law of 1830, had attached to the land in controversy, and was thus an insuperable obstacle in the way of Wynn's entry.

If the judicial power can afford Wynn no redress in this case, a great wrong must go without remedy. But upon no other ground can he be supposed to labor under any disability in this respect, not common to ordinary entries, than that his rights in the premises are in some way at the mercy of the Executive Department, whether that department proceeded, in reference to them, in accordance with law, or to the contrary; and hence, his common right to look to the judiciary for redress for wrongs is thereby abridged.

That idea is to find support alone from the provisions of the pre-emption laws in reference to the action of the Registers and Receivers upon these claims when preferred to them for allowance.

If it could be supposed that Congress ever designed that the decisions of these officers in such cases, were to be final upon the rights of adverse claimants, as between themselves, when both claimed the same tract of land, or against the Government, there is certainly no evidence of it in any provision of these laws for contestation between such parties as to such rights. And when pre-emption rights are regarded in the light of the decisions of the Supreme Court at Washington, in their true nature and character as defined by that court, it would seem strange that Congress should have ever designed that such substantial and important rights should be excluded from judicial cognizance and left to be finally passed upon by such a *quasi* court, armed with such imperfect means to administer justice in the premises.

It is true, that practically, under instruction from the Commissioner of the General Land Office, the Register and Receiver do in some cases decide upon conflicting claims, as between adverse claimants for the same tract of land, but this is only done incidentally in passing upon the claim of each claimant as between him and the Government, and as a means of enlightening the executive, as to whom it is apparently most proper to allow the entry and issue the patent, under the ordinary condition of the sales of the public land, that they are to be conducted by the Government in accordance with law.

Hence, there is but little reason to suppose that Wynn took his pre-emption right under any contract with the Government, that he would not resort to the judiciary to assert his rights against a third person, who might obtain the legal title to the land in which his pre-emption right vested, either by fraud or mistake. That was not one of the provisions of the law under which he derived his right, and a court of equity would be impotent to suppress fraud if it could not give him relief in such a case upon the ground of mistake merely; because, otherwise "it would be to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party, who receives the benefit of the mistake, to resist the claims of justice under the shelter of a rule framed to promote it." 1 *Story's Equity* 155. It is "to prevent manifest wrong and to suppress fraud," (*Ib.* 166) that courts of equity grant relief in cases of mistake.

In the light of these views, we think Wynn entitled to relief upon this ground; and hence, it is unnecessary to examine the points made as to the sufficiency of the allegations of his bill, and the admissibility of some of the testimony as to the charge of fraud, in procuring the pre-emption right of Hemphill to be proved up; and will proceed to decree to him all such proper relief as is included in his prayer, and is within the scope of his bill.

Mr. Chief Justice ENGLISH said: I fully concur in the conclusion of the opinion just delivered in this case, that Wynn is entitled to the relief sought by the bill.

There are some portions of the theory of the opinion, however, as to which I deem it unnecessary to express a concurrence or dissent. My conclusion, that Wynn is entitled to the relief sought, is based upon the following predicates:

1. The authorities cited by the counsel for the parties, abundantly show that the decision of the Register and Receiver, upon the pre-emption claim of Hemphill, is examinable for fraud, if not for mistake.

2. Sufficient indications of fraud in proving up the Hemphill

pre-emption, are deducible from the evidence, to warrant a court of equity, in a direct proceeding like this, to open the decision of the Register and Receiver.

3. The proof in the cause establishes the fact, beyond any reasonable doubt, that the cultivation of Hemphill did not extend to the tract of land in controversy; and, therefore, his claim to pre-emption was unfounded.

4. Wynn acquired a valid pre-emption right to the land, under the act of 1838.

So far as the opinion endorses the decision of the majority of this court in *Wynn vs. Morris & Taylor*, I dissent; remarking however, that the effect of the abandonment of the country by Hemphill upon his claim to pre-emption, is not properly in the case, as the claim turns out to have been unfounded.

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## CLARK ADX. ET AL. VS. SHELTON

Where suit is brought against an administrator, and a judgment obtained for a debt due by the intestate, it is the duty of the administrator, under the 98th section of the statute, (*Digest, chap.* 4,) to return such claim to the Probate Court for classification; and no other presentation or notice of his claim is required of the creditor; nor approval by the administrator.

In a chancery suit by a creditor, against an administrator, charging that assets had come to his hands, which he had not accounted for, the securities in the administration bond may be made parties, and a decree rendered against them on a recovery against the administrator.

The settlements made in the Probate Court by the administrator, are conclusive between the parties interested in the estate, so far as the court had jurisdiction; and

can only be impeached in a court of chancery upon allegations of fraud in the settlement. (*Dooley vs. Dooley*, 14 *Ark.* 122.)

Where fraud is alleged in the settlements of an administrator — as that the intestate sold property, and took notes therefor, payable to his wife, (afterwards his administratrix) to hinder and delay his creditors; that she received the money, but had not accounted for it as assets — the Probate Court has no jurisdiction to decide such question of fraud, and the creditors of the estate may well seek relief in a court of chancery.

Upon a creditor's bill, it is error for the court to decree the payment in full of the debt of the pursuing creditor, without giving opportunity to all the other creditors to bring in their claims and receive their proportion of the amount recovered—they paying their proportion of the expenses.

*Appeal from Hempstead Circuit Court in Chancery.*

Hon. JOHN QUILLIN, Circuit Judge.

WATKINS & GALLAGHER, for appellants. The sureties of Mrs. Clark, on her administration bond, were improper parties. The remedy against them on the bond, was purely of legal cognizance. *Outlaw vs. The Governor*, 5 *Ark.* 468; *Jones vs. The State*, 14 *Ark.* 171. The Probate Court is the forum where the alleged default of the administrator, for which they are to become liable on the bond, must be ascertained and established.

The decree is erroneous, because the demand of the complainant is to be paid in full; whereas, after the decree had professed to establish the fraudulent nature of the transaction, it would enure to the benefit of all the creditors.

It does not appear that the claim was ever probated. It was, in any event, the duty of the claimant to have taken his claim before the Probate Court for classification.

The matter in regard to the note of Hannah & Baldwin, was *res adjudicata.* It had been settled by the adjudication of the Circuit Court, on the appeal from the Probate Court; and the complainant is concluded by the adjudication of the Circuit Court upon the appeal, and which must stand forever, not being appealed from or reversed on error.

The Probate Court is a court of limited, but not of inferior jurisdiction, (*Borden vs. The State*, 6 *Eng.* 519,) and had the most ample and plenary power to investigate and determine the issue presented by the exceptions of the appellee to the settlements of the administratrix. The decision and all questions involved in the result, and which might or could have been decided, are forever conclusive upon the parties. See 2 *Smith's Leading Cases*, *p.* 424; *Duchess of Kingston's case*, and authorities cited.

PIKE, for the appellee. That the finding and judgment of the Circuit Court in the case before them on the exception, was no bar to this proceeding in chancery, is obvious, on two or three grounds.

*First.* It could not be conclusive, in any event, unless it was a finding and judgment on *the facts*, of want of consideration for the note, and of fraud or fraudulent intent as to creditors.

To make a former judgment a bar, it must *appear* that the trial was on the merits. If the real merits of the second action have not been decided in the first, the prior judgment is no bar. *Hitchin vs. Campbell*, 2 *W. Bla.* 827; 3 *Wils.* 304; *Sintzenick vs. Lucas*, 1 *Esp.* 43; *Estill vs. Taul*, 2 *Yerg.* 467.

It is conclusive only as to the facts directly and distinctly put in issue, and the finding of which must have been necessary to uphold the verdict or judgment. *Spooner vs. Davis*, 7 *Pick* 147; *Smith vs. Sherwood*, 4 *Conn.* 276; *Dennison vs. Hyde*, 6 *Conn.* 508; *Hopkins vs. Lee*, 6 *Wheat.* 109.

*Second.* The decision of the Circuit Court was made upon a summary application to the Court of Probate; and such decisions are not considered so final and decisive as to furnish a bar to another and further discussion of the question. The question of fraud, and the annulling of fraudulent conveyances and assignments and the enforcement of secret trusts, are peculiarly within the jurisdiction of courts of equity, and courts of probate, from their peculiar frame and constitution, and the narrow and limited scope of their powers, are wholly incompetent to deal with them. *Brom-*

*ley vs. Holland*, 5 *Ves.* 610; 7 *id.* 3; *Greathead vs. Bromley*, 7 *T. R.* 450; *Angell vs. Hadden*, 2 *Meriv.* 163; 3 *Phill. on Ev.* (*Cowen & Hill's notes*) *p.* 825.

We submit that the Probate Court did not decide the essential questions in this case, because it had no jurisdiction or power to do so. *State vs. Reigart*, 1 *Gill* 1.

The note was received by Mrs. Clark, not after his death, in which case, if she had not accounted for it, it would have been the proper subject of an exception. But it was received by her in his lifetime; and the question whether she was entitled to it was one peculiarly within the jurisdiction of a court of chancery.

Mr. Justice WALKER delivered the opinion of the Court.

This is a suit in chancery, brought by Shelton against Huldah Clark, as the administratrix of Benjamin Clark, deceased, and William Trimble, William Moss, and Thomas Davidson, her securities upon the administration bond.

The complainant alleges in his bill: That on the 10th of October, 1840, in the Hempstead Circuit Court, he obtained judgment against Benjamin Clark for two hundred dollars, with interest from the 30th of April, 1830, and costs: That to hinder and delay the collection of this judgment, Clark sold a plantation to Joel W. Hannah and Samuel Baldwin, after the judgment was obtained and whilst it was in force, for $1800, and took notes or bonds for the purchase money, payable to his wife, Huldah, without any consideration from her: That afterwards, Clark died, leaving the said Huldah his widow, who, on the 29th of February, 1845, took letters of administration, and gave bond with her codefendants as securities: That she had not charged herself, as administratrix, with the plantation, or the money received for the same: That the personal estate was appraised to $985 75 and, except the slaves, was, by a fraudulent arrangement, bought in for her use, for the sum of $37 65: That Clark owned two slaves worth $400 and $200, of whom she had possession, and had con-

verted their labor to her own use, without having charged herself with hire; there was, also, $32 worth of property appraised, which she retained: that the claims allowed against the estate, amounted to $877, and that Shelton brought suit on the judgment obtained in 1840, against Clark; and, at the November Term, 1846, of the Hempstead Circuit Court, obtained judgment against the said Huldah, as administratrix: That no just and legal settlement had been made.

The prayer of the bill was for an account, and that the administratrix should be charged with the $1800, the price of the plantation; the appraised value of the slaves and their hire, and the appraised value of the personal property; that the estate should be settled, and all the claims against it paid.

Moss and Davidson demurred to the bill, which was overruled, and Huldah Clark answered.

She admitted the sale of the plantation, and that a bond for $1500 was taken directly to her; says that $100 of that amount was paid to Clark, leaving $1400, which she admits that she collected; claimed it as her own; denied that the bond was made payable to her to hinder, delay, or defraud creditors, but because Clark had, before then, acquired possession of property through her of greater value than $1500 and used it; and that for this consideration, and because of her dower interest in the land, the bond was executed to her.

She states that she made a settlement with the Probate Court, which she relies upon as conclusive against the complainant: says that he excepted to the account, amongst others, for the reason that she had not charged herself with the item of $1400, the money so received as part of the price for the land, as well as for the reason that hire had not been charged, and for improper credits claimed. And that upon appeal to the Circuit Court, a trial, *de novo*, was there had, and it was held that she was not properly chargeable with the $1400, and that upon a re-statement of the acccount for settlement, in conformity with the decision of the Circuit Court, a final settlement was made: That the assets have been distributed.

She admits that she retained the slaves in her own hands, because she disliked to sell them, and preferred charging herself with the appraised value. She admits that her son bought in the property at less than its value for her: says the sale was open, after notice, and there were many persons present.

The case was heard upon the bill, answers, and exhibits, and the records pleaded in the answer to the bill.

The court below decided that the $1400 were properly assets of the estate, and ascertained the amount of the complainant's claim to be $531 26, and decreed in favor of the complainant for the same, to be paid by the administratrix, if to be had by recourse against her, if not, then against the securities.

It is first objected by the appellants, that the complainant never submitted his claim to the Probate Court for classification and allowance; and, therefore, he has no right to an equitable account and distribution of assets.

If this claim had been probated, under the 88*th section*, *Digest*, *ch.* 4, in which it is made the duty of the claimant to present his claim to the administrator for allowance, there would be much force in the objection; but the claim of the claimant required no presentation to the administratrix for her approval. It is a claim provided for under the 87*th section*, which provides, that all actions commenced against the executor or administrator, after the death of the testator or intestate, shall be considered as claims legally exhibited against such estate from the time the action is commenced, and shall be classed accordingly. And the 98*th section* makes it the duty of the administrator to class such claims with others, and make a return thereof to the Probate Court. The 99*th section*, which requires of the claimant to file his claim in the office of the Probate Court for classification, evidently has reference to claims presented for allowance under the 88*th section*; because, the 99*th section* makes direct reference to claims that have been "approved and allowed" by the administrator, and requires the same, together with a copy of the notice served upon the administrator, to be filed, &c. This notice and appro-

val, and an allowance by the administrator, are all provided for in the 98*th section*, and belongs to the class of claims therein mentioned: but with regard to claims founded on suits commenced against the administrator in the Circuit Court, neither presentation, notice nor approval are required, but the suit is itself notice and presentation, and the judgment of the court an allowance of the claim.

We think, therefore, that this objection cannot prevail.

It is next objected that the securities are improper parties to this suit; that they can only be reached by a suit at law upon their bond. We find no authority to sustain the grounds assumed by counsel; nor does there appear to be any good reason why they should not be sued jointly with the administrator for a breach of trust. She entered into bond to perform that trust. They became securities that she would do so, or that they would pay damages, &c. They can make as good a defence in chancery as at law, and after the court has decided upon the extent of the liability of the principal, there would seem to be no good reason for requiring a suit at law upon the bond against the securities, when by making them parties to the suit in chancery, unnecessary delay and expense would be avoided. All of the objections urged by the counsel in this case, were presented in the case of *Ennis vs. Smith*, 14 *Howard S. C. R.*, 418, and were overruled by the court.

Conceding the claim to be valid and properly presented for payment, the next question is, can the complainant re-investigate the accounts of the administratrix, approved upon final settlement with the Probate Court.

This can only be done in a court of chancery upon the allegation of fraud in the settlement of such account supported by the affidavit of the party making such allegation. *Digest, sec.* 111, *chap.*4; *Dooley vs. Dooley*, 14 *Ark.* 122.

So long as the settlement stands, it is conclusive upon the parties, and definitely fixes the extent of the liability of the administratrix for assets; so far, at least, as the items of charge or

credit were proper subjects for investigation. But it is insisted that the settlement in this instance is not binding upon the complainant, because the item, if charged against the administratrix, involved a question of fraud between the intestate and herself, which had first to be determined before the item could be charged as assets; and that the Probate Court had no jurisdiction over the same. But that in order to determine the question of fraud, resort should be had to a court of chancery, where all the parties may be brought forward, and a full investigation had.

There is no provision made by the statute for trying an issue of this kind before the Probate Court, as between the administratrix and creditors, where the administratrix asserts title in herself to estate supposed to be assets. The contest upon exceptions to an account for final settlement, is narrowed down to an account of assets with which the administratrix stood charged, or which came to her hands as such, or which she should have received and accounted for, but not to property or estate claimed and held adversely. That never becomes assets until so adjudged. The administrator may be held accountable for neglect of duty in not reclaiming and charging himself with property or effects belonging to the estate, but which is held by adverse title; but this must be done in a court of competent jurisdiction for that purpose.

This question came up in *Forniquett vs. Perkins*, 7 *How. S. C. Rep.* 160, and it was there held that the Probate Court had no jurisdiction, whatever, in a case like the present, and that no decision made by that court would bar a re-investigation of the same question in a court of chancery.

In the case of *Forniquett vs. Perkins*, it seems that Perkins made a settlement with *Forniquett and wife*, and took their receipt in full discharge and payment of the whole of the estate in his hands. Subsequently, Forniquett and wife filed their petition in the Probate Court for the purpose of setting aside the settlement, and charging Perkins with spoliations to a large amount, which had been concealed from petitioners, and not taken into

the account for settlement. Perkins, the administrator, in his answer, denied the fraud, and insisted upon his receipt as a discharge. By consent of both parties, this issue was taken to the district court to be tried, and the decision made in favor of Perkins.

After this, *Forniquett and wife* filed their bill in chancery in the Circuit Court of the United States, setting up therein the same cause of complaint as that set forth in their petition to the Probate Court, and which had been decided against them, referred to the former decision, and protested that it was not binding upon them, because the Probate Court had no jurisdiction of the subject matter at issue.

The defendant relied upon the former adjudication of the case in bar of the action. Judge DANIELS, who delivered the opinion of the court, cited authorities and held that the Probate Court had no jurisdiction of the matter at issue, but that, inasmuch as by agreement of parties, the case had been removed to the district court, a court of competent jurisdiction, he would hold its decision conclusive.

Such was, also, the decision of the Supreme Court of Pennsylvania in *Trett's Appeal*, 4 *Watts & Serg.* 433.

Independent of these authorities, which would seem to be decisive of the question, is that of our own court: *Moss vs. Sandefur*, 15 *Ark.* 381, in which it was held that the Probate Court had no jurisdiction to try and determine contested rights to property between the administrator and third persons.

Adhering to the principle settled in *Moss vs. Sandefur*, we hold that the Probate Court could rightfully exercise no jurisdiction in regard to the alleged fraud between the administratrix and her intestate; and, consequently, that the settlement made with the Probate Court did not preclude the right to sue in chancery for the purpose of setting aside the fraudulent transfer of estate to the administratrix, and to subject it to the payment of the creditors of the estate. And although we are far from being satisfied that any decision ever was in fact made upon the question

of fraud by the Probate Court, or by the Circuit Court upon appeal, yet, we deem it a matter of no importance to investigate it; because, as we have held that the Probate Court had no jurisdiction, it follows that no decision made by it would be valid.

This may be considered a creditor's bill brought by the complainant, one of the creditors of the estate of Ben. Clark, for himself and for all of the creditors. The practice, on account of convenience, may be considered as well settled. *Daniel Chancery Pleadings & Practice, page* 284. All of the creditors are specially referred to in the bill. It is alleged that the payment of the note was made payable to the administratrix, to defraud all of the creditors: an exhibit of their respective claims allowed, with date and amount, is made. They are all just claims, now due and unpaid, as well as complainant's; that the administratrix refuses to pay them, with a prayer that the court of chancery may take jurisdiction of the estate, charge the administratrix with the sums she has fraudulently withheld, for the benefit of complainant and the other creditors, and that such creditors be jointly charged with the costs and expenses of this suit; that payment be made by the administratrix to them, and each of them, and in the event that she fails to do so, that the securities be decreed to pay, &c.

Upon the death of the intestate, his estate became at once charged with the payment of all of his debts, to be paid under our statute according to class, *pro rata.* We think the bill sufficiently comprehensive to protect the rights of all the creditors; and without going into a minute examination of the facts, we may say that the answer, as it sets up a right to the money, which is admitted to have been received, as charged in the bill, is altogether unsustained by any proof that the notes were made payable to her upon a meritorious consideration. If, as she alleges, it was in consideration of property received by Clark, by virtue of his marriage, it devolved upon her to show the facts—which she has failed to do—which leaves the allegation, in effect, admitted.

We think, therefore, that the court below properly decreed that the $1400 were assets in the hands of the administratrix, and should be accounted for as such; but we can see no sufficient reason why the claims of the other creditors should have been overlooked, or why a just and fair settlement of the estate (which was properly before the court for settlement) was not made. It is true, that so far as the settlement with the Probate Court was made, touching matters within its jurisdiction, it was, unless set aside for fraud, by a direct proceeding in chancery, conclusive; but there was, nevertheless, no reason why, as between the creditors of the estate, the whole of the assets, as well those found to be due upon the settlement, as the $1400, should not be considered as one fund, out of which to pay all the claims. To charge the several claimants with the amounts received upon their claims, upon distribution of the assets under the settlement, and to divide the assets amongst the creditors according to the statute, giving to the complainant's claim a place in the classification, as of the date of the commencement of the suit, upon which judgment was rendered. By doing this, all of the claimants would have been placed upon equal footing, and should, in like proportion to the benefits received, have borne the expenses of the suit.

But it seems that the court below made no provision whatever for the other creditors. This, at least, in the first instance, should have been done, unless the other creditors had formally declined to incur the expenses, and take the benefits of the decree. If, upon day being given for that purpose, the other creditors should decline or neglect to come in as parties to take the benefits of the decree, then no doubt the relief granted in this case would have been proper; but such is not the nature of the decree. It must be set aside, and the cause remanded to the court below with instructions to enter up a decree in conformity with the opinion herein delivered, taking an account as well of the amount of the assets reported upon final settlement, as the sum of $1400, the sum heretofore unaccounted for, and after charging the other

creditors with sums received upon the distribution of assets, to proceed, according to the statute, to ascertain the amount due to each creditor, and decree accordingly, upon condition that he comes in, by a day given for that purpose, to take the benefits of the decree; and, in the event that the other creditors, or any of them, fail to do so, that then the sum or sums so decreed, be applied, upon like equitable principles, to the benefit of those who come in to share the expenses and advantages of the decree. That costs be decreed in the court below against the defendants, and in entering the decree, an account shall be taken of the expenses of the complainant, including his attorney's fees in prosecuting this suit, and each of the creditors charged with his due proportion thereof, according to the amount of his claim against the estate.

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## BAKER VS. CALVERT & THOMPSON.

The Circuit Court has no jurisdiction to try, as an appeal case from a justice of the peace, where only a copy of the judgment and the note sued on are filed: but should either dismiss the case, or upon proper showing cause the justice rendering the judgment, or his successor, or other person having custody of his docket, to certify a full transcript of the record.

*Writ of Error to the Circuit Court of Polk County.*

Hon. SHELTON WATSON, Circuit Judge.

Mr. FOWLER, for the plaintiff, referred to *sections* 181, 182, *chap.* 95, *Digest; Watts vs. Hill*, 2 *Eng.* 203.

Mr. Justice WALKER delivered the opinion of the Court.

It appears from the transcript sent from the Circuit Court, that a paper, of which the following is a copy, was placed upon the files of that court and docketed as an appeal case from a justice s court:

"CALVERT & THOMPSON vs. B. R. BAKER.

Came to hand July the 18th, 1840. Judgment against B. R. Baker for debt and damages and costs.

| | |
|---|---|
| Debt, | $31 50 |
| Justice's fees, | 1 00 |
| Constable's fees, | 3 50 |

JOHN DAUGHERTY, *J. P.*"

And with this paper was also filed a writing obligatory, of which the following is a copy:

"One day after date, I promise to pay Calvert & Thompson, or order, thirty-one dollars and fifty-one cents, to bear ten per cent. interest until paid, for value received. Given under my hand and seal, January, 1st, 1840.

B. R. BAKER," [SEAL.]

These two papers, without certificate or evidence of authenticity, seem to have been taken and acted upon by the Circuit Court as an appeal case, certified from a justice's court to that court.

The paper copied above, in its present condition, is evidence of nothing. We may infer from it that a proceeding had been instituted before the justice, in which judgment had been rendered, and costs to the justice and constable had accrued. The note was the proper subject of litigation before a justice's court, and judgment may have been rendered upon it in that court, and an appeal prayed and taken to the Circuit Court; but if such was the fact, there is no evidence of it furnished by the record. The Circuit Court clearly had no jurisdiction of it, as an appeal case,

and should have ordered it stricken from the docket, unless upon petition, and a proper showing, that a judgment had been rendered in the justice's court, and an appeal prayed and granted, the court should in its discretion have retained the case, and ordered the justice to certify a perfect record of the proceedings in his court. This, it seems, the Circuit Court did, upon the motion of the appellant, but upon what showing, does not appear. The justice, however, failed to respond to the rule; and after repeated efforts, on the part of the appellant, to have the appeal perfected, all of which failed, and without having taken any steps to compel the justice to respond to the rule, the Circuit Court assumed jurisdiction of the case, and rendered judgment against the appellant, for the amount of the note, with interest and costs. In this, we think the Circuit Court erred.

That court could render no judgment until after it had acquired jurisdiction of it as an appeal case; and the jurisdiction of the court was only retained upon the suggestion of a diminution of record, for the purpose of compelling the justice to send up the judgment and appeal, if in fact, as suggested, such was the fact. The Circuit Court, therefore, should in its discretion either have compelled the justice to respond to the rule, or have dismissed the proceedings for want of jurisdiction.

The judgment of the Circuit Court must be reversed, and the cause remanded with instructions to that court to enforce the rule upon the justice, and compel him to certify the true state of the records and proceedings had before him; so that it may determine whether it has jurisdiction of the case or not; and, if so, proceed to try the case upon its merits. So long as the justice is within reach of the process of the court, he may, and should be compelled to respond to the rule, or if it should be made appear that he is out of office, or beyond the reach of the process of the court, then the process may be directed to his successor, or other person in custody of the justice's docket, or the rule discharged, and the case dismissed for want of jurisdiction.

## WHITLOCK ET AL. VS. KIRKWOOD.

The plaintiff, in his declaration in attachment, claims the amount of the debt sworn to, with interest and "current exchange," on the place where the debt, due on promissory note, is payable; and the writ of attachment commands the sheriff to attach, &c., to satisfy the debt and interest, but is silent as to the exchange: there is not such a variance as will abate the writ.

Nor is there a fatal variance where the affidavit for an attachment claims the interest due upon the debt; and the attachment bond is silent as to such interest.

*Appeal from Lawrence Circuit Court.*

Hon. BEAUFORT H. NEELY, Circuit Judge.

CUMMINS, for the appellant. The pleas in abatement and exceptions to affidavit are merely frivolous.

The exchange was no part of the demand. 2 *H. Bl.* 378; 3 *B. & P.* 335; 10 *Metc.* 375; 2 *McLean* 581.

The contract for exchange is merely what is implied in any contract to pay in a particular place; that is, that the party will pay the value in money in that place. 1 *McLean* 423; *Story Conflict of Laws, sec.* 509, *and notes.*

The reference to exchange is merely made to enable the party to recover it, if anything. 1 *McLain* 522.

The truth of the affidavit cannot be controverted. 4 *Eng.* 378.

BYERS, for appellee. Our statute states that "*the amount of which demand shall be stated in such affidavit.*"

Now the amount of this demand was not stated in the affidavit; because they demanded the *exchange* between the place where paid and New York City, and do not state the amount of

that exchange; therefore, the *amount of the demand* was not stated in the affidavit.

The action by attachment, according to our statute as we understand it, partakes of two distinct characters: is in *rem* and in *personam*. That the attachment clause of the writ is in *rem*. To give jurisdiction to such writ, there must be an affidavit filed, setting forth, with certainty the amount of the demand—and the writ commands the officer to attach sufficient to secure that demand as sworn to, with interest and costs, and if there is no personal service, and the party does not appear so as to make it a proceeding in *personam* judgment cannot be rendered or property condemned to a greater amount than the demand certain as sworn to. Because the court would have no jurisdiction to go beyond the sum certain sworn to.

The proceeding by attachment is in derogation of the common law, and should be construed strictly. *Hughes vs. Martin*, 1 *Ark. Rep.* 388; *Didier vs. Galloway*, 3 *Ark.* 502; *Childress vs. Fowler*, 4 *Eng.* 163. If we apply the rules in this case, the judgment of the Circuit Court must be sustained.

Mr. Justice WALKER delivered the opinion of the Court.

This was an action of debt upon a promissory note, dated 27th of May, 1853, due twelve months after date, for $537 91, and made payable at the office of plaintiffs in New York, where made, "with current rate of exchange on New York."

Farnham, who described himself as agent of the plaintiffs, swears that the debt is due, payable on the 27th May, 1854, with interest from due, and the current exchange on New York, between the place where the same may be paid and that city: that defendant is about to remove himself and his goods and effects out of this State, as affiant was informed, by credible persons having ample opportunities of knowing the facts, and his intentions, and as he has good reason to believe, and does verily believe.

The condition of the attachment bond described the action to

be "for a debt, as sworn to, of $537 91, with current rates of exchange on New York."

The writ of attachment commanded the sheriff to summon the defendant to appear and answer an action of debt for $537 91, with the current rate of exchange thereon, between said county of Lawrence and the City of New York in favor of said city."

This may suffice to show the grounds of variance relied upon by the defendant, who filed two pleas in abatement.

In the first plea, the variance is averred to consist in this: that the plaintiff claims $537 91, with interest and *current exchange at New York*, in his affidavit; and in the writ of attachment, the sheriff is commanded to attach, &c., to satisfy the debt of $537 91, with interest and costs, but is silent as to exchange.

The second plea is for an alleged variance between the affidavit for an attachment, and the attachment bond, and consists in this: that in the affidavit interest is claimed—in the bond it is omitted.

With regard to the first plea, it may suffice to say, that although true, that the omission is made in that part of the writ directing the sheriff to attach, &c., not in the after part of the writ in which the sheriff is commanded to summon the defendant to answer the complaint, there is no variance whatever, and the demurrer should have been sustained.

The ground of objection set up in the second plea, is wholly untenable. It is unnecessary, however, to discuss the questions argued by the counsel, or refer to the decisions upon which they rely, because in a recent case (*Ellis vs. Cossitt et al.*, 14 *Ark.* 222,) the same questions were raised, and the same cases cited and relied upon, and it was there held, that defects of this class were not sufficient to abate the writ.

The Circuit Court erred in overruling the plaintiff's demurrer to the defendants' pleas in abatement; and for this error, the judgment must be reversed, and the cause remanded for further proceedings therein to be had according to law.

## DEMPSEY VS. FENNO, SURV.

The 10*th*, 11*th*, *and* 12*th secs. of chap.* 148, *Digest*, embrace guardian's bonds; and the securities in such bonds, may well apply by petition to the Probate Court to require the guardian to give a new bond.

It is not necessary to give the Circuit Court jurisdiction on appeal from the Probate Court, that a bill of exceptions should have been filed, where the record itself presents every thing necessary to a full adjudication of the case.

There can be no question in respect to the constitutionality of the law granting the right of appeal from the Probate Court, and authorizing a trial *de novo* in the Circuit Court.

Where a demurrer, involving merely a question of law, has been sustained by the Probate Court, and on appeal to the Circuit Court, the judgment of the Probate Court is reversed: the Circuit Court ought to remand the cause to the Probate Court, that a trial may be there had upon the merits.

The charge that a guardian is not solvent and responsible; or that he keeps possession of, and uses the slaves of his ward instead of hiring them out according to law, is sufficient to sustain a petition, on the part of his securities, to be relieved from further liability on his bond.

*Appeal from the Circuit Court of Pulaski County.*

Hon. WM. H. FEILD, Circuit Judge.

This was a petition filed in the Probate Court by James Lawson and Joseph Fenno, who are the securities of the appellant in a guardian's bond, setting forth that he is not solvent and responsible; and that he has in his hands five or six slaves, the property of his ward, which he does not hire out, as he ought to do, but keeps them in his own employment, and for his own use; averring, that they are unwilling, and refuse absolutely longer, to remain bound on his bond; and praying that they may be discharged from said bond; that he give bond with other securities,

or be discharged from his guardianship. The guardian demurred to the petition, and his demurrer was sustained. The securities appealed to the Circuit Court. The judgment of the Probate Court was set aside, the demurrer overruled, and final judgment forthwith rendered in accordance with the prayer of the petition.

BERTRAND, for the appellant.

S. WILLIAMS, for the appellee.

Hon. THOMAS JOHNSON, Special Judge, delivered the opinion of the Court.

This was a proceeding instituted in the Pulaski Probate Court, to compel the appellant to execute a new bond, or to submit to a revocation of his authority as such guardian. The proceeding is supposed to have been predicated upon the *10th*, *11th*, and *12th sections of chapter* 148, of the *Digest*. It is contended that this class of bonds is not embraced within the provisions of the act referred to; and, that consequently, the courts, through which this case has passed, have acquired no jurisdiction over it. Much stress has been laid upon the terms "office" and "officer," and considerable argument has been employed to show that the place of a guardian is not an office, and that, as a matter of course, he himself is not an officer, within the meaning of the act in question. True it is, that this class of bonds is expressly excepted out of the operation of the two first sections of the act; but this, we presume, was not from any indisposition, on the part of the Legislature, to relieve securities in such bonds, but simply because the remedy therein provided, in cases of private contracts for the direct payment of money, or the delivery of property, could not be made to apply to such instruments. The fact, then, that they were excepted out of the operation of the two first sections, can afford no evidence that they were not intended to be embraced within the subsequent provisions of the act. True it is, that the special act, under the title of GUARDIANS AND WARDS, and *chap-*

*ter* 80 *of the Digest*, provides for the removal of guardians, for good cause shown; and also, for the ruling of the guardian to additional security. It will be perceived, that this act looks alone to objections which may be urged, either against the guardian himself or his securities, and not to such as might be urged of a nature entirely personal to the security. This being the state of case, it was very natural that the Legislature, in passing an act for the relief of securities in official bonds generally, should have intended to embrace the class under consideration. This act, for the benefit of securities, is purely remedial in its nature; and is, consequently, entitled to a fair and liberal construction, and although the term "guardianship" might not, in a strict and technical sense, convey the idea of an office, yet, in a more enlarged and comprehensive point of view, it most clearly would do so. Indeed if there could be a doubt upon this subject, it would vanish upon a reference to the 12*th section* of the special act already referred to, as it is there distinctly denominated an office. We think, however, that it cannot be very material, under which act the securities intended to proceed, as either is broad enough for the case, as made by the petition, and certainly the appellant cannot justly complain, since he has had a fair and ample notice of the intended application; and, also, of the facts charged against him. No more could have been done under either act, and so much having been done, he has no just cause of complaint. But it is insisted, that although the proceeding may have been properly instituted, yet the law regulating proceedings in the Probate Courts has not been complied with, so as to bring this case within the jurisdiction of the Circuit Court; and that, consequently, none has attached to this court. The ground assumed, is that the only mode, by which an appeal can be prosecuted from the Probate to the Circuit Court, is by a bill of exceptions, and that there being no such bill in this case, no jurisdiction could attach to the Circuit Court; and, as a necessary consequence, none could be legally exercised by this Court. It is conceded, that the 179*th section* of *chapter* 4 *of the Digest*, provides, that in all cases where ap-

peals are allowed, the party appealing, his agent, or attorney, may tender to the court, during the term at which the appeal is asked, a bill of exceptions, specially setting forth each item, the allowance or rejection of which is objected to, and the decision of the court. Here is merely a power to save the facts necessary to be brought upon the record by a bill of exceptions; but it, by no means, follows that no appeal will lie where the record itself presents everything necessary to a full adjudication of the case. The whole proceedings in this case consisted of a petition, demurrer, and joinder, and a judgment of the Probate Court upon the issue formed. Here, then, there was no office to be performed by a bill of exceptions, since the record itself presented every fact, and the decision of the court as to the law arising upon those facts. There can be no doubt of the correctness of this construction, since the passage of the act of January 4th, 1849, even admitting that there could have existed a doubt before that event. But it is objected that the Circuit Court acquired no jurisdiction to try the case *de novo*, as it would be a virtual transfer of the constitutional jurisdiction of the Probate Court, to that of the Circuit; and even admitting that it had rightful jurisdiction, yet, it was error to pronounce final judgment upon the overruling of the demurrer. In respect to the first proposition, it is sufficient to remark, that under the constitution the Probate Court has no exclusive jurisdiction whatever. The 10*th section* of that instrument, provides that it shall have such jurisdiction in matters relative to the estates of deceased persons, executors, administrators, and guardians, as may be prescribed by law, until otherwise directed by the General Assembly. There can be no question, therefore, in respect to the constitutionality of the law granting the right of appeal and authorizing a trial *de novo*, in the Circuit Court. The second, it must be conceded, is not altogether free from difficulty, but we are of opinion that it is well taken. The 181*st section of chapter* 4 *of the Digest*, provides that, "on every appeal the Circuit Court shall determine the points made to the decision, to which exceptions have been filed; and if the Circuit

Court should be of opinion that the court of probate erred in relation to any material question of law or fact, the Circuit Court shall try the matter *de novo;* and such court shall make the same order and decision, that ought to have been made by the court of probate."

Now what was the question presented here? Most clearly a question of law; and, of course, under the statute, that and no other was the matter to be tried *de novo*, and in regard to which alone the same order and decision was made that the Probate Court should have made. The question then is, what order should the Probate Court have made upon the question of law raised by the demurrer. We think that it should have overruled the demurrer, and have put the appellant to answer; and, if so, it is clear that the only order this court can now make under the statute, is one of like effect. We think, therefore, that the Circuit Court erred in proceeding to render judgment upon the merits of the case, which were not properly before it, but that it should have corrected the error of law, and have remanded the case for further proceedings. This case bears no analogy to the class of cases provided for under the *4th chapter of the Digest*. Indeed, the right of appeal, in a case like this, is not granted by it, and the act extending the jurisdiction by appeal, embracing this class of cases—makes no provisions for trial, but leaves the manner of proceedings to be governed by the law as it then stood, and when applied to the particular cases therein enumerated, it must be done with proper allowance for the nature of the case presented by appeal. This will be seen, at once, by reference to the proceedings under *chapter* 4, *section* 179, which provides, that bills of exceptions shall set forth each item allowed or rejected, and the decision of the court upon it, referring directly to the cause for which appeals were allowed by statute; so that the mode of proceeding in *section* 181, was directly in reference to accounts, items of charge, &c., which were matters of fact, and the law arising upon them, and not to applications like the present. This was a final judgment upon demurrer, and is embraced by the *1st section of*

*the act of* 1849, *at page* 59, which extends the right of appeal from the Probate Court. This act simply refers to the manner of proceeding under the *4th chapter of the Digest*, as alike applicable to the appeals therein allowed; but, of course with due consideration of the case appealed from, and the matter put at issue before the Circuit Court. The petition presents two distinct charges against the guardian; and we think that both are sufficient in law. There can be no doubt about the first, as no man can be held responsible against his will for a guardian, who is utterly insolvent and irresponsible. The second is also believed to be a violation of the undertaking of the guardian, and to amount to mismanagement of the estate. True it is that there is no statute directly requiring guardians to hire out the slaves of his minor, yet it is believed, from the analogy between them and executors and administrators, and also from the act of 29th December, 1852, that they have no discretion upon the subject without an express order of the Probate Court. See *Welch vs. Cole*, 14 *Ark. R.* 401. The *1st section* of this act provides "that guardians at law having the custody and control of negroes, slaves for life, the property of their wards, shall not be required to hire the same out at public vendue, but may hire the same out at private hiring; observing, in all instances, a due regard to the preservation and proper use of the property and best interest of the ward." We think that this act implies a plain negation of his power to keep them at home, and in his own employment without the express order of the Probate Court. The Circuit Court, therefore, decided correctly in overruling the demurrer, but erred in proceeding to render final judgment upon the merits. The judgment is therefore reversed, and the cause remanded, to be proceeded in according to law, and not inconsistent with the opinson herein delivered.

Mr. Chief Justice ENGLISH, not sitting in this case.

## THE STATE VS. ADAMS.

An indictment, charging that the defendant on a certain day, in the county where the indictment was found, "did then and there keep a public tavern, without having first procured a license from the County Court of his county," &c., is sufficient.

*Appeal from the Circuit Court of Johnson County.*

Hon. FELIX J. BATSON, Circuit Judge.

Mr. Attorney General JORDAN referred to *sec.* 23, *et seq.*, *ch.* 160, *Digest; Moffat vs. State*, 6 *Eng.* 169 ; *State vs. Eldridge*, 7 *Eng.* 608.

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

Adams was indicted in the Circuit Court of Johnson county, as follows: "The grand jurors, &c., &c., in and for the body of the county of Johnson, upon their oath, present that William Adams, on the 10th day of April, A. D. 1854, in the county aforesaid, did then and there keep a public tavern without having first procured a license from the County Court of his county for that purpose, against the peace and dignity of the State of Arkansas."

Upon the motion of the defendant, the indictment was quashed, but upon what ground does not appear from the record. The State appealed to this court.

The indictment was doubtless drawn under the *4th section of chapter* 159, *Digest*, which declares that "all persons keeping a public tavern, whether they retail spirituous or vinous liquors or not, shall first procure a license for that purpose from the County Court of his county."

The *5th*, *6th*, and *7th sections* of the same chapter, prescribe regulations for the government of the county court in granting such license, and the *14th section* fixes the penalty for the violation of certain provisions of the act, and among them the *3d section.*

The indictment is drawn substantially in the language of the *3d section*, which embraces in its terms, the material ingredients of the offence designed to be punished. *Gabe vs. The State*, 1 *Eng. R.* 519; *Smith Bill vs. The State*, 5 *ib.* 536; *Moffatt vs. State*, 6 *Eng.* 169; *State vs. Eldridge*, 7 *ib.* 608.

The indictment charges that the defendant kept a public tavern in Johnson county, without procuring license from the County Court of "his county." If the word *said* had been used in place of the word *his*, the offence would have been charged with more technical certainty, but it follows the language of the statute, and we think is substantially good.

We are not aware that any serious doubts of the constitutionality of this statute are now entertained. See *Washington vs. The State*, 13 *Ark.*, *p.* 760, 761.

Finding upon the record no substantial cause for quashing the indictment, the judgment is reversed, and the cause remanded for further proceedings, &c.

## REED VS. THE STATE.

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It is sufficient, in an indictment for murder, to charge that the deceased was a "Wyandott Indian, whose name is to the jurors unknown," without averring that the deceased was a human being.

Where an indictment for murder describes the deceased as a Wyandott Indian, the description is material, and the race of the deceased must be proved as alleged.

Such description may be proved by reputation; and although it would not be sufficient if the witness stated that "he did not know except from what he had heard;" that the deceased was a Wyandott Indian, yet the jury would be warranted in finding the fact, where a witness stated "that he heard from those, with the Indian that was killed, that he was a Wyandott Indian," when it was in proof that there was a band of Indians encamped together, of whom the deceased was one.

Where, upon the trial of an indictment for murder, the bill of exceptions purports to set out all the evidence, and fails to show that it was in proof that the act was committed in the county where the indictment was found, the judgment will be reversed. (*Sullivant vs. State*, 3 *Eng.* 400; *McElroy vs. State*, *ib.* 451; *Holeman vs. State*, 13 *Ark.* 110.)

*Appeal from the Circuit Court of Desha County.*

Hon. THEODORIC F. SORRELLS, Circuit Judge.

YELL, for the appellant. There is no evidence in this case but the admissions of the party: but it is a well settled principle that the admissions of a party, when given in evidence, must be taken together, as well what makes in his favor as what makes against him. *Stover vs. Gowen*, 6 *Shep.* 174; *Howard vs. Newson*, 5 *Miss.* 523; *Reese vs. Hardy*, 7 *Miss.* 343; 1 *Phillips Ev.* 397; 4 *Blackstone* 357; *Roscoe's Crim. Ev.* 38 *to* 44.

The allegation in the indictment is, that the defendant killed a Wyandott Indian. The proof as to this, is that one of the wit-

nesses heard an Indian say that the deceased was a Wyandott. This, I presume, is no proof at all. *Phill. on Ev.* 197; *Roscoe's Crim. Ev.* 22.

The allegation was, that the name of the deceased was, to the grand jurors, unknown. Carter says he was one of the grand jurors that found the indictment; the grand jury tried to find out the name of the deceased, but he don't think they knew it. *Wharton's Am. Crim. Law* 218, 104 *to* 108, 110. This allegation must be proven, for it is material.

In the case of *Rex vs.* ———, *R. R.* 489, that an indictment against a defendant, describing him as a *person*, to the jurors unknown, without some other designation as to whom the grand jury meant, would be an insufficient indictment. See *note R. American Crim. Law* 108.

In this case the indictment does not allege that he is a person. A variance in the name or identity of the party laid as injured, will entitle the party to an acquittal. 2 *Hale's Pleas of the Crown.*

Indian is the name of a river in Asia. It applies as well to the persons who inhabit the Indies, east or west, as it does to aborigines of America; but, with the adjective Wyandott attached to it, it has no fixed signification to it known to the English language, and to decide that a term or phrase the signification of which is unknown to the English language, means a human being in an indictment, where the greatest particularity is required, would be to set a precedent in criminal proceedings that might hereafter lead to bad consequences.

Mr. Attorney General JORDAN, for appellee.

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

Reed was indicted in the Desha Circuit Court, for the murder of "a certain Wyandott Indian, whose name is [was] unknown to the grand jury." He was tried upon the plea of not guilty, convicted of manslaughter, and sentenced to the penitentiary for

four years. Motion in arrest of judgment and for a new trial overruled, and appeal to this court.

The motion in arrest of judgment, was upon the grounds that the allegation in the indictment, that the name of the Indian was unknown to the grand jury, was insufficient; and that there was no allegation in the indictment, that any human being was killed by the defendant, and that the court could not judicially know that the words "Wyandott Indian," meant a human being.

If the name of the party deceased be known, it should be stated. 1 *Chitty's Crim. L.* 212, 213; *Cameron vs. The State*, 13 *Ark. R.* 712. But if the name of the person killed cannot be ascertained, an indictment for the murder "of a certain person, to the jurors unknown," will be valid. 1 *Chitty's Crim. L.* 212; 3 *ib.* 733; 2 *Hale* 181.

In this case, the indictment alleges the killing "of a certain *Wyandott Indian*, whose name is unknown to the grand jury, in the peace of the State," &c. The words *Wyandott Indian* are surely as certain, and indeed more descriptive of the deceased, than the general term "*person*," used in the precedents.

It is not alleged in any indictment, in terms, that the party slain is a *human beiny*. This is to be inferred from the character of the accusation and the descriptive language employed in the tenor of the indictment.

It would hardly be going too far to say, that the court judicially knows that a *Wyandott Indian* is a *human being*, and especially when it is alleged that he was in the peace of the State, and was *murdered*. 1 *Greenleaf's Ev.*, *sec.* 4, 5, 6. If there could be any serious doubt of this, the verdict, upon the plea of not guilty, would cure the defect, as the court below would hardly have received from the jury a verdict of *manslaughter*, unless it had been proven upon the trial that the deceased was a *human being*. The learned counsel could hardly have been serious in urging that the word *Indian* might have referred to a *river*, which he says bears that name. It would be a glaring want of judicial knowledge, in any court, to suppose that a man was indicted for

the murder of a river, or that a jury would return a verdict for *manslaughter* in such case. An indictment for selling liquor to an Indian of the Miami tribe, whose name was to the jurors unknown, was held good. *State vs. Jackson*, 4 *Blackf.* 49.

The motion for a new trial is based upon the grounds, that the verdict was contrary to law and evidence, and that the court admitted incompetent evidence upon the trial.

It is urged by the prisoner's counsel, that the proof was not sufficient to sustain the allegation in the indictment; that the name of the deceased was unknown to the grand jury. The only evidence on this point, was as follows: Carter being introduced and sworn, on the part of the State, was asked by the prosecuting attorney, if the grand jury knew what was the name of the deceased Indian? He answered, "I don't think they knew it: they tried to find out what his name was; I was a member of the grand jury."

The allegation in the indictment, that the name of the deceased was unknown to the grand jury, was a material one, to be proven to the satisfaction of the jury as any other fact, and they were judges of the sufficiency of the evidence. As to what degree of certainty would be legally sufficient to establish the fact, was well enough settled in the case of *Cameron vs. The State.*

Upon the sufficiency of the evidence upon this point, as well as that connecting the prisoner with the killing of the deceased, which consisted entirely of the statements of the prisoner to the witnesses, we deem it improper to express any opinion, as the case must be sent back for a new trial.

The attorney for the State asked the witness, Grace, if the deceased was of the Wyandott tribe of Indians. He answered that he did not know, except from what he had heard. The prisoner's counsel objecting to such evidence, the court overruled the objection, deciding that as to whether the Indian was a Wyandott or not, could be proven by common reputation, and the prisoner excepted.

The unlawful killing of any human being is a crime. Had

the indictment charged the killing of a *certain person* whose name was to the grand jurors unknown, we know of no rule of law requiring any proof of the race of the deceased. But here the indictment charges the murder of a certain *Wyandott Indian*, whose name was unknown to the grand jury. The allegation that he was a Wyandott Indian, was matter of description and identity of the person slain.

This mode of identification was adopted by the draftsman of the indictment, and we think the State thereby took upon herself the burthen of making some proof of such descriptive matter.

The object of the allegations in an indictment, descriptive of the deceased, is to inform the accused of the particular crime with which he is charged, that he may prepare to meet it, and to put upon record the necessary identification of the offence to protect him against a second indictment for the same crime. The name of the deceased is the legal mode of description; and must be stated in all cases where it can be ascertained by the grand jury. But where the name cannot be ascertained, or where an infant is murdered before it has received a name, the criminal is not, on that account, to go unpunished, and the law permits of other modes of description. 1 *Chitty's Cr. L.* 112 *to* 217. If there be a material variance between the name of the deceased, alleged in the indictment, and that proven upon the trial, it is fatal. *Roscoe Cr. Ev.* 694 *to* 697. Or if the State omits to prove the name as alleged, the evidence is deficient. *Gabe alias Santa Anna vs. The State*, 1 *Eng. R.* 540. So we think upon principle, where the indictment undertakes to identify the deceased by his race, as in this case, the State should make some proof of the descriptive matter. The addition or occupation of the deceased, if alleged, need not be proven, (3 *Chitty's Crim. L.* 733) because these have reference to his political or social condition merely, and are not personal marks of identity, as his race is. And though, as above remarked, the race of the deceased need not be alleged, yet if alleged, it should be proven, as the State takes upon herself the proof of it as descriptive of the offence. The distinc-

tion between the races of men, is strongly marked, in their personal appearance, language, habits, &c., and *there is* but little difficulty in determining, by some competent evidence, the peculiar race of an individual when alleged. And if a man is charged with the murder of an Indian, or a negro, the record would afford him no protection against a subsequent indictment for the same offence, alleging the deceased to have been a white person. In other words, the record would not bear upon its face, any evidence that the two accusations were for the same offence. No more than if a man were charged in one indictment with killing *John Doe*, and in the other with the murder of *Richard Roe.*

The court below was right in deciding that it was competent to prove by common reputation, that the deceased was a *Wyandott Indian.* The people of this country being generally Anglo-Saxon, a person coming into any community, of a different race, bears upon him such peculiar marks of his nationality, as to enable the community very soon to form an opinion in reference to it, sufficiently certain for all the purposes of legal identity. See 1 *Greenl. Ev. sec.* 103, 104, 105. It stands upon the same footing with the proof of pedigree.

The witness, Grace, was asked if the deceased was of the Wyandott tribe of Indians, and he answered that he did not know except from what he had heard; and it does not appear from the bill of exceptions that he answered further on the subject. He did not state whether he had heard that he was or was not, or from whom he had heard it. Whether from one individual, or from a sufficient number of the community to constitute it common reputation. His evidence, therefore, amounted to nothing.

The witness, Sexton, stated "that he heard from those with the Indian that was killed, that he was a Wyandott Indian," and to this evidence the defendant objected, and excepted to its admission by the court. This statement, if taken by itself, is not satisfactory, but when taken in connexion with the testimony of the other witnesses who testified on the trial, it was doubtless competent evidence. It appears that a party of Indians, passing

through the country, it may be inferred, encamped near Sexton's residence, and remained there for some weeks. The prisoner was prevailed upon by some white men, to go with them to the camp one night, to play the fiddle for them, that they might have a frolic with the Indian women. The Indians, during the night, were offended at the conduct of the white men, and drove them off, but insisted that the prisoner, who it seems was a negro, should remain, and he did so. During the night he got into a difficulty with one of the Indian men, in whose tent he slept, and killed him.

Understanding Sexton to have referred to the declarations of the party of Indians, so encamped in the neighborhood, the deceased being with them, and constituting one of their number, we think that their declarations, as to the tribe to which they belonged, or as to the tribe to which the deceased belonged, made under ordinary circumstances, in response to inquiries on the subject, such as would be commonly made of a party of Indians passing through the country, were competent. It would be of as high a grade of evidence as general reputation in the community where the Indians had encamped, that they were of the Wyandott tribe, because such reputation would ordinarily be derived from the declarations of the Indians themselves, in response to inquiries on that subject.

These remarks are made in reference to the competency of the testimony. The jury were the judges of its sufficiency, upon this point, as upon others.

The bill of exceptions purports to contain all the evidence that was offered or introduced upon the trial by either party, and it does not appear that any proof was made that the offence was committed in *Desha* county. This was a material allegation in the indictment, and required to be proven by the State. *Sullivant vs. The State*, 3 *Eng. R.* 400; *McCoy vs. State*, *ib.* 451; *Holman vs. The State*, 13 *Ark. Rep.* 110.

For the total want of evidence upon this point, the judgment of the court below is reversed, and the cause remanded for a new trial.

## THE STATE VS. PARNELL.

An indictment, charging that the defendant, "on Sunday, the 2d day of April, 1854,' in the county where the indictment was found, "did sell to divers persons, a large quantity of ardent spirits, to wit," &c., without setting out the names of the persons to whom the spirits were sold, or that they were sold to some person, to the jurors unknown, held sufficient.

*Appeal from the Circuit Court of Scott County.*

Hon. FELIX J. BATSON, Circuit Judge.

Mr. Attorney General JORDAN, for the State. The indictment pursues the language of the statute; and is, in substance, good. It is wholly unnecessary to set out the name of the person to whom the spirits were sold. *Digest Ark., chap.* 51, *sec.* 3; *Moffatt vs. The State*, 6 *Eng.* 169; *Shover vs. State*, 5 *Eng.* 259; *Brown vs. State*, 13 *Ark.* 96; *The State vs. Eldridge*, 7 *Eng.* 608.

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

Parnell was indicted in the Circuit Court of Scott county, as follows: "The grand jurors, &c., &c., in and for the body of the county of Scott aforesaid, upon their oath, present that Richmond P. Parnell, on Sunday, the 2d day of April, A. D. 1854, in the county aforesaid, did sell to divers persons, a large quantity of ardent spirits, to wit: one quart of whiskey, against the peace," &c.

The defendant moved to quash the indictment, on the grounds that it did not allege to whom the spirits were sold, or that they were sold to some person, to the grand jurors unknown: and that

it was not alleged that the offence was committed in Scott county.

The court sustained the motion, and the State appealed.

The indictment is for the violation of *section* 5, *article* 5, *part* 8, *chapter* 51, *Digest*, *p.* 370, which declares, among other things, that every person who shall, on Sunday, sell or retail any spirits or wine, shall be deemed guilty of a misdemeanor, &c.

The venue is well enough alleged.

Was it necessary to aver the names of the persons to whom the spirits were sold, or that the names were unknown to the grand jurors?

It is a general rule, that in indictments for offences against the person or property of individuals, the name of the party injured must be stated, if it is known, or can be ascertained, and if not, it may be alleged that the injury was to a certain person or persons to the jurors unknown, or something equivalent. 1 *Chitty C. L* 212; *Camèron vs. State*, 13 *Ark.* 712; *Reed vs. State*, *present term.*

In the case at bar, the gravamen of the charge is a desecration of the Sabbath—an offence against public morals, and not against an individual.

If it is necessary to state the name of the person or persons to whom the spirits are sold, it could only be as matter of description. Is it requisite for this purpose?

It was held by this court, in a number of cases, that in indictments for betting at cards, under the 8th section of the gaming act, (*Digest*, *chap.* 51, *part* 8, *art.* 3, *sec.* 8,) it was necessary to set out the names of the persons by whom the game was played, as matter of description of the offence, and that the proof must correspond with the allegation. *Barkman vs. The State*, 13 *Ark. Rep.* 703; *Johnson vs. The State*, *ib.* 684; *Jester et al. vs. The State*, 14 *Ark.* 552; *Drew vs. State*, 5 *Eng. Rep.* 82; *Parrott vs. State*, *ib.* 572; *Moffatt vs. The State*, 6 *ib.* 169; *Stith vs. The State*, 13 *Ark. Rep.* 680.

This rule was found to be so inconvenient in practice, that the General Assembly, at its recent session, passed an act, intending

doubtless to dispense with the necessity of stating the names of the persons by whom the game is played. *Acts* 1854, 1855, *p.* 270.

A similar question arising now, under a different statute, for the first time, we are not disposed to treat the decisions above referred to, as conclusive upon the point; though upon principle, analogous to some extent.

The decisions of the courts of our sister States on this subject, are conflicting. See *Wharton's Crim. Law* 713, where they are collected.

In *State vs. Munger*, 15 *Vermont Rep.* 290, BENNETT, Judge said: "The general requisites of an indictment require it to be framed with so much certainty as to identify the offence, that the grand jury may not find a bill for one offence, and the prisoner be tried for another; and that he may know what accusation he has to meet, and the jury be able to give a verdict upon it, and the court to see such a definite crime that they may apply the punishment which the law has prescribed, and the prisoner be able to plead his conviction, or acquittal, in bar of a second prosecution for the same offence. It is said that the indictment is bad, because it is not averred to whom the liquor was sold, or that the person or persons are unknown. It is of no importance that the indictment should contain such an averment. The offence complained of works no injury upon the individual rights of the person to whom the sale was made, and none are supposed to be violated. It has no analogy to an indictment for theft, to which it was likened by the counsel, where the violation of private rights enters into the very essence of the crime. * * * The statute upon which this indictment is founded, gives but one penalty for a single violation, and it is immaterial whether the sale is to one or divers individuals."

So in *The People vs. Baker*, 17 *Wendell Rep.* 475, NELSON, Chief Justice, said: "It is to be remarked that the offence upon the statute consists in the act of selling the spirituous liquors without license; and, therefore, the designation of the persons to whom

sold, is in no way material to constitute it. The question is simply one of pleading, whether certainty to a common intent, requires the names of the persons to be given to whom the liquor was sold. The precedents appear to be all the other way. Our statutes on this subject appear to correspond substantially with the English acts of parliament, and were undoubtedly taken from them forbidding the sale of '*distilled spirituous liquors*, or *strong water*,' as will be seen from a collection of them in 2 *Burn's Justice* 185, and onward. 4 *Wentworth* 504 contains the form of an information upon these statutes, for selling without license, in which the *mere act of retailing* the liquor without a license, is averred; the persons to whom it was sold, are not mentioned, or in any way referred to. The same remark is applicable to an information and complaint before justices, for selling ale without license. 1 *Burn's* 23, 25. There is a precedent in 2 *Chitty's Crim. Law* 434, for selling ale and beer on Sundays, in which the sale is charged as made to *divers idle and ill-disposed persons*, whose names to the jurors aforesaid are yet unknown. Here, though the persons are mentioned as unknown, yet, from the manner in which it is stated, it is, I think, to be inferred that the names were not deemed material, as in the precedents where they are so considered, it is indicated by the form. In 4 *Went.* 525, a precedent is given for selling hard soap in a shape different from that required by the statute of 24 *G.* 3, *chap.* 48, *sec.* 14, in which the names of the persons are not mentioned, or in any way referred to. The case is strictly analogous to the one under consideration, so far as respects the question involved. The precedents are clearly with the pleader in this case, and upon a question, the decision of which depends so much upon the opinion of the court as to what amounts to certainty to a common intent; these afford, perhaps, as safe a guide as can be found."

In *Commonwealth vs. Smith & Burwell*, 1 *Grattan* 553, it was held, that in an indictment for selling ardent spirits to slaves, without the consent of the master, &c., it was not necessary to state the names of the owners of the slaves to whom the liquor was sold.

So in *Commonwealth vs. George Dove*, 2 *Virginia cases* 26, it was held, that in an information for retailing spirituous liquors without a license, it was not necessary to name the persons to whom the liquors were sold.

In *Ells vs. The People*, 4 *Scammon* 508, Ells was indicted for harboring a certain negro slave, owing service to Chancy Durkee, &c.; and it was held that it was not necessary to state the name of the slave, as this omission could not, in any degree, affect the rights of the defendant.

In indictments for misdemeanors, the same technical particularity in the averments is not required, as in indictments for the higher grades of crime. If the names of the persons, to whom spirits are sold, were required to be stated, it would lead to inconvenience, in practice, rather than tend to promote the ends of justice. It would be often difficult for the grand jury to ascertain them, or the State to prove them as alleged. When a number of persons step into a dram shop for the purpose of obtaining ardent spirits, or wines, a significant nod or tap upon the counter, is sufficient to indicate to the keeper their purpose; and, in many cases, an observer might swear that there was a sale upon the Sabbath, but it might be difficult for him to state, with requisite certainty, the name of the particular individual who made the purchase.

Upon the whole, we think the indictment in this case is substantially good, and ought not to have been quashed.

The judgment is, therefore, reversed, and the cause remanded for further proceedings.

## HENSLEY VS. BRODIE.

W. sold to B. certain machinery attached to a mill, and delivered possession; subsequently, he entered into a written contract, under seal, for the sale of the lot and mill-house: HELD, that he was a competent witness, in a suit between B. and one claiming under the contract of sale, to prove the previous sale of the machinery, and that, at the time of the sale of the lot, there was a special reservation, by parol, of the machinery; though he might be estopped in a suit between himself and others, growing out of the contract of sale, from proving a parol reservation of any thing attached to the freehold.

The sale of an engine and apparatus, fitted up in a mill-house for the purpose of driving a mill, accompanied by delivery of possession and exercise of ownership by the vendee, clearly amounts to such a severance of them from the realty as to make them personal property and entitle the vendee to bring replevin for them.

*Error to the Circuit Court of Pulaski Connty.*

Hon. WILLIAM H. FEILD, Circuit Judge.

A. FOWLER, for the plaintiff.

S. H. HEMPSTEAD, for the defendant.

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

On the 22d of February, 1850, George Brodie brought an action of replevin in Pulaski Circuit Court, against Larkin Hensley for the following property: "One steam boiler and stand pipe, one governor to a steam engine, and appendages thereto attached, one large band wheel and shaft, one large force pump with its appendages, and all the copper pipe thereto attached, which belonged to the engine, as erected by one Darwin Lindsey, one lift-

ing cold water pump, with all the copper pipe thereto attached, one large flour bolting chest, steam-engine timbers, bolts, boiler door, and detached copper pipe, and two wrenches."

The declaration was in the *detinet*, describing the property as above, alleging a bailment thereof by the plaintiff to the defendant, and a refusal to re-deliver on demand.

The defendant pleaded *non detinet*, and property in himself, to which pleas, issues were made up, the cause submitted to a jury at December term, 1851, and verdict and judgment for the plaintiff. The defendant excepted to the opinion of the court, in giving and refusing instructions to the jury, took a bill of exceptions, setting out the evidence and brought error.

It appears from the bill of exceptions, that upon the trial the plaintiff proved, by William E. Woodruff, that some four or five years before then, he being the owner and in possession thereof, sold to the plaintiff the boiler, pumps, and machinery connected with the steam engine mentioned in the declaration, which were then in a steam saw, and grist mill belonging to the witness, and which had been previously erected and worked by Darwin Lindsey, on the north-half of fractional block No. 108, in the City of Little Rock, and which fractional block witness had purchased of Lindsey, and was, at the time of the trial, the owner, and in possession thereof. Witness sold the engine, apparatus and pumps to the plaintiff for $500, received the consideration, and delivered them to him. Thinks he did not give a bill of sale, but plaintiff had the right to take the property, and did afterwards remove some of the articles of the engine away, and at all events it belonged to the plaintiff, who exercised ownership and control over it after the sale. Witness did not sell the bolting chest to plaintiff—knew nothing about it; there was none there when he sold the engine to the plaintiff. The machinery so sold to the plaintiff, was then in the mill, and witness delivered it to the plaintiff, as above stated, who still let a portion of it remain in the mill; and had not taken away such portion when witness, afterwards, conditionally, sold the lot or block, on which the mill

was situated, to *Hoyt and Johnson.* Witness contracted to sell them the lot, and executed to them a title bond therefor on the 1st of October, 1848, and delivered the possession to them, (the boiler and other machinery of the engine mentioned in the declaration, being then still in the mill.)

The title bond referred to, was shown to the witness, identified by him, and is copied in the bill of exceptions as part of the evidence.

After this title bond had been so proven, the court permitted the witness to testify, against the objection of the defendant, that at the time he sold said lot or block, with the mill on it, to Hoyt and Johnson, and executed to them said title bond, he specially reserved, by parol, the engine, boiler, machinery, &c., in controversy, as the plaintiff's property, and that Hoyt and Johnson so distinctly understood it.

The defendant excepted to the opinion of the court, so permitting the witness to testify as to such parol reservation, when the contract was reduced to writing under seal.

Woodruff further testified, that Hoyt and Johnson, under said contract with him, used the saw and grist mill and the boiler, engine, and machinery, in controversy, that defendant acquired possession of the same under Hoyt and Johnson, and also used the mill and boiler, engine, and machinery in the mill, and was in the use and possession of them when this suit was brought. That Hoyt and Johnson never paid witness any part of the purchase money, agreed to be paid to him; and, under the contract, forfeited all right. That after they had run away from Little Rock, the defendant told witness that he had not paid them anything on account of his purchase of the lot and mill from them; but witness afterwards understood, from some source not remembered, that defendant got the notes, which he had given to them from A. E. Thornton.

Bennett testified, on the part of the plaintiff, that the defendant was in possession of the mill, at the time the articles in controversy were replevied by the sheriff; they were in the mill-

house, and defendant in the use of them. The boiler had been rolled out and repaired, and some of the articles of the machinery had been taken down, and others had not, but were in their proper places. The defendant was running the mill, and it could not have been run without the machinery mentioned in the declaration, or similar articles; the bolting chest was also fixed up in the mill. Defendant had refused to deliver the property in controversy to the plaintiff, on demand, before suit. Witness was present when the sheriff executed the writ, &c. The articles mentioned in the declaration, and sued for by the plaintiff, constituted only a part of the steam engine originally in the Lindsey mill; the plaintiff having taken part of it away, after he purchased the engine from Woodruff. Witness helped plaintiff to take it down. That when Hoyt and Johnson had the mill, the witness put in for them a part of a steam engine owned by him, which in connection with the part left by the plaintiff, and sued for by him, enabled Hoyt and Johnson to use the mill; and that both parts were there, and came into the possession of the defendant when he took possession of the property. Hensley, the defendant, lived with his family in a dwelling house on said lot or block, after Hoyt and Johnson left the premises.

The witness, on being asked by the plaintiff what he had heard the defendant say respecting the boiler and apparatus sued for, replied, in substance, that after the contract between Hoyt and Johnson and the defendant, and before this suit, he, the witness, heard defendant say that he would do what was right about it, or words to that effect, but did not mention the plaintiff, or any other person's name.

Plaintiff proved by *Robert Brodie*, that about three years previous to the time of the trial, and before suit, he heard the defendant say to the plaintiff at the penitentiary: "I understood the boiler and machinery in the mill is yours. I am poor, and not able to buy it, and I will pay you the same rent for them that Hoyt and Johnson were to pay you," or words to that purport and substance. Plaintiff at the time had charge of the penitentiary.

Mercer testified for the plaintiff, that he first saw the bolting chest in controversy, at the plaintiff's residence, and helped to haul it from thence to the penitentiary, and then to the steam mill above referred to. That about three years ago (before the trial) Hoyt and Johnson took possession of the steam mill, and witness helped to take the boiler, &c., to the penitentiary to be repaired, and they were then returned to the mill, and the plaintiff had the bolting chest taken to the mill, whilst Hoyt and Johnson were in possession of it.

The defendant then was permitted to prove the execution of, and read to the jury, against the objection of the plaintiff, the agreement between Woodruff and Hoyt and Johnson, for the sale of the lot or fractional block, upon which the mill was situated, the agreement of sale from Hoyt and Johnson to the defendant, and his four obligations to them for the purchase money with the endorsements thereon.

The agreement between Woodruff and Hoyt and Johnson, bears date 1st October, 1848. It witnesseth, that in consideration of $1, &c., and in further consideration of five obligations executed by them to him, whereby they agree to pay to him $212 on the 1st October, 1849, $224 on the 1st October, 1850, $236 on the 1st October, 1851, $248 on the 1st October, 1852, and $260 on the 1st October, 1853, with interest, &c., he covenants, on full payment of said obligations, &c., to make to them, their heirs, &c., a deed with usual covenants of warranty, to the fractional block before mentioned, "being the same fractional block on which the steam mill and dwelling house formerly belonging to Darwin Lindsey, are now situate, &c., together with all the rights and privileges thereto belonging." Hoyt and Johnson covenanted on their part to pay the obligations, as they severally fell due, with taxes, &c.; and it was further expressly agreed by the parties that if said obligations, &c., or either of them should not be fully paid within ten days after maturity, Woodruff was not to be bound to convey said fractional block or any part thereof to Hoyt and Johnson, and thereupon all payments previously made by them,

were to become absolutely forfeited to Woodruff, and from thence, and forever thereafter, the said block of land was to be absolutely re-invested in him, and by him again re-entered upon and repossessed as fully and effectually as if this agreement had never been entered into, and the same was to remain forever null and void as against Woodruff, who was thereupon to be fully authorized to sell, or otherwise dispose of the same, in any form or manner that to him might seem right and proper.

The agreement was signed and sealed by the parties, acknowledged by them on 13th, and filed for record on the 15th December, 1848, in the Recorder's Office of Pulaski county, and duly recorded, as appears from the appended certificates.

The agreement between Hoyt and Johnson and defendant, bears date 18th December, 1848, and is, substantially, in the same from as that between Woodruff and Hoyt and Johnson, except that it provides for the payment of the obligations given for the purchase money in the grinding of grain to be furnished at the mill by Hoyt and Johnson, at a stipulated price per bushel. It refers to the agreement with Woodruff in describing the premises.

Hensley's obligations were for $930, $885, $840, and $795, payable at one, two, three, and four years from date. They are endorsed by Hoyt and Johnson to A. E. Thornton, 12th January, 1849, and by him endorsed to Hensley, without recourse, on the 19th of February, 1849.

Defendant proved by Fowler, that some time after Hoyt and Johnson had run away, he was called in to the State Bank, then occupied by Thornton, who then had in his possession the four obligations above referred to, and who stated that he had acquired them from Hoyt and Johnson, and acknowledged that Hensley had satisfactorily arranged with him, Thornton, and in the presence of witnesses, signed the transfer to Hensley, endorsed on each of said obligations, and then delivered them to Hensley. Witness did not know how Hensley had settled them with Thornton, further than that they both then said that Hensley transfer-

red some lands to Thornton, by a deed of mortgage, or deed of some kind, in the adjustment of said obligations.

Plaintiff then proved by parol evidence, and by the records of the court, that on the 25th March, 1850, Woodruff brought an action of unlawful detainer against Hensley, in Pulaski Circuit Court, for the same fractional block, conditionally sold by Woodruff to Hoyt and Johnson, and by them to Hensley, upon which the mill was situated, and recovered final judgment therein against Hensley, on the 3d day of January, 1851, and under which proceeding Woodruff obtained, and continued to retain possession of the premises.

Defendant, conceding these facts to be proven, objected to the competency and relevancy of this testimony, and excepted to the opinion of the court refusing to exclude it.

At the instance of the plaintiff, the court instructed the jury as follows: "That if the jury believe, from the evidence, that the engine and machinery, and articles sued for, were the property of the plaintiff, and had not been sold or disposed of by the plaintiff, he has the right to recover in this action."

The defendant moved the following instructions: 1*st*. That even if the jury believe, from the evidence, that plaintiff in fact owned the machinery and property in controversy, yet, if he permitted the said Hoyt and Johnson to hold the same in their possession, and use it in their mill as their own, as a part of the machinery thereof, and that the defendant purchased the same with the mill without notice of the plaintiff's claim, he is entitled to hold it against the plaintiff, as a *bona fide* purchaser from said Johnson and Hoyt.

2*d*. If the jury believe, from the evidence, that the articles of property in controversy were fixtures, attached to the steam mill, in possession of said Hensley, at the time of the institution of this suit, the plaintiff is not entitled to recover them in this form of action.

3*d*. That in order to constitute an article of property, a fixture in land, it is not always necessary that it be fastened per-

manently to the ground, or to the building where it is used; but where a mill stands upon land, it constitutes in law a part of the land, and any machinery annexed to it, where it is necessary to its use, is a fixture, and becomes thereby also a part of the freehold.

*4th.* That if the jury believe, from the evidence, that the articles of property mentioned in the declaration, and replevied under the said writ, were fixtures, and a part of the machinery of said mill, then although, at the time of their said seizure by the sheriff, under the said writ, they may have been temporarily detached from the mill, for repairs, or other purposes, yet they did not thereby lose their character and quality of fixtures.

*5th.* That the action of replevin only lies for personal property, and cannot be maintained for real estate, or for that which partakes of the realty, by being so attached thereto as to constitute it a fixture.

*6th.* That in law, a fixture is an article of property, originally personal, but so fixed to the freehold or realty, that it cannot be severed therefrom without damage to the realty, and thus become a part of the realty." Which instructions the court declined to give.

"Whereupon," the bill of exceptions states, "the court declared to the counsel, engaged in the cause, in the presence of the jury, before they retired, that the said deeds read in evidence, show no title in the defendant to the property therein mentioned, on which he can only rely as a defence to this action, and before he could so rely upon them, he would have to prove the performance of the condition mentioned in said deeds, and that they were not forfeited."

"And, thereupon, instructed the jury that all of the instructions, moved for by the said defendant, touching the question or subject of fixtures, are abstract, and have nothing at all to do with the case on trial; and that the doctrine or question of fixtures, does not arise in the case at all."

The defendant excepted to the opinion of the court, giving and refusing instructions as above.

1. It is insisted, on the part of the plaintiff in error, Hensley, that the conditional conveyance by Woodruff to Hoyt and Johnson, of the lot of ground on which the mill house was situated, being a contract reduced to writing, and under seal, the court erred in permitting Woodruff to prove a parol reservation of the machinery in controversy, which it is submitted, passed by the deed, from the vendor to the vendees, with the premises, as fixtures.

Assuming that the machinery constituted fixtures, and remained the property of Woodruff, at the time of the contract of sale with Hoyt and Johnson, this would doubtless be the law as between the vendor and vendees, the parties to the contract. But is this rule applicable to the case at bar?

Mr. GREENLEAF says: "When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing, and all oral testimony of a previous *colloquium* between the parties, or of conversations or declarations, at the time when it was completed, or afterwards, as it would tend, in many instances, to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected." 1 *Greenf. Ev., sec.* 275.

But again he says: "The rule under consideration is *applied only in suits between the parties to the instrument*, as they alone are to blame if the writing contains what was not intended, or omits that which it should have contained. It cannot affect third persons, who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties; and who, therefore, ought not to be precluded from proving the truth, however contradictory to the written statements of others." *Ib., sec.* 279.

*Brodie* was in no way a party, or privy to the deed in ques-

tion. It seems from the evidence, that he purchased the machinery, paid for it, received it into his possession, and under his control, and removed a portion of it from the mill house, before the deed was executed; and in no way holding under the deed or a party to it, he could not be estopped by its recitals. A portion of Woodruff's testimony related to the sale of the machinery to Brodie, which was a separate and distinct contract from that entered into by the witness with Hoyt and Johnson. Another portion of his testimony related to the latter contract, in which he stated that he distinctly informed them, at the time of the sale of the premises, that the machinery in controversy (except the bolting chest) had been previously sold by him to Brodie, and that they purchased with a full understanding of that fact. Though in a suit between Woodruff and Hoyt and Johnson, growing out of this contract, the former might be estopped by the deed from proving a parol reservation of anything attached to the premises, and which by law, without a reservation in the deed, would pass with the land; yet, surely Woodruff could not, by failing to insert such reservation, divest Brodie of property, which he had previously sold to him, and especially where the purchaser is notified of the previous sale.

In *Gibbons vs. Dillingham*, 5 *Eng. R.* 9, this court held that an absolute deed in fee of the soil passed the growing crop, and that a reservation of the crop could not be established by parol, but in that case it was proven by parol testimony, that before the vendor conveyed the land, he had leased it to another, and that the growing crop belonged to the tenant; and the court held that the crop of the tenant did not pass to the vendee by the deed, but merely the right of the vendor to the rent. If the tenant had paid the rent in advance, it can hardly admit of doubt, but that notwithstanding the conveyance of the soil by his landlord without reservation, the tenant would have been entitled to the crop, free of the payment of any rent to the vendee. The conveyance of the landlord could neither cut off the tenant's vested right in the crop, nor subject him to a second payment of the rent, nor could he

possibly be estopped by the deed of his landlord to the vendee, from proving the lease and payment of the rent. The case now at bar is analogous in principle.

So, as between the parties to the deed, where certain premises were leased, including a yard, described 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. So, 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 to this point is admitted. 1 *Greenl. Ev.*, 4 *Pick.* 239; 6 *Greenl. Rep.* 354.

The court below, therefore, did not err in permitting Woodruff to prove the previous sale of the machinery to Brodie, and the reservation of it in the subsequent sale of the premises to Hoyt and Johnson.

2. The instruction given to the jury on the part of Brodie, the 2d, 3d, 4th, 5th, and 6th, proposed for Hensley, and refused, and the remark of the court to the jury, that they were abstract, and that the question of fixtures did not arise in the case, present the important inquiry, whether upon all the facts of the case, Brodie, though the owner of the machinery, could maintain replevin for it, notwithstanding it was so fitted up in the mill-house as to answer the purpose of running the mill.

The position assumed for Hensley is, that the machinery was so affixed to the premises as to constitute it a part of the realty, and that it could not be recovered by a personal action.

If Brodie could not recover the property by the action of replevin, upon the facts of the case, he could not recover it in any form of action. It is not shown that he had any claim to the possession of the premises, upon which the mill house was situated, and therefore could not bring ejectment, and recover the machinery as an incident. Ejectment for a *steam engine, boiler, bolting*

*chest, &c.*, belonging to the plaintiff, but fitted up on the premises of another, would be a novelty unknown to the law books. Detinue lies for personal property in specie only, and trover for its conversion. If replevin will not lie upon the facts of this case, Brodie is in the singular predicament of having a legal right to property, without a legal remedy to recover it.

His position may be illustrated by a case that might not unfrequently occur in this age of invention, and the use of machinery for propelling purposes in thousands of various forms.

Suppose A to be the owner of a lot with a mill or manufacturing house erected upon it. He rents from B a steam engine and apparatus for an agreed term, with the understanding that it is to be fitted up in the house for propelling purposes, and so used during the term, and then to be restored to the owner. It is accordingly fitted up, employed, and at the end of the term, A refuses to surrender the machinery to B on demand. If by being fitted up upon the premises of A and affixed to his mill or manufacturing house, it becomes, under such circumstances, a fixture in law, and part of the realty, how is B to recover his property in specie? Must he lose it, or resort to an action for damages upon a breach of the contract, and take the chances of the solvency of the defendant? Or is the property, though in some sense a fixture in fact, not a fixture in law, under the circumstances, and may it not be recovered as personalty by replevin or detinue?

The proof in this case conduces to show that Hoyt and Johnson rented the machinery of Brodie, and that Hensley, shortly after he purchased the premises, stated to Brodie that he understood that the machinery belonged to him, and offered to pay rent for it, and afterwards refused to surrender it upon demand.

We are not prepared to say, upon examination of authorities, that if this were a case arising between a vendor and purchaser of the premises, or an heir and executor, the machinery being fitted up for the purpose of running a mill upon the premises, it would not have belonged to and followed the soil. But it is clear

that if the case arose between landlord and tenant—if Brodie for instance had leased the lot and mill house from Woodruff, and being the owner of the machinery, had fitted it up in the house for purposes of trade, he would have had the right to remove it as personalty at the end of the term, and a conveyance by Woodruff of the premises during the lease, would not have vested a right to the machinery in the vendee. See *Elwes vs. Maw*, 3 *East R.* 38; 2 *Kent Com.* 342 *to* 348; *Holmes vs. Tremper*, 20 *Johns. R.* 29; *Walker vs. Sherman*, 20 *Wend. R.* 636; *Farrar vs. Stackpole*, 6 *Greenl. R.* 154; *Vann Ness vs. Pacard*, 2 *Peters* 137.

The case at bar is not one arising between a landlord and tenant of the premises, but it is upon principle more analogous to that class of cases, than to the other classes of cases, in which the law in relation to fixtures is more rigid.

*Folsom vs. Moore*, 19 *Maine R.* 252, was trespass for entering the plaintiff's close, and carrying away a stove affixed to his dwelling. The plaintiff had conveyed the premises to Small, and afterwards recovered possession of them again under a mortgage aken for the purchase money. When he sold the premises to Small, he represented the stove as constituting part of the improvements, but afterwards sold it to Randall as personal property. Randall sold it to Small, and Small to the defendant, who entered the premises and took away the stove after the plaintiff had come back into possession under the mortgage; the stove having remained all the while unmoved in the dwelling. It was argued for the plaintiff, that the stove was a fixture, and its character could not be changed by selling it as personal property. WESTON, Chief Justice, delivering the opinion of the Court, said: "The better opinion is, upon the authorities, that the stove in question being fitted, adapted and designed for the use of the house, would pass by a conveyance of it, as part of the real estate. But it was doubtless competent for the owner to sell it as personal, and if the purchaser or any under him thereupon takes it away, the former owner has no just cause of complaint. * * * * A fence is part of the realty,

but it may be sold or reserved as personal property. *Ropps vs. Barker*, 4 *Pick.* 230." The opinion proceeds to decide that the plaintiff by selling the stove severed it from the realty, though it was not in fact removed, and that it would be against every principle of justice to permit him, after having sold it as personal, to turn round and reclaim it as part of his real estate; and that the defendant had the right to enter the premises and remove the stove as his personal property, and was therefore no trespasser.

If the effect of the sale of the stove was to sever it from the realty, in contemplation of law, so as to make it personal property, and entitle the purchaser to enter the premises peaceably and remove it, as held in this case, can it be doubted upon principle, that he could have recovered it by detinue or replevin? Where a man buys goods, and pays for them, and the seller refuses to deliver them, the purchaser may recover them by detinue, because by the sale and payment, the property is in the buyer. 1 *Arch. N. P.* 287; *Bul. N. P.* 50.

In *Holmes vs. Tremper*, 20 *John. R.* 29, the defendant erected a cider mill and press, at her own cost during her tenancy, for the purpose of making cider on the farm which she had leased. After the expiration of her term, she removed the mill and press, and the plaintiff deriving title to the premises from the landlord, brought replevin for them, contending that the mill and press were such fixtures, as the tenant could not remove; but SPENCER, Chief Justice, said: "It is immaterial whether the mill was let into the ground or not. The tenant, in my judgment, had an unquestionable right to remove it as personal property."

*Heaton vs. Findlay*, 2 *Penn. R.* 304, in its principal features, is much like the case at bar. Q. & M. were the owners and occupiers of a furnace, blown by a cast iron cylinder, which was affixed to the furnace, and absolutely necessary to its use. They sold the cylinder to Findlay, who perhaps temporarily detached it, but it was afterwards put back into its place and used as before. At the time Findlay purchased the cylinder, there was a judgment against Q. & M., which was a lien upon the premises to

which the cylinder was attached, and afterwards Heaton purchased the premises under an execution issued upon the judgment, and Findlay brought replevin against him for the cylinder. BELL, Justice, delivering the opinion of the Court, said: "Under these circumstances can the plaintiff recover? It is objected that the right of property in a chattel, which has become so by severance from the freehold, cannot be determined in replevin, or other transitory action. But this obtains only where ownership of the thing severed is deduced from an averment of title to the freehold, and to be established by a trial of that title. The present case, putting it on the ground presented by the plaintiff, is not therefore within the principle of *Mather vs. The Trinity Church*, 3 *S. & R.* 509, and *Powell vs. Smith*, 2 *Watts* 126, but is covered by that ascertained by *Cresson vs. Stout*, 17 *John. R.* 116, where it was ruled that machinery, severed by the owner of the realty, became personal property and a proper subject of replevin. This technical difficulty is thus put aside, and we are brought unimbarrassed by it, to the leading question in the case, is the plaintiff the owner of the cylinder?"

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The court proceeded to decide that Findlay was not the owner of the cylinder, because, at the time he purchased it of Q. & M., the judgment constituted a lien upon the premises, to which the cylinder was attached as a fixture, and that the sale by them to Findlay did not divest the lien, but that the purchaser under the execution obtained the title to the cylinder as part of the premises.

It can hardly be doubted but that the machinery in controversy, including the bolting chest, under the facts proven in the case, would have been subject to execution and sale as the personal property of Brodie. See *Taffe vs. Warwick*, 3 *Blackf.* 111.

Though, as above intimated, perhaps the engine and apparatus, fitted up for the purpose of driving the mill, might have passed, on a sale of the premises by Woodruff, without reservation, to his vendee as fixtures, (*Sparks vs. State Bank*, 7 *Blackf.* 469), yet the sale of them by Woodruff to Brodie, the delivery of posses-

sion and control to him, and the subsequent exercise of ownership over them by him, established by the evidence, amounted clearly to such a severance of them, in law, from the realty, as to make them his personal property, and entitle him to bring replevin for them, against the defendant, who had recognized his title to them and offered to pay him rent for them, but afterwards refused to surrender them upon demand.

This view of the case determines all the questions arising upon the record. The proof does not show that Hensley was an innocent purchaser, without notice, and if it did, the property being personalty, the rule *caveat emptor* applies.

The admission by the court of proof of the recovery of the premises by Woodruff in the action against Hensley, whether erroneous or not, is immaterial, as Brodie was entitled to recover independent of Woodruff's claim to the possession of the lot, and Hensley cannot be regarded as having been prejudiced by the admission of such evidence.

Upon the whole record the judgment of the court below is right, and must be affirmed.

## WELCH VS. WELCH.

Service of the subpoena, in a bill of divorce, by reading the same to the defendant, is not such a legal service as will bind him to appear to the suit: and it is error, on such service, to adjudge the defendant in default, and take the bill as confessed.

A decree *pro confesso* is not sufficient, without evidence to sustain the allegations of the complainant's bill, to authorize the court to decree relief from the bonds of matrimony.

*Appeal from the Circuit Court of Columbia County in Chancery.*

Hon. SHELTON WATSON, Circuit Judge.

CURRAN & GALLAGHER, for appellant. 1. Can a decree *pro confesso* be rendered in an application for a divorce, *a vinculo matrimonii*, without some proof being adduced in support of the allegations of the bill? *Viser vs. Bertrand*, 14 *Ark.* 282.

2. Is a service of subpoena in chancery by reading, a sufficient service to warrant the rendering of a decree *pro confesso?* *Sec.* 10, *chap.* 28, *Digest.*

MR. Justice SCOTT delivered the opinion of the Court.

This was a bill for divorce, filed in the Columbia Circuit Court, by the wife, against the husband, alleging wilful desertion for the space of more than one year, without reasonable cause, and praying relief by divorce, *a vinculo matrimonii*, and for maintenance and alimony, and for injunction. The subpoena was served upon the defendant, by reading the same to him at his place of abode; and upon this service a decree, *pro confesso*, was taken against him, and upon that, all the relief prayed by the

complainant below, was decreed to her, without any further testimony to sustain the allegations of her bill. At the next succeeding term of the court, within the time allowed by the statute, the defendant appeared and moved to set aside this decree, and all the orders made consequent upon it; and, upon oath, denying all the matters charged against him in the bill, offered to prove by witnesses then in court, that the proceeding was but a scheme to wrong and defraud him, and submitting that he was ready and willing to answer the bill. But the court overruled his motion, and he appealed to this court.

The service of the subpoena was insufficient. Under the provisions of the statute, (*chap.* 28, *sec.* 10,) it could have been served, properly, only by delivering a copy to the defendant, or by leaving one at his usual place of abode, with some free white person of his family, over the age of fifteen years, and informing such person of its contents.

Hence, it was error, under the facts of this case, as to the supposed service, to adjudge the defendant in default, and to take the complainant's bill as confessed against him.

But had this service been regular, the decree, *pro confesso*, was not sufficient, without evidence to sustain the allegations of the complainant's bill, to authorize the court to decree her the relief it did, from the bonds of matrimony; because the marriage contract in the language of one of the judges of this court, in the case of *Viser vs. Bertrand*, 14 *Ark.*, *at p.* 282,) "unlike ordinary contracts of business, is one which the public, as well as the individuals contracting, is interested in preserving unbroken, unless for such causes as are specially set forth in the statute, and these causes must in fact exist, and must be shown to exist by evidence. No admissions of the defendant, whether by answer or by failure to answer, will supercede the necessity of proof of the truth of the allegations in the bill." And in the same case another one of the judges said (*id.*, *p.* 278): "The marital tie, although a civil contract, in the eye of the law, differs from all other civil contracts in one essential particular. The parties can never annul it

by means either direct or indirect. Hence, the inflexible rule of law that the confessions of either party are wholly incompetent as evidence. Nor does our statute, which directs that 'like process and proceedings shall be had in divorce cases, (*Digest, chap.* 58, *p.* 402, *sec.* 3,) as are had in other cases on the equity side of the court,' or in any other of its directions or provisions, in any way alter or modify this vital rule of evidence, touching the dissolution of the marital tie. Parties, by their mutual consent, if of proper age and capacity to receive the sanction of the law, may make the marriage tie, but they can never break it, according to the rules of law, and the sound morals upon which they rest, by any express confessions, much less those implied by a default to answer a bill for divorce."

Adhering to these views, we hold that it was error to overrule the defendant's motion, and refuse him leave to answer.

The whole decree, therefore, in this case, is erroneous, and must be reversed, and the cause must be remanded to be proceeded with in accordance with law, and not inconsistent with this opinion.

## BARNETT VS. THE STATE.

In proceeding, under the statute, against the reputed father of a bastard child. it is not necessary that there should be other pleading than the mere denial of the defendant to authorize the Circuit Court to submit the matter, whether he is the father or not, to a trial by jury.

And in such proceedings the defendant should not be allowed, on cross-examination of the mother of the child, a witness for the State, to ask her as to the number of times, the place where, the time of day when, he had connection with her, or the mode of meeting for such purpose, unless such questions be confined to some definite time within which the child might have been begotten.

But the defendant may well ask the witness in such case: how do you know that the defendant is the father of the child?

*Appeal from the Circuit Court of Union County.*

Hon. THOMAS HUBBARD, Circuit Court.

QUILLIN, for the appellant.

JORDAN, Attorney General, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

This was a proceeding under the Bastardy Act (*chap.* 24, *Dig.*, *p.* 210) commenced before a justice of the peace of Union county, and taken by the appeal of Barnett to the Circuit Court of that county, where, after an unsuccessful motion on his part to quash the proceedings, the issue, whether or not he was the father of the child in question, was submitted to a jury, who found the verdict against him, upon which the court rendered judgment and made the usual consequent final orders, and Barnett appealed to this court.

From the bill of exceptions it appears that the mother of the al-

leged bastard, was the only witness introduced on the trial of this issue. She swore that she was a white woman; that she had never been married; that on the 13th of July, 1854, she was delivered of a girl child in said county of Union; that the child was still living, and that the defendant below was the father of the aforesaid child. The State here announcing that the evidence on her part was closed, the defendant proposed to ask the same witness the following questions:

1st. How many times did the defendant have connexion with you—if more than once say so?

2d. Did he and you meet out accidentally, or by agreement —or meet out at all?

3d. Where did he have connexion with you—give one place?

4th. What time did the connexion take place—in the day or night?

5th. How do you know the defendant is the father of the child?

The State objected to all these questions, and they were ruled out, and Barnett excepted.

He afterwards moved in arrest of judgment and for a new trial, upon the ground that the complaint and warrant were not sufficiently certain, and, therefore, the court ought to have granted the motion to quash; that there was no regular issue formed by the pleadings, and the jury were not sworn to try any such; because the court ruled out the questions, above copied, that were proposed by him to be profounded to the witness; and because, the verdict was contrary to law and evidence.

Both motions were overruled, and he took his bill of exceptions, setting out the whole proceedings and evidence in the cause, the whole of which we have already copied.

The complaint and the warrant are as certain as the statute; and the proceedings before the justice, were in strict conformity with its provisions. The statute does not require more than a mere denial, that the defendant is the father of the alleged bastard, to authorize the Circuit Court, without any formal pleading,

to submit that matter to the trial of a jury, (*Dig.*, *chap.* 24, *sec.* 18), and the record shows that the jury "were duly elected, empanneled and sworn in the case."

Under the statute (*sec.* 22,) the mother of the alleged bastard was a competent witness upon the trial of the matter submitted to the jury, and the defendant had a clear right to cross-examine her, and to invalidate her testimony, if he could, according to the general rules of law in reference to cross-examination, and to the issue, and to what was involved in it. To have made the first four questions relevant to the issue, they should have been limited to a period of time in which it was probable the child in question was begotten. In the terms in which they were proposed, they were too latitudinous *as to time*, to be relevant to the issue. The evidence, as to its relevancy, should be confined within the period of time, when according to the course of nature, the child in question could have been begotten *Walker vs. The State*, 6 *Blackf. Rep.* 1.

The fifth question, however, was clearly proper to be answered by the witness. She having sworn that the defendant was the father of the child, he had the right to interrogate her as to the grounds of her knowledge as to this. The very point in issue, and the only point, was whether or not the defendant was the father of the child. And as in most cases it would be utterly impossible for the party charged to prove negatively, that he was not the father, he would be deprived of the only means posisible to falsify the charge against him, if he should not be permitted to cross-examine the witness as to the ground of her knowledge, or to show that another person was the father of the child, or might have been, and thus make it probable that the witness was mistaken. Nor would evidence of the latter class be incompetent because of its indecency and of its affecting the feelings of third persons, because it is directly relevant to the issue to be tried, which involves a civil right. And for the same reason it could not be objectionable on account of its tending to cast discredit upon the testimony of the witness: because, although it is the gene-

ral rule that you can only attack the general character of a witness, and cannot show particular discreditable acts for this purpose, on the ground that every one is supposed capable of supporting a general character, but is not prepared to answer as to any particular matter without notice; yet here, so far as the general character and behavior of the witness are brought in question by the proof of such acts, it is not incidentally and collaterally done so, as is generally the case with respect to witnesses, but is directly involved in, and material to the issue to be tried. (See the opinions of both BROOKE and ROANE, as to this point, in the case of *Hall vs. The Overseers of Augusta*, 3 *Munf. Va. Rep.*, *p.* 502, 504, 505.)

We think, therefore, that the court erred in ruling out this question, and on this ground the appellant ought to have been granted a new trial. The judgment of the court will consequently be reversed, and the consequent orders set aside, and the cause will be remanded to be proceeded with to another trial and judgment.

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HENDERSON ET AL. VS. THE STATE.

Mr. Justice SCOTT: The two questions presented by this record, have been settled in the cases of *Fletcher and others vs. The State*, 7 *Eng.* 169, and *Washington vs. The State*, 8 *Eng.* 752. The judgment of the Circuit Court of Prairie county must be reversed, and the defendants discharged from prosecution.

## HOFLER VS. THE STATE.

On the trial of an indictment for an assault with intent to murder, the counsel for the prisoner has no right to inspect the minutes of the testimony taken before the grand jury who found the indictment.

A witness, in a criminal prosecution, may be required to answer, whether at the time of the occurrences, to which he has deposed, he was not excited by anger, or whether he had not a fight immediately before—particularly where his testimony is of minute circumstances.

And where questions are not apparently material, still they may be put on the cros-examination of a witness, by way of testing the accuracy of his statements, and that the jury may be in possession of every fact which may legitimately tend to show the true character of the transaction.

*Appeal from the Circuit Court of Clark County.*

Hon. THOMAS HUBBARD Circuit Judge.

FOWLER & STILLWELL, for the appellant. It is the duty of the grand jury to preserve the minutes of their procedings and of the testimony given before them, which shall be delivered to the attorney for the State. *Dig., chap.* 52, *sec.* 67. This is intended as a guide for the attorney in the prosecution, and it is at least a reasonable inference that it was as much the intention of the Legislature to protect the innocent as to convict the guilty. The defendant is entitled to be informed of what the proof against him will be on the trial, that he may be enabled to rebut it in defence.

The next question is the correctness of the ruling of the court in refusing to permit the witness Woods to answer the several questions. These enquiries, at least the first and last, were im-

portant to show the condition of the witness at the time, and his capability for observing correctly what passed. *Stewart vs. The State*, 19 *Ohio Rep.* 304.

Mr. Attorney General JORDAN, contra. The minutes of the testimony before the grand jury are directed to be placed in the hands of the attorney for the State, to enable him to prepare the case for the State, and not for the benefit of the person indicted. *Dig.*, *chap.* 52, *sec.* 67.

The several questions proposed to the witness Woods were overruled. Randal might have been called to prove whether he was armed. If answered in the affirmative they could have had no influence on the jury. *Weaver vs. Caldwell's, Ex.*, 4 *Eng.* 339.

Mr. Justice Scott delivered the opinion of the Court.

The appellant was indicted, tried, convicted and sentenced to the penitentiary for the term of three years, upon an indictment found by the grand jury of Clark county, in the first court of which he was charged with an assault, with a deadly weapon, commonly called a pistol, with intent to murder; and in the second (with greater particularity as to the weapon, and as to the manner of making the assault) of an assault with intent to maim.

The jury found him guilty under the first court, and not guilty as to the second. He moved in arrest of judgment, and for a new trial; both of which the court below overruled; and he appealed to this court, having taken his bill of exceptions setting out all the testimony, and all the several motions made by him and overruled by the court, to which he excepted in the progress of the cause. Of the latter, the first was a motion to permit his counsel to inspect the minutes of the testimony taken before the grand jury, by one of that body, and delivered to the attorney for the State, under the provisions of the statute, *Dig.*, *chap.* 52, *sec.* 67 which we think was very properly overruled. The indictment, a copy of which he was entitled to, advised him of the nature

and cause of the accusation against him. This he had a right, under the bill of rights, to be informed of; but he was not entitled to demand an exhibit of the testimony by which the State expected, at the trial, to sustain this accusation.

Afterwards, having interposed the plea of not guilty, on which the State took issue, which was submitted to a jury, who it appears by the record was "duly elected, empanneled and sworn," the only witness produced on the part of the State, was one William Woods, who testified in substance, that "on election day in last August, in Clark county, he was standing near a gallery of a grocery," in front of which there was a crowd, where a fight was in progress, in which some twenty-five persons were taking sides, and making a great noise, when he saw Edwin D. Randle (the person alleged to have been assaulted) making his way into the crowd from between two houses, the grocery building and that next adjoining, and some several feet behind Randle, he saw the defendant following him, with a pistol out and cocked and drawn on Randle, and when the defendant got his pistol within eighteen inches of Randle's body, he attempted to pull the trigger, when the witness jumped and caught the defendant and attempted to fire the pistol in the air, but did not succeed in doing so. That the pistol had a cap on it, that was bright, and that when he let the defendant go, he went round on the other side of the crowd. Upon cross-examination he said both Randle and the defendant were hurrying, and that he "supposed the defendant attempted to pull the trigger from the fact that (I) he saw his finger move, it being pointed out, and he bent it towards the trigger: and that when he let the defendant go, Randle had got into the crowd.

The defendant, by his counsel, then asked the witness the following questions to wit:

1st. Were you excited from anger when this took place?

2d. Was Randle armed?

3d. Did Randle have his arms out?

4th. Did you not have a fight or a scuffle immediately before this took place?

All of which were objected to on the part of the State, and ruled out by the court, and the defendant excepted.

The State having closed, the defendant introduced as a witness one John T. Greene, who testified, that he was present at the fight mentioned by the first witness, and saw Randle come into the crowd with a small bowie knife in his hand, but did not see the defendant: that a great many persons were taking part in the fight, and many had arms out: that a good many persons were coming up during the fight, and in coming there from one quarter of the town, it was most convenient to pass between the grocery building and the house adjoining. And the defendant here rested his case.

In ruling out these questions, we think the Circuit Court erred. If it be true that the witness, at the time of the occurrence, of which he testifies, was excited from anger, or had had a fight, or a scuffle immediately before, they were circumstances legitimate for the jury to consider in weighing his testimony, which, as we have seen, was exceedingly minute in particulars. He had measured space by inches. He had testified that the cap upon the pistol was bright; that he had seen the defendant's finger pointed out, and then had seen him bend it towards the trigger of the pistol. According to human experience, there would, perhaps, be much greater probability that such minute particulars would have been accurately observed by a witness, who was cool and deliberate, than by one excited by anger, or by a fight or scuffle, in which, immediately before, he had been engaged. At any rate, it was a legitimate matter for the jury to consider as an element of the probability of the truth of the transaction deposed to, upon which it was their province to pass; and this, whether they might conclude the witness was merely mistaken, or had wilfully sworn false. The materiality of the fact, whether or not Randle was armed, or had his arms out, does not seem so entirely apparent, yet we think that perfectly legitimate to be enquired about on cross-examination, by way of testing the accuracy of the witness' statements. Indeed the jury ought to be

informed of every fact, which may legitimately tend to show the true character of the transaction and motives of the actors therein, upon which they have to pass in arriving at their verdict. And it is a great hinderance to the proper administration of criminal justice, to exclude from them such legitimate sources of light.

And as the appellant must be allowed to have a new trial, because of the error of the court below in ruling out these questions, it will be unnecessary to decide upon the point, whether or not he would also have been entitled to it, on the ground of the newly discovered testimony set out. Indeed, it would seem to be improper that we should do so; because, we could not well discuss that question without making some observations as to that testimony, which might have some influence upon the future trial to be granted.

The judgment of the Circuit Court, therefore, in this cause, will be reversed, and a new trial awarded and all consequent orders will be made.

## LAMB VS. D. W. & F. BELDEN.

The husband is not liable, after the death of his wife, for debts contracted by her while a feme sole, unless judgment has been recovered therefor against him in the lifetime of the wife.

And this, although at the time of the death of the wife, a suit by attachment be pending against them for such debt, and property of the husband taken by virtue of the attachment and placed in the hands of the sheriff—the attachment lien being imperfect and inchoate, until judgment rendered, and dependent thereon.

*Error to the Circuit Court of Arkansas County.*

Hon. THEODORIC F. SORRELLS, Circuit Judge.

PIKE & CUMMINS, for the plaintiff. Plea alleging death of wife after suit, was a good bar to the action as to the husband. 15 *Wend.* 360; 2 *Kent* 143; 1 *Sch. & Lef.* 263; 3 *P. Wms.* 409; 2 *Rop. on H. & W.* 73, 74; *McQueen's H. & W.* 193; 5 *Barr* 359.

WATKINS & GALLAGHER, contra. Did the cause of action survive against defendant after the death of his wife, by virtue of the lien created by the still subsisting levy of the attachment, as against the property levied on thereunder?

We maintain that the levying of an attachment upon personal property, constituted such a lien thereon as cannot be defeated as to the property levied on, except by matter of defence to the cause of action itself. *Burwell vs. Robinson*, 5 *Gilman* 282; *Brown vs. Tutrell*, 1 *Iowa* (*Greene*) 189; 11 *Humph.* 569; 3 *McLean* 542; 6 *Iredell* 233; 2 *Brevard* 201; 7 *How. Miss.* 658; 1 *McLean* 95. And the lien of attachment cannot be defeated by

bankruptcy of defendant committed after the attachment lien attached. 10 *Metc.* 320; 5 *ib.* 294; 1 *Day* 136; 6 *Law Reporter* 109; 6 *New Hamp.* 459; 4 *Day* 127.

Mr. Justice SCOTT delivered the opinion of the Court.

This action was commenced by attachment. The declaration shows a promissory note executed by Lamb's wife, when a *feme sole*, and her subsequent intermarriage with Lamb. The attachment was levied in April, 1854, upon goods, wares and merchandise, which were taken into the custody of the sheriff. At the October term, 1854, of the Arkansas Circuit Court, in which this cause was then pending, Lamb pleaded that since the institution of this suit, to wit: on the 1st day of October, 1854, his then late wife aforesaid departed this life, whereby he became exonerated from liability on the demand in the declaration mentioned. To this plea the Beldens interposed a demurrer, which the court sustained, and Lamb electing to rest, the Beldens suggested and proved the death of Mrs. Lamb, since the commencement of this suit, and the court ordered it to abate as to her, and proceeded to render final judgment against Lamb, who has brought the case here by writ of error.

The authorities distinctly show that the husband is not liable after the death of his wife, for debts contracted by her while a *feme sole*, unless judgment has been recovered therefor against him in the lifetime of the wife. Her death extinguishes forever all such liabilities, not at that time in judgment against him. And this is the rule, both at law and in equity, although the husband may have received a fortune by his wife, (besides the authorities cited by the counsel for the plaintiff in error to this point, see *Morrow vs. Whitesides Ex.*, 10 *B. Mon.* 412; *Buckner vs. Smith*, 4 *Dessau R.* 371; *Witherspoon vs. Dubose*, 1 *Baileys Ch. R.* 166; *Henning's Edition of Noyes Maxims* 35.)

Under the attachment laws of this State, the property attached in case it be not released in the manner provided, or its proceeds, if perishable, is to remain in the hands of the officer to abide the

judgment of the court on the plaintiff's demand. Thus the lien created by the statute can never be of any avail to the plaintiff until he obtains a judgment in his favor upon his demand. Until then, his lien is inchoate and imperfect. If he fails to establish his claim, and judgment is rendered against him, his inchoate lien vanishes at once. Thus it is essentially dependent upon the judgment to be rendered in the cause; where therefore, the defendant interposes by his plea, as in this case, an insuperable obstacle to any judgment upon the plaintiff's demand in his favor, this inchoate lien must necessarily be at end in the judgment that will be rendered upon such a plea.

The bankrupt and insolvent cases cited, therefore, are not in point; because, in these the plaintiff is enabled to go on and perfect his inchoate lien by a judgment against the defendant, notwithstanding the bankruptcy or insolvency, although execution will go out only against the property attached. And besides by the act of Congress the lien is expressly saved. See *Davenport et al. vs. Titton*, 10 *Metcalf* 320.

And so, also, in the cases where the defendant dies pending the suit, and judgment obtained against his representative, unless otherwise provided by statute. In Alabama there is a statute to the effect, that no suit shall be either commenced or sustained against an executor or administrator after the estate of the testator or intestate shall have been declared insolvent by the orphans' court. Under that statute, a question, strictly analogous to that we are considering, arose upon the following state of facts: A suit had been commenced against Carpenter, as the drawer of a bill of exchange, by *capias ad respondendum*. Afterwards, the plaintiff, under the provisions of the statute in that State, sued out, in the same suit, an ancilliary attachment against the defendant, which was levied upon land and personal property, and created a lien thereon in favor of the plaintiff of like character with that, that would have arisen had the suit been originally commenced by attachment as the principal process; and that lien was of the character of that created by the service of our process of at-

tachment. Pending that suit, Carpenter died, and Hale becoming his administrator, was substituted as party defendant. In the mean time, Hale had reported to the orphan's court that Carpenter's estate was insolvent, and it was so declared by that court. And he pleaded this declared insolvency of the estate in abatement of the further prosecution of the suit in the court in which it was pending. The plaintiffs replied, setting up their attachment lien. A demurrer was interposed to this replication; and upon the issue of law arising, the plaintiffs insisted that they had acquired positive rights by the levy of the attachment, which would have been recognized if Carpenter was living; and, therefore, ought to be enforced notwithstanding his death, and that if they could not be permitted to go on to judgment, and get the benefit of their attachment lien, the result would be that they would get but a *pro rata* on their debt, in the orphans court, instead of the whole amount, as they would, if allowed to make their lien available by a judgment in the court in which they were proceeding. But the Supreme Court held that because the law declared that the suit should abate upon such a state of facts, as that pleaded, the lien created by the attachment would necessarily be at end; that the lien was but inchoate and dependent upon whether a judgment should be had for the plaintiff, and as the law interfered and prevented the further prosecution of that remedy, the inchoate lien could not mature. *Hale adm. vs. Cummins & Spiker*, 3 *Ala. R.* 398.

In the case before us the law acts upon the remedy by extinguishing the right which was dependent for its life upon the life of the wife.

The judgment must be reversed and the cause remanded.

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LAMB VS. TAYLOR ET AL. LAMB VS. FARRELLY.

Judgments reversed — opinion in preceding case.

16 543
54 508
16 543
58 257
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59 293
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68 126
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c73 89
73 92
j73 97
j73 99
j73 100

## BYERS ET AL. VS. ENGLES.

A deed for the conveyance of real estate, duly executed, &c., is good and valid against a creditor of the person executing such deed, obtaining a judgment, which, by law, is a lien on real estate; and, also, against a purchaser of such real estate at a judicial sale under the judgment, if actual notice of the deed be given to the purchaser and to the creditor, or his attorney of record, or if such deed be filed for record, at any time before the sale, though not until after the judgment is rendered and execution levied upon the land.

Such notice may be given at any time before, or at the time of the sale under execution; and will be sufficient, though the deed be not produced.

Continuous possession by the grantee, from the date of the judgment to the day of the sheriff's sale, would also be sufficient notice to put both the judgment creditor and the purchaser upon enquiry. (*Hamilton vs. Fowlkes et al. ante.*)

*Appeal from the Circuit Court of Independence County.*

Hon. BEAUFORT H. NEELY, Circuit Judge.

WILLIAM BYERS, for the appellants. This case must be determined by the construction of the 31*st section, chap.* 37, *Digest.*

The debt for which the judgment was rendered, was contracted when Harvey Engles was the owner of the land, and notwithstanding the deed was made to John Engles before the judgment, it was not filed for record until after the levy was made; and there is no pretence of notice, to either the judgment creditor or the purchaser, of the deed until after the levy.

The whole policy of our Legislation and laws is that the title or claim of a party to real estate must be matter of record. *Trapnall vs. Richardson et al.* 10 *Ark.* 555.

It would be against the spirit and policy of our laws, to say that notice of an unregistered deed, after judgment, would cut off the lien of a judgment creditor. Such a construction would cut off

from the creditor that which the act intended to secure him. The debtor's title being perfect, as far as the record shows, he obtains credit, and the creditor obtains judgment, but before he can have the land sold under execution, the man who holds the secret deed notifies him of it, and he thereby loses his debt. Notice cannot affect the judgment lien. Suppose the purchaser has notice, and the judgment creditor has not, can it affect the lien of the judgment creditor? Or suppose the creditor has notice, and the purchaser has not, can it affect the purchaser? Notice cannot affect this case, if the appellee's deed was not recorded before the rendition of the judgment. *Simple vs. Burd*, 7 *Serg. & Rawle* 286; *Jaques vs. Weeks*, 7 *Watts Rep.* 261; *Cleveland Bank vs. Sterges et al.*, 2 *McLean's Rep.* 341; *Coffin vs. Ray*, 1 *Metcf.* 212; *Sigourney vs. Larned*, 10 *Pick.* 72; *Cushing vs. Hurd*, 4 *ib.* 253; *Warden vs. Adams*, 15 *Mass.* 233; *Batt. & Dar. Eq. cases* 470; 3 *Penn. Rep.* 240; 1 *ib.* 447; 4 *Rawle* 255; 14 *Serg. & R.* 236; 19 *ib.* 70.

A deed not recorded is void, as to creditors, without notice of the conveyance at the time their debts were contracted. 1 *Dana* 166. A purchaser under execution is not affected by a notice of a mortgage, which was not recorded; and, therefore, void as to creditors. *Helm vs. Logan's heirs*, 4 *Bibb* 78. The position we insist upon is fully sustained in *Benjamin vs. Hyatt et al.*, 1 *Smedes & Marsh. Ch. Rep.* 437.

FOWLER, for the appellee. Harvey Engles having conveyed away the land in controversy, before the judgment, his deed divested him of all title, and vested it in the defendant. *Robinson vs. Rowan*, 2 *Scam. Rep.* 501; *Shields vs. Mitchell*, 10 *Yerg. Rep.* 8; *Jackson vs. Town*, 4 *Cowan* 605; 7 *Smedes & Mar.* 22; *Orth vs. Jennings*, 8 *Black.* 425.

A judgment is not a lien on lands previously conveyed away by an unrecorded deed. *Orth vs. Jennings*, 8 *Blackf. Rep.* 425; *Jackson vs. Du Bois*, 4 *John. Rep.* 221; *Money vs. Dorsey*, 7 *Smedes & Marsh.* 22.

Where the judgment debtor, before the rendition of the judgment, conveyed away his land, *bona fide*, no interest remained to him which could be sold under execution, and a purchaser at such sale could acquire no title, although the deed was not registered. *Briggs vs. French*, 2 *Sumn. C. C. Rep.* 253; *Webster vs. Maddox*, 6 *Greenl. Rep.* 258; *McSouth vs. Rathbone*, 19 *Ohio Rep.* 25; *Money vs. Dorsey*, 7 *Sm. & Mar.* 22; *Taylor vs. Eckford*, 11 *ib.* 33; 8 *Blackf. Rep.* 321; 1 *Paige* 284.

There is no period fixed under the statute, (*Ark. Dig.*, *p.* 262, *sections* 30, 31,) within which a deed must be filed for record. And if filed before the purchase under judicial sale is made, it protects the grantee, because the purchase afterwards cannot be *bona fide*. And whenever it is filed, as to the creditor, it relates back to its execution, and takes precedence over an intermediate judgment. The filing for registry places it upon an equality with the judgment, and that which is prior in time, as to its execution, becomes prior in right.

The primary object of registration being to give notice to subsequent purchasers, it is now settled law, under the registry acts, that actual notice is equivalent to registration. *Webster vs. Maddox*, 6 *Greenl. Rep.* 258; *Van Renssalaer vs. Clark*, 17 *Wend.* 30; 2 *Scam.* 501; 4 *Mass.* 639; 11 *S. & M.* 33.

Even the actual possession of the land by the defendant for so many years, from the commencement of the suit to the day of the sheriff's sale, was sufficient evidence of a title in fee, and notice to all persons. 2 *Saund. Pl. & Ev.* 729; *Willard vs. Warren*, 17 *Wend* 261; *Smith vs. Tucker*, 9 *Ala.* (*N. S.*) 210; *Troup vs. Hurlbut*, 10 *Barb. S. C. Rep.* 358; 4 *B. Mon.* 466; *Adams on Ejectment* 54; 4 *Cowen* 602; 3 *A. K. Marsh.* 623; 6 *Greenl.* 258; 3 *Paige* 437; 10 *How. U. S. Rep.* 375.

Mr. Justice WALKER delivered the opinion of the Court.

Byers and Patterson brought an action of ejectment against John Engles for a tract of land. The judgment in the Circuit Court was for the defendant, from which the plaintiffs appealed.

The plaintiffs claim title to the land, as purchasers at a judicial sale. The proceedings, under which the sale was made, were regular, and a valid deed made by the sheriff to the plaintiffs, who purchased the land. No objection is taken by defendant to the regularity of the proceedings or the deed; but, in defence, he sets up a title, by deed, from Harvey Engles, the defendant in execution, to himself, duly executed and delivered before the commencement of the suit, and the rendition of the judgment under which the land was sold to the plaintiffs; which was, however, not filed for record until after the judgment had been rendered, and execution thereon issued, and levied upon the land.

Waiving all consideration of the legal sufficiency of the respective titles, in other respects, the contest for title is between the prior unregistered deed, and the judgment lien creditor, or rather the plaintiff under him. It is contended on their part, that by force of the statute the judgment, under which they bought, was a lien upon the land from its date, and although the deed from Harvey Engles to John Engles was prior in date to the judgment, yet as it was not filed for record until after the rendition of the judgment, and the levy upon the land, the title of John Engles was void, as against the judgment lien creditor, or one purchasing under the judgment lien; and this, though they had actual notice of the deed before the sale of the property, or that if such notice could affect their title, it must be given before the the judgment is rendered, and the lien has attached.

On the part of the defendant it is contended, that the judgment lien only attached to the lands of the debtor at the time the judgment was rendered, subject to all then existing equities and incumbrances. That although recording or filing the deed for record, would, under the statute, be good constructive notice, actual notice is equivalent to constructive notice, and is sufficient to protect the rights of the defendant under the deed, if given at any time before or at the sale of the property, and that such notice was, in fact, given before, and at the time of the sale. And that in addition to this, defendant had in fact entered upon

the lands so conveyed, and was in actual possession of the same before the judgment was obtained, and so continued up to, and at the day of sale, and that this was sufficient to affect the plaintiffs with notice.

The question thus presented, is one of much importance, and has been fairly presented, and ably argued by counsel on both sides. Our statute (*Dig., p.* 269, *sec.* 30,) provides, "that all instruments affecting the title to real or personal property, whether in law or equity, which are required by law to be recorded, shall, from the time the same are filed for record, be constructive notice to all persons."

And the 31*st section* provides: "That no deed, bond or instrument of writing, for the conveyance of any real estate, or by which the title thereof may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditor of any 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 proven 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."

It will be seen that the 30*th section* makes deeds, &c., filed for record, constructive notice from the time they are filed. And the 31*st section* makes actual notice equivalent to registry notice as against purchasers; but does not, in express terms, extend to judgment lien creditors.

Thus leaving the latter clause of the section, which relates to judgment lien creditors, to be construed in view of the whole statute, and its obvious intent according to precedent and authority, considering the statute as, in terms, declaring all unregistered deeds, &c., void as against subsequent judgment liens.

The question is, shall we give this statute a literal construction, by which judgment lien creditors will override all incumbrances,

or conveyances not of record at the time judgment is obtained, wholly irrespective of any actual notice which the judgment creditor may have; or shall we place this class of creditors upon the same general footing of creditors, who contract for liens, and hold actual notice equivalent to registry notice in all cases?

If the distinction is taken in favor of judgment liens, we are at a loss to conceive any sufficient reason for doing so. It cannot be doubted but that all creditors, who have claims of equal merit, (that is, upon fair consideration) have a corresponding right, in the first instance, to satisfaction out of the debtor's property; but, in the meantime, any fair and honest disposition of the property should be respected. If one creditor contracts for a specific lien upon part of the debtor's property, and another creditor, instead of contracting for a like lien, sues the debtor and obtains judgment, at this point the law confers a lien upon the judgment creditor. If the judgment creditor had, instead of suing, obtained his lien by contract, with a knowledge of the prior mortgage of the first creditor, whether the notice was constructive registry notice, or actual notice, by the uniform and well established rules of construction given to the registry acts of England, and of America, such actual notice would have been held equal to registry notice, and the subsequently acquired lien would have been held subject to the prior liens; because, as the object of the statute was to prevent fraud by means of secret conveyances, when the conveyance is open and the creditor has notice, the means by which it is communicated is comparatively unimportant. With notice, no fraud can be practised upon him. And shall we say that this is less true with regard to judgment creditors? Why should their lien override prior liens, of which they had notice, simply because the one is of record, the other not?

In the absence of some more potent reason than has been urged, or suggests itself, we can scarcely believe that the Legislature intended to make such distinction in favor of judgment creditors. It has been held upon high authority, that the judgment lien is inferior to that created by contract; because it is a mere gra-

tuity, conferred by law upon the creditor, for which he pays nothing, and is intended as a security against subseqent incumbrances. Thus, in *Kersland vs. Avery*, 4 *Paige* 14, it was held: "That 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.

"The lien of the judgment can only operate on the interest which the debtor had at the time of its rendition." *Mooney vs. Dorsey*, 7 *Sm. & Mar.* 22.

"The judgment creditor is entitled to the debtor's real interest alone, subject to his equities as they existed at the date of the judgment." *Adams Eq.* 311.

Judge KENT says: "A lien amounts to but a security against subsequent purchasers and incumbrancers." 4 *Kent* 437.

And so this court, in *Watkins & Trapnall vs. Wassell*, said: "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 subseqent alienations and incumbrances." Taking this view of the judgment lien, and of the general rights of creditors, there would seem to be no sufficient reason for the distinction attempted to be set up in favor of judgment creditors. Our statute is not stronger in terms than the English, and most of the American statutes upon the same subject; and with regard to these it may suffice to rely upon the research of Judge KENT, who says: (*Kent's Com.*, *vol.* 4, 159,) "It is a settled rule in the English and American law, that if a subsequent purchaser has notice, at the time of his purchase, of the prior unregistered deed, he shall not avail himself of the priority of his registry to defeat it. That if in fact, the second purchaser has notice, the intent of the registry act is answered. And to permit him to hold against the first purchaser, would be to convert the statute into an engine of fraud."

Upon general principles, therefore, the construction of the registry acts may be said to be well and firmly established, and it is but fair to suppose that the language of our statute, being like

that of the English, and most of the American States, was adopted with reference also to the uniform construction which these statutes had received. And so permanently has this construction been settled, as well as a like liberal construction of the statute of frauds, and some others, that to change the construction given by the courts would, in effect, be changing the law itself.

So far as regards purchasers there can be no controversy, and although a distinction was, at one time, attempted to be set up between purchasers and creditors, denying a like liberal construction to the latter, which seems yet to prevail in Pennsylvania, and in some of the other States not to be very clearly settled, the weight of authority would seem to place creditors and purchasers upon the same general footing with regard to notice and the effect of it upon junior creditors and purchasers.

The *Act of Parliament*, 7 *Anne Ch.* 20, in unqualified terms, declared unregistered conveyances void as to subsequent purchaers and mortgagees; yet Lord HARDWICKE, in *Leneve vs. Leneve*, 3 *Atkins* 646, when considering this and the act of 27, *Hen.* 8, *ch.* 16, held that these acts were intended to screen innocent persons against prior secret conveyances, and fraudulent incumbrances; and if a subsequent purchaser has notice of the existence of the prior conveyance, then it is not secret or fraudulent.

The registry act of South Carolina is stronger than the English statutes, because the act not only declares deeds, conveyances, &c., not recorded within the time prescribed, void, except only as between the parties, but in express terms so declares that such instrument, unless so recorded, "shall be void and incapable of barring the right of persons claiming as creditors, or under subsequent purchases, recorded in the manner described."

In construing this statute, the Supreme Court of that State, in *McFall vs. Serrott*, 1 *Const. Rep.* 296, said: "It is obvious that the mischief, intended to be remedied by this act, was the facility with which frauds might be practised by double conveyances, and the remedy provided is recording the deed in the Clerk's Office. Thus, constituting a common place of deposit for all of

the land titles in the district, to which all may resort for information, and thus protect themselves from such practices. But if this information is attained by other means, the object of the act is accomplished, and on the principle that when the reason ceases, the law also ceases, the law becomes inoperative, and its sanctions do not attach."

This was a case of purchase under execution; the purchaser at the time having notice of the unrecorded deed, and such notice was held to be sufficient.

The registry act of Alabama declares all deeds, &c., void, against *bona fide* purchasers, and mortgagees for a valuable consideration, unless acknowledged and recorded. In the case of *Ohio Life Insurance Company vs. Ledyard*, 8 *Ala. Rep.* 866, the Supreme Court of Alabama held, that the design of the statute requiring registration, was to give notice that creditors and purchasers might not be deluded and defrauded, and as to all such who have not notice in fact, the unregistered deed is void. That actual notice of the existence of the deed is equivalent to constructive notice, afforded by registration.

In *Daniel vs. Sorrells*, 9 *Ala.* 436, it was held that the creditors, referred to in the statute, were not creditors at large, but such as have obtained a lien by the recovery of a judgment, &c. The court waives the consideration of the effect of notice before judgment, but holds that notice, after judgment, to the judgment creditor, will not avail: even though notice may have been given to the purchaser before his purchase, if the plaintiff in execution had no notice until after judgment.

The registry act of Massachusetts provides, that no conveyance, &c., shall be valid and effectual against a person, other than the grantor, his heirs, &c., and persons having actual notice thereof, unless it is made by a deed, recorded, &c. The Supreme Court of Massachusettt in *Priest vs. Rice*, 1 *Pick.* 164, held that a creditor, knowing of a conveyance of land, made by his debtor for a valuable consideration, which is not registered, cannot, by attachment and levy upon the land, obtain a title against the

grantee. In that case it was admitted in argument, that if the claim was under a deed, instead of a levy, he could not hold against the demandant, although the deed to him may have been executed, delivered and registered before the deed to the demandant was registered: and put his case expressly upon the issue, as to whether a creditor, knowing of a conveyance made by his debtor for a valuable consideration, which is not registered, may not, nevertheless, attach the same land and obtain title against the grantee by a levy of the execution. PARKER, Chief Justice, who delivered the opinion of the court, distinguished between purchaser and creditor. He said: "There is undoubtedly a difference between the two cases, for in case of a second purchaser having knowledge of the former conveyance, there is fraud between the grantor and grantee; whereas land, which has been conveyed by deed, not registered, may be attached without the privity, and so without any fraud of the grantor. Still, we think the effect of a conveyance, actually made and delivered, and known to be so by a creditor, is the same, under the construction which has been given to the statute in relation to such creditor, as it would be in relation to a second purchaser under like circumstances; and it has so been considered by the court in the several cases, which have presented the subject to them. * * * If he sees no occasion to attach, until after a *bona fide* conveyance is made, with valuable consideration, and this is made known to him, justice does not require that he should have a right to intercept a title, for want of that ceremony, which is to bind every one, he having full knowledge of the fact, which would be made public by it."

The first section of the registry act of Mississippi, provides, that no estate of inheritance, or freehold, &c., shall be conveyed, unless in writing; nor good against a purchaser, for a valuable consideration, not having notice thereof, unless filed for record, &c. The third section declares all such conveyances void, as to creditors and subsequent purchasers without notice, unless filed for record, &c.

In *Dixon & Starkey vs. Doe ex. dem. Lacoste*, Judge SHARKEY made a lengthy opinion in regard to the construction of this statute. The contest for title being between a judgment lien creditor, and one holding title by a prior unrecorded deed; the claimant under the deed having been in actual possession of the land, at the time the judgment was rendered, under which the purchaser, at sheriffs sale, claimed title—Judge SHARKEY remarked, that taking the two sections together, both creditors and purchasers were, clearly, and beyond dispute, placed upon the same grounds. But the judge goes further, and holds the first section, of itself, sufficient for that purpose, without the aid of the *3d section;* and it is evident, that that section is as strong, in terms, as our own. In regard to this, he remarks: "But, apart from a comparison of the several sections, if we look to the reason and object of the whole law, we find that creditors are equally within its perview, and have been so considered in the interpretations of these statutes in England and the United States. These interpretations show the reason of the law, from which it is evident that notice is equivalent to registration as to all persons. This becomes perfectly apparent, when we look at the common law, the evils which were likely to result from the statute of uses, and the remedy which the registry act had in view."

And it was held in that case, (Judge CLAYTON dissenting) that notice is equivalent to registration, as to all persons: that unregistered deeds shall not be avoided in favor of creditors with notice; and that possession is sufficient notice to every one of the conveyance to, or title of, the occupant.

In a later case, (*Taylor et al. vs. Echford*, 11 *Sm. & Mar.* 21,) the same question came up for consideration, and Judge CLAYTON, who had dissented from the opinion in *Dixon & Starkey vs. Doe, &c.*, delivered the opinion of the court, and upon this point said: "The sale of the lot, as the property of J. J. Humphries, passed no title. He had sold and conveyed his interest, many years before the judgment was rendered. The lien of the judgment could not extend beyond the actual interest of the debtor.

The possession of the vendees was notice of their right, in the absence of the registration of his conveyance. The failure to record the lease, or the assignment, could have no effect upon the title of Clifford, in favor of purchaser with notice."

In *Wiley vs. Hightower*, 6 *Sm. & Marsh.* 345, the same question came up on an issue between the prior unregistered title, and that by purchase, under a junior judgment lien; and it was held, that possession is notice to the purchaser, at execution sale, of the title of the party in possession; though he had no deed to the property, or other title of record.

In *Neal vs. Kew & Hop*, 4 *Geo. Rep.* 169, after an able investigation of this question, Judge LUMPKIN said: "Numerous adjudications can be adduced in support of the position, that an absolute conveyance to a purchaser, though not recorded within the time prescribed, transfers the title to the land, free of subsequent judgments."

Without a more particular reference to other adjudications to the same effect, it may suffice to say, that in *Colby vs. Kemston*, 6 *New Hamp.* 262; *Webster vs. Mattax*, 6 *Maine* 256; *Jackson vs. Post*, 15 *Wend.* 588, and *McLouth vs. Rathbone*, 19 *Ohio* 21, it has been held that notice, by possession, is equivalent to registry notice. On the other hand, the decisions of the courts of Tennessee, Pennsylvania, Kentucky, and, as to mortgages, also in Ohio, although not uniform, and in some of these States, quite contradictory, may be said to hold a different rule, and deny that actual notice of the prior incumbrance, or purchase, will affect the rights of the judgment lien or attaching creditor. *Hervey & New vs. Champion*, 11 *Humph. Rep.* 570; *Jacques vs. Weeks*, 7 *Watts* 261; *Edwards vs. Brinker*, 9 *Dana* 69.

The case of *Hervey vs. Champion*, was made without reference to authority, either by the counsel or the court. *Jacques vs. Weeks*, was decided upon what we conceive a misapprehension of the interest acquired by the creditor in the debtor's property. The court says: "It would give the mortgage priority over the judgment, and take away the value of the judgment to the amount

of the mortgage. Now the office of the lien is not to cut away prior incumbrances, but to guard against incumbrances; not to create an interest in the estate, but to prevent an after interest from being acquired to the prejudice of the judgment creditor. Admit, then, that such is the effect produced upon the judgment, that is, that it is postponed to the rights of an elder claim upon the property; this, if unattended with fraud, is what is just and right, and of which the junior lien creditor has no right to complain. It is worthy of remark, too, that in this case the court was divided in opinion, and a most able and searching dissenting opinion delivered.

*Brinker vs. Edwards* was decided without argument or authority, by a court that has repeatedly changed its opinions upon this question. See *Helm vs. Logan's heirs*, 4 *Bibb.* 78; *Morton vs. Roberts*, 4 *Dana* 258, in which it was held that subsequent notice would bind the judgment creditor.

After a careful consideration of this question, in view of the object intended to be effected by the registry act, the statutes of England, and the statutes in the different American States, varying, in some instances, in language, but all evidently intended for the same common purpose, and the almost uniformly liberal construction, which the courts have given to them, we do not feel at liberty to depart from the spirit of these decisions, which look beyond the mere letter of the act, and give it such an interpretation as to protect the innocent purchaser and creditor from fraud, but at the same time never to allow a fraud to be perpetrated under cover of the statute. Should we go back to a literal construction of this act, we might, with the same propriety, indulge in a like limited construction of our statute of frauds, to which, like those of other States and of England, we have given a liberal construction; indeed, so uniformly has this construction been given to both these statutes; and also, to some others of like class, that the law and its judicial interpretation, are so delicately interwoven, and rights so spring into life under them, that a change in the decisions would be, in effect, a repeal of the

act itself. Thus considered, we hold that upon a liberal and fair construction of our statute, judgment creditors are, alike with subsequent purchasers and mortgagees, affected by notice of a prior unregistered deed, or contract, touching real estate, and that notice is equivalent to registration, as to all persons.

This brings us next to consider the time when such notice shall be given. As the whole purpose for which notice is required to be given, is to prevent fraud, it necessarily follows that it should be given at a time when it may effect this purpose. For instance, as between contracting parties, the notice should be given before the contract is consummated; because, by concealing the existence of the prior contract, or conveyance, the purchaser may be induced to consummate a contract, which, with notice, he would decline to make.

And for a like reason, notice to the judgment creditor can only be necessary at such time as his rights may he affected without it. Notice, therefore, could be of no use before judgment, unless with it he would decline, like the purchaser, to take such judgment. And this, we have seen, would not be the case; because, until after the judgment, his lien rights have no existence, and whether with or without notice of the incumbrance upon the property when rendered, the judgment lien would attach as a mere gratuity conferred by law, and for which he pays nothing. He is, therefore, at this time, not to be likened to a purchaser contracting for a lien; indeed, it is very questionable, whether he himself ever can be said to bear that relation to the debtor. Because, as we have repeatedly held, he never acquires by the lien any interest whatever in the property. The lien is a quality added to the judgment to hold the property of the debtor for a given time, (unless displaced or abandoned,) free from future incumbrances. The judgment lien certainly has no more potency to communicate title to the creditor, than a levy of an execution would have, and we have often held that the debtor was not divested of title to his property by force of the levy. The early doctrine, with regard to the effect of a levy, has been long overruled

by nearly all of the courts in America, and this court, in thus holding, has but conformed its decisions to the established American doctrine. As held in *Atwood vs. Pearson*, 9 *Ala. Rep.* 656, after a levy, although the property is in custody of the law, the title to it remains in the debtor, and the officer of the law, who has it in custody, acts, in fact, as the agent of the debtor, sells the property as his, and conveys the title from the debtor to the purchaser. The relation of vendor and purchaser, may more properly be said to exist between the purchaser at the sheriff's sale and the debtor, than between the creditor and the debtor.

We have had occasion to examine the case of *Daniel vs. Sorrells*, and one or two others, which would seem to hold that notice should be given to the creditor before judgment; after which he is treated as one having an interest in the property, and that such interest is communicated to the purchaser. In *Daniel vs. Sorrells* it was said, that the purchaser might protect himself against the claim of one holding under an unregistered deed, even though at the time of his purchase, he had notice of such deed. If this be true, it must be because the lien vests in the creditor such interest in the property, as not only to cut off and prevent all future incumbrances; but also all prior unregistered conveyances and incumbrances. Thus giving to the lien an effect never contemplated by the act, by making it, in effect, retrospective, as well as prospective, in its operation; and dispenses with the necessity of any notice whatever to the purchaser, and makes him stand in the relation of purchaser from the creditor.

This class of decisions is not only in opposition to the spirit, intent, and legal effect of the lien, but is also wholly irreconcilable with another class of decisions, that makes notice to the purchaser a protection to the title of one holding under an unregistered deed. They place the purchaser, at a judicial sale, upon the same footing with a purchaser from the debtor himself. The debtor is only restrained by the lien from subsequent sales or incumbrances, and the purchaser, but for these, would acquire a good title against all prior conveyances of which he had no notice at the

time of his purchase. Such is precisely the situation of the purchaser at a judicial sale, as held by repeated adjudications.

Thus, in *Lesse of Scribner vs. Lockwood*, 9 *Ohio Rep.* 184, the contest, (as in the case now before us,) was between a purchaser, who held under a prior unrecorded deed, and a purchaser at sheriff's sale; no notice was given to the purchaser until after sale and payment of the purchase money, and the confirmation of his sale by the court, but before the sheriff's deed had been executed and filed for record, the first deed was recorded. The question was, whether this was sufficient to affect the purchaser with notice; and the court, fully recognizing the doctrine of notice to the purchaser, and its effect upon him, if given at any time before the sale, concluded by saying: "The conclusion at which we have arrived, is that, inasmuch as the deed from Daniel to Uriah Scribner, was not recorded until after the levy, sale, and confirmation by the court, and the payment of the purchase money by Townsend, the delivery of the deed as consequent on these proceedings, was a mere formal act, and that the title of the defendant, therefore, takes precedence to that of the plaintiff."

The rule of notice to the purchaser was recognized by the same court in *McLouth vs. Rathbone*, 19 *Ohio Rep.* 21.

The Supreme Court of Alabama, in *Ohio Life Insurance Company vs. Ledyard*, 8 *Ala. Rep.* 866, held that a purchaser, at a judicial sale, without notice of a prior unregistered deed, is a purchaser for a valuable consideration, within the meaning of the registry acts. Such, also, was the decision of that court in *Powell vs. Alford*, 11 *Ala. Rep.* 318.

In *Dixon & Starkey vs. Doe, &c.*, it was held by the Supreme Court of Mississippi, that both creditors and purchasers are affected by notice of a prior unregistered deed.

In *Ellis vs. Tously*, 1 *Paige Rep.* 280, it was held that if a purchaser under the judgment has notice of the equitable title, before his purchase, and the actual payment of the money, he cannot protect himself as a *bona fide* purchaser. And in *Jackson vs. Post*, 15 *Wend.* 588, the previous decisions of the court

were reversed, and the rule as to the time when notice shall be given to protect the purchaser, under the prior unregistered deed, definitely settled. The court in that case said: "The object of the recording act is to give notice to all the world that the title has passed from the vendor to the vendee. If the vendee neglects to record his deed, in consequence of which another person purchases *bona fide*, such vendee, so neglecting to record his deed, loses his title; but if the second purchaser has actual notice of the first conveyance, he is not a *bona fide* purchaser. The record of the first deed is constructive notice of the fact of the existence of the deed: if, however, actual notice has been given to the second purchaser, he cannot complain of the want of constructive notice. Notice to the second purchaser, whether actual or constructive, that the land has been previously sold and conveyed, deprives him of the character of a *bona fide* purchaser. When this case was before the court formerly, as reported in 9 *Con.* 120, the preceding point in the decision of *Jackson vs. Town* was cited, and apparently relied on. It was unnecessary to resort to that ground, as it appeared then, as it does now, that Ten Eyke, when he purchased, had full notice of the previous deed of the plaintiff. His sheriff's deed had the same force and efficacy, as a quit-claim from Merrick, of the same date, would have had, and having notice, he purchased with as full a knowledge of the plaintiff's deed as if it had been recorded. In such cases, we consider the lien of the judgment as of no force by way of giving priority; it is the sale under the judgment which is effectual, and the lien is not regarded as an incumbrance, but only as an ingredient in the conveyance."

This decision is so fully to the point, that we have made an unusually full quotation from it, and we need only add, that with the other cases cited, it fully sustains the former decision of this court in *Trapnall & Watkins vs. Wassell*, 15 *Ark. Rep.* 73, in which Trapnall, as purchaser at judicial sale, was held to be affected by notice of the prior incumbrance in favor of Wassell.

Authorities have been cited by the plaintiffs, to show what the

rule is in cases of attaching creditors, and by analogy, they contend that the same rule should be applied to judgment creditors. We have looked into these decisions. They are made by the courts of Massachusetts and Maine, in neither of which are judgments liens upon the real estate of the creditor. Those decisions rest essentially upon the ground of the interest which the execution or attaching creditor has in the property by force of a levy. The old doctrine, that a levy upon goods, or an *extent* upon lands, divested the debtor of title to the same, prevails in these States. This doctrine was considered in this court, in *Whiting & Slark vs. Beebe*, and *Trapnall vs. Richardson, &c.*, and expressly overruled. The title to the property, whether real or personal, when levied upon, remains in the debtor, and does not pass to the creditor in satisfaction of his debt, as it did by the English process of *extendi facias*, adopted and in use in these States. We cannot, therefore, give these decisions weight in determining the effect of the judgment lien, or as to when the notice should be given. And for like reasons, the decisions of the courts of New Hampshire, Rhode Island, Connecticut, Vermont, Kentucky, Virginia, and North Carolina, should be received with due allowance, from the fact that they have no statutes making judgments a lien upon the debtor's property. In most of them, a lien attaches upon the issuing or the levy of the execution, and in Virginia and North Carolina the creditor may sue out an *elegit*. How far the decisions of these courts may have been influenced by the supposed effect which the levy of the execution had in divesting the debtor of title to the property, or of communicating it to the creditor, it is difficult to determine. But, upon due consideration of these, and the evident conflict of opinions between the courts in the States, in which, by statute, judgments are declared to be liens upon the debtor's real estate, if left to the weight of authority alone, we should feel at much loss to determine at what time the notice should be given, or in fact for what practical purpose it should be given to the creditor at all. One of two alternatives is left us: we must either give such potency to the judgment lien, as

to let it cut its way over all deeds, securities, or conveyances, whether in law or equity, that are not registered at the date of the judgment, wholly irrespective of notice, and thereby leave the statute, that was enacted to prevent fraud, an engine in the hands of sharpers in the law, to enable them to perpetrate it. In which event, the whole question of notice, whether to the creditor or the purchaser is discarded: because, all such titles are swept off as fraudulent, by the mere failure to put them of record, and the purchaser relies upon the perfect title, thus communicated, by force of the lien; or we must adhere to the liberal construction, which, with a few exceptions, is universally given to such statutes; and hold that, as the sole purpose of the statute was to prevent fraud by secret conveyances, any notice given at any time before the fraud is perpetrated, as it accomplishes all that the statute was intended to accomplish, shall be held as equivalent to registry notice. Under all the circumstances, we think it safest to adopt the latter alternative.

And with regard to the time when the notice should be given, we can see no reason for giving it before the judgment, or at any intermediate time, between then and the sale. The levy of the execution in no wise displaces or affects the lien. So far from this, its effect is to extend the lien also to the personal estate. It is true that the levy is an election to make the debt out of the particular property taken in execution; but the general lien is not thereby displaced, and if upon sale the property levied upon is found to be insufficient to pay the debt, the creditor has his recourse at once to any amount, or all of the remaining property subject to sale, if necessary, in order to make his debt. Up to the time of sale, then, there would seem to be no necessity for giving notice to any one. But when the property is about to be sold, the creditor, as well as the purchaser, has a right to know what encumbrances there are upon it. Public policy requires this, to prevent a sacrifice of property, and the interest of the creditor in making his debt, as well as an assurance to the purchaser, that he buys clear of all titles not made known to him at

that time, requires it. And if notice of the prior incumbrance is not then given, as well to the creditor as the purchaser, the actual notice, substituted in the place of the registry notice, is not as broad and full; and, consequently, cannot be received instead of such registry notice, and both the creditor and purchaser may rely upon the statute, that declares all deeds, &c., of which notice is not given, void as against them.

And although the purchaser at such sale, by virtue of the statute, gets a perfect title to the property purchased, free from all incumbrances, of which notice is not given, it is not because the lien attached in the first instance to a perfect unincumbered title, or that such title was in fact in the debtor at the time of the sale, but because the first purchaser, notwithstanding his superior title, failed to give notice of it. Wherefore, it was, by force of the statute, swept off as fraudulent, and left the title in the purchaser as perfect as if the prior conveyance had never been made.

On the other hand, if notice is given at the time of the sale of the property, the creditor has no just cause of complaint, even though the property may sell for less by reason of such incumbrance, because the lien, in the first instance, only attached to the property with its incumbrances, and when sold with notice of them, no fraud is perpetrated, either upon him or the purchaser: because, he still gets all that the lien was ever intended to protect, that is the real value of the property with its incumbrances at the time the lien took effect. And no wrong is done the purchaser, because, with notice, he buys the property, charged with the incumbrance, and bids with a view to its diminished value in consequence thereof.

Having thus disposed of the questions of law arising in this case, before applying them, we will briefly review the facts of the case. They are, for the most part, free from all doubt. There is no question but that John Engles bought the land in dispute from the judgment debtor, Harvey Engles, long before the judgment, under which the plaintiffs claim as purchasers, was rendered, and paid him for it, and took a valid deed of conveyance for the land,

and was in possession of it, but failed to file his deed for record in the proper office until after the judgment was rendered; and also, until a few days after the execution thereon had been levied upon the land. It is in proof, and is not controverted, that the plaintiffs hold by deed under regular and valid proceedings under the judgment as purchasers at judicial sale. That the plaintiffs were the attorneys for the plaintiff in execution, and that Byers, one of them, bid off the land.

The evidence, with regard to notice at the time of the sale, is that about the time the sheriff proposed selling the land, the defendant, in an ordinary tone of voice, declared that the land was his. The witness distinctly heard the declaration, and witness Fairchild says that Byers was standing near to the sheriff at the time the claim was made; that the defendant was about fifteen feet from the sheriff, and spoke sufficiently loud for those around to hear him. When we consider that Byers was the attorney, engaged in the collection of the debt, and that the sheriff had proclaimed that he was about to sell the land, and that the defendant's claim set up was in response to the offer to sell, we think it altogether improbable that Byers failed to hear what was said. It is true that the defendant did not produce his deed; nor was any inquiry made with regard to the character of his title. Under all the circumstances, we think this notice sufficient. Certainly it was sufficient to have put a prudent man upon inquiry.

With regard to the occupancy, the facts are substantially as follows: Witness stated that he was well acquainted with the parties to the suit, and well acquainted with the land in controversy. That the defendant had had it in possession since the year 1845. There were about thirty acres of cleared land upon the tract: it was good bottom land, and worth $2 per acre rent per annum, from the first of January, 1850, until the present time, (the time of trial). There was no building upon the land. The houses were near the line, on an adjoining tract, and were occupied by the father, mother, and family of defendant, who is a

single man, and resided with them. Witness once owned the life-estate of the father and mother in the land, and turned it over to defendant, who agreed to take the place of witness, and take care of their father and mother during their life. The land lay two miles from Batesville; was cultivated in 1845, by witness, and the only other proof, with regard to the persons who cultivated afterwards, was the evidence of Desha, who says, that the defendant, and the other children, lived in the houses, and that the land was cultivated by some of them.

This is, substantially, the evidence with regard to possession, and although the witness states, in unqualified terms, that defendant was in possession since 1845, when we come to consider the real situation of the parties, it is quite probable that a stranger might well have supposed the father and mother the head of the family, and the owners of the land, and the children, including defendant, residing with them, and cultivating it for them. There is no evidence that the judgment debtor, Harvey Engles, ever was in possession of the land. The evidence is not very clear with regard to the nature of a life-estate, which witness says he owned, and turned over to defendant, in consideration that he would take care of their father and mother. Witness, whilst he held this estate, cultivated the land in 1845, and he says he turned it over to defendant, who had possession of it after that time. Under all the circumstances, we think it probable that Harvey Engles, the judgment debtor, never had possession of the land, nor was he entitled to the possession, on account of the life-estate owned by the defendant, who took the life-estate in 1846, and entered into possession of the land, charged with the support of his parents. The witness says he was in possession since 1845, and it is in proof, that he was still in possession at the commencement of this suit.

In the absence of all evidence, therefore, tending to show that the judgment debtor ever was in possession of the land, or that the defendant held under him, we must consider the defendant in possession, and holding adversely at the time the judgment

was rendered, and so continued until after the purchase at sheriff's sale by the plaintiff. This was sufficient notice, both to the creditor and the purchaser, and not only at the day of sale, but also before the date of the judgment, as held by many of the authorities cited in this case, and also as expressly decided at the present term of this court in the case of *Hamilton vs. Fowlkes et al.*

Independent of this, we think the notice given to Byers, the purchaser, at the time of the sale, amply sufficient, and as he was the attorney of record conducting the sale, notice to him was also notice to the judgment creditor. As a necessary consequence, therefore, it follows that the defendant's title, which was in all respects regular and of older date, and of which due notice was given, must prevail over the title acquired under the judgment lien of subsequent date. Let the judgment be affirmed.

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NOTE, by the Clerk.—Mr. Chief Justice ENGLISH announced that he dissented from the opinion of the court in this case: holding that, under our statute, actual notice of an unrecorded deed would not be good and valid against the judgment creditor, or one claiming under the judgment, unless given before the judgment was rendered: that unless the deed be recorded, or notice of its existence be given to the creditor at or before the rendition of the judgment, the judgment would be a lien upon the land, which could not be displaced by subsequent registration or notice: but has filed no written opinion.

## CROUSE VS. THE STATE.

An indictment, charging that a woman *did bed to, and live with,* a man, (naming him) is not good, under the statute prohibiting a man and woman living together as husband and wife without being married.

*Quere:* Is adultery or fornication indictable as a common law offence?

*Error to the Circuit Court of Dallas County.*

Hon. THEODORIC F. SORRELLS, Circuit Judge.

COMPTON & SMITH, for the plaintiff. The indictment cannot be sustained as charging the statutory offence created by *sec.* 4, *chap.* 51, *Digest*, for it is a rule of pleading that it is, in general, necessary not only to set forth in the indictment all the circumstances which make up the statutable definition of the offence, but also to pursue the precise and technical language in which they are expressed. *Chitty's Crim. Law, vol.* 1, *p.* 235; *Moffat vs. The State*, 6 *Eng.* 171.

Nor can the indictment be sustained as charging either fornication or adultery; because there are no such offences at common law punishable by indictment. *State vs. Cooper*, 16 *Verm.* 551, *and authorities there cited; Anderson vs. Commonwealth*, 5 *Rand.* 627; and there is no statute in Arkansas making fornication and adultery indictable.

Mr. Attorney General JORDAN, for the State. It is submitted that the indictment in substance, charges the offence contemplated in *sec.* 4, *chap.* 51, *Digest*, though not drawn with technical accuracy; and that even if not a good statutory indictment, it is

sustainable under the common law in force in this country. *Digest, chap.* 34, *sec.* 1 *and* 2.

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

The plaintiff in error was indicted in the Dallas Circuit Court, as follows:

The grand jurors, &c., &c., present that Harriet Crouse, late of, &c., on the first day of September, A. D. 1854, in the county of Dallas, &c., then and there being, with force and arms, unlawfully and wickedly did *bed to*, and live with, one Johnson Kenedy, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Arkansas.

The defendant moved to quash the indictment, which motion being overruled, she was tried on the plea of not quilty, convicted and fined twenty dollars. She moved in arrest of judgment, on the ground, that the indictment was not good, which motion was not sustained by the court, and she brought error.

*Sec.* 4, *art.* 2, *part* 8, *chap.* 51, *Dig.*, *p.* 364, declares that: "If any man and woman shall live together, as husband and wife, without being married, each of them shall be deemed guilty of a misdemeanor, and shall, upon the first conviction, be fined in a sum not less than twenty dollars, &c., &c.

Under this statute, the indictment is manifestly defective, because it does not charge that the parties lived together as husband and wife without being married.

This statute was doubtless designed to punish the illegal assumption of the marriage relations, and not the mere act of illicit intercourse.

We have no statute providing for the indictment of *adultery or fornication*, other than as above.

It is suggested by the Attorney General, that the indictment is good as for the common law offence of adultery, &c.

It seems to be a matter of doubt whether adultery or fornication is indictable as a common law offence in this country, except

in cases of open lewdness, amounting to nuisance. See *Wharton's American Crim. Law, p.* 758, 760, *and cases cited in the margin; State vs. Cooper*, 16 *Verm.* 551.

It would not be safe to punish a person criminally, where there is a doubt that any positive provision of law has been violated.

The judgment of the court below is reversed, and the cause remanded, with instructions to sustain the motion in arrest of judgment.

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## ATKINS VS. THE STATE.

A plea to an indictment for murder, that the defendant had once before been put in jeopardy of his life for said offence in said indictment, without showing how or in what manner he had been put in jeopardy of his life, is bad on demurrer.

And where such plea sets up that the defendant was before in jeopardy, upon another and different indictment, for the same offence, it must also set out the record of the former indictment: propose to verify the same by the record; and allege the identity of the defendant in said plea to be the same as the one heretofore supposed to have been put in jeopardy of his life.

It is a matter within the sound discretion of the Circuit Judge, who is cognizant of all the circumstances, whether the jury ought to be discharged on account of the sickness of one of the panel; and this court will not control that discretion, unless it affirmatively appear of record that it was exercised to the detriment of the prisoner.

A person who is "opposed to capital punishments," is not, therefor, incompetent and disqualified as a juror: and it is error in the court to reject one of the original venire for such cause.

Where threats, on a trial for murder, are proved to have been made by the defendant against the deceased, the defendant should be permitted to enquire of the witness as to any irritating or provoking remarks, made at the time by the deceased, inducing the threats.

A witness, in a criminal case, cannot be interrogated as to his statements made before the examining court, unless such statements be different from the evidence given on the trial: then he may be interrogated as to such statements with the view of contradicting him.

A defendant on a trial for murder, has no right to read in evidence to the jury, the statement made by him and reduced to writing before the examining court.

Evidence of threats made by the deceased, against the prisoner, are inadmissible in his defence, unless there be proof that they were communicated to him before the homicide.

Where a witness makes a statement on the trial, differing from that made by him before the examining magistrate, and such testimony was reduced to writing, it should be produced for the purpose of contradicting him, or sufficient ground laid for the introduction of secondary evidence.

It is not allowable on cross-examination to put questions to a witness, not relating to the matter in issue, for the purpose of contradicting him by other witnesses: but such questions may be put to him for the purpose of trying his credibility—in such case, the cross-examining party must be satisfied with his answer.

It is not necessary that the verdict in a criminal cause should be written on the indictment, though it is usual to do so; nor that it should be returned in writing at all.

It is error in the court to permit the traverse jury, when retiring, to take with them, for any purpose, a record containing the evidence given before the committing magistrate, not offered in evidence on the trial, though the court instruct the jury "that they must not read said record."

The fact that the prisoner went to the house of the deceased "for the purpose of having a difficulty with him," and in that difficulty killed him, with a deadly weapon, would not, regardless of all other circumstances attending the difficulty, make the homicide a murder.

Where two parties propose and accept a combat, without previous malice, and one kills the other with a deadly weapon, he is at least guilty of manslaughter.

If one party asks another to strike him, intending to use a deadly weapon, and upon being struck by the other with his fist or hand, kills him with such deadly weapon, he is guilty of murder.

If one assail another with insulting words and blows, and without the use of any weapon, and the assailed party, without attempting to evade the fight, kill the other with a deadly weapon, he is guilty of manslaughter.

Instructions should not assume that the facts upon which they are based were proven; but should be so framed as to leave the jury to determine whether or not they were proven.

*Appeal from Union Circuit Court.*

Hon. THOMAS HUBBARD, Circuit Judge.

WATKINS & GALLAGHER, for the appellant. 1. The court should

have sustained Atkins' motion to be discharged, for the court discharged the jury without absolute or inevitable necessity. 3 *Phill. on Ev.* 953, *and cases there cited; Commonwealth vs. Coove*, 6 *Serg. & Rawle* 577; 10 *Yerger* 536; *Stewart vs. State*, 13 *Ark.* 747; *Bevens vs. State*, 6 *Eng.* 455.

2. The court erred in setting aside for cause the jurors on account of being merely opposed to capital punishment, contrary to statutory and common law. *Secs.* 158, 161, *chap.* 52, *Digest; Wheaton's Am. Crim. Law* 856, *and authorities cited;* 17 *Serg. & Rawle* 164; *People vs. Brodine*, 1 *Denio* 317; 24 *Wend.* 549; 4 *ib.* 240.

3. Court erred in refusing Carroll to testify the whole of the conversation that led to Atkins' threats. *Whart. Am. Crim. Law* 884, *p.* 287, *and cases there cited.*

4. Court erred in refusing to allow Atkins' testimony or statements before examining court to be read. *Digest, chap.* 52, *sec.* 33, *p.* 392.

5. The court erred in refusing to allow the witness to refresh his memory by reference to his former written depositions. 1 *Greenl. on Ev., sec.* 436, *note* 3.

6. The court allowed jury to take papers away with them, not in evidence in the cause, but relating thereto. *Whart. Am. Cr. Law, p.* 901, *and authorities there cited.*

7. That the court erred in the instructions given, see *State vs. Yoes*, 4 *Eng.* 243; *Bevins vs. State*, 6 *Eng.* 460; *Wharton's Am. Crim. Law* 362, 369, 372, *and authorities.*

Mr. Attorney General JORDAN, contra. The court below did not err in overruling the motion: because, the only method by which that question could be raised, was by plea. *Brown vs. Peevey*, 1 *Eng.* 36; *ib.* 196; *Houston vs. Moore*, 5 *Wheat.* 3; *Serg. Const. Law* 278; *Moore vs. State, Walker Miss. Rep.* 139; 1 *Russell on Crimes* 837, *note* 1.

The plea setting up the same matter, is objectionable, because it sets up matter of law. As to such pleas, see 6 *Serg. & Rawle* 588; 10 *Yerger* 537; 2 *John. Cases* 275.

As to challenges of jurors, see 13 *Ark.* 147; *Digest* 412; *Wharton Crim. Law* 856; 17 *Serg. & R.* 155.

As to reading the examination of the prisoner, before the examining court: *Roscoe's Crim. Ev.* 60, 61, 64, 65; 1 *Haywood Rep.* 112; 3 *Hill N. C. Rep.* 291.

As to a witness refreshing his memory: 1 *Greenleaf's Ev., sec.* 436.

Though the court may have erred in the instructions, yet if the verdict be right on the whole recored, it should be sustained. 14 *Ark.* 420; 4 *Eng.* 213; 6 *Eng.* 764.

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

At the April term of the Columbia Circuit Court, 1853, Robert W. Atkins was indicted for the murder of Thomas Wicker. The venue was afterwards changed to the Union Circuit Court, where the defendant was tried, convicted of manslaughter, sentenced to the Penitentiary for three years and one month, and appealed to this court.

The questions of law reserved for the decision of this court, will be taken up in the order in which they are presented of record, and have been argued by counsel.

1. At the term at which the indictment was found, the defendant was arraigned, pleaded not guilty, and the cause was continued. During the first week of the next October term of the Columbia Circuit Court, (1853,) steps appear to have been taken to empannel a jury for the trial of the cause, but the requisite number seem not to have been obtained until Saturday of the first week of the term, when the panel was completed, and the jury sworn.

On Monday of the second week of the term, it seems that the trial commenced, a witness was examined on the part of the State, an objection by the defendant to the proof of the dying declarations of the deceased, overruled by the court, and exceptions taken.

Then follows a record entry in these words: "During the ex-

amination of said Wicker, (the witness above referred to) and pending the trial, James Gault, one of the jurors to try this cause, was reported to be sick—whereupon, the court took a recess until one o'clock, P. M.

Dr. A. J. Smith, a regular, practicing physician, being called in to see the said James Gault, the juror aforesaid, reported to the court that he considered said Gault wholly unable to sit as a juror to-day, and in the event said juror might soon recover, his sitting as a juror would produce a relapse—therefore, the court discharged the jury without day."

Thereupon, it appears, the defendant filed a motion to be discharged, on the ground that he had been regularly put upon his trial before a jury duly empanneled, and the jury discharged pending the trial, without his consent, which motion the court overruled.

The prosecuting attorney then moved for a *venire de novo*, and that the court proceed to try the cause at that term, but the court overruled the motion, and continued the case.

At the next term, the cause was continued on the motion of the defendant.

At the October term, 1854, the defendant filed the following plea:

"And now on this day, comes the said Robert Atkins, in his own proper person, and for a further plea in this behalf, by leave of the court, &c., says that the said State ought to be barred in this behalf, and ought not further to prosecute her said indictment against him, because he says that he has once, before this time, been put in jeopardy of his life for said offence upon said indictment, in said Circuit Court of Columbia county aforesaid, at the term thereof, begun and held in and for said county of Columbia, on the third Monday after the fourth Monday in September, in the year 1853, at, to wit: in the said county of Columbia, said court being then and there a court of general jurisdiction, and having then and there full and complete jurisdiction of the issue specified and mentioned in said indictment,

and of the person of the said Robert H. Atkins, at, to wit: in the county of Columbia, which he, the said Robert H. Atkins, is ready to verify—whereupon, he prays judgment," &c.

To which plea the State demurred on the following grounds:

1. "Said plea does not show how, or in what manner the said defendant has been put in jeopardy of his life.

2. It does not set out the record of the former indictment.

3. It does not propose to verify the same by the record.

4. It does not allege the identity of the defendant, in said plea, to be the same as the one heretofore supposed to have been put in jeopardy of his life," &c.

The court sustained the demurrer.

Was the demurrer to the plea properly sustained? If so, should the court have discharged the defendant upon the motion first made by him?

The substance of the plea is, that the defendant had once before been put in jeopardy of his life for said offence upon said indictment, in said Circuit Court, &c.

This was pleading a mere conclusion of law, and not issuable facts. It may be supposed that the matter of jeopardy, designed to be set up by the plea, was the discharge of the jury after the cause had been submitted to them, at a previous term. But it was not proper for the plea to leave the court to inference. If the defendant thought proper to present the matter by plea, he should have alleged the facts, so that the State could have taken issue to them, or admitted them to be true, by demurrer, and submitted to the court their sufficiency in law to entitle him to a discharge from further prosecution.

The plea of former acquittal consists of matter of record and matter of fact—of record, the indictment and acquittal: of fact, that the defendant is the same person, and that the offence is the same. *United States vs. Shoemaker*, 2 *McLean's Rep.* 120; 1 *Chitty's Crim. Law* 459.

A man who has stood upon his defence on a valid indictment, before a legal jury, which has been discharged without good

cause, has incurred the first peril, and shall not incur the second by a subsequent trial. A modification of the usual plea of *auterfoits acquit* must be the consequence of establishing this doctrine, so as to adapt the plea to the facts: or if the plea remain unaltered, the rules of evidence must so far yield as to allow an averment of an acquittal by a verdict, to be proved by a record showing a virtual acquittal by the unnecessary discharge of a jury without a verdict. *Weinzorpflin vs. The State*, 7 *Blackf. Rep.* 192; *United States vs. Shoemaker ub. sup; The People vs. Barnett et al.*, 1 *John. Rep.* 66; *Commonwealth vs. Cook et al.*, 6 *Serg. & Rawle* 577.

The first objection taken to the plea, upon demurrer, that it did not show how, or in what manner the defendant had been put in jeopardy of his life, was, therefore, well taken.

Had the plea intended to set up that the defendant was before in jeopardy, upon another and different indictment for the same offence, the other objections taken upon demurrer would have been good.

But the plea being to the same indictment upon which the defendant had been previously arraigned and put upon his trial, it was not necessary for him to set out the indictment to which he was still pleading, for the whole record was before the court. The allegation, that the defendant had once before been put in jeopardy of his life for said offence, upon said indictment, would have been sufficient, had the plea gone further and alleged the facts relied on as constituting the jeopardy.

Should the defendant have been discharged upon his motion? It was objected by the Attorney General, that the defendant could only raise the question of his right to discharge by plea, and not by motion.

This objection is not well taken in this case. The defendant moved for his discharge immediately after the court discharged the jury. The facts were all known to the court, and put upon its record. It was the action of the court, in progress of the trial, that the defendant complained of, and the court being perfectly

cognizant of its own proceedings in the premises, no plea was necessary to enable it to determine the legal effect of discharging the jury, under the circumstances. The facts being upon record, the question of the right of the defendant to be discharged from further prosecution, could be raised by motion or in arrest of judgment. Such has been the practice, as will appear from the following cases. *Nugent vs. The State*, 4 *Stewart & Port.* 72; *State vs. Garrigues*, 1 *Haywood* 241; *United States vs. Perez*, 9 *Wheaton* 579; *The State ex. rel. Battle*, 7 *Ala. Rep.* 259; *The People vs. Barrett & Ward*, 2 *Caines' Cases* 305; *The People vs. Olcott*, 2 *Johnson's Cases* 301; *The People vs. Goodwin*, 18 *J. R.* 187.

The question recurs, should the defendant have been discharged upon the merits of the motion? The facts stated of record in reference to the cause of the discharge of the jury, must be taken as true, as the defendant did not propose, by bill of exceptions, to put upon record any additional or different facts.

The 12th section of our Bill of Rights declares: "That no person shall, for the same offence, be twice put in jeopardy of life or limb."

A similar clause is contained in the 5th Article of the Amendments to the Constitution of the United States, and in, perhaps, all of the American Bills of Rights. It was likewise a provision of the common law.

Lord COKE seems to have been of the opinion that a jury charged in a capital case, could not be discharged without giving a verdict, even with the consent of the prisoner and the attorney general. 1 *Inst.* 227 *b*; 3 *Inst.* 110. But the doctrine was fully discussed in the case of the *Kinlocks*, *Foster* 22, and the law settled to be that where the jury is discharged by the consent, and for the benefit of the prisoner, he cannot avail himself of such discharge as ground to be released from further prosecution.

In *The King vs. Edwards*, 4 *Taunt.* 309, whilst the prosecutor was giving his evidence, one of the jurors fell down in a fit, and was pronounced by a physician on oath, incapable of proceeding in his

duty as a juryman on that day: whereupon, the jury was discharged, a new jury sworn and the prisoner convicted. The point argued before all the judges of England, (except MANSFIELD and LAWRENCE,) was, whether the prisoner could be tried after the discharge of the jury without his consent. The judges held that it was the settled law that he could, and gave judgment against the prisoner. Such, too, was the decision in *Ann Scalbert's case*, 2 *Leach C. C.* 706. In *The King vs. Stevenson*, *ib.* 618, the prisoner fell down in a fit, during the trial, and the jury was discharged, and upon his recovering, he was tried, and convicted by another jury. *Nugent vs. The State*, 4 *Stew. & Port.* 78; 1 *J. R.* 204.

Mr. CHITTY says (1 *Crim. Law* 629,) if one of the jurymen be taken ill during the trial, though of a capital offence, so as to be incapable of agreeing in the verdict, or die, the jury must be discharged, though the evidence of the crown is nearly gone through, and the prisoner may be tried afresh by another jury. * * * And if the prisoner himself be taken so ill during the trial, that he is incapable of remaining at the bar, the investigation must be suspended; and when he afterwards recovers, another jury must be returned to decide on the merits of the accusation. In some cases, indeed, where a juryman has taken ill, the judge, instead of discharging the jury, has asked the prisoner's consent to swear another juror in the room of him, who was removed by indisposition, but the better practice seems to be that of discharging the jury altogether, and returning another, competent to determine the issue.

Nor are we without American adjudications on this point.

In the case of *Nugent vs. The State*, 4 *Stew. & P.* 72, the prisoner was arraigned for murder, pleaded not guilty, a jury was empanneled and sworn to try the issue, and the court adjourned until the next day. The record then recited that on the next day the presiding judge was so extremely indisposed as to render it impossible for him to preside; and it was, therefore, ordered that the jury be discharged. At the ensuing term, the

prisoner was again put upon his trial, and a verdict of manslaughter against him. When called to the bar for sentence, his counsel moved for his discharge, on the ground of the discharge of the first jury, but the court overruled the motion, reserving the question for the decision of the Supreme Court. The Supreme Court, after reviewing the leading English and American decisions on the subject, held that the prisoner was not entitled to a discharge. The general rule is recognized to be, that where a jury has been sworn, and the prisoner put upon his trial, they cannot be discharged until they render a verdict without his consent, and if they are so discharged, he cannot be put upon his trial again: but the court, also, held that the ends of public justice admitted of exceptions to the rule, based upon urgent necessity.

So it has been held that the expiration of the term of a court, operates *ipso facto*, to discharge a jury deliberating upon a capital case: and such discharge will not bar a second trial. *Love vs. The State*, 4 *Ala. Rep.* 173; *Ned vs. The State*, 7 *Porter* 187.

In *The People vs. Olcott*, 2 *Johnson's Cases* 301, the power of a court to discharge a jury, in a criminal case, before they render a verdict, without the consent of the prisoner, and the effect of such discharge, were elaborately examined by Mr. Justice KENT. The rule was conceded to be more rigid in capital cases and felonies, than in misdemeanors, but the judge remarks that all the authorities admit that when a juror becomes mentally disabled by sickness, &c., the court possesses the power, to be exercised with sound discretion, and based upon necessity, of discharging the jury. See, also, *The People vs. Goodwin*, 18 *John. Rep.* 187, where the subject was discussed by Chief Justice SPENCER: also, *People vs. Barrett & Ward*, 2 *Caine's Cases*, 304. In these cases, as well as in *Commonwealth vs. Cook et al.*, 6 *Serg. & Rawle*, 577; *Commonwealth vs. Clue*, 3 *Rawle* 501; *Ned vs. The State*, 7 *Porter* 187; *State vs. Job Garrignes*, 1 *Haywood*, 241; *United States vs. Perez*, 9 *Whart. Rep.* 579, and other cases cited in these cases, the power of the court to discharge a jury because of their being unable to agree, without the consent of the prisoner, is dis-

cussed, and there is some conflict between them, but it is generally conceded that where the court is under the clear necessity of discharging a jury in consequence of the sickness of one of them, the prisoner may be put upon his trial again in capital cases.

In *The United States vs. Perez, ubi sup.* (9 *Wheat.* 579,) Judge STORY, delivering the opinion of the Supreme Court of the United States, said: "We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge, and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oath."

In *The United States vs. Shoemaker*, 2 *McLean's Rep.* 117, the court said: "Where the judgment is arrested for some defect in the indictment, it is admitted that the defendant may be prosecuted a second time for the same offence. And that a discharge of the jury by the court, under sudden emergency, constitutes no bar to another trial. In the first case, the defendant could not be said to have been in jeopardy, as the indictment was radically defective; and, in the second case, from the sudden indisposition of a witness, a juror, the court, or an irreconcilable difference of opinion among jurors, having occurred, over which neither the court nor the parties could exercise any control, the discharge of the jury became indispensable. The trial could not

proceed: no verdict could be rendered—and, for this reason, the defendant, in such a case, was not considered in jeopardy. The fault was not with the prosecuting attorney, nor with the defendant, and the circumstance was so imperious as to lead to a failure of public justice, unless the court should discharge the jury."

It is insisted by the counsel for the prisoner, in this case, that the juror having taken ill on Monday, and the court having the remainder of the week to sit, it should have waited to see if the juror would not recover from his illness in time to conclude the trial, and that the court had no right to discharge him at once, as it did. We think the matter rested in the sound discretion of the circuit judge, who was upon the spot, heard the statement of the physician, and was cognizant of all the surrounding circumstances, and unless it affirmatively appeared of record that this discretion was abused to the detriment of the prisoner, we would not feel warranted in saying that the jury was improperly and illegally discharged, and that the motion of the prisoner to be discharged from further prosecution, should have been sustained. The cases, however, cited above, abundantly show, that the power of the court to discharge the jury is a delicate one, based upon necessity, and should not be exercised except in cases of manifest and urgent necessity, and if the jury are improperly discharged, in a criminal case, after the issue is submitted to them, the accused cannot be put upon his trial again for the same offence. See *Powell vs. State*, 19 *Ala.* 581.

The remaining points reserved were made grounds of a motion for a new trial, which the court overruled, and the prisoner excepted, setting out the evidence, &c.

2. It appears that a *venire facias* was issued for thirty-eight jurors, and a list of the persons summoned duly served upon the prisoner. When the jurors were called to the bar for the purpose of making up the jury, it seems that the court propounded the following interrogatories to four of the regular panel: "Do you entertain any opinion, which would preclude you from finding a prisoner guilty, where the punishment is death, if the evidence

would justify the verdict, *or in other words, are you opposed capital punishment?*" And they severally answered "that they were opposed to capital punishment."

Whereupon, the counsel for the prisoner moved the court to limit the enquiry, and ask the jurors the questions in these or similar words: "Are your opinions such as to preclude you from finding any defendant guilty of an offence punishable with death?"

Which motion the court overruled, and decided that if a juror answered that "*he was opposed to capital punishment*, he was incompetent and disqualified as a juror, and the defendant excepted.

The 158*th sec.*, *chap.* 52, *Dig.*, declares that "persons whose opinions are such as to preclude them from finding any defendant guilty of any offence punishable with death, shall not be allowed or compelled to serve as jurors on the trial of an indictment for any offence punishable with death."

The court surely erred in rejecting the jurors, because they were opposed to capital punishment, unless they had gone further and brought themselves within the disqualification prescribed by the statute.

Whatever may be a man's views of capital punishment as a question of policy, the jury box is not a proper place for him to consider such policy. There he is obliged, by his oath, to try the guilt or innocence of the accused, according to law and evidence, and not to set up his own private opinion against the policy of the law, which he is bound, as a good citizen, to abide by and administer, so long as it is in force, and until it is repealed by the constituted authority. See the authorities collected on this subject in *Wharton's Crim. Law* 857, 858.

It appears that there were only six jurors obtained from the original names returned upon the *venire*, and the remainder of the panel was made up from talesmen.

In capital cases, the defendant is entitled to a list of the jurors sommoned, at least forty-eight hours before the trial. *Dig.*, *chap.* 52, *sec.* 154. This affords the prisoner and his counsel an opportu-

nity of enquiring into the characters and dispositions of the venire men, and of selecting such as they may think will give him a fair and impartial trial. It is an important right, and should not be impaired by any irregular action of the court. See *Stewart vs. The State*, 13 *Ark. Rep.* 720. It is impaired to the extent that the court may erroneously reject, as incompetent, persons returned upon the original list, which has been furnished the prisoner, and put him upon talesmen to make up the jury.

It appears, also, from the bill of exceptions, that the court rejected a person summoned as a talesman, because he said he was opposed to capital punishment. But this could not be supposed to have prejudiced the prisoner.

3. Carroll, a witness for the State, testified that he had heard some slighty remarks from Atkins about Wicker. Atkins said that Wicker had been talking about him, and if he did not quit talking about him and let him alone, he would put Wicker where the dogs could not find him. This was said near Wicker. There was a wedding at Wicker's at the time.

On *cross-examination*, the witness stated that Atkins, and a part of his family, were at the wedding at Wicker's.

Defendant then asked the witness: "what circumstances, or what Wicker had said about Atkins that led to the remark of Atkins about putting Wicker where the dogs could not find him?"

The question was objected to by the State, and ruled out by the court, and defendant excepted.

The object of the State in proving the declarations of the prisoner, against the deceased, at the wedding, was doubtless to show malice. If these declarations fell from the prisoner, in consequence of any irritating or provoking remarks, the witness should have been permitted to state that fact to the jury. The jury might have attached more or less consequence to the threats made by the prisoner, on a full understanding of the circumstances under which they were made. It was their province to determine whether the declarations of the prisoner made upon the

occasion, were indicative of permanent and settled malice toward the deceased, or merely a temporary ebullition of feeling arising upon the provocation of the moment. While it is the province of the court to exercise a sound discretion in the exclusion of irrelevant matter, it is safest to let in any competent testimony that may tend to throw light upon the motives of the accused in making such declarations.

4. The defendant asked the same witness, Carroll, if he had not testified before the examining court in this case, that he regarded Atkins' threats, made at the wedding, as of no importance or consequence? Which, upon the objection of the State, was ruled out by the court as incompetent.

This question was properly ruled out by the court, there being no proper foundation laid for it.

The defendant had the right to enquire of the witness as to the manner or temper in which the prisoner made the declarations referred to, for the purpose of letting the jury understand whether they were serious and deliberate: and if his response had differed from his statement before the examining court, the prisoner then might have interrogated the witness as to such statement, with the view of contradicting him.

5. After the State had closed her examination in chief, the defendant offered to read in evidence to the jury, the statement made by him, and reduced to writing, before the examining court: which, upon the objection of the attorney for the State, the court excluded, and the defendant excepted.

*Section* 33, *chap.* 52, *Digest, p.* 392, provides that "after the examination of the complainant and the witnesses on the part of the prosecution, the magistrate shall proceed to take the examination of the prisoner, without oath, in relation to the offence charged; but, before it is commenced, he shall distinctly inform the prisoner of the charges made against him, and that he is at liberty to refuse to answer any question put to him, and shall allow the prisoner reasonable time to advise with his counsel, if he has any in attendance at such examination."

*Section* 34, provides that "none of the witnesses for or against the prisoner shall be present at his examination."

*Section* 35, that "the answers of the prisoner on his examination shall be reduced to writing by the magistrate, or under his direction. Such answers shall be read to the prisoner, who may correct or add to them; and, when made conformable to what he declares to be the truth, shall be certified and signed by the magistrate."

*Section* 47, requires the magistrate to deliver such examination, with the statements of witnesses, to the clerk of the Circuit Court, where the offence is cognizable, on or before the next term thereof, except where the prisoner is committed, and then they are to accompany the warrant of commitment, and be delivered to the jailor.

These provisions of the statute were perhaps designed to afford the prisoner an opportunity of making a free and voluntary confession of the crime charged against him, if he desired so to do. But whatever may have been the intention of such enactments, the right of the prisoner to read the statement made by him before the committing magistrate, upon his trial, in his own favor, is not supported by reason or authority. It would be but to permit him to manufacture testimony for himself, and in many cases, doubtless, would insure his acquittal, if received with credit.

6. The defendant offered to read in evidence the testimony of Richard Harvey, taken in his behalf, before the examing court, the witness being dead. The court on the objection of the State, excluded so much of the deposition of Harvey as related to threats made by the deceased against the prisoner, and he excepted.

On looking into the statement of Harvey which is set out in the bill of exceptions, it appears that he testified before the examining court, as follows:

"I heard Wicker, the deceased, say that he had his knife ground for Atkins. He then asked if Atkins did not have some hogs at Jackson Wicker's. I replied, I did not know, and he said he had his knife whetted or scoured, but which I do not recollect. * *

Wicker had a decanter of whiskey, and asked me to drink. I then told him that my business was to make up a school. He asked me if Atkins was going to send to school? I replied, I did not know. It was then that Wicker said: 'I have my knife ground for Atkins.' Wicker said he believed Atkins was a *Murrell* man. This was some four or five days before Wicker was killed, or it might have been a week. This conversation occurred at Russell's old mill." *Cross-examined by the State.* "Walker came to the mill with me. When we got to the mill, we found Cook and Thomas Wicker, and several other gentlemen, I did not know. I never had seen Wicker before to know him. Wicker asked me and the other gentlemen to drink. I do not know whether the conversation about the knife was before or after we took the drink. I do not recollect whether any one else was present at the time when we had the conversation or not. I never informed Atkins of this conversation."

It will be observed, that the conversation in which these threats were made, (if deemed such) occurred between the deceased and the witness. That he could not state that any one else was present when the conversation took place, and that he never communicated the threats to the prisoner.

In *Powell vs. The State*, 19 *Ala. Rep.* 577, Mr. Justice COLEMAN, delivering the opinion of the court, said: "We think the court properly excluded the threat of Porter, and his declaration concerning the field, as stated in the bill of exceptions. It appears that the admission of threats, &c., as proof, was objected to unless the defendants would prove that information thereof was communicated to them before the killing, which the prisoners failed to prove. The threats, if made known to the prisoner, would have been competent testimony, as tending to show, that in the assault on the deceased, he may have acted under a just fear of danger to his own life, but we cannot see in this case how they could be considered as proof pertinent to the issue. The eminent counsel for the prisoner have failed to produce any authority for the admission of such proof. They insist that it ought to have

been permitted to the jury to infer from the circumstances that the prisoner had knowledge of the threat. No circumstances, from which such an inference might be drawn, are disclosed by the bill of exceptions, and if such existed, it was obligatory on the defence to show them affirmatively. We will not undertake to say that no case could occur, in which such threats, although unknown to the prisoner, might be admissible, but we think there is nothing in this case to authorize their admission."

In *Hudgins vs. The State of Georgia*, 2 *Kelly Rep.* 181, LUMPKIN, Judge, said: "Was the judge below right in ruling out the evidence of Anderson Hudgins, who testified that he said to the prisoner: 'Yonder comes John Anderson, (the deceased,) and *he will kill you.*'

The witness was permitted to state that he notified the defendant that the deceased was approaching, and it was only his opinion as to the *quo animo* or intention for which he was advancing: that was adjudged to be inadmissible. The doctrine on this subject is this: where the question is, whether the party acted prudently, wisely, or in good faith, the *information* on which he acted, whether true or false, is original and material evidence. And that portion of the proof which was received, comes strictly within the rule, but the part excluded was the *opinion* only of the witness. "To justify a homicide, the defendant must depend upon the circumstances by which he was at the time surrounded, and under the influence of which he perpetrated the act. Were they sufficient to excite the fears of a reasonable man? And is it evident that the slayer acted under the influence of these fears, and not in the spirit of revenge? Was the danger so urgent and pressing, at the time of the killing, that, in order to save his own life, the killing of Anderson was absolutely necessary? Does it appear, also, that the person killed was the assailant?

"Now all these pregnant inquiries must be solved by the facts which transpired, and not by the opinion of a by-stander, whether that opinion was communicated to the accused or not.

"Had young Hudgins informed his father that Anderson was

advancing in great haste, apparently much enraged, that he was using threats of personal violence, armed with a weapon, and the like, all this would be admissible to satisfy the jury that the homicide was in self defence. The *opinion* of the witness is a very different thing. It would be dangerous, in the extreme, to permit the belief of any one, whether sincere or feigned, much more the offspring of the accused, to afford a pretext for taking human life."

See, on the same subject, *State vs. Goodrich*, 19 *Vermont* 117.

The court below did not err in excluding the deposition of Richard Harvy.

7. The defendant proposed to prove by the witness Morehead, that Wicker, the deceased, had threatened Atkins, without offering to prove that Atkins ever heard it. Objected to by the State, and overruled by the court as incompetent. In this, the court did not err.

8. On the examination in chief, Tilford Powell, a witness for the State, testified, in substance, that he was at the house of the deceased on the evening he was killed. That a little after dark, some gentleman came to Wicker's and hallooed, "halloo!" Wicker went out, and asked what he wanted? He said he wanted to talk to him, and Wicker said he would be G-d-d if he could not talk to any one. Witness heard them talking, but could not tell what they were saying, Wicker having gone to the fence. Witness went out to the fence, and Atkins said he wanted Wicker to go out to the wagon and see the marks of some hogs, "you have been accusing me of killing hogs, and you are a G-d-d liar, and a G-d-d rascal." Wicker then replied, "you have, and I can prove it." They then cursed and used short words, and Atkins challenged him to fight him. Wicker at first did not appear to want to go, but soon started out and opened the gate, but witness pulled him back. Then he saw Atkins about that time pull out of his pocket a knife, as he thought, and open it. A son of the deceased then came out, walked through the gate, and asked Atkins what was the matter; and he said, not much, only your father has been

talking something about some hogs, and made very light of it. Wicker then spoke to Atkins, and told him to come up to the fence, that he wanted to get a lick at him, and he would knock him down. Atkins went up to the fence, held out his head, and told Wicker to strike, and Wicker struck him, and knocked him down. Atkins arose immediately and struck over the fence—witness thought with a knife—he struck but one lick. Witness went to Wicker, and asked him if he was cut, and he said he was.

The remaining testimony of this witness, and that of others, conduces to show that Wicker was stabbed with a knife, and died shortly afterwards of the wound.

On *cross-examination*, witness Powell stated, "that he did not know who the person was who called at the fence. Does not believe that he stated on the former trial of this cause, that he knew the man, who called at the fence, by his voice. Did say on said trial, that Atkins called in a friendly manner."

Hobson, a witness for the prisoner, stated that he was present before the examining court, and at the former trial in the Columbia Circuit Court, and that Powell testified in behalf of the State, on both trials, "that we did know the voice of Atkins, when he called at the fence of Wicker on the night of the death of Wicker, and that it was Atkins, and in a friendly voice."

On the motion of the State, this testimony was excluded as incompetent, and the prisoner excepted.

The object of Hobson's testimony seems to have been to discredit Powell, by showing that he had made contradictory statements. The precise point of contradiction appears to be this: Powell seems to have stated, on his cross-examination by the prisoner, on the final trial, that when Atkins first called at the fence of Wicker, he did not know the voice; and that he did not believe that he had stated on the former trial that he knew the voice to be that of Atkins. Hobson testified, that Powell had stated on the former trials, that he knew the voice of Atkins.

It could not be very material to the issue, whether Powell knew

the voice of Atkins, when he first hallooed at the fence of Wicker or not. It seems that he afterwards went to the fence, and found Atkins there altercating with Wicker. The presence of Atkins, and the purpose for which he came, as indicated by what he said and did, and the character of the difficulty that ensued between him and Wicker, were the material matters to be considered by the jury.

It may be remarked that if Powell made a statement upon the final trial, differing from that made by him before the examining magistrate, and his testimony before the examining court was reduced to writing, it should have been produced for the purpose of contradicting him, as it would be the best evidence for that purpose. The prisoner could not introduce secondary evidence, without showing that it was not in his power to produce the statement of the witness as reduced to writing by the magistrate. *Roscoe's Crim. Ev.* 236.

As to the testimony of Powell, on the former trial in the Columbia Circuit Court, the rule is that although it is not allowable on cross-examination to put questions to a witness not relating to the matter in issue, for the purpose, if he answers them against the cross-examining party, of contradicting him by other witnesses, yet it is a well settled rule that questions not relevant may be put to a witness for the purpose of trying his credibility, but in such case the party cross-examining must be satisfied with his answer. *Roscoe's Crim. Ev.* 181, 182.

Had it been a question before the jury, whether in point of fact it was Atkins who hallooed at the gate, or some one else, then the statement of Powell, that he knew or did not know the voice, would have been material to the issue; but the witness going to the gate, and finding Atkins there, put aside any question as to the identity of the voice, and the only matter was, whether the witness did or did not recognize the voice when he first heard it, which could not have been material to the issue.

The manner and tone of the voice of Atkins, when he first came up and hallooed, might have been material for the purpose of

showing the temper of mind he was in, but as to this, it does not appear that the witness made contradictory statements.

We cannot conclude, therefore, that the court committed any error, prejudicial to the prisoner, in excluding the testimony of Hobson.

9th. The defendant proposed to prove by the witness Franks, that he saw the prisoner's head the next day after the death of Wicker, and that there was a deep cut in his head, and that the witness examined the wound, which the court excluded upon the objection of the State, and the defendant excepted.

It seems to have been a matter of controversy on the trial, whether Wicker struck the prisoner with his fist, when he put his head over the fence, or had something in his hand.

We think it is very clear that the proposed proof, that there was found a deep cut or wound upon the prisoner's head, on the next day, was material and relevant to the issue, and should have gone to the jury for what it was worth. We can perceive no good reason why it should have been excluded. It is but natural that the prisoner would have been more or less excited and provoked in proportion to the force and aggravating character of the blow which he may have received from the deceased. It is usual for the jury to enquire into the nature of any wounds that may be found upon both the deceased and prisoner, after the conflict between them, and to draw such conclusions from them as they may deem legitimate.

10. Walker, a witness for defendant, testified that Harvey, a deceased witness, stated to him "that Wicker had made threats about Atkins, but what they were was not said. He never told Atkins, as he recollects. He mentioned it in Atkin's family. Does not know that he ever heard any threats made by Wicker against Atkins, which he informed Atkins of before Wicker's death.

The defendant then proposed that the witness should refresh his recollection by referring to his own deposition given before the committing court, to which the State objected, the court sustained the objection, and defendant excepted.

The examination before the magistrate occurred in January, 1853, the final trial in December, 1854.

At the time the witness was examined before the magistrate, incidents previously occurring within his knowledge, may have been fresher in his memory, than at the time of the trial; and, in such case, the law is well established that he may refresh his memory by referring to his former deposition. 1 *Greenleaf's Ev., section* 556, *and cases cited in note; Roscoe's Criminal Evidence* 65, 171.

The court should have permitted the witness to refer to his former deposition to refresh his memory, and if it called to mind any fact that had escaped his recollection, the court then could have determined upon its competency or relevancy.

11. It appears from the bill of exceptions, that when the jury were about to retire to consider of their verdict, the prosecuting attorney moved that they should be permitted to take with them the transcripts of the record of the cause sent to the Union Circuit Court on the change of venue from Columbia, which contained all the evidence given before the committing magistrate, and certified to the Columbia Circuit Court. To this the defendant objected, but the court overruled the objection, and permitted the jury to take with them the transcript, "but instructed them that they must not read said record, but that it contained the indictment, and they should endorse their verdict on said record."

And the jury were permitted to retain said transcript in their possession until they returned their verdict. To all of which the defendant excepted. The bill of exceptions sets out the entire transcript.

The practice usually prevails in this State, for the jury to return their verdict in writing, endorsed upon the indictment, and it was perhaps to conform to this practice that the court permitted the jury to take with them the transcript containing the indictment, charging them not to read its contents. But there was no necessity for this, because we have no statute requiring the jury

to return their verdict in writing, nor was it required by the common law. The foreman announced their verdict orally, and the clerk entered it in proper form upon the record. See 1 *Chitty Crim. Law* 635.

Mr. WHARTON says, (*American Criminal Law, p.* 901,) "if the jury receive papers not submitted in evidence, or conditionally, or imperfectly submitted, the verdict will be set aside, in civil cases, if resulting for the party concerned in the irregularity, and in criminal cases, it would seem in all cases whatever, if there be a conviction, unless it appear that the error was the result of the misconduct of the defendant himself. Where the solicitor for the plaintiffs, after the evidence was concluded, delivered a bundle of depositions to the jury, a portion of which were not in evidence, the verdict for the plaintiff was set aside, though the jury swore they had not opened the bundle; (2 *Hale P. C.* 308,) and in Massachusetts, where through mistake, a similar paper, containing material evidence for the party ultimately prevailing, found its way to the jury box, the same result took place, (*Whitney vs. Whiteman*, 5 *Mass.* 405). Subsequently, however, in a case of the same character, this opinion was reviewed, and it was held that where the paper was taken out by the jury through accident, and it was shown that it was not opened, this of itself did not vitiate the verdict, but where it was delivered by design, or where being opened, it made for the prevailing party, the case was otherwise. *Hix vs. Drury*, 5 *Pick.* 296. In New York *Hackley vs. Hastie*, 3 *John.* 252, and Pennsylvania *Sheaff vs. Gray*, 2 *Yeates* 273, the same distinction has been followed, and such may be considered the settled law." See the authorities cited by *Wharton* in the margin.

Here the transcript was delivered to the jury at the instance of the State, in whose favor the verdict was returned. The depositions taken before the examining court, contained irrelevant and incompetent matter on both sides, and no showing appears to have been made that they were not read by the jury. The prisoner, perhaps, would not have been permitted to introduce affida-

vits of the jurors to impeach their verdict by showing that they read the contents of the transcript against the express charge of the court. See *Stanton vs. The State*, 13 *Ark. R.* 317; *Pleasants vs. Heard*, 15 *Ark.*

We think the court erred in permitting the jury to take with them, and retain in their possession, the transcript.

12. The eleventh ground assigned in the motion for a new trial, is that the verdict of the jury was contrary to law and the testimony in the case.

If this were the only ground assigned for setting aside the verdict, we should not hesitate to affirm the judgment of the court below refusing a new trial, it being the province of the jury to determine upon the sufficiency of the evidence to warrant the verdict rendered by them.

13. The last ground, upon which the motion for a new trial was based, is, that the court erred in the instructions given to the jury, on the part of the State, &c.

Without stating the substance of the evidence introduced by the parties upon the trial, it is deemed sufficient to remark that none of the instructions were abstract, if unobjectionable in other respects. They are as follows:

1st. That if the jury believe, from the testimony, that Atkins, the prisoner, went to Wicker's house, on the night of the homicide, *for the purpose of a difficulty with Wicker*, and in that difficulty killed him with a deadly weapon, he is guilty of murder."

This instruction seems to make the guilt or innocence of the accused turn exclusively upon the purpose for which he may have gone to the house of the deceased, and the use of a deadly weapon, regardless of the facts attending the difficulty which ensued—the conduct of the parties in bringing it on—and the circumstances under which the weapon was used.

If the prisoner went to the house of Wicker with a hostile purpose, or for the purpose of getting into a difficulty with him, and if he used a deadly weapon in the fight, these were facts to be considered by the jury, in passing upon his guilt or innocence,

or in determining the grade of his offence, but these alone, regardless of all other circumstances attending the difficulty, would not necessarily make him guilty of murder. See *Yoes vs. The State*, 4 *Eng. R.* 42.

This instruction was, therefore, erroneous in the form in which it was given.

2d. That if the jury believe, from the testimony, that prisoner went to the house of Wicker, for a lawful and friendly purpose, but that after getting there, he got into a quarrel with Wicker, and without any previous malice, proposed or accepted a combat with Wicker, and that in that combat killed him with a deadly weapon: that then the offence is at least manslaughter, and they can so find.

3d. That if the jury believe, from the testimony, that Atkins asked Wicker to strike him, intending to use a deadly weapon, that Wicker did strike him with his fist or hand, and that Atkins then killed Wicker, with such deadly weapon, that he is guilty of murder, and they should so find.

4th. That if the jury believe that Wicker assailed Atkins with insulting words and blows, and without the use of any weapon, and that Atkins, without attempting to evade the fight, killed him with a deadly weapon, he is guilty of manslaughter.

No substantial objection to these instructions is perceived, when considered in reference to all the evidence before the jury. See *Roscoe's Crim. Evidence, Titles*, MANSLAUHTER, MURDER.

5th. That no threats made by the deceased before the homicide will extenuate the offence or reduce it to manslaughter, if the combat were sought, or willingly entered into by the defendant, *the deceased being unarmed*, and the defendant *using a deadly weapon, likely to produce death.*"

This instruction would seem to assume that the deceased was unarmed, and that the defendant did use a deadly weapon, likely to produce death. It should have been so framed as to leave to the jury the fact whether or not the deceased was unarmed, and whether the prisoner used a deadly weapon. In others respects, the instruction is unobjectionable.

Upon the whole record, considering all the errors of the court above specified together, we think the verdict should be set aside.

The judgment of the court below is, therefore, reversed, and the cause remanded with instructions to grant a new trial, and that the cause progress according to law, and not inconsistent with this opinion.

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## RAIGAUEL & CO., USE OF LINDAUER VS. AYLIFF.

An instrument of writing, directing the payment of a certain sum "from proceeds of drafts," is not a bill of exchange according to the law merchant; nor can the payee maintain an action thereon, on non-payment, against the maker. (*Owen vs. Lavine*, 14 *Ark.* 389, reviewing previous decisions).

A draft, drawn upon a particular fund, is not admissible in evidence under the common counts for money, &c., without proof of its execution by the defendant.

An instrument drawn upon a particular fund, and not purporting upon its face to have been executed upon any consideration, is not, of itself, evidence of indebtedness by the defendant under the money counts.

*Appeal from the Circuit Court of Pulaski County.*

Hon. WM. H. FEILD, Circuit Judge.

S. H. HEMPSTEAD, for the appellants. That the bill was evidence of consideration, and a right of action existed in the payee, see the case of *Owen vs. Lavine*, 14 *Ark.* 390.

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

This was an action of assumpsit, brought in the Pulaski Circuit Court, by William Raigauel, Augustus Raigauel, and John Eckel, partners, under the style of Raigauel & Co., suing for the use of Lindauer, against Charles Ayliff.

There were five counts in the declaration. The first four upon the following instrument:

$650. LITTLE ROCK, ARKANSAS, *March 23d*, 1853.

From proceeds of drafts of Messrs. Adams & Timms, in my favor, filed in your office, pay to the order of Messrs. Raigauel & Co., of Philadelphia, six hundred and fifty dollars, acceptance waived, and charge, without further advice, to account of

Your ob't serv't.,

C. AYLIFF.

TO THE AUDITOR POST OFFICE ACCOUNTS,
*Washington City, D. C.*

The *first* count described the instrument as a *bill of exchange*, averred its execution and delivery to plaintiffs, by defendant, its presentment for payment to the Auditor of Post Office Accounts, non-payment, and notice thereof to defendant.

The *second* count described the instrument as an *order*, with like averments.

The *third*, as an *order*, with like averments, and that defendant had no effects or moneys in the hands of the Auditor of Post Office Accounts, at the time the instrument was drawn, &c., for the payment thereof; and was, therefore, not entitled to notice of non-payment.

The *fourth* count described the instrument as a "*contract in writing*," with averments of its execution, delivery to plaintiffs, presentment, and non-payment by the drawee.

The *fifth* count alleged that defendant was indebted to plaintiffs in the sum of $1000, for goods, &c. A like sum for money lent, &c. A like sum for money paid by the plaintiffs for the

use of defendant: and in a like sum for money received by the defendant for the use of the plaintiff.

The defendant obtained oyer of the instrument sued on, and demurred to the first four counts in the declaration, on the grounds that the instrument declared on was not a bill of exchange, and could not be made the basis of an action.

The court sustained the demurrer.

The defendant pleaded non-assumpsit to the fifth count, issue was taken thereto by the plaintiffs, the cause submitted to the court sitting as a jury, and finding and judgment for the defendant.

Upon the trial of this issue, it appears from a bill of exceptions taken by the plaintiffs, that to sustain the issue on their part, they read in evidence the instrument above copied; and then proved that it was presented by the plaintiffs on the 13th September, 1853, to the Auditor of Post Office Accounts at Washington, for payment, and payment thereof refused. And that neither at the time of drawing the draft, nor at any time afterwards to the time of the presentation thereof for payment, had the defendant any funds in the hands of the Auditor, or in his office, to pay the draft. Which was all the evidence introduced by the plaintiffs, the defendant objecting to its introduction, and the count overruling the objection.

That the plaintiffs insisted upon the court to hold, as matter of law: *first*, that the draft was sufficient evidence of money had, and received by the defendant, from the plaintiffs, to entitle them to judgment on the money counts: and *second*, that it was not necessary to enable the plaintiffs to recover, that any proof should be offered of the original consideration, other than as contained and evidenced in and by the said draft, and the proof connected therewith: *third*, that on the law of the case, the plaintiffs were entitled to judgment.

But the court refused so to hold, and decided: *first*, that without further proof of the original consideration, other than that offered, the plaintiffs were not entitled to judgment: and *second*,

that the draft was not, of itself, evidence of the right of the plaintiffs to recover.

The plaintiffs appealed to this court:

1. It is well settled by the decisions of this court, that the instrument sued on being drawn upon a particular fund, is not a bill of exchange according to the law merchant. *Hamilton vs. Myrick & Williams*, 3 *Ark. Rep.* 541; *Gwin vs. Roberts*, *ib.* 72; *Wilamowicz vs. Adams*, 13 *Ark.* 12; *Owen vs. Lavine*, 14 *Ark.* 389.

It is supposed by the counsel for the appellants, that the case of *Owen vs. Lavine*, in which the previous decisions of this court, on the subject of the negotiability of such instruments, were reviewed, some of them approved, and others overruled, settles the question that the payees, in the instrument now before us, could maintain an action upon it against the drawer, on non-payment by the drawee, they being the immediate parties to the instrument.

In that case, Foster drew an order upon Owen, in favor of Lavine, payable out of Foster's cotton crop, which was accepted by Owen, and the suit was brought by Lavine against Owen, upon the acceptance. And this court held that the contract being complete by the acceptance, was, in effect, the same as if Owen had made his promissory note payable to Foster in property or upon a contingency, and Foster had assigned it to Lavine; and that Lavine could maintain the action upon the acceptance, overruling *Hawkins vs. Watkins*, 5 *Ark.* 481, and *Henry vs. Hazen*, *ib.* 501; but approving *Hamilton vs. Myrick & Williams*, 3 *Ark.* 541, and *Gwin vs. Roberts*, *ib.* 72.

And the court said: "It does not follow, that upon such a contract the *payee* or endorsee could hold the drawer, or any intermediate assignor primarily liable upon notice of non-payment by the acceptor."

In the case at bar, the suit was brought by the payees against the drawer of the instrument, on failure of payment by the drawee, and falls fully, upon principle, within the rule established in *Hamilton vs. Myrick & Williams*, and *Gwin vs. Roberts*.

The court below, therefore, did not err in sustaining the demurrer to the first four counts of the declaration, which were upon the instrument.

2. The fifth count, we may suppose, was intended to recover the original consideration upon which the draft was drawn, but not being upon the draft, it could be introduced as evidence, for no purpose, without proof of its execution by the defendant, which, it appears, was not done; and, on that account, should have been excluded by the court. 2 *Greenleaf's Ev., sec.* 158, 159, 162; *Digest, chap.* 126, *sec.* 103.

3. The instrument not purporting upon its face to have been executed upon any consideration, and not being a bill of exchange, note, order, draft, or check, within the law merchant, imported no consideration; and was, of itself, no evidence of indebtedness by the defendant to the plaintiffs, under the money counts, and the plaintiffs were not entitled to recover without other proof. *Owen vs. Lavine, ubi. sup.; Chitty on Bills* 144; 2 *Greenleaf's Ev., secs.* 105, 112, 172.

The judgment of the court below is affirmed.

## SMISER ET AL. VS. ROBERTSON ET AL.

A writ of error will not lie to the statutory judgment upon a forfeited forthcoming bond.

*Writ of Error to the Circuit Court of Phillips County.*

FOWLER & STILLWELL, for the plaintiffs. After making points and citing authorities to show that the original judgment was erroneous, contended that the original proceeding and first judgment, being erroneous, the second and dependant statutory judgment is necessarily erroneous also. *Fowler vs. Gibson et al.*, 4 *Ark. R.* 427; *Barton vs. Petit & Bayard*, 2 *Cond. R.* 494; *S. C.* 7 *Cranch.* 288.

Mr. Justice SCOTT delivered the opinion of the Court.

In response to the writ of error in this case, there has been certified into this court, a transcript of the entire record and proceedings from its inception in the Phillips Circuit Court to a return of a forfeited forthcoming bond, regular upon its face, executed upon the levy of an execution issued upon the original judgment.

The statutory judgment, thus shown, extinguished the original judgment, to which a writ of error will no longer lie, as has been heretofore settled in this court. (*Phillips et al. vs. Wills, Pease, & Co.*, 14 *Ark. Rep.* 595; *Dougherty vs. McDonald, ib.* 597.) And the question presented is whether or not that writ will now lie to this statutory judgment.

Writs of error lie only for the revision of the mistakes of courts of record, proceeding in the course of the common law. In the

case of *Ruddell vs. Magruder*, 6 *Eng. R.* 579, it was held that the forfeited forthcoming bond has, by operation of law, the force and effect of a judgment; and that the sheriff's return of forfeiture was conclusive record evidence of that fact, and that the execution does not issue upon the forthcoming bond, but upon the statutory judgment, which, by operation of law, springs into being upon the forfeiture.

Such, then, is the legal effect of the forfeiture, without any order or judgment of the court thereon. Hence, there is no order or judgment of a court of record to complain of, through a writ of error. And such was the opinion of the Supreme Court of Alabama in a like case. (*Taylor et al. vs. Powers, use, &c.*, 3 *Ala. R.* 285. See, also, *McNutt et al. vs. Wilcox & Farn*, 3 *How. Mis. R.* 421.)

The cases cited to the contrary by the counsel for the plaintiffs in error, where the court entertaining the writ of error, looked to the original proceedings and final judgment, and finding them erroneous, held the second judgment also erroneous, as a dependant one, are all cases where the second was in fact the judgment of a court of record obtained after notice to the obligors in the forthcoming bond and motion against them in court. Those cases, therefore, have no bearing upon the question we have been considering.

In the view we have thus taken, we are of opinion that the writ of error improvidently issued in this case, and it must therefore be dismissed.

## WILSON VS. THE STATE.

The case of *Atkins vs. The State, ante,* referred to for the principles of law governing pleas of *auterfoits acquit.*

Our statute having made no provisions for trials by consent in *criminal* cases, other than a trial by jury, nothing short of the confession of the facts, or the finding of them by the verdict of a jury, can regularly authorize the judgment of the court against the accused, on an indictment for a felony, where the plea of not guilty is filed by himself or entered for him—even though the accused may waive a trial by jury and consent that the judge may try the issue.

*Writ of Error to Arkansas Circuit Court.*

Hon. THEODORIC F. SORRELLS, Circuit Judge.

WILLIAMS & WILLIAMS, for plaintiff.

Mr. Attorney General JORDAN, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

The plaintiff in error was indicted for larceny in the Arkansas Circuit Court. In the first count, he was charged with stealing a lot of bacon, of the value of ten dollars, the property of one Friend, whose given name was to the jurors unknown.

In the second the only variation was, that the bacon was the property of one Mary A. Friend. This was quashed on motion of the prosecuting attorney.

The accused being in custody of the sheriff, was brought into court where the indictment was read to him in proper person, his counsel being also present; and upon demand, whether or

not he was guilty, put in a plea of which the following is a copy, to wit:

"STATE OF ARKANSAS,
vs.
GILBERT M. WILSON. } *Larceny.*

IN THE ARKANSAS CIRCUIT COURT, APRIL TERM, A. D. 1855.

Comes said defendant in proper person and defends, &c., and prays judgment of the indictment, and that the same be quashed, because he says, that at this present term of this court, the grand jury found a bill of indictment for the same offence charged in this indictment, and he was put upon his trial before the court, sitting as a jury, when after hearing the evidence and argument of counsel the court directed a non-suit, against the objection of defendant, and this he is ready to verify; wherefore, he prays judgment of the said indictment, and that the same be quashed.

G. M. WILSON.

"I, Gilbert M. Wilson, do solemnly swear that the matters set forth in the foregoing plea, are true, so help me God.

G. M. WILSON.

Sworn to before me, this 25th day of April, A. D. 1855.
J. G. QUATERMOUS, Clerk."

To this plea the State interposed a demurrer which the court sustained and the accused excepted.

The record then proceeds, as follows, to wit: "And the defendant refused to plead further, but stands mute, and the court enters a plea of not guilty, to which the State joins issue; and, by consent, this cause is submitted to the court sitting as a jury, and the court, after hearing the evidence, and hearing the argument of counsel, found the defendant guilty of larceny; whereupon, it is

considered by the court, that the said Gilbert M. Wilson, be taken from hence to the City of Little Rock, in the State of Arkansas, there to be confined in the jail and penitentiary house of the State of Arkansas, there to be confined at labor for the time and term of two years from this date.

To all of which finding and judgment of the court, the defendant at the time excepted, and filed his bill of exceptions," &c.

This bill of exceptions, after setting out that upon this "case coming on, and the defendant's plea in abatement having been held bad, on demurrer, and the plea of not guilty having been entered by the court, sitting as a jury, Oakly was introduced as a witness on the part of the State, testified," &c.

The substance of this testimony was, that about the 1st of March, 1855, in Arkansas county, Mrs. Friend, whose reputed husband had been absent some two months, came to the witness crying, and said her meat had been stolen; whereupon, he went to her house, and finding that the hinges of her smoke-house had been cut, he took the trail of some persons, and after following it about two hundred yards, found some salt and meat strings on a pile of cord wood, and from thence pursued the trail to a camp, where he found the defendant, apparently asleep, and another person, who was awake and attempted to run out by the witness. In this camp the witness found, covered with some boards, two or three hundred pounds of bacon, and some venison hams, worth $10. The two men had a jug of liquor, and appeared to be intoxicated. The witness took them in custody, and conveyed them to the Post of Arkansas, having first induced them to send the meat to Mrs. Friend, by a man named Robertson. Witness did not know the christian name of the plaintiff in error.

The only additional testimony introduced, was that of a Mr. Haller, who was one of the grand jury who found the bill. He simply testified that the christian name of Friend, was unknown to the grand jury.

This is the whole case, as it appears in the record. There

was no motion in arrest of judgment, or for a new trial, no exceptions to any ruling of the court in admitting or rejecting testimony, and nothing to show any opinion or ruling of the court, as to any point of law, otherwise than as we have already stated. And, therefore, it cannot be known whether or not, in arriving at the verdict in this case, the court found according to the weight of evidence, without any misconception as to any point of law; and, hence, in the absence of any means, whereby the plaintiff in error could have, by exceptions, put his finger upon any error of law, not now upon the face of this record, all proper presumptions are in favor of the verdict and judgment. Irrespective of any such supposed errors, however, the plaintiff in error assigns, as upon the face of this record; 1st. That the court below erred in sustaining the demurrer to his plea. 2d. In proceeding to hear evidence and to try the issue upon the plea of not guilty, put in by the court for the defendant below, upon his standing mute; and in rendering judgment against him upon the supposed verdict of guilty, so found against him, he excepting thereto at the time.

With regard to the question raised by the first assignment, the plea was clearly bad, according to the principles of law governing such pleas, so fully expounded in the case of *Atkins vs. The State*, just decided, that it is unnecessary to do more than refer to the opinion in that case as to this point, keeping in mind, that the jeopardy, attempted to be set up in this case, was incurred on another record, while in the case of Atkins it was upon the same record on which he was still held to answer.

The other assignment presents a new question in this court, which is not without difficulty; mainly, however, because a practice has grown up in this State, to what extent we are not accurately informed, to submit by consent, issues of not guilty, in cases of misdemeanors at least, to the trial and judgment of the Circuit Court, sitting as a jury, as is expressly authorized by our statute in cases on the civil side of the court.

In the cases of *Guess vs. The State*, 1 *Eng. R.* 147; *Rector vs. The State*, *ib.* 187; *Robinson vs. The State*, 2 *Eng. R.* 122;

*McBride vs. The State*, 2 *Eng.* 374, this practice seems to have been tacitly allowed by this court, and may possibly have been in other cases not developed in our printed reports. We have not, however, found any such case, in some examination of these volumes, on a charge of felony, at the common law, or for that grade of crime since the passage of our statute defining felony in this State. But, whatever may be the difficulties on this score, the party in this case demands his legal rights, and although it may not be improbable that he is a drunken thief, and would be better off in the penitentiary than out of it, nevertheless his legal rights are as emphatically secured to him by our constitution and laws, as those of the best of our citizens. And besides, the face of this record, which we have pretty fully set out, manifests a degree of haste and carelessness, unless very great aid could be claimed for it at the expense of the clerk, not compatible with that sedate and careful administration of the criminal law, upon which much of the safety and security of the citizen depend.

No one will suppose that we have any other law in this State, providing for the trial of public offenders, than the common law, and such as has been enacted by the legislation of this country.

By the common law, when one was put to answer to a criminal charge by indictment, he either *stood mute*, or *confessed* the facts, or *pleaded* to the indictment. The two former were *incidents* to the arraignment, the latter was considered as the next stage of the proceedings.

If he stood mute, the court empanneled a jury to enquire whether he so stood obstinately, or by visitation of God. If the verdict was the former, judgment of guilty was rendered; and in the case of *Rex. vs. Lemercier* alias *LeBatt*, *Leach* 218, where the charge was murder, sentence of death was immediately passed, and the prisoner was executed accordingly. If the latter, and it appeared to the court that the accused could receive intelligence by signs, the accused was held to answer through that medium. If not so capable of receiving intelligence, the plea of not guilty

was entered for him by the clerk, and the trial proceeded, as if he himself had entered the plea; in which case it was the duty of the court to inquire touching all those points, of which the prisoner might take advantage himself, to examine all the proceedings against him with a cautious eye, and to render him every possible service consistent with the rules of law. *Rex vs. Jones, Leach*, 120; *Rex vs. Steel, Leach*, 520.

All this, however, is dispensed with under the provisions of our statute, which requires that if the accused "deny the charge in any form, or requires a trial, or if he refuses to plead or answer, and in all cases, where he *does not confess* the indictment to be true, the plea of not guilty shall be entered, and the same proceedings had as if he had formally pleaded not guilty to such indictment. *Chap.* 52, *Digest, page* 404, *sec.* 123.

Hence, the only incident of arraignment left, is that of the confession of the facts, which, if the accused does not make, the plea of not guilty is either put in by himself, or entered for him by the court. Upon a simple and plain confession, the court had nothing to do but to award judgment; but, in the language of Judge BLACKSTONE, "it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it, and plead to the indictment." 4 *Blacks. Com., p.* 329.

Hence, it follows, that in this country, by the common law, as modified by our statute, if the accused does not confess the facts the plea of not guilty is put in for him, either by his own act, or by the act of the court, and the issue upon this plea has to be tried.

By the common law, Judge BLACKSTONE remarks (4 *Black. Com., p.* 312,) "the several methods of trial and conviction, established by the laws of England, were formerly more numerous than at present, through the superstition of our Saxon ancestors, who, like other northern nations, were extremely addicted to divination, a character which Tacitus observes of the ancient Germans. They, therefore, invented a considerable number of meth-

ods of purgation, or trial, to preserve innocence from the danger of false witnesses, and in consequence of a notion, that God would always interpose, miraculously, to vindicate the guiltless." *Ib. p.* 342.

He then proceeds to enumerate:

1*st.* Trial by *Ordeal*, which he says was abolished by 3 *Hen.* 3*d.*

2*d.* By a species of purgation, somewhat similar to the ordeal called the "*Corsneda* or morsel of *execration*," which, long before his day, was antiquated and disused.

3*d.* Trial by *Battle*, which although disused from the 7th year of Charles 1st, was not actually abolished in England, until by act of Parliament, in 1819; and 4th. A method of trial used in criminal cases, by the peers of Great Britain alone. Neither of which two latter have ever been supposed to have been in force in the United States by any court or judge. And finally in the last place: 5th. The trial by jury, or the country, *per patriam.* And at page 341, he remarks: "But upon indictments, since the abolition of Ordeal (and by battle under the act of parliament of 1819, neither of which were ever in force in the United States,) there can be no other trial but by jury, *per pais*, or by the country; and, therefore, if the prisoner refuses to put himself upon the inquest in the usual form: that is, to answer that he will be tried by God and the country, if a commoner: and if a peer, by God and his peers; the indictment, if in treason, is taken *pro confesso;* and the prisoner in cases of felony is adjudged to stand mute, and if he perseveres in his obstinacy, shall now be convicted of felony."

Unless, therefore, the Legislature has provided some other mode of trial, that by jury remains the only mode known to our laws upon such a plea, whether interposed by the accused by his own act, or in his behalf, by the act of the court, when he stands mute. By our statute of "Criminal Proceedings," (*Digest, chap.* 52, *p.* 410,) it is provided in *section* 149: "All issues of fact, in any criminal or penal cause, shall be tried by a jury, to be selected,

summoned, and returned, in the manner prescribed by law;" and, in *section* 166, "The proceedings prescribed by law in civil cases, in respect to empanneling jurors, the keeping of them together, and the manner of rendering their verdict, shall be had upon trials of indictments, and prosecutions for criminal offences, except in cases otherwise provided by this act."

The provisions are but declaratory of, and in affirmance of the common law, as we have already seen. The only other provisions of our statute, which relate to trials, are those of the *99th* and following *sections* of *chap.* 126, *Digest*, *p.* 812, prescribing regulations for practice on the civil side of the court: those in *chap.* 28, *sec.* 62, *Digest*, *p.* 234, relating to chancery proceedings, and those in *chap.* 95, *p.* 654, and *p.* 674, relating to civil and criminal proceedings before a justice of the peace.

The first are the only provisions that, in terms, have any approach to regulations for criminal trials, and if they apply, then it would seem that the provisions that we have already copied above, under the head of criminal proceedings, were quite unnecessary. These are: "*Section* 99. All issues of fact joined in any suit at law, in any court of record, shall be tried, either by the court, by jury, or by arbitration. *First.* The trial shall be by the court, when neither party shall demand a trial by jury. *Second*, The trial shall be by a jury, when either party shall demand such trial. *Third.* It shall be tried by arbitrators, on the agreement of the parties to refer the matter in dispute to arbitrators." *Digest*, *p.* 812.

No one would suppose that it was the intention of the Legislature to refer prosecutions for public offences to arbitrators; besides, the term "suits at law," to say nothing of the context, plainly indicates that these provisions relate solely to proceedings on the civil side of the court, and have no reference to criminal trials.

Hence, there would seem to be no other mode for the trial of a criminal issue, than that by jury. The difficulty is not obviated by any waiver of this mode of trial, because the Legislature

has provided no other mode, in lieu of it, in such an event, as it has in civil cases.

Nothing short of a confession of the facts, or the finding of them by the verdict of the jury, can regularly authorize the judgment of the court. If the accused would not only waive his right to a trial by jury, but go further, and withdraw his plea, and then confess the facts charged against him in the indictment, the court would be authorized to render a judgment against him; but so long as his plea of not guilty is in, there is no mode by which the court can dispose of it, although the accused may waive a trial by jury, with all its attendant privileges, and desire, ever so much, that the issue may be disposed of by a reference of it to the judge, or any other referee or arbitrator, and the prosecuting attorney may desire the same, and act in concert with the accused; for the simple reason, that the law makes no provision for any such referee or arbitrator, in criminal cases. The only provision is for a confession of the facts, or a trial by jury to determine them. If a judgment upon the finding of the judge, upon such an issue submitted to him, by consent, in a criminal case, can be upheld at all, it can only be so upon the principle, that this extra-judicial mode of finding the facts, amounts to a simple and plain confession of them, as charged in the indictment; and that the party is forever afterwards estopped from denying it to be such. But can a party be estopped by a record, which the law does not authorize to be made? And especially shall he be estopped by a record, which, in that view, is to *legally import his confession*, and which, nevertheless, upon its face, shows that at the very time the clerk was making it, the accused was taking exceptions to it; and, instead of submitting, was doing all he could to retract?

The law does not so move upon confessions. On the contrary, as we have seen, it is "backward, and generally advises the prisoner to retract and plead to the indictment."

Mr. Justice GRIER says, in the case of *Weems vs. George et al.*, 13 *How. United States Rep.*, *p.* 197: "When the case is sub-

mitted to the judge, to find the facts without the intervention of a jury, he acts as a referee by consent of the parties." This is unquestionably so, strictly, when he is not authorized by law to sit and find as a jury, as he is, in such case of consent, by our statute, in *civil cases.* And in cases, whether "civil or criminal," in Indiana, and some of the other States. *Rev. Code of Indiana,* 1831, *p.* 408; *The State vs. Mead,* 4 *Blackf. Rep.* 309.

Supposing, however, in cases where the accused and the State consented that the judge should hear the testimony, and find the facts, without the intervention of a jury, and the judgment of the court should be rendered accordingly, and it was done, and neither party took any exceptions at the time, that this should be properly held to be a mode of *nol. pros,* or of *confession of the facts,* as charged in the indictment, as the finding might happen to be one way or the other by the judge, and that in all such cases, the parties should be estopped from setting up any thing to the contrary; this would not be such a case, because the accused, in this case, excepted at the time, both to the finding and judgment, and placed his exceptions upon the record by bill of exceptions.

There is still another objection upon the face of this record, which, in view of the principle frequently recognized in this court, as applicable to criminal cases in general, and especially to those where life is involved, that "the convicted is to be considered as standing upon all his legal rights that he has not expressly waived of record;" (*Bivens vs. The State,* 6 *Eng. Rep.* 457,) would, of itself, be worthy of examination, if that we have already considered was not sufficient to reverse this judgment. We mean that which might be taken to the record entry of the supposed consent of the convicted. It does not explicitely appear that he consented in proper person, or even that he consented at all. The entry shows that he was present in proper person, and that he had counsel also present, and that the State was represented by her counsel, and that he stood mute, when called on to plead. "In criminal cases, an express relinquishment of a

right should appear before the party can be deprived of it." *Commonwealth vs. Andrews*, 3 *Mass. Rep.*, *p.* 132; *People vs. McKay*, 18 *John. Rep.*, *p.* 218. To make the record good, it should show, substantially, that all was done at the trial, which the law requires to be done; and this must be set down in fit and expressive words. All that is written, from the beginning of the trial to the judgment, is to be regarded as one entry, although it may spread through many days; and therefore, the whole must be looked to in order to ascertain its sufficiency in any one respect. *Crist vs. The State*, 21 *Ala. Rep.* 148. But it is unnecessary to go at large into this objection, because, in the view that we have already taken of the irregularity of the trial in this case, the judgment would have been equally erroneous, even had the record shown, in the most explicit terms, that the accused, in proper person, had consented for the judge to try the issue, in the stead of a jury.

The judgment will be reversed, and the cause remanded, with instructions to the court below to proceed to a trial of the cause, in accordance with law, and not inconsistent with this opinion. And the consequent order must be made for taking the prisoner from the penitentiary, and conveying him to the custody of the sheriff of Arkansas county, to wait his trial.

## BROWN AS AD. VS. MERRICK & FENNO.

When the statute of limitations has commenced running in the life time of the creditor, it does not stop upon his death until administration be granted on his estate—(the cases of *Aikin vs. Bailey*, 5 *Eng.* 583; *Etter vs. Finn*, 7 *ib.* 632, and *Walker et al. vs. Byers*, 14 *Ark.* 259, explained as to this point).

*Writ of Error to the Circuit Court of Pulaski County.*

Hon. WM. H. FEILD, Circuit Judge.

BERTRAND, for the plaintiff. This court has decided that the statute of limitations does not run against the *creditor* of an estate, from the period of the death until administration is had: that when the statute has commenced to run, it will stop at the death, and will not commence running again until there is administration. We contend that the same rule applies in *favor* of deceased persons' estates, as has been decided to apply *against* them in favor of creditors.

An administrator or executor only can sue for personal assets, on the death of the party. *Lemon's heirs vs. Noland et al.*, 15 *Ark.* 436.

Where there is a want of persons to sue and be sued, the statute will not run. *Angell on Lim.* 61.

FOWLER, contra. Three years is the limitation on the action in this case—see *section* 7, *chap.* 99, *Digest;* and the plaintiff has not brought himself within the exception in *section* 23.

The general rule is, that when the statute begins to run, it runs on, regardless of death or other disability. 13 *Wend.* 269;

1 *John. Rep.* 176; 1 *Bibb Rep.* 261; 1 *How. United States Rep.* 52; 10 *Smedes & Marsh.* 101; 3 *Ark.* 413; *Angell on Lim.* 206.

Mr. Justice SCOTT delivered the opinion of the Court.

The plaintiff in error, as administrator of Wm. H. Bump, commenced this suit on the 4th day of November, 1853. It was an action of assumpsit on the common counts. The bill of particulars disclosed a demand for services rendered by Bump, as a clerk on a steam-boat, ending on the 15th of April, 1848. The plea of the statute of limitations of three years, was interposed. To this, the plaintiff replied that the intestate died in April, 1848, before the bar attached, and that no administration was taken or granted on his estate until the 18th of May, 1853, when they were granted to the complainant, who commenced this suit within one year thereafter. To which replication, a demurrer was interposed, which the court sustained, and the plaintiff refusing to reply further, final judgment was rendered against him, and he brought error.

By the *7th section* of the statute, (*chap.* 99, *p.* 696, *Digest*,) three years is the limitation for such actions: and, by the *23d section*, (*id.*, *p.* 699,) it is provided, that "If any person entitled to bring any action in the preceding provisions of this act specified, die before the expiration of the time herein limited for the commencement of such suit, and such cause of action shall survive to his representatives, his executor or administrator may, after the expiration of such time, and within one year after such death, commence such suit, but not after that period."

This section is but the enactment by our Legislature, of the equitable construction that the English courts gave to the fourth section of the statute; (21*st James* 1*st*,) which was, that when the action was not barred at the death of the testator, his executor should be allowed twelve months, from the time of his death, to commence suit, although the bar would have attached before that year would have elapsed. *Grice vs. Jones*, 1 *Steward's R.* 254. It has, therefore, no material bearing upon the real question raised

by the demurrer in this case; which is, whether or not, when the statute commenced running in the life time of the deceased, it was stopped by his death until administration was granted upon his estate. That it did commence running in this case, in the life time of the deceased, is manifest from the pleadings and the bill of particulars; because, it was for personal services rendered by the deceased, which is claimed as due at the end of the services.

In discussing this point, in the case *Aikin vs. Bailey*, 5 *Eng. Rep.* 583, after stating the rule to be, that when the statute begins to run, it will continue to run, notwithstanding any subsequent disability, and whether that disability be voluntary or involuntary, and citing Judge KENT as saying, in *Peach vs. Randall*, 1 *J. R.* 176, "that he knew of nothing that could arrest the progress of the statute," certain cases were cited as showing some qualification or explanation of the rule, upon which it was remarked: "Most of these cases resting upon the principle, that to authorize a just application of the statute, there should be an existing cause of action, a party to sue, and one liable to suit."

If the substance of these cases had been stated, instead of merely citing them, this remark would have been calculated to lead no one into error, as it would have been seen that it was to be limited, in its application, to cases like those cited, both as to the time when the statute would begin to run, and as to when its progress would be arrested, either by some positive statutory provision, or by some equally potent operating principle of law.

Thus, in the case of *Jackson ad. vs. Wren*, 3 *Steward's Rep.* 172, where the defendant took the negro from the estate of the deceased, after his death and before the grant of administration, it was held that the statute did not begin to run until the grant of administration.

So, in the case of *McKinder vs. Littlejohn*, 1 *Iredell's R.* 66, upon the statute of North Carolina, which requires creditors to present their claims within seven years after the death of the debtor, or they will be forever barred, it was held that this time did not begin to run until administration was granted upon the

estate. These two classes of cases having been cited more for explanation of the rule than as showing qualifications of it.

The third class cited, however, did qualify the rule—as the Mississippi and South Carolina cases—where, although the statute did begin to run in the life time of the deceased; yet, inasmuch as upon his death the statute prohibits suit against his representative until after nine months from the date of the grant of administration, these nine months are excluded from the computation; because, during that time, the statute arrests the remedy. And of this class, also, are the cases of *Montgomery vs. Hernandes, &c.*, 12 *Wheaton Rep.* 129, and *Trecothic vs. Austin*, 4 *Mason C. C. R.* 16, where the appeal arrests the cause of action, and holds it in a state of suspended animation.

And it is in reference to these latter cases, that Mr. ANGELL, in his work on Limitations, *chap.* 7, *sec.* 9, *p.* 60, lays down the rule, that "There must not only be a person to sue, but a person to be sued;" which is equally calculated to lead one into error, unless regard is had to the cases he cites to sustain it, whereby it is to be limited in its scope, to that class of cases.

In the subsequent case of *Etter vs. Finn*, 7 *Eng. Rep.* 632, the incautious remark referred to in the case of *Aikin vs. Bailey*, drew this court into the error of holding, in the latter case, that the death of a party arrested the running of the statute, which had commenced to run in his life time. And although that case was afterwards overruled in the case of *Walker et al. vs. Byers*, 14 *Ark.* 259, so far as it applied the general statute of limitations, to claims against the estates of deceased persons, the error, as to the death of a party arresting the running of the statute, was incautiously retained, in the incidental remark, not called for by the case before the court, "that the principle for which the case of *Aikin vs. Bailey* was cited in *Etter vs. Finn*, was undoubtedly sound, and was applicable to the general statute of limitation.

Thus, we have now but to correct this *dictum* in the case of *Walker et al. vs. Byers*, as to the general statute of limitations,

in order to make all the authoritative cases in this court harmonize with the law, as we still find it, and now hold it, as we did in *Aikin vs. Bailey*, as above explained.

And thus holding the law, it is clear, as the death of the plaintiff below did not stop the running of the statute against *him*, which, under the general rule, had begun to run in his life time, the cause of action was barred; and hence, the demurrer was properly sustained by the court below.

The judgment must, therefore, be affirmed.

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## BERNIE VS. VANDEVER AS AD.

The refusal of the Circuit Court to permit an answer to be filed after the time allowed; or the striking an answer from the files when so filed, is within the discretion of the Circuit Court, and this court will not interfere, unless in cases of palpable abuse of such discretion; and so, this court will not reverse a decree for such cause, when by consent of parties it was ordered that the answer be filed within a certain time, or the bill be taken as confessed.

Upon a reference to the master in chancery to state an account between the parties, he should give them reasonable notice of the time and place of taking testimony and stating the account—to notify them to appear within a few hours after the reference, between 8 and 12 o'clock at night, is not reasonable notice.

A defendant in chancery, although he may have made default to answer, has a right to appear before the master, and have process for witnesses, on a reference to state an account between him and the complainant.

Upon the death of one of several partners, the partnership is dissolved; and the surviving partner is entitled to the partnership property and effects, for the purpose of settling the accounts, and paying off the debts of the firm.

Where one of two partners dies, if the surviving partner, instead of settling the partnership property, uses it in carrying on the business, the representative of the deceased partner may, at his election claim an interest, according to the principles of equity, in the subsequent profits; or take interest upon the amount due to him, after a full settlement of the partnership debts, at the time of the dissolution.

Where an answer is necessary to a full and fair development of the whole transaction, and to the just and equitable division of partnership effects sought to be recovered by the bill, it should be permitted to be filed, if a full and perfect answer; and if delay or inconvenience occur to the opposite party because filed out of time, terms of cost, &c., should be imposed.

*Appeal from the Circuit Court of Sebastian County in Chancery.*

The Hon. FELIX J. BATSON, Circuit Judge.

S. F. CLARK and S. H. HEMPSTEAD, for the appellant. 1. That the report in this case was partial and unjust, and ought to have been set aside.

2. That the exceptions to it should have been sustained.

3. That the testimony does not warrant the decree, and that it is erroneous.

Authorities referred to: *Digest* 236; 1 *Dev. Ch. R.* 61; 2 *Munf.* 235; 9 *Porter* 79; 13 *Ark.* 619; 4 *Litt.* 258; 2 *John. Ch. R.* 495; 2 *Daniell* 1390, 1388; 2 *Smith* 151; 2 *Daniel* 1379*th to* 1395, 1355.

Mr. Justice WALKER delivered the opinion of the Court.

This was a suit brought by Vandever, as the administrator of the estate of Darby, against Charles A. Bernie, the surviving partner of the late firm of Bernie & Darby, for the purpose of having an account and settlement of the partnership accounts, and for payment of the profits, &c., to the administrator.

As the questions of law presented for our consideration grow out of matters of practice, and of instructions to the master, to whom the accounts were referred, we will only state so much of the case, as will be necessary to a proper understanding of the questions thus presented.

The bill was filed on the 26th of July, 1851, and the cause came to hearing at the February term, 1852, upon bill and answer, and was referred to the master to state an account and report to the next term.

At the August term, 1852, the time when the master was required to report, by consent, the complainant dismissed his suit with leave to file a new bill *instanter*, which was done; and to which the defendant entered of record his appearance, and leave was given him to file his answer to the last bill filed, within thirty days, and in default thereof that the bill be taken as confessed. And it was further ordered that the case be set for final hearing at the next term, as if the same was then really at issue, upon bill, answer, replication and depositions, unless the defendant fail to answer, and in that event, the case was to be heard upon bill and depositions *pro confesso*.

On the 18th January, 1853, the defendant filed his answer to the bill.

At the February term, 1854, the complainant moved the court to strike the defendant's answer from the files, because it was filed after the time allowed by order of court, which motion the court sustained, and the bill ordered to be taken as confessed, and the cause continued until the next term, with leave to take depositions.

At the August term, 1854, the defendant moved the court to set aside the order striking his answer from the files, and to permit him then to file the same. This motion the court overruled; and, thereupon, ordered the case to be referred to Archibald Rutherford, the master in chancery, to take an account and report with all convenient speed. On the next day after his appointment, the master reported. The defendant moved the court to set aside the order referring the matter of account to the master, because the order directed the master to take an account of profits of the partnership concern after the death of the intestate up to the filing of the bill, and interest thereon. 2d. Because the master was instructed to report interest upon the sum found to be due

the firm at the death of the intestate down to the time of stating the account. 3d. Because the allegations in the bill were directed to be taken as true. 4th. Because the master had been one of the attorneys in the cause for the defendant.

This motion the court overruled.

The defendant, thereupon, filed his motion to set aside the master's report, and supported the same by affidavit. For causes: 1st. That the master was once his attorney in the case, and he believes is prejudiced against defendant, and not inclined to hear all the testimony on both sides, and state the accounts justly and fairly: that notice was served upon the defendant to appear between 8 and 12 P. M., on the 17th day of August, 1854, (the day on which the case was submitted to the master) to attend before the master to the taking of evidence, &c.

The defendant, as ground for setting aside the report of the master, states on oath that he did appear at the time and place appointed, and there tendered to the master the names of witnesses, and requested subpoenas to bring them before the master to testify in his behalf, but that the master refused to allow such process or to hear any evidence whatever on the part of the defendant.

And the defendant, for second ground, stated on oath that the account was stated without evidence on his part, and the report made in secret, at an unusual hour for business, upon the evidence of the complainant alone.

This motion the court also overruled, and received the report and rendered final decree thereon against the defendant, from which he appealed.

The first ground of objection to the decision of the court is, that the answer of the defendant was rejected.

This was a decision of the court below in the exercise of its discretion in bringing the cause to a hearing, and with which this court will not interfere, unless in cases of palpable abuse of such discretionary power to the prejudice of the rights of the parties litigant. Such was not the case in this instance. It is true that the

defendant was not bound to enter his appearance to the action: and after he had done so, he was not bound to submit to arbitrary and unjust restrictions. But it seems that he consented to answer within 30 days, and upon his failure to do so, that the bill should be taken as confessed. Having thus by consent waived all objection to the length of time given him to answer, as well as to the consequences which would follow his failure to do so, he has no cause to complain that the court held him to abide by the order made. But then, although the answer was not filed within the time fixed upon by the court, still it was filed in advance of the regular time for filing the answer, and as it remained on file for more than a year, and was not objected to as insufficient, it was not a matter of surprise to the complainant; and in view of the nature of the discovery sought, was almost indispensably necessary to a full and fair settlement of the account. The Circuit Court, under such circumstances, and where neither delay nor surprise was occasioned, should have permitted the answer to be filed. But, as we have before remarked, this is a matter of practice left to the discretion of the court below, with regard to which we will not ordinarily interfere, and certainly not when done by consent of parties, as appears here to have been the case.

Passing this as a matter which, of itself, would not be sufficient ground for reversing the decision of the court below, we come to consider those touching the submission of the case to the master for an account, and the proceedings before him.

The statute requires that the master should give the parties notice of the time and place of stating the account. This notice was evidently intended to afford to the party thus summoned, time to prepare his defence or sustain his allegations. The statute is silent as to what length of time shall be given after notice to prepare for hearing the case before the master. This is left a matter of discretion, to be determined by the master, and should be a reasonable notice.

In this instance, a few hours were too short a time, and between eight and twevle o'clock at night, an improper time for business,

The defendant could not be expected to prepare himself, and appear at such hours to transact business; and, for this reason, the report should have been set aside.

But even if the notice had been sufficient, it seems that the defendant was refused process for witnesses, and denied the right to introduce any evidence before the master.

This was so palpable a violation of the rights of the defendant, as only to be accounted for upon the supposition that the master considered the default of the defendant as precluding him from all right to be heard in defence. In this he was clearly mistaken. Had this been a common law default, the defendant would still have had a right to offer evidence in mitigation of damages, and much more so would it be the case in a court of chancery.

The next question relates to the instructions given by the court to the master upon the reference of the cause to him for settlement.

Upon the death of the intestate, the partnership was dissolved, and Bernie, the surviving partner, was by law entitled to the possession of the partnership property and effects, for the purpose of settling the accounts and paying off the debts of the firm.

The first instruction given the master was, therefore, correct, because upon a settlement of accounts up to that time, it could be ascertained what was coming to the intestate's estate according to the terms of partnership.

But the second instruction required the master to take an account of the profits from the death of the intestate to the filing of the bill. This instruction is predicated upon the allegations in the bill (which by default are taken as true) that instead of selling the property, the surviving partner used the tools and materials on hand in carrying on the trade and business followed by the firm before the dissolution took place. It is true that if the surviving partner, instead of selling the partnership property, uses it in carrying on the business lately followed by the firm, the representative of the deceased partner may, at his election, claim an interest in the profits of the concern so carried on, or take in-

terest upon the amount due to him, after a full settlement of the partnership debts, at the time of the dissolution; because, from the time of the settlement of the firm debts, so much of the profits as are coming to the representatives of the deceased partner, whether so ascertained upon actual settlement or not, are to be taken as held by the surviving partner in trust for the benefit of the estate, and the fund, no matter how invested, is still so considered, and may be followed up, and the proceeds of the speculations by the investment claimed.

But upon another ground, also, the representative of the deceased partner may claim profits in the trade carried on after the death of one of the partners; because, although it is true that, upon the death of one of the partners, the partnership is for most purposes dissolved, still a community of interest remains in the partnership effects on hand at that time, until they are disposed of. Thus, in *Cranshay vs. Collins*, 15 *Ves.* 218, it was held that, after a dissolution of a co-partnership, the joint property may be used by the survivors for the benefit of all whose property it is, for the purpose of winding up engagements with third persons. And a like principle is laid down in *Ex parte Williams*, 11 *Ves.* 5. In all such cases, the survivor holds the partnership effects in trust until the same are distributed amongst the parties. And this distribution is not to be made until the partnership debts are paid. *Washburn vs. Goodman*, 17 *Pick.* 537.

From this view of the case, it is evident, that the representative of the deceased partner had a right to profits, or interest upon the sum due to the intestate's estate after the dissolution of the firm by the death of Socrates Darby. The profits to be estimated upon the amount ascertained upon settlement to be due the intestate's estate after settlement of the debts and liabilities of the firm, but not upon the labor and materials brought into the trade by the surviving partner, at his own proper cost and expenses. In other words, that if the surviving partner, instead of selling off the partnership effects, and after the payment of the debts of the firm, paying over the sum due the intestate's es-

tate, continued to use the property and effects of the firm, or such part thereof as should have been paid over to the representative of the deceased partner; to that extent, and in the proportion that such sum bore to the whole capital invested in trade after the dissolution, should the profits be divided.

On the other hand, if the representatives of the deceased partner preferred to do so, they might elect to take interest upon the sum due, or which should have been paid after the settlement, or a reasonable time for the settlement of the partnership transactions. *Millard vs. Randall, Harring Ch.* 373.

There would, therefore, have been no impropriety in directing the master to state an account of both interest and profits, but not to charge both against the defendant in making up the account; because it is evident that he could not take both — and the court, in this case, in making up the decree, seems to have recognized this rule, as it excluded profits after the dissolution, and allowed interest in making up the decree.

From the view which we have thus taken of the case, it follows that the judgment and decision of the court below must be reversed and set aside, and the cause remanded.

And thus considering the extent of the interest of the representatives of the deceased partner and the profits arising from the continuation of the business of the firm after the dissolution by death, and of the whole object and purpose of the bill, which is essentially for a discovery, as well as for an account, we are of opinion that the answer of the defendant is necessary to a full and fair development of the whole transaction, and to the just and equitable division of the partnership effects. The allegations in the bill, from the situation of the parties and the means of information possessed by the administrator, are not so certain and definite as to become reliable evidence upon a confession of the allegations by default. The rejection of the answer was evidently upon technical, rather than substantial grounds. It was not objected to, as not being a full and perfect answer; and was filed in time to prevent either surprise or delay. We think, under such

circumstances, the answer should not have been rejected; but if delay or inconvenience had arisen, it should have been permitted to be filed upon terms of cost, &c. Indeed, as a general rule, answers, in cases like the present, should be encouraged: and, in some cases, when a discovery is necessary to the relief sought, may be required.

When this case goes back to the Circuit Court for further proceedings, we think the court should, if asked for by the defendant, permit him to file his answer, upon equitable terms, if delay, &c., is thereby occasioned, so that issue may be taken, and a full hearing of the whole case had upon the merits.

# CASES

## ARGUED AND DETERMINED

IN THE

# SUPREME COURT OF ARKANSAS,

AT THE JANUARY TERM, A. D. 1856.

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### COCHRAN VS. JORDAN, SPECIAL ADM.

The statutory judgment on a forfeited delivery bond, is perfect, immediately upon the forfeiture, unless set aside for cause at the return term of the execution, without any action of the court confirming the judgment: and as the original judgment is extinguished, *eo instanti*, upon the forfeiture, by the statutory judgment, a writ of error will not lie to the original judgment, though sued out before the return term of the execution.

*Writ of Error to Clark Circuit Court.*

FLANNAGIN, for the plaintiff.

JORDAN, for defendant.

Mr. Justice SCOTT delivered the opinion of the Court.

To the writ of error issued in this case, on the 11th September, 1855, the defendant in error has interposed his plea, setting up

that on the 28th of April next preceding, the plaintiff below sued out execution on the judgment in question, returnable into the Circuit Court of Clark county, from whence it issued, the 19th of September next following. That on the 21st of May, this writ was levied upon personal property, which was re-delivered to the defendant below, upon his executing in due course with security, the statutory bond, for the delivery of the same, on the 4th day of June following, to the sheriff of Hempstead county, to whom the writ was sent. That the property was not delivered in accordance with the bond, and that the latter became forfeited, and was returned with the writ of execution by the sheriff, wholly unsatisfied. To this plea, a demurrer has been interposed, and the other party has joined.

In support of the demurrer, it is urged that, because, at the return term of the writ of execution, that, as well as the forthcoming bond returned with it, may be quashed for defects apparent upon their face, it should be holden that the statutory judgment, which springs into being upon the forfeiture of a forthcoming bond, is but *in fieri*, or interlocutory, until after the lapse of that term.

Upon a parity of reasoning, it might be urged, that an ordinary judgment of the Circuit Court should not have the force and effect of one, until after the lapse of the period limited for the suing out of a writ of error, which no one would pretend, since from time immemorial it has been supposed that a judgment of a court of record was none the less a judgment of such a court, with all its legal consequences, because of the possibility that by some future proceeding in the law courts, before these should be closed to the opposite party by lapse of time, and the equity courts alone remain for him, its judgment should be held for nought.

In the same sense that the common law is the author of the judgment of a court of record, and establishes its effects and consequences, our statute is the author of that species of judgment, we are now considering, and establishes their effects and conse-

quences. Both operate upon the parties and persons bound by them, by way of estoppel, the one by matter of record; the other by matter *in pais*. It is by express statutory enactment, that upon the forfeiture of a forth-coming bond, that forfeiture has the force and effect of a judgment against all the obligors in the bond, for the amount due upon the record judgment, which it, *eo instanti*, extinguishes, upon the principle that a party cannot have more than one judgment for the same subject matter at the same time. *Phillips et al. vs. Wills, Pease, & Co.*, 14 *Ark. R.* 597; *Biscoe et al. vs. Sandefur et al.*, *ib.* 583. If, at the return term of the execution, this statutory judgment should be overturned by a quashal of the execution and bond for any of the causes indicated, the original judgment would be reviewed, just as the original cause of action would be reviewed by the reversal on error of the record judgment itself, in which, during its existence, the cause of action was merged.

It requires no action of the Circuit Court at the return term of the execution to confirm these statutory judgments, and make them final, as we have already said, in the case *J. & W. Sniser vs. Robertson & Hudson*, 16 *Ark. Rep.*, but they stand, by operation of the statute, out of the course of the common law, and are in full life, even without the return of the sheriff, which the law requires him to make within two days after the forfeiture; because, as we have said in *Ruddel vs. Magruder*, 6 *Eng. R.* 584, this return is but the evidence of the forfeiture upon which the clerk is to act: and hence, the want of it does not make the fact of forfeiture any the less a fact, and is to be enforced by rule and attachment, at the application of any party interested, either for or against the validity of the forth-coming bond.

In the light of these views, we think it inevitable that the plea is good. The demurrer must, therefore, be overruled, and judgment rendered accordingly.

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## SADLER ET AL. ADM. VS. SADLER.

The plaintiffs suing as administrators, having proved by the record of the Probate Court, upon an issue to the plea of *ne unques administrators*, that letters of administration upon the estate of their intestate, had been granted to the defendant, and afterwards revoked; and that administration was then granted to them — the reading, by the defendant, of the letters granted to him, was not prejudicial to the plaintiffs.

In such case, the letters of administration granted to the plaintiffs, were *prima facie* evidence of their authority to sue: and although an instruction, that the plaintiffs could not recover unless they are *bona fide* administrators, would be objectionable; yet there was no substantial error in such instruction, the court having also instructed the jury that if they believe the letters of the defendant were revoked, and that letters were granted to the plaintiffs, they are, in fact, the administrators.

Hearsay statements are clearly inadmissible as evidence; and the court should promptly exclude from the jury any incompetent matter which might tend to influence their conclusion.

A witness, in the course of his examination, after some unobjectionable testimony, makes a statement upon hearsay; the party against whom he is called objects to the "above statement;" and, upon his objection being overruled, excepts; the witness then proceeds with his testimony: HELD, That it is sufficiently manifest that the objection was made to the hearsay testimony.

Where the court refuses to give an instruction in the words of the party asking it; but in lieu thereof, gives one more favorable to him, he has no cause to complain: nor where the court refuses to give instructions, unexceptionable in themselves, if the substance of them be given in other instructions—the multiplication of instructions disapproved.

It is error in the court to give an instruction not warranted by the testimony, and which may mislead the jury.

The power of the Legislature to pass laws limiting the time in which actions shall be brought, and controversies about the title to property shall be at repose, so that all existing remedies be not cut off, *eo instanti*, is now too well established to admit of question.

It is beyond question, that the possession of a slave for a period of some thirteen years—the possessor of the slave during all that time, claiming and controlling him as his

own property, and not obtaining possession under any instrument of writing—by virtue of the statute, (*Digest, chap.* 153, *secs.* 3, 4, 5,) vests in the possessor a perfect legal title to the slave, which he may rely upon as a bar to an action against him for the slave, or which he may assert, if the slave be deforced from him, in a suit for his recovery.

An instruction that "when the admissions of a party are introduced in evidence, all he said in the same conversation is evidence before the jury, as well what he said in his own favor as against him," should be qualified by the further instruction that the jury should compare its consistency with the other testimony in the cause, and so form their opinion of the weight to be attached to it.

*Appeal from Yell Circuit Court.*

Hon. WM. H. FEILD, Circuit Judge.

S. H. HEMPSTEAD, for the appellants. In this case, the deceased having had peaceable possession of the slave for five years from the 19th of December, 1846, and there being no writing acknowledged and recorded, his title was perfect; and, therefore, there should be a new trial.

JORDAN, for the appellee. It was purely a question of fact for the jury to find, whether plaintiff's intestate had held peaceable possession of the boy five years before the commencement of this suit, as his property, or under color of title; or, whether, during the time he had held possession, they might presume a sale, or whether he held him by a loan, or otherwise, and prior to his death had surrendered possession of the boy to defendant, as his property.

From the fact that defendant had possession of the boy some three months, prior to Lucien's death, claiming him as his own, and that defendant sent for him to attend on his brother in his last sickness; the jury not only had the right to infer he belonged to defendant, but it was the only legitimate conclusion, from the facts before them.

Some portions of the testimony of A. S. Heck, defendant's witness, were objected to on the trial, and overruled. A part of the

testimony so objected to, was *relevant*, and the motion failed to point out and distinguish between the relevant and irrelevant, and, of course, was properly overruled. *Gracie vs. Robinson*, 14 *Ark. Rep.*

The instruction given by the court in lieu of the 3d, asked by plaintiffs, was more favorable to their cause of action; and, therefore, no ground of error. The substance of the 8th and 9th was embraced in the 5th and 6th; and, consequently, properly refused.

The 11th instruction asked by the plaintiffs, was not supported by the evidence, and properly refused, there being no evidence that deceased held the slave by virtue of any deed or instrument of writing.

The 1st and 2d instructions given, on motion of defendant, when taken in connection with the instructions given for the plaintiffs, are clearly applicable to the case.

That the 3rd is correct, the following authorities are submitted: *Adkins vs. Hershy*, 14 *Ark.* 442; 1 *Greenl. Ev., sec.* 201, 152; *and note, on page* 305; 4 *Term R.* 669; 2 *Stark.* 34; 1 *Phil.* 34, 357, *note* 1.

The plaintiffs having had the full benefit of the law upon the trial, through the medium of instructions, and the jury having found the facts against them, this court will not disturb the verdict, unless there is a total failure of evidence to support it. *Turner vs. Higgins*, 14 *Ark. Rep.* 21; *Brown vs. Cook*, 14 *Ark. Rep.* 202; *Floyd et al. vs. Ricks.* 14 *Ark. Rep.* 297; *Miller vs. Ratliff*, 14 *Ark. Rep.* 419; *Drennen vs. Brown*, 5 *Eng.* 140; *Sparks vs. Beavers*, 6 *Eng.* 680; *State Bank vs. Conway*, 18 *Ark.* 344.

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

On the first day of February, 1854, Wilhelmina L. Sadler, administratrix, and John W. May, administrator of Lucien O. Sadler, deceased, brought an action of replevin, in the Yell Circuit Court, against Theodore P. Sadler, for the recovery of a slave named Ben. The declaration contained two counts; one in the *cepit* and the other in the *detinet*.

The defendant pleaded, 1st. *Ne unques* administrators: 2d. *Non cepit:* 3d. *Non detinet:* 4th. Property in the defendant as administrator of the said Lucien O. Sadler: and 5th. Property in the defendant in his own right, and not in the plaintiffs as administrators, &c. Issues were made up upon these pleas, trial, verdict for the defendant, motion for a new trial overruled, and a bill of exception taken.

So much of the evidence, and instructions of the court to the jury, as relates to the issue upon the plea of *ne unques administrators*, will be considered first.

It appears from the bill of exceptions that the plaintiffs read in evidence letters of administration granted to them by the Probate Court of Johnson county, upon the estate of Lucien O. Sadler, deceased, bearing date 27th January, 1854.

They then introduced a transcript from the record of said Probate Court, showing that on the 6th day of January, 1854, letters of administration upon the estate of Lucien O. Sadler, deceased, were granted by the clerk of the court in vacation, to John J. Walker, the widow of Sadler (Wolhelmina L.) waiving her right to administer, and his children being infants. That at the next succeeding term of said Probate Court, on the 25th of January, 1854, on the petition of the defendant, Theodore P. Sadler, representing himself to be a creditor of Lucien O. Sadler, deceased, and that Walker was neither a creditor, nor a distributee of said estate, the letters granted by the clerk, in vacation to Walker, were revoked by the court, and letters granted to the defendant. That on the 27th of January, 1854, on the petition of the plaintiffs, the letters granted to the defendant were revoked by the court, and letters granted to the plaintiffs. No appeal appears to have been taken from this last order of the court.

After the plaintiffs had closed their testimony in the cause, the court permitted the defendant, against the objection of the plaintiffs, to read in evidence the letters of administration granted to him upon the estate of Lucien O. Sadler, by the Probate Court of Johnson county, and the plaintiffs excepted.

On this branch of the case, the court instructed the jury, at the instance of the plaintiffs, as follows:

(7.) "That the letters of administration produced here by the plaintiffs, are evidence to prove the fact of the plaintiffs' representative capacity.

"(10.) That if they believe, from the evidence, that the defendant was appointed administrator by the Probate Court of Johnson county, and that afterwards, at the same term of said court, his letters so granted were revoked, and that during the same term of said court, letters of administration were granted to the plaintiffs, the plaintiffs are in fact the administratrix and administrator of the said Lucien O. Sadler, deceased."

On the motion of the defendant, the court instructed the jury as follows:

"(1.) That the plaintiffs cannot recover in this action unless they were *bona fide* administrator and administratrix of the estate of Lucien O. Sadler, deceased, at the commencement of this suit, as in their declaration alleged."

To the giving of which the plaintiffs excepted.

The decision of the court permitting the defendant to read in evidence the letters of administration granted to him by the Probate Court of Johnson county, upon the estate of Lucien O. Sadler, could hardly have been prejudicial to the cause of the plaintiffs, because the transcript from the record of the Probate Court, which they had previously read in evidence to the jury, embraced a copy of the same letters. Moreover, the court charged the jury in effect, by the instruction copied above, numbered (10), given at the instance of the plaintiffs, that the letters granted to the defendant having been revoked by the Probate Court during the same term at which they were granted to him; and, thereupon, letters granted to the plaintiffs, they were in fact the administrators of the deceased.

The instruction copied above, numbered (1,) and given at the instance of the defendant, was unobjectionable, if the words "*bona fide*" had been omitted. The issue was whether the plaintiffs were

the legal administrators of Sadler, and not whether they were such in *good faith*. The jury under this issue, had nothing to do with their good or bad faith in becoming the administrators of Sadler, or in acting as such. The letters of administration introduced by the plaintiffs, were *prima facie* evidence of their authority to sue. The defendant failing to show that the letters were forged, that the Probate Court had no jurisdiction and power to grant them, or that, from some other legal cause, they were null and void, there was but little or nothing under the issue of *ne unques administrators* for the jury to pass upon. Whether the Probate Court had granted the letters to the right or wrong person, or had acted irregularly in revoking the letters of the defendant, and granting letters to the plaintiffs, were not questions for the jury to determine. Such questions could only properly arise on a direct proceeding to review the action of the Probate Court in the matter. See 2 *Greenl. Ev.*, *secs.* 339, 340.

But taking all the instructions given by the court to the jury on this branch of the case together, there is no substantial error: none that could have mislead the jury.

On the other branch of the case, the evidence and action of the court were as follows:

John Cravens, witness for the plaintiff, testified, that Lucien O. Sadler, deceased, had been in the possession of, and exercised acts of ownership over, the slave Ben for some ten, twelve or fourteen years prior to his death. That Ben was in his possession at the time of his death. Witness had lived within a mile of Lucien O. ever since Ben became his property, and had never heard of one setting up any claim to the negro prior to the death of Lucien O. The defendant lived in Yell county, some fifteen or twenty miles from Lucien O. during all the time he had possession of Ben.

Nehemiah Cravens, witness for plaintiffs, testified that the slave in controversy, Ben, was in possession of Lucien O. Sadler from the year 1839 or 1840, until his death. That he exercised acts of ownership over him, and he was regarded as his property.

Witness had never heard of any one setting up any claim to the negro prior to the death of Lucien O. Witness knew the negro when he belonged to Logan. That Logan or Clark sold him to the defendant about the year 1836, who had possession of him for three or four years prior to 1839 or 1840, and then the negro came into the possion of Lucien O. and so remained until his death, as far as witness knew. Witness saw the negro waiting on him in his last illness.

Thomas Haines, witness for plaintiffs, testified that he had known the negro Ben some seven or eight years. He was in possession of Lucien O. the first time he ever saw him, which was seven or eight years before the death of Lucien O. Witness worked for him frequently, and the negro was always in his possession, and he exercised acts of ownership over and controlled Ben as he did his other negroes. Never heard of any one else having any right or claim to the negro from the time witness first became acquainted with him until after the death of Lucien O. Witness was present when the writ of replevin was served upon the defendant, and saw the negro upon the premises working on the defendant's farm.

John Haines, (by whom introduced does not appear) testified that Lucien O. held possession of the negro five or six years; did not know that he remained in his possession all the time up to his death. Witness saw the boy in possession of the defendant some two or three months before the death of Lucien O. That he was working for the defendant, on his plantation, and remained in possession of the defendant until a few days before the death of Lucien O. That the defendant went over to see Lucien in his last sickness, and while there sent for the boy Ben to come and wait upon his brother, Lucien, in his last illness. Witness lent defendant his horse to convey the negro over to Lucien's, and he remained there and waited on Lucien until after his death. It was a negro boy of Lucien's that came after Ben. The boy said master Preston (Theodore P.) sent him after Ben, and that his master Preston requested witness to loan him his horse

for Ben to ride over; which witness did, and Ben rode off his horse. That some three or four weeks before Ben was replevied, witness saw him on the farm of defendant laboring for him. That while Ben was in possession of defendant, at his residence, Ben passed by the door, and Mr. Duncan asked defendant whose negro that was? Defendant said it belonged to him, and always had belonged to him—witness did not recollect whether this conversation took place while Ben was in possession of defendant before the death of Lucien O. or after. Defendant is sometimes called Preston, and sometimes Theodore.

A. S. Heck, witness for defendant, proved the signature of L. N. Clark to the endorsement upon a bill of sale shown to him, and to which he was a subscribing witness. He then stated that he knew the boy Ben before Lucien O. got possession of him. That defendant purchased the negro from Jonathan Logan or Clark, and held possession of him until about 1839 or 1840. That defendant's wife died about that time, and after her death, he broke up house-keeping, and Ben and three others of his negroes went to Lucien O. Sadler's, where they all remained about five or six years. That Jonathan Logan told witness that defendant sold all but Ben. To this statement of the witness—the above statement, a sit is termed in the bill of exceptions—the plaintiffs objected, but the court overruled the objection, and permitted it to go to the jury as evidence, and plaintiffs excepted.

The statement of this witness as to what Jonathan Logan told him about the defendant's selling all the negroes but Ben, was clearly incompetent, and should have been excluded from the jury, as evidence by the court. It being now the settled law in this State, that the verdict of the jury is conclusive upon the facts submitted to them, unless their finding is clearly not sustained by the evidence, the court should promptly exclude from them any incompetent matter, which might tend to influence their conclusion, and more especially where the testimony is in conflict, and slight circumstances might turn the scale one way or the other.

It is urged by the counsel for the defendant, that the motion to exclude was not sufficiently explicit in pointing out the particular portion of Heck's testimony that was deemed objectionable by the plaintiffs. The bill of exceptions might have been more explicit, but we think it sufficiently manifest that the objection was intended to apply to what the witness was permitted to state that Logan had told him about the defendant selling all the negroes but Ben. There was nothing in the testimony of Heck, previous to this, that could have been objectionable, and in the bill of exceptions, the objection and exception immediately follow this statement, and then the remainder of Heck's testimony is stated.

Heck further testified, that in the year 1832 or 1833, and for two or three years, the defendant and Lucien O. were in partnership in a farm, stock and property, as he understood. That they held themselves out to the world as partners at that time—to this statement, the plaintiffs also objected, but the court overruled the objection and they excepted.

He further testified, that the defendant left Johnson county, where he and Lucien O. were said to be in partnership, in the year 1835 or 1836, and witness had never understood them to be in partnership since that time. That Ben did not go to Lucien's to live until some years after the defendant moved to Yell county. Witness did not know whether they dissolved partnership or not. He had never heard them called partners since the defendant moved to Yell county to live in 1835 or 1836.

It does not appear from the bill of exceptions, or the argument of counsel, what object the defendant had in view, in proving a partnership between himself and his brother Lucien. It may be supposed that it was designed to conduce to show a joint ownership and joint possession of the negro Ben. But it seems, from the statement of the witness, that the partnership ceased about the year 1836, which was several years prior to the time that the boy Ben went into the possession of Lucien. So that, whether this testimony was relevant to the issue or not, it is not perceived that

the admission of it by the court could have been of any prejudice to the plaintiffs.

The court next permitted the defendant to read to the jury, against the objection of the plaintiffs, a bill of sale made by Jonathan Logan, conveying to Lorenzo N. Clark "a negro man slave, about twenty-five years old," &c., bearing date 12th February, 1836, together with an endorsement thereon, made by Clark, transferring the bill of sale to the defendant, dated 17th February, 1836.

The plaintiffs objected to the introduction of the bill of sale and assignment, because no negro was named or identified therein, and no evidence offered in connection therewith to show that Ben was the negro conveyed thereby.

The witnesses, both for the plaintiffs and the defendant, had proven that the defendant purchased the boy Ben from Logan or Clark about the year 1836, kept him in his possession some three years, and then delivered him to Lucien O. Sadler. Even if this testimony was not sufficient to lay a foundation for the introduction of the bill of sale and assignment, their admission could not have been prejudicial to the plaintiffs, because they only conduced to prove a fact which the plaintiffs themselves had already proven.

It appears that Lucien O. Sadler died in Johnson county, in December, 1853. The above is all the evidence introduced by the parties. The instructions of the court to the jury, are as follows:

At the instance of the plaintiffs:

1. "That no bill of sale or other instrument of writing is necessary to transfer property in a slave—the title of slaves pass by sale and delivery. (*Given.*)

2. "Five years peaceable possession of slaves after 19th December, 1846, is sufficient to give the possessor a right of property against all persons. (*Given.*)

3. "That if the jury believe, from the evidence, that Lucien O. Sadler, deceased, had five years adverse peaceable possession of the

slaves mentioned in the declaration, it gave his administratrix and administrator a right to said slave against all persons, unless such possession was under and by virtue of a deed, or some instrument of writing from the owner, duly acknowledged and recorded."

This instruction the court refused to give, but gave in lieu thereof the following: "That if the jury believe, from the evidence that Lucien O. Sadler, deceased, had five years adverse peaceable possession of the slave mentioned in the plaintiffs' declaration, it gives his administratrix and administrator a right to said slave against all persons."

4. "That possession of personal property is *prima facie* evidence of ownership, and if the jury believe, from the evidence, that Lucien O. Sadler, deceased, held exclusive peaceable possession of said slave for five years, it gave him a right to the property in said slave. (*Given.*)

5. "That if the jury believe, from the evidence, that said slave was the property of said Lucien O. Sadler, deceased, at the time of his death, and that said defendant became unlawfully possessed of said slave, within two years before the commencement of this suit, they must find for the plaintiffs. (*Given.*)

6. "That if the jury believe, from the evidence, that said slave was the property of the said Lucien O. Sadler at the time of his death, and that the defendant got possession of said slave unlawfully, or unlawfully detained the same, claiming him, the said negro, as his own property, within two years before the commencement of this suit, they must find for the plaintiffs. (*Given.*)

8. "That if the jury believe, from the evidence, that said slave was the property of said Lucien O. Sadler, deceased, at the time of his death, and that after the death of said Lucien O., the defendant took possession of said slave, and exercised acts of ownership over him, it was, in law, an unlawful taking; and, if they believe these facts, they should find for the plaintiffs. (*Refused.*)

9. "That the exercise of ownership and claim to property, and acts of possession of property, without the consent of the real

owner, or the person who has the right to the immediate possession, is evidence of an unlawful detention. (*Refused.*)

11. "That if the jury believe, from the evidence, that the said Lucien O. Sadler had peaceable possession of said slave, for more than five years before his death, it gave him, and those claiming under him, the right of property in said slave against all other persons, unless the said Lucien O. held the said slave under and by virtue of a deed, or other instrument of writing, from the owner, duly acknowledged and recorded in the county where said slave was possessed or held in such possession."

This instruction the court refused to give; but, gave in lieu thereof, the following: "That if the jury believe, from the evidence, that the said Lucien O. Sadler had peaceable possession of said slave for more than five years before his death, it gave him and those claiming under him, the right of property in said slave against all other persons."

12. "If the jury believe, from the evidence, that Lucien O. Sadler held peaceable possession of said slave for eight or ten years before his death, and that the defendant had previously owned said slave, and was in the country during all that time, and set up no claim to said slave, it is a circumstance from which they may presume a sale to the said Lucien O. by the said defendant. (*Given.*)

13. "That if they believe, from the evidence, that the defendant got possession of said slave after the death of the said Lucien O., and exercised acts of ownership over said slave, and claimed him as his own property, without the consent of the plaintiffs, it was a conversion of said slave, and it was not necessary for the plaintiffs to make demand of the said slave from the said defendant previous to the institution of this suit." (*Given.*)

The plaintiffs excepted to the decision of the court, refusing to give such of the above instructions as were not given as asked.

At the instance of the defendant, the court instructed the jury as follows, and plaintiffs excepted:

2. "That if the jury believe, from the evidence, that Lucien

O. Sadler, deceased, did not hold the quiet and peaceable possession of the slave Ben up to the time of his death, but had surrendered possession prior to his, the said Lucien's death, the plaintiffs cannot recover in this action upon length of possession.

3. "That when the admissions of a party are introduced in evidence, all he said in the same conversation is evidence before the jury, as well what he said in his own favor as against him."

The motion for a new trial was based upon the several exceptions taken by the plaintiffs, as above noticed, as well as that the verdict of the jury was contrary to law and evidence, &c.

The statute which is relied upon by the plaintiffs, as supporting the title of their intestate to the slave in controversy, is as follows:

*Section* 3. "The peaceable possession of slaves, acquired after the passage of this act, for the space of five years, shall be sufficient to give the possessor the right of property thereto, as against all persons whatsoever, and which may be relied on as a complete bar to any suit in law or equity.

*Section* 4. "As to slaves now held by any person, and heretofore acquired, five years peaceable possession thereof, from and after the passage of this act, shall be sufficient to give the possessor such right of property against all persons, and constitute such bar as in the preceding section specified.

*Section* 5. "The two preceding sections shall not be construed to extend to cases of the possession of slaves, where such possession is held under and by virtue of a deed, or any other instrument of writing from the owner, duly acknowledged and recorded in the county where such slaves are possessed or held." (*December* 19, 1846,) *Digest*, *chap.* 153, *p.* 943.

There are several cases upon the docket of this court involving the consideration of this statute; and, in some of them, counsel have taken the bold ground that the court should disregard, and hold to be null, void and inoperative, what are supposed to be rigorous and unjust features of the statute. It may be remarked, once for all, in response to such arguments, that the power of the Legislature to pass laws limiting the time in which actions shall

be brought, and controversies about the title to property shall be at repose, so that all existing remedies be not cut off *eo instanti*, is now too well established to admit of question. 2 *Story's Com. on Const.*, *Sec.* 1385, *and authorities cited.* The power being conceded, the question of policy is not for us to consider. It must be presumed, that the Legislature, in its wisdom, passed the act, to remedy some prevailing mischief, and that the welfare of the community required its enactment. Our business is to construe and administer the law as we find it upon the statute book.

The third and eleventh instructions moved by the plaintiffs, and refused by the court, are substantially the same: and the two given by the court, in lieu thereof, do not materially differ.

The plaintiffs proposed that the court should charge the jury, that if their intestate had five years adverse peaceable possession of the slave, it gave his administrators a right to the slave against all persons, unless such possession was held under and by virtue of a deed, &c., from the owner, duly recorded, &c. The object of this instruction, doubtless, was, that the court should declare that the only exception from the operation of the statute, was, that provided for in its *fifth section.*

But the court charged the jury that if Lucien O. Sadler had five years peaceable adverse possession of the slave, it gave his administrators a right to the slave against all persons. Thus the court charged the jury in a form more favorable to the plaintiffs than they asked. They proposed to make one exemption from the operation of the statute, but the court made none. If the court erred in this, it was in their favor, and they have no grounds of complaint.

But it was not necessary for the court to declare in this case, under the state of the evidence, that no exemption from the operation of the statute could be made other than that provided for in the *fifth* section, even if that were the law: such a charge would have been abstract. Because, it appears from the evidence, that during the whole period in which Lucien O. Sadler was in possession of the slave, the defendant was in full life, and rested

under no disability to assert his claim to the negro. The rights of married women, infants, persons beyond seas, *non compos mentis*, &c., such as are frequently, upon the face of the enactments, exempted from the operation of the acts of limitation, do not appear to have been, in any way, involved in this case. Nor does it appear that there was any fraud, concealment, or trust on the part of Lucien O. Sadler in connection with the possession of the slave.

The instruction, therefore, given by the court, was as broad as the facts of the case required it to be.

No substantial objection is perceived to the *eighth* and *ninth* instructions moved by the plaintiffs, and refused by the court. But their substance is embraced in the fifth, sixth, and thirteenth instructions, which were given by the court. A multiplication of instructions, announcing, in effect, the same legal principle, tends only to encumber the record, perhaps to confuse the jury, and is not to be encouraged.

The instructions given by the court at the instance of the defendant are next to be considered.

The substance of the second instruction is, that if the jury believe, from the evidence, that, plaintiffs' intestate did not hold possession of the slave up to the time of his death, but had surrendered possession to the defendant prior thereto, the plaintiffs could not recover upon length of possession.

The substance of the proof was, that Lucien O. Sadler obtained possession of the slave about the year 1839 or 1840, from the defendant, and kept him in his possession until within two or three months before his death, a period of some thirteen years, during all that time claiming and controlling him as his own property, the witnesses knowing of no other person setting up any claim to him.

It is beyond question, that such possession, by virtue of the statute above copied, vested in Lucien O. Sadler a perfect legal title to the slave. Had the defendant, after such lapse of time and adverse holding, brought suit against him for the slave, he

could have relied upon the statute as a bar to the action. Or had the slave been deforced from him, he could have maintained an action for him, relying upon the length of possession, under the statute, for title. That such is the effect of the statute, is well established by adjudicated cases, of the highest authority. See *Calvert vs. Lowell*, 5 *Eng. R.* 151; *Brent vs. Chapman*, 5 *Cranch* 358; *Shelby vs. Guy*, 11 *Wheat.* 361; *Newby's ad. vs. Blakey*, 3 *Hen. & Munf.* 57; *Lessee of Haltzapple and wife vs. Phillibaum*, 4 *Washington C. C. R.* 357; *Bradstreet vs. Huntingdon*, 5 *Peters* 403; *Cook vs. Wilson's ad. Littells' Select Cases* 437; *Stanley vs. Earl*, 5 *Littell R.* 280.

The title of Lucien O. Sadler to the slave being thus vested and perfected, whether a voluntary surrender of him to the defendant, would have been an abandonment of the title, so as to preclude his administrators from recovering the slave again, it is not necessary now to decide. There was no proof of any such surrendering of the slave to the defendant. One witness stated that he saw the slave in possession of the defendant some two or three months before the death of Lucien: that he continued in the defendant's possession until the occurring of the last illness of Lucien, and was then sent by the defendant to wait upon him, and remained with him until he died. How the defendant obtained possession of the slave, does not appear from the evidence. It could only be matter of conjecture. But, in the absence of proof to the contrary, the presumption of law would be, that his possession was consistent with the title of Lucien, unless the possession had continued so long as to divest his title under the statute of limitations.

It follows that the second instruction, given at the instance of the defendant, was not warranted by the testimony—that it was abstract, and may have misled the jury.

The third instruction given by the court, at the instance of the defendant, was probably based upon that portion of John Haines' testimony, in which he stated that at some time while Ben was in defendant's possession, the negro passing the door, Duncan

asked defendant, whose negro he was? To which defendant replied that he belonged to him, and always had.

Perhaps this declaration of the defendant was introduced by the plaintiffs (if by them introduced) to conduce to show such conversion as would dispense with proof of demand before suit.

If introduced by the plaintiffs for their purpose, it would also be evidence in favor of the defendant for what it was worth. But in determining its value, the jury should compare its consistency with the other testimony in the cause, and so form their opinion of the weight to be attached to it. *Gracie vs. Robinson*, 14 *Ark.* 441; 1 *Greenleaf Ev.*, *sec.* 201. The third instruction should have been thus qualified.

The judgment is reversed for the errors above indicated, and the cause remanded with instructions to the court below to grant the plaintiffs a new trial, &c.

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## HALLIWELL AD. VS. SPRING EX.

Where a question of variance arises upon the formation of a letter, this court will not overrule the finding, upon inspection, of the court below, upon an attempted *fac simile* by the clerk.

*Appeal from Sebastian Circuit Court.*

Hon. FELIX J. BATSON, Circuit Judge.

S. H. HEMPSTEAD, for the appellant.

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

Spring, as the executor of Ailes, brought an action of assumpsit, in the Sebastian Circuit Court, against Halliwell, upon a note alleged to have been executed by him to Ailes, in his life time. The defendant craved oyer of the note sued upon, which was granted by filing the original, and he demurred for an alleged variance between it, and that described in the declaration. The court overruled the demurrer, and the defendant resting, final judgment was rendered against him, and he appealed to this court. Afterwards, his death was suggested here, and his administratrix substituted.

The question of variance grew out of the manner in which the first letter of the sur-name of the payee in the note was formed. The declaration makes it an A – Ailes: and the counsel for the appellant insists, that in the note, it was an H – Hiles. The clerk, in transcribing the note, to send up to this court, has attempted to make a *fac simile* of the original letter. How well he has succeeded, we are not able to determine. The letter which he has made, however, if it may be called a letter, looks as much like an A as an H. The court below had the original before it; and, upon inspection, determined it to be an A, and that there was no variance. It would not be very safe for us to overrule its judgment, upon a copy made by the clerk. The judgment is affirmed.

## WILSON VS. BRANDENBURG.

It is error to render judgment against the defendant, by default, where the original writ has been quashed, and he has not been served with other process, nor has voluntarily appeared—the prosecution of a writ of error, to such judgment, is an appearance.

*Error to Monroe Circuit Court.*

The Hon. CHARLES W. ADAMS, Circuit Judge.

WATKINS & GALLAGHER, for plaintiff, referred to *Borden et al. vs. Trustee R. E. Bank*, 6 *Eng.*

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

Brandenburg brought an action of trover against Wilson, to the April term, 1854, of the Monroe Circuit Court. At the return term, upon motion, the writ was quashed, the cause continued, and an alias writ ordered. It does not appear, from the record before us, that any writ was afterwards issued. At the next term, a default was taken against defendant, on his failure to appear, a writ of inquiry executed, and final judgment rendered for the damages assessed by the jury. The defendant brought error.

When the original writ was quashed, the defendant went out of court, and no judgment could regularly be rendered against him, until he was again served with process, or voluntarily entered his appearance. The judgment, by default in this case, was therefore erroneous, and must be reversed. According to the well established rule, however, the defendant has made himself a party by prosecuting the writ of error, and will be regarded as in court, on the case being remanded.

## GRIMES AD. VS. BUSH.

Upon an appeal from the Probate, to the Circuit Court, the presumption of law is in favor of the judgment, as to the facts upon which it is based, where nothing to the contrary is shown, as to the evidence, by bill of exceptions. But where that court has erred in relation to any material question of law or fact, the Circuit Court should try the case *de novo*.

Upon application to the Probate Court, for allowance of a claim against the estate of a deceased person, which has been rejected by the administrator, a plea, that the claimant had not delivered to the administrator a copy of the claim, before or at the time of its presentation, is a good defence; and such plea need not allege that the administrator did not waive or dispense with the copy.

The administrator may waive the copy required by the statute; but the facts and circumstances going to show such waiver should, legitimately, be brought forward by the claimant, and whether they amount to a waiver of the copy is a matter of fact to be determined by the jury.

*Appeal from Sebastian Circuit Court.*

The Hon. FELIX J. BATSON, Circuit Judge.

S. H. HEMPSTEAD, for the appellant. A copy of the claim, not having been served on the administrator, the judgment, according to *Borden vs. Fowler*, 14 *Ark.* 474, must be reversed.

Mr. JUSTICE SCOTT delivered the opinion of the Court.

This cause originated in the Probate Court of Sebastian county, where Grimes, as administrator, appeared in January, 1855, in pursuance of notice under the statute, to contest the allowance of an alleged claim of Bush against the estate of his intestate. The claim was a money demand, the open account for which was

regularly authenticated, and upon it was endorsed, over the signature of Grimes as administrator: "Examined, disallowed, and rejected, 5th day of November, 1853."

When Bush presented the claim to the court for allowance, Grimes pleaded, in apt time and due form, that Bush had never delivered to him, before or at the time of the presentation of the claim, a copy thereof, setting forth each item distinctly, and prayed the proceeding might be abated.

Bush demurred upon the grounds: 1st. That the plea does not allege that defendant did not waive and dispense with his right to such copy. 2d. That it does not allege that he refused to allow or disallow the account for the reason that no such copy was delivered to him. 3d. That it does not allege that defendant asked for, or required any such copy, or refused to take any action in regard to the claim, because such copy was not delivered to him. 4th. That it does not allege that defendant refused to endorse his disallowance, and did not endorse it on the back of said claim for the reason that such copy was not delivered to him.

The demurrer was sustained, and the defendant refusing to plead over, the court heard the evidence adduced, and allowed and classed the claim.

The defendant took a bill of exceptions, not only as to the decision of the court on the demurrer, but also, "because the court erred in allowing plaintiff's account of $280 against the defendant," and appealed to this court.

According to the provisions of the statute, the clerk of the Probate Court certified into the Circuit Court, not only a transcript of the record and proceedings relating to the points decided on the demurrer, but also that, together with the original papers relating to the claim allowed—that allowance having been also specifically excepted to. There is nothing in the bill of exceptions relating to the evidence. Upon the hearing, the Circuit Court found no error in any of the matters embraced by the exceptions, and affirming the judgment of the Probate Court, Grimes appealed to this court.

We think it clear enough that the Circuit Court decided right as to so much of the case presented, as relates to the action of the Probate Court as followed the sustaining of the demurrer, if that action could be disconnected and considered without reference to that part of the case covered by the demurrer; because, independent of the affirmative statement in the record, that the court "heard the evidence adduced" by the claimant, the presumption, which the law universally indulges in favor of a judgment until the contrary is made to appear, would have been ample support—the defendant having shown nothing, as to the evidence, by his bill of exceptions, to the contrary.

But the statute is imperative, that if the Probate Court has erred in relation to any material question of "law or fact," the Circuit Court shall try the case, *de novo*—hence, although that court may have been of opinion that, upon the whole case embraced by the exceptions, justice had been done, although material error of law had intervened, it was inhibited by the statute from an affirmance, and ought to have tried the case anew.

With regard to the demurrer, we are of the opinion that none of the objections taken to the plea were good. Such matters as are embraced in these objections, as well as a multitude of other facts and circumstances, of which one might conceive—might be legitimately brought forward by the claimant, upon the determination of the matter of fact, whether or not the defendant had dispensed with, or waived the statutory copy: but it is not necessary that the defendant pleading the want of the copy should embrace them in his plea.

In any such case, whether or not the facts and circumstances shown in evidence, amount to a waiver of the copy, is matter of fact to be determined by jury, like other matters of fact in analogous cases, as in waiver of notice by an endorser in the law merchant, and in tender, &c. As was remarked in the case of *Borden vs. Fowler adm.*, 14 *Ark.* 474, the provision of the statute for the copy was evidently designed to afford an executor or administrator such information as would enable him to act advi-

sedly in allowing or refusing to allow a claim presented against the estate of his testator or intestate, and in case he allowed it, to place in his possession accurate data for the list of claims he is required to keep, and for their classification and return into the Probate Court annually under the provisions of the administrative law. *Digest, p.* 128, *sec.* 98.

Hence, where the representative of an estate has had a fair and convenient opportunity to examine the original, no violence is done to the spirit of the statute, by the finding of a waiver of the copy by a jury, upon slight grounds shown in evidence.

Holding the objections taken to the plea to be untenable, as we have said, we think, on that ground, that the Circuit Court ought to have heard the case *de novo*. The judgment will, therefore, be reversed, and the cause remanded, with instructions to the Circuit Court to permit the claimant to withdraw his demurrer, and otherwise respond to the plea, and to hear the case *de novo*, and determine it according to law.

## OWENS USE OF WALLACE VS. CHANDLER.

16 651
32 510

Upon a plea of payment to an action upon a specialty or record, the burden of proof is upon the defendant; and, under such plea, he may prove the payment of a less sum than that claimed in the declaration, by way of reduction of the debt or recovery.

The law does not warrant the giving of instructions presenting abstract questions, as to which there was no evidence introduced from which the jury could have been authorized to infer the fact assmed in the instructions.

The payment of a debt, no matter by whom effected, whether by the debtor, or his agent, or a stranger, can be nothing more or less than its extinguishment as a demand.

Under the plea of payment, evidence of accord and satisfaction, is inadmissible: and it is error in the court to instruct the jury, on the trial of an issue to such plea, that if they believe, from the evidence, that the plaintiff had received such satisfaction, or that he had received any sum in satisfaction of his debt, they must find for the defendant.

*Appeal from the Circuit Court of Hempstead County.*

The Hon. THOMAS HUBBARD, Circuit Judge.

S. H. HEMPSTEAD, for the appellant. A payment made by a stranger, without the consent of the defendant, and where there is no privity of contract, cannot amount to an extinguishment of a judgment. To produce that result, it must be made by the defendant, or with his authority and consent, express or implied.

Mr. Justice HANLY delivered the opinion of the Court.

The appellant, on the 14th day of September, A. D. 1854, commenced his action of debt in the Hempstead Circuit Court, on a transcript of a judgment recovered in his favor against the ap-

pellee, in the Circuit Court of Benton county, Alabama, at its spring session of 1845.

It appears from the record sent up to this court, that the appellee in the court below, interposed the plea of payment, as his only defence, and that issue was made up on this plea; that this issue was tried by a jury; that they found the issue for the appellee; that judgment was rendered on the verdict, and in conformity therewith. It also, appears, that all the evidence introduced, at the trial, was the testimony of a single witness on the part of the appellee, one Emory Chandler, who testified, that he was well acquainted with both the parties to this suit; that he first knew them in Alabama; that the appellee left that State some five or six years since, and removed to this; that he also knew of the appellant bringing a suit against the appellee in the Circuit Court of Benton county, Alabama, and of his recovery of judgment therein; that he had been informed, from some source or other, that execution was issued on the judgment so recovered, and returned by the sheriff "no property found," that suit had been brought or motion for judgment made against the sheriff of Benton county, Alabama, for not making the amount of such execution; that after this, he heard the appellant say, that the sheriff of Benton county "had paid him one hundred dollars on account of the judgment sued on in this case, and that he was satisfied." To so much of which statement as pertained and applied to the payment of the one hundred dollars, under the pleadings in the cause, the appellant objected at the time, and his objection thereto being overruled, he excepted.

On this state of facts and the case, the appellant moved the court to instruct the jury:

1st. That if they believe, from the evidence, that the sum of one hundred and thirty two 52-100 dollars, with 6 per cent. interest thereon from the 20th day of October, A. D. 1845, has not been paid in full, then they must find for the plaintiff.

2d. That if they believe, from the evidence, that there was no privity between the sheriff of Benton county, Alabama, and the

defendant, and that the payment by the said sheriff, of one hundred dollars to the plaintiff, was to relieve himself from the penalty of official neglect, they must find for the plaintiff.

3d. That unless the defendant has proven that the defendant or some agent for him, paid or satisfied the said sum of one hundred and thirty two 52-100 dollars, with 6 per cent. interest from the 20th October, 1845, then they must find for the plaintiff.

And the counsel for the appellee also desiring instructions, asked the court to give the following:

1st. That if the jury believe, from the testimony, that the plaintiff, John A. Wallace, for whose use this action was brought, received payment and full satisfaction of said judgment, they must find for the defendant.

2d. That if the jury believe, from the evidence, that the said plaintiff, Wallace, acknowledged that he had received satisfaction of said judgment debt from any person, at any time since its rendition, they will find for the defendant.

3d. If the jury believe, from the evidence, that the said Wallace received any sum from any person, whatsoever, in satisfaction of said judgment, they must find for the defendant.

The appellee asked for two other instructions, which were refused by the court; but, as they are not involved in the bills of exceptions or assignments of error, we will not set them out, or notice them further.

The first and third instructions as asked for by the appellant, were given, and the second one refused.

The appellant objected to all the instructions asked for by the appellee; but the court gave the first, second, and third, as above. To the giving of which instructions, on the part of the appellee, and refusing to give the second one asked for by the appellant, he excepted and appealed to this court for redress; and he now assigns four causes wherefore the judgment of the Circuit Court should be reversed, that is to say:

1st. That the court, on the trial, permitted Emory Chandler, a witness of the defendant, to give incompetent and improper evidence against the objection of the plaintiff.

2d. That the court refused the second instruction asked for by the plaintiff.

3d. That the court gave in charge to the jury, the first, second, and third instructions asked for by the defendant.

4th. That the said judgment was rendered for the defendant, when by the law of the land, such judgment should have been given for the plaintiff.

Having thus given as full statement of the case, and the facts of it, as will make our views of the law presented by the record intelligible and understood, we propose, without further remark, to proceed to the consideration of the several errors assigned, in the order in which they are assigned.

As to the first error, then, did the court below err in permitting Emory Chandler, the witness for the appellee, to testify in the manner shown?

To determine this, we have to look to the issue tried in the Circuit Court, and consider what evidence was necessary and material. The issue tried was upon a formal and technical plea of payment; and was, therefore, responsive to the demand set out and claimed in the declaration. The defence, of payment, may be made under the general issue in assumpsit; but, in an action of debt, on a specialty or record, it must be specially pleaded. In either case, however, the burden of proof is on the defendant, who must prove the payment of the money, or something accepted in its stead, made to the plaintiff or some person authorized in his behalf to receive it. See 2 *Greenl. Ev.*, 491, *sec.* 516.

It was, therefore, of course, material for the defendant in the case at bar, to prove payment of the sum demanded, in some one of the modes known to the law. It is insisted, however, by the counsel for the appellant, that the testimony of the witness, Chandler, was immaterial for the reason, that it did not go to the support of the issue to the full extent. Let us examine this point, therefore, and determine whether this argument of the appellant is not based upon premises unwarranted by both the letter and spirit of the law. As we before remarked, (and we believe it is

a principle of universal application,) every plea must be a full and complete answer or response to the entire declaration. This, though, is a rule, which is alone applicable to pleading in a technical sense. The question at hand is one which does not grow out of pleading, but is wholly one involving the principles and law of evidence applied to a particular state and condition of pleading. In this view, then, we propound, is it competent to prove partial payment under an issue of full payment? We apprehend there can be no doubt, that if payment of the whole sum demanded is pleaded, but the proof is of the payment of part only, the defendant is entitled to the benefit of the evidence by way of reduction of the debt or recovery, if the action was debt, and of the damages, if the action was one sounding in damages. See *Lord vs. Ferrand*, 1 *Dowl. & L.* 630; 2 *Greenlf. Ev.* 491, *note* 1.

Apply this principle, then, to the testimony of Chandler, and we conceive it clear, that it was material for the appellee; and was, therefore, correctly and properly admitted by the Circuit Court against the objections of the appellant.

Having thus disposed of the first error assigned by the appellant, we will proceed to the consideration and determination of the others, in the order in which they are respectively presented.

It is insisted by the counsel for the appellant, that the Circuit Court erred in refusing to give the second instruction asked by him. We are at a loss to divine the principle of law which would have authorized the court below to have given this instruction, for the reason that we esteem it as presenting an abstract question, not warranted by the rules of law in such cases, as there was no evidence whatever introduced, from which the jury could have been authorized to infer that the payment of the one hundred dollars, proved to have been made by the sheriff of Benton county, Alabama, to Wallace, was made on account of the suit or proceeding supposed to be instituted against him for official neglect to make the money out of the appellee. But we apprehend the effect of the payment by the sheriff of Benton county,

could not be changed in the slightest degree, whether it proceeded from the cause assumed, or from the fact of his relation to the appellee, as agent, constituted for the purpose of payment: for payment of the entire debt to the appellant, or his agent, whether by the appellee or a stranger, would be an extinguishment thereof, as between the original creditor and debtor. See 1 *Saunders on Plead. & Ev.* 618; *Tarver vs. Rankin*, 3 *Kelly's Rep.* 214; *Harrisons vs. Hicks*, 1 *Porter's Rep.* 430.

The proposition that a debt, as between the debtor and creditor, can only be discharged by the payment by the debtor, or his agent, is a palpable solecism; for we are clear that the payment of a debt, no matter by whom effected, can be nothing more or less than its extinguishment as a demand, notwithstanding the concession, which we think proper to make: *i. e.*, that the payment of a debt, by a stranger to the debtor, might not and would not possibly create and constitute the original debtor, a debtor to the volunteer. But as this point is not fairly and fully before us, in the case at bar, we do not desire to be understood as expressing any settled or fixed opinion in relation to it, as upon deliberation hereafter, when the point is more thoroughly presented, we may have occasion to qualify or recede from the opinion already indicated on this point; and besides this, it is not our purpose to anticipate any question, but simply to decide those that legitimately arise in those cases under adjudication.

We have said there is no evidence in the record, from which the jury could have possibly inferred that the payment of the one hundred dollars, by the sheriff of Benton county, was made on account of any dereliction of duty on his part, for it is not stated by the witness, Chandler, that such was the fact; but, on the contrary, that witness distinctly stated that Wallace told him that the payment of the one hundred dollars was made him "on account of the judgment, the foundation of this action." But we are not left to this alone, as the basis of the conclusion to which we have reached on the subject, for on inspection of the transcript from the record and proceedings had in Alabama, copied

in the record sent to this court, no execution is shown to have ever been issued on the judgment rendered in Alabama. We are, therefore, bound to infer, that the statement made by the witness, Chandler, to the effect, that suit had been brought or motion made against the sheriff of Benton county, on account of official neglect in making the money out of the appellee, was predicated on gossip, or the idle talk of those who spoke without accurate knowledge in reference thereto. We think, therefore, there is no error in the proceedings of the Circuit Court, on account of the refusal of the judge to give this instruction.

This brings us, in due course of investigation, to the consideration of the third error assigned by the appellant. Did the court below err in giving the first, second, and third instructions asked for by the appellee? As to the first, we think, clearly not. But, as to the second and third, we are of the opinion that the jury may have been, and probably were, misled by the directions and instructions of the court.

The word, "payment," used in these instructions, is not a technical term: it has been imported into law proceedings from the exchange, and not the Law Treatises. When used in pleading, in respect to cash, it means immediate satisfaction: but when applied to the delivery of a bill, or note, or other collateral thing, it does not necessarily mean *payment in immediate satisfaction and discharge of the debt;* but may be taken in its popular sense, as delivery only. See 2 *Greenlf. Ev.* 491, *sec.* 516. Payment, therefore, means one thing, and satisfaction, or accord and satisfaction, another; each being understood and comprehended by the professional reader, in its proper and appropriate sense. Accord means the tendering of something of value in discharge of a pre-existing debt or liability. It is, therefore, executory, and is not executed until the tender is accepted, when the accord, *eo instanti*, becomes satisfaction; or, in other words, a virtual acknowledgment of a discharge of the debt or liability. See 2 *Greenlf'.s Ev.* 28, *et seq.*

The issue in the court below, presents one state of facts, and

the testimony adduced on the trial, illustrates another and different one. Payment was pleaded and the proof shows that the payment made was not a satisfaction of the debt demanded; because, a debt is not paid or satisfied until it is discharged, *in eo numero*. Payment, in part, is only a part discharge from the demand, when fully pleaded: whilst, if accord and satisfaction had been pleaded, and a lesser amount proved to have been delivered before the day, or at a different place than the one fixed for the payment of the debt originally, an acceptance of a lesser amount than the sum really due, would unquestionably be held a satisfaction of the greater debt or amount.

In the case under consideration, payment was the plea, and evidence of accord and satisfaction introduced. Can such proof, in the latter case, be received and accepted to maintain and sustain the issue in the former? We unhesitatingly say not; and presume no instance or precedent can be found to establish the converse of this proposition. It is the payment of the debt in money, or property accepted, in case such as the one under consideration, and not the acknowledgment of payment, which operates as an acquittance, or discharge from the obligation of indebtedness; for an acknowledgment of payment is but affording evidence of the payment; whilst payment, technically speaking, is the act itself, which produces the effects incident to it, and which we have enumerated and stated. This, therefore, disposes of the third assignment of errors, so far as it relates to the second instruction asked for by the appellee, and given by the court, at the trial below, which we say, for the reasons before indicated, was an improper direction to the jury.

In determining the third assignment of errors, as far as it relates to the second instruction asked for by the appellee, and given by the court, we have, in a great measure, determined that assignment, so far as it pertains to the third instruction asked for and given to the jury at the instance of the same party. To say that if Wallace, the appellant, had received "any sum from any person in satisfaction of the judgment" sued on, it would amount

to a payment, we are satisfied is going farther than the learned counsel for the appellant would seriously insist upon, or the law at all warrant; for, as we have before stated the law to be, payment must be co-extensive with the debt in amount, and the payment of a lesser amount will not do, except for the purpose of diminishing the recovery. To have made the proof, therefore, in this case available to the appellee, he should have interposed the plea of accord and satisfaction; and possibly his third instruction, as given by the court, might have been applicable to the proof and issue; particularly, if the accord had been tendered and accepted before the day, or at a different place than that appointed for the payment of the debt in the original contract. We, therefore, hold that this instruction, like the second, was improperly given by the Circuit Court; and as the verdict was for the appellee, upon the two erroneous instructions on his part, we are constrained to intend that the jury would not have so found if the law had not been mistated to them, as before shown. Wherefore, the judgment of the Circuit Court of Hempstead county is reversed.

## ALEXANDER VS. FOSTER.

A plea to an action upon a promissory note, that the defendant, being unable to read or write, and the payee taking advantage thereof, made the note payable at a day before the debts or accounts, for which it was given, were due, and so the note was obtained by fraud, &c., must be intended as a special plea of *non est factum.*

A special plea of *non est factum*, alleging that the defendant is ignorant and unable to read or write—that he owed the amount of the note, but a large portion of it was not due until a day long subsequent to the day of payment in the note—that he thought the note, when he executed it, was payable at such subsequent day—that it was his intention to make it payable on such day, and his understanding that it was so drawn; but not averring any contract or agreement with the creditor, or any intention or understanding on his part as to the time of payment: HELD, That the plea was not sufficient to bar the action.

The plaintiff filed his motion to strike out the plea of the defendant; and then filed a demurrer to the same plea: HELD, That the demurrer was not a waiver of the motion to strike the plea from the files.

A plea in bar attacking the consideration of the note sued on—averring fraud and usury—is a nullity, unless sworn to: (*McFarland vs. State Bank*, 4 *Ark.* 415; *Williams vs. Williams*, 13 *Ark.* 491;) and a motion to strike out is proper.

*Appeal from the Circuit Court of Columbia county.*

Hon. THOMAS HUBBARD, Circuit Judge.

J. H. CARLETON, for the appellant. Fraud renders all contracts tainted with it void. *Ch. on Con.* 678, (5 *Am. Ed.*,) *and notes d and* 2; and is a good defence: 1 *Story Eq. Jur.*, *sec.* 60; 3 *N. Hamp.* 455; 15 *Mass.* 319.

Procuring an illiterate person to execute an instrument or deed, which is different from what he understands it, or misreading it to him, is a fraud which will avoid it. *Jackson ex. dem.*

*Russell vs. Cory.*, 12 *J. R.* 469; 24 *Wend.* 419; 1 *Story's Eq. Jur.*, *sec.* 60.

There must be a mutual consent, otherwise there is no contract. *Domat Com. Civ. Law, part*, 1, *lib.* 1 *art.* 1, *sec.* 1, *page* 163, *Cushing's Ed.; Ch. on Con.* 9. And the parties must assent to the same subject matter and in the same sense. *Hazard vs. New Eng. Mar. Ins. Co.*, 1 *Sumn.* 218.

Pleas, unless they are wholly frivolous, should not be stricken out. *Blackmore et al. vs. President and Directors*, 4 *Ark.* 454. There is no rule of law requiring pleas of fraud to be sworn to.

Demurring to the plea, after a motion to strike out for the same cause, is a waiver of the motion. *Yeates vs. Heard*, 2 *Ark.* 459.

GALLAGHER, for the appellee. The 3d plea purported to be a plea of usury, and should have been verified by affidavit. It was properly stricken out. *Digest, p.*808, *chap.*126, *sec.*76; *Howell vs. Vansant*, 2 *Eng.* 147.

A plea, impeaching the consideration of any instrument in writing sued on, not verified by affidavit, may be disregarded by the court, and judgment rendered as for want of a plea, or may, on motion, be stricken from the files. *McFarland vs. State Bank*, 4 *Ark.* 415; *Wilson vs. Wilson*, 13 *Ark.* 421.

The court below correctly sustained the demurrer to the 2d plea. It was no answer to the declaration: it is an incomprehensible plea. It is not a plea of fraud or partial failure of consideration. *Wheat use &c. Dotson*, 7 *Ark.*

Mr. Justice HANLY delivered the opinion of the Court.

This was an action of assumpsit, brought by the appellee against the appellant in the Circuit Court of Columbia county, upon a promissory note for the sum of $241 08, dated July 24th, 1854, and payable one day after date, with interest at 10 per cent from the 1st day of January, A. D. 1854.

Process of summons was duly issued and executed on the ap-

pellant. At the return term of the writ, he appeared, craved oyer of the note sued on, which being granted, he filed three several pleas in bar of the action—that is to say:

1st. The general issue. 2d. That he was an illiterate man; could not read, write or sign his name: that he owed the appellee the sum of one hundred and fifty dollars, but the same was not due, nor to be paid until Christmas next after filing said plea: that the balance of the amount claimed by the appellee is for a store account, due the 1st of January next before the filing of such plea; that, at the time of the execution of said note, it was not his intention, nor understanding to give said note due until Christmas, 1854; that the said note may have been read; but, if so, he did not discover that it was drawn due when it was; that appellee took advantage of appellant's want of literary attainments, and drew said note due one day after date, when in conscience and equity, the said sum of one hundred and fifty dollars, part of the consideration of said note, was not due until Christmas, 1854, and that the note sued on was understood, at the time it was made, as above shown, and intended by the appellant, to be made due as aforesaid, and was concluded with a verification in the usual form. And 3d. That said note was usurious and covinous, in this: because the said appellant was indebted to the appellee in the sum of one hundred and fifty dollars, due Christmas, 1854; and also in some sixty odd dollars, (the balance of said sum of said note) for a store account due 1st January, 1854; that, at the date of said promissory note, said appellee, well knowing the facts, and that said appellant could not read or write, took, covinously and usuriously, to oppress appellant and for his own gain, the note in this suit for said sum of one hundred and fifty dollars, so due as aforesaid, and the said store account, due as foresaid, and made of them the entire consideration of the note in this case, and contrary to the understanding of appellant, and good faith, and drew said note due one day after date, and covinously and usuriously drew said note, so that the said sum of one hundred and fifty dollars, part of the consideration of said note, should,

and by the terms thereof did, draw interest at the rate of ten per cent. per annum from the first day of January, 1854, when in truth and in fact the same was not due, nor intended to be made due, until Christmas, 1854; and so appellant avers that said promissory note is covinous and usurious: concluding with a verification in the usual form.

To the first plea of the general issue, the appellee took issue: to the second, he demurred, and assigned the following causes, to wit:

1st. The said defendant does not conclude his said plea by putting himself upon the country.

2d. The said defendant has not, by his said plea, traversed or denied, or attempted to put in issue, any matter of fact alleged by the plaintiff, and is no answer to the declaration.

3d. Said plea proposes and shows matter of defence cognizable only in a court of equity.

4th. Said plea proposes no defence known at law.

5th. Said plea, if properly pleaded, would, in effect, be a plea in abatement, and should have been pleaded before oyer craved and granted.

6th. Said plea states no time known to the law when the sum denied to be due was to become due and be paid.

7th. Said plea leaves out many words, which should be stated. And also, that said second plea is, in many other respects, uncertain, informal and insufficient.

It appears from the transcript of the record of the Circuit Court of Columbia county, sent up to this court, that the appellee filed his motion in writing to strike out the said third plea: which motion is in the words and figures following, to wit:

"The plaintiff in this cause, by attorney, comes and moves the court that the defendant's third plea in this cause be stricken from the files for the following reasons:

1st. Said plea is not supported by affidavit as required by law.

2d. That said plea has not affixed, at its conclusion, the name of the defendant, or any person as attorney."

And it appears further, from said transcript, that, on the day that the motion to strike out was filed, the appellee also filed his demurrer to the said third plea, which is in the words and figures following:

"The plaintiff, by attorney, demurs to defendant's third plea for the following reasons:

1st. The quantity (*quantum*) of usurious interest alleged in said plea, and claimed by the said plaintiff, is not specified.

2d. That the interest (ten per cent.) alleged to be claimed by said plaintiff, is not usurious, when specified in a promissory note.

3d. That said defendant's plea does not show usury.

4th. That said plea does not aver that said usurious interest was contray to the statute in such case made and provided.

And that said plea is otherwise defective and informal."

It appears that an affidavit was appended to the second plea, in substance as follows: "That the facts set forth in said plea are true to the best of my knowledge," which purports to have been made by the appellant. To the third plea, there does not purport to be any affidavit accompanying it, verifying, in any manner, the truth of the facts therein set forth.

The appellant joined in the demurrer of the appellee to his second and third pleas. The demurrer to the second plea was sustained, and so was the motion to strike out the third one. To the judgment of the court sustaining the demurrer to the second plea—and the motion to strike out the third one of the appellant, he excepted, and made the three pleas before stated, a part of his bill of exceptions, by setting them out *in hæc verba*. Final judgment was rendered by the Circuit Court of Columbia county against the appellant on the single issue to the first plea, the general issue—the others having been disposed of in the manner before stated—it being affirmatively shown by the transcript, that a jury trial was waived. The appellant having filed the usual affidavit in such cases, prayed an appeal to this court.

But two errors are assigned in respect to the procedings of the court below:

1st. That the court erred in sustaining the demurrer to appellant's second plea.

2d. In striking appellant's third plea from the files.

Extended arguments have been filed in this court by both parties, and much zeal manifested by the counsel for their respective clients. We will not attempt to follow the learned gentlemen over the whole field which they have covered by their argument; but will content ourselves by the consideration and adjudication of the points legitimately arising from the causes assigned in error, and those properly growing out of them.

The two pleas of the appellant, designated as the second and third, were certainly interposed to bar the appellee from a recovery in the court below, upon the cause of action set out in the declaration: and to determine their character and intent, independent of extraneous matter, it might not be improper that we should proceed to analyse them with the view of determining whether they really set up matter which places the bar upon the ground of a want, or part failure of consideration inducing the execution of the writing sued on. Now if we comprehend the substance of these pleas, and may determine the design of the pleader in interposing them, from the language employed in their construction, we think there can be no doubt that such a state of facts is shown in both pleas, as to render it certain, that the appellant designed to make his bar rest upon the fraud, misrepresentation, concealment, and usury set up in his pleas, respectively, superinducing the execution of the note sued on, and going to a partial want of consideration to support it. Much of both pleas is regarded as foreign to the objects evidently intended, and was thrown into them by the pleader, supposing, as he must have done, that if his cause should not be promoted by its introduction into them, that by reason of the generous and charitable maxim of the law, *utile per inutile non vitiatur*, he could be saved from any injury or harm resulting from it. Being not only willing, but absolutely disposed to carry out the liberal maxim of the law, which we have just quoted, both in its letter and spirit, we

will consider the pleas, for the present, therefore, as if they contained nothing redundant or ambiguous.

Does the second one, then, go to the consideration of the note sued on, or does it virtually question its execution? We are inclined to the conclusion that the plea in question is a virtual denial of the execution of the note sued on; and is, therefore, a special plea of *non est factum*, though inartificially drawn. For, by the common law, under the plea of the general issue, in assumpsit, nearly every defence, which shows that there was not a subsisting cause of action at the time of the commencement of the suit, is admissible. See 2 *Hill's N. Y. Rep.* 478. Also, the defendant's incapacity to contract, as that he was an infant, lunatic, or drunk: that he was in duress, the want of sufficient or legal consideration for the contract, or illegality in the contract itself might be given in evidence under this plea, as gaming, usury, &c. See 1 *Chitty's Plea.* 476 and 477. But this liberal doctrine of the common law has been restricted by legislative enactments in this State, when the suit is founded on a contract in writing, whether under seal or not: for here, the execution of a contract in writing (whatever may be the form of action adopted,) cannot be denied, or its consideration questioned, except by plea verified by the affidavit of the party, or some other person for him. See *Digest, p.* 808, *sec.* 76; *p.* 812 *sec.* 103. With this qualification, then, the law in this State, on this subject, is the same as it was at the common law; and the defence here is as broad, under the plea of the general issue in assumpsit, as it was in England. It is clear, then, that if no other plea had been interposed in the court below, than the plea of the general issue, and that had been sworn to in the manner prescribed by our statutes, the defence attempted to be set up under the second plea, which we are considering, could have been rendered available to the appellant; for, as we have before declared, the defence set up in the second plea was a virtual attempted *non est factum* of the instrument sued on: for says Mr. CHITTY, *in his learned Treatise on Pleadings, vol.* 1, *p* 483, the defendant may give in

evidence, under the plea of *non est factum*, that the deed was delivered to a third person as an *escrow*, or that it was void at common law *ab initio*. as that it was obtained by fraud; or whilst the party was drunk; or made by a married woman, or a lunatic; or that it became void after it was made and before commencement of action, by *erasure*, *alteration*, *addition*, *et cet.*" We must presume, therefore, that the defendant below intended this plea as a special plea of *non est factum*. Let us look to it, then, and determine whether it be good in law for this purpose: for if it is not, the judgment of the Circuit Court, sustaining the demurrer of the appellee thereto, must be affirmed.

A party to a deed at the common law, or an instrument in writing under our peculiar statutes, who means to deny it, must plead *non est factum*, either generally or specially, as he may see fit, and cannot, in pleading, deny its operation by averring that "he did not grant," "did not demise," &c., (see 1 *Chitty's Plea. p.* 483,) for the reason, as it is stated by the author, that the instrument itself gives the evidence of these facts, and the party is estopped, both in his pleading and evidence, from denying them beyond the legal effect of the writing itself.

The appellant, in his second plea, does not deny but that he made the note sued upon. He, however, attempts to answer the declaration based upon it, by saying simply, that he was ignorant, could not read, write, or sign his name, is indistinct as to the fact whether the note was read to him before it was signed with his mark; admits that he owed two accounts to the appellee, which made up the aggregate of the note; that $150 of that amount was not to have been paid, by the original contract with the appellee, until Christmas, 1854, and that he thought, when he made the note in question, by its terms, and tenor, it was not payable until Christmas, 1854; when in truth, and in fact, it was drawn payable one day after date. These facts are all admitted by the demurrer, which we are considering. Being admitted, do they serve as a bar to the appellee? We think there can be no question on the subject, that they do not. The appellant avers in

his plea, more than once, that it was "his intention" to make the note payable, Christmas, 1854; that it was "his understanding" that the note was to be due Christmas, 1854; and, in the course of his plea, he enters into a kind of argument to prove that such must have been the case, saying that $150 of the amount of the note was not due until that time, by a previous contract, but no where, and in no portion of the plea, does he aver or intimate the fact to be that the appellee had the same "intentions," possessed the same "understanding" on the subject, as to the time of the payment of the note, that he himself had. Viewing this second plea, therefore, as a special plea of *non est factum*, or in whatever other light it may be considered, we are irresistibly forced to the conclusion, that it is not a good bar to the appellee's action; and, therefore, hold that the Circuit Court did not err in sustaining his demurrer thereto.

Having thus disposed of the first error assigned, we will, at once, proceed to the consideration and determination of the second, and only remaining one; that is, that the court erred in striking out appellant's third plea."

The transcript sent up to this court, shows that a motion to strike out the 3d plea, and a demurrer thereto, were filed in the court below, on the same day; but the motion to strike out appears first on the record; and may, therefore, be intended to have been first filed, and thus it seems to have been considered by the appellant in his argument, who, nevertheless, insists that the interposition of the demurrer by the appellee in the court below, after his motion to strike out the plea demurred to, operates as a waiver of the motion to strike out; and he relies, in support of this position, on the case of *Yates vs. Heard*, 2 *Ark.* 461. This case, in our judgment, does not sustain the appellant in his position; for in the case of *Yates vs. Heard* the motion was not to strike out a plea, but was to dismiss the suit, thereby making it, to all intents and purposes, a motion in abatement—as much so as if the same facts had been set up in a formal plea in abatement—and as a matter of course this court could have held in no other

way, than that a demurrer, filed subsequently to the motion in abatement, was a waiver of it. But the case at bar presents a totally different state of facts. The motion being considered, was simply to strike out a plea. It could not be considered as a motion in abatement, for the reason, that a motion or replication in abatement of a plea would amount, at least, to a solecism, if not an absolute absurdity. In the case of *Knott et al. vs. Clements ad.*, 13 *Ark. Rep.* 317, Mr. Justice WALKER, in determining a question somewhat akin to this, remarked that the objection should have been taken (in this case) by a motion to reject or strike out the plea, and not by demurrer, which presents alone the legal sufficiency of the plea for consideration." And in a subsequent case Mr. Justice SCOTT (in case *Allis vs. Bender*, 14 *Ark. Rep.* 627,) remarked that a demurrer would not lie to a plea, on the ground that the plea was not sworn to, saying that "according to the course of decisions of this court the demurrer did not reach the first objection (the one stated above). To do this, a motion to strike out was necessary;" and, in support of this position, refers to the cases of *Wilson & Turner vs. Shannon and wife*, 1 *Eng. Rep.* 196; *Hardwick et al. vs. Campbell*, 2 *Eng. Rep.* 118; *Mayor & Aldermen of Little Rock vs. State Bank*, 3 *Eng. Rep.* 227; *State Bank vs. Ward*, *i b.* 506. From these authorities, then, we think it clear that a motion to strike out a plea, and a demurrer to the same plea perform totally different offices. The first is only intended to reach such defects as—after pleading to the action, one pleads matter in abatement, or pleads one not sworn to, when an affidavit is required, or one not signed by counsel. The second, or a demurrer to a plea, is proper, when the plea merely sets up a defective defence, or a defence defectively stated. See *Wilson & Turner vs. Shannon and wife*, 1 *Eng. Rep.* 196. We are of the opinion, therefore, that the demurrer of the appellee to the 3d plea of the appellant, was not a waiver of the motion of the appellee to strike that plea from the files of the court below.

And as the assignment of errors also questions the judgment of the Circuit Court in sustaining the motion of the appellee to strike

out the 3d plea of the appellant, we will proceed to determine that point. This plea was evidently intended, as its substance imports, to bar the plaintiff below from a recovery on the note declared on, and was an attack upon its consideration, averring fraud and usury to accomplish the bar. It does not purport to have been sworn to; and was, therefore, a nullity, as has been repeatedly held by this court. See *McFarland et al. vs. The State Bank, above referred to*, and, also, *Williams vs. Williams*, 13 *Ark. Rep.* 421. The motion to strike out this plea was therefore properly sustained.

The third plea having been stricken out, and as we have held, properly, by the Circuit Court of Columbia county, it does not become necessary for us to consider the demurrer which was interposed thereto in the court below, as the judgment of the court on the motion to strike out that plea, was a final disposition of it. We, therefore, refrain from any opinion on the subject of the demurrer.

The judgment of the Circuit Court of Columbia county, is therefore in all things affirmed.

16 671
64 321

# PRYOR ET AL. VS. RYBURN.

Where one of several defendants in chancery is merely a nominal party, having no personal interest in the result of the suit—the bill seeking no decree against him—his deposition may be taken, upon an order of court for that purpose, in favor of the complainant. *Folsom vs. Fowler ad.*, 15 *Ark. Rep.* 281.

A complainant, prosecuting a suit in chancery as the next friend of an infant, is incompetent, as a witness, to sustain the allegations of the bill in behalf of the infant.

When the deposition of a party to the record is desired, an order of court for it to be taken will be made, as a matter of course, upon a suggestion that the party has no interest in the cause. And although such deposition, taken without such order, can not be read, yet an agreement of record, that all depositions, taken by either party, may be read upon the hearing, reserving objections to competency only, is a waiver of the objection that they were taken without an order of court.

The adverse possession of slaves for five years, gives the party in possession the right of property thereto by virtue of the act of 19th December, 1846, (*Digest, p.* 943,) and is "a complete bar to any suit in law or equity therefor," unless there be some showing to prevent the operation of the statute.

It is a general rule, that where the Legislature makes no exception in a statute of limitations, the courts can make none. *Erwin vs. Turner*, 1 *Eng. Rep.* 14; *State Bank vs. Morris et al.*, 13 *Ark. Rep.* 291.

A father conveys certain slaves to his son B., by bill of sale, expressing a money consideration: a few days afterwards, B. and his brothers and sisters execute an article of agreement, (reciting that B. had purchased the slaves of his father,) that the slaves are to remain in his possession until the death of the father, and then to be equally divided between them: On a bill for partition, more than five years after the death of the father, B. in his answer averred that the bill of sale was a *bona fide* conveyance; that he purchased the slaves of his father upon the consideration that he was to pay his father's debts; that the agreement was executed on the understanding that it was to be operative only in the event that the debts of the father did not exceed the value of the slaves; and that he had paid his father's debts to the full value of the slaves. The proof tended to sustain the answer: HELD, That the bill of sale was not a testamentary devise; nor was there such a case of trust established as would prevent the statute of limitation from running in favor of B.

The article of agreement was delivered to one of the parties to be benefited by it; its existence was unknown to another, who was a non-resident; and B. did not inform him of its execution: HELD, That it was not the duty of B. to do so, and his omission or failure was not such a fraud or concealment as would prevent the statute bar.

The heir cannot maintain a suit in equity for the value of personal property belonging to his ancestor, against a person who converts such property to his own use on the death of the ancestor—his remedy is only through an administration upon the estate of the deceased.

*Appeal from Hempstead Circuit Court in Chancery.*

The Hon. THOMAS HUBBARD, Circuit Judge.

WATKINS & GALLAGHER, and PIKE & CUMMINS, for the appellants. The deed of Matthew to B. F. Ryburn, was a testamentary instrument. 4 *Dessau.* 617; 12 *N. Hamp.* 371; 4 *McCord* 198; 1 *Phil.* 1, *and cases cited;* 4 *McCord* 12; *West's case No.* 177, *p.* 314; 1 *Hagg.* 130; *ib.* 488; 1 *Russ.* 498; 3 *Keb.* 310; *S. C.* 1 *Mod.* 117; *Ves. J.* 204; *S. C.* 4 *Bro. C. C.* 335; 4 *Hawks.* 141; 2 *Hagg.* 554; *Walker* 520.

B. F. Ryburn was a direct trustee—to pay debts and distribute residue.

Any property may be the subject matter of a trust; and a trust of personalty, may be created or proven by parol. *Hill on Tr.* 44, 57, 58; 2 *Ala.* 156; *Ambl.* 264; 2 *S. W.* 393; 2 *J. & W.* 565, 573; *Hill on Tr.* 114, 119 *N. A.*; 2 *Kelly* 297; 4 *Sandf. Sup.* 102; 7 *Sm. & M.* 319.

Where parties act at all in respect to trust property, they will be deemed trustees, with like effect, as if they had executed the deed, and assented to act as such. *Hill T.* 215; 17 *Ves.* 488; 19 *Ves.* 638; 2 *Sch. & Lefr.* 231; *Hill T.* 215; 3 *McLean* 50.

In cases of express trusts, the statute of limitations, or the analogous bar in equity from the staleness of the demand, has no application. 14 *Ark.* 66; 2 *Eng.* 518; 3 *J. C. R.* 216; 7 *ib.* 90; 17 *Ves.* 97; 2 *Sch. & Lefr.* 633; 4 *M. & C.* 52; 2 *Keen* 722; *Hill on Tr.* 265; 3 *M. & Cr.* 31, 33; 7 *B. Mon.* 556; 3 *Kelly* 383; 1 *Maryland Ch. Dec.* 53.

The act of December 19th, 1846, (*Rev. St. chap.* 153, *p.* 943,) does not operate a bar unless there is adverse possession, which never can exist in cases of express trusts, as between trustee and *cestui que trust.*

The concealment of the facts, and the mistake under which the parties acted, would debar B. F. Ryburn from protecting himself by lapse of time. *Hill on Tr.* 148; 3 *S. W.* 300; 1 *Y. & C. Exch. Cas.* 238; 2 *Lead. Cases in Equity, part 2d., p.* 251, 255; 3 *Swanst.* 409; 4 *Russ.* 58; 3 *P. Wms.* 315, 321; 2 *Russ. & M.* 614; 2 *Ball & B.* 171; 2 *Beav.* 31, 56; 3 *P. Wms.* 315; *Cow. & Hill's Notes, p.* 1438, 1439, *and cases cited; Hill Tr.* 527.

Infancy and coverture will prevent the operation of the statute, whether trusts are express or implied, until the disability is removed. 3 *Brev.* 438; *Hill on Tr.* 265; 1 *Bro. C. C.* 9, *&c., ib.* 266; 3 *Myl. & Cr.* 31, 42; 4 *Geo.* 75; 3 *Swanst.* 64; *Cr. & Phil.* 135; *Hill on Tr.* 527, *and cases cited.*

S. H. HEMPSTEAD, contra. Points, &c. 1. That the property acquired by the appellee, from his father, was not sufficient to pay his debts.

2. That it belonged, and does now belong, to the appellee.

3. That it was not a testamentary disposition of property. *Digest* 987. Consideration may be proved by parol. 15 *Ark.* 278.

4. The paper signed by appellee, was without consideration and a *nude pact.* 1 *Chitty on Cont.* 29; 4 *Shepley* 458; 4 *John.* 235. There was no mutuality. 2 *Story's Eq.* 723, 790. Specific performance would not be decreed of it. 1 *Madd. R.* 1; 1 *Sch. & Lef.* 13; 2 *Story's Eq.* 742, 793 *a.*

5. Appellee did not become or act as a trustee.

6. Under act of 19th December, 1846, the title of appellee is good by five years possession. *Digest* 943; *Angell* 205; 17 *Vesey* 93; 1 *Eng.* 16, *and cases cited.*

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

On the 15th May, 1852, Richard H. Binford, his wife Susan J., formerly Ryburn, and Mary F. Ryburn, minor and sole heir of Montgomery M. Ryburn, deceased, by her next friend, the said Richard H. Binford, filed a bill on the chancery side of the Hempstead Circuit Court, against Benjamin F. Ryburn, John W. Ryburn, Edward L. Pryor, and wife Martha A., formerly Ryburn, alleging, in substance, as follows:

That, on the 1st February, 1843, Matthew Ryburn, (the father of the said Susan J. Binford, Montgomery M. Ryburn, Benjamin F. Ryburn, John W. Ryburn, and Martha A. Pryor,) residing in Lafayette county, by way of testamentary disposition of part of his estate, executed and delivered to said Benjamin F. Ryburn, an instrument in the form of a bill of sale, by which, for the nominal, but express consideration of $2500, he conveyed to him the following named slaves: George, a man aged 21 years; Abraham, a boy aged 17 years; Caroline, a girl aged 16 years; Leonard, a boy aged 12 years; Jim, a boy aged 12 years; Armstead, a boy aged about 8 years; Warner Washington, a child of Maria, aged 7 months. Which bill of sale contained a clause of warranty, was executed in the presence of two attesting witnesses, acknowledged on the 17th March, 1844, and recorded in said county of Lafayette, 16th July, of the same year. A copy of the deed is exhibited.

That Matthew Ryburn died late in the year 1844, his children all surviving him.

That the said deed, or bill of sale, was made upon the understanding between Matthew Ryburn and Benjamin F. Ryburn, that the latter should, at the death of the former, divide the said negroes and their increase, equally, between himself and the said John W. Ryburn, Montgomery M. Ryburn, and Susan J. Binford, one-fourth to each. That no consideration whatever was paid by Benjamin F., nor passed between him and his father. That the sum of $2500, mentioned in the deed, was nominal and fictitious, and the deed was intended to be, and was in fact, merely a testamentary disposition of the slaves.

That accordingly, on the 18th February, 1843, John W. Ryburn being in the State of Tennessee, a deed, or article of agreement, was entered into and executed, by and between Benjamin F. Ryburn, Montgomery M. Ryburn, and Susan J. Binford, for themselves, and said John W. Ryburn, a copy of which is exhibited and is as follows:

"An article of agreement, made and entered into, on this the 18th day of February, A. D. 1843, between Benjamin F. Ryburn, of the first part, of the county of Lafayette and State of Arkansas, and Montgomery M. Ryburn and Susan J. Ryburn, of the State and county aforesaid, and John W. Ryburn of the county of Haywood, and State of Tennessee, of the second part, *witnesseth*: That whereas, the said B. F. Ryburn, of the first part, having, on the first day of February last, purchased of Matthew Ryburn, a family of negroes, namely: George, Abraham, Caroline, Leonard, Jim, Armstead, Maria and child—now the said negroes are to remain in the possession of the said party of the first part, until the death of the said Matthew Ryburn, at which time, they, the said negro slaves, are to be divided equally between the said parties of the first and second part.

In testimony whereof, we, the said parties of the first and second part (excepting John W. Ryburn, a party of the second part, who is absent in Tennessee,) have this day and date above written, set our hands and affixed our seals.

B. F. RYBURN, [SEAL.]
M. M. RYBURN, [SEAL.]
SUSAN J. RYBURN." [SEAL.]

That Mathew Ryburn died seized and possessed of the following other negroes, &c.: Tom, man, then about 42 years old; Amy, yellow woman, aged 27 years; William, son of Amy, aged about 13 years; Jane, daughter of Amy, aged about 9 years. Also, sundry mules, horses, a large number of cattle and hogs, a considerable quantity of house-hold and kitchen furniture, farming

implements, tools, wagons, harness, and divers other articles, &c., &c.

That upon the death of Matthew Ryburn, Benjamin F., not only remained and continued in possession of all the negroes named in the said deed, but also took possession of said other negroes, and of all the personal property above mentioned, and of the whole of said Matthew's estate, and converted the same to his own use. That he afterwards continued to manage, use and settle said estate as he pleased. He, nor any one else, administered thereon, nor did said Matthew leave any will.

That, at some time after the death of said Matthew, Benjamin F. delivered to John W. Ryburn, the slave Jim, and to Montgomery M. Ryburn, Abraham, Amy, and Jane. That Montgomery M. died in April, 1848, having, by will, devised Amy and Jane to his daughter, the complainant, Mary F., but that Benjamin F. administered on his estate, and claiming that he had merely loaned Amy and Jane to Montgomery M., and there being no one to oppose him, took them into his possession, and did not account for them as part of said estate. That Abram was sold by order of the Probate Court, as part of the estate of Montgomery M., in January, 1850, purchased by Benjamin F., who immediately sold him to one Bankhead, from whom the complainant, Richard H. Binford, purchased him in February, 1851, at the market price. He is alleged to be 26 years old, and worth $1000.

That John W. Ryburn still retained possession of Jim, who was 21 years old, and worth $800.

That Benjamin F. had appropriated to his own use, disposed of, or still retained, the horses, mules, cattle, and other personal property, mentioned above, and had, ever since the death of Matthew Ryburn, retained possession of, and used as his own, the slaves George, now (the time of filing the bill,) 29 years old, and worth $1000: Caroline, 25 years of age, and her children, four or five in number, born since the execution of the deed, names and ages unknown, worth, she and her children, $1900: Leon-

ard, 21 years, worth $1000: Tom, 50, worth $500: Amy 35, William, her son, 17; Jane 13; Martha 5, and Fanny 12 or 18 months, daughters of Amy—value not alleged.

That complainants, Richard H. Binford and Susan J., intermarried in February, 1849, and she is now 30 years old, and complainant, Mary F., is six years of age.

That, after the execution of the article of agreement above copied, it was left in the custody of Susan J., who afterwards mislaid it, and supposed it to be lost, until she accidentally found it, two or three months before filing the bill, when, for the first time, her husband Binford knew of its existence or contents, he having purchased Abraham in utter ignorance thereof, supposing the title good, and paying Bankhead for him $1100.

That, since the discovery of said article of agreement, Binford had applied to Benjamin F. for a division of the negroes, named in the deed and article, but he refused to make any, saying, he had paid debts of his father, Matthew, enough to cover all the property he had received; as to which, complainants knew nothing, nor did they believe it to be true.

The bill insists that Binford and wife are entitled to one-fourth, Mary F. one-fourth, John W. one-fourth, and Benjamin F. the remaining fourth of the negroes, George, Abraham, Caroline, and her four or five children: Leonard, Jim, Armstead, Maria and Warner Washington, the slaves, and their increase, named in the bill of sale, &c. And that Binford and wife are entitled to one-fifth: Mary F., John W. and Benjamin F., to one-fifth each, and Pryor and wife to the remaining fifth of the slaves, Tom, Amy, William, Jane, Martha and Fanny; and of the horses, mules, cattle, and other personal property, or an equivalent in money; and to like proportional parts of the hire, profits, &c., of the slaves from the death of Matthew Ryburn; and of interest or the equivalent of the personal property aforesaid.

That defendant, Benjamin F., had made no division of said slaves and other property, except to give Abraham to Montgomery, and Jim to John W. Ryburn, and refused to make any, but had retained the whole estate, without administration, &c.

The bill prays that Benjamin F. be compelled to discover the amount and description of property, choses in action, &c., left by Matthew Ryburn, that he account for the same, &c., and for partition of the slaves, and other property, or its value, interest, hire, &c., and that in making such partition, John W. Ryburn be charged with the value of Jim at the time he received him, with interest: Mary F. with the value of Abraham, and that Binford's title to him be quieted, and for general relief.

On the 5th October, 1852, Pryor and wife filed their answer and cross-bill. They claim no interest in the negroes conveyed by the deed from Matthew to Benjamin F. Ryburn. Admit all the allegations of the bill to be true, and join in the prayer, except as to the slaves named in the deed. By way of cross-bill, they allege that Matthew Ryburn died seized and possessed of the slaves, Tom, Amy and her children, William, Jane, Martha and Fanny, and of other personal property as alleged in the bill. That Benjamin F. Ryburn continued in possession thereof, and of the whole of said Matthew's estate, and has ever since had possession of the same; except that he loaned Amy and Jane for a time to Montgomery M., and Jane was now loaned to his daughter, Mary F. That no administration was had on said estate; but that Benjamin F. had kept all the property, still has all of said negroes, and has, or has disposed of, all of the personal property, which has not died, perished, or been worn out and destroyed.

That Benjamin F. has made no division of the estate, and particularly none to Pryor and wife. Prayer, for discovery, account, partition of the slaves, and other property, or its value, interest, hire, &c., and for general relief.

At the May term, 1853, Binford and wife dismissed the original bill, as to them.

At the same term, (20th May,) Benjamin F. Ryburn filed his answer to the cross-bill of Pryor and wife. He admits that Matthew Ryburn died, intestate, in Lafayette county, in the latter part of the year, 1844, surviving him, his children, John W., Martha A., Susan J., Montgomery M., and respondent; and that

Montgomery M. died intestate, in April, 1848, leaving Mary F. his only child. He positively denies that said Matthew died seized and possessed of the slaves, Tom, Amy, William, Jane, Martha and Fanny, or either of them, or of any other negroes; or of a large number of horses, mules, cattle, hogs, &c., &c., as charged in the bill. He avers the truth to be, that, about the 1st of February, 1843, said Matthew transferred and delivered to him, and he then purchased and acquired of the said Matthew, and became peaceably possessed of, the slaves Tom, Amy, William and Jane, and since then, Martha, and Fanny have been born. That from the time he so acquired said slaves, until the present, he has held peaceable possession thereof, as of his own property; exercising control and ownership, and claiming the same in his own right, and the issue of said negroes for more than ten years, without claim or interruption on the part of any one, until these vexatious and inequitable proceedings were set on foot, &c.

That the principal consideration for the purchase of said slaves was, that said Matthew was owing debts, which were then pressing upon him, many of which were liens and incumbrances upon the four slaves transferred as aforesaid, or the slaves were liable to be seized, sold and sacrificed towards the payment thereof, and upon several of which debts respondent was security for the said Matthew. That he took the property and assumed the payment of debts, to the full value thereof, all of which debts respondent has paid, and he proposes to furnish a schedule thereof, if required, &c. He alleges that he thereby acquired an absolute title to said slaves against all persons, paying the full value thereof, and therefore denies that said Matthew died seized or possessed of said slaves.

That the debts, which he had paid for said Matthew, exceed the value of all the property he ever received from him, which he did not pay for in money; and moreover, that in January, 1844, he purchased of said Mathew, a woman called Julia, and her child Maria, for which he paid him $750 in cash, and took a bill of sale, with warranty of title, which is exhibited. That Pryor had

brought trover against respondent for the value of said slaves and increase, and obtained judgment in the Hempstead Circuit Court, from which he had appealed to this court, where the case was pending, (*See Ryburn vs. Pryor*, 14 *Ark.* 505,) and if affirmed, the said Matthew would be liable to him, if living, and his property, if he left any, for the purchase money of said slaves, interest, &c., but which respondent would lose, on account of the insolvency of said Matthew.

That said Matthew, at the time of his death, had four cows, which came to the possession of respondent, worth $40, or $50. One horse, which respondent did not have possession of, and which died the same year; three or four beds and bedding, taken by Montgomery M. Ryburn, and with which respondent had nothing to do; but few, if any, farming implements of any value; and that his whole property was not worth over $150: that he was really insolvent, and had no estate worth administration, which was well known to the complainants, &c.; who also knew that respondent had been, as it were, a father to his brothers and sisters, expending his means for their support and maintenance, and for the comfort and subsistence of the family, keeping them together in times past, and providing a home for those of them who chose to resort to it.

Admits that he had made no distribution of the estate of said Matthew, because he had none to distribute; denies that he converted proporty of said Mathew to his own use, or that complainants had any title to the slaves mentioned in the bill, as alleged.

Insists, that the pretended claim of complainants is stale, unjust and inequitable, and ought not to be entertained in equity. Pleads that his adverse possession of the slaves for more than five years under the statute of 19th December, 1844, gives him an absolute title thereto, against all persons, and that the relief sought by the complainants is barred, &c.

On the 21st of May, 1853, Pryor and wife filed an amendment and supplement to their cross-bill, for the benefit of themselves,

and such of the other heirs of Matthew Ryburn as thought proper to avail themselves of it. They allege that they intermarried many years before the death of said Matthew, had continued to live together as man and wife; and, since his death, Mrs. Pryor had been a *feme covert*. That the slave Tom is worth $1,000, Amy, $900; William, $1,000; Jane, $750; Martha, $400, and Fanny, $250. That the hire of Tom has been worth, since the death of said Matthew, $120 per annum; of Amy, $90 per annum; of William, from $36 to $100, according to his age; and of Jane, from and after the year 1848, $50 per annum. That since the filing of the cross-bill, Binford had made some final settlement with said Benjamin F. Ryburn, abandoned his suit, and no longer demanded anything from him. They pray that this suit may be taken and considered as brought by them, for themselves, and such of the other heirs as might choose to avail themselves of it, and that it proceed as an original suit, against said Benjamin F., and for such decree as by their bill is prayed, &c.

On the 13th of October, 1853, John W. Ryburn filed an answer and cross-bill. He admits the allegations in the bill to be true, and joins in the prayer thereof. By way of cross-bill, he alleges, that Matthew Ryburn died possessed of the slaves and other property mentioned in the bill; and that the defendant, Benjamin F., kept and converted the whole to his own use, &c. That from the time of the death of said Matthew, until December, 1848, complainant lived in Haywood county, Tennessee, when he removed to Jefferson county, in this State, where he has since resided. That he was never in that portion of the State, where said Matthew and Benjamin F. resided, until the first of the year 1849; and, until recently, had no knowledge of the condition in which the affairs of said Matthew had been left. That on hearing of his death, knowing that he had brought with him to Arkansas slaves and other property, worth at least $12.000, and owed but little at the time of his removal from Tennessee, complainant desiring to ascertain the condition of his estate, and get his portion thereof, wrote several letters to said Benjamin F., ask-

ing for such information. To which he replied, in positive terms, that said Matthew had died utterly insolvent; that he had purchased of him all his slaves before his death, and paid more than the value of them in discharging his debts, &c. Relying upon the truth of these representations, and not supposing that said Benjamin F. could wish to wrong his brothers and sisters, complainant gave himself no further concern about the matter, and made little or no inquiry as to how said Matthew became so suddenly embarrassed, &c. That, in the first of the year 1849, said Benjamin F. wrote to complainant, inviting him to visit him, proposing to pay his expenses going and returning, he being poor, and having to support a large family by his own labor. He accordingly paid him a visit, and while at his house, said Benjamin F. re-affirmed the substance of what he had before written him in relation to the condition of said Matthew's estate. That, in the latter part of the same year, he visited said Benjamin F. again; until when, he had not supposed that he had been using falsehood and misrepresentation towards complainant, in order to keep possession of, and acquire, if possible, by lapse of time, title to the slaves and other property left by said Matthew, &c. But complainant then made known to said Benjamin F. his suspicions, and claimed from him a division of the slaves, &c., mentioned in the original bill, &c.; but he again assured complainant that he had always represented the whole matter, touching said Matthew's estate truly and fairly; and exhibited to him a bundle of papers, which he said were notes, &c., paid for said Matthew by him, in his life time, amounting to more than the value of the slaves, &c. But complainant made no examination of the bundle of papers, telling said Benjamin F. that he could know nothing about them, and supposing that said Benjamin F. had paid the debts, as he had so frequently represented, &c. That Benjamin F. pretending to feel sympathy for complainant and family, on account of their indigence, proposed, from considerations of natural love and affection, to give to his wife, to be held in her own right, the negro boy Jim; and, accordingly, executed

to her a bill of sale for said boy, then worth about $500, and delivered him to complainant for his wife. He also made him a present of a horse worth from $60 to $100. That from thence until the filing of the original bill by Binford, &c., complainant remained in total ignorance of the fact that said Matthew made a testamentary disposal of his property, as stated in said bill, and which he learned, for the first time, in coming to answer the bill: nor did he, until then, have any knowledge of the execution or existence of the article of agreement exhibited with the bill—said Benjamin F. never having, in any of his letters to, or conversations with him, alluded to the agreement, or informed him of its existence. That, at the time he received from Benjamin F. the boy Jim and the horse, he gave him a receipt; and was induced by him to give it in such form as to show that he had received his interest or distributive share of the estate of said Matthew; but complainant avers that he did so under the impression that he had really no distributive share, and gave it in that form to gratify Benjamin F., and not because he supposed he was really receiving his share of said estate. But, since he has become possessed of the knowledge and information in relation to the slaves, &c., of said Matthew, above stated, he is satisfied that said Benjamin F. designed to perpetrate, and by falsehood and misrepresentation, did perpetrate a gross fraud upon him in obtaining said receipt from him. Had he supposed that such was his design, or that he was inducing complainant to give it for dishonest purposes, he would not have given it for anything other than the slave Jim and the horse at their real value. He is willing to be charged with the slave at $500, and the horse at $100, in the division of the slaves, &c., of said Matthew. Prayer for partition of the slaves, &c., &c., and for general relief, as prayed in the other bills.

On the 23d November, 1853, Benjamin F. Ryburn filed his answer to the amended and supplemental bill of Pryor and wife. He admits their marriage, and the coverture of Mrs. Pryor, as alleged. Protesting that they are not entitled to the discovery

sought or the relief prayed, and claiming the slaves to be absolutely his own property, he denies that the bill makes a correct estimate of their value and hire. On the contrary, he avers the truth to be as follows: Tom, aged 69 years, value $150, hire since the death of said Matthew, deducting cost of clothing, medical attention and taxes, $30 per annum. Amy, 40, and sickly, worth $500, hire $40. William, 22, $900, hire $50. Jane died September, 1853, at 13, worth then $700, hire $30. Martha, 5, $400, hire nothing. Fanny, 2, hire nothing, and raising equal to value. That if the slaves belonged to said Matthew, which he denies, respondent would be entitled to compensation for the care thereof, which would be worth nearly their hire. Avers again, his purchase of the slaves of said Matthew, his continued adverse possession of them from thence forward, relies upon the statute of limitations, and alleges that Pryor had rested under no disability to prevent him from asserting long before the pretended claim of his wife, &c.

On the 23d November, 1853, Benjamin F. Byburn also filed his answer to the original bill, and to the cross-bill of John W. Ryburn. Denies that said Matthew died seized and possessed of any of the slaves named in the bills, or that respondent held them for the benefit of him or his heirs. Denies that said Matthew died possessed of the other personal property, &c., as charged, but avers that he died insolvent, leaving nothing worth administration. That about the 1st of February, 1843, respondent absolutely purchased, and said Matthew transferred to him, by bill of sale and delivery, the slaves George, Abraham, Caroline, Leonard, Jim, Armstead, Mariah and child, Warner Washington: a copy of which bill of sale is exhibited with the original bill. That about the same time, respondent purchased, and said Matthew transferred and delivered to him, without bill of sale or writing, the slaves Tom, Mary, William and Jane: and that respondent thus acquired all of said slaves, without any resulting trust, or residuary right in the said Matthew, or any other person; and without any understanding or stipulation, as to any future dis-

position or division thereof; that the sale was absolute. That Martha and Fanny, children of Amy, have been born since, and Jane died in September, 1843. That the allegations in the bills, that said bill of sale was intended, or was in fact executed by said Matthew, by way of testamentary disposition of part of his estate; or that respondent received said negroes, or those for which no bill of sale was given, for any such purpose, or incumbered with any such condition or trust, were wholly untrue. And that the only possible pretext to demand a division of any of the slaves, must rest upon the separate agreement exhibited with the original bill, and copied above, which was no part of the contract of purchase, was executed for the reason and purpose stated below; was wholly without consideration and void, and extended only to the slaves therein named.

That the true considerations of the purchase of all of said slaves, was that said Matthew, then advanced in life, was owing the respondent for money advanced to, and paid for him; and was also owing debts to other persons, then pressing upon him, many of which had, by legal proceedings, become liens upon his negroes, or they were liable to be seized, sold, and sacrificed in payment thereof: upon some of which debts, the respondent was security for said Matthew, and had assumed the payment of others. That, from the embarrassed condition of said Mutthew, respondent could look for indemnity to the slave property only, he having none other of consequence. That slaves were then worth hardly more than half their present value, money scarce, and all the slaves transferred to respondent by the said Matthew, would not, under the hammer, have paid his debts, as it was believed. That respondent being security, &c., as above stated, and the creditors of said Matthew being willing to give respondent time to pay the debts, if he would assume them, and under the belief that he could save himself from loss thereby, he purchased all of said slaves, regarding it as the only means of saving himself from ultimate loss, and his aged father from absolute want, during the period he might live. That these were the true considerations of

the purchase of the slaves: and that the sum of $2500, expressed as the consideration in the bill of sale, was not actually paid to said Matthew at the time, but was inserted as approximating to the value of the slaves therein named. But that the sale was absolute, &c., and respondent thereby acquired, and has ever since held all of said slaves as his own property, except Jim and Abraham.

That in compliance with his undertaking, respondent assumed, and has paid the debts of said Matthew, principal and interest, amounting to between $5,000 and $6,000, which, with the amount due from said Matthew to respondent, exceeds the value of all the slaves at the time of the purchase and transfer, &c. That the payment of these debts was well known to the parties seeking relief—a schedule of which, with the amount due from said Matthew to respondent, he proposes to file, if required, and to prove the same, though from the death of witnesses, lapse of time, and loss of vouchers, he will be unable to establish the whole amount, &c.

He admits that about the 18th of February, 1853, after he had purchased said slaves, and entirely disconnected therewith, he signed the agreement exhibited with the original bill; avers that it was executed by him voluntarily, without consideration, and totally disconnected with the purchase of the slaves. That it was executed for the reason alone, that if the other slaves, or property, not therein embraced, were sufficient to pay off and discharge the debts due from said Matthew to respondent and others, the precise amount of which was not then known, those slaves were to be equally divided between respondent, said John W., Montgomery M., and Susan J., the said Martha A. having been provided for at her marriage; but if the amounts of the debts reached the value of these slaves at the time, it was well understood and agreed among the parties, that no distribution could or ought to be made; that the liability of respondent, in virtue of said paper, was to cease, and the agreement to become null and void; for, otherwise, respondent would have been the only suf-

ferer. That the reason and object of that paper were well known to the family, and respondent never concealed, or attempted to conceal, the same from the said John W., or any one else, and that the allegations in that respect are untrue—and respondent having no doubt that said John W., by means of correspondence or otherwise, knew of the existence of said paper, denies that he did not come to that knowledge until the time mentioned in his cross-bill. That the agreement was executed upon the reason, and with the understanding above set forth, and no other; and when it was ascertained that the debts of said Matthew amounted to the value of all of his property, the agreement was known to the parties as no longer obligatory, if it ever was. The respondent openly and notoriously claimed the said slaves as his own property, with their knowledge and consent, up to the institution of these proceedings: no division was asked for or demanded, and the agreement, no longer valid, was not brought forward, or any right asserted under it for nearly ten years, and then as a pretext to drive respondent into some compromise, or purchase of peace, &c. He insists that the agreement was without consideration, was never acknowledged or recorded, that the reason for which it was made had failed, and that it should be declared null and void, &c.

Denies that the bill of sale was made upon an understanding between him and said Matthew, that he should divide the slaves conveyed, and their increase, on the death of said Matthew as alleged; or that the said agreement was executed in pursuance of any such understanding.

Avers that in addition to the debts paid by him for said Matthew, &c., &c., he purchased of him, 1st January, 1844, the woman Julia and her child, Maria, at $750 in cash, taking a bill of sale with warranty. That Pryor had brought trover for the value of the woman and her children; and, on 12th May, 1852, obtained judgment against respondent for $1,875, and costs. That, by reason of the insolvency of said Matthew, he would lose the purchase money and interest, amounting to $1,100, besides costs, expenses and attorney's fees, amounting to $500.

Claiming the absolute title to said slaves, and denying that complainants are entitled to any partition of them, yet if the court should decree them to be part of the estate of said Matthew, respondent insists that, as such, they would be subject to the following claims before division could be made:

1. The amount of the debts, principal, interest, costs, and expenses paid by respondent for said Matthew.

2. The sum due from said Matthew to him for money paid, lent and advanced, &c.

3. The amount due on the warranty of Julia and child, with costs, expenses and counsel's fees, in defending the title to them.

4. Compensation for care and attention to the slaves from the time respondent acquired them to the present time, and reimbursement for taxes, clothing, medical bills, and other necessary expenses, &c.

5. Credit or reimbursement for property and money advanced to the said John W. and Montgomery M.

Which sums, respondent insists, exceed the value of all the slaves, and make it manifest that complainants are entitled to no relief, &c.

Denies that said Matthew died possessed of more than $150 worth of property: of which, but four cows, worth $40 or $50, came to respondent's possession, &c. That he died insolvent, leaving nothing worth administration, as complainants well knew, &c. That respondent had done a good part by said John W., Montgomery M. and Susan J., in giving them property beyond what they would be entitled to, on any division of said slaves, even if they had belonged to said Matthew, and in their maintenance and support, furnishing a home for the family, their mother having died before said Matthew, &c.

Admits that John W. resided in Tennessee, when said Matthew died, that he removed to Jefferson county, in 1848, and was not in respondent's neighborhood (Hempstead county,) until the time mentioned in his cross-bill. But avers that by means of correspondence and conferences with persons cognizant of the

matter, he was apprised of the situation of said Matthew at the time of his death—that he was insolvent—left no estate for distribution, and that respondent had purchased of him all his slaves, in order to reimburse and save himself, &c. That respondent stated these facts to said John W., in letters to, and conversations with him, and still avers them to be true.

That it is utterly false that respondent was guilty of the misrepresentation and fraud imputed to him in said cross-bill, or that he used any concealment whatever in the premises, and that these and all kindred allegations, made by the said John W., are as unjust and false as they are ungrateful and scandalous, &c. That respondent willing to aid the said John W., as far as he was able, in justice to himself and family, let him have the boy Jim, now worth from $1,200 to $1,500, and made the title to his wife at his own request. Also, let him have a horse, worth $125, besides money. That on the 3d of December, 1849, said John W., with a knowledge of his rights, and of the condition of the estate of said Matthew, executed to respondent, the following receipt:

"Received of Benjamin F. Ryburn, six hundred dollars in full of all demands against him, this 3d of December, 1849.

JOHN W. RYBURN."

Which is the receipt referred to in the cross-bill. Denies that he concealed or misrepresented any thing, to induce said John W. to sign the receipt, or that he was not fully aware of his right, or that respondent perpetrated any fraud upon him to obtain it. Avers that it was given because said John W. felt that he had no claim against respondent for any cause whatever: and in giving the receipt, it was well understood that it included whatever right he might have in the estate of said Matthew, be the same more or less; and respondent pleads and insists upon it as a bar to the relief asked in the cross-bill.

Admits that he delivered the boy Abram or Abraham, to Montgomery M. in his life time: that he was sold under order of

the Probate Court, &c., for the payment of the debts of said Montgomery M., purchased by Bankhead, sold by him to Binford, and is now worth $1,000 or $1,500, &c.

Admits that he administered on the estate of said Montgomery M. and did not account for Amy and Jane, as part of his estate, because they did not belong to him, having been merely loaned to him by respondent.

That besides Abraham, respondent from time to time loaned to, and paid money for Montgomery M., to an amount above the the value of any distributive share he would have been entitled to in the said slaves, had they belonged to said Matthew at the time of his death, instead of respondent, a schedule of which he proposed to furnish if required. Denies that Mary F., child of Montgomery M., has any just claim upon respondent in respect of the estate of said Matthew.

States that since the filing of the original bill, Binford becoming satisfied from vouchers examined by him, and otherwise, that respondent had paid debts of said Matthew to an amount fully equal to the value of the property acquired by the respondent from him, dismissed the bill as to himself, and makes no further claim.

Insists that the claim set up in the bills, is stale, and barred by lapse of time. Pleads limitation of five years. Relies upon his peaceable, uninterrupted and adverse possession of the slaves, since the death of said Matthew for title, and pleads the statute of 19th December, 1846, as a bar to the relief sought.

On the 22d November, 1855, the cause came on to be heard upon the original and cross-bills, answers, replications, exhibits and depositions; and was dismissed for the want of equity, each party to pay his own costs. The complaining parties appealed to this court.

The evidence, so far as deemed material, will be stated in connection with the points at issue.

The bills proceed for a partition of the slaves, their hire, and of other personal property, or its value, with interest, &c.

Apart from the slaves, the answers of Benjamin F. Ryburn positively deny, that he received and used any personal property belonging to his father, at his death, except four cows, worth $40 or $50. There is nothing in the depositions read upon the hearing to overturn the truth of this portion of his answers. The only questions of magnitude in the cause, arise upon the claim of complainants to a partition of the slaves.

A preliminary question arises, as to the admissibility of the depositions of Binford and wife, and to determine this, their position, as parties to the suit, must be understood.

They were complainants in the original bill, claiming a partition of the slaves, &c., in right of Mrs. Binford. Binford was also complainant as the next friend of Mary F. Ryburn, demanding for her a share of the same property. They were made defendants in the cross-bills of Pryor and wife, and John W. Ryburn, but the slaves, &c., in controversy, being in the hands of Benjamin F. Ryburn, the cross-bills sought no relief as against Binford and wife. After Binford had compromised and settled the claim of himself and wife with Benjamin F. Ryburn, and dismissed the original bill as to them, he continued to be a complainant as the next friend of Mary F. Ryburn, and the bill was prosecuted for her benefit.

Binford and wife, after the compromise, had no personal interest in the result of the suit, as they state in their depositions, and the cross-bills seeking no decree against them, they were merely nominal defendants thereto, and in this attitude, though parties, their depositions might have been taken upon an order of court for that purpose, in favor of the complainants in the cross-bills, even if they had been contingently liable for costs. *Folsom vs. Fowler adm.*, 15 *Ark. Rep.* 281; 1 *Greenlf. Ev.*, *sec.* 361; 2 *Daniel's Chancery Plead. & Prac.* 1035 *to* 1044, *and notes; Gresley's Eq. Ev.* 338.

But Binford being complainant in the original bill, as the next friend of Mary F. Ryburn, it seems that his deposition could not be taken to sustain the allegations of the bill in her behalf. In

other words, he could not be a witness in his own case, though prosecuting as a *prochien amy.* 2 *Daniel's Chancery Plead. & Prac.* 1037, 1038; *Gresley's Eq. Ev.* 357, 359; *Eckford vs. De Kay et al.*, 6 *Paige Chan. Rep.* 565.

To the extent that Binford would be incompetent, his wife also would be disqualified. 1 *Greenlf. Ev.*, *sec.* 334, *et seq.*

The cross-bills seeking the same relief against Benjamin F. Ryburn, which is sought by the original bill—a partition of the slaves, &c., among the parties—the depositions of Binford and wife could not be read in favor of the complainants in the cross-bills, without enuring to the benefit of the infant complainant in the origiginal bill, represented by Binford; and hence, their depositions must be disregarded altogether. *Eckford vs. DeKay*, 6 *Paige Chan. Rep.* 565.

It is insisted, also, that the depositions of Binford and wife should be excluded, because they were taken without an order of court. Where the deposition of a party to the record is desired, an order of court for it to be taken, will be made, as a matter of course, upon a suggestion that the party has no interest in the cause, the court leaving the question of interest to be settled at the hearing. *Folsom vs. Fowler adm.*, 15 *Ark. Rep.* 280; *Neville vs. Demeritt et al.*, 1 *Green's Chan. Rep.* 33; 2 *Daniel's Chan. Plead. & Practice* 1044; *Gresley's Eq. Ev.* 338; 1 *Greenl. Ev.*, *sec.* 361. And it has been held that the deposition of a party, taken without such order, cannot be read. *Clagett et al. vs. R. & H. M. Hall*, 9 *Gill & John. Rep.* 96; *De Wolf vs. Johnson*, 10 *Wheat.* 367; *Bogart vs. Bogart*, 2 *Edward's Chan. Rep.* 399. But see *Sproule et al. vs. Samuel et al.*, 4 *Scam.* 137.

But the counsel in the cause, in the court below, filed an agreement of record that all the depositions, taken by either party, might be read upon the hearing, reserving objections to competency only. This agreement waived the objection that the depositions of Binford and wife were taken without an order of court.

Returning to the main issue, it is manifest, from the pleadings

and evidence, that Benjamin F. Ryburn was in possession of the slaves in controversy from the death of his father, Matthew Ryburn, in the latter part of the year 1844, until the commencement of this suit, in May, 1852, using and claiming them as his own property. During this entire period, it does not appear that he made any clear and distinct admission of any claim of the complainants to a partition of the slaves. It is true, that he let John W. Ryburn have the boy Jim, and Montgomery M. Ryburn the boy Abraham, but the bills do not allege, nor does the proof show that he delivered these slaves to them upon a recognition of their right to a partition, but he seems to have placed it upon the ground of a gratuitous assistance of his brothers, claiming that he had purchased all the slaves of his father, and paid their full value. Whatever may have been his actual motives for letting them have those slaves, the testimony fails to show any clear and open admission by him of a right in them: such as would be necessary to avoid the conclusion that he held adverse possession of all the slaves from the death of his father forward.

It is also manifest, that whatever right of action for partition, Pryor and wife, John W. Ryburn, and Montgomery M., the father of Mary F. Ryburn, may have had of the slaves mentioned in the article of agreement of the 18th February, 1843, or of the other slaves, accrued to them upon the death of Matthew Ryburn, according to the allegations of the bills.

It follows, that the adverse possession of the slaves by Benjamin F. Ryburn, for more than five years after the passage of the act of 19th December, 1846, (*Digest, p.* 943,) and before the institution of this suit, gave him the right of property thereto by virtue of the statute, and was "a complete bar to any suit in law or equity therefor," unless something appears of record to prevent the operation of the statute as against the complainants.

The only exception upon the face of the statute, is contained in the 5th section, and applies to cases of possession of slaves held under a deed, or other instrument of writing from the owner, duly acknowledged and recorded in the county where the slaves are possessed. This exception has no application in this case.

It appears, that at the time of the death of Matthew Ryburn, Mrs. Pryor was a married woman, and so continued; and that John W. Ryburn resided in the State of Tennessee; and continued to reside there until December, 1848, when he removed to and settled in Arkansas. Montgomery M. Ryburn survived his father until April, 1848, when he died, leaving the infant complainant, Mary F. his sole representative.

The act, in its terms, applies to suits in equity as well as at law, and makes no exceptions in favor of any class of persons.

The general rule, that where the Legislature makes no exceptions in favor of infants, married women, non-residents, &c., the courts can make none, was recognized in *Erwin vs. Turner*, 1 *Eng. Rep.* 14. And in *State Bank vs. Morris et al.*, 13 *Ark. Rep.* 291, this court said: "The statute which creates the limitation, must also create the exception: we know of no rule of law or decision to the contrary." If it were deemed necessary to look beyond these decisions, there is no want of authorities to to sustain them. *Angel on Lim.* 204, 205; *Beckford et al. vs. Wade*, 17 *Vesey* 87, *and cases cited; Hall vs. Barnstead*, 20 *Pick. Rep.* 2; *Sacia vs. DeGraaf*, 1 *Cowen* 356; *Clark vs. Rutherford*, 3 *Murphy Rep.* 237.

There were, doubtless, grave considerations of policy, which induced the Legislature to pass the act in question, without the exceptions usually made in general statutes of limitation. Ours was, at the date of the enactment, as it still is, comparatively a new State, increasing its population by immigration mostly from the slave States. Slaves were being brought into our State for settlement or market, from abroad, and changing owners among our own people. Unlike land, they are a moveable property. Cases doubtless had arisen, and were likely to arise, in which persons purchasing slaves in good faith, had, or might have, to surrender them with an account of hire, after the lapse of many years, in favor of the dormant claims of non-residents, married women, infants, &c. Hard cases may arise under the statute, but more numerous cases of hardship might have arisen had the

statute been less comprehensive in its terms. All this, however, was the subject of legislative policy.

Before the passage of this act, the Legislature had repealed the reservation contained in the general statute of limitations in favor of non-residents, except in cases of fraudulently absconding debtors, &c. *Digest, chap.* 99, *secs.* 14, 15.

Husbands have sufficient motives to look after the property, and protect the interest of their wives, and Pryor and wife could as well have commenced their action in this case, upon the death of Matthew Ryburn, as at a later period. Our statute makes ample provision for the appointment of guardians for infants, whose duty it is to take care of their estates, and prosecute their claims to property. All such considerations were doubtless weighed by the Legislature in passing the act in question.

It is insisted, moreover, by the counsel of complainants, that Benjamin F. Ryburn held the slaves as a trustee, and that the statute would not run in his favor. The bills do not make any case of trust against him, as to the slaves not included in the bill of sale, and in the article of agreement. They allege that Matthew Ryburn died the owner of these slaves, and that after his death, Benjamin F. Ryburn kept and converted them to his own use.

As to the other slaves, the bills allege that the bill of sale, though in the form of a deed, was a testamentary devise, made by Matthew to Benjamin F. Ryburn, without consideration, upon an understanding that the slaves, upon the death of Matthew, were to be divided by Benjamin F., between himself, John W., Montgomery M. and Susan, and that in pursuance of this arrangement the article of agreement was executed.

Benjamin F. denies that the bill of sale was intended as a testamentary disposition of the slaves, made upon any such understanding. He avers that the bill of sale was intended to be, what it imports to be upon its face, an absolute conveyance. That he purchased the slaves therein mentioned, as well as the other slaves of his father, upon the consideration that he was to dis-

charge his liabilities, &c. That the instrument of February the 18th, 1843, was a voluntary and independent agreement, made upon the understanding that if the debts, &c., of his father, did not exceed the value of the slaves not embraced in the article, it was to be operative, otherwise it was to be null and void; and that the liabilities &c., of his father amounted to the full value of all the slaves, &c.

The depositions in the cause, tend rather to sustain, than to overturn his version of the contracts.

Dr. *Ellets* testified, that he drew the bill of sale at the request of Matthew Ryburn. That the consideration upon which the negroes were sold to Benjamin F., was that he was to pay off all the liabilities at that time existing against his father in the State of Arkansas, to support him during his life, and pay him a certain sum of money. That Matthew Ryburn told the witness at the time, that he was in debt, and wished his debts paid by his son Benjamin F. He had been in bad health for more than a year, and by reason of ill health and old age, was too feeble to attend much to business. His mind was deemed sound. At the time the bill of sale was executed, Benjamin F. paid his father money, but the witness did not know the amount. It was in a shot-bag, and was handed to Matthew by Benjamin F., as a part of the consideration of the slaves. Matthew told the witness it had been counted to him or by him. It was gold and silver, and the shot-bag, which was of the ordinary size, was about half full. Benjamin F., afterwards paid to witness a medical bill which Matthew owed him.

The witness further states, that the agreement of 18th February, 1843, was taken because Matthew Ryburn had concluded that the property sold to Benjamin F. was worth more than the amount that he was owing, and what would be necessary for his support, and that of his younger children, Montgomery and Susan. That Benjamin F. Ryburn at first refused to sign the writing, because he said he had already assumed for his father more than the property was worth. Witness had written the bill of sale,

and also wrote the agreement. He regarded the latter instrument in the light of a private memorandum for the parties, and he induced Benjamin F. to sign it, to satisfy the old man, and at the same time represented to him that this could not affect the bill of sale. But for the influence of the witness, and his assurance that the latter agreement could not affect the bill of sale, Benjamin F. would not have signed the agreement. The value of the slaves, named in the bill of sale, at the time, was not less than $2500, nor more than $2750.

*Janes* testified, that he held a note against Matthew Ryburn, upon which he had paid a small amount, and when he called upon him for the balance, Matthew told him that he had sold out to his son Benjamin F., and that he was to pay all his debts. After the death of Matthew, Benjamin F. paid the debt.

*McKinney* testified, that he called on Matthew Ryburn for the payment of a note which he held against him, and the old man referred him to his son Benjamin F., stating that he found himself inthralled, and did not think he could ever be able to pay his debts; that he wished all his just debts paid, and that to do this, he had turned over to Benjamin F. all his property, on the understanding that he was to pay off his debts. Witness then went to Benjamin F. and he paid the debt.

Other depositions in the cause show the payment of a number of the debts of Matthew Ryburn by Benjamin F. amounting to a considerable sum; but we deem it unnecessary to make an estimate of the entire amount. The proof of the payment of these debts, by Benjamin F., conduces to sustain the statement in his answers, that he purchased the slaves of his father.

We think the complainants have failed to establish any such trust as would prevent the statute of limitations from running in favor of Benjamin F. Ryburn. See *Sullivan vs. Hadley et al., ante.*

It is alleged by John W. Ryburn, that Benjamin F. Ryburn committed a fraud upon him, in concealing from him the existence of the article of agreement; and, therefore, the statute would not run against him. Without intending now to decide

whether any fraud and concealment, or, if any, what would prevent the running of the statute in question, it may be remarked that the allegations of fraud and concealment, made by the cross-bill of John W., and denied by the answer of Benjamin F., are not sustained by proof. The article of agreement when executed, was delivered to Susan J. Ryburn, and but little consequence seems to have been attached to it, by the parties, for a number of years afterwards. We do not know that it was particularly incumbent on Benjamin F. Ryburn to make its existence known to John W., or that his failure to do so, under all the circumstances, could be regarded as a fraud.

Upon all the facts of the case, we think the remedy of the complainants, for a partition of the slaves, was barred.

Nothing remains to be considered but the right of complainants to a decree for partition of the four cows, or their value, which Benjamin F. Ryburn admits came to his hands upon the death of his father, and which he converted to his own use, without any pretence of purchase.

Upon the death of Matthew Ryburn. this species of property did not technically descend to his heirs, like lands or slaves, and we think the safer doctrine is, that complainants could only make Benjamin F. liable for this property, and obtain distribution of it through an administration. See *Lemon's heirs vs. Rector et al*, 14 *Ark. R.* 436.

The decree of the court below is affirmed.

## CLOUD AS SCHOOL COMMISSIONER VS. DANLEY ET AL.

Since the passage of the act of 11th January, 1853, in relation to common schools, the Trustees of Common Schools, and not the county commissioner, are proper parties to bring suits on notes given for the purchase of the sixteenth section.

*Appeal from the Circuit Court of Pulaski County.*

Hon. WILLIAM H. FEILD, Circuit Judge.

CLENDENIN, Attorney General, for the appellant.

CUMMINS and JORDAN, contra.

Hon. THOMAS JOHNSON, Special Judge, delivered the opinion of the Court.

The appellant has assigned for error, generally, that the court below sustained the demurrer interposed by the appellees. Several causes of demurrer were assigned; but the only one which it is considered material to decide, is whether the appellant was entitled to maintain the suit in his capacity of school commissioner of Saline county. The instrument in suit was executed under the authority of the 11*th sec. of chap.* 145 *of the Digest*, and was made payable to Philip Link, successor to Robert Calvert, or his successors in office. The suit was brought by Madison M. Cloud, as commissioner of schools of Saline county; and he avers, in his declaration, that he is the successor in office of the said Philip Link, as commissioner of schools in Saline county, Arkansas; and that, as such, he is of right entitled to bring suit on said writing obligatory, &c. The point to be determined will depend upon the

construction which shall be put upon the several acts of the Legislature, bearing upon the subject of the school lands. The 12*th sec. of chap.* 145 *of the Digest*, already referred to, requires the bond for the purchase money to be drawn in favor of the commissioner of the township, as such, and his successors in office. The same act authorizes and requires the election of one township commissioner and three school trustees for each township, and they are given the collection and control of all funds arising from the sale of the 16th sections in the several townships, and such other funds as are excepted by the act out of those placed under the control of the board of county commissioners. The 24*th sec. of the act of* 1850, enacts: "That the offices of school trustees and commissioners, provided for by existing laws, be, and the same are hereby abolished, and that the commissioners required to be elected or appointed under the provisions of this act, shall hereafter perform all the duties heretofore required of such trustees and commissioners, as may not be inconsistent with this act." Here, then, the offices of school trustees and commissioners, provided for by the 145*th chap. of the Digest*, are abolished, and the township commissioner provided for by the act of 1850–1851, is substituted in their stead, so far as is consistent with that act. There is nothing in this act that can militate against his power to collect the purchase money of the sixteenth section; but, on the contrary, it is expressly conferred upon him by the 29*th sec.* This section provides: "That under the order and direction of the County Courts of the several counties of this State, it shall be the duty of the commissioner of schools, or treasurers of said counties, as the case may be, to institute and prosecute to final judgment, all suits necessary for the collection of any moneys which may be due to any congressional township in their respective counties for the use of schools there; and it shall be the duty of the prosecuting attorney to conduct said suit free of charges. The act of January 12th, 1853, (see *Pamphlet Acts of* 1852,) *secs.* 39 and 40, provide that: "The trustees of common schools, elected as aforesaid, shall be successors to the township commission-

ers elected under the provisions of an act to amend the common school system in this State, approved January 11th, 1851," and that "all rights of property, rights of causes of action, existing or vested in the township commissioners as aforesaid, for the use of schools in said townships, shall vest in the trustees under this act as their successors, in as full and complete a manner as was vested in said commissioners appointed or elected as aforesaid." These sections have reference to the 31st section of the same act, which provides for the election of three trustees of schools for each township, in each congressional township in the State. This section declares that they shall be a body politic by the name and style of the "trustees of schools of township No.—and range No.—" and that "the said corporation shall have perpetual existence, and shall have power to sue and be sued, to plead and be impleaded, in all courts and places where judicial proceedings are had in this State," &c. This is the last act that was past anterior to the commencement of this suit; and, consequently, it is the one that must govern as to the proper party to institute the same. Under this view it is clear that trustees of common schools, elected under the act of January 11th, 1853, and not the township commissioner, were entitled to institute this suit. The Circuit Court therefore did not err in sustaining the demurrer; and, consequently, its judgment ought to be, and is in all things affirmed.

Mr. Chief Justice ENGLISH not sitting in the cause.

# INDEX:


ACCORD AND SATISFACTION.

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ACTION, FOUNDATION OF.

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ADMINISTRATION.

1. An administrator is not authorized to invest in real estate or otherwise, the balance in his hands, as such; but should distribute it to the representatives of the intestate, if known; and, if unknown, put it out at interest, under the direction of the Probate Court, until called upon to pay it over. *Wheat et al. vs. Moss et al.*, 243.
2. Where an administrator purchases property with money in his hands, due to the estate of his intestate, and causes the title to be made to another—there being a judgment and execution against him at the time, and no property of his own out of which to satisfy the judgment—the court may well presume, as between the judgment creditor and the parties to the purchase, that the administrator had converted the assets to his own use; that the purchase was made for his individual benefit, and that the transaction was intended to delay his creditors. *Ib.*
3. By the common law, the powers of executors, administrators, and guardians, as such, did not extend beyond the limits of the local government, in which they were appointed, for the purpose of bringing suits, and our statute was designed to enlarge their powers. *Clark as ad. vs. Holt*, 257.
4. The disposition of the personal estate of any one deceased, is determined by the law of the domicil; and if he has effects in a foreign jurisdiction, and administration be there granted on his estate, it is merely ancillary or auxiliary to the administration of the domicil, so far as regards the collection of the effects and the proper disposition of them, but subservient to the rights of creditors, legatees and distributees, who are resident in the country where the ancillary administration is granted. *Ib.*
5. Where letters of administration have been granted on the estate of a deceased person,

ADMINISTRATION—CONTINUED.

by the proper authority in one State, and afterwards his will probated in another State, the place of his domicil, and letters testamentary granted by the proper authority, the letters of administration, previously granted, are not thereby vacated. *Ib.*

6. Where slaves, held by an ancillary administrator in another State, have been taken from his possession, or pass to the possession of the defendant, by virtue of a bailment, such administrator would have the right to institute an action for their recovery in this State, although there may be a principal administration in some other State. *Ib.*

7. Where suit is brought against an administrator, and a judgment obtained for a debt due by the intestate, it is the duty of the administrator, under the 98th section of the statute, (*Digest, chap.* 4,) to return such claim to the Probate Court for classification; and no other presentation or notice of his claim is required of the creditor; nor approval by the administrator. *Clark adx. et al. vs. Shelton*, 474.

8. The plaintiffs suing as administrators, having proved by the record of the Probate Court, upon an issue to the plea of *ne unques administrators*, that letters of administration upon the estate of their intestate, had been granted to the defendant, and afterwards revoked; and that administration was then granted to them — the reading, by the defendant, of the letters granted to him, was not prejudicial to the plaintiffs. *Sadler et al. ad. vs. Sadler*, 628.

9. In such case, the letters of administration granted to the plaintiffs, were *prima facie* evidence of their authority to sue: and although an instruction, that the plaintiffs could not recover unless they are *bona fide* administrators, would be objectionable; yet there was no substantial error in such instruction, the court having also instructed the jury that if they believe the letters of the defendant were revoked, and that letters were granted to the plaintiffs, they are, in fact, the administrators. *Ib.*

10. Upon application to the Probate Court, for allowance of a claim against the estate of a deceased person, which has been rejected by the administrator, a plea, that the claimant had not delivered to the administrator a copy of the claim, before or at the time of its presentation, is a good defence; and such plea need not allege that the administrator did not waive or dispense with the copy. *Grimes ad. vs. Bush*, 646.

11. The administrator may waive the copy required by the statute; but the facts and circumstances going to show such waiver should, legitimately, be brought forward by the claimant, and whether they amount to a waiver of the copy is a matter of fact to be determined by the jury. *Ib.*

See, also, *Claims against Estate* 1; *Chancery* 26, 27, 28, 40; *Evidence* 2.

ADMISSIONS.

1. Where an account against a party is delivered to him, and he examines it carefully, and makes no objection to it, or any thing contained in it, it amounts to an indirect

ADMISSIONS—CONTINUED.

admission of the debt—acquiescence or silence, when a demand is made, is equivalent to an admission. *Brown vs. Brown*, 202.

2. The admission of a fact, when not operating as an estoppel, is but evidence of the existence of the fact; and when it is established by other evidence, that the fact admitted never had existence, and that the party making it, could have had no personal knowledge of the fact, such admission is not of much weight against him. *Wynn vs. Garland*, 440.

AFFIDAVIT.

See *Claims against Estates* 1.

APPEALS FROM PROBATE COURT.

See *Jurisdiction* 3, 4; *Practice in Circuit Court* 4, 6.

ASSUMPSIT.

1. In an action of assumpsit for money paid, the plaintiff may prove the payment of money on the drafts of the defendant, without producing or accounting for the drafts. *Greenfield vs. Wright, Williams & Co.*. 186.
2. Where one receives a note from another, to be used in some purpose of his own if it will answer the purpose, and if not to return it, and he loses it, the inconvenience resulting to the owner of the note from its loss, is a sufficient consideration to support a promise, made by the party who thus obtains and loses it, to pay the amount of it to the owner. *Sandefer ex. vs. Mattingly*, 237.
3. Where one receives of another a note for collection, and is afterwards called upon by the owner of the note to know if he has collected it, and replies that he has not, but has lost it, and would pay the amount of it himself, if he should not find it—the owner of the note, after the lapse of a reasonable time, may bring an action against the party making such promise, without further demand, and if further demand were necessary, the party making the promise having died, a demand upon his executor, in legal form, is sufficient. *Ib.*
4. Where a party is thus sued for the amount of the note so lost by him, he could not require strict proof of its identity, having by his own negligence, placed it out of the power of the plaintiff to identify it, by losing it. *Ib.*
5. The claim being based upon the promise of the party to return the note if it did not answer his purpose, the loss of it by him, his failure to return it, and his promise to pay the amount of it, the plaintiff was not required to prove that the note could have been collected by proper diligence, as in cases where a note is placed in the hands of an agent for collection, and the suit is simply for the failure to collect. *Ib.*

ATTACHMENTS.

1. An account against the defendant in favor of the plaintiff, for an "account bought of the estate" of a deceased person, held to be a sufficient foundation of a suit by attachment before a justice — as the plaintiff might by proof on the trial, have established a direct liability on the part of the defendant for the amount of the account. *Boothe vs. Estes*, 104.
2. A judgment in attachment, when questioned collaterally, will not be held null and void, because, the affidavit stated that the defendant "*conceals or absents himself*," &c. *Ib.*
3. The correct practice, on a judgment in attachment, is for the execution to direct the officer to sell the property taken in the attachment: but though the execution be generally against the goods, &c., of the defendant, the informality will not avoid the sale, if the officer sells the property attached and none other. *Ib.*
4. The defendant in attachment pleaded in abatement, that the plaintiff did not file an attachment bond before suing out his writ; the plaintiff replied, setting out a bond purporting to be executed by S. and C., the defendant rejoined that the bond was not the deed of said C.: the proof showed that the bond was the deed of C. alone, but sufficient to indemnify the defendant: HELD, That the true issue was, whether a good and sufficient bond had been filed, and not whether it was the bond of S. and C. *McMechan vs. Hoyt*, 303.
5. The plaintiff, in his declaration in attachment, claims the amount of the debt sworn to, with interest and "current exchange," on the place where the debt, due on promissory note, is payable; and the writ of attachment commands the sheriff to attach, &c., to satisfy the debt and interest, but is silent as to the exchange: there is not such a variance as will abate the writ. *Whitlock et al. Kirkwood*, 488.

Nor is there a fatal variance where the affidavit for an attachment claims the interest due upon the debt; and the attachment bond is silent as to such interest. *Ib.*

ATTACHMENT LIEN.

*Husband and Wife* 2, 3.

AUTERFOITS ACQUIT.

See *Criminal Law* 15, 16.

BAILOR AND BAILEE.

1. Where property is left with another under an agreement to deliver it when demanded, or *account for it*, even if the bailee had the right to elect to retain and pay for it, his refusal to deliver, and denial of the bailor's title, show a conversion of the property, and not an election to retain and pay for it. *Boothe vs. Estes*, 104.

BASTARDY.

1. In proceeding, under the statute, against the reputed father of a bastard child, it is not

BASTARDY—CONTINUED.

necessary that there should be other pleading than the mere denial of the defendant to authorize the Circuit Court to submit the matter, whether he is the father or not, to a trial by jury. *Barnett vs. The State*, 530.

2. And in such proceedings the defendant should not be allowed, on cross-examination of the mother of the child, a witness for the State, to ask her as to the number of times, the place where, the time of day when, he had connection with her, or the mode of meeting for such purpose, unless such questions be confined to some definite time within which the child might have been begotten. *Ib.*
3. But the defendant may well ask the witness in such case: how do you know that the defendant is the father of the child? *Ib.*

BILLS AND NOTES.

1. An instrument of writing, directing the payment of a certain sum "from proceeds of drafts," is not a bill of exchange according to the law merchant; nor can the payee maintain an action thereon, on non-payment, against the maker. (*Owen vs. Lavine*, 14 *Ark.* 389, reviewing previous decisions). *Raigauel & Co. use of Lindauer vs. Aylift*, 594.
2. A draft, drawn upon a particular fund, is not admissible in evidence under the common counts for money, &c., without proof of its execution by the defendant. *Ib.*
3. An instrument drawn upon a particular fund, and not purporting upon its face to have been executed upon any consideration, is not, of itself, evidence of indebtedness by the defendant under the money counts. *Ib.*

CHANCERY.

1. R., by written contract, sold to D. his improvement on unsurveyed public land, binding himself to prove up his pre-emption right to a quarter section, embracing his improvement; and if obtained, make a valid title to D. Previous to the written agreement, R. stated to D., who made a personal examination of the land, and was aware of R's. rights, that he claimed the adjoining lands, supposed to be 640 acres. to conditional lines: and that by common understanding, this claim would be respected, The claim to the adjoining lands was not respected, and the quantity fell short of that supposed: the pre-emption was not proved up by R., who applied to do so, because, by the sale to and possession by D., he alone had the right of pre-emption, which he proved up. HELD, 1st. That there was no such deceit or misrepresentation as would affect the validity of the contract: 2d. That as D. obtained the right to a pre-emption through his purchase from R., it was equivalent, in equity, to a proving up of the pre-emption by R., and transfer of the title to D. *Dickson vs. Richardson et al.*, 114.
2. As failure of consideration is a good defence at law, a bill in equity to enjoin a judg-

CHANCERY—CONTINUED.

ment at law, on such plea, should allege that no defence, whatever, was made at law. (*Arrington vs. Washington*, 14 *Ark.* 218.) *Ib.*

3. Although a deed of trust confers upon the trustee the power to sell, upon failure of payment, he may resort to equity to foreclose and sell the trust property; and perhaps that would be the more appropriate course, where, by a removal of the property, the notices of sale prescribed by the trust deed could not be given. *Sullivan vs. Hadley.* 129.

4. Where the complainant's remedy is barred by limitation on the face of the bill, and he fails to allege any matter in avoidance of the defence of limitation, and the answer contains a demurrer to the bill, the objection will be fatal on the hearing. *Ib.*

5. It is a general rule, that where there is a legal and an equitable remedy, in respect to the same subject matter, the latter is under the control of the same statute bar as the former. *Ib.*

6. Where a mortgage or trust is upon slaves, and the mortgager continues in possession after default of payment, the mortgagee or trustee has the same time to bring a bill to foreclose and sell, that is allowed him, under like circumstances, to commence an action at law for the possession of the slaves: and the limitation to such action is three years. *Ib.*

7. When a cause has been decided by the Supreme Court, and remanded for further proceedings, none of the parties has a right to raise any question, in the inferior court, touching the correctness of the decision of the Supreme Court: and where one of the parties dies, during the pendency of the cause in the Supreme Court, the heir, upon being made a party in the court, to which the cause is remanded, takes the place of the ancestor, and stands in precisely the same situation as any other party. *Ashley et al. vs. Cunningham et al.*, 168.

8. The death of the complainant being suggested, his heirs applied to be admitted parties in his stead, to prosecute the suit to final decree: the defendants objected, and presenting to the court a deed of conveyance for the land in controversy, executed by the complainant before his death, and after the commencement of the suit, suggested that the grantee was the proper party: HELD, That the heirs of the complainant were the proper parties. *Ib.*

9. If this court reverse a decree and remand the cause to the Circuit Court for further proceedings, that court can only carry into effect the mandate of this court so far as its direction extends: but the Circuit Court is left free to make any order or direction in the further progress of the case, not inconsistent with the decision of this court, as to any question not presented or settled by such decision. *Cunningham et al vs. Ashley et al.*, 181.

10. In this case, a right to the rents and profits of the land, during the wrongful and fraudulent disseizin of the complainant, necessarily follows the recovery, as a consequence resulting; and no express claim for rents and profits need have been set up in the bill, but they may be recovered under the general prayer for relief. *Ib.*

CHANCERY—CONTINUED.

11. A decree of foreclosure of a mortgage should fix some certain time, within which the amount decreed against the property, with interest and cost, might be paid, in default whereof the sale to be made. *Fowler et al. vs. Byers ad.*, 196.

12. Where a party makes a fruitless attempt to interpose a defence at law, which is exclusively an equitable one, and not cognizable by the court of law, he is not thereby debarred from the right to resort to equity. *Newton ex. vs. Field*, 216.

Watkins obtained a judgment against Johnston, and Walters as his security; issued a writ of garnishment against Field, the debtor of Johnson; before judgment on the garnishment, the original judgment was paid by Walters, but not entered satisfied; execution was issued on the garnishment judgment, for the benefit of Walters; Field filed his bill for injunction, alleging that a judgment had been rendered against him, as the security of Johnston, which he had paid, to a larger amount than his debt to Johnston: HELD,

1. That the garnishment judgment must be considered as *res adjudicata* as between Watkins and Field as to any defence that could have been made at law, but not so in a proceeding between Walters and Field.

2. That when Walters paid the original judgment, it was extinguished at law; as between the parties to it.

3. That if the garnishment judgment had been rendered at the time the original judgment was paid, it would also have been extinguished, so far as Watkins was concerned, being but an incident to the original judgment.

4. That if Field had known that the original judgment had been paid he might have, successfully interposed it as a defence to the garnishment suit.

5. That as Field had no legal or actual notice of the payment of the original judgment, and was thereby deprived of interposing that defence to the garnishment suit, he had sufficient grounds to resort to a court of equity to enjoin the execution of the judgment, so far as Watkins was concerned.

6. That though the payment of the original judgment extinguished it, and extinguished the right of Watkins to enforce the garnishment judgment against Field, it did not extinguish the debt which Field owed to Johnson: and so, had the bill of Field been filed to be relieved from the garnishment judgment, exclusively upon the ground of such payment, without any equitable right of his own, equity would not have relieved him without his paying to Walters the debt which he owed to Johnston; or had Walters, by a cross-bill, shown that his equity as security was superior to Field's, the court might well have decreed that Field pay him the amount of the garnishment judgment.

7. That the garnishment judgment having been extinguished by the payment of the original judgment, and the plaintiff enjoined from proceeding on it, if Walters had any equitable right to collect the money, on the doctrine of subrogation, he could not do so by an execution on the judgment, but would be compelled to apply to a court of equity.

CHANCERY—CONTINUED.

8. Regarding Walters and Field as having equal claims to be protected in equity from loss, a court of chancery would not compel Field to surrender up to Walters an indemnity which he held in his own hands. *Ib.*

13. It is a general rule (but with exceptions, *Walson et al. vs. Palmer et al.*, 5 *Ark. R.* 501,) that, where a general replication is put in to an answer in chancery, all the allegations, which are responsive to the bill, shall be taken as true, unless disproved by two witnesses, or by one witness with pregnant circumstances: and, also, that every allegation, not directly responsive to the bill, but stating matter in avoidance, or in bar of the plaintiff's claim, must, under such circumstances, be fully proved, or it will have no effect. *Wheat et al. vs. Moss et al.*, 243.

14. The charges in a bill by a judgment creditor of one of the defendants, to subject certain real estate to the payment of his judgment, were, that such defendant had purchased the real estate with his own money, but had caused the title to be made to his co-defendant to delay and defraud his creditors: The answer stated that he did not purchase with his own money, but with money in his hands as administrator, and that the deed was executed to the co-defendant, to hold in secret trust for the benefit of the heirs: HELD, That so much of the answer was responsive to the bill. *Ib.*

15. But the answer proceeding further to state that, at the time of the purchase, the co-defendant advanced a portion of the money, which she borrowed, and executed a mortgage on the property to secure the payment, and afterwards borrowed money to pay off such mortgage, and executed a second mortgage to secure the payment thereof: HELD, that this was a distinct transaction, not responsive to the bill, but new matter in avoidance. *Ib.*

16. An administrator is not authorized to invest in real estate or otherwise, the balance in his hands, as such; but should distribute it to the representatives of the intestate, if known; and, if unknown, put it out at interest, under the direction of the Probate Court, until called upon to pay it over. *Ib.*

17. Where an administrator purchases property with money in his hands, due to the estate of his intestate, and causes the title to be made to another—there being a judgment and execution against him at the time, and no property of his own out of which to satisfy the judgment—the court may well presume, as between the judgment creditor and the parties to the purchase, that the administrator had converted the assets to his own use; that the purchase was made for his individual benefit, and that the transaction was intended to delay his creditors. *Ib.*

18. A prior incumbrancer may properly be made a party to a bill to subject real estate to sale; but he is not a necessary party. *Ib.*

19. Where depositions taken under a commission in a chancery cause have been filed and published several years, without objection, to allow exceptions after such a lapse of time, and such gross laches, upon the ground that "the witnesses were not properly sworn, nor the depositions certified according to law," could not fail greatly to

CHANCERY—CONTINUED.

surprise the opposite party, and would be gross unfairness. *Hemphill vs. Miller*, 272.

20. It is error to suppress depositions, upon a motion to suppress them, because the evidence was incompetent and irrelevant, and inapplicable to the issues, where a portion of them is relevant and applicable to the issue, and the motion is general, without discriminating between such of the depositions as are, and such as are not relevant. *Ib.*

21. It is clear, that where exceptions to a part of the answer are filed and sustained, all of the answer not affected by such exceptions, is left standing in the cause. *Ib.*

22. Where a vendor of real estate remains in possession under a subsequent contract to make certain improvements, such subsequent contract is a distinct and independent agreement, and is binding upon the parties. *Ib.*

23. A party sells an improvement upon the public land, and remains in possession under a parol agreement to make certain improvements, for which, together with the price of the land, he is to be paid at a certain day; the vendee fails to comply with his part of the contract at the time stipulated: afterwards the vendor sells to a third person at an advanced price: HELD, That it would be improper to decree a specific performance, not only because it had become impossible by a subsequent sale of the public lands by the United States, but because of the laches of the purchaser: and that the vendor will be considered as a trustee for the vendee for the advanced price; and that such subsequent sale be ratified. *Ib.*

24. Upon a bill to foreclose a mortgage given to secure the payment of a promissory note for the purchase of real estate, sold and conveyed by deed of warranty, it is no defence to set up, that at the time of the sale there was an incumbrance on the real estate, and that the vendor promised to remove the incumbrance before the note became due, and has failed to do so—such promise forming no part of the contract. *Robards vs. Cooper*, 288.

25. Where a contract respecting real estate is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it, as it is for a court of law to give damages for the breach of it. *Hamilton et al. vs. Fowlkes et al.*, 340.

26. In a chancery suit by a creditor, against an administrator, charging that assets had come to his hands, which he had not accounted for, the securities in the administration bond may be made parties, and a decree rendered against them on a recovery against the administrator. *Clark adx. et al. vs. Shelton*, 474.

27. The settlements made in the Probate Court by the administrator, are conclusive between the parties interested in the estate, so far as the court had jurisdiction; and can only be impeached in a court of chancery upon allegations of fraud in the settlement. (*Dooley vs. Dooley*, 14 *Ark.* 122.) *Ib.*

28. Where fraud is alleged in the settlements of an administrator—as that the intestate sold property, and took notes therefor, payable to his wife, (afterwards his administratrix) to hinder and delay his creditors; that she received the money, but had not

accounted for it as assets—the Probate Court has no jurisdiction to decide such question of fraud, and the creditors of the estate may well seek relief in a court of chancery. *Ib.*

29. Upon a creditor's bill, it is error for the court to decree the payment in full of the debt of the pursuing creditor, without giving opportunity to all the other creditors to bring in their claims and receive their proportion of the amount recovered—they paying their proportion of the expenses. *Ib.*

30. Service of the subpoena, in a bill of divorce, by reading the same to the defendant, is not such a legal service as will bind him to appear to the suit: and it is error, on such service, to adjudge the defendant in default, and take the bill as confessed. *Welch vs. Welch*, 527.

31. A decree *pro confesso* is not sufficient, without evidence to sustain the allegations of the complainant's bill, to authorize the court to decree relief from the bonds of matrimony. *Ib.*

32 The refusal of the Circuit Court to permit an answer to be filed after the time allowed; or the striking an answer from the files when so filed, is within the discretion of the Circuit Court, and this court will not interfere, unless in cases of palpable abuse of such discretion; and so, this court will not reverse a decree for such cause, when by consent of parties it was ordered that the answer be filed within a certain time, or the bill be taken as confessed. *Bernie vs. Vandever ad.*, 616.

33. Upon a reference to the master in chancery to state an account between the parties, he should give them reasonable notice of the time and place of taking testimony and stating the account—to notify them to appear within a few hours after the reference, between 8 and 12 o'clock at night, is not reasonable notice. *Ib.*

34. A defendant in chancery, although he may have made default to answer, has a right to appear before the master, and have process for witnesses, on a reference to state an account between him and the complainant. *Ib.*

35. Upon the death of one of several partners, the partnership is dissolved; and the surviving partner is entitled to the partnership property and effects, for the purpose of settling the accounts, and paying off the debts of the firm. *Ib.*

36. Where an answer is necessary to a full and fair development of the whole transaction, and to the just and equitable division of partnership effects sought to be recovered by the bill, it should be permitted to be filed, if a full and perfect answer; and if delay or inconvenience occur to the opposite party because filed out of time, terms of cost, &c., should be imposed. *Ib.*

37. Where one of several defendants in chancery is merely a nominal party, having no personal interest in the result of the suit—the bill seeking no decree against him—his deposition may be taken, upon an order of court for that purpose, in favor of the complainant. (*Folsom vs. Fowler ad.*, 15 *Ark. Rep.* 281.) *Pryor et al. vs. Ryburn*, 671.

38. A complainant, prosecuting a suit in chancery as the next friend of an infant, is incompetent, as a witness, to sustain the allegations of the bill in behalf of the infant. *Ib.*

39. When the deposition of a party to the record is desired, an order of court for it to be taken will be made, as a matter of course, upon a suggestion that the party has no

CHANCERY—CONTINUED.

interest in the cause. And although such deposition, taken without such order, can not be read, yet an agreement of record, that all depositions, taken by either party, may be read upon the hearing, reserving objections to competency only, is a waiver of the objection that they were taken without an order of court. *Ib.*

40. The heir cannot maintain a suit in equity for the value of personal property belonging to his ancestor, against a person who converts such property to his own use on the death of the ancestor—his remedy is only through an administration upon the estate of the deceased. *Ib.*

See, also, *Pleas and Pleading* 9; *Pre-emptions* 9, 10.

CLAIMS AGAINST ESTATES OF DECEASED PERSONS.

1. An affidavit, by an officer of a corporation, in the form prescribed by the statute, omitting the words: "that the sum demanded is justly due," is sufficient to authenticate a claim against the estate of a deceased person. *State use State Bank vs. Collins ad.*, 32.

See, also, *Administration* 1.

COMMON SCHOOLS.

1. Since the passage of the act of 11th January, 1853, in relation to common schools, the Trustees of Common Schools, and not the county commissioner, are proper parties to bring suits on notes given for the purchase of the sixteenth sections. *Cloud as com. vs. Danley et al.*, 599.

CONTEMPTS OF COURT.

2. This court has the constitutional power to punish, as for contempt, for the publication of a libel, made during a term of the court in reference to a case then decided, imputing to the court, officially, *bribery* in making the decision—such power being inherent in courts of justice, springing into existence upon their creation, as a necessary incident to the exercise of the powers conferred upon them. *The State vs. Morrill.* 384.
2. The Legislature may regulate the exercise of, but cannot abridge the express, or necessarily implied powers granted to this court by the constitution. *Ib.*
3. The statute, (*Digest, chap.* 36, *sec.* 1,) so far as it sanctions the power of the courts to punish, as contempts, the acts therein enumerated, is merely declaratory of what the law was before its passage: the prohibitory clause is entitled to respect as an opinion of the Legislature, but is not binding on the courts. *Ib.*
4. By the common law, courts possessed the power to punish, as for contempt, libelous

CONTEMPTS OF COURT—CONTINUED.

publications upon their proceedings, pending or past, tending to degrade the tribunals, destroy that public confidence and respect for their judgments and decrees, so essential to the good order and well being of society, and to obstruct the free course of justice. *Ib.*

5. When the Supreme Court was created by the constitution, and certain judicial powers conferred upon it, the power to punish contempts of its authority, was impliedly given to it as a necessary incident to the exercise of its express powers. *Ib.*
6. There is no feature in the constitution, or in the character of our free institutions, which denies to this court the power to punish, as for contempt, libelous publications tending to degrade its authority, and destroy public confidence in the integrity of its judgments and decrees. *Ib.*
7. The fact, that the convention, which framed the constitution, had the subject of contempts before them, and placed a limitation upon the legislative, but none upon the judicial department, to punish contempts, warrants the conclusion that the courts were left to exercise such common law powers on the subject, as might be necessary to preserve their authority, and enforce their legal process, orders, judgments, and decrees. *Ib.*
8. Any citizen has a right to comment upon the proceedings and decisions of this court, to discuss their correctness, and the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important trusts reposed in them; but he has no right, under the 7th section of the Bill of Rights, to attempt, by libelous publications, to degrade the tribunal, &c.—such publications are an abuse of the liberty of the press, for which he is responsible. *Ib.*
9. The cases of *Neil vs. The State*, 4 *Eng. Rep.* 263, *and Cossart vs. The State*, 14 *Ark.* 541, quoted with approbation. *Ib.*

CONTRACTS AND AGREEMENTS.

1. Where a party enters into a contract to make and burn brick, he will be held to skill and diligence in the execution of his undertaking; and upon failure to make and burn the brick in a workmanlike manner, the damages may be recouped in an action by him for the value of the work and labor. *Robinson vs. Mace*, 97.
2. Where a vendor of real estate remains in possession under a subsequent contract to make certain improvements, such subsequent contract is a distinct and independent agreement, and is binding upon the parties. *Hemphill vs. Miller*, 272.
3. A party sells an improvement upon the public land, and remains in possession under a parol agreement to make certain improvements, for which, together with the price of the land, he is to be paid at a certain day; the vendee fails to comply with his part of the contract at the time stipulated: afterwards, the vendor sells to a third person at an advanced price: HELD, That it would be improper to decree a specific performance, not only because it had become impossible by a subsequent sale of the

CONTRACTS AND AGREEMENTS—CONTINUED.

public lands of the United States, but because of the laches of the purchaser: and that the vendor will be considered as a trustee for the vendee for the advanced price; and that such subsequent sale be ratified. *Ib.*

4. Upon a bill to foreclose a mortgage given to secure the payment of a promissory note for the purchase of real estate, sold and conveyed by deed of warranty, it is no defence to set up, that at the time of the sale there was an incumbrance on the real estate, and that the vendor promised to remove the incumbrance before the note became due, and has failed to do so—such promise forming no part of the contract. *Robards vs. Cooper*, 288.

5. Where a contract respecting real estate is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it, as it is for a court of law to give damages for the breach of it. *Hamilton et al. vs. Fowlkes et al.*, 340.

6. A contract in writing between two settlers upon the unsurveyed public lands, that an agreed line dividing their respective improvements, shall be the permanent line between them, and that upon the sale of the public lands by the United States, and the purchase of their respective improvements, each will convey to the other, at cost, the land by each respectively purchased or secured, that might be found upon the survey to be within the improvement of the other, is *certain, fair in all its parts, for an adequate consideration, capable of being performed, and mutual and reciprocal*, and will be enforced in a court of equity. *Ib.*

7. Though an agreement in relation to land be not put upon the public records of the county where the land is situated, a subsequent incumbrancer or purchaser thereof, with notice of the agreement, will be bound thereby. *Ib.*

8. And so, although in such case, he have no actual notice, but has only heard that there was some agreement between the parties thereto in relation to their lands, yet if one claiming under such agreement be in the open and visible occupancy and cultivation of the land, it is sufficient to put the purchaser upon enquiry, and charge him with constructive notice. *Ib.*

9. Where a person claiming title to land under an agreement, not recorded, has been in the actual, open, and visible possession and occupancy thereof, and has been cultivating the same for several years, a subsequent purchaser will be held to notice, although he may not have had actual knowledge of such possession and cultivation. *Ib.*

See, also, *Chancery* 1.

CONVERSION.

See *Bailor and Bailee* 1.

CONVEYANCES.

1. A deed for the conveyance of real estate, duly executed, &c., is good and valid against

CONVEYANCES—CONTINUED.

a creditor of the person executing such deed, obtaining a judgment, which, by law, is a lien on real estate; and, also, against a purchaser of such real estate at a judicial sale under the judgment, if actual notice of the deed be given to the purchaser and to the creditor, or his attorney of record, or if such deed be filed for record, at any time before the sale, though not until after the judgment is rendered and execution levied upon the land. *Byers et ul. vs. Engles*, 543.

2. Such notice may be given at any time before, or at the time of the sale under execution; and will be sufficient, though the deed be not produced. *Ib.*
3. Continuous possession by the grantee, from the date of the judgment to the day of the sheriff's sale, would also be sufficient notice to put both the judgment creditor and the purchaser upon enquiry. (*Hamilton vs. Fowlkes et al. ante.*) *Ib.*

COURTS—TERMS OF.

1. The act (*sec.* 5, *ch.* 47, *Dig.*,) authorizing the judge to hold court at a subsequent day, on failure at the regular term, is a general law, and applies as well to courts whose terms may be subsequently prescribed, as to those whose terms were fixed at the passage of the act. *Jones vs. Austin*, 336.

CREDITOR'S BILL.

See *Chancery* 27.

CRIMINAL LAW.

1. Upon the failure of the County Court to make out, and deliver to the sheriff, a list of sixteen persons qualified to serve as grand jurors, and of the sheriff to select and summon the requisite number himself, as prescribed by the statute, the Circuit Court has the implied con titutional power to direct the sheriff to summon, forthwith, the requisite number of qualified persons to serve as grand jurors for the term. *Straughan et al. vs. The State*, 37.
2. In criminal cases, though several persons concerned in the same offence, may be jointly indicted and tried together, the verdict and judgment against them, should be several: that is, fix the fine or punishment to be paid or suffered by each. *Ib.*
3. And where the jury return a verdict, fixing a joint fine against all the defendants, the court should send them back with directions to assess a separate fine against each: but if the verdict be received and recorded, the judgment should be arrested and a *venire de novo* awarded. *Ib.*
4. This court will not entertain an application for a supersedeas of the judgment in a criminal case, unless application be first made to, and refused by the Circuit Court. (*Bixby vs. The State*, 13 *Ark.* 286.) *Hofler vs. The State*, 214.

CRIMINAL DAW—CONTINUED.

5. An indictment, charging that the defendant on a certain day, in the county where the indictment was found, "did then and there keep a public tavern, without having first procured a license from the County Court of his county," &c., is sufficient. *The State vs. Adams*, 497.

6. It is sufficient, in an indictment for murder, to charge that the deceased was a "Wyandott Indian, whose name is to the jurors unknown," without averring that the deceased was a human being. *Reed vs. The State*, 499.

7. Where an indictment for murder describes the deceased as a Wyandott Indian, the description is material, and the race of the deceased must be proved as alleged. *Ib.*

8. Such description may be proved by reputation; and although it would not be sufficient if the witness stated that "he did not know except from what he had heard;" that the deceased was a Wyandott Indian, yet the jury would be warranted in finding the fact, where a witness stated "that he heard from those, with the Indian that was killed, that he was a Wyandott Indian," when it was in proof that there was a band of Indians encamped together, of whom the deceased was one. *Ib.*

9. Where, upon the trial of an indictment for murder, the bill of exceptions purports to set out all the evidence, and fails to show that it was in proof that the act was committed in the county where the indictment was found, the judgment will be reversed. (*Sullivant vs. State*, 3 *Eng.* 400; *McElroy vs. State*, *ib.* 451; *Holeman vs. State*, 12 *Ark.* 110.) *Ib.*

10. An indictment, charging that the defendant, "on Sunday, the 2d day of April, 1854" in the county where the indictment was found, "did sell to divers persons, a large quantity of ardent spirits, to wit," &c., without setting out the names of the persons to whom the spirits were sold, or that they were sold to some person, to the jurors unknown, held sufficient. *The State vs. Parnell*, 506.

11, On the trial of an indictment for an assault with intent to murder, the counsel for the prisoner has no right to inspect the minutes of the testimony taken before the grand jury who found the indictment. *Hofler vs. The State*, 534.

12. A witness, in a criminal prosecution, may be required to answer, whether at the time of the occurrences, to which he has deposed, he was not excited by anger, or whether he had not a fight immediately before—particularly where his testimony is of minute circumstances. *Ib.*

13. And where questions are not apparently material, still they may be put on the cross-examination of a witness, by way of testing the accuracy of his statements, and that the jury may be in possession of every fact which may legitimately tend to show the true character of the transaction. *Ib.*

14. An indictment, charging that a woman *did bed to, and live with*, a man, (naming him) is not good, under the statute prohibiting a man and woman living together as husband and wife without being married. *Crouse vs. The State*, 566.

15. A plea to an indictment for murder, that the defendant had once before been put in jeopardy of his life for said offence in said indictment, without showing how or in

CRIMINAL LAW—CONTINUED.

what manner he had been put in jeopardy of his life, is bad on demurrer. *Atkins vs. The State*, 568.

16. And where such plea sets up that the defendant was before in jeopardy, upon another and different indictment, for the same offence, it must also set out the record of the former indictment: propose to verify the same by the record; and allege the identity of the defendant in said plea to be the same as the one heretofore supposed to have been put in jeopardy of his life. *Ib.*

17. It is a matter within the sound discretion of the Circuit Judge, who is cognizant of all the circumstances, whether the jury ought to be discharged on account of the sickness of one of the panel; and this court will not control that discretion, unless it affirmatively appear of record that it was exercised to the detriment of the prisoner. *Ib.*

18. A person who is "opposed to capital punishments," is not, therefor, incompetent and disqualified as a juror: and it is error in the court to reject one of the original venire for such cause. *Ib.*

19. Where threats, on a trial for murder, are proved to have been made by the defendant against the deceased, the defendant should be permitted to enquire of the witness as to any irritating or provoking remarks, made at the time by the deceased, inducing the threats. *Ib.*

20. A witness, in a criminal case, cannot be interrogated as to his statements made before the examining court, unless such statements be different from the evidence given on the trial: then he may be interrogated as to such statements with the view of contradicting him. *Ib.*

21. A defendant on a trial for murder, has no right to read in evidence to the jury, the statement made by him and reduced to writing before the examining court. *Ib.*

22. Evidence of threats made by the deceased, against the prisoner, are inadmissible in his defence, unless there be proof that they were communicated to him before the homicide. *Ib.*

23. Where a witness makes a statement on the trial, differing from that made by him before the examining magistrate, and such testimony was reduced to writing, it should be produced for the purpose of contradicting him, or sufficient ground laid for the introduction of secondary evidence. *Ib.*

24. It is not allowable on cross-examination to put questions to a witness, not relating to the matter in issue, for the purpose of contradicting him by other witnesses: but such questions may be put to him for the purpose of trying his credibility—in such case, the cross-examining party must be satisfied with his answer.

25. It is not necessary that the verdict in a criminal cause should be written on the indictment, though it is usual to do so; nor that it should be returned in writing at all. *Ib.*

26. It is error in the court to permit the traverse jury, when retiring, to take with them, for any purpose, a record containing the evidence given before the committing magistrate, not offered in evidence on the trial, though the court instruct the jury "that they must not read said record."

CRIMINAL LAW—CONTINUED.

27. The fact that the prisoner went to the house of the deceased "for the purpose of having a difficulty with him," and in that difficulty killed him, with a deadly weapon, would not, regardless of all other circumstances attending the difficulty, make the homicide a murder. *Ib.*
28. Where two parties propose and accept a combat, without previous malice, and one kills the other with a deadly weapon, he is at least guilty of manslaughter. *Ib.*
29. If one party asks another to strike him, intending to use a deadly weapon, and upon being struck by the other with his fist or hand, kills him with such deadly weapon, he is guilty of murder. *Ib.*
30. If one assail another with insulting words and blows, and without the use of any weapon, and the assailed party, without attempting to evade the fight, kill the other with a deadly weapon, he is guilty of manslaughter. *Ib.*
31. Instructions should not assume that the facts upon which they are based were proven; but should be so framed as to leave the jury to determine whether or not they were proven. *Ib.*
32. The case of *Atkins vs. The State, ante*, referred to for the principles of law governing pleas of *auterfoits acquit. Wilson vs. The State*, 601.
33. Our statute having made no provisions for trials by consent in *criminal* cases, other than a trial by jury, nothing short of the confession of the facts, or the finding of them by the verdict of a jury, can regularly authorize the judgment of the court against the accused, on an indictment for a felony, where the plea of not guilty is filed by himself or entered for him—even though the accused may waive a trial by jury and consent that the judge may try the issue. *Ib.*

DAMAGES.

1. It is a general rule, that where a party is doing an illegal act, he is liable to other persons injured thereby, regardless of intention to do the injury, or care manifested to avoid it. *Bizzell vs. Booker, et al.*, 308.
2. Persons encamping and hunting upon the public lands, in a "wilderness" district, are not guilty of such an illegal, mischievous, or wanton act. as would render them liable, at all events, for any injury that may result therefrom to others, regardless of any diligence, care, or prudence, on their part, to prevent such injury. *Ib.*
3. Where one is doing a lawful act—or an act not mischievous, rash, reckless, or foolish, and naturally liable to result in injury to others—he is not responsible for damages resulting therefrom by accident or casualty, while he is in the exercise of such care and caution as a prudent man would observe, under the circumstances surrounding him, to avoid injury to others: but he is answerable for damages resulting from negligence, or a want of such care and caution on his part. *Ib.*
3. If parties fire-hunting, or encamped in the woods or prairies, covered with combustible matter, suffer or permit, otherwise than in consequence of *unavoidable accident which*

DAMAGES—CONTINUED.

*could not be prevented by proper care*, the fire to communicate to such combustible matter, they are liable for all property destroyed thereby. *Ib.*

5. If the parties in such case are not guilty of *negligence*, they are not responsible for the property destroyed: but it is error to instruct the jury that they are not liable if they used *ordinary diligence*. *Ib.*

DELIVERY BOND.

1. The statutory judgment on a forfeited delivery bond, is perfect, immediately upon the forfeiture, unless set aside for cause at the return term of the execution, without any action of the court confirming the judgment: and as the original judgment is extinguished, *eo instanti*, upon the forfeiture, by the statutory judgment, a writ of error will not lie to the original judgment, though sued out before the return term of the execution. *Cochran vs. Jordan*, 625.

See, also, *Writ of Error* 1.

DEMAND.

See *Assumpsit* 3.

DEMAND AND REFUSAL.

See *Replevin* 3.

DISCOVERY.

See *Evidence* 6.

DISQUALIFICATION OF JUDGE.

1. A Circuit Judge is not disqualified to preside, where he is related by affinity within the constitutional degrees, to one of the parties in a cause, who is merely a trustee, and has no interest in the determination of the cause. *Fowler et al. vs. Byers ad.*, 196.

DIVORCE.

1. Where a question arises, in an action of assumpsit for money paid, whether the payment was on account of an agreement to compound a divorce suit, or for the purpose of settling the rights of the parties to the divorce, to property, the defendant, having proved the fact of divorce, is entitled to an instruction, that upon a divorce, legally obtained, the wife is entitled to all the property which came to her husband by the marriage. *Viser vs. Bertrand*, 296.

DIVORCE—CONTINUED.

2. A power of attorney, executed by a husband to an agent to receive certain property and hire it out for the benefit of his wife and daughter, is admissible in evidence in a case where the question is, whether money was advanced for the wife, and paid to the husband, solely on account of his interest in such property, or whether an agreement to compound a divorce suit constituted any part of the consideration of the payment to the husband. *Ib.*
3. Service of the subpoena, in a bill of divorce, by reading the same to the defendant, is not such a legal service as will bind him to appear to the suit: and it is error, on such service, to adjudge the defendant in default, and take the bill as confessed. *Welch vs. Welch*, 527.
4. A decree *pro confesso* is not sufficient, without evidence to sustain the allegations of the complainant's bill, to authorize the court to decree relief from the bonds of matrimony. *Ib.*

See, also, *Chancery* 30, 31.

DOMICIL.

See *Guardian and Ward*, 1, 2, 3, 4.

EJECTMENT.

See *Evidence* 1.

EVIDENCE.

1. Under the statute, (*Digest. chap.* 60,) a certificate of entry of public land, and payment of the purchase money, is sufficient evidence of a legal title, unless such entry was void, to enable the purchaser to maintain an action of ejectment. *Gaines et al. vs. Hale*, 9.
2. A duly certified transcript, from the record of a Probate Court in a sister State, of the orders granting to the plaintiff as sheriff, letters of administration, and the certificate of the judge of such court, that such letters of administration had been granted to him, and that he was duly qualified and authorized to administer said estate, are sufficient *prima facie* evidence of his representative character, without proof that he had taken an oath of office, or given an administration bond. *Carmichael vs. Saint*, 28.
3. One of the distributees of an estate filed his bill, in a sister State, for his distributive share, against the administrator and his sureties in the administration bond, setting out the bond and all the proceedings in the administration. The administrator was a non-resident, and no actual notice was served upon him, nor did he appear to the suit: a decree was rendered against the heirs of a deceased surety, for their proportional part of the sum due. Execution was issued against the heirs, and returned satisfied, with a receipt thereon: HELD, That though the record of the proceeding

EVIDENCE—CONTINUED.

and decree would not be valid as the foundation of an action against the administrator, for want of notice, it was admissible in an action against him, by the heirs, for money paid, as *prima facie* evidence of the sum due by the administrator, of the obligation of the heirs to pay, of the assent of the administrator to the payment, and of the actual payment of the money. *Snider vs. Greathouse et al.*, 72.

4. A judgment or decree in a suit against a surety, is sufficient *prima facie* evidence of the liability of the security and of the liability of the principal over to him. (*Snider vs. Greathouse, ante.*) *Bone ad. vs. Torry*, 83.

5. And if the proceedings and judgment or decree, in such case, do not show that the plaintiff was the security of the defendant for the debt for which such decree or judgment was rendered; the fact may be proved by other evidence. *Ib.*

6. The books of the plaintiff, the State Bank, having been brought into court and used by her on the trial, the defendant, to sustain his plea of payment, made application to the court, first laying a foundation therefor, to read an entry, showing a part payment, which was granted, and the entry read. He then, without a bill for discovery or a proceeding in its nature, offered to read in evidence other entries showing a balance to his credit: the plaintiff objected, and the court sustained the objection: HELD, That the court committed no error in refusing permission to read the entry under such circumstances. *Chase vs. State Bank*, 189.

7. A transcript of the judgment rendered against a security, is evidence in an action by the security against his principal to recover back the money paid by the security, although the principal was not a party to the suit, nor notified of the suit against the security. (*Snider vs. Greathouse, ante*, 72.) *Chipman vs. Fambro*, 291.

8. The receipt of a sheriff, given without process in his hands, for the amount of a judgment, and the receipt of the plaintiff to the sheriff for such amount, are no part of the record of the cause; and though copied into the transcript, they are not record evidence of payment, in an action by the security against the principal for money paid. *Ib.*

9. Where threats, on a trial for murder, are proved to have been made by the defendant against the deceased, the defendant should be permitted to enquire of the witness as to any irritating or provoking remarks, made at the time by the deceased inducing the threats. *Atkins vs. The State*, 568.

10. A witness, in a criminal case, cannot be interrogated as to his statements made before the examining court, unless such statements be different from the evidence given on the trial: then he may be interrogated as to such statements with the view of contradicting him. *Ib.*

11. A defendant on a trial for murder has no right to read in evidence to the jury, the statement made by him and reduced to writing before the examining court. *Ib.*

12. Evidence of threats made by the deceased, against the prisoner, are inadmissible in

EVIDENCE—CONTINUED.

his defence, unless there be proof that they were communicated to him before the homicide. *Ib.*

13. Where a witness makes a statement on the trial, differing from that made by him before the examining magistrate, and such testimony was reduced to writing, it should be produced for the purpose of contradicting him, or sufficient ground laid for the introduction of secondary evidence. *Ib,*

14. It is not allowable on cross-examination to put questions to a witness, not relating to the matter in issue, for the purpose of contradicting him by other witnesses: but such questions may be put to him for the purpose of trying his credibility—in such case, the cross-examining party must be satisfied with his answer. *Ib.*

15. It is error in the court to permit the traverse jury, when retiring, to take with them, for any purpose, a record containing the evidence given before the committing magistrate, not offered in evidence on the trial, though the court instruct the jury "that they must not read said record." *Ib.*

16. The plaintiffs suing as administrators, having proved by the record of the Probate Court, upon an issue to the plea of *ne unques administrators*, that letters of administration upon the estate of their intestate, had been granted to the defendant, and afterwards revoked; and that administration was then granted to them — the reading, by the defendant, of the letters granted to him, was not prejudicial to the plaintiffs. *Sadler et al. ad. vs. Sadler*, 628.

17. In such case, the letters of administration granted to the plaintiffs, were *prima facie* evidence of their authority to sue: and although an instruction, that the plaintiffs could not recover unless they are *bona fide* administrators, would be objectionable; yet there was no substantial error in such instruction, the court having also instructed the jury that if they believe the letters of the defendant were revoked, and that letters were granted to the plaintiffs, they are, in fact, the administrators. *Ib.*

18. Hearsay statements are clearly inadmissible as evidence; and the court should promptly exclude from the jury any incompetent matter which might tend to influence their conclusion. *Ib.*

19. A witness, in the course of his examination, after some unobjectionable testimony, makes a statement upon hearsay; the party against whom he is called objects to the "above statement;" and, upon his objection being overruled, excepts; the witness then proceeds with his testimony: HELD, That it is sufficiently manifest that the objection was made to the hearsay testimony. *Ib.*

20. An instruction that "when the admissions of a party are introduced in evidence, all he said in the same conversation is evidence before the jury, as well what he said in his own favor as against him," should be qualified by the further instruction that the jury should compare its consistency with the other testimony in the cause, and so form their opinion of the weight to be attached to it.

See also, *Power of Attorney* 2.

EXECUTORS AND ADMINISTRATORS.

See *Administration.*

FAILURE OF CONSIDERATION.

See *Chancery* 2.

FIRE HUNTING.

See *Trespass* 4, 6.

FIXTURES.

See *Replevin* 4.

FOREIGN LAWS.

See *Judgments* 2.

FRAUDS.

See *Chancery* 28; *Pleas and Pleading* 8, 9, 11; *Limitation* 9, 10.

FRAUDULENT CONVEYANCES.

See *Chancery* 17.

GRAND JURY.

See *Criminal Law* 1.

GUARDIANS AND WARDS.

1. The domicil of the father is, in legal contemplation, the domicil of his minor children. *Grimmett as guardian vs. Witherington et al.*, 377.
2. Where a father was domiciled, and died in Arkansas, and a guardian was here appointed for his minor children, who by law was entitled to the care and custody of them, they cannot legally change their domicil, so as to divest their guardian of the care and custody of them. *Ib.*
3. And if such minors remove to another State, and a foreign guardian is there appointed for them, such foreign guardian, without proof that the minors were legally domiciled in such State, cannot recover their property from the domestic guardian, nor their distributive share of their father's estate from his administrators. *Ib.*
4. But where minors are legally domiciled in a foreign State and a guardian is duly appointed for them there, the Probate Court of this State would have the power, under the act of 12th January, 1853, to order an administrator, having in his hands their distributive share of an estate, to pay the same over to the guardian. *Ib.*

GUARDIAN'S BONDS.

1. The *10th, 11th, and 12th secs. of chap.* 148, *Digest,* embrace guardian's bonds; and the

GUARDIAN BONDS—CONTINUED.

securities in such bonds, may well apply by petition to the Probate Court to require the guardian to give a new bond. *Dempsey vs. Fenno surv.*, 491.

2. The charge that a guardian is not solvent and responsible; or that he keeps possession of, and uses the slaves of his ward instead of hiring them out according to law, is sufficient to sustain a petition, on the part of his securities, to be relieved from further liability on his bond. *Ib.*

HUSBAND AND WIFE.

1. Where the personal property of the wife is not reduced to possession by her husband during the lifetime of the wite, upon her death, it descends to her heirs or representatives, and not to her husband. (*Cox et al. vs. Morrow*, 14 *Ark.* 617.) *Carter et al. vs. Cantrell.* 154
2. The husband is not liable, after the death of his wife, for debts contracted by her while a feme sole, unless judgment has been recovered therefor against him in the lifetime of the wife. *Lamb vs. Beldin*, 539.
3. And this, although at the time of the death of the wife, a suit by attachment be pending against them for such debt, and property of the husband taken by virtue of the attachment and placed in the hands of the sheriff—the attachment lien being imperfect and inchoate, until judgment rendered, and dependent thereon. *Ib.*
4. An indictment, charging that a woman *did bed to, and live with*, a man, (naming him) is not good, under the statute prohibiting a man and woman living together as husband and wife without being married. *Crouse vs. the State*, 566.

See, also, *Limitation* 2; *Divorces* 1.

IMPROVEMENTS ON PUBLIC LANDS.

See *Contracts and Agreements* 6; *Pre-emptions* 4, 5.

INNOCENT PURCHASER.

1. A party conveys property by deed, duly recorded in another State, to a trustee for the benefit of his wife and children; afterwards, upon the death of his wife, he removes to this State, and sells the property to a third person: the purchaser cannot defend as "an innocent purchaser," when it appears that he was informed that the children had a claim to the property, and was referred to one who could give further information. *Pond et al. vs. Obaugh et al.*, 94.

INSTRUCTIONS.

1. Where instructions have been refused, in the words asked for, though legal and appropriate to the case, yet the party has no cause of complaint if the court give other instructions, the same in substance. *Viser vs. Bertrand*, 296.

INSTUCTIONS—CONTINUED.

2. Instructions should not assume that the facts upon which they are based were proven; but should be so framed as to leave the jury to determine whether or not they were proven. *Atkins vs. The State*, 568.
3. Where the court refuses to give an instruction in the words of the party asking it; but in lieu thereof, gives one more favorable to him, he has no cause to complain: nor where the court refuses to give instructions, unexceptionable in themselves, if the substance of them be given in other instructions—the multiplication of instructions disapproved. *Sadler et al. adm. vs. Sadler*, 628.
4. It is error in the court to give an instruction not warranted by the testimony, and which may mislead the jury. *Ib.*
5. An instruction that "when the admissions of a party introduced in evidence, all he said in the same conversation is evidence before the jury, as well what he said in his own favor as against him," should be qualified by the further instruction that the jury should compare its consistency with the other testimony in the cause, and so form their opinion of the weight to be attached to it.
6. The law does not warrant the giving of instructions presenting abstract questions, as to which there was no evidence introduced from which the jury could have been authorized to infer the fact assmed in the instructions. *Owens use &c., vs. Chandler*, 652.

JEOPARDY.

1. A plea to an indictment for murder, that the defendant had once before been put in jeopardy of his life for said offence in said indictment, without showing how or in what manner he had been put in jeopardy of his life, is bad on demurrer. *Atkins vs. State*, 568.
2. And where such plea sets up that the defendant was before in jeopardy, upon another and different indictment, for the same offence, it must also set out the record of the former indictment: propose to verify the same by the record; and allege the identity of the defendant in said plea to be the same as the one heretofore supposed to have been put in jeopardy of his life. *Ib.*

JOINT OWNERS.

See *Replevin* 2.

JUDGMENTS.

1. Nothing less than actual notice, or a waiver of it, would give such validity to a judgment against a non-resident, as to make it obligatory upon him: and so a judgment rendered in Tennessee, on motion without notice, against the principal in an injunction bond, then a citizen of Arkansas, in favor of a security, who had paid the

JUDGMENTS—CONTINUED.

debt after the dissolution of the injunction, is not of such validity as to constitute the foundation of an action in this State; although, at the time of the execution of the bond, the parties all resided in Tennessee, and the laws of that State provide for such a judgment against the principal in such case. *Iylehart vs. Moore*, 46.

2. This court cannot take judicial notice of the laws of other States: and, in the absence of proof of the fact, will not presume that a judgment, in favor of a Bank, for a specific sum of money, was payable in depreciated Bank paper. *Bone adm. vs. Torrey*, 83.

See, also, *Evidence* 3; *Jurisdiction* 1.

JUDGMENT LIENS.

1. A deed for the conveyance of real estate, duly executed, &c., is good and valid against a creditor of the person executing such deed, obtaining a judgment, which, by law, is a lien on real estate; and, also, against a purchaser of such real estate at a judicial sale under the judgment, if actual notice of the deed be given to the purchaser and to the creditor, or his attorney of record, or if such deed be filed for record, at any time before the sale, though not until after the judgment is rendered and execution levied upon the land. *Byers et al. vs. Engles*, 543.
2. Such notice may be given at any time before, or at the time of the sale under execution; and will be sufficient, though the deed be not produced. *Ib.*
3. Continuous possession by the grantee, from the date of the judgment to the day of the sheriffs sale, would also be sufficient notice to put both the judgment creditor and the purchaser upon enquiry. (*Hamilton vs. Fowlkes et al., ante.*) *Ib.*

JURISDICTION.

1. The proceedings of a justice's court, to be valid, must show affirmatively that the subject matter of the suit is within the jurisdictional limits prescribed for the court; but when the judgment and proceedings are brought collaterally in question, and the jurisdiction of the subject matter and person or thing, affirmatively appears, they will not be held null and void for such irregularities as would merely be grounds of reversal. *Boothe vs. Estes*, 104.
2. The Circuit Court has no jurisdiction to try, as an appeal case from a justice of the peace, where only a copy of the judgment and the note sued on are filed: but should either dismiss the case, or upon proper showing cause the justice rendering the judgment, or his successor, or other person having custody of his docket, to certify a full transcript of the record. *Baker vs. Calvert & Thompson*, 485.
3. It is not necessary to give the Circuit Court jurisdiction on appeal from the Probate Court, that a bill of exceptions should have been filed, where the record itself presents every thing necessary to a full adjudication of the case. *Dempsey vs. Fenno*, 491.

JURILDICTION—CONTINUED.

4. There can be no question in respect to the constitutionality of the law granting the right of appeal from the Probate Court, and authorizing a trial *de novo* in the Circuit Court. *Ib.*

See, also, *Chancery* 28.

LIMITATION.

1. Disabilities, which bring a party within the exceptions of the statute of limitations, cannot be multiplied: as where, at the time of the accrual of the cause of action, the party entitled was a female infant, she cannot, after that disability is removed, set up coverture to avoid the statute bar. *Carter et al. vs. Cantrell*, 154.
2. If the wife be entitled to personal property, and a sufficient time has elapsed for the statute of limitations to constitute a bar to a recovery, the coverture of the wife will not avoid the statute in a suit by the husband and wife—it could only do so in a suit by the wife after the death of the husband. *Ib.*
3. The statute of limitations, prescribing ten years as the period of presumption of payment of a judgment, having been repealed before any vested right of defence under it, had accrued to the defendant, he can derive no benefit from it under his plea of payment. *Ringgold vs. Randolph.* 212.
4. When the statute of limitations has commenced running in the life time of the creditor, it does not stop upon his death until administration be granted on his estate—(the cases of *Aikin vs. Bailey*, 5 *Eng.* 583; *Etter vs. Finn*, 7 *ib.* 632, and *Walker et al. vs. Byers*, 14 *Ark.* 259, explained as to this point). *Brown ad. vs. Merrick & Fenno;* 613.
5. The power of the Legislature to pass laws limiting the time in which actions shall be brought, and controversies about the title to property shall be at repose, so that all existing remedies be not cut off, *eo instanti*, is now too well established to admit of question. *Sadler et al. ad. vs. Sadler*, 628.
6. It is beyond question, that the possession of a slave for a period of some thirteen years—the possessor of the slave during all that time, claiming and controlling him as his own property, and not obtaining possession under any instrument of writing—by virtue of the statute, (*Digest, chap.* 153, *secs.* 3, 4, 5,) vests in the possessor a perfect legal title to the slave, which he may rely upon as a bar to an action against him for the slave, or which he may assert, if the slave be deforced from him, in a suit for his recovery. *Ib.*
7. The adverse possession of slaves for five years, gives the party in possession the right of property thereto by virtue of the act of 19th December, 1846, (*Digest, p.* 943,) and is "a complete bar to any suit in law or equity therefor," unless there be some showing to prevent the operation of the statute. *Pryor et al. vs. Rybum*, 671.
8. It is a general rule, that where the Legislature makes no exception in a statute of

LIMITATION—CONTINUED.

limitations, the courts can make none. (*Erwin vs. Turner*, 1 *Eng. Rep.* 14; *State Bank vs. Morris et al.*, 13 *Ark. Rep.* 291.) *Ib.*

9. A father conveys certain slaves to his son B., by bill of sale, expressing a money consideration: a few days afterwards, B. and his brothers and sisters execute an article of agreement, (reciting that B. had purchased the slaves of his father,) that the slaves are to remain in his possession until the death of the father, and then to be equally divided between them: On a bill for partition, more than five years after the death of the father, B. in his answer averred that the bill of sale was a *bona fide* conveyance; that he purchased the slaves of his father upon the consideration that he was to pay his father's debts; that the agreement was executed on the understanding that it was to be operative only in the event that the debts of the father did not exceed the value of the slaves; and that he had paid his father's debts to the full value of the slaves. The proof tended to sustain the answer: HELD, That the bill of sale was not a testamentary devise; nor was there such a case of trust established as would prevent the statute of limitation from running in favor of B. *Ib.*

10. The article of agreement was delivered to one of the parties to be benefited by it; its existence was unknown to another, who was a non-resident; and B. did not inform him of its execution: HELD, That it was not the duty of B. to do so, and his omission or failure was not such a fraud or concealment as would prevent the statute bar. *Ib.*

See, also, *Vendor and Vendee* 1; *Chancery* 4, 5, 6.

LOST NOTE.

See *Assumpsit* 2, 3, 4, 5.

MONEY PAID.

See *Assumpsit* 1.

MORTGAGES.

See *Chancery* 6, 10, 24.

NEGLIGENCE.

See *Trespass.* 4, 5.

NEW TRIAL.

1. A party is entitled to have the jury pass upon the facts with a correct understanding of the law applicable to them: and, where this is not done, and the jury might, if correctly instructed as to the law, have rendered a different verdict, this court will award a new trial. *Bizzell vs. Booker et al.*, 308.

NON EST FACTUM.

See *Pleas and Pleading* 8, 9.

NOTICE.

See *Judgments* 1; *Evidence* 3; *Contracts and Agreements* 7, 8, 9.

PARTIES TO SUITS.

See *Chancery* 7, 8, 18; *Common Schools* 1.

PARTNERS AND PARTNERSHIP.

1. Upon the death of one of several partners, the partnership is dissolved; and the surviving partner is entitled to the partnership property and effects, for the purpose of settling the accounts, and paying off the debts of the firm. *Bernie vs. Vandever ad.*, 616.
1. Where one of two partners dies, if the surviving partner, instead of settling the partnership property, uses it in carrying on the business, the representative of the deceased partner may, at his election, claim an interest, according to the principles of equity, in the subsequent profits; or take interest upon the amount due to him, after a full settlement of the partnership debts, at the time of the dissolution. *Ib.*

PAYMENT.

1. Upon a plea of payment to an action upon a specialty or record, the burden of proof is upon the defendant; and, under such plea, he may prove the payment of a less sum than that claimed in the declaration, by way of reduction of the debt or recovery. *Owens use &c., vs. Chandler*, 650.
2. The payment of a debt, no matter by whom effected, whether by the debtor, or his agent, or a stranger, can be nothing more or less than its extinguishment as a demand. *Ib.*
3. Under the plea of payment, evidence of accord and satisfaction, is inadmissible: and it is error in the court to instruct the jury, on the trial of an issue to such plea, that if they believe, from the evidence, that the plaintiff had received such satisfaction, or that he had received any sum in satisfaction of his debt, they must find for the defendant. *Ib.*

PLEAS AND PLEADING.

1. The application to file additional pleas, or amend pleadings, after the return term, is addressed to the sound discretion of the court; which will not be controlled, unless there be a palpable abuse. *Pennington et al. vs. Ware & Miller*, 120.
2. In no case should a party, upon leave, be permitted to file an insufficient plea. *Ib.*
3. Where a note sued upon, is described as bearing interest at a certain per cent. *per an-*

PLEAS AND PLEADING—CONTINUED.

*num;* and a release pleaded in which the note is copied as bearing the same per cent. *per amount*, but the note is described in the release as bearing the interest *per annum*; there is no such variance as will render the release inoperative. *Vandever vs. Clark et al.* 331.

4. In copying a note and an assignment endorsed upon it, there is no variance if the copy omit calculations of interest endorsed upon it. *Ib.*
5. In proceeding, under the statute, against the reputed father of a bastard child, it is not necessary that there should be other pleading than the mere denial of the defendant to authorize the Circuit Court to submit the matter, whether he is the father or not, to a trial by jury. *Barnett vs. The State*, 530.
6. Upon application to the Probate Court, for allowance of a claim against the estate of a deceased person, which has been rejected by the administrator, a plea, that the claimant had not delivered to the administrator a copy of the claim, before or at the time of its presentation, is a good defence; and such plea need not allege that the administrator did not waive or dispense with the copy. *Grimes ad. vs. Bush*, 646.
7. The administrator may waive the copy required by the statute; but the facts and circumstances going to show such waiver should, legitimately, be brought forward by the claimant, and whether they amount to a waiver of the copy is a matter of fact to be determined by the jury. *Ib.*
8. A plea to an action upon a promissory note, that the defendant, being unable to read or write, and the payee taking advantage thereof, made the note payable at a day before the debts or accounts, for which it was given, were due, and so the note was obtained by fraud, &c., must be intended as a special plea of *non est factum*. *Alexander vs. Foster*, 660.
9. A special plea of *non est factum*, alleging that the defendant is ignorant and unable to read or write—that he owed the amount of the note, but a large portion of it was not due until a day long subsequent to the day of payment in the note—that he thought the note, when he executed it, was payable at such subsequent day—that it was his intention to make it payable on such day, and his understanding that it was so drawn; but not averring any contract or agreement with the creditor, or any intention or understanding on his part as to the time of payment: HELD, That the plea was not sufficient to bar the action. *Ib.*
10. The plaintiff filed his motion to strike out the plea of the defendant; and then filed a demurrer to the same plea: HELD, That the demurrer was not a waiver of the motion to strike the plea from the files. *Ib.*
11, A plea in bar attacking the consideration of the note sued on—averring fraud and usury—is a nullity, unless sworn to: (*McFarland vs. State Bank*, 4 *Ark.* 415; *Williams vs. Williams*, 13 *Ark.* 491;) and a motion to strike out is proper. *Ib.*

See, also, *Set-off* 1.

POSSESSION AND OCCUPANCY.

See *Contracts and agreements* 8, 9.

POWER OF ATTORNEY.

1. An authority or power coupled with an interest, or given for a valuable consideration, unless there is an express stipulation that it shall be revocable, cannot be revoked by the party executing it: as where the husband makes an appointment or constitution of an agent to take charge of certain property and hire it out and appropriate the proceeds to the use of his wife and daughter. *Viser vs. Bertrand*, 296.
2. A power of attorney, executed by a husband to an agent to receive certain property and hire it out for the benefit of his wife and daughter, is admissible in evidence in a case where the question is, whether money was advanced for the wife, and paid to the husband solely on account of his interest in such property, or whether an agreement to compound a divorce suit constituted any part of the consideration of the payment to the husband. *Ib.*

PRACTICE IN CIRCUIT COURT.

1. The court may well assess the plaintiff's damages on an interlocutory judgment, in a suit founded upon an instrument of writing, where the demand may be ascertained by the instrument, although the declaration contain a general count, as well as a special count, upon the instrument. *Johnson vs. Frank*, 199.
2. But where a portion only of the demand sued for can be ascertained by the instrument—as where the plaintiff sues for the ten per cent. interest, damages, and protest fees, as well as the amount of a bill of exchange protested for non-acceptance—it is error in the court to assess the damages. *Ib.*
3. Where but two witnesses are examined as to a fact, and they disagree in their statements, the finding of the court sitting as a jury, one way or the other, is conclusive, there being no motion for a new trial. *Sandefur ex. vs. Mattingly*, 237.
4. Where a demurrer, involving merely a question of law, has been sustained by the Probate Court, and on appeal to the Circuit Court, the judgment of the Probate Court is reversed: the Circuit Court ought to remand the cause to the Probate Court, that a trial may be there had upon the merits. *Dempsey vs. Fenno*, 491.
5. It is error to render judgment against the defendant, by default, where the original writ has been quashed, and he has not been served with other process, nor has voluntarily appeared—the prosecution of a writ of error, to such judgment, is an appearance. *Wilson vs. Brandenburg*, 646.
6. Upon an appeal from the Probate, to the Circuit Court, the presumption of law is in favor of the judgment, as to the facts upon which it is based, where nothing to the contrary is shown, as to the evidence, by bill of exceptions. But where that court has erred in relation to any material question of law or fact, the Circuit Court should try the case *de novo*. *Grimes ad. vs. Bush*, 646

See, also, *Pleas and Pleading* 1, 2, 10, 11.

PRACTICE IN SUPREME COURT.

1. A party excepting to the finding of the court or jury, without a motion for new trial, must specify the error of law as to any ruling or decision of the court below. (*State Bank vs. Conway*, 13 *Ark.* 344; *Jones et al. vs. Gatlin*, 34.
2. Application for mandamus to the Auditor, filed during a vacancy in the office of Judge of the Fifth Judicial Circuit; denied, after the election and commission of the judge: upon motions to vacate the order denying the writ and for leave to amend the petition, the court was divided—Mr. Justice SCOTT, against permitting the amendment to be made; Mr. Chief Justice ENGLISH in favor of it. *Crise Ex parte*, 193.
3. In passing upon a question of law arising upon a demurrer to a plea in the court below, this court will look alone to the plea and the declaration to which it responds. Allegations or denials contained in other pleas, upon which no question arises on the appeal, are not to be regarded, in determining the sufficiency of the plea demurred to. *Clark as ad. vs. Holt*, 257.

PRE-EMPTIONS.

1. The Register and Receiver of the Land Office having rejected a claim to pre-emption, on appeal to the Commissioner of the General Land Office, the entry was ordered to be allowed, under directions of the Secretary of the Interior, to enable the pre-emption claimant to contest the title with other claimants, for the same land: HELD, That the entry was not void. *Gaines et al. vs. Hale*, 9.
2. A right to pre-emption had accrued under the act of Congress of 29th May, 1830: the pre-emptor was unable to make proof of settlement, &c., as required by law, because the surveys had not been made, and the plats filed in the Land Office; the land was reserved from sale by act of Congress of 20th April, 1832, before the passage of the act of 14th July, 1832, extending the benefits of the act of 29th May to those who were unable to make proof, because the surveys had not been made: HELD, That the rights of the pre-emption claimant were not affected by the subsequent reservation of the land. *Ib.*
3. The complainant being restricted to a pre-emption of one-half of the quarter section in consequence of there being another settler upon the same quarter, who was entitled to a pre-emption, though no entry was made under it, is entitled, in the division of the quarter, to the east-half, though that portion embrace the location of the other settler as well as his own—both having settled upon the same subdivision of the quarter. *Ashley et al. vs. Cunningham et al.*, 168.
4. Before any claimant can question the sufficiency of the title of a pre-emptor of the public lands of the United States, to whom a patent has been issued by the Government, he must show such title in himself as, but for the interference of such pre-emption, would entitle him to the land in controversy. *Wynn vs. Morris et al.*, 44.
5. Such title is not shown by proof that the claimant, having had the land in possession and cultivation for several years, under a purchase from one to whom the pre-emp-

PRE-EMPTIONS—CONTINUED.

tor had sold her improvement, after abandoning the land and the country, had made an agreement with the Governor, who had the direction of the selection of the 500,000 acre grant by Congress to this State: that the tract in controversy should be selected by the locating agent, as a part of said grant, and that he should have the privilege of purchasing it upon such terms as the Legislature might prescribe; that the tract was so selected; but afterwards, upon the allowance of the pre-emption, and because of such allowance, the selection was withdrawn by the Governor before the Legislature had prescribed the terms of purchase in such cases, and other lands selected in lieu thereof. *Ib.*

*Quere*: After the vesting of a pre-emption right in the unsurveyed public lands, under the act 29th of May, 1830, and before the act of 14th July, 1832, extending the time in certain cases for making the proof, the settler abandons the land and becomes a citizen of a foreign country, and so continues. Is the pre-emption right forfeited? Or would a parol sale of the improvement, in such case, and the continued possession and cultivation of another under such sale, affect the original settler's right to prove up a pre-emption? See *opinions of Mr. Justice Scott and Mr. Chief Justice English.* *Ib.*

6. There is no ground to impute fraud to one legally entitled to a pre-emption, on account of failure to give notice of his right to another, who subsequently settles upon the same land, and makes valuable improvements thereon: nor on account of his omission to select, until the last day allowed by law for proof and payment, which of two tracts of land, upon both of which his improvement extended, he will elect to take. *Wynn vs. Garland*, 440.

7. There is no doubt of the regularity and validity of the action of the Land Department in annulling a pre-emption allowed by the Register and Receiver, upon proof of a legal pre-emption right to the same land under a prior law—all entries being *in fieri* until sanctioned by the President by the issuance of the patent. *Ib.*

8. Where a valid entry is set aside, and the land afterwards sold by the Government to another person, and the patent issued to him, he takes the legal title charged with the trust. *Ib.*

10. The decision of the Register and Receiver, in allowing a pre-emption, is examinable in a court of chancery, for fraud or mistake, at the suit of one legally entitled to a right of pre-emption in the same land. *Ib*

10. And where a patent has been issued in such case, and fraud or mistake is clearly proven: as that the possession and cultivation of the patentee were not on the tract of land to which he proved up his pre-emption, but on an adjoining tract, a court of chancery will grant relief to the injured party. *Ib.*

PRESUMPTION OF PAYMENT.

See *Limitation* 3.

PRINCIPAL AND SURETY.

1. Where a surety pays a debt, on default of his principal, there is such an implied assent, on the part of the principal, as will entitle the surety to maintain an action against him for money paid. *Snider vs. Greathouse el al.*, 72.
2. Where a joint judgment is rendered against several heirs of a deceased surety, and the money paid by them, they are entitled to maintain a joint action against the principal debtor for the sum paid. *Ib.*
3. A security, against whom a decree was rendered, pays the amount in cash and a note with security, which are received by the creditor in full discharge of the decree: and satisfaction entered of record: this is such a payment as will entitle the surety to maintain an action against the principal. *Bone ad. vs. Torry* 83.

See, also, *Evidence* 4, 7.

RECORDS.

See *Evidence* 8.

RECOUPMENT.

See *Contracts and Agreements* 1.

RELEASE.

1. A release of one of several obligors, is a release of all. (*Frazier vs. State Bank*, 4 *Ark.* 510; *Ferguson vs. State Bank*, 6 *Eng.* 513.) *Vandever v. Clark et al.*, 331.,

RENTS AND PROFITS.

See *Chancery* 10.

REPLEVIN.

1. To entitle the plaintiff to recover in an action of replevin, he must not only have title, but must also have a right to the possession at the time his action is commenced. *Britt vs. Aylett*, 6 *Eng.* 476. *Hill vs. Robinson* 90.
2. Where there are several joint owners of a divisible chattel, in the possession of one, replevin will not lie by another joint owner for his share, until a division of the property. *Ib.*
3. Replevin will not lie for property legally in the possession of another, who has a lien upon it for charges, until such charges be paid; nor until after demand and refusal, or conversion. *Ib.*

*Quere:* Is a declaration in replevin "for fifteen hundred pounds of seed cotton," without other description, sufficient.

4. The sale of an engine and apparatus, fitted up in a mill-house for the purpose of driving a mill, accompanied by delivery of possession and exercise of ownership by the

REPLEVIN—CONTINUED.

vendee, clearly amounts to such a severance of them from the realty as to make them personal property and entitle the vendee to bring replevin for them. *Hensley vs. Brodie*, 511.

REPUTATION.

See *Criminal Law* 8.

SALARIES.

See *Swamp Lands* 1.

SET-OFF.

1. The law requires much strictness in pleas of set-off, and the plea should contain not only all the requisites essential to the validity of other pleas in bar, but must describe the debt intended to be set-off with the same certainty, as in a declaration; and so, must aver that the debt set-off was a subsisting demand, not only at the commencement of the action, but at the time of plea pleaded. *Robinson vs. Mace*, 97.

SEVERANCE.

See *Replevin* 4.

SHERIFFS.

1. A sheriff has no authority to receive payment of a judgment after the return day of an execution which was not levied. *Chipman vs. Fambro*, 291.
2. The receipt of a sheriff, given without process in his hands, for the amount of a judgment, and the receipt of the plaintiff to the sheriff for such amount, are no part of the record of the cause; and though copied into the transcript, they are not record evidence of payment, in an action by the security against the principal for money paid. *Ib.*

SKILL AND DILIGENCE.

See *Contracts and Agreements* 1.

SPECIFIC PERFORMANCE.

See *Chancery* 23.

SUBSEQUENT PURCHASERS.

See *Contracts and Agreements* 7, 8, 9,

SWAMP LANDS.

1. The Swamp Land Agents, elected under the act approved 12th January, 1853, are entitled to their salary from the time fixed by law for their offices to go into operation, and their official duties to commence; which was upon their Districts being laid off by the commissioners and the maps and plats of the lands in their respective Districts being furnished by the Auditor, and not from the date of their commissions. *Hempstead vs. The Auditor*, 57.
2. Upon an application for mandamus to the Auditor to compel him to issue his warrant for the damages assessed under the statute in favor of the owner, upon whose land the Swamp Land Commissioners have located a levee, it must show not only a regular inquisition and assessment of damages, as prescribed by the statute, but also that the levee had been built, was in process of construction, or was under contract. *Crise, Ex Parte* 193.

TESTAMENTARY DEVISE.

See *Limitation* 9.

TRESPASS.

1. It is a general rule, that where a party is doing an illegal act, he is liable to other persons injured thereby, regardless of intention to do the injury, or care manifested to avoid it. *Bizzell vs. Booker, et al.*, 308.
2. Persons encamping and hunting upon the public lands, in a "wilderness" district, are not guilty of such an illegal, mischievous, or wanton act, as would render them liable, at all events, for any injury that may result therefrom to others, regardless of any diligence, care, or prudence, on their part, to prevent such injury. *Ib.*
3. Where one is doing a lawful act—or an act not mischievous, rash, reckless, or foolish, and naturally liable to result in injury to others—he is not responsible for damages resulting therefrom by accident or casualty, while he is in the exercise of such care and caution as a prudent man would observe, under the circumstances surrounding him, to avoid injury to others: but he is answerable for damages resulting from negligence, or a want of such care and caution on his part. *Ib.*
4. If parties fire-hunting, or encamped in the woods or prairies, covered with combustible matter, suffer or permit, otherwise than in consequence of *unavoidable accident which could not be prevented by proper care*, the fire to communicate to such combustible matter, they are liable for all property destroyed thereby. *Ib.*
5. If the parties in such case are not guilty of *negligence*, they are not responsible for the property destroyed: but it is error to instruct the jury that they are not liable if they used *ordinary diligence*. *Ib.*

TRUSTS.

See *Chancery* 3, 6; *Limitation* 9.

VARIANCE.

1. Where a note sued upon, is described as bearing interest at a certain per cent. *per annum;* and a release pleaded in which the note is copied as bearing the same per cent. *per amount*, but the note is described in the release as bearing the interest *per annum;* there is no such variance as will render the release inoperative. *Vandever vs. Clark et al.*, 331.
2. In copying a note and an assignment endorsed upon it, there is no variance if the copy omit calculations of interest endorsed upon it.. *Ib.*
3. The plaintiff, in his declaration in attachment, claims the amount of the debt sworn to, with interest and "current exchange," on the place where the debt, due on promissory note, is payable; and the writ of attachment commands the sheriff to attach, &c., to satisfy the debt and interest, but is silent as to the exchange: there is not such a variance as will abate the writ. *Whitlock et al. vs. Kirkwood*, 488.
4. Nor is there a fatal variance where the affidavit for an attachment claims the interest due upon the debt; and the attachment bond is silent as to such interest. *Ib.*
5. Where a question of variance arises upon the formation of a letter, this court will not overrule the finding, upon inspection, of the court below, upon an attempted *fac simile* by the clerk. *Halliwell ad. vs. Spring Ex.*, 645.

VENDOR AND VENDEE.

1. A vendor of real estate receives payment of the purchase money, executes a bond to the vendee for title, and either remains in possession, or after delivery of possession to the vendee, is constituted his agent in respect to the land: he holds the naked legal title in trust for the vendee, and the statute of limitations is no bar to an action for a specific performance of the contract, after ten years from the time of its execution, if the vendor has done no act inconsistent with the vendee's title. *Harris vs. King*, 122.
2. A purchaser of the vendor's interest in such real estate, at a sale by his administrators after his death, with a knowledge of the vendee's purchase, stands in the same situation as the vendor would if contesting the title of his vendee. *Ib.*

VENUE.

See *Criminal Law* 9.

WITNESS.

1. A witness has such a direct interest in the event of a suit, as will disqualify him, if the record would be the instrument of securing to him some advantage in a future

WITNESS—CONTINUED.

proceeding, as where he is called to prove the value of work done by the plaintiff for defendant, and discloses that he was employed by plaintiff to assist him in such work and was to receive one-half of the sum paid by the defendant. *Robinson vs. Mace* 99.

2. W. sold to B. certain machinery attached to a mill, and delivered possession; subsequently, he entered into a written contract, under seal, for the sale of the lot and mill-house: HELD, that he was a competent witness, in a suit between B. and one claiming under the contract of sale, to prove the previous sale of the machinery, and that, at the time of the sale of the lot, there was a special reservation, by parol, of the machinery; though he might be estopped in a suit between himself and others, growing out of the contract of sale, from proving a parol reservation of any thing attached to the freehold. *Hensley vs. Brodie* 511.
3. A witness, in a criminal prosecution, may be required to answer, whether at the time of the occurrences, to which he has deposed, he was not excited by anger, or whether he had not a fight immediately before—particularly where his testimony is of minute circumstances. *Hofler vv. The State*, 534.
4. And where questions are not apparently material, still they may be put on the cros examination of a witness, by way of testing the accuracy of his statements, and that the jury may be in possession of every fact which may legitimately tend to show the true character of the transaction. *Ib.*

WRITS.

1- A writ made returnable at a time other than that fixed by law, is irregular, and may be abated. (*Murphy vs. Williams*, 1 *Ark. R.* 333; *Featherston vs. Wilson*, 3 *Ark.* 387; *Ferguson vs. Ross*, 5 *Ark.* 518.) *Jones vs. Austin*, 336.
2. All original writs must be made returnable to the first regular term thereafter, unless they be issued within fifteen days of the first term; and not to a term held under *sec.* 5, *ch.* 47, *Digest.* *Ib.*

WRITS OF ERROR.

1, A writ of error will not lie to the statutory judgment upon a forfeited forthcoming bond. *Smiser et al. vs. Robertson et al.*, 599.

E. 2, a, 17.

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